

Accordingly, the finding of guilt is affirmed, the sentence is vacated, and the cause is remanded for further proceedings consistent with this opinion.



Shabaka SHAKUR, Plaintiff-Appellant,

v.

Donald SELSKY, Director of Special Housing, James Conway, First Deputy Superintendent of Attica, T. Sticht, Captain, R.T. Lomanto, Daniel Hurlburt, Correctional Officer, P. Foley, Correction Officer, Beyler, Correction Officer, R. Stack, Correction Officer, T. Steele, Correction Officer Dolan, Hearing Officer, Carol Edwards, Hearing Officer, sued in their individual and official capacities, Defendants-Appellees.

Docket No. 03-0050.

United States Court of Appeals,
Second Circuit.

Argued: May 26, 2004.

Decided: Dec. 6, 2004.

Background: State prisoner brought multiple claims pursuant to § 1983 against corrections officers and officials alleging infringement of his free speech, free exercise, due process, and equal protection rights under the Constitution, and of his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) stemming from alleged confiscation of prisoner's political literature and denial of prisoner's opportunity to attend a Muslim holiday. The United States District Court for the Western District of New York, Charles J. Siragusa, J., sua sponte dis-

missed prisoner's complaint with prejudice, and appeal was taken.

Holdings: The Court of Appeals, Wesley, Circuit Judge, held that:

- (1) prisoner stated a legally sufficient claim of violations of First Amendment right to freedom of expression;
 - (2) corrections officers' alleged conduct of failing to invoke media committee review of political literature confiscated from prisoner did not violate his due process rights;
 - (3) prisoner stated a claim under the RLUIPA; and
 - (4) prisoner stated a § 1983 claim for violations of his First Amendment right to the free exercise of religion.
- Affirmed in part, vacated in part, and remanded.

1. Federal Courts §776

Court of Appeals reviews de novo a district court's sua sponte dismissal of prisoner's civil action as frivolous, malicious, or for failure to state a claim. 28 U.S.C.A. § 1915A.

2. Constitutional Law §82(13)

A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. U.S.C.A. Const. Amend. 1.

3. Prisons §4(1)

When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.

4. Prisons §4(1)

For purposes of determining the reasonableness of a prison regulation, a court must first ask whether the governmental

objective underlying the regulations at issue is legitimate and neutral, and whether the regulations are rationally related to that objective.

5. Prisons §4(1)

For purposes of determining the reasonableness of a prison regulation, conduct expressly aimed at protecting prison security is legitimate beyond question and is in fact central to all other correctional goals.

6. Prisons §4(8)

For purposes of determining the reasonableness of a prison regulation, where prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are neutral in the technical sense; however, where regulations fairly invite prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner censorship, they are decidedly not neutral in the relevant sense.

7. Constitutional Law §90.1(1.3)

For purposes of determining the reasonableness of a prison regulation, as far as the regulation of free expression is concerned, a regulation cannot deprive prisoners of all means of expression and must leave effective means for substitutable exercises of expression.

8. Prisons §4(1)

For purposes of determining the reasonableness of a prison regulation, while there is no requirement that prison officials adopt the least restrictive alternative to their preferred policy, if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

9. Constitutional Law §90.1(1.3)

Prisons §4(8)

Prisoner stated a legally sufficient claim for violations of First Amendment right to freedom of expression by alleging that corrections officers confiscated prisoner's political literature predicated on a prison regulation that banned all literature from outside organizations unless those organizations had been approved. U.S.C.A. Const. Amend. 1.

10. Constitutional Law §90.1(1.3)

Prisons §4(8)

Prisoner stated a legally cognizable claim for violations of his First Amendment right to freedom of expression by alleging that prison regulation that banned all literature from outside organizations unless those organizations had been approved did not authorize corrections officers' confiscation of prisoner's political literature, and accordingly, that such confiscations were improperly made for reasons of personal prejudice as opposed to legitimate penological interests. U.S.C.A. Const. Amend. 1.

11. Constitutional Law §255(1), 278(1)

A procedural due process analysis proceeds with two questions: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient. U.S.C.A. Const. Amend. 5.

12. Constitutional Law §272(2)

Prisons §13(8)

Corrections officers' alleged conduct of failing to invoke media committee review of political literature confiscated from inmate, as required by state procedural guidelines, did not violate inmate's due process rights; regardless of state procedural guarantees, the only process due the

inmate was that minimal process guaranteed by the Constitution. U.S.C.A. Const. Amend. 14.

13. Constitutional Law $\S$ 252.5

State statutes do not create federally protected due process entitlements to specific state-mandated procedures. U.S.C.A. Const. Amend. 14.

14. Prisons $\S$ 4(14)

Prisoner stated a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA) by alleging that corrections officers refused to allow him to attend Muslim holiday feast of Eid-ul-Fitr. Religious Land Use and Institutionalized Persons Act of 2000, $\S$ 2, 42 U.S.C.A. $\S$ 2000cc.

15. Constitutional Law $\S$ 84.5(14)

Prisons $\S$ 4(14)

Prisoner stated a $\S$ 1983 claim for violations of his First Amendment right to the free exercise of religion by alleging that corrections officers refused to allow him to attend Muslim holiday feast of Eid-ul-Fitr. U.S.C.A. Const. Amend. 1; 42 U.S.C.A. $\S$ 1983.

WESLEY, Circuit Judge.

This 42 U.S.C. $\S$ 1983 (Supp. I 2002) action involves a prisoner's claims of infringement of his free speech, free exercise, due process, and equal protection rights under the Constitution, and of his rights under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. $\S$ 2000cc. The free speech, due process, and equal protection claims stem from confiscations of the prisoner's "New African political literature." The free exercise and RLUIPA claims arise from the alleged denial of the prisoner's opportunity to attend the Eid ul Fitr feast, a Muslim holiday. The prisoner filed his action *pro se* and, before defendants were served, the district court dismissed the complaint in its entirety with prejudice under 28 U.S.C. $\S$ 1915A (Supp. I 2002). We affirm the district court's dismissal of the due process and equal protection claims under $\S$ 1915A, but vacate the dismissal of the free speech and free exercise claims, as well as the RLUIPA claim.

BACKGROUND

Plaintiff-appellant Shabaka Shakur filed a *pro se* complaint in the United States District Court for the Western District of New York. He was and remains in the custody of the New York State Department of Correctional Services (DOCS). Shakur appeals from the district court's dismissal of his complaint. The following are the "facts" as alleged in the complaint. See, e.g., *Ortiz v. McBride*, 380 F.3d 649, 651 (2d Cir.2004).

1. *The Christmas Eve Confiscation*, 1999

In 1999, Shakur spent Christmas Eve in a Special Housing Unit (SHU) at Great Meadows Correctional Facility as the sub-

ject of a facility investigation. Defendant Hurlburt, a Great Meadows correctional officer, searched Shakur's property and discovered and then confiscated 26 books and pamphlets of "New African political literature," which he characterized as "Nubian gang materials." On Christmas Day, Shakur received an inmate misbehavior report charging him with possession of "gang materials" in violation of DOCS Institutional Rule of Conduct 105.12. Rule 105.12 provides that "[i]nmates shall not possess ... or use unauthorized organizational insignia or materials." N.Y. Comp. Codes R. & Regs. tit. 7, $\S$ 270.2(B)(6)(iii) (2004). "An unauthorized organization," under Rule 105.12, "is any gang or any organization which has not been approved by the deputy commissioner for program services." *Id.*

2. *The January 2, 2002 Confiscation*

Two years later, on January 2, 2002, Defendant Foley, a correctional officer at the Attica Correctional Facility, searched Shakur.¹ He found and confiscated materials he characterized as a "New African Self Development Program." Shakur again requested that these materials be sent to the FMRC; Foley declined to do so. Instead, Foley filed a report charging Shakur with a second Rule 105.12 violation.

Defendant Lomanto, a Lieutenant, gave Shakur a hearing on this second Rule 105.12 charge, determined that Shakur's materials were "from a group that is not authorized," and found Shakur in violation of the rule, imposing a penalty of thirty days in keeplock. Shakur appealed the disposition on the grounds that Foley had failed to send the materials to the FMRC, that Rule 105.12 did not apply to his literature, and that Rule 105.12 was unconstitutionally vague. Defendant Conway, First Deputy Superintendent at Attica, found no error in the hearing. Shakur then filed an Article 78 petition. See N.Y. C.P.L.R. $\S$ 7801 (Consol.1994). The New York State Supreme Court, Appellate Division, confirmed the DOCS determination and dis-

ber 2000.

missed the petition. See *Matter of Shakur v. Goord*, 306 A.D.2d 958 (4th Dep't 2003).

3. *The Eid ul Fitr Feast, 2002*

Shakur also contends that he was prevented from attending an important religious feast held at Attica on January 19, 2002. Shakur does not name the religious feast in his complaint, but on appeal claims that it was Eid ul Fitr. Shakur asserts that he was scheduled to attend but that Defendant Beyler, an Attica officer, prevented him from participating in the feast and him from receiving a "required" meal. Shakur filed a grievance with the Inmate Grievance Resolution Committee and asked that "Beyler's malicious and intentional failure to perform his duties . . . be reprimanded." The committee found that Beyler should have released Shakur for the event. Conduct reversed that finding and the Central Officer Review Committee affirmed Conway's determination.

4. *The Summer Confiscations and FMRC Review, 2002*

In July, Defendant Stack, a correctional officer at Attica, searched Shakur's cell and confiscated 17 pages of additional "New African" materials that he characterized as "unauthorized gang materials." Shakur requested that the materials be sent to the FMRC and Stack refused. Stack charged Shakur with a third Rule 105.12 violation.

Defendant Sticht, a Captain at Attica, gave Shakur a hearing on this third Rule 105.12 charge. Shakur argued that the materials should be sent to the FMRC and requested that Stack appear as a witness. Sticht adjourned the hearing to review the materials and to secure Stack's appearance. Upon reconvening the hearing, Sticht found Shakur guilty of violating Rule 105.12. Sticht found that the "New African Program" [literature] talks about

alleged that defendants violated these rights by improperly confiscating his "New African political literature." The district court disagreed. It noted that "[t]he New African organization, also known as the New African Liberation Movement (NALM), is a group which has been identified as an unauthorized organization by the DOCs, and this identification by DOCs has been upheld in federal court as reasonably related to legitimate penological objectives." Citing *Duanmatef v. Morley*, 1998 WL 166838 (N.D.N.Y. Apr. 7, 1998) (Pooler, J.) (*Duanmatef I*) and *Duanmatef v. Hollins*, 297 F.3d 108 (2d Cir. 2002) (*Duanmatef II*), the court held that it has already been settled that the limitations imposed in the New York State prison system on written materials related to the New African Liberation Movement comport with First Amendment requirements.

The district court then considered Shakur's claim that defendants denied him due process. The court held that "[t]o the extent the claim is that the materials should have been [sic] reviewed by the FMRC the claim fails because DOCs had already determined that the New African organization is not authorized, and thus the possession of any written materials related to it are, *a priori*, a violation of prison rules." The court held further that to the extent that . . . plaintiff [claims to have] been deprived of written materials in which he has [a] property interest," such a deprivation "was not without due process of law because New York provides an adequate post-deprivation remedy" in the form of an Article 78 proceeding.

The district court also examined Shakur's equal protection claim. Shakur alleged that defendants "in subjecting plain-

21. We ordered that assigned counsel brief both Shakur's appeal and the appeal in *Isi Yerushalmi v. United States Dep't of Corr.*, 374

tiff to continuous searches, confiscations and punishment in clear disregard to plaintiffs [sic] constitutional rights evidence a pattern of political and racial discrimination in violation of the Equal Protection clause of the 14th amendment." The district court found that Shakur failed to allege either "that other inmates who possessed materials related to an authorized organization were treated differently" than he or that defendants had disciplined him "based on impermissible considerations." The court thus found no ground for an equal protection claim.

Finally, the district court considered Shakur's claim that Beyler violated Shakur's right "to freely exercise his religious belief" by preventing him from attending the January 19 religious feast that Shakur now contends was Eid ul Fitr. The district court cited *Ford v. McGinnis*, 230 F.Supp.2d 338 (S.D.N.Y.2002), for the proposition that "a denial of a single religious meal is a *de minimis* burden on the free exercise of religions and, as such, is not of constitutional dimension." The court likewise concluded that the fact that Shakur missed "a single religious feast simply does not amount to a 'substantial burden' on his religious 'exercise' under RLUIPA. Accordingly, the court concluded that Shakur failed to state a claim for a violation of either the Free Exercise Clause of the First Amendment or RLUIPA.

The district court entered an order dismissing Shakur's complaint with prejudice. Shakur filed a notice of appeal and moved for *in forma pauperis* status. This Court granted Shakur's motion and assigned *pro bono* counsel.² The Office of the Attorney General of the State of the New York submitted a brief as amicus curiae.

F.3d 89 (2d Cir.2004) (per curiam), as the appeals involved substantially similar questions.

DISCUSSION

[1] We review the district court's § 1915A dismissal of Shakur's complaint *de novo*. See *Liner v. Goord*, 196 F.3d 132, 134 (2d Cir.1999). Section 1915A provides:

§ 1915A. Screening

(a) SCREENING.—The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) GROUNDS FOR DISMISSAL.—On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

- (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted

28 U.S.C. § 1915A(a)-(b).

The court also cited 28 U.S.C. § 1915(e)(2)(B)(ii) as a statutory predicate for its dismissal of the complaint. Section 1915 governs proceedings *in forma pauperis*, while § 1915A “applies” to all civil complaints brought by prisoners against governmental officials or entities regardless of whether the prisoner has paid [a] filing fee.” *Carr v. Doornin*, 171 F.3d 115, 116 (2d Cir.1999) (per curiam). Sections 1915 and 1915A recite identical grounds for dismissal, compare 28 U.S.C. § 1915A(b)(1) with 28 U.S.C. § 1915(e)(2)(B)(i)-(ii), and we have found both sections applicable to prisoner proceedings *in forma pauperis*, see, e.g., *Giano v. Goord*, 250 F.3d 146, 149–50 (2d Cir.2001) (applying § 1915); *Carr*, 171 F.3d at 116 (applying § 1915A); *McEachin v. McGuinnis*, 357 F.3d 197, 198 (2d Cir.2004) (applying both).

We limit our review here to § 1915A. The Supreme Court has held that the pre-

1996 version of § 1915 did not permit dismissals with prejudice, see *Denton v. Hernandez*, 504 U.S. 25, 34, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992), and the Fourth and Seventh Circuits have applied that rule to the present § 1915, see *Nagy v. Butner*, 576 F.3d 252, 258 (4th Cir.2004); see also *Gladney v. Pendleton Corr. Facility*, 302 F.3d 773, 775 (7th Cir.2002). We see no need to resolve that question at this time as § 1915A permits dismissals with prejudice. Although the Supreme Court has not commented on § 1915A in this regard, both the Seventh and D.C. Circuits agree that § 1915A authorizes dismissals with prejudice. See *Gladney*, 302 F.3d at 775; *Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C.Cir.1998). We have already tacitly held as much, see *Liner*, 196 F.3d at 133–35, and now abide by that precedent.

No portion of a complaint stating “a claim upon which relief may be granted” should be dismissed by the screening mechanism of § 1915A. This ground—legal sufficiency—“authorizes a court to dismiss a claim on the basis of a dispositive issue of law.” *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) (discussing standard of Federal Rule of Civil Procedure 12(b)(6)). It operates “without regard to whether [a claim] is based on an outlandish legal theory or on a close but ultimately unavailing one.” *Id.* at 327, 109 S.Ct. 1827. “The settled rule is that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *McEachin*, 357 F.3d at 200 (citations and internal quotation marks omitted). In assessing whether a claim is legally sufficient, “we accept all of the facts alleged in the complaint as true and draw all inferences in the plaintiff’s favor.” *Larkin v.*

Savage, 318 F.3d 138, 139 (2d Cir.2003) (per curiam). “Further, when the plaintiff proceeds *pro se*, as in this case, a court is obliged to construe his pleadings liberally, particularly when they allege civil rights violations.” *McEachin*, 357 F.3d at 200. Liberally construing Shakur’s complaint, we find his free expression, free exercise, and RLUIPA claims to be legally sufficient, and vacate the district court’s dismissal with regard to those claims.

However, we find that Shakur’s due process allegations fail to state a claim on which relief may be granted.³ Moreover, we find them frivolous. A claim “is frivolous where it lacks an arguable basis either in law or in fact.” *Neitzke*, 490 U.S. at 325, 109 S.Ct. 1827. Section 1915A “does not require that process be served or that the plaintiff be provided an opportunity to respond before [the] dismissal” of a frivolous claim. *Carr*, 171 F.3d at 116. Accordingly, we affirm the district court’s *sua sponte* dismissal with regard to Shakur’s due process claim.

The Freedom of Speech Claim

Shakur’s first claim is that the defendants violated his constitutional right to free expression. Reading Shakur’s complaint liberally, we find the complaint alleges (1) that Rule 105.12 is unconstitutional, and (2) in the alternative, that Rule 105.12 did not authorize defendants’ confiscations, and, accordingly, that such confiscations were improperly made for reasons of personal prejudice as opposed to legitimate penological interests. We hold that Shakur states a legally sufficient First Amendment claim.

[2, 3] “A prison inmate . . . retains those First Amendment rights that are not inconsistent with his status as a prisoner of” with the legitimate penological objec-

tives of the corrections system.” *Giano v. Senkowski*, 54 F.3d 1050, 1053 (2d Cir. 1995) (*Senkowski*). “The governing standard is one of reasonableness” *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir.1990). “[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Turner v. Safley*, 482 U.S. 78, 89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). “The prisoner-plaintiff bears the burden of proving that [a] disputed regulation is unreasonable.” *Senkowski*, 54 F.3d at 1054.

[4] The reasonableness of a prison regulation is measured by the three-step analysis outlined by the Supreme Court in *Turner*, 483 U.S. at 89–91, 107 S.Ct. 2729. See *Allen v. Coughlin*, 64 F.3d 77, 79 (2d Cir.1995). First, we ask “whether the governmental objective underlying the regulations at issue is legitimate and neutral, and [whether] the regulations are rationally related to that objective.” *Thornburgh v. Abbott*, 490 U.S. 401, 414, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989). Second, we look to see “whether there are alternative means of exercising the right that remain open to prison inmates.” *Id.* at 417, 109 S.Ct. 1874 (citations and internal quotation marks omitted). Third, we examine “the impact that accommodation of the asserted constitutional right will have on others (guards and inmates) in the prison.” *Id.* at 418, 109 S.Ct. 1874.

[5, 6] “The first *Turner* factor is multi-fold.” *Id.* at 414, 109 S.Ct. 1874. “A governmental objective must be “legitimate” and “neutral.” *Id.* Conduct expressly aimed at protecting prison security is “legitimate” beyond question and is in fact “central to all other correctional goals.” *Id.* at 415, 109 S.Ct. 1874 (quoting *Pell v. Procunier*, 417 U.S. 817, 823, 94 S.Ct. on appeal. See *infra* Part 3.

2800, 41 L.Ed.2d 495 (1973)). As for neutrality, "[w]here . . . prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are 'neutral' in the technical sense" *Id.* at 415-16, 109 S.Ct. 1874. However, where "regulations fairly invite[] prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner . . . censorship," they are "decidedly not 'neutral' in the relevant sense." *Id.* at 416 n. 14, 109 S.Ct. 1874 (citations and internal quotation marks omitted).

A legitimate and neutral governmental objective must be rationally related to a challenged course of action. *Id.* at 414, 109 S.Ct. 1874. "Where the regulations at issue concern . . . [publications in] prison, . . . a regulation which gives prison authorities broad discretion is appropriate." *Id.* at 416, 109 S.Ct. 1874. It is rational to censor any materials found "to create an intolerable risk of disorder under the conditions of a particular prison at a particular time." *Id.* at 417, 109 S.Ct. 1874. The Supreme Court has permitted censorship of such materials where the censorship occurred via "individualized" review. *See id.*

[7] The second *Turner* prong cautions that, when other avenues for exercising an asserted right remain available, "courts should defer to the informed discretion of prison officials to gauge the validity of the regulation." *Senkowsky*, 54 F.3d at 1056. The "right" in question must be viewed "sensibly and expansively," *Thornburgh*, 490 U.S. at 417, 109 S.Ct. 1874, to "allow for flexibility in determining what qualifies as another means of expression," *Senkowsky*, 54 F.3d at 1055. As far as the regulation of free expression is concerned, a regulation cannot "deprive prisoners of all means of expression," *Turner*, 482 U.S. at

92, 107 S.Ct. 2254, and must leave "effective" means for "substitutable" exercises of expression, *see Allen*, 64 F.3d at 80. But, generally, if a regulation "permit[s] a broad range of publications to be . . . read, this factor is clearly satisfied." *Thornburgh*, 490 U.S. at 418, 109 S.Ct. 1874.

[8] Under the third and final *Turner* factor, the Supreme Court has instructed that, "[w]here . . . the right in question can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike, the courts should defer to the informed discretion of corrections officials." *Id.* at 418, 109 S.Ct. 1874 (internal citations and quotation marks omitted). However, "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable." *Turner*, 482 U.S. at 90, 107 S.Ct. 2254. While "there is no requirement that prison officials adopt the least restrictive alternative to their preferred policy," *Senkowsky*, 54 F.3d at 1056, "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Turner*, 482 U.S. at 91, 107 S.Ct. 2254. "The degree to which the cost of [an alternative] is burdensome is an issue of fact" *Allen*, 64 F.3d at 81.

[9] Shukur has stated a legally sufficient claim that defendants' confiscation of his New African political literature violated the First Amendment. The complaint in this case is akin to the complaint in *Thomas v. Scully*, 943 F.2d 259 (2d Cir. 1991) (per curiam). In *Thomas*, the plaintiff challenged a prison's confiscation of nude photographs of his girlfriend. *Id.* at 260. This Court later upheld similar confiscations in *Senkowsky*, 54 F.3d at 1057, as reasonable under *Turner*. However, in

Thomas, we concluded that, "whatever its merit, the complaint did state a claim on which relief could be granted." 943 F.2d at 260. The distinction between *Thomas* and *Senkowsky* is that *Senkowsky* came to us on summary judgment rather than on a dismissal for failure to state a legally sufficient claim. At the point of summary judgment, plaintiff had been able to assemble evidence to attempt to meet his burden of proof, *see Senkowsky*, 54 F.3d at 1054, and defendants had been able to articulate rationales for the policy, *see id.* at 1054-55. This Court could thus "find the government's explanation . . . valid and rational," *see id.* at 1055, and hold that the plaintiff could not meet his burden of proof, *see id.* at 1054. The holding of *Thomas*, by contrast, indicates that we would not reach such a conclusion on "the face of the complaint" alone.⁴ *Thomas*, 943 F.2d at 260. Likewise, although we are unable now to determine whether the challenged conduct is reasonable or not, we hold that Shukur has stated a claim on which relief may be granted.

Defendants predicated their confiscations on Rule 105.12. That rule distinguishes between authorized and unauthorized organizations. N.Y. Comp. Codes. R. & Regs. tit. 7, § 270.2(B)(6)(iii). "An unauthorized organization is any gang or any organization which has not been approved by the deputy commissioner for program services." *Id.* Rule 105.12 prohibits the possession of "unauthorized organizational insignia or materials." *Id.* Defendants classified Shukur's New African political literature as unauthorized organizational materials.

On its face, Rule 105.12 appears to ban all literature from outside organizations, 195.1.1
4. Admittedly, there are regulations so obviously related to legitimate penological concerns that challenges to them may be dismissed . . . based simply on an (irrefutable)

unless those organizations have been approved by the deputy commissioner. This regulation would sweep more broadly than the regulations upheld in *Turner*, *Thornburgh*, *Senkowsky*, and *Allen*. An across-the-board exclusion of materials of "unauthorized organizations" may not be rationally related to any governmental objective. Assuming that Rule 105.12 is targeted at the legitimate goal of securing prisons, we are not sure how a complete ban on the materials of "unauthorized organizations" is rationally related to that goal. The district court articulated no such relationship, and none appears to us on the face of the regulation.

Moreover, Supreme Court precedent suggests that Rule 105.12 may be too broad to meet the *Turner* standard. In *Thornburgh*, the Supreme Court upheld the facial validity of a prison regulation permitting the warden to reject publications pursuant to articulated standards. 490 U.S. at 404, 405 n. 5, 109 S.Ct. 1874. The Court noted that it was "comforted by the individualized nature of the determinations required by the regulation," and that the regulations "expressly reject[ed] certain shortcuts that would lead to *needless exclusions*." *Id.* at 416-17, 109 S.Ct. 1874 (emphases added). Rule 105.12, by contrast, does not provide any standard against which DOCS officials will conduct an individualized review of the publication in question.

Indeed, the "needless exclusions" apparently made possible by Rule 105.12 exceed even the exclusions that the Supreme Court suggested would be unconstitutional in *Thornburgh*. In *Thornburgh*, the Supreme Court cited with approval a regulation prohibiting the establishment of an

'common sense determination.' " *Senkowsky*, 54 F.3d at 1059 (Calabresi, J., dissenting). Common sense does not provide us with an irrefutable determination here.

excluded list of subscription publications, suggesting that the "shortcut" of listing banned publications would lead to "needless exclusions." *Id.* at 417, 109 S.Ct. 1874. The shortcut in *Thornburgh* would, by default, subject the universe of publications to individualized review, and ban only a discrete set of enumerated publications. Rule 105.12 appears to take a much more serious shortcut. It seems to ban all the publications of unlisted organizations and allow only a discrete set of enumerated organizational materials. This "shortcut" greatly circumscribes the universe of reading materials accessible to inmates. It thus appears that Rule 105.12's ban is not sufficiently related to any legitimate and neutral penological objective.

The second prong of *Turner* may also support Shakur. At this point, we do not know what alternative avenues exist by which Shakur might exercise his right to free expression. Defendants were never served in this case and, consequently, have not been asked to explain the range of materials available to Shakur. Nor do we know how Rule 105.12 has been applied: we do not know how many materials are considered to be "organizational materials," how many organizations are "authorized," or how difficult it is to obtain such authorization. Thus, we cannot say that this prong weighs in favor of dismissal.

Most clearly, the third *Turner* prong supports Shakur's argument. There is an obvious alternative in this case. As Shakur has continually pointed out, DOCS has established an FMRC in every correctional institution. The purpose of the FMRC is to review inmates' reading materials. Shakur thus points to evidence that DOCS might be able to accommodate Shakur's rights "at de minimis cost to valid penological interests." *Turner*, 482 U.S. at 91, 107 S.Ct. 2254. Indeed, his final confiscation was subjected to FMRC review, with

no obvious harm to penological interests. While we recognize that forcing an individualized FMRC review of materials might put a strain on prison resources, *Allen* counsels that the nature of those costs is an issue of fact. *See Allen*, 64 F.3d at 81. In the absence of a determination that the costs are prohibitive—a claim that is somewhat unlikely given that FMRC review procedures are already in place—this third prong weighs in Shakur's favor. Thus, with regard to the constitutionality of Rule 105.12, the present complaint cannot be dismissed on its face because none of the *Turner* factors facially favor DOCS. *Id.*

[10] Shakur also states a legally cognizable claim if we assume that Rule 105.12 did not authorize the challenged confiscations. The first *Turner* factor requires a "neutral" objective, and the Supreme Court has distinguished actions pursuant to neutral objectives from actions pursuant to "personal prejudices." *See Thornburgh*, 490 U.S. at 416 n. 14, 109 S.Ct. 1874. Shakur alleges that his Rule 105.12 punishment was "arbitrary and unjustifiable." We understand Shakur's complaint therefore to allege, as he now argues, that the confiscations were made for reasons of "personal prejudice."

Our precedent indicates that a failure to abide by established procedures or standards can evince an improper objective. In *Abdul Wali v. Coughlin*, 754 F.2d 1015 (2d Cir.1985), this Court held that a prison official's failure to adhere to established procedures was evidence that he was not acting pursuant to a proper penological objective:

[The prison official] did not apply the guidelines set forth [in DOCS directives] [O]ur review ... might have been very different had it been reached by reference to those standards. The DOCS guidelines provide corrections officials great leeway in de-

termining what literature will be permitted into prison facilities, yet assure that each decision represents the consensus of a number of penological professionals, rather than the bias or animosity of a particular official [A] decision reached by reference to the [substantive and procedural guidelines of the DOCS directives] will be afforded great deference by a reviewing court. Where a corrections official chooses to ignore established standards and procedures, however, he must be prepared to demonstrate that his decision—reached in consultation with no one, and made in reliance on no more than his personal beliefs—is supported by reasonable justification.

Id. at 1036. Although *Abdul Wali* predates the Supreme Court's establishment of its current "reasonableness" test, *see Turner*, 482 U.S. at 101 n. 1, 107 S.Ct. 2254 (Stevens, J., concurring in part and dissenting in part), the evidentiary point of *Abdul Wali* remains applicable.

In the absence of Rule 105.12, the challenged confiscations would have been subject to FMRC review. *See N.Y. Comp. Codes. R. & Regs. tit. 7, §§ 712.2-712.3.* Under *Abdul Wali*, defendants' decision to bypass FMRC review suggests that their confiscations were not made pursuant to legitimate and neutral penological objectives. This conclusion is buttressed by the fact that an eventual FMRC review of Shakur's materials—in the single instance where FMRC review occurred—ended in approval of the vast majority of those materials. We thus hold that, if Rule 105.12 did not authorize defendants' confiscations, Shakur's complaint states a legally sufficient claim of unconstitutional infringement of his First Amendment right to free expression.

For these reasons, we find that Shakur's claim that the confiscations at issue were

unconstitutional is a claim on which relief could be granted. Although the district court properly cited *Turner*, *Thornburgh*, and *Allen* as controlling precedent, it ultimately based its dismissal on *Dumateuf II* and *Dumateuf I*, and neither case is appropriate. The district court cited the *Dumateuf* cases for the proposition that "it has already been settled that the limitations imposed in the New York State prison system on written materials related to the New African Liberation Movement comport with First Amendment requirements." *Dumateuf II* and *Dumateuf I* do not support that proposition. Moreover, the complaint only alleges that defendants seized "New African political literature," not "materials related to the New African Liberation Movement."

In *Dumateuf II*, this Court considered allegedly arbitrary mail censorship. *See Dumateuf II*, 297 F.3d at 110-11. The plaintiff alleged that the defendants had violated the First Amendment by instituting a "mail watch," "stopping, opening and reading all non-privileged correspondence." *Id.* This Court upheld the mail watch as reasonably related to legitimate penological interests. We noted that the plaintiff "had an extensive disciplinary history involving prohibited organizational activities," *id.* at 113, and had recently been disciplined for "deliberately misaddress[ing] mail containing correspondence advocating violent overthrow of the government," *id.* at 110. The misaddressed correspondence included NALM materials. *See id.* at 110. The case, however, did not involve the confiscation of NALM materials. *See id.* at 110. Indeed, the incident triggering the mail watch was the prisoner's receipt of James Dale Davidson and Sir William Rees Magg's economics book "Blood in the Streets: Investment Profits in a World Gone Mad." *Id.* at 111. We had no reason to consider the constitutionality

of a ban on unauthorized materials generally or on New African political literature in particular. See *id.* at 110, 113. Thus, our holding in *Duamutef II* does not reach Shakur's claims.

Duamutef I is as unavailing as *Duamutef II*. Moreover, *Duamutef I*, of course, is not binding. In *Duamutef I*, the district court considered the confiscation of certain NALM materials. 1998 WL 166838, at *1. Unlike the district court here, the district court in *Duamutef I* reviewed all of those materials. *Id.* at *2. The *Duamutef I* court concluded that seizure of those particular materials "furthered the legitimate goal of maintaining prison security." *Id.* at *2. The court adopted a magistrate judge's opinion which assumed, *arguendo*, that NALM was a "nonviolent," "legitimate peaceful political movement" that constituted "an acceptable political organization under prison rules." *Id.* at * 3-4. The court did not consider any NALM materials beyond those before it. It certainly did not consider Shakur's seized New African political literature or a ban on unauthorized materials generally. Consequently, neither *Duamutef II* or *Duamutef I* disposes of Shakur's claim. We hold that the district court erred in disposing of Shakur's free expression claim. We therefore vacate the district court's dismissal of that claim.

2. The Procedural Due Process Claim

The district court relied on the *Duamutef* cases in dismissing Shakur's procedural due process claim. Although we disagree with this analysis for the reasons stated above, we affirm the district court's dismissal.

[11] Shakur presents no colorable due process argument. A procedural due process analysis proceeds with two questions. "[T]he first asks whether there exists a liberty or property interest which has been

interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dept. of Corrs. v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (citations omitted). There are two possible sets of deprivations in this case. The first consists of the punishments imposed on Shakur, which included a penalty of 12 months in SHU. The second consists of Shakur's deprivation of his literature, as his literature constituted a property interest, see, e.g., *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), and, according to Shakur, a First Amendment liberty interest. Neither deprivation occurred without due process.

[12] Shakur objects *only* to the defendants' failure to invoke FMRC review. He concedes that "the prison may, consistent with the Due Process clause . . . immediately seize any publication that is suspected as potentially posing a threat to institutional security," and he therefore "does not object to the immediate seizure of his political material." Instead, he contests what he terms "the entirely inadequate subsequent final process." The only procedural protection that Shakur identifies as missing from that process is an FMRC review. Shakur does not challenge this Court's holding that the ordinary disciplinary procedures of the New York State prison system comport with the appropriate due process standards outlined in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2966, 41 L.Ed.2d 935 (1974). See *Walker v. Bates*, 23 F.3d 652, 656 (2d Cir.1994).

[13] Shakur's allegation that defendants deviated from FMRC procedures is unavailing. We confronted an analogous

question in *Holcomb v. Lykens*, 337 F.3d 217 (2d Cir.2003). In *Holcomb*, the plaintiff "assert[ed] that he was deprived of his Fourteenth Amendment procedural due process rights when Vermont state corrections officers revoked his extended furlough without following the procedures" required by state law.⁵ *Id.* at 220. *Holcomb* brought a § 1983 action, claiming that defendants' failure to follow mandatory procedures denied him due process. *Id.* at 224. This Court affirmed the district court's grant of summary judgment to the Vermont officers. *Id.* at 220, 224-25. We explained that the *only* relevant inquiry was whether the constitutional "minimal procedure[s] for revocation of parole" were met, not whether state procedures were followed.

Although for purposes of his *state habeas* petition the question was whether *Holcomb* received an appropriate sanction under *state* law, for purposes of his *federal* procedural due process claim the question is whether he received the procedural protection mandated by the federal Constitution.

Id. at 224 (emphasis in original). Likewise, here, regardless of state procedural guarantees, the *only* process due an inmate is that minimal process guaranteed by the Constitution, as outlined in *Wolff*, 418 U.S. at 561-70, 94 S.Ct. 2963. "[S]tate statutes do not create federally protected due process entitlements to specific state-mandated procedures." *Holcomb*, 337 F.3d at 224.

Thus, we find that Shakur fails to present a colorable due process claim and we affirm the district court's dismissal of that claim.

3. The Equal Protection Claim

The district court also dismissed Shakur's equal protection claim. The court explained that Shakur alleged neither that "other inmates who possessed materials related to an unauthorized organization were treated differently" nor that he had been disciplined on any "impermissible considerations." Shakur does not raise the equal protection claim on appeal. "It is well established that an argument not raised on appeal is deemed abandoned and lost, and that a court of appeals will not consider the argument unless it has reason to believe that manifest injustice would result otherwise." *United States v. Joyner*, 313 F.3d 40, 44 (2d Cir.2002) (citations and internal quotation marks omitted). We therefore affirm the district court's dismissal of Shakur's equal protection claim.

facility for 15 or more consecutive days and nights." *Id.* at 218 n. 1.

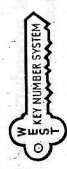
5. Applicable state regulations define "extended furlough" as "approved absence from a

ment by plaintiff and the semblance of a disputed factual issue ... prevented[] us from holding that plaintiff [was] entitled to summary judgment." *Id.*

Our decision in *Ford* is controlling here. Under *Ford*, Shakur states free exercise and RLUIPA claims. Accordingly, we vacate the district court's dismissal of those claims.

CONCLUSION

The district court's order of December 12, 2002 dismissing plaintiff-appellant's complaint with prejudice is hereby affirmed with regard to the procedural due process and equal protection claims, and vacated and remanded for further proceedings with regard to the First Amendment free speech and free exercise claims and the RLUIPA claim.



UNITED STATES of America,
Appellee,
v.
Jo-Ann VENTURELLA, also known
as Jo-Ann Ferretti, Defendant—
Appellant.

Docket No. 04-1219-CR.
United States Court of Appeals,
Second Circuit.
Argued: Sept. 30, 2004.
Decided: Dec. 8, 2004.

Background: Following a jury trial, the defendant was convicted in the United States or confined to an institution 42 U.S.C. § 2000cc-1(a).

District Court for the Eastern District of New York, Denis R. Hurley, J., of knowingly and willfully failing to pay a past due support obligation greater than \$10,000 with respect to minor children residing in another state. Defendant appealed.

Holdings: The Court of Appeals, Wesley, Circuit Judge, held that:

- (1) term "resides" in statute prohibiting knowingly and willfully failing to pay a past due support obligation greater than \$10,000 with respect to minor children residing in another state denoted residency, rather than domicile;
- (2) rule of lenity was inapplicable in determining whether defendant resided in another state for purposes of statute;
- (3) failure of statute to define "resides" did not render the statute void-for-vagueness; and
- (4) Court of Appeals would not review defendant's ineffective assistance of counsel claim on direct appeal.

Child Support §653

Term "resides" in statute prohibiting knowingly and willfully failing to pay a past due support obligation greater than \$10,000 with respect to minor children residing in another state denoted residency, rather than domicile. 18 U.S.C.A. § 228.

Statutes §241(1)

The rule of lenity requires a sentencing court to impose the lesser of two penalties where there is an actual ambiguity over which penalty should apply.

Statutes §241(1)

Rule of lenity was inapplicable in determining whether defendant resided in another state for purposes of statute prohibiting knowingly and willfully failing to pay a past due support obligation greater

than \$10,000 with respect to minor children residing in another state; term "resides" was susceptible to two meanings, one, "domicile," which in context was absurd, and the other, "residency," which in context was consistent with the term's usage in another criminal statute and with Congressional expectations. 18 U.S.C.A. § 228.

Child Support §650

Constitutional Law §82(10)

Failure of statute prohibiting knowingly and willfully failing to pay a past due support obligation greater than \$10,000 with respect to minor children residing in another state to define "resides" did not render the statute void-for-vagueness. 18 U.S.C.A. § 228.

Criminal Law §1030(1)

Before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. Federal Rules Crim. P. 52(b). 18 U.S.C.A.

Criminal Law §13.1(1)

Generally, the "void-for-vagueness doctrine" requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

See publication Words and Phrases for other judicial constructions and definitions.

Criminal Law §1038.1(4)

Failure of district court to instruct jury on a dual residency defense in criminal proceedings for knowingly and willfully

4. *The Free Exercise & RLUIPA Claims*
[14, 15] Finally, Shakur alleges that defendants' refusal to allow him to attend a "religious feast" violated his First Amendment right to the free exercise of his religion and constituted a violation of RLUIPA. The district court dismissed both of these claims. Shakur and the amici contend that the district court erred in its analysis. We agree.

The district court adopted the reasoning of *Ford*, 230 F.Supp.2d at 347-48. In *Ford*, the district court found, *inter alia*, that denying an inmate the Eid ul Fitr feast was merely a *de minimis*—and not a "substantial"—burden, and therefore was not cognizable under our free exercise jurisprudence. *Id.* at 348 n. 10. The district court in this case simply applied *Ford* to Shakur's First Amendment free exercise and RLUIPA claims. It held that "[p]laintiff's missing of a single religious feast simply does not amount to a 'substantial burden' on his religious exercise."

Ford has subsequently been overruled by this Court. See *Ford v. McGinnis*, 352 F.3d 582 (2d Cir.2003). In reversing the district court's *Ford* opinion, we applied the substantial burden test to Ford's free exercise claim as Ford had not challenged that standard. "Given that fact, and because we did not benefit from the parties' briefing on the issue, we ... proceed[ed] ... on the assumption that the substantial burden test applies." *Id.* at 592. We explained that Eid ul Fitr "is one of two major religious observances in Islam." *Id.* at 584-85. We then stated that we "would be inclined to hold ... that Ford has established a substantial burden as a matter of law." *Id.* at 594. Only "[t]he absence of a cross-motion for summary judgment

6. RLUIPA provides, *inter alia*, that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in