UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

RAFIQ SABIR, *Plaintiff*,	
v.	NO. 3:17-cv-749 (VAB)
D.K. WILLIAMS, WARDEN FCI DANBURY, et al., *Defendants.*	AUGUST 15, 2019

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS EQUITABLE RELIEF CLAIMS AS MOOT

Defendants D.K. Williams, former Warden, FCI Danbury, Herman Quay, former Warden, FCI Danbury,[1] and Hugh J. Hurwitz, acting director of the Federal Bureau of Prisons ("BOP"), reply in support of their motion to dismiss as moot (docs. ##54, 72, 76) plaintiffs Rafiq Sabir's and James Conyers's claims for equitable relief against the defendants in their official capacities.

Plaintiffs' Second Amended Complaint (doc. #36) ("Complaint" or "Compl.") seeks relief against a policy that a former warden established at FCI Danbury to govern religious activity by inmates at that facility, arguing it violates the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, and the First Amendment's protection of the free exercise of religion. For reasons unrelated to this litigation, both plaintiffs have been transferred and are no longer incarcerated at FCI Danbury, and thus are no longer subject to FCI Danbury's policy on inmate group prayer. Plaintiffs concede, as they must, that their equitable relief claims against the Warden of FCI Danbury are moot. Pls.' Opp. to Defs.' Suppls. to Mot. to Dismiss

[1] The current Warden of FCI Danbury is M. Licon-Vitale.

Pls.' Second Am. Compl. 10 (doc. #79) ("Opp.").[2] Plaintiff Conyers further concedes the dismissal of his claims for injunctive and declaratory relief against BOP Acting Director Hurwitz in his official capacity. *Id.* Sec. III at 3, Sec. III.D. at 10.

Plaintiffs argue only that Sabir's claims against Acting Director Hurwitz in his official capacity survive defendants' mootness challenge to the claims for equitable relief. *Id.* They do so without engaging in the standard analysis of exceptions to the mootness doctrine. But as defendants have shown, and further argue below, all pleaded claims for injunctive and declaratory relief against all defendants in their official capacities are indeed moot.

I. Plaintiff, not defendants, bears the burden of showing the narrow exception to the mootness doctrine applies, and he has failed to carry that burden.

Under Article III, Section 2 of the Constitution of the United States, the plaintiff "must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (citation omitted)) "This case or controversy requirement means that plaintiff must continue to have a personal stake in the outcome of the civil action when the Complaint is filed and when the case is decided." *Ramadan v. FBOP*, No. 1:14-cv-25757, 2015 WL 13745349, at *12, *report & rec. adopted*, No. CV 1:14-25757, 2015 WL 5684126 (S.D.W. Va. Aug. 27, 2015). "If at any point in the proceeding there is no actual controversy, the case must be dismissed as moot." *Id.*

A narrow exception to the mootness doctrine exists for claims that are "capable of repetition, yet evading review." *Fed. Elec. Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007). "For this exception to apply, **Plaintiff must demonstrate** that his claim for injunctive relief possesses the following characteristics: (1) the duration of the challenged actions

[2] Plaintiffs' brief at Sec. III.C., page 10, only explicitly states that injunctive relief claims against the Warden of FCI Danbury are waived, but it is apparent they also waive any declaratory relief claims against the Warden of FCI Danbury in his or her official capacity. Opp. at 11.

were too short to be fully litigated prior to their cessation or expiration, and (2) a reasonable expectation exists that Plaintiff will be subjected to the same actions again." *Ramadan*, 2015 WL 13745349, at *12 (citing *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)) (emphasis added). "The second characteristic requires that the same prisoner face the same alleged wrong at the same prison." *Id.* (citing *Wolf v. Anderson*, No. Civ. A. 5:05 0436, 2006 WL 218205, *3 (S.D.W. Va. Jan. 25, 2006) (J. Faber)). "Mere conjecture, however, that the prisoner may return to the first prison and again face the alleged wrong is not sufficient to meet the mootness exception." *Id.* (citing *Higgason v. Farley*, 83 F.3d 807, 810 (7th Cir. 1996)). It is well settled that "**[t]he party asserting that this exception applies bears the burden of establishing both prongs**." *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir.2005) (citation omitted) (emphasis added); *see also Video Tutorial Servs., Inc. v. MCI Telecomm. Corp.*, 79 F.3d 3, 6 (2nd Cir. 1996) (party seeking to apply the exception bears the burden).

Sabir has not carried his burden of demonstrating that the "capable of repetition" exception applies here. Defendants have made an initial showing of mootness by asserting a change of circumstances that are undisputed—Sabir was transferred and is no longer subject to FCI Danbury's institution supplement, which is what he sought relief against in the operative complaint. *See* Compl. ¶¶ 3-7. Now, the burden rests with Sabir to show that an exception to mootness applies. *See Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) ("[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally **only where the named plaintiff can make a reasonable showing** that he will again be subjected to the alleged illegality.") (emphasis added); *Murphy v. Hunt*, 455 U.S. 478, 483 (1982); *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 57 (1st Cir. 2013); *see also Atlas Brew Works, LLC v. Barr*, No. 19-cv-79 (CRC), 2019 WL 3458616, at *6 (D.D.C. July 31, 2019) ("An otherwise

moot case may be salvaged if one of the exceptions to mootness applies. While the government, as the party seeking dismissal for lack of jurisdiction, bore the burden of establishing that Atlas's claims had been mooted by the restoration of appropriations, it is now Atlas, as the party opposing dismissal, that 'bears the burden of proving an exception applies.'") (quoting *J.D. v. Azar*, 925 F.3d 1291, 1307 (D.C. Cir. 2019)); *Malaj v. Adducci*, No. 12-cv-11495, 2013 WL 1507024, at *5 (E.D. Mich. Apr. 12, 2013) (petitioner's burden to show exception applied); *Allen v. Collins*, No. 1:08-cv-1780, 2010 WL 3075186, at *3 (N.D. Ohio Aug. 4, 2010), *aff'd*, 529 F. App'x 576 (6th Cir. 2013).

Despite the weight of authority, Sabir spends his brief arguing that it is **defendants' burden** to show the claims are moot. Opp. 3-8. This is not the law. As the *Atlas* court explained, it is plaintiff's "burden to show that the conduct it complains about here is likely to recur, **not the government's to show it absolutely cannot recur**." *Atlas Brew Works, LLC*, 2019 WL 3458616, at *9.

In fact, Sabir appears to have waived any protection the "capable of repetition" exception might have provided to him by failing to raise it in his response to defendants' motion. Even had he raised it, Sabir would have failed to carry his burden of proving he satisfied its requirements. Sabir's claim fails the first prong because the challenged action was not of a short duration. Rather, Sabir's briefing shows the opposite. Opp. 1 ("Plaintiff Dr. Rafiq Sabir has spent over four and a half years bringing this legal challenge . . . ."). Sabir's claim fails the second prong because there is no reasonable expectation that Sabir will again be subject to FCI Danbury's Institution Supplement. Indeed, Sabir withdrew his injunctive relief claims against the FCI Danbury Warden. Opp. 10. Although Sabir is still subject to the BOP's national-level Program Statement on religious practice, his complaint never alleges that Program Statement 5360.09,

Religious Beliefs and Practices, violates RFRA.[3] In fact, the complaint admits the federal BOP "has no formal policy banning congregational prayer in its facilities." Compl. ¶ 4.

Since Sabir has failed to raise and argue that the "capable of repetition, yet evading review" exception applies, his claims for equitable relief against all official capacity defendants should be dismissed as moot.

II. Plaintiff's other arguments are unavailing.

Rather than engage with established precedent regarding mootness, Sabir suggests to the Court other ways to rewrite or reinterpret his complaint to avoid mootness. These arguments are unavailing.

The objective of Sabir's complaint was to challenge a local policy that was implemented by the former warden at FCI Danbury to govern inmates at that institution. *See* Compl. ¶¶ 3-7. Sabir's claims for equitable relief against FCI Danbury's policy are moot because he has been transferred and is no longer subject to that policy.

In his opposition brief, Sabir attempts to connect BOP Acting Director Hurwitz to the FCI Danbury Institution Supplement by arguing that Acting Director Hurwitz "has authority over all federal prison facilities operated by BOP." Opp. at 8. He also argues that an order enjoining Acting Director Hurwitz from "enforcing a policy against Dr. Sabir would therefore grant effective relief to Dr. Sabir." *Id.* On the same basis, he argues that a declaratory order against Acting Director Hurwitz would "affect Director Hurwitz's future actions toward" Sabir. Opp. 9. However, Sabir is not currently subject to the FCI Danbury Institution Supplement, nor to any policy that he alleges violates RFRA. An order restricting Acting Director Hurwitz from

[3] Plaintiffs' Complaint challenges only FCI Danbury's Institution Supplement under RFRA and the Free Exercise Clause. Compl. ¶ 3 (citing FCI Danbury Institution Supplement), ¶ 30 (quoting FCI Danbury Institution Supplement), ¶¶ 30-54 (describing alleged violations caused by application of the FCI Danbury Institution Supplement).

enforcing the FCI Danbury Institution Supplement against Sabir, or declaring that the FCI Danbury Institution Supplemental violates RFRA, would be a legal nullity between these particular parties.[4] That is the definition of mootness—there is presently no case or controversy between Sabir and Acting Director Hurwitz, in his official capacity.[5] Moreover, courts "**are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong**." *Hanrahan v. Mohr*, 905 F.3d 947, 962 (6th Cir. 2018) (quoting *Spencer v. Kemna*, 523 U.S. 1, 18 (1998)) (quotation marks omitted, emphasis added).

The district court in *Deville v. Crowell* rejected an argument similar to Sabir's:

> It is arguable that injunctive relief at the BOP national level is not necessarily foreclosed by plaintiff's transfer because he remains in BOP custody and subject to BOP regulations. However, plaintiff makes no argument subsequent to his transfer for continuing to press any RFRA claim after his transfer to a California facility, and there is nothing to indicate any decision rendered by the central BOP office in plaintiff's USPLVN administrative appeals is currently dictating—or placing any substantial burden on—his practice of his religious beliefs at that new facility. Nor is there any indication that plaintiff pursued or exhausted administrative remedies at the California facility on any related claim. *Compare Sample v. Lappin*, 479 F. Supp.2d 120 (D.D.C. 2007) (transfer to another federal facility did not moot RFRA claim, noting plaintiff had demonstrated that the alleged impairment on practice of religion continued at the new facility, and that he had exhausted administrative remedies at the new facility).

Deville v. Crowell, No. CIV.A. 08-3076-SAC, 2011 WL 4526772, at *7 (D. Kan. Sept. 28, 2011).

Likewise, in *Ramadan* the court rejected—by applying the elements of the exception to the mootness doctrine, as outlined above—a similar argument by a BOP inmate plaintiff who was transferred between BOP facilities and who had challenged an institution supplement at his

[4] The "capable of repetition" prong "requires that the same parties will engage in litigation over the same issues in the future." *United Bhd. of Carpenters & Joiners of Am., AFL-CIO v. Operative Plasterers' & Cement Masons' Int'l Ass'n of U.S. & Canada, AFL-CIO*, 721 F.3d 678, 688 (D.C. Cir. 2013) (internal quotation marks omitted); *see also Atlas Brew Works, LLC*, 2019 WL 3458616, at *6.

[5] Any "declaration" Sabir seeks regarding the application of RFRA to the Danbury Institution Supplement would come, if at all, in connection with his individual capacity claims.

prior facility. *Ramadan*, 2015 WL 13745349, at *12 ("Having examined Plaintiff's Complaint, the Court finds that Plaintiff challenges the conditions of his confinement at FCI McDowell. Plaintiff's transfer from FCI McDowell, however, destroys the 'case or controversy' requirement concerning his claims requesting injunctive relief. Specifically, Plaintiff requested that the Court order Defendants to allow him to engage in congregational prayer at FCI McDowell. Plaintiff is currently incarcerated at FMC Butner and acknowledges that he is allowed to engaged in daily congregational prayer. ").[6] The court found that the transfer mooted his claims, including claims against the BOP Director and Regional Director, and dismissed them. *Id.* at *12 ("Although the BOP policy allows each institution the option of allowing inmates to engage in individual daily prayer or daily prayer in small groups (2 to 3 inmates), Plaintiff can point to no 'reasonable expectation' that he will be transferred or subjected to the requirement of individual daily prayer.").

III. Sabir was not subject to retaliatory transfer.

Sabir's transfer was ordered after the completion of an investigation and the conclusion of the BOP's disciplinary process, administrative processes that are entitled to a presumption of

[6] Sabir does not state whether he is permitted to engage in congregational prayer at MDC Brooklyn. At present, there is no reasonable basis to believe that Sabir's rights are likely to be violated at the next BOP facility where he will continue to serve his sentence. In any event, before Sabir can pursue a federal claim against Acting Director Hurwitz based on any policy at his new prison, Sabir (not the government) bears the burden of demonstrating (1) that Acting Director Hurwitz is responsible for some act or decision that substantially burdens Sabir's exercise of religion at his new prison, and (2) that Sabir has exhausted his administrative remedies at the new facility related to any claim against Acting Director Hurwitz, as required by the PLRA.

It is unfortunate that, without any basis, Sabir suggests defendants are acting in bad faith by redacting information concerning Sabir's next prison facility. Opp. 1-2. As defendants fully informed plaintiff and the Court, until the prisoners reach their assigned institutions, defendants are unable to disclose transferring prisoners' destinations due to security concerns. Second Mot. to Suppl. (doc. #76), Ex. 1, C. Magnusson Decl. ¶ 5 (July 12, 2019) (doc. #76-1). This is not bad-faith obstructionism, nor any failure of candor to the Court, as Sabir would have this Court believe. Rather, defendants' redaction is simply a specific application of a generally-applicable, reasonable policy—which is not at issue in this case—designed to protect both federal prisoners and the BOP staff who coordinate their safe transfer between facilities that are as dispersed as our country is wide.

regularity.[7] *Contra* Opp. 2-3. In any event, Sabir has not exhausted a claim for retaliatory transfer. Any such claim is not ripe and may not be joined to the pending claims. The pending claims against the official capacity defendants are moot, and should be dismissed as such.

IV. Conclusion

For the foregoing reasons, the defendants respectfully request that the Court dismiss as moot plaintiffs' claims for declaratory and injunctive relief against FCI Danbury's Institution Supplement.

Respectfully submitted,

JOHN H. DURHAM
UNITED STATES ATTORNEY

/s/ Natalie N. Elicker
Natalie N. Elicker, ct28458
Assistant United States Attorney
157 Church Street
New Haven, CT 06510
Telephone: (203) 821-3700
Fax: (203) 773-5373
Email: Natalie.Elicker@usdoj.gov

[7] Congress has authorized BOP to designate where a prisoner will serve his sentence, 18 U.S.C. § 3621, and the BOP retains exclusive discretion to assign or transfer any prisoner to any facility. *See* BOP Program Statement 5100.08, Inmate Security Designation and Custody Classification, *at* https://www.bop.gov/policy/progstat/5100_008.pdf. It is not the province of the courts to determine the correctional facility in which an inmate should serve his sentence, and the judiciary typically defers to the expertise of correctional administrators in determining the appropriate facility for a particular inmate. *Sandin v. Conner*, 515 U.S. 472, 482-483 (1995) (holding federal courts ought to afford deference and flexibility to state officials trying to manage a volatile environment); *Olim v. Wakinekona*, 461 U.S. 238, 245-246 (1983) (holding inmate has no justifiable expectation he will be incarcerated in any particular state); *Meachum v. Fano*, 427 U.S. 215, 228 (1976) ("Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all."); *Montanye v. Haymes*, 427 U.S. 236 (1976) (an intrastate prison transfer does not directly implicate the Due Process Clause; an inmate has no justifiable expectation he will be incarcerated in any particular prison).