UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RAFIQ SABIR, *et al.*,	:	Case No. 3:17-CV-00749 (VAB)
Plaintiffs,	:	
v.	:	
D.K. WILLIAMS, WARDEN FCI DANBURY, *et al.*,	:	
Defendants.	:	August 2, 2019

PLAINTIFFS' OPPOSITION TO DEFENDANTS' SUPPLEMENTS TO MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiff Dr. Rafiq Sabir has spent over four and a half years bringing this legal challenge to the attempts by officials from the federal Bureau of Prisons ("BOP") to restrict his ability to pray in accordance with his beliefs. Defendants now argue that his challenge is mooted by his transfer to another facility, even though they have not revealed where that facility is and, more importantly, whether Dr. Sabir will be able to pray in accordance with his beliefs there. Yet Defendants claim they can wipe out years of progress by Dr. Sabir and force him to start all over—even if prison officials subject him once again to the same restrictions on his ability to pray that motivated him to begin this lawsuit.

This is not the law. Because there is no evidence that Dr. Sabir can or will be able to pray in accordance with his beliefs at the facility where he will ultimately be housed, his claims for injunctive relief are not moot. The burden is on the defendant asserting mootness to demonstrate that a case is moot. While a prisoner's claim over conditions of confinement can, under some circumstances, become moot when a prisoner is transferred, such a claim is *not* moot where the prisoner is still subject to an equivalent policy at the prisoner's new facility. Because Defendants refuse to reveal where Dr. Sabir is being transferred, they have not shown that the transfer of Dr. Sabir remedied his inability to pray in accordance with his beliefs. An order from this Court enjoining Director Hurwitz in his official capacity from enforcing a policy restricting group prayer would accordingly still grant relief to Dr. Sabir, and therefore Dr. Sabir's claims for injunctive relief are not moot. Similarly, because a declaratory judgment that the restrictions on Dr. Sabir's ability to pray are unlawful would bind Director Hurwitz and affect the relationship between the parties, Dr. Sabir's claims for declaratory judgment against Director Hurwitz are not moot.

II. STATEMENT OF FACTS

Ever since he was first transferred to FCI Danbury in July 2014, Plaintiff Rafiq Sabir has been unable to pray in accordance with his religious beliefs. (SAC ¶¶ 12, 41.) Dr. Sabir first filed a grievance concerning his inability to pray on November 1, 2014 (ECF 36-2 at 2), and has diligently litigated the issue ever since. In May 2017, James Conyers, another prisoner at FCI Danbury, separately grieved the issue and joined Dr. Sabir as a plaintiff in the case on June 1, 2018, at the time of filing of the operative Second Amended Complaint ("SAC"). The SAC seeks injunctive and declaratory relief against the director of BOP and the warden of FCI Danbury, in their official capacities ("official-capacity defendants"), and damages against two former wardens of FCI Danbury in their individual capacities ("individual-capacity defendants"). (SAC ¶¶ 14-16.)

Both Plaintiffs have now been transferred out of FCI Danbury. Mr. Conyers, at his request, has been transferred to FCI Petersburg Low, a federal facility in Virginia (ECF 72-1 at ¶ 4), where prison officials do not restrict prisoners' ability to pray daily *salah* in large groups.

Dr. Sabir is temporarily housed in MDC Brooklyn, pending his transfer to a permanent facility—the location of which Defendants have declined to share with Plaintiffs' counsel or with the Court. (ECF 76-1 at ¶ 3.) Prison officials claim they transferred Dr. Sabir as a disciplinary measure because of his supposed participation in a peaceful, prison-wide hunger strike over a crackdown in prison conditions. (Decl. of Rafiq Sabir in Support of Pl.s' Opp'n ("Sabir Decl.") ¶¶ 2, 5-6.) This strike, in which over 700 prisoners participated, resulted in only a handful of prisoners receiving discipline and transfers—including Dr. Sabir. (*Id*. at ¶ 5.) Dr. Sabir, who had no part in orchestrating or leading the strike, was subjected to discipline for supposedly announcing to an interrogator that he had participated in the hunger strike. (*Id*.) Dr. Sabir denies

making this statement; in fact, at the time he was interrogated, his unit had not even been called in for a meal, meaning he could not have participated in the strike at that point even if he had wished to. (*Id.* at ¶¶ 3, 5.) Dr. Sabir believes his transfer out of FCI Danbury was motivated by his participation in this lawsuit; he is currently grieving the issue and intends to file suit once his administrative remedies are exhausted. (*Id*. at ¶ 7.)

Defendants have declined to state where Dr. Sabir will be transferred and have not stated whether or not he will be subject to restrictions on his ability to pray at that facility, nor have they made any commitment to accommodate his prayer in the manner requested in the SAC. Nonetheless, Defendants have now supplemented their Motion to Dismiss to argue that the transfers of Mr. Conyers and Dr. Sabir moot Plaintiffs' claims for injunctive and declaratory relief against the official-capacity defendants. (ECF 72 (Conyers); ECF 76 (Sabir).)[1]

III. ARGUMENT

Dr. Sabir's injunctive and declaratory claims against Director Hurwitz in his official capacity are not moot because Defendants have not met their burden of showing that Dr. Sabir will be free from the restrictions on his ability to pray that he challenges in his complaint.

Plaintiffs do not oppose the dismissal of their claims for injunctive and declaratory relief against the warden of FCI Danbury in her official capacity. Because Mr. Conyers is now able to pray in accordance with his beliefs, he does not oppose the dismissal of his claims for injunctive and declaratory relief against Director Hurwitz in his official capacity.

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[1] Defendants do not argue that the transfers have mooted Plaintiffs' claims for damages. (ECF 72 at 2 n.2; ECF 76 at 3 n.2). Nor could they, since damages claims are unaffected by a prisoner's transfer.

A. Dr. Sabir's injunctive claims against Director Hurwitz are not moot.

Plaintiff Sabir's claims for injunctive relief against Director Hurwitz in his official capacity are not mooted by his transfer because Defendants have not shown that Dr. Sabir will be able to pray in accordance with his faith at his new facility. Until the government can show not only that Dr. Sabir is not subject to FCI Danbury's group prayer policy, but that he is actually able to pray daily *salah* in accordance with his beliefs, Dr. Sabir's claims for injunctive relief against Director Hurwitz are not moot.

1. A plaintiff's injunctive claims related to his prison conditions are not mooted by transfer as long as he is subject to the challenged conditions and a defendant can provide relief.

The burden of showing mootness falls on the defendant. *Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 190 (2000)). "A litigant [asserting mootness] must demonstrate that it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *N.Y. Nat'l Org. for Women v. Terry*, 159 F.3d 86, 91 (2d Cir. 1998) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 66 (1987)) (emphasis in original). "[A] case is not moot where *any* effective relief may be granted." *Forest Guardians v. Johanns*, 450 F.3d 455, 461 (9th Cir. 2006) (emphasis in original).

When a prisoner is transferred, his claims related to conditions of confinement are not moot if the conditions complained of persist after his transfer. For example, in *Davis v. New York*, the Second Circuit rejected an argument by the New York Department of Corrections that a prisoner's challenge to his exposure to second-hand smoke had been mooted by his transfer to a different cell block at the same facility, noting that the claim was not moot because the plaintiff was "in conditions similar to those he experienced prior to being transferred" and "indicate[d] that his problems with second-hand smoke are ongoing." 316 F.3d 93, 99 (2d Cir. 2002).

Similarly, in *Perez v. Arnone*, a prisoner sued prison officials (including the Commissioner of the Connecticut Department of Correction) over the officials' decision to house him with another prisoner, claiming his mental illness required that he be housed in a single cell. Ruling on Pl.'s Mot. for TRO and Prelim. Inj., *Perez v. Arnone*, No. 3:12-cv-1591, at *1 (D. Conn. Feb. 28, 2014), ECF No. 27. Because the plaintiff was transferred to a different prison after filing his complaint, the district court held that his injunctive claims related to being housed with another prisoner were moot. *Id*. at *3-4. Applying *Davis*, the Second Circuit reversed, holding that "the problem with double-celling persisted at his new facility, and the DOC Commissioner, a named defendant, has the power to implement the requested relief" and, therefore, "[the plaintiff's] claims with respect to his requests for a single cell are not mooted by his subsequent transfer to a new facility." *Perez v. Arnone*, 600 F. App'x 20, 22-23 (2d Cir. 2015) (citing *Davis*, 316 F.3d at 99).[2]

This is not only the law of the Second Circuit, it is necessary to prevent gamesmanship by government defendants. "To find otherwise would mean that prison officials could simply transfer a prisoner from facility to facility in order to moot his claims, even where the same conditions that underlie the plaintiff's litigation are present at the new facility." *Pugh v. Goord*, 571 F. Supp. 2d 477, 489 (S.D.N.Y. 2008). For the same reason, the Supreme Court has held that

[2] *See also* Text Order Denying Mot. for Leave to File Suppl. Compl., *Ajaj v. Fed. Bureau of Prisons*, No. 15-cv-992 (D. Colo. Apr. 10, 2018) (holding that federal prisoner's injunctive claim concerning deprivations of religious exercise is not mooted by transfer if the same deprivations continue at the new facility), ECF No. 210; *Bonga v. Abdellatif*, No. 16-cv-13685, 2017 WL 2454083, at *4 (E.D. Mich. May 10, 2017) (holding that prisoner's injunctive claim is not moot post-transfer because "[a]lthough Plaintiff is no longer incarcerated at the institutions which were the subject of the allegations within his complaint, he has convincingly argued that Defendant . . . still has control over the injunctive, medical relief he seeks in his current location." (citations omitted)), *report and recommendation adopted,* 2017 WL 2438803 (E.D. Mich. June 6, 2017), *on reconsideration,* 2017 WL 3097950 (E.D. Mich. July 21, 2017), and *report and recommendation adopted in part, rejected in part,* 2017 WL 3097950 (E.D. Mich. July 21, 2017).

the government cannot moot a challenge to a law by replacing the challenged law with one that is so "sufficiently similar to the repealed [law] that it is permissible to say that the challenged conduct continues." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993).[3] Dr. Sabir's Second Amended Complaint clearly challenged Defendants' restrictions on his ability to pray in congregation. Until the government can show not only that Dr. Sabir is no longer subject to FCI Danbury's group prayer policy, but that he is actually able to pray daily *salah* in accordance with his beliefs, Dr. Sabir's claims for injunctive relief are not moot.

The cases cited by Defendants are not to the contrary. Indeed, *Johnson v. Killian*, cited by Defendants, explicitly notes that the plaintiff's claim seeking to enjoin a group prayer policy "was not mooted by the mere fact of transfer but by [the plaintiff's] apparent concession that the [transferee] prison was not violating his right to perform congregational prayers." *Johnson v. Killian*, No. 07-cv-6641, 2013 WL 103166, at *3 n.10 (S.D.N.Y. Jan. 9, 2013) (punctuation omitted). Unlike the plaintiff in *McIntosh v. United States*, No. 15-cv-2442, 2018 WL 1275119 (S.D.N.Y. Mar. 7, 2018), who was released from prison and no longer subject to the control of the defendants against whom he sought an injunction at the time his case was found moot, Dr. Sabir remains in the custody of BOP and subject to the control of Director Hurwitz. And Dr. Sabir concedes that his injunctive claims against the warden of the transferring prison (FCI Danbury) are moot now that he is no longer housed there, which was the issue dealt with in *Salahuddin v. Goord*, 467 F.3d 263 (2d Cir. 2006), *Prins v. Coughlin*, 76 F.3d 504 (2d Cir.

[3] *Accord Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta,* 219 F.3d 1301, 1310 (11th Cir. 2000) ("[A] superseding statute or regulation moots a case only to the extent that it removes challenged features of the prior law.") (quotations and citation omitted); *Rosenstiel v. Rodriguez,* 101 F.3d 1544, 1548 (8th Cir. 1996) (holding challenge to statute is not moot where "the new statute disadvantages the complainants in the same fundamental way the repealed statute did").

1996), and *Young v. Coughlin*, 866 F.2d 567 (2d Cir. 1989).[4] The Second Circuit in *Salahuddin* even limited its mootness holding to injunctive relief against the officials of the transferring facility, relying on other grounds to dismiss the plaintiff's injunctive claims against holders of statewide office and "employees of New York State Department of Correctional Services." *See Salahuddin* at 272. Because Dr. Sabir remains in custody, seeks to maintain his injunctive relief only against Director Hurwitz, and is not demonstrably free from the conditions he is challenging, these cases are inapposite.

2. Defendants have not met their burden of showing that Dr. Sabir will be free to pray in accordance with his beliefs at his new facility.

Because Defendants have not shown that Plaintiff Sabir is or will be able to pray in accordance with his beliefs, his claims for injunctive and declaratory relief are not moot. Many BOP facilities have instituted policies that, in effect, restrict daily *salah* prayer by prisoners in the same manner as FCI Danbury's Policy. *See, e.g., Ajaj v. United States*, No. 15-cv-992, at *8-9 (D. Colo. Aug. 30, 2016) (describing policy banning group prayer at BOP facility in Colorado), ECF No. 97, *report and recommendation adopted*, 2016 WL 6212518 (D. Colo. Oct. 25, 2016), *on reconsideration in part sub nom. Ajaj v. Fed. Bureau of Prisons*, 2017 WL 219343 (D. Colo. Jan. 17, 2017). Defendants have stated that they will not reveal to the Court or to Plaintiffs' counsel where Dr. Sabir will ultimately be transferred. (ECF 76-1 at ¶ 3.)

By arguing that Dr. Sabir's claim is moot before they are willing to reveal his ultimate destination or discuss whether it permits group prayer, Defendants are effectively asserting that

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[4] *See Prins* at 506 (noting that a transfer generally "moots an action for injunctive relief *against the transferring facility*" (emphasis added)); *Salahuddin* at 272 (noting that a transfer "generally moots claims for declaratory and injunctive relief *against officials of that facility*" (emphasis added)); *Young* at 568-69 & n.1

(describing plaintiff's claims as challenging a limited privilege program at transferring prison).

they can continue to restrict Dr. Sabir's ability to pray while requiring him to restart the years-long process of exhausting his administrative grievances and litigating his case to the point of a decision on the merits.

3. An injunction against Director Hurwitz can still provide relief to Dr. Sabir.

Regardless of where Dr. Sabir is transferred, Director Hurwitz can still grant meaningful injunctive relief to Dr. Sabir. Mr. Hurwitz, in his official capacity as director of the U.S. Bureau of Prisons ("BOP"), has authority over all federal prison facilities operated by BOP. (SAC ¶ 16.) While Dr. Sabir is no longer subject to the group prayer policy at FCI Danbury that he initially sought to challenge, any policy limiting group prayer in the federal prison system is under the control of Director Hurwitz. An order directing him to refrain from enforcing a policy against Dr. Sabir would therefore grant effective relief to Dr. Sabir.

B. Dr. Sabir's claims for declaratory relief against Director Hurwitz are not moot because a declaration of his rights would affect the relationship between the parties.

Dr. Sabir's claims for declaratory relief against Director Hurwitz are not moot for the same reasons that his claims for injunctive relief against Director Hurwitz are not moot. "[A] declaratory judgment action should be entertained when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and . . . when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.,* 925 F.2d 556, 562 (2nd Cir. 1991) (citation omitted). Declaratory relief is not moot when a declaration of the plaintiff's rights would affect the prospective relationship between the parties. *See Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974) (finding the plaintiff had standing to bring a claim for declaratory relief where "the challenged governmental activity in the present case is not contingent, has not evaporated or

disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties."); *Thorpe v. District of Columbia*, 916 F. Supp. 2d 65, 66 (D.D.C. 2013) (finding plaintiffs' claims for declaratory relief against their former nursing home were not moot because the policy was ongoing, even though plaintiffs had been transferred out of the facility). As noted above, Defendants have failed to meet their burden of showing that Dr. Sabir is free of the challenged restrictions on his ability to pray. Therefore, the parties have an ongoing controversy regarding the legality of Director Hurwitz's restrictions on Dr. Sabir's ability to pray.

Dr. Sabir's claims for declaratory relief would not be moot even if his injunctive claims were found to be moot. Where a claim for declaratory relief accompanies a claim for injunctive relief, the court must perform a separate analysis for each claim. *See Super Tire*, 416 U.S. at 121 ("[T]he District Court had 'the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.'" (citations omitted)). The failure of a claim for injunctive relief is not necessarily fatal to a claim for declaratory relief; where "both injunctive and declaratory relief are sought but the request for an injunction is rendered moot during litigation, if a declaratory judgment would nevertheless provide effective relief the action is not moot." *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 830 (9th Cir. 2017); *see also Larsgard v. Straub*, No. 13-cv-638, 2019 WL 669788, at *1 n.1 (D. Ariz. Feb. 19, 2019) ("Plaintiff's claim for injunctive relief is not mooted by his release from custody because declaratory relief is available in cases where an injunction is inappropriate.").

A declaration that restricting group prayer is unlawful would affect Director Hurwitz's future actions toward Dr. Sabir. Because Director Hurwitz exercises control over all BOP

facilities, a declaration that restricting group prayer is illegal would affect his actions toward Dr. Sabir regardless of where Dr. Sabir is ultimately housed. By permitting facilities under his control like FCI Danbury and others to maintain and enforce policies restricting group prayer, and by maintaining their legality through this action, Director Hurwitz has ensured that a live controversy exists between him and Dr. Sabir. A declaration from this Court that FCI Danbury's group prayer policy is illegal would affect Director Hurwitz's actions in supervising the other prison facilities under his control, including those in which Dr. Sabir will be housed.

C. Plaintiffs do not oppose the dismissal of their claims for injunctive relief against the Warden of FCI Danbury.

Because neither plaintiff is currently housed at FCI Danbury, Plaintiffs do not oppose the dismissal of their claims for injunctive relief against the warden of FCI Danbury in her official capacity.

D. Mr. Conyers does not oppose the dismissal of his claims for injunctive relief against Director Hurwitz.

Because Mr. Conyers is now able to pray his daily *salah* in congregation at FCI Petersburg Low, he does not oppose the dismissal of his claims for injunctive relief against Defendant Director Hurwitz in his official capacity.

E. Plaintiffs' transfers do not affect their claims against the individual-capacity Defendants.

As Defendants note in the Supplemental Motions, the transfers do not affect Plaintiffs' claims for damages against the individual-capacity Defendants. (ECF 72 at 2 n.2); (ECF 76 at 3 n.2); *see also Salahuddin*, 467 F.3d at 272 ("Of course, [the plaintiff's] right to seek damages is not affected" by the plaintiff's transfer.").

Defendants' Supplemental Motions do not address Plaintiffs' claims for declaratory relief against the individual-capacity defendants. Plaintiffs note that their claims for declaratory relief

against the individual-capacity defendants, like their claims for damages, are unaffected by the transfer. Where a claim for declaratory relief accompanies a live claim for damages, the declaratory claim is not moot. *See Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974) (holding that "a declaratory judgment as a predicate to a damages award" could proceed even in the absence of a claim for injunctive relief); *accord Crue v. Aiken,* 370 F.3d 668, 677 (7th Cir. 2004); *Winsett v. McGinnes*, 617 F.2d 996, 1004 (3d Cir. 1980). Therefore, Plaintiffs' claims for declaratory relief against the individual-capacity defendants, like Plaintiffs' claims for damages against the individual-capacity defendants, are unaffected by Plaintiffs' transfer.

IV. CONCLUSION

The Court should deny Defendants' Supplemental Motions to Dismiss the Second Amended Complaint on grounds of mootness with respect to Dr. Sabir's claims for injunctive and declaratory relief against Director Hurwitz.

Dated: August 2, 2019

Respectfully submitted,

By: */s/ Matthew W. Callahan*

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