

1 WO

SVK

2  
3  
4  
5 **IN THE UNITED STATES DISTRICT COURT**  
6 **FOR THE DISTRICT OF ARIZONA**7  
8 Keith P. Nance,

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

9 Plaintiff,

**ORDER**

10 v.

11 Allen Miser, et al.

12 Defendants.

13 Defendants move for reconsideration of this Court's Order entered on October 7,  
14 2013. (Doc. 71.) The Court denies the motion.15 Plaintiff Keith P. Nance, an inmate confined by the Arizona Department of  
16 Corrections (ADC), filed this *pro se* civil rights action alleging denial of a Halal diet with  
17 meat and denial of a shaving waiver, in violation of his religious exercise rights. (Doc.  
18 9.) Plaintiff also asserted an Equal Protection claim. Defendants moved for summary  
19 judgment. (Doc. 54.) The Court dismissed the damage claims under the Religious Land  
20 Use and Institutionalized Persons Act (RLUIPA) and denied the motion for summary  
21 judgment. (Doc. 69.)22 Defendants now seek reconsideration, alleging that the Court committed clear  
23 error because (1) it shifted the burden to Defendants without requiring Plaintiff to meet  
24 his initial burden to submit evidence regarding a substantial burden to his religious belief,  
25 and (2) it denied Defendants qualified immunity. (Doc. 71.) The Court will deny the  
26 Motion because the Court did not commit clear error, and Defendants' motion is nothing  
27 more than disagreement with the Court's decision.

28 In addition Plaintiff moves for appointment of counsel; the Court will deny the

1 motion. (Doc. 70.)

## 2 **II. Defendants' Motion for Reconsideration**

### 3 **A. Legal Standard**

4 Motions for reconsideration should be granted only in rare circumstances.  
5 *Defenders of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). Mere  
6 disagreement with a previous order is an insufficient basis for reconsideration. *See Leong*  
7 *v. Hilton Hotels Corp.*, 689 F. Supp. 1572, 1573 (D. Haw. 1988). Rather, reconsideration  
8 is appropriate only “in the face of the existence of new evidence, an intervening change  
9 in the law, or as necessary to prevent manifest injustice.” *Navajo Nation v. Confederated*  
10 *Tribes of Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003). A motion for  
11 reconsideration “may not be used to raise arguments or present evidence for the first time  
12 when they could reasonably have been raised earlier in the litigation.” *Kona Enters., Inc.*  
13 *v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). Nor may a motion for  
14 reconsideration repeat any argument previously made in support of or in opposition to a  
15 motion. *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 586 (D.  
16 Ariz. 2003).

### 17 **B. Discussion**

#### 18 **1. Sincerely Held Belief and Substantial Burden**

19 In its Order, the Court stated that under both the RLUIPA and First Amendment  
20 analysis, Plaintiff must initially show that the religious practice at issue—consuming a  
21 Halal diet that includes Halal meat—satisfies two criteria: (1) the proffered belief must be  
22 sincerely held, and (2) the claim must be rooted in religious belief and not purely secular  
23 philosophical concerns. (Doc. 69 at 7, citing *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir.  
24 1994).) If the inmate makes his initial showing, he must establish that prison officials  
25 substantially burden the practice of his religion by preventing him from engaging in  
26 conduct which he sincerely believes is consistent with his faith. (Doc. 69 at 10, citing  
27 *Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008).)

28 It is undisputed that Defendants do not offer a Halal diet with meat; rather they

1 offer a Kosher diet and a vegetarian diet. Plaintiff asserted that he defiles himself eating  
2 non-halal meats, which interfere with his spirituality and prayer life, and that he believes  
3 that the practice of eating Halal meats is a part of worship to Allah as established in the  
4 Qur'an. (Doc. 59 at 5.) He asserted that the standard and Kosher diets are haram (not  
5 permitted) and the vegetarian and vegan diets require that he forgo Halal slaughtered  
6 meat, which he believes he is commanded to eat. (*Id.* at 5-6.)

7 Defendants claim that under the Court's Order, all an inmate needs to do is profess  
8 what his sincere religious belief requires and that the failure of prison officials to provide  
9 the item he wants pressures him to abandon his beliefs. (Doc. 71 at 3-4.) They object to  
10 the lack of a requirement for documentation supporting his entitlement or that no  
11 organized or recognized religious support or affiliation is required. (*Id.* at 4.) But as this  
12 Court stated in the Order, the right to religious practice "is not limited to beliefs which  
13 are shared by all of the members of a religious sect." *Thomas v. Review Bd. of Ind.*  
14 *Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981). Plaintiff is therefore not required to  
15 show that consuming a Halal diet that includes meat is mandated as a part of the Islamic  
16 religion; rather, he is required to show that he sincerely believes that eating such a diet is  
17 consistent with his faith. *Shakur*, 514 F.3d at 884-85; *see Parks v. Brooks*, 302 Fed.  
18 Appx., 611, 612 (9th Cir. 2008) (unpublished) (reversing a grant of summary judgment  
19 on a RLUIPA claim because the Ninth Circuit concluded that the sincerity of the  
20 plaintiff's alleged religious belief in the need for a Kosher diet could not be determined  
21 without a trial).

22 Defendants offered little or no evidence that Plaintiff's belief was not a sincerely  
23 held religious belief, and they cite no cases requiring documentation of such beliefs. In  
24 *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de*  
25 *Puerto Rico*, the First Circuit Court of Appeals found that the sincerity of a Seventh-Day  
26 Adventist's beliefs were suspect because he lied on an employment application, was  
27 divorced, worked five days a week instead of six, and took an oath before a notary  
28 public—actions inconsistent with his professed religious beliefs. 279 F.3d 49, 56-57 (1st

1 Cir. 2002). But the court held only that the defendant had raised a triable issue of fact.  
2 *Id.* at 57. The court also noted that the finding of sincerity generally depends on the  
3 factfinder’s assessment of the plaintiff’s credibility and that “[c]redibility issues such as  
4 the sincerity of [a plaintiff’s] religious belief are quintessential fact questions. As such,  
5 they ordinarily should be reserved ‘for the factfinder at trial, not for the court at summary  
6 judgment.’” *Id.* at 56 (internal citations omitted). Likewise, in *Patrick v. LeFevre*, the  
7 Second Circuit reasoned that “[s]crutiny of a prisoner’s sincerity is often essential in  
8 ‘differentiating between beliefs that are held as a matter of conscience and those that are  
9 animated by motives of deceptions and fraud.’” 745 F.2d 153, 157 (2d Cir. 1984). The  
10 court emphasized that courts are “singularly ill-equipped to sit in judgment on the verity  
11 of an adherent’s religious beliefs” and held that summary judgment was inappropriate  
12 because the subjective issue of sincerity of belief was a question of fact; “assessing a  
13 claimant’s sincerity of belief demands a full exposition of facts and the opportunity for  
14 the factfinder to observe the claimant’s demeanor during direct and cross-examination.”  
15 *Id.* at 157. *Patrick* was cited with approval by the Ninth Circuit in *Spence v. World*  
16 *Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011).

17 As to a requirement of support for a belief by an organized or recognized religious  
18 group, this appears to the Court to be requiring evidence of objective accuracy, not  
19 sincerity of belief. In *Jackson v. Mann*, the Second Circuit rejected a district court’s  
20 reliance on a rabbi’s determination that an inmate was not Jewish for purposes of a  
21 prison’s Kosher diet; the Second Circuit reasoned that whether an inmate’s beliefs are  
22 entitled to First Amendment protection turns on whether those beliefs are sincerely held,  
23 not on an ecclesiastical question whether the inmate is a Jew under Jewish law. 196 F.3d  
24 316, 320-21 (2d Cir.1999). The *Jackson* court reasoned that the prison “erroneously  
25 substituted the objective ‘accuracy’ of [the inmate’s] assertion that he is Jewish for the  
26 correct test—whether [the inmate’s] beliefs are ‘sincerely held.’” 196 F.3d at 320; *see*  
27 *also Ford v. McGinnis*, 352 F.3d 582, 593-94 (2d Cir. 2003) (the role a religious feast  
28 played in a prisoner’s practice of Islam determined whether there had been a substantial

1 burden to his religious practice, not the testimony of Muslim clerics as to the proper  
2 celebration of the feast); *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008).

3 This Court correctly found a triable issue of fact regarding a sincerely held  
4 religious belief. (Doc. 69 at 8-10.)

5 Regarding substantial burden, the Court stated that if Plaintiff establishes that a  
6 Halal diet with meat is a sincerely held belief, denial of the diet is a substantial burden.  
7 (Doc. 69 at 10, citing *Greene v. Solano County Jail*, 513 F.3d 982, 987 (9th Cir. 2008)  
8 (“We have little difficulty in concluding that an outright ban on a particular religious  
9 exercise is a substantial burden on that religious exercise.”).) The Court also noted that  
10 Defendants’ evidence was inadequate to establish that the vegetarian diet offered is either  
11 Kosher or Halal. (Doc. 69 at 11.)

12 The Court finds this case distinguishable from *Hartmann v. Calif. Dep’t. of Corrs.*  
13 *and Rehab.*, 707 F.3d 1114 (9th Cir. 2013), on which Defendants now rely. In  
14 *Hartmann*, the plaintiffs challenged prison officials’ failure to hire a Wiccan chaplain.  
15 The Ninth Circuit Court of Appeals found no substantial burden to religious practice  
16 because the plaintiffs failed “to plead any factual allegations showing their religious  
17 exercise was so burdened as to pressure them to abandon their beliefs.” *Id.* at 1125. The  
18 court reasoned that instead of claiming they had been pressured to abandon their religious  
19 beliefs, plaintiffs were “seeking additional religious accommodations beyond those  
20 already provided by the prison to facilitate the religious exercise of their Wiccan faith.”  
21 *Id.* In the present case, Plaintiff alleges that he must eat Halal meat and that the practice  
22 is part of worship to Allah as established in the Qur’an. Defendants refuse to provide a  
23 diet with Halal meat; therefore, Plaintiff is pressured to abandon his religious belief  
24 regarding his need to eat Halal meat.

25 The Court did not improperly shift the burden, and defense counsel’s hyperbole  
26 and remarks about “shrimp cocktail Tuesday” and “Eggs Benedict” Sunday are not a  
27 substitute for analysis based on case law or a substitute for evidence. (Doc. 71 at 4, 5.)

28

1                                   **2.     Qualified Immunity**

2           The Court denied Defendants qualified immunity for the first 7 months after  
3 Plaintiff requested his religious diet and shaving waiver; Defendants did not dispute  
4 Plaintiff’s assertions that he was initially denied the diet and waiver based on his re-  
5 incarceration, which was deemed evidence of the lack of a sincere belief. (Doc. 69 at  
6 16.) After the Director approved the diet and shaving waiver, Plaintiff was offered either  
7 a Kosher or vegetarian diet, which he refused, and the shaving waiver. In their Motion  
8 for Summary Judgment, Defendants failed to make an argument of any kind as to  
9 qualified immunity for that period and again make no argument on reconsideration.  
10 There was no error regarding denial of qualified immunity for this period.

11           The Court also denied Defendants qualified immunity for the period after Plaintiff  
12 was offered either a Kosher or vegetarian diet. This is a closer question. The Court notes  
13 that although Defendants raised qualified immunity in both their Motion for Summary  
14 Judgment and Motion for Reconsideration, other than *Curry v. California Dep’t of*  
15 *Corrs.*, 2013 WL 75769 (N.D. Cal. 2013), they cited to no cases specifically discussing  
16 qualified immunity in religious diet cases. In *Curry*, the court granted qualified  
17 immunity as to the inmate’s Kemetiic-diet request, made by a practitioner of Shetaut  
18 Neter, but also found no constitutional violation where the defendant prison officials  
19 provided evidence for a full analysis under *Turner v. Safley*, 482 U.S. 78, 89 (1987) and  
20 RLUIPA. *Curry*, 2013 WL 75769, at \* 17.

21           For purposes of a qualified immunity determination, “the right allegedly violated  
22 must be defined at the appropriate level of specificity before a court can determine if it  
23 was clearly established.” *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *see Dunn v. Castro*,  
24 621 F.3d 1196, 1200 (9th Cir. 2010) (when deciding whether there has been a violation of  
25 a clearly established right for qualified immunity, a court must strike the proper balance  
26 in defining that right.) A right is clearly established if its contours are “sufficiently clear  
27 that a reasonable official would understand that what he is doing violates that right.”  
28 *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1065 (9th Cir. 2006) (quoting *Hope v.*

1 *Pelzer*, 536 U.S. 730, 739 (2002)). It is not necessary that there be a prior case with the  
2 identical facts showing that a right is clearly established; it is enough that there is  
3 preexisting law that provides a defendant “fair warning” that his conduct was unlawful.  
4 *Kennedy*, 439 F.3d at 1065.

5 Although there is no clearly established right to a Halal diet with meat, for  
6 purposes of the First Amendment, there is a clearly established right to a religious diet  
7 that meets the inmate’s religious dietary needs unless there is a legitimate penological  
8 reason to deny it. Moreover, the Court finds that it is clearly established that sincerely  
9 held religious beliefs are entitled to protection whether or not prison officials deem them  
10 central or valid tenets of the inmate’s faith. The *Shakur* Court clearly explained that the  
11 Supreme Court disapproved the centrality test, finding it inappropriate for courts to  
12 “question the centrality of particular beliefs or practices to a faith, or the validity of  
13 particular litigants’ interpretations of those creeds.” *Shakur*, 514 F.3d at 884-885.

14 Defendants argued that they would have believed their conduct was reasonable  
15 because there was no precedent requiring prison officials to provide a Halal diet with  
16 meat, other Muslim inmates did not require a Halal diet with meat, and Defendants’  
17 inquiries demonstrated that consuming Halal meat is not an Islamic requirement. (Doc.  
18 54 at 6, 9-10.) But that argument did not address *Plaintiff’s* sincerely held belief.  
19 Defendants appeared to argue that the only religious beliefs that are protected by the First  
20 Amendment are those held by a majority of practitioners of a particular faith or those that  
21 prison officials have determined are correct or valid and that as long as those beliefs are  
22 accommodated, their conduct was reasonable. Moreover, Defendants did not address,  
23 even cursorily, the *Turner* factors.<sup>1</sup>

24 Defendants now assert that “[t]he minute details underlying Qur’anic  
25 interpretations of religious diet and individual inmate interpretation of these requirements  
26

---

27 <sup>1</sup> The Court dismissed the RLUIPA claim for damages although Defense counsel  
28 failed to make such a request; the Court notes that Defendants also failed to address the  
RLUIPA factors.

1 in this case demonstrate exactly why Defendants are entitled to qualified immunity.”  
2 (Doc. 71 at 7.) They argue that they have in the past accommodated Muslims with a  
3 choice of either a Kosher or vegetarian diet “approved by the outside religious authorities  
4 Defendants rely on for counsel in these matters.” (*Id.* at 8.) Defendants’ argument here  
5 is essentially the same argument made before. As noted, the Court finds this is a close  
6 question, but it finds no clear error.

7 The Court notes that as a practical matter, Plaintiff’s damage claims for the period  
8 before he was approved for the shaving waiver and religious diet remain. More  
9 importantly, the claim for injunctive relief on the religious diet remains and implicates  
10 the same evidentiary issues as those for the damage claim for the period after Plaintiff  
11 was offered either a Kosher diet or a vegetarian diet.

12 **III. Plaintiff’s Motion for Appointment of Counsel**

13 There is no constitutional right for an indigent litigant to have appointed counsel  
14 in a civil case. *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980). Plaintiff’s case is  
15 beyond the pleading stage, so his right of access to the court is not at issue and, therefore,  
16 cannot justify appointment of counsel. Further, 28 U.S.C. § 1915(e)(1) confers on a court  
17 the discretion to “request” counsel to represent an indigent civil litigant, but this circuit  
18 has limited the exercise of that power to “exceptional circumstances,” based upon such  
19 factors as the likelihood of success on the merits and the ability of the plaintiff to  
20 articulate his claims in light of their complexity. *Wood v. Housewright*, 900 F.2d 1332,  
21 1335 (9th Cir. 1990). Plaintiff offers nothing to show a likelihood of success or any  
22 special complexity of issues in this case. (Doc. 70.) The request is denied.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

