

15-1631

Burns v. Martuscello

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4
5 August Term, 2017

6
7 (Argued: October 11, 2017

Decided: May 9, 2018)

8
9 Docket No. 15-1631

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13 MARK BURNS,

14
15 *Plaintiff-Appellant,*

16
17 v.

18
19 DANIEL F. MARTUSCELLO, JR., Superintendent, Cossackie Correctional
20 Facility, CAPTAIN SHANLEY, Cossackie Correctional Facility, SERGEANT
21 NOEH, Cossackie Correctional Facility, SCHWEBLER, Guidance Counselor,
22 Cossackie Correctional Facility, BRIAN FISCHER, Commissioner of New York
23 State Department of Corrections, TERESA KNAPP-DAVID, Director of
24 Movement and Control, New York State DOCCS, MCGLYNN, Guidance
25 Counselor, Cossackie Correctional Facility,¹

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27 *Defendants-Appellees.*
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¹ The clerk is respectfully directed to amend the caption as above.

1 Before: WALKER and POOLER, *Circuit Judges*, CRAWFORD, *District Judge*.²

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3 Appeal from United States District Court for the Northern District of New
4 York (Lawrence E. Kahn, *J.*; Christian F. Hummel, *M.J.*) granting summary
5 judgment to defendants on a First Amendment retaliation claim, and Eighth and
6 Fourteenth Amendment claims related to plaintiff Mark Burns's placement in
7 restricted custody after he refused (i) to serve as a prison informant, or (ii) to
8 provide false information regarding an incident within the facility. With regard
9 to the First Amendment retaliation claim, we hold that the First Amendment
10 protects a prisoner's right not to serve as a prison informant or provide false
11 information to prison officials. Because we have not previously recognized this
12 speech and speech-related activity as protected by the First Amendment, we
13 nonetheless affirm the judgment of the district court on qualified immunity
14 grounds.

15 Affirmed.

16

² Judge Geoffrey W. Crawford, United States District Court for the District of Vermont, sitting by designation.

1 NOAM BIALE, Sher Tremonte LLP (Michael W.
2 Gibaldi, *on the brief*), New York, N.Y., *for Plaintiff-*
3 *Appellant Mark Burns.*

4
5 ROBERT M. GOLDFARB, Assistant Solicitor General
6 (Barbara D. Underwood, Andrew D. Bing, *on the brief*),
7 *for* Eric T. Schneiderman, Attorney General of the State
8 of New York, Albany, N.Y., *for Defendants-Appellees*
9 *Daniel F. Martuscello et al.*

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11 POOLER, *Circuit Judge:*

12 Plaintiff-Appellant Mark Burns appeals from a February 10, 2015 decision
13 and order of the United States District Court for the Northern District of New
14 York (Kahn, J.), adopting the report-recommendation of the magistrate judge
15 (Hummel, M.J.) in its entirety, and granting summary judgment to defendants.
16 Burns brought several Section 1983 claims, alleging that his First, Eighth, and
17 Fourteenth Amendment rights were violated when he was put on a restricted
18 status known as Involuntary Protective Custody (“IPC”) for over six months,
19 after he refused the demands of prison guards to act as a “snitch,” or to falsify
20 his account of a minor incident in the commissary. With regard to the First
21 Amendment retaliation claim, the district court reasoned that Burns was not
22 engaged in protected speech or conduct, because the First Amendment did not
23 protect Burns’s refusal to snitch.

1 Today we hold that the First Amendment protects both a prisoner's right
2 not to serve as an informant, and to refuse to provide false information to prison
3 officials. We have previously held that citizens enjoy a First Amendment right to
4 refuse to provide false information to the government, but have not previously
5 recognized this right in the prison context. *See Jackler v. Byrne*, 658 F.3d 225 (2d
6 Cir. 2011). With regard to a prisoner's right not to snitch, we have not previously
7 reached this issue—though we have encountered it and declined to decide it on
8 at least two prior occasions. *See Willey v. Kirkpatrick*, 801 F.3d 51 (2d Cir. 2015);
9 *Allah v. Juchenwioz*, 176 F. App'x 187, 189 (2d Cir. 2006) (summary order). Because
10 these rights were not clearly established at the time of the events underlying this
11 suit, the defendants are entitled to qualified immunity. For these reasons, we
12 affirm the judgment of the district court.

13 BACKGROUND

14 I. Facts

15 Burns is an inmate in the custody of the New York State Department of
16 Corrections and Community Supervision, and, at all times relevant to his claims,
17 was an inmate at Coxsackie Correctional Facility. As we must at summary
18 judgment, we credit Burns's account of events, and draw all reasonable

1 inferences in his favor. *See Reyes v. Lincoln Auto. Fin. Servs.*, 861 F.3d 51, 54 (2d
2 Cir. 2017), *as amended* (Aug. 21, 2017).

3 Burns began working as a stock clerk in the Coxsackie commissary
4 beginning in April of 2010. According to Burns, on May 19, 2010, he was in the
5 commissary removing stock from shelves, when a can fell from a high shelf and
6 struck him in the face and neck. Burns suffered minor injuries—namely, redness
7 on his face, which subsequently became a small bruise, and a scratch on his neck.
8 Burns reported the injury to commissary staff and signed a medical waiver. The
9 next day, May 20, an inmate injury report was filed, indicating that Burns had
10 been injured by a falling can in the commissary.

11 Also on May 20, 2010, Burns asserts that he was again working in the
12 commissary when he was approached by defendants Sergeant Noeh and Captain
13 Shanley. Noeh and Shanley told Burns that his wife had called and complained
14 that Burns had been “cut” by a fellow inmate. Report-Recommendation and
15 Order at 4, *Burns v. Martuscello*, 13-cv-486, ECF No. 46 (N.D.N.Y. Dec. 18, 2014).
16 In Burns’s telling of the events, he denied having any altercation with a fellow
17 inmate. Burns also pointed out that he had no cut, and that his apparent, minor
18 injuries were the result of the can falling on him the day before. Burns further

1 explained that a correctional officer assigned to the commissary had witnessed
2 the accident and documented it as a work-related injury. Burns also questioned
3 whether his wife made any such call. However, Burns told Noeh and Shanley
4 that he had recently been experiencing marital difficulties, and theorized that if
5 his wife had in fact called, it was due to their marital discord.

6 According to Burns, Shanley then proposed a deal. He told Burns that he
7 intended to recommend Burns for placement in IPC, citing the call from Burns's
8 wife as an indication of a threat to Burns's safety. But, Shanley offered to let
9 Burns avoid this restricted status if Burns agreed to be the guards' snitch.
10 Shanley and Noeh did not say that that they had a particular reason to believe
11 Burns would have information, but instead said that Burns knew "what goes
12 on." Joint App'x at 48. If Burns didn't agree to this arrangement, the guards
13 threatened that Burns would be relegated to IPC indefinitely. Burns refused to go
14 along with the guards' request. Shanley then instructed Noeh to write an IPC
15 recommendation. In the subsequent IPC recommendation, Noeh noted that
16 Burns's wife called and reported he was cut, that Burns had a bruised left eye but
17 no visible cut, and that Burns reported that a can fell on him, causing the bruise.

1 On May 26, 2010, a hearing commenced to determine whether Burns
2 would be put in IPC. Burns opposed the transfer. Burns indicated that he would
3 like to call as a witness correctional officer Jablanski, who had been assigned to
4 the commissary when the can fell, and the hearing adjourned.

5 According to Burns, at some point near the initial hearing—about a week
6 after the can fell—Shanley and Martuscello approached Burns and repeated the
7 demand that Burns be “their snitch.” Shanley and Martuscello also said that they
8 “had a new theory that [Burns] was assaulted by staff and that when [Burns]
9 agreed to snitch [he] would be let out but until then [he] could rot in IPC.” Joint
10 App’x at 22.

11 The hearing resumed on June 7, 2010. Officer Jablanski testified that he
12 recalled that a can fell from the top shelf and hit Burns in the face, and that Burns
13 reported the event to him. Jablanski also noted that he logged the injury. Noeh
14 then testified that Burns’s wife called and reported that Burns had been “cut.”
15 Supp. App’x at 69. Noeh further testified that Burns “had no cuts on him but he
16 had a black eye, which he claimed he got from a can falling.” Supp. App’x at 69.
17 When asked if he knew whether there was “a threat to Mr. Burns[’] safety within
18 the general inmate population” at Cocksackie, Noeh replied, “[i]f I go by the

1 inmate[']s word, no.” Supp. App’x at 69. Shanley then testified that he
2 recommended Burns for IPC status after receiving a phone call from Burns’s wife
3 and determining that Burns’s injuries were consistent with having an altercation.

4 That same day, June 7, 2010, the hearing officer approved Burns’s
5 placement in IPC. Burns was then transferred to IPC, where he remained until
6 January 2011. This status mandated that Burns remain in his cell for 23 hours a
7 day, and dramatically curtailed his access to the library, religious services, and
8 other prison resources.

9 Burns further recounts that while he was in IPC, Shanley and Martuscello
10 repeatedly demanded that Burns serve as their snitch in order to be released
11 from restricted custody. According to Burns, at one point, Martuscello stopped
12 by Burns’s cell, and, when Burns protested to be released from IPC, Martuscello
13 replied that “only [Martuscello] had the power to change [the] situation,” and
14 that “the only way that would happen was agree to snitch other wise [sic]
15 [Burns] could rot here,” in IPC. Joint App’x at 23. Burns also reports that the
16 officers continued to pressure him to change his account of how he received his
17 injuries. Burns explained time and again that his injuries were the product of a
18 minor workplace mishap, but the guards continued to ask him for a version of

1 events that implicated a guard. In response to these requests, Burns reiterated to
2 the officers that he “couldn’t give them anything that [he] d[id]n’t know,” but the
3 officers insisted that Burns should “give [them] some knowledge and [Burns]
4 would be able to get out.” Joint App’x at 50, 43.

5 During his time in IPC, Burns filed numerous grievances related to his IPC
6 status. After over six months in IPC, Burns was ultimately released from the
7 restricted status upon his transfer to a different correctional facility in early 2011.

8 II. Procedural History

9 On April 30, 2013, Burns filed suit pro se, alleging violations of his
10 constitutional rights. The district court construed Burns’s complaint to raise
11 violations of the First, Eighth, and Fourteenth Amendments. Following
12 discovery, defendants moved for summary judgment, asserting that Burns failed
13 to exhaust administrative remedies, and that the record evidence did not support
14 his Eighth and Fourteenth Amendment claims.

15 The magistrate judge found that Burns had established a genuine issue of
16 material fact regarding exhaustion, but ruled that Burns had failed to establish
17 claims to relief under the Eighth or Fourteenth Amendments. With respect to the
18 First Amendment retaliation claim, the magistrate judge reasoned Burns was not

1 engaged in protected speech or conduct, since no court has previously held that
2 there was a right to refuse to serve as a prison informant. Defendants did not
3 assert the defense of qualified immunity in their motion for summary judgment,
4 and the magistrate judge did not reach the question. The district court adopted
5 the recommendation of the magistrate in its entirety.

6 Burns appealed. We appointed counsel for the limited purpose of briefing
7 whether there is a constitutional right to refuse to become a prison informant,
8 and dismissed the remainder of Burns's appeal.

9 DISCUSSION

10 "A grant of summary judgment is reviewed de novo, construing the facts
11 in the light most favorable to the non-moving party and drawing all reasonable
12 inferences in that party's favor." *Kazolias v. IBEW LU 363*, 806 F.3d 45, 49 (2d Cir.
13 2015). "But because prisoner retaliation claims are easily fabricated, and
14 accordingly pose a substantial risk of unwarranted judicial intrusion into matters
15 of general prison administration, we are careful to require non-conclusory
16 allegations." *Bennett v. Goord*, 343 F.3d 133, 137 (2d Cir. 2003) (quoting *Dawes v.*
17 *Walker*, 239 F.3d 489, 491 (2d Cir. 2001), *overruled on other grounds*, *Swierkiewicz v.*
18 *Sorema N.A.*, 534 U.S. 506 (2002)) (internal quotation marks omitted).

1 In order for a prisoner's First Amendment retaliation claim under Section
2 1983 to survive summary judgment, a prisoner must show "(1) that the speech or
3 conduct at issue was protected, (2) that the defendant took adverse action against
4 the plaintiff, and (3) that there was a causal connection between the protected
5 speech and the adverse action." *Dolan v. Connolly*, 794 F.3d 290, 294 (2d Cir. 2015)
6 (quoting *Espinal v. Goord*, 558 F.3d 119, 128 (2d Cir. 2009)).

7 This appeal centers on the question of whether Burns was engaged in
8 protected speech or conduct when he refused to serve as a snitch. Neither we
9 nor the Supreme Court have squarely addressed this question previously. *See*
10 *Willey v. Kirkpatrick*, 801 F.3d 51, 66 (2d Cir. 2015) (declining to rule on whether
11 there is a right not to serve as a prison informant); *Allah v. Juchenwioz*, 176 F.
12 App'x 187, 189 (2d Cir. 2006) (summary order) (similarly declining to rule). We
13 now hold that the First Amendment protects a prisoner's right not to serve as an
14 informant.

15 Burns's refusal to alter his account of how he received his minor injuries or
16 otherwise fabricate information also raises the question of whether an inmate
17 retains the right to refuse to provide false information to government officials,

1 recognized previously in a different context in *Jackler*, 658 F.3d 225. We today
 2 hold that this right extends to prisoners.

3 **I. The Right Not to Speak**

4 As a general matter, the First Amendment protects the “right to decide
 5 what to say and what not to say.” *Jackler*, 658 F.3d at 241. “[T]he right of freedom
 6 of thought protected by the First Amendment against state action includes both
 7 the right to speak freely and the right to refrain from speaking at all.” *Wooley v.*
 8 *Maynard*, 430 U.S. 705, 714 (1977). To force a person to speak,³ and compel
 9 participation, is a severe intrusion on the liberty and intellectual privacy of the
 10 individual. Just as compelled silence will extinguish the individual’s right of
 11 expression, compelled speech will vitiate the individual’s decision either to
 12 express a perspective by means of silence, or to remain humbly absent from the
 13 arena. In *Riley v. National Federation of the Blind of North Carolina, Inc.*, the
 14 Supreme Court explained,

³ To be clear, we here refer only to speech made by an individual in her or his private capacity. We are not presently concerned with, for example, advertising requirements, which the Supreme Court has observed involve interests that “are not of the same order as those discussed in *Wooley* ... and *Barnette*.” *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Nor are we reviewing “disclosure requirements in the electoral context,” which are subject to distinct considerations. *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010).

1 There is certainly some difference between compelled speech and
2 compelled silence, but in the context of protected speech, the difference is
3 without constitutional significance, for the First Amendment guarantees
4 “freedom of speech,” a term necessarily comprising the decision of both
5 what to say and what *not* to say.

6
7 487 U.S. 781, 796–97 (1988) (emphasis in original).

8 The right not to speak derives largely from the notion, central to our
9 system of government, that the individual’s right to “freedom of mind” must be
10 jealously guarded. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

11 Preserving the “freedom to think as you will and to speak as you think” is both
12 an inherent good, and an abiding goal of our democracy. *Whitney v. California*,
13 274 U.S. 357, 375 (1927), *overruled in part by Brandenburg v. Ohio*, 395 U.S. 444
14 (1969) (Brandeis, J., concurring). In service of this core component of liberty, our
15 jurisprudence recognizes a “sphere of intellect and spirit which it is the purpose
16 of the First Amendment to our Constitution to reserve from all official control.”
17 *Barnette*, 319 U.S. at 642.

18 In our view, compelled speech presents a unique affront to personal
19 dignity. The decision to withhold speech depends on views and calculations
20 known only to the individual. And since the individual seeks to refrain from
21 speaking, those motivations are all the more obscure, and privately held. *See*

1 Abner S. Greene, *The Pledge of Allegiance Problem*, 64 Fordham L. Rev. 451, 473
2 (1995) (“[T]he right not to speak is the right not to reveal one’s mind publicly.”).
3 Accordingly, the right *not* to speak may be abrogated only under carefully
4 policed circumstances. As the Supreme Court has explained, between compelled
5 silence and compelled speech, compelled speech is the more serious incursion on
6 the First Amendment: “It would seem that involuntary affirmation could be
7 commanded only on even more immediate and urgent grounds than silence.”
8 *Barnette*, 319 U.S. at 633.

9 In *Barnette*, the Supreme Court held that the state could not require
10 students to salute the flag. *Id.* at 642. The Court found that the requirement
11 “requires affirmation of a belief and an attitude of mind,” and reflected an
12 attempt by officials to “coerce acceptance of [a] patriotic creed.” *Id.* at 633-34.
13 Such an intrusion was a significant burden on the “right of self-determination in
14 matters that touch individual opinion and personal attitude.” *Id.* at 631. As a
15 result, the Court held that the compelled salute impermissibly “invade[d] the
16 sphere of intellect and spirit which it is the purpose of the First Amendment to
17 our Constitution to reserve from all official control.” *Id.* at 642.

1 Subsequently, in *Wooley*, the Supreme Court ruled that New Hampshire
2 could not compel its citizens to advertise the slogan “Live Free or Die” on their
3 vehicle license plates. 430 U.S. at 713. The Court reasoned that requiring even
4 “the passive act of carrying the state motto on a license plate” violated the First
5 Amendment, because it converted the plaintiff into “an instrument for fostering
6 public adherence to an ideological point of view he finds unacceptable.” *Id.* at
7 715.

8 *Barnette* centered on speech of an overtly political nature, and political
9 speech has long stood at the “core” of First Amendment rights. *McIntyre v. Ohio*
10 *Elections Comm’n*, 514 U.S. 334, 346-47 (1995). However, the protections of the
11 First Amendment are hardly confined to political speech—and the Supreme
12 Court repeatedly “has rejected as ‘startling and dangerous’ a ‘free-floating test
13 for First Amendment coverage based on an ad hoc balancing of relative social
14 costs and benefits.’” *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (plurality
15 opinion) (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)) (internal
16 punctuation omitted). Indeed, the motto “Live Free or Die” at issue in *Wooley*
17 cannot be fairly categorized as traditional political speech. Rather, *Wooley*
18 expanded on *Barnette*’s notion of First Amendment protection for individual

1 matters of opinion and morality — “the sphere of intellect and spirit which it is
2 the purpose of the First Amendment to our Constitution to reserve from all
3 official control,” *Wooley*, 430 U.S. at 715 (quoting *Barnette*, 319 U.S. at 642)— and
4 articulated a strong view of First Amendment protection for matters of personal
5 philosophy and morality.

6 We have also recognized that the First Amendment right not to speak
7 protects the right to refuse to make false statements to the government. *See*
8 *Jackler*, 658 F.3d at 241. In *Jackler*, a probation officer filed a report against a fellow
9 officer, asserting that the officer had used excessive force on an arrestee. *Id.* at
10 230. Other members of the police force then attempted to coerce the plaintiff into
11 withdrawing his report. *Id.* at 231. When he did not, he was terminated. *Id.* at
12 232.

13 We found that a First Amendment retaliation claim could lie based on the
14 right not to speak. Drawing on *Wooley* and *Barnette*, as well as a citizen’s right to
15 give truthful evidence, we reasoned that the officer had a First Amendment right
16 to refuse to make false statements to the government: “a citizen has a First
17 Amendment right to decide what to say and what not to say, and, accordingly,
18 the right to reject governmental efforts to require him to make statements he

believes are false.” *Id.* at 241. We further held that “the First Amendment protects the rights of a citizen to refuse to retract a report to the police that he believes is true, to refuse to make a statement that he believes is false, and to refuse to engage in unlawful conduct by filing a false report with the police.” *Id.*

II. Limited First Amendment Interests of Prisoners

While an individual is not stripped of all constitutional rights upon incarceration, an inmate’s constitutional liberties are necessarily limited. “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.” *Shakur v. Selsky*, 391 F.3d 106, 113 (2d Cir. 2004) (quoting *Giano v. Senkowski*, 54 F.3d 1050, 1053 (2d Cir. 1995)) (internal punctuation omitted); see also *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Accordingly, while “[i]nmates clearly retain protections afforded by the First Amendment,” *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987), “the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere,” *Beard v. Banks*, 548 U.S. 521, 528 (2006) (plurality opinion). At bottom, “[t]he governing standard is one of reasonableness.” *Shakur*, 391 F.3d at 113 (quoting

1 *Benjamin v. Coughlin*, 905 F.2d 571, 574 (2d Cir. 1990)) (internal punctuation
2 omitted).

3 The majority of the jurisprudence evaluating the scope of a prisoner's First
4 Amendment rights arises in the context of a challenge to a generally applicable
5 prison policy or regulation. *See, e.g., Pilgrim v. Luther*, 571 F.3d 201, 204-05 (2d Cir.
6 2009) (challenge to prison regulation prohibiting organizations of strikes or work
7 stoppages); *Shaw v. Murphy*, 532 U.S. 223, 225 (2001) (challenge to policies
8 governing inmate communication with one another regarding legal claims). In
9 evaluating such a policy or regulation, courts employ the framework outlined by
10 the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). The *Turner*
11 inquiry requires us to examine several factors: (1) whether the policy or
12 regulation is "reasonably related to legitimate penological interests;" (2) whether
13 "there are alternative means of exercising the right that remain open;" (3) "the
14 impact that accommodation of the asserted constitutional right will have on
15 guards and inmates;" and (4) whether "ready alternatives" in prison policy that
16 would accommodate the right exist, indicating that the policy is "an exaggerated
17 response to prison concerns." *Id.* (internal citations and punctuation omitted).

1 Here, we do not confront a generally applicable policy or regulation, and
2 thus the *Turner* framework is not directly applicable. *Cf. Harris v. Miller*, 818 F.3d
3 49, 57 (2d Cir. 2016) (noting that prisoners' Fourth Amendment challenges
4 proceed under *Turner* when "a prison regulation or policy" is at issue, while
5 distinct reasonableness inquiry generally applies to "isolated" incidents). Rather,
6 Burns alleges that a single incident—his placement in IPC—was in retaliation for
7 the exercise of First Amendment rights. As a result, certain aspects of the *Turner*
8 framework do not apply here. For example, questions about alternative means of
9 expressing the right are ill-fitting in a single incident case. And indeed, the rights
10 that Burns asserts are not amenable to alternative modes of expression. There is
11 no middle ground between silence and speech. Nonetheless, because *Turner* itself
12 discussed the First Amendment rights of prisoners, and outlined certain guiding
13 considerations in prisoner cases, we find that the "several *Turner* factors are
14 relevant to the question of whether [an inmate's] speech is an activity protected
15 by the First Amendment." *Watkins v. Kasper*, 599 F.3d 791, 797 (7th Cir. 2010).

16 Specifically, the first *Turner* factor is undoubtedly relevant to a single-
17 incident case, and we take care to emphasize the heightened role of security
18 interests in the prison context. "[M]aintaining prison security and protecting

1 against increased inmate violence” is “central to all other corrections goals.”

2 *Duamutef v. Hollins*, 297 F.3d 108, 112 (2d Cir. 2002) (quoting *Senkowski*, 54 F.3d at
3 1054; *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989)). And, as we have observed,
4 “prison officials must be given latitude to anticipate the probable consequences
5 of certain speech, and must be allowed to take reasonable steps to forestall
6 violence.” *Id.* (quoting *Giano*, 54 F.3d at 1055) (internal punctuation omitted).

7 Further, the concern that prison officials may obviously be engaging in an
8 “exaggerated response” is also relevant to a single incident case. *Turner*, 482 U.S.
9 at 87. Our review of actions taken by prison officials is “deferential,” *Ford v.*
10 *McGinnis*, 352 F.3d 582, 595 (2d Cir. 2003), but, just as a policy may clearly place
11 too great a burden on inmates’ rights, so too may a single incident plainly
12 constitute an outsize reaction to prison administration concerns.

13 In *Turner* itself, the Supreme Court ruled that a Missouri rule prohibiting
14 communications between inmates at different institutions, subject to certain
15 exceptions, did not violate the First Amendment. 482 U.S. at 81-82. The Court did
16 not question that inmates held a First Amendment interest in the speech, but
17 focused on the policy’s relationship to curtailing coordination among inmates for
18 violent acts and gang related activity. *Id.* at 91. The Court emphasized the

1 minimal reach of the regulation, which “bars communication only with a limited
2 class of other people with whom prison officials have particular cause to be
3 concerned—inmates at other institutions.” *Id.* at 92. Finally, the Court found that
4 the lack of available alternatives, and the strain on institutional resources that
5 would be generated by an individualized review of communications, militated in
6 favor of the measure’s constitutionality. *Id.* at 93.

7 Following *Turner*, we have many times encountered challenges to prisoner
8 mail policies. We have repeatedly held, in line with the Supreme Court’s
9 reasoning in *Turner*, that a prisoner retains a First Amendment interest in their
10 communications. As we have noted, “a prisoner’s right to the free flow of
11 incoming and outgoing mail is protected by the First Amendment.” *Davis v.*
12 *Goord*, 320 F.3d 346, 351 (2d Cir. 2003). Nonetheless, the right is subject to
13 significant limitation in light of countervailing interests within the correctional
14 system. *See, e.g., Johnson v. Goord*, 445 F.3d 532, 535 (2d Cir. 2006) (employing
15 *Turner* framework to uphold prison policy allowing each prisoner one free stamp
16 per month for personal use).

17 On a handful of occasions, we have considered First Amendment suits
18 arising from specific, isolated actions by guards. In *Shakur v. Selsky*, we

1 considered whether guards' confiscation of reading New Afrikan political
2 literature "pursuant to personal prejudices" violated an inmate's First
3 Amendment rights. 391 F.3d 106, 116 (2d Cir. 2004) (internal quotation marks
4 omitted). We reasoned that such an "improper objective" was inconsistent with
5 any reasonable penological purpose. *Id.* As a result, we found that the
6 confiscation allegations amounted to "a legally sufficient claim of
7 unconstitutional infringement of [the inmate's] First Amendment right to free
8 expression." *Id.* at 117.

9 In *Meriwether v. Coughlin*, we upheld a jury verdict finding First
10 Amendment retaliation where inmates who were "outspoken critics of the
11 [prison] administration" were transferred to new facilities. 879 F.2d 1037, 1046
12 (2d Cir. 1989). The prison suffered from corruption and lax security procedures,
13 and inmates became vocal about the poor state of affairs within the institution.
14 *Id.* at 1039. Specifically, several prisoners "corresponded with state officials and
15 public interest organizations about the problems at [the prison], and many
16 attended [a] meeting at which media contact was demanded." *Id.* at 1046. In
17 response, prison officials had the inmates transferred and dispersed throughout
18 various facilities. We recognized that the inmates' speech was protected by the

1 First Amendment, and explained that they had made out a retaliation claim
2 because “a reasonable jury could find that the plaintiffs were transferred solely
3 because they exercised their First Amendment rights.” *Id.*

4 **III. The Right Not to Snitch**

5 Applying these principles, we find that Burns held a strong First
6 Amendment interest in refusing the demands of the guards that he provide both
7 false information, and truthful information on an ongoing basis. At the most
8 basic level, Burns’s claims derive from the guards’ attempt to force him to speak
9 against his will. The right not to speak, as articulated in *Barnette*, *Wooley*, and
10 *Jackler*, safeguards a humble but vitally important restraint on the government’s
11 coercive powers. And, in light of the unobtrusive but foundational nature of the
12 right not to speak, we think it clear that inmates generally retain a First
13 Amendment interest in declining to speak.

14 Of course, the right not to snitch implicates speech that is not a simple
15 expression of opinion. Crediting Burns’s version of events and drawing all
16 reasonable inferences in his favor, as we must on appeal from summary
17 judgment, Burns’s case presents the questions of whether an inmate may,
18 consistent with the First Amendment, be forced to (i) provide false, inculpatory

1 information to guards, by fabricating events or falsely casting blame for injuries
2 sustained from a workplace mishap; or (ii) provide true, inculpatory information
3 to guards by acting as their snitch. Invoking *Turner*, defendants urge that their
4 actions were in service of prison safety, and that, as a result, Burns cannot be said
5 to have engaged in First Amendment protected speech in refusing to submit to
6 the guards' demands. However, as we explain, forcing an inmate to snitch, at
7 least on the facts presented here, is not reasonably related to that goal. Nor is
8 compulsion to provide false information. Accordingly, we hold that the First
9 Amendment protects an inmate's refusal both to serve as a prison informant and
10 to provide false information.

11 **A. *Jackler* and the Right to Refuse to Provide False Information**

12
13 To dispose of the simpler question first—it is eminently clear to us that the
14 First Amendment protects an inmate's right to refuse to provide false
15 information to prison officials. As we held in *Jackler*, an individual holds “a First
16 Amendment right to decide what to say and what not to say, and, accordingly,
17 the right to reject governmental efforts to require him to make statements he
18 believes are false.” 658 F.3d at 241. We see no basis to circumscribe this right in
19 the prison context. No legitimate penological objective is served by forcing an

1 inmate to provide false information. Truth is vital to security. Inaccurate
2 incrimination of others—as the guards are alleged to have sought from Burns
3 here—could lead only to unwarranted punishment. Such arbitrary and
4 manifestly unjust outcomes would plainly undermine the integrity of the
5 correctional system. Accordingly, though we have not previously considered
6 whether the First Amendment rights discussed in *Jackler* extend to the prison
7 context, we have little difficulty concluding that they do.

8 Indeed, Burns’s experience with his workplace injury neatly parallels the
9 allegations in *Jackler*. In both instances, an initial report was made, and officials
10 pressured the plaintiffs to change their accounts of the events in question.
11 Though in *Jackler* we were concerned with an officer’s right not to retract a report
12 and falsely absolve another of wrongdoing, this same logic naturally extends to
13 the situation here, where officials sought to force the false incrimination of
14 others. Thus it is plain to us that the First Amendment protects an inmate’s
15 refusal to provide false information. Accordingly, by refusing to invent false
16 information, Burns was engaged in First Amendment protected speech.

17 **B. The Right Not Serve as a Prison Informant on an Ongoing**
18 **Basis**
19

1 We also conclude that the First Amendment protects Burns’s refusal to act
2 as the guards’ snitch by providing truthful information. We begin by observing
3 the nature of the speech in question. Safety risks as well as legitimate concerns
4 about personal loyalty play a role in the decision to divulge information and
5 incriminate others. Thus the Supreme Court’s reasoning in *Wooley* and *Barnette*,
6 and the notion of autonomy and “individual freedom of mind” as guiding First
7 Amendment principles, are central to the instant matter. *Wooley*, 430 U.S. at 714
8 (quoting *Barnette*, 319 U.S. at 637).

9 Further, while the speech at issue is not overtly political—in the sense that
10 it does not involve, for example, campaigning for a candidate—neither is it
11 purely personal. The guards sought continued information regarding the general
12 illicit goings on in the prison—not information about Burns’s personal
13 relationships. And the governance of our criminal justice system, and the
14 methods that may be undertaken in the maintenance of that system, are plainly
15 matters of broad public concern. *See Johnson v. California*, 543 U.S. 499, 511 (2005)
16 (observing that “society as a whole suffers” when prison officials’ actions run
17 afoul of generally applicable constitutional principles).

1 Indeed, outrage regarding similar investigative methods of the British was
2 a major cause of the Revolution, and guided the Framers in crafting the Bill of
3 Rights. The “reviled ‘general warrants’ and ‘writs of assistance’ of the colonial
4 era ... allowed British officers to rummage through homes in an unrestrained
5 search for evidence of criminal activity.” *Riley v. California*, 134 S. Ct. 2473, 2494
6 (2014). According to the writings of John Adams, the writs also allowed officers
7 to “enter all houses, shops, etc at will, and command all to assist him.” Charles
8 Francis Adams, *The Works of John Adams, II*, 524 (1856). As Justice Gorsuch
9 recently recounted, such practices ignited the fury of the colonists largely
10 because they forced individuals to serve as “snitches and snoops” for the Crown.
11 Transcript of Oral Argument at 82, *Carpenter v. United States*, 484 U.S. 19 (2018).
12 In 1761, James Otis denounced the writs as “the worst instrument of arbitrary
13 power, the most destructive of English liberty and the fundamental principles of
14 law, that ever was found in an English law book,” in a Boston debate, and John
15 Adams subsequently described the agitation provoked by the writs, writing,
16 “then and there was the first scene of the first act of opposition to the arbitrary
17 claims of Great Britain. Then and there the child Independence was born.” *Boyd*
18 *v. United States*, 116 U.S. 616, 625 (1886) (quoting Cooley, Const. Lim. 301-03).

1 Generally, it is understood that these concerns provided the foundation for
2 the Fourth Amendment. *See United States v. U.S. Dist. Court for E. Dist. of Mich., S.*
3 *Div.*, 407 U.S. 297, 327 (1972) (“[I]t was such excesses as the use of general
4 warrants and the writs of assistance that led to the ratification of the Fourth
5 Amendment.”). And indeed, Fourth Amendment jurisprudence has long
6 recognized a right analogous to the one we recognize today: the right to walk
7 away from police questioning. When an individual, unsuspected of wrongdoing,
8 is approached by a law enforcement officer, the individual “need not answer any
9 question put to him; indeed, he may decline to listen to the questions at all and
10 may go on his way.” *United States v. Hooper*, 935 F.2d 484, 490 (2d Cir. 1991)
11 (quoting *Florida v. Royer*, 460 U.S. 491, 497-98) (1983); *see also Terry v. Ohio*, 392
12 U.S. 1, 32-33 (1968) (Harlan, J., concurring).

13 Here, by refusing to serve as a snitch, Burns sought to exercise a right akin
14 to the right, enjoyed by members of the public at large, to decline to participate in
15 police questioning. In both cases, a government officer seeks information from an
16 individual who is not under suspicion. In the case of the unconfined individual,
17 she may walk away. But in the case of the prisoner, she cannot walk away, as she
18 is physically incarcerated within the institution. Thus her only recourse is in

1 speech: she may decline to answer. Accordingly, the speech that we recognize
2 today as protected by the First Amendment fits well within a broader frame of
3 constitutional protection from the government's ability to compel participation in
4 investigative measures.

5 We also must emphasize the extreme risk that attends the act of snitching
6 in the prison context. "When evaluating compelled speech, we consider the
7 context in which the speech is made." *Evergreen Ass'n, Inc. v. City of New York*,
8 740 F.3d 233, 249 (2d Cir. 2014) (citing *Riley*, 487 U.S. at 796–97). Here, the prison
9 setting weighs heavily on our analysis. It is a sobering and deplorable fact that
10 violence occurs with regularity in far too many of our nation's correctional
11 institutions. It is also well understood that inmates known to be snitches are
12 widely reviled within the correctional system. In light of these facts, a number of
13 courts have found an Eighth Amendment violation where a guard publicly labels
14 an inmate as a snitch, because of the likelihood that the inmate will suffer great
15 violence at the hands of fellow prisoners. *See, e.g., Irving v. Dormire*, 519 F.3d 441,
16 450-51 (8th Cir. 2008); *Benefield v. McDowall*, 241 F.3d 1267, 1270-71 (10th Cir.
17 2001); *Watson v. McGinnis*, 964 F. Supp. 127, 131 (S.D.N.Y. 1997) (collecting cases).
18 If a prison snitch is found out, then the inmate's forced service as an informant

1 may well prompt life-threatening physical harm. And even if the informant is
2 never unmasked, she must shoulder the burden of the knowledge that, if her
3 status as a snitch ever does come to light, violence may well befall her.

4 For these same reasons, the degree of the intrusion on the inmate's
5 constitutional interests is severe. In *Wooley*, the Court compared the flag salute at
6 issue in *Barnette* to the license plate motto, and observed,

7 Compelling the affirmative act of a flag salute involved a more serious
8 infringement upon personal liberties than the passive act of carrying the
9 state motto on a license plate, but the difference is essentially one of
10 degree.

11
12 *Wooley*, 430 U.S. at 715. The act of providing information about general criminal
13 goings on of a prison is appreciably more active than the salute in *Barnette*: the
14 guards sought to have Burns affirmatively report information about the
15 wrongdoing of others, on potentially an ongoing basis, contrary to his wishes
16 and at great physical peril. Put another way, the act of disclosing inculpatory
17 information about other inmates requires a good deal more of the individual
18 than a salute. More than a gesture is at stake.

19 Concurrently, we think it significant that the prison setting amplifies the
20 degree of the incursion beyond the moment of reporting inculpatory

1 information. The subjects of an informant's reporting either live or work in the
2 same facility where the informant is confined. It is likely that the inmates or
3 guards implicated by the informant are within the informant's immediate
4 surroundings, rather than the remote reaches of the facility, and that this regular
5 contact provided the foundation for the informant's report. Thus the jailhouse
6 snitch is imprisoned alongside the very individuals that pose the greatest risk to
7 her safety, creating a unique burden on the liberty interests of the individual
8 inmate.

9 We also think it clear that forcing an inmate to serve as an informant on an
10 ongoing basis is not reasonably related to a legitimate penological purpose—
11 namely, safety. It is of course possible, as a general matter, that information
12 obtained compulsorily from prisoners may provide officials with some
13 advantage in maintaining order. But not all inmates will be able to obtain or
14 provide information that in fact would be useful to preserve safety within the
15 institution. And, indeed, forcing inmates to serve continuously as snitches may
16 well prompt further violence, as others may seek retribution for perceived
17 betrayals. Coercing inmates to serve as informants is, at best, an “exaggerated

1 response to prison concerns.” *Turner*, 482 U.S. at 90 (internal quotation marks
2 omitted).

3 Thus it is clear to us that the actions of the guards here were an
4 unreasonable incursion on Burns’s First Amendment rights. The requests from
5 the guards indicate that they sought general information from Burns about any
6 illicit goings-on at the facility that Burns might become aware of in the future. As
7 discussed above, such an obligation is a heavy burden for any inmate to bear.
8 And the record does not reflect any hefty countervailing considerations that
9 might have outweighed Burns’s strong constitutional interest under the
10 circumstances at hand. Rather, it appears that the prison was experiencing
11 relatively run of the mill operations, when guards attempted to conscript Burns
12 into serving as a covert ally among the inmate population. Crediting Burns’s
13 version of events, it appears that he was singled out because he made an easy
14 mark: the mild injuries he sustained from the falling can allowed the guards to
15 credibly assert that Burns was at risk within the facility, and thus gave the
16 guards the opportunity to place Burns in restricted custody for an extended
17 period in order to pressure Burns to cede to their demands. Drawing all
18 inferences in Burns’s favor, as we must, such an arbitrary incursion on Burns’s

1 First Amendment rights as alleged here cannot be countenanced under our
2 constitutional system.

3 In support of their assertion that the First Amendment does not protect the
4 speech in question, defendants direct our attention to the government's power to
5 subpoena witnesses, and contend that the First Amendment is not implicated
6 here because of the longstanding rule that "the public has a right to every man's
7 evidence." *United States v. Nixon*, 418 U.S. 683, 709 (1974) (internal ellipsis
8 omitted). But this argument is unavailing. First Amendment rights are clearly at
9 stake when a person gives evidence. *See Jackler*, 658 F.3d at 239 ("Voluntarily
10 appearing as a witness in a public proceeding or a lawsuit is a kind of speech
11 that is protected by the First Amendment.") (quoting *Kaluczky v. City of White*
12 *Plains*, 57 F.3d 202, 210 (2d Cir. 1995)). And, while the government may compel a
13 witness to divulge evidence under appropriate circumstances, the considerations
14 governing the constitutional inquiry into such a compulsion are quite distinct
15 from the instant matter.

16 First, this long-observed principle does not entitle the government to all
17 evidence under all circumstances, as defendants suggest. The Fifth Amendment,
18 for example, constrains the government's ability to force self-incrimination. And

1 a subpoenaed witness enjoys protections utterly unattainable for the inmate. A
2 subpoena can be contested, and a court may quash or limit the scope of the
3 subpoena if it is overbroad, or otherwise abusive of an individual's rights and
4 privileges. *See, e.g., In re Grand Jury Subpoena Dated Oct. 22, 2001*, 282 F.3d 156, 160
5 (2d Cir. 2002) (quashing subpoena that would have required attorney testimony
6 violating work product doctrine).

7 Burns's case itself provides a dramatic example of the difference between a
8 subpoenaed witness and a potential prison informant. Burns was put on a highly
9 restrictive status for over six months when he refused vague and repeated
10 demands for information. According to Burns, the guards simply wanted
11 someone to act as their snitch—indicating that the potential subjects and scope of
12 the guards' interest were near limitless within the facility. This is hardly akin to a
13 witness being called to recount specific facts relevant to an investigation or trial
14 proceeding.

15 Accordingly, the longstanding evidentiary principle that "the public has
16 the right to every man's evidence," *Nixon*, 418 U.S. at 709, is no bar to finding
17 First Amendment protection here.

1 It is worth noting what we are not deciding. Burns has alleged that he
2 responded truthfully to the officers' questions about what happened with the
3 can. Therefore, we need not, and do not, address whether Burns had a First
4 Amendment right to refuse to give truthful information about a past event, or in
5 an emergency. We also wish to underscore that the rights at issue here do not
6 implicate the widespread practice of conditioning pleas or other favorable
7 prosecutorial treatment on the provision of information. Under such
8 circumstances, the government confers a benefit on the potential informant, in
9 the form of relief from warranted criminal or other adverse action. By contrast,
10 we here are concerned with the distinct circumstances of an inmate punished
11 only in retaliation for refusing to provide information as it may come to the
12 inmate's attention on an ongoing basis.

13 Again, the case before us is illustrative. Construing the evidence in Burns's
14 favor, there is no indication that Burns himself was engaged in wrongful
15 conduct. Burns was given a choice between snitching or incurring an otherwise
16 underserved punishment. The distinction is of appreciable significance. It means
17 that the government may withdraw a benefit—by, for example, refusing to lessen

1 charges where the would-be informant declines to offer information—but may
2 not impose punishments at random.

3 Accordingly, for these reasons, we conclude that the refusal to provide
4 false information and to serve as a snitch on an ongoing basis are protected by
5 the First Amendment.

6 **IV. Retaliation**

7 Having concluded that Burns's speech was protected by the First
8 Amendment, we proceed to the remaining portions of the retaliation inquiry: an
9 adverse action against the plaintiff, and a causal connection between the
10 protected speech and the adverse action. *Dolan*, 794 F.3d at 294. Neither prong is
11 in serious doubt.

12 Burns was put in IPC for over six months, significantly impairing his
13 ability to move within the facility, socialize, and engage with prison
14 programming. And Burns gave detailed testimony about the threats he received
15 from defendants, to the effect that he must serve as a snitch and change the
16 explanation of how he received his injuries, or else remain in IPC. Portions of
17 Burns's testimony also are corroborated by documentary evidence and the
18 testimony of prison officials. For example, the commissary officer testified that

1 the can did in fact fall on Burns, and the IPC referral paperwork indicates that
2 defendants did not observe a cut on Burns's person.

3 We have previously held that a retaliation claim may lie where an inmate
4 suffers the adverse action of "the filing of false misbehavior reports ... [and the]
5 sentence of three weeks in keeplock—[because] that would deter a prisoner of
6 ordinary firmness from vindicating his or her constitutional rights through the
7 grievance process and the courts." *Gill v. Pidlypchak*, 389 F.3d 379, 384 (2d Cir.
8 2004). Here, Burns has provided evidence that he was subjected to a pretextual
9 IPC hearing, and placed on this restricted status for over six months. Such an
10 injury more than suffices to show an adverse action.

11 Burns has also presented sufficient evidence of causation. His IPC status
12 hearing centered entirely on the questions related to injuries Burns suffered
13 when struck by the can. Burns also testified that defendants told him on more
14 than one occasion that he was referred to the IPC and left there because he
15 declined to serve as a snitch. Such testimony raises a question of material fact for
16 the jury. *See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (finding evidence of
17 causation sufficient to defeat summary judgment based on "alleged admission of
18 the existence of a retaliatory scheme" by guard).

1 For these reasons, we conclude that Burns made a sufficient showing of
2 First Amendment retaliation.

3 V. Qualified Immunity

4 Qualified immunity protects government officials from liability for civil
5 damages unless a plaintiff demonstrates “(1) that the official violated a statutory
6 or constitutional right, and (2) that the right was clearly established at the time of
7 the challenged conduct.” *McGowan v. United States*, 825 F.3d 118, 124 (2d Cir.
8 2016) (quoting *Wood v. Moss*, 134 S.Ct. 2056, 2066-67 (2014)) (internal quotation
9 marks omitted). “Although we generally look to Supreme Court and Second
10 Circuit precedent existing at the time of the alleged violation to determine
11 whether the conduct violated a clearly established right, the absence of a decision
12 by this Court or the Supreme Court directly addressing the right at issue will not
13 preclude a finding that the law was clearly established so long as preexisting law
14 clearly foreshadows a particular ruling on the issue.” *Garcia v. Does*, 779 F.3d 84,
15 92 (2d Cir. 2015) (quoting *Okin v. Vill. of Cornwall-on-Hudson Police Dep’t*, 577
16 F.3d 415, 433 (2d Cir. 2009); *Tellier v. Fields*, 280 F.3d 69, 84 (2d Cir. 2000))
17 (internal punctuation omitted).

1 On the facts presented here, we conclude that the defendants are entitled
2 to qualified immunity.⁴ *Jackler* was not decided until late 2011, well after Burns
3 was released from IPC. And we have not previously held that the First
4 Amendment protects the right not to snitch. Nor do we believe that prior
5 decisions clearly foreshadowed our decision today. By the time of the events in
6 question, we had issued one summary order noting the possibility of a right not
7 to serve as a prison informant. *Allah v. Juchenwioz*, 176 F. App'x 187, 189 (2d Cir.
8 2006) (summary order). However, in that case, we explicitly noted that we did
9 “not address whether ... an inmate has a constitutional right not to become an
10 informant.” *Id.* Further, neither the Supreme Court nor any other circuit court
11 has yet to decide whether a prisoner holds a right not to serve as an informant.
12 Accordingly, we conclude that the defendants are entitled to qualified immunity.

⁴ We acknowledge that defendants did not raise the defense of qualified immunity in the district court. Although we do not generally consider a claim raised for the first time on appeal, we can exercise our discretion to do so where, as here, “the argument presents a question of law and there is no need for additional fact-finding.” *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004).

CONCLUSION

We hold that the First Amendment protects a prisoner's right not to serve as an informant, as well as the right to refuse to provide false information to prison officials. Nonetheless, due to the novel nature of the legal questions before us, we conclude that defendants are entitled to qualified immunity. Accordingly, we AFFIRM the judgment of the district court. Each side to bear its own costs.