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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**

8  
9 Keith P. Nance,

10 Plaintiff,

11 v.

12 Allen Miser, et al.

13 Defendants.

No. CV-12-0734-PHX-RCB (DKD)

**ORDER**

14 Plaintiff Keith P. Nance an inmate confined by the Arizona Department of  
15 Corrections (ADC), filed this *pro se* civil rights action. (Doc. 9.) Defendants—Allen  
16 Miser, Michael Linderman, Robert Patton, and James Vicklund—move for summary  
17 judgment.<sup>1</sup> (Doc. 54.) Plaintiff opposes the motion. (Doc. 59.)

18 The Court will dismiss the damage claims under the Religious Land Use and  
19 Institutionalized Persons Act (RLUIPA) and deny the motion for summary judgment.

20 **I. Background**

21 In Count I of his First Amended Complaint, Plaintiff alleges that Miser, Vicklund,  
22 Linderman, and Patton denied him a Halal diet and shaving waiver in violation of his  
23 religious exercise rights. Plaintiff also alleges the absence of a compelling governmental  
24 reason for denying him a Halal diet and that such denial substantially burdened the  
25 exercise of his religion. He further alleges that as a Muslim adherent, he has been  
26 discriminated against based on his religion in that he is not provided a Halal diet while

27 <sup>1</sup>Pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (*en banc*), the Court  
28 notified Plaintiff of his obligation to respond to the motion for summary judgment. (Doc.  
56.)

1 adherents of other faiths are provided religious diets consistent with their religions.

2 On screening under 28 U.S.C. § 1915A, the Court directed Miser, Vicklund,  
3 Linderman, and Patton to respond to the religious exercise and equal protection rights  
4 allegations and dismissed the remaining claims and Defendants. (Doc. 14.)

5 In their Motion for Summary Judgment, Defendants argue that Plaintiff cannot  
6 establish a free exercise or equal protection claim and that they are entitled to qualified  
7 immunity. (Doc. 54.) In support of their motion, Defendants submit their Statement of  
8 Facts (Doc. 55, (DSOF)), their Declarations (*id.*, Ex. C, Linderman Decl.; Ex. D, Miser  
9 Decl.; Ex. E. Patton Decl.; Ex. F, Vicklund Decl.), and other exhibits. In opposition,  
10 Plaintiff submits his Memorandum (Doc. 59), his Statement of Facts (Doc. 60 (PSOF)),  
11 Motions to Strike, with exhibits (Docs. 61-63), and 148 pages of other exhibits (Doc. 64).

## 12 **II. Legal Standards**

### 13 **A. Summary Judgment**

14 A court “shall grant summary judgment if the movant shows that there is no  
15 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
16 of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23  
17 (1986). Under summary judgment practice, the moving party bears the initial  
18 responsibility of presenting the basis for its motion and identifying those portions of the  
19 record, together with affidavits, which it believes demonstrate the absence of a genuine  
20 issue of material fact. *Id.* at 323.

21 If the moving party meets its initial responsibility, the burden then shifts to the  
22 opposing party who must demonstrate the existence of a factual dispute and that the fact  
23 in contention is material, i.e., a fact that might affect the outcome of the suit under the  
24 governing law, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and that the  
25 dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict  
26 for the non-moving party. *Id.* at 250; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio*  
27 *Corp.*, 475 U.S. 574, 586-87 (1986). The opposing party need not establish a material  
28 issue of fact conclusively in its favor; it is sufficient that “the claimed factual dispute be

1 shown to require a jury or judge to resolve the parties' differing versions of the truth at  
2 trial." *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968).

3 When considering a summary judgment motion, the court examines the pleadings,  
4 depositions, answers to interrogatories, and admissions on file, together with the  
5 affidavits or declarations, if any. *See* Fed. R. Civ. P. 56(c). At summary judgment, the  
6 judge's function is not to weigh the evidence and determine the truth but to determine  
7 whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The evidence of  
8 the non-movant is "to be believed, and all justifiable inferences are to be drawn in his  
9 favor." *Id.* at 255. But, if the evidence of the non-moving party is merely colorable or is  
10 not significantly probative, summary judgment may be granted. *Id.* at 248-49.  
11 Conclusory allegations, unsupported by factual material, are insufficient to defeat a  
12 motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). *See*  
13 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) ("[c]onclusory,  
14 speculative testimony in affidavits and moving papers is insufficient to raise genuine  
15 issues of fact and defeat summary judgment").

### 16 **B. Free Exercise of Religion**

17 "Inmates retain the protections afforded by the First Amendment, 'including its  
18 directive that no law shall prohibit the free exercise of religion.'" *Shakur v. Schriro*, 514  
19 F.3d 878, 883-84 (9th Cir. 2008) (quoting *O'Lone v. Estate of Shabazz*, 482 U.S. 342,  
20 348 (1987)). To implicate the Free Exercise Clause, a prisoner must show that the belief  
21 at issue is both "sincerely held" and "rooted in religious belief." *Malik v. Brown*, 16 F.3d  
22 330, 333 (9th Cir. 1994); *see Shakur*, 514 F.3d 884-85 (noting the Supreme Court's  
23 disapproval of the centrality test and finding that the sincerity test in *Malik* determines  
24 whether the Free Exercise Clause applies).

25 If the inmate makes his initial showing, he must establish that prison officials  
26 substantially burden the practice of his religion by preventing him from engaging in  
27 conduct which he sincerely believes is consistent with his faith. *Shakur*, 514 F.3d at 884-  
28 85.

1 A regulation that burdens the First Amendment right to free exercise may be  
2 upheld only if it is reasonably related to a legitimate penological interest. *Turner v.*  
3 *Safley*, 482 U.S. 78, 89 (1987). This determination requires analysis of four prongs:  
4 (1) there must be a valid, rational connection between the regulation and the legitimate  
5 governmental interest; (2) whether there are alternative means of exercising the right that  
6 remain open to inmates; (3) the impact accommodation of the right will have on guards  
7 and other inmates, and on the allocation of prison resources; and (4) the absence of ready  
8 alternatives. *Id.* at 90.

9 Under RLUIPA, a government may not impose a substantial burden on the  
10 religious exercise of a confined person unless the government establishes that the burden  
11 furthers a “compelling governmental interest” and does so by “the least restrictive  
12 means.” 42 U.S.C. § 2000cc-1(a)(1)-(2). This “compelling government interest” and  
13 “least restrictive means” test replaced *Turner’s* “legitimate penological interest” test.  
14 *Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005) (citing 42 U.S.C. § 2000cc-  
15 1(a)). Under its own terms, RLUIPA must be “construed broadly in favor of protecting  
16 an inmate’s right to exercise his religious beliefs.” *Id.* at 995 (citing 42 U.S.C. § 2000cc-  
17 3(g)).

18 The inmate bears the burden of establishing prima facie that RLUIPA has been  
19 violated and that his religious exercise has been substantially burdened. *Warsoldier*, 418  
20 F.3d at 994 (citing 42 U.S.C. § 2000cc-2(b)). The government then bears the burden of  
21 proving that the substantial burden on the inmate’s religious practice both furthers a  
22 compelling governmental interest and is the least restrictive means of doing so. *Id.* at 995  
23 (citing 42 U.S.C. §§ 2000cc-1(a), 2000cc-2(b)).

### 24 **C. Equal Protection**

25 The Equal Protection Clause requires that persons who are similarly situated be  
26 treated alike. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439  
27 (1985); *Shakur*, 514 F.3d at 891. An equal protection claim may be established by  
28 showing that prison officials intentionally discriminated against a plaintiff based on his

1 membership in a protected class, *Comm. Concerning Cmty. Improvement v. City of*  
2 *Modesto*, 583 F.3d 690, 702–03 (9th Cir. 2009); *Serrano v. Francis*, 345 F.3d 1071, 1082  
3 (9th Cir. 2003), *Lee v. City of L.A.*, 250 F.3d 668, 686 (9th Cir. 2001), or that similarly  
4 situated individuals were intentionally treated differently without a rational relationship  
5 to a legitimate state purpose, *Engquist v. Or. Dept. of Agric.*, 553 U.S. 591, 601–02  
6 (2008); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Lazy Y Ranch Ltd. v.*  
7 *Behrens*, 546 F.3d 580, 592 (9th Cir. 2008).

8 In addition, an inmate “‘must set forth specific facts showing that there is a  
9 genuine issue’ as to whether he was afforded a reasonable opportunity to pursue his faith  
10 as compared to prisoners of other faiths” and that “officials intentionally acted in a  
11 discriminatory manner.” *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997),  
12 *abrogated on other grounds* by *Shakur*, 514 F.3d at 884-85. Taking from *Turner*, the  
13 Court must consider whether “the difference between the defendants’ treatment of  
14 [Plaintiff] and their treatment of [other] inmates is ‘reasonably related to legitimate  
15 penological interests.’” *Shakur*, 514 F.3d at 891 (citing *DeHart v. Horn*, 227 F.3d 47, 61  
16 (3rd Cir. 2000)). A mere rational basis for disparate treatment of inmates of different  
17 religious faiths is not sufficient. *Id.*

### 18 **III. Background Facts**

19 Defendants assert that to accommodate inmates’ religious needs, ADC offers a  
20 variety of methods for inmates to practice their chosen religion, including receipt of  
21 religious diet and other religious privileges. (DSOF ¶ 14.) They further allege that for  
22 more than 20 years, ADC accommodated Muslim dietary requests by providing the  
23 option of a pork-free diet. (DSOF ¶ 17.) About 10 years ago, ADC added a vegetarian  
24 option for Muslims, which they assert also meets Islamic standards by avoiding meat not  
25 properly blessed and slaughtered. (DSOF ¶ 19.) ADC does not offer a Halal diet but  
26 provides a Kosher or vegetarian diet for qualifying Muslim inmates. (DSOF ¶ 16.) ADC  
27 is currently instituting a new vegetarian diet program that has been certified by both  
28 Jewish (Kosher) and Islamic (Halal) representatives. (DSOF ¶ 20, Linderman Decl ¶¶

1 10, 12, 13, ADC Support Services Position Paper.) The religious diet program offers a  
2 vegetarian diet that is not tied to any particular religion and is available to accommodate  
3 a variety of religious beliefs. (DSOF ¶ 22.)

4 Plaintiff alleges that he is a practicing Muslim since 1986. (Doc. 9.) Between  
5 2002 and 2008, he was in custody of ADC and was provided a Kosher or vegetarian  
6 religious diet (ADC records are unclear which) and a shaving waiver, but not a Halal diet.  
7 (DSOF ¶ 8.)

8 In September, 2010 Plaintiff was again committed to ADC custody to serve a 20  
9 year sentence. (DSOF ¶ 9.) Shortly after his return to ADC, Plaintiff requested a  
10 religious diet and shaving waiver on religious grounds. (DSOF ¶ 10.) In the course of  
11 his shaving waiver and religious diet request, Defendants assert that they disputed  
12 whether he had a religious reason for his request. Plaintiff alleges that Miser interviewed  
13 him on or about October 31, 2010, and questioned his sincerity based on Plaintiff's re-  
14 incarceration on a sex offense conviction. (Doc. 9; *see* Doc. 59 at 2, Exs. 3-7, Ex. 30.)  
15 Plaintiff asserts that his new conviction is for kidnapping and domestic violence. (PSOF  
16 ¶ 7; Doc. 63 Ex. 1.) The Director ultimately approved the shaving waiver and religious  
17 diet on May 25, 2011. (Ex. 32 (Doc. 64 at 31).) On June 16, 2011, Plaintiff was offered  
18 either a vegetarian or Kosher diet. (DSOF ¶ 12.) He accepted the shaving waiver but  
19 rejected the Kosher or vegetarian diet, stating he wanted a Halal diet. (DSOF ¶ 11.) On  
20 August 5, 2011, Plaintiff was informed by Deputy Director Patton, after consultation with  
21 Linderman, that if he did not want the Kosher diet he could request a vegetarian diet,  
22 which ADC also considers proper under Halal standards. (DSOF ¶ 12.) Plaintiff rejected  
23 both options, and is currently not on any religious or special diet.

24 Defendants assert that at no time has Plaintiff or any other member of the Muslim  
25 or legal communities indicated that Muslims are required to eat meat. (DSOF ¶ 18, Decl.  
26 Linderman ¶ 11.) Plaintiff disputes this, alleging that he did indicate that Halal meat is a  
27 religious dietary requirement. (PSOF ¶ 18, Exs. 20, 25, 44, 47, 49-51.) Plaintiff also  
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1 disputes that the Kosher diet and vegetarian diets offered meet his sincerely held beliefs  
2 because he is commanded to eat meat that meat must be Halal. (Doc. 59 at 5-6.)

#### 3 **IV. Discussion**

4 The Court will dismiss the damage claims under RLUIPA and deny the motion.

##### 5 **A. Preliminary issues**

6 Plaintiff files three motions to strike portions of the declarations of Patton,  
7 Linderman, and Miser. (Docs. 61-63, respectively.) Local Rule of Civil Procedure  
8 7.2(m)(2) prohibits such motions, requiring that objections to the admissibility of  
9 evidence must be presented in the responsive pleading and not in a separate motion to  
10 strike. The Court will deny the motions. To the extent that the Court relies on any  
11 evidence to which either party has objected, the Court overrules the objection.

12 The Court declines to consider DSOF as undisputed, as suggested by Defendants.  
13 (Doc. 68 at 7.) *Pro se* pleadings are liberally construed. *Haines v. Kerner*, 404 U.S.  
14 519, 520 (1972); *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010) (noting that the  
15 Ninth Circuit has consistently that held that courts should construe liberally motion  
16 papers and pleadings filed by *pro se* inmates and should avoid applying summary  
17 judgment rules strictly); *Bernhardt v. Los Angeles County*, 339 F.3d 920, 925 (9th Cir.  
18 2003) (“[c]ourts have a duty to construe *pro se* pleadings liberally, including *pro se*  
19 motions”).

##### 20 **B. Free Exercise**

###### 21 **1. Sincerely held belief**

22 Under both the RLUIPA and First Amendment analysis, Plaintiff must initially  
23 show that the religious practice at issue—consuming a Halal diet that includes Halal  
24 meat—satisfies two criteria: (1) the proffered belief must be sincerely held and (2) the  
25 claim must be rooted in religious belief and not purely secular philosophical concerns.  
26 *Malik*, 16 F.3d at 333. The right to religious practice “is not limited to beliefs which are  
27 shared by all of the members of a religious sect.” *Thomas v. Review Bd. of Ind.*  
28 *Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981). Plaintiff is therefore not required to

1 show that consuming a Halal diet that includes meat is mandated as a part of the Islamic  
2 religion; rather, he is required to show that he sincerely believes that eating such a diet is  
3 consistent with his faith. *Shakur*, 514 F.3d at 884-85. Finally, the United States Supreme  
4 Court has stated that the question of sincerity “is, of course, a question of fact.” *United*  
5 *States v. Seeger*, 380 U.S. 163, 185 (1965) (addressing sincerity of religious beliefs of  
6 individual “is, of course, a question of fact.”)

7 The record shows that Plaintiff requested a Halal diet. (*See e.g.*, DSOF, Ex. B,  
8 Inmate Grievance, date 12/10/10, Assoc. Deputy Warden Resp., dated Feb. 14, 2011). It  
9 does not show that he specifically requested a diet with meat, but it appears that until the  
10 Director upheld Plaintiff’s grievance on May 25, 2011 (Doc. 64, Ex. 32 (Doc. 64 at 12)),  
11 the issue was not so much the specific content of the diet as the sincerity of Plaintiff’s  
12 beliefs and his entitlement to any religious diet at all. After the Director upheld  
13 Plaintiff’s grievance, Miser offered Plaintiff a kosher diet on June 16, 2011, which  
14 Plaintiff rejected. (DSOF ¶¶ 10, 12, Ex. B, Grievance (Doc. 55-1 at 33).) Plaintiff was  
15 offered a vegetarian diet on August 5, which he also rejected. (DSOF ¶ 12.) The record  
16 also shows that Plaintiff apparently filed inmate letters thereafter claiming that the diet  
17 issue was not resolved; inmate letter responses in July and August state that Plaintiff did  
18 not specify the religious diet he wanted; that if he did not want the Kosher diet, he could  
19 have vegetarian diet that complied with Halal requirements; and that the decision of the  
20 Director was final. (DSOF, Ex. B (Doc. 55-1 at 33, 34.)

21 In his response to the motion, Plaintiff asserts that he defiles himself eating non-  
22 halal meats, which interfere with his spirituality and prayer life, and that he believes that  
23 the practice of eating Halal meats is a part of worship to Allah as established in the  
24 Qur’an. (Doc. 59 at 5.) He asserts that the standard and Kosher diets are haram (not  
25 permitted) and the vegetarian and vegan diets require that he forgo Halal slaughtered  
26 meat, which he believes he is commanded to eat. (*Id.* at 5-6.) Defendants argue that  
27 Plaintiff does not challenge the acceptability of ADC’s vegetarian or vegan diets as  
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1 compliant with Halal requirements and provides no citation requiring him to consume  
2 meat. (Doc. 68 at 1.)

3 But the law provides that Plaintiff need do no more than represent that he believes  
4 that he must consume a Halal diet with meat to conform with his religious beliefs. As  
5 stated, it is improper for the Court to second-guess a particular individual's interpretation  
6 of his religious creeds. *Shakur*, 514 F.3d at 884. Further, Defendants' insistence that  
7 Plaintiff provide a "citation" or documentation to support his request or assertion that he  
8 must eat meat is much like requiring an inmate to establish that a requested  
9 accommodation is a mandated tenant of his faith. See *White v. Linderman*, CV 11-8152-  
10 PCT-RCB (SPL) (Doc. 68). That is not, and has not been, the law in this Circuit since  
11 the *Shakur* Court clearly explained that the Supreme Court disapproved the centrality  
12 test, finding it inappropriate for courts to "question the centrality of particular beliefs or  
13 practices to a faith, or the validity of particular litigants' interpretations of those creeds."  
14 *Shakur*, 514 F.3d at 884-885. Defendants assert that they have specifically inquired into  
15 the question of whether Halal meat is required and found that the answer is no. (Doc. 54  
16 at 6.) Not only do the cited SOF and Declaration not support the assertion (see DSOF  
17 ¶ 16, Linderman Decl. ¶¶ 8-9), the argument misses the point. The same is true  
18 regarding Plaintiff's refusal to accept a Kosher or vegetarian diet accepted by other  
19 inmates—that other inmates have accepted these diets does not establish that either diet  
20 conforms to Plaintiff's sincerely held religious beliefs. Finally, if it is Plaintiff's belief  
21 that he must consume Halal meat, a vegetarian diet plainly does not satisfy his religious  
22 diet requirements.

23 The Court is aware of two other cases where an inmate asserted a sincerely held  
24 belief that he must consume meat; in neither case did the court find that the belief was not  
25 sincerely held as a matter of law. In *Sefeldeen v. Alameida*, the Court of Appeals  
26 affirmed the district court's finding that the inmate did not properly exhaust the issue  
27 because he did not argue at the administrative level that vegetarianism violated his  
28 beliefs; complaints to prison officials at the administrative level focused on the perceived

1 nutritional inadequacy of the vegetarian diet, not that eating vegetarian meals violated his  
2 religious beliefs. 238 Fed. App'x. 204, 206, 2007 WL 1585599, at \*2 (9th Cir. 2007). In  
3 *Via v. Wilhelm*, the inmate asserted that his religious beliefs required him to eat Halal  
4 meat daily. 2011 WL 5419709, at \*5 (W.D. Va. Nov. 9, 2011). In *Via*, the district court  
5 noted that RLUIPA makes it clear that a particular religious practice need not be  
6 mandated by a religion for the court to find a substantial burden on the inmate's religious  
7 practice; the court assumed, without deciding, that there was a substantial burden, and  
8 proceeded with the RLUIPA and First Amendment analyses. (*Id.* at \*6-\*7.)

9 The Court finds that material questions of fact preclude summary judgment as to  
10 whether Plaintiff's beliefs are sincerely held, and Defendants are not entitled to judgment  
11 as a matter of law on this issue.

## 12 **2. Substantial burden**

13 Next, Plaintiff must demonstrate that Defendants substantially burden the practice  
14 of his religion by preventing him from eating a Halal diet with meat. *Shakur*, 514 F.3d at  
15 884-85. A substantial burden exists where the state "put[s] substantial pressure on an  
16 adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 717-18.  
17 Even where the compulsion to modify behavior may be indirect, "the infringement upon  
18 free exercise is nonetheless substantial." *Id.* at 718.

19 If Plaintiff establishes that his need for a Halal diet with meat is a sincerely held  
20 religious belief, denial of the diet is a substantial burden to his religious practice. *See*  
21 *Greene v. Solano County Jail*, 513 F.3d 982, 987 (9th Cir. 2008) ("We have little  
22 difficulty in concluding that an outright ban on a particular religious exercise is a  
23 substantial burden on that religious exercise."); *see Via*, 2011 WL 5419709, at \*5  
24 (assuming without deciding there was a substantial burden where the inmate alleged he  
25 must eat Halal meat daily but he was provided a soy-protein substitute).

26 Defendants argue that Plaintiff fails to understand that ADC has never offered a  
27 Halal diet and that Muslims have not only historically accepted but specifically asked for  
28 kosher and vegetarian diets to satisfy Halal requirements. (Doc. 54 at 4-5.) Inmate

1 Shakur, for example, requested a kosher diet which he claimed was permitted under the  
2 Qur'an. 514 F.3d at 882. Defendants further assert that Plaintiff has no explanation why  
3 he cannot eat the vegetarian diet. They argue that if the vegetarian or vegan options  
4 available are acceptable and comply with Halal restrictions by avoiding meat altogether,  
5 then there has been no substantial burden to his religion. But this argument ignores that  
6 Plaintiff asserts that he considers eating Halal meat something that he is required to do.

7 Defendants are correct that Plaintiff does not explain why the vegetarian diet is not  
8 acceptable. On the other hand, Defendants themselves assert that it is not "tethered" to  
9 any particular religion. Linderman attests that the vegetarian diet has been certified by  
10 both Jewish and Islamic representatives. (DSOF, Linderman Decl. ¶ 12.) But he  
11 provides no evidence to support a conclusion that relies on hearsay from unidentified  
12 persons; his declaration is not sufficient to establish that the vegetarian diet offered is  
13 either Kosher or Halal. In *Shakur*, the Court of Appeals criticized the district court's  
14 reliance on an affidavit that stated that the affiant's testimony was based not only "on  
15 [his] personal knowledge" but also on "consultation with [ADOC] staff, and research on  
16 the issues." 514 F.3d at 889-90. The Court noted that "[c]onclusory affidavits that do not  
17 affirmatively show personal knowledge of specific facts are insufficient." *Id.*, additional  
18 citation omitted. At least one court has noted that not all vegetarian diets would  
19 necessarily comply with religious dietary restrictions. "It is certainly logical, however,  
20 that a Vegetarian Diet would (1) not consist of exclusively Kosher food; or (2) contain  
21 enough foods without yeast/leavening to satisfy Plaintiff's nutritional needs during the  
22 Feast." *Porter v. Wegman*, 2013 WL 3863925 (E.D. Cal. July 24, 2013).

23 The Court finds that on this record because Plaintiff asserts that consuming Halal  
24 meat is a sincerely held religious belief, whether or not the vegetarian diet complies with  
25 Halal restrictions, there is a triable issue of fact as to substantial burden. The Court must  
26 therefore evaluate the merits of Plaintiff's claim under both RLUIPA and the First  
27 Amendment.

1                                   **3.     RLUIPA Analysis**

2           Defendants do not raise this issue, but this Court has consistently held that  
3 damages are not available against Defendants sued in their individual capacity under  
4 RLUIPA. *See e.g., White v. Linderman*, CV 11-8152-PCT-RCB (SPL) (Doc. 68); *Harris*  
5 *v. Schriro*, 652 F. Supp. 2d 1024, 1030 (D. Ariz. 2009); *Abdullah v. Schriro*, CV 08-  
6 0255-TUC-CKJ. Although the Ninth Circuit has not ruled on whether RLUIPA allows  
7 for money damage claims against state actors in their individual capacity, it has observed  
8 that four other circuit courts have held that RLUIPA does not provide for such claims  
9 against prison officials. *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916,  
10 922 n. 3 (9th Cir. 2011), citing *Rendelman v. Rouse*, 569 F.3d 182, 188-89 (4th Cir.  
11 2009); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 2010); 328-29 (5th Cir.  
12 2009); *Nelson v. Miller*, 570 F. 3d 868, 889 (7th Cir. 2009); and *Smith v. Allen*, 502 F.3d  
13 1255, 1272 (11th Cir. 2007)). Other district courts within this Circuit have found that  
14 RLUIPA does not provide for individual-capacity damage claims. *See, e.g., Florer v.*  
15 *Bales- Johnson*, 752 F. Supp. 2d 1185, 1205-1206 (W.D. Wash. 2010); *Parks v. Brooks*,  
16 2010 WL 5186071, at \*1-2 (D. Nev. 2010); *Sokolsky v. Voss*, 2010 WL 2991522, at \*2-4  
17 (E.D. Cal Damages are also not available on official-capacity claims.) Damages are also  
18 not available for official-capacity claims. *Sossamon v. Texas*, --- U.S. ---, 131 S. Ct.  
19 1651, 1663 (2011). Because damages under RLUIPA are not available as a matter of  
20 law, claims for damages under RLUIPA are dismissed. *See* 28 U.S.C. § 1915(e)(2)(B)(ii)  
21 (where a plaintiff has been granted *in forma pauperis* status, regardless of any filing fee,  
22 or any portion thereof, that may have been paid, the court shall dismiss the case at any  
23 time if the court determines that the action fails to state a claim on which relief may be  
24 granted). Plaintiff was granted *in forma pauperis* status. (Doc. 6.)

25           Although damages are not available in a RLUIPA claim, injunctive relief may be.

26           As noted, to analyze the merits of a RLUIPA claim, the Court determines whether  
27 Defendants’ actions further a “compelling governmental interests” and do so by the least  
28 restrictive means.” Defendants bear the burden on this, but here, they provide no

1 explanation other than that they have never offered a Halal diet, including one with meat.  
2 In addition to their argument that the Kosher and vegetarian diets are Halal, they also  
3 represent that although they offer a Kosher diet or vegetarian diet, the Director approved  
4 a Position Paper on June 14, 2013, instituting a new vegetarian diet program that has  
5 been certified by Jewish and Islamic representatives. (DSOF ¶ 20, Ex. G.) This program  
6 would eliminate the Kosher meat entrees and replace them with a vegetarian alternative.  
7 The Position Paper notes that this will result in substantial savings and eliminate Muslim  
8 inmate complaints about disparate treatment by providing Kosher for Jews but not Halal  
9 for Muslims. (*Id.*, Ex. G.)

10 The Court finds that even if cost savings are sufficient to constitute a compelling  
11 interest, here, there is no evidence regarding costs. *See Shakur*, 514 F.3d at 889-90; *see*  
12 *also Curry v. Cal. Dep't. of Corrs.*, 2013 WL 75769, at \*9 (N.D. Cal. Jan. 4, 2013)  
13 (questioning whether negligible cost increase would constitute compelling interest but  
14 finding that a \$50,000 to \$60,000 increased expense for special diet is a compelling  
15 interest and collecting cases). Moreover, the Court must also find that Defendants'  
16 policy uses the least restrictive means to achieve its compelling interest. *See Warsoldier*,  
17 418 F.3d at 998. The Ninth Circuit explained that, “[I]n light of RLUIPA, no longer can  
18 prison officials justify restrictions on religious exercise by simply citing to the need to  
19 maintain order and security in a prison. RLUIPA requires more.” *Greene*, 513 F.3d at  
20 989-90. Prison officials must show that they “actually considered and rejected the  
21 efficacy of less restrictive measures before adopting the challenged practice.” *Id.* at 990  
22 (quoting *Warsoldier*, 418 F.3d at 999). In *Warsoldier*, the court specifically rejected the  
23 idea that courts must “completely defer to [prison officials’] judgment.” 418 F. 3d at  
24 1001.

25 Prison officials in *Curry* presented extensive evidence of the cost of providing a  
26 Kemetite religious diet and the time taken from security personnel to procure the foods,  
27 and, therefore, met their burden to show that the existing diet plan was the least  
28 restrictive means to further compelling government interests of cost containment and

1 security. 2013 WL 75769, at \*9-10. Defendants here do not make the required showing  
2 of a compelling interest or that they considered and rejected alternative measures.

3 There are genuine issues of material fact on the RLUIPA claim for injunctive  
4 relief.

5 **D. First Amendment**

6 **1. Constitutional claim**

7 For Plaintiff's First Amendment claim, the Court must determine whether the  
8 burden on Plaintiff's religious exercise is reasonably related to a legitimate penological  
9 interest. *Turner*, 482 U.S. at 89. Although Defendants make no specific arguments  
10 regarding *Turner*, the Position Paper suggests a legitimate interest in running a simplified  
11 food service and that by limiting the number of dietary options, they save money and  
12 eliminate complaints of discrimination. (Doc. 55, Ex. G.) Limiting special religious  
13 dietary options and thereby saving money serves a legitimate penological interest. *Ward*  
14 *v. Walsh*, 1 F.3d 873, 879 (9th Cir. 1993). But, as noted, there is no admissible evidence  
15 of this claim. Moreover, the Court has already determined that there exists a material  
16 factual dispute whether Plaintiff has shown a sincerely held belief rooted in his religious  
17 faith that he must eat Halal meat.

18 The second *Turner* factor is whether Plaintiff has other means of religious  
19 expression. *Id.* at 877. Defendants offer no evidence on this point, although it is clear  
20 that Plaintiff now has a shaving waiver. Also relevant to this second *Turner* factor is "the  
21 distinction between a religious practice which is a positive expression of belief and a  
22 religious commandment which the believer may not violate at peril of his soul." *Ward*, 1  
23 F.3d at 878 (considering an Orthodox Jewish inmate's claim that he was denied a Kosher  
24 diet). Plaintiff's claim implies that eating non-Halal meat requires him to violate his  
25 beliefs but that eating Halal meat is a positive expression of his belief; on the other hand,  
26 he alleges that eating Halal meat is commanded. *Compare Henderson v. Terhune*, 379  
27 F.3d 709, 714 (9th Cir. 2004) (second *Turner* factor supports the plaintiff because, "[l]ike  
28 asking an Orthodox Jew to eat non-Kosher food, cutting [the plaintiff's] hair involves a

1 strict religious prohibition about the sanctity and purity of the body, and the concern we  
2 identified in *Ward* is heightened”). Here, on this record, it is difficult to weigh this  
3 factor.

4 As to the third factor—the impact of accommodating Plaintiff’s request, because  
5 there is no evidence of cost, Defendants offer no admissible or specific evidence.

6 Plaintiff has not offered any “ready alternatives”—the fourth factor—to  
7 accommodating Plaintiff’s First Amendment rights at a *de minimis* cost to prison  
8 resources. (Doc. 48 at 25-26). But the prison already serves a Kosher diet with meat to  
9 prisoners, and Defendants offer no evidence that providing Halal meals with meat would  
10 greatly tax prison resources.

11 There is insufficient evidence to rule as a matter of law that Defendants’ religious  
12 diet policy is reasonably related to legitimate penological interests.

## 13 **2. Qualified immunity**

14 The Court finds that Defendants are not entitled to qualified immunity on the First  
15 Amendment damage claim for not providing a Halal diet with meat.

16 A defendant in a § 1983 action is entitled to qualified immunity from damages for  
17 civil liability if his or her conduct does not violate clearly established statutory or  
18 constitutional rights of which a reasonable person would have known. *Harlow v.*  
19 *Fitzgerald*, 457 U.S. 800, 818 (1982). The “qualified immunity inquiry” asks if the right  
20 was clearly established at the relevant time. *Saucier v. Katz*, 533 U.S. 194, 201-02  
21 (2001). This inquiry “must be undertaken in light of the specific context of the case, not  
22 as a broad general proposition.” *Id.* at 201. “The relevant, dispositive inquiry . . . is  
23 whether it would be clear to a reasonable officer that his conduct was unlawful *in the*  
24 *situation he confronted.*” *Id.* at 202 (emphasis added).

25 The Supreme Court established decades ago that “religious beliefs need not be  
26 acceptable, logical, consistent, or comprehensible to others in order to merit First  
27 Amendment protection.” *Thomas*, 450 U.S. at 713-14. Further, for some time, but at the  
28 least since the 2008 *Shakur* decision, it has been clearly established that the First

1 Amendment protects a prisoner's sincere religious beliefs, not just central tenets of his  
2 faith. 514 F.3d 884-85 (citing cases). It is also clearly established that prisoners have a  
3 right to meals that meet the dietary laws of their religion. *Ward*, 1 F.3d at 877. And the  
4 applicability of the *Turner* test to religious-diet polices challenged under the First  
5 Amendment was well-established at least since *Shakur*. 514 F.3d 885-87.

6 Defendants' argument on qualified immunity is that there is no requirement that  
7 prisons provide Halal meat and that historically Muslims have accepted Kosher and  
8 vegetarian diets. (Doc. 54 at 9-10.)

9 Defendants do not dispute Plaintiff's claims regarding the initial refusal in October  
10 2010 to provide him a religious diet based on his re-incarceration. A Grievance response  
11 states that Miser did not know exactly what the sincerity issue was but that he believed  
12 that because Plaintiff was released and came back on a new charge, he was not consistent  
13 in practicing his faith. (DSOF, Ex. B, Grievance Resp. (Doc. 55-1 at 27).) As noted, the  
14 Director granted plaintiff's request for a religious diet in May 2011. Defendants make no  
15 argument regarding qualified immunity for the period from October 2010 through May  
16 2011.

17 Although prison officials may inquire as to an inmate's sincerity of religious  
18 belief, *Cutter v. Wilkinson*, 544 U.S. 709, 725, n.13 (2000), the Court is unaware of any  
19 authority even suggesting that re-incarceration is, by itself, evidence of insincerity.  
20 Given that many inmates are incarcerated again after release, this appears to be an  
21 especially dubious ground to deny a religious practice or accommodation. Even non-  
22 observance of a particular religious practice—e.g. consuming food inconsistent with a  
23 religious diet—although evidence of insincerity of belief as to the need for the diet, is not  
24 dispositive. *See Curry*, 2013 WL 75769, at \*7 (additional citations omitted). The Court  
25 cannot find that a reasonable prison official would have thought his conduct to be lawful  
26 when the diet was denied based on Plaintiff's re-incarceration.

27 As to the denial of the Halal diet with meat, Defendants' argument appears to  
28 assume that there was no substantial burden to Plaintiff's sincerely held beliefs because



1 other Muslim inmates did not require a diet with meat or because Defendants' inquiries  
2 demonstrate that consuming meat is not an Islamic requirement. But that is the wrong  
3 focus. Moreover, because the record does not show that Defendants considered any of  
4 the *Turner* factors, the Court cannot find that a reasonable officer would believe that his  
5 conduct was lawful in the situation he confronted.

6 **E. Equal protection**

7 Defendants argue that to prevail on an equal protection claim it is not enough that  
8 Jewish inmates were able to obtain diets consistent with their faith. (Doc. 54 at 8.) They  
9 argue that Plaintiff received a good faith accommodation of his rights by providing him  
10 access to a Kosher or vegetarian diet. (*Id.* at 10.) They rely on *Curry*, 2013 WL 75769,  
11 at \*16-17. (Doc. 54 at 8.)

12 As noted, to show a violation under the Equal Protection Clause, a plaintiff must  
13 demonstrate that the defendant acted with a discriminatory intent or purpose that was  
14 based upon the plaintiff's membership in a protected class, *Serrano*, 345 F.3d at 1082,  
15 and he "must set forth specific facts showing that there is a genuine issue' as to whether  
16 he was afforded a reasonable opportunity to pursue his faith as compared to prisoners of  
17 other faiths" and that "officials intentionally acted in a discriminatory manner."  
18 *Freeman*, 125 F.3d at 737.

19 Here, it is undisputed that Defendants offered a Kosher diet with meat to Jewish  
20 inmates but did not offer a Halal diet with meat to Muslim inmates. Defendants state that  
21 Muslim inmates accepted the Kosher diet or a vegetarian diet, but because the record  
22 shows that nothing else was available, without more, the Court cannot find that "the  
23 difference between the defendants' treatment of [Plaintiff] and their treatment of [other]  
24 inmates is 'reasonably related to legitimate penological interests.'" *Shakur*, 514 F.3d at  
25 891. As Defendants note, in *Curry*, the district court found no equal protection violation.  
26 But that court had already determined under the *Turner* test for the inmate's First  
27 Amendment claim and the evidence presented that there was a legitimate penological  
28

1 justification for the religious-diet policy. *Curry*, 2013 WL 75769, at \*16-17. Here, the  
2 Court has already ruled that it cannot make a determination on the *Turner* test.

3 In addition, Defendants are not entitled to qualified immunity on this claim. The  
4 record is too incomplete to find that they reasonably believed they had a legitimate  
5 penological justification for providing a Kosher diet with meat but not a Halal diet with  
6 meat.

7 Finally, it is unclear from the record if or when ADC will adopt vegetarian-only  
8 Kosher and Halal meals. If both Jews and Muslims are provided only vegetarian  
9 religious meals, there will be no equal protection violation. Courts have upheld religious  
10 diet policies that provide for only vegetarian diets, including vegetarian Halal and Kosher  
11 diets. *See Jackson v. Hill*, 128 Fed. App'x. 595, 2005 WL 823876, at \*1 (9th Cir. 2011)  
12 In *Jackson*, a Muslim inmate alleged an equal protection violation, arguing that prison  
13 officials provided meat to Jewish inmates receiving a Kosher diet but provided only a  
14 vegetarian Halal diet. The Ninth Circuit found no equal protection violation because the  
15 defendants provided undisputed evidence that the Kosher diet contained no meat. *Id.*

16 **G. Shaving waiver**

17 Defendants do not address and, therefore, do not dispute Plaintiff's claims  
18 regarding the initial refusal to provide him a shaving waiver based on his re-  
19 incarceration. Although he was eventually provided a shaving waiver, he was without  
20 one from the end of October 2010 until the Director upheld his grievance on May 25,  
21 2011. Having approved the shaving waiver, Defendants cannot now argue that he was  
22 not entitled to it. Plaintiff's damage claim for the nearly 7-month delay in approving the  
23 shaving waiver remains.

24 **IT IS ORDERED:**

25 (1) The reference to the Magistrate Judge is withdrawn as to Defendants'  
26 Motion for Summary Judgment (Doc. 54) and Plaintiff's Motions to Strike (Docs. 61-  
27 63.).

28 (2) Defendants' Motion for Summary Judgment (Doc. 54) is **denied**.

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- (3) Plaintiff's Motions to Strike (Docs. 61-63) are **denied**.
- (4) Damage claims under RLUIPA are **dismissed**.
- (5) The remaining claims are:
  - (a) the claims for injunctive relief under the First Amendment and RLUIPA regarding the Halal diet with meat;
  - (b) the claim for damages under the First Amendment;
  - (c) the equal protection claim for injunctive relief and damages for the Halal diet with meat; and
  - (d) the First Amendment damage claim for denial of the shaving waiver for 7 months.

DATED this 7th day of October, 2013.

  
\_\_\_\_\_  
Robert C. Broomfield  
Senior United States District Judge