

1 WO

2

3

4

5

6

7

IN THE UNITED STATES DISTRICT COURT

8

FOR THE DISTRICT OF ARIZONA

9

10

11

12 Erik Scott Maloney,)

13 Plaintiff,)

No. CV 13-00314-PHX-RCB(BSB)

14 vs.)

O R D E R

15 Charles L. Ryan, et al.,)

16 Defendants.)

17

18 This matter is before the court on plaintiff *pro se* Erik
19 Scott Maloney's second amended civil rights complaint ("SAC")
20 pursuant to 42 U.S.C. § 1983 (Doc. 17). On June 28, 2013,
21 this court granted plaintiff leave to file that SAC. Ord.
22 (Doc. 13) at 6:17-19, ¶ (4). As 28 U.S.C. § 1915A(a)
23 requires, the following constitutes the court's screening of
24 plaintiff's SAC.

25 In screening the original complaint (Doc. 1), the court
26 dismissed without prejudice defendants Hetmer and Morris.
27 Doc. 5 at 7:8, ¶ (3). However, Charles L. Ryan, the Director
28 of the Arizona Department of Corrections ("ADOC") and Mike

1 Linderman, ADOC's Administrator of Pastoral Activities, were
2 ordered to answer counts I, II and III; and Wayne Mason, a
3 Chaplain at the Florence complex where plaintiff is housed,
4 was ordered to answer count II of that complaint. Id. at
5 7:9-10, ¶ (4). All three defendants have waived service of
6 process as to the original complaint, though no answer or
7 other response to that complaint have been filed. See Docs.
8 14, 15 and 20.

9 **I. Statutory Screening of Prisoner Complaints**

10 The court is required to screen complaints brought by
11 prisoners seeking relief against a governmental entity or an
12 officer or an employee of a governmental entity. 28 U.S.C.
13 § 1915A(a). The court must dismiss a complaint or portion
14 thereof if a plaintiff has raised claims that are legally
15 frivolous or malicious, that fail to state a claim upon which
16 relief may be granted, or that seek monetary relief from a
17 defendant who is immune from such relief. 28 U.S.C.
18 § 1915A(b)(1), (2).

19 A pleading must contain a "short and plain statement of
20 the claim *showing* that the pleader is entitled to relief."
21 Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does
22 not demand detailed factual allegations, "it demands more
23 than an unadorned, the defendant-unlawfully-harmed-me
24 accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).
25 "Threadbare recitals of the elements of a cause of action,
26 supported by mere conclusory statements, do not suffice."
27 Id. "[A] complaint must contain sufficient factual matter,
28 accepted as true, to 'state a claim to relief that is

1 plausible on its face.'" Id. (quoting Bell Atlantic Corp. v.
2 Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible
3 "when the plaintiff pleads factual content that allows the
4 court to draw the reasonable inference that the defendant is
5 liable for the misconduct alleged." Id. "Determining whether
6 a complaint states a plausible claim for relief [is] . . . a
7 context-specific task that requires the reviewing court to
8 draw on its judicial experience and common sense." Id. at
9 679. Thus, although a plaintiff's specific factual
10 allegations may be consistent with a constitutional claim, a
11 court must assess whether there are other "more likely
12 explanations" for a defendant's conduct. Id. at 681.

13 But as the United States Court of Appeals for the Ninth
14 Circuit has instructed, courts must "continue to construe pro
15 se filings liberally." Hebbe v. Pliler, 627 F.3d 338, 342
16 (9th Cir. 2010). A "complaint [filed by a pro se prisoner]
17 'must be held to less stringent standards than formal
18 pleadings drafted by lawyers.'" Id. (quoting Erickson v.
19 Pardus, 551 U.S. 89, 94 (2007) (*per curiam*)). With these
20 principles firmly in mind, the court will review the SAC in
21 accordance with 28 U.S.C. § 1955A(a).

22 **II. Second Amended Complaint**

23 "[T]he general rule is that an amended complaint
24 supercedes the original complaint and renders it without
25 legal effect[.]" Lacey v. Maricopa Cnty., 693 F.3d 896, 927
26 (9th Cir. 2012) (en banc); see also Valadez-Lopez v. Chertoff,
27 656 F.3d 851, 857 (9th Cir. 2011) (quotation marks and
28 citations omitted) ("[I]t is well-established that an amended

1 complaint supersedes the original, the latter being treated
2 thereafter as non-existent."). Thus, as previously
3 explained, plaintiff's first amended complaint superseded his
4 original complaint. See Ord. (Doc. 13) at 4:10 - 5:1. And
5 now, the SAC supersedes the FAC so that the SAC becomes the
6 operative complaint.

7 The first three counts in the SAC, all pertaining to
8 Ramadan, are virtually identical to the first three counts in
9 plaintiff's original complaint. The only differences are
10 that in accordance with this court's screening order, Lance
11 Hetmer and Stephen Morris are no longer named as defendants.
12 Likewise, the SAC omits all allegations pertaining to them.
13 Unlike the original complaint, however, the SAC includes a
14 fourth count, alleging a violation of the Religious Land Use
15 and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C.
16 § 2000cc-1(a), against defendant Ryan. Basically, in that
17 count the plaintiff alleges that defendant Ryan violated his
18 religious exercise rights by implementing a policy which
19 limits the amount of books, including religious books,
20 available to him at any one time.

21 **III. Failure to State a Claim**

22 An inmate may bring a claim for violation of his
23 religious exercise rights under RLUIPA. RLUIPA prohibits the
24 government from imposing a substantial burden on the
25 religious exercise of an institutionalized person unless the
26 government establishes that the burden furthers a "compelling
27 governmental interest" and does so by "the least restrictive
28 means." 42 U.S.C. § 2000cc-1(a)(1) - (2). "While [RLUIPA]

1 adopts a 'compelling governmental interest' standard,
2 [c]ontext matters in the application of that standard."
3 Hartmann v. Cal. Dep't of Corr. & Rehab., 707 F.3d 1114, 1124
4 (9th Cir. 2013) (citing Cutter v. Wilkinson, 544 U.S. 709,
5 722-23, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005)) (other
6 citations and internal quotations marks omitted).

7 An inmate claiming a RLUIPA violation "must allege facts
8 plausibly showing that the challenged policy and the
9 practices it engenders impose a substantial burden on the
10 exercise of their religious beliefs." Id. at 1125 (citing
11 Warsoldier v. Woodford, 418 F.3d 989, 995 (9th Cir. 2005).
12 RLUIPA does not define 'substantial burden[,] ' but th[e]
13 [Ninth Circuit] has held that 'a substantial burden on
14 'religious exercise must impose a significantly great
15 restriction or onus upon such exercise." Id. at 1124-25
16 (quoting San Jose Christian Coll. v. City of Morgan Hill, 360
17 F.3d 1024, 1034 (9th Cir. 2004)). In other words, "[t]he
18 burden must be more than a mere inconvenience, and must
19 prevent the plaintiff from engaging in [religious] conduct or
20 having a religious experience[.]" Navajo Nation v. United
21 States Forest Serv., 479 F.3d 1024, 1033 (9th Cir. 2007)
22 (internal quotations and citations omitted), overruled on
23 other grounds by 535 F.3d 1058 (9th Cir. 2008) (en banc).

24 "In the context of a prisoner's constitutional challenge
25 to institutional policies, th[e] [Ninth Circuit] has held
26 that a substantial burden occurs 'where the state . . .
27 denies [an important benefit] because of conduct mandated by
28 religious belief, thereby putting substantial pressure on an

1 adherent to modify his behavior and to violate his belief.'"
2 Hartmann, 707 F.3d at 1125 (quoting Warsoldier, 418 F.3d at
3 995 (alteration in original) (quotation omitted)). Thus,
4 "[p]risoners pursuing a RLUIPA claim must plead 'factual
5 allegations showing their religious exercise was so burdened
6 as to pressure them to abandon their beliefs.'" Hill v.
7 Wamble-Fisher, 2013 WL 3223631, at *4 (D.Idaho March 25,
8 2013) (quoting Hartmann, 707 F.3d at 1125). The burden is
9 then on the government to prove that the substantial burden
10 on the inmate's religious practice both furthers a compelling
11 governmental interest and is the least restrictive means of
12 doing so. Warsoldier, 418 F.3d at 995.

13 "By its terms, RLUIPA is to be construed broadly in favor
14 of protecting an inmate's right to exercise his religious
15 beliefs." Id. (citation omitted). "Nonetheless, [a]
16 prison's accommodation of religious observances should not be
17 elevated over an institution's need to maintain order and
18 safety." Davis v. Powell, 901 F.Supp.2d 1196, 1230 (S.D.Cal.
19 2012) (internal quotation marks and citations omitted).

20 In count IV, plaintiff alleges a violation of RLUIPA
21 against defendant Ryan only. Plaintiff Maloney alleges that
22 he is seeking to exercise his religion by engaging in
23 "Dawwah[,] " which, among other things, "requires a Muslim
24 practitioner to obtain knowledge of the religion of Islam
25 and teach it to others by either proselytizing or . . .

26
27
28

1 studying with" them. SAC (Doc. 17) at 13:4-6¹; and 13:13-14.
2 The plaintiff also alleges that as part of Dawwah, the Qur'an
3 requires "one" to "back up his words/teaching with proof and
4 evidence" in the form of "relivent [sic] text or book . . .
5 to establish truthfulness and accuracy of the information."
6 Id. at ¶ 3.

7 On January 30, 2013, defendant Ryan allegedly violated
8 RLUIPA by rescinding a "policy . . . which allowed for an
9 unlimited number of books provided they fit into a property
10 box[,]" and implemented another policy limiting the number of
11 books readily accessible to inmates. Id. at 13:16-14:1
12 (emphasis added). More specifically, defendant Ryan
13 allegedly "set a limit on books at ten . . . to include
14 religious books, and a limit on property boxes at Four[,]
15 . . . forc[ing] Plaintiff to store the remainder of his
16 books[.]" Id. at 14:2-4. To retrieve those stored books,
17 plaintiff "must submit a written request to exchange books,
18 then wait over a week until the property officer" provides
19 the requested books. Id. at 14:5-7.

20 Allegedly, this book "policy inhibits" the plaintiff in
21 two ways. Id. at 14:8 and 11. First, it "inhibits [his]
22 ability to teach" in that he does not "have the necessary
23 proof and evidence on hand" to engage in Dawwah. Id. at 14:8-
24 9. Second, allegedly, this policy "inhibits [plaintiff's]
25 ability to retain the knowledge necessary to teach and

26
27 ¹ The page number references to plaintiff's SAC, (Doc. 17), are to
28 the page numbers generated by the District Court's electronic filing
system, not the pre-printed page numbers on the complaint form or those
hand-written by the plaintiff.

1 proselytize[.]” Id. at 14:11-12.

2 As the court construes count IV, under the current policy
3 up to four property boxes, each containing no more than ten
4 books, *i.e.*, a maximum of 40 books, religious or otherwise,
5 are readily available to an inmate on any given day. Other
6 books are kept in storage and available, although not
7 immediately, upon request. Plaintiff Maloney thus has at his
8 disposal on an ongoing basis, at the very least, ten religious
9 books, and perhaps up to as many as 40. Indeed, as plaintiff
10 alleges, presently, on any given day, “on average” he uses
11 “anywhere from 3 to 5 different books[.]” Id. at 14:13-14.

12 Count IV does not state a RLUIPA claim that is plausible
13 on its face because plaintiff Maloney has not pled an
14 essential element of such a claim. Namely, the plaintiff has
15 not sufficiently alleged that defendant Ryan’s claimed policy
16 of limiting books, religious and otherwise, has substantially
17 burdened the exercise of his religion. Given the ready
18 availability of a number of plaintiff’s religious books, and
19 the facility’s retrieval process for others, plainly the
20 alleged book policy does not “impose a significantly great
21 restriction or onus upon [the] exercise” of plaintiff’s
22 religion. See Hartmann, 707 F.3d at 1125 (internal quotation
23 marks and citation omitted); see also Callaway v. Frink, 2013
24 WL 1856524, at *5 (D.Mont. April 3, 2013), adopted, 2013 WL
25 1856471 (D.Mont. May 2, 2013) (citation omitted) (Plaintiff’s
26 “desire for more Odinist books does not establish a RLUIPA
27 violation.”) This is all the more so given the lack of
28 allegations explaining how or why having to wait over a week

1 to be provided with additional requested religious books has
2 put "significant pressure" on plaintiff Maloney to "abandon
3 [his] religious beliefs." See id. Additionally, there is
4 nothing in the SAC from which it can be reasonably inferred
5 that defendant Ryan's purported book policy is "oppressive[;]"
6 or that it burdens plaintiff Maloney "to a 'significantly
7 great extent,' so as to make the religious practice
8 'effectively impracticable.'" See Davis, 901 F.Supp. at 1230
9 (quoting San Jose Christian Coll., 360 F.3d at 1034-35).
10 Rather, evidently plaintiff Maloney is "seek[ing] additional
11 religious accommodations beyond those already provided by the
12 prison to facilitate the religious exercise of [his] . . .
13 faith." Hartmann, 707 F.3d at 1125. Failure to provide
14 additional religious accommodations does not, however, amount
15 to a substantial burden for RLUIPA purposes. See id. at
16 1125.

17 Count IV does baldly allege that the book "policy has
18 substantially burdened the religious exercise of Dawwah by
19 putting pressure on plaintiff to modify his behavior
20 substantially and to violate his beliefs." SAC (Doc. 17) at
21 14:15-17. This bald assertion does not overcome the pleading
22 deficiencies just outlined, however, in that the court cannot
23 reasonably infer from that allegation, unsupported by factual
24 content, that defendant Ryan has violated RLUIPA. See
25 Twombly, 550 U.S. at 570. Indeed, that broad, conclusory
26 allegation is precisely the sort of "[t]hreadbare recital" of
27 an element of a cause of action[,"] which the Supreme Court
28 has found does not satisfy Rule 8's pleading requirements.

1 See Iqbal, 556 U.S. at 678.

2 In sum, because count IV does not allege a plausible
3 RLUIPA claim against defendant Ryan, count IV will be
4 dismissed.

5 **IV. Claims for Which an Answer Will be Required**

6 As previously stated, counts I, II, and III are identical
7 in all relevant ways to counts I, II, and III of the SAC.
8 Therefore, for the reasons set forth in this court's prior
9 screening order, defendants Ryan and Linderman must answer
10 counts I, II, and III of the SAC and defendant Mason must
11 answer count II of the SAC. See Doc. 5 at 3-6. Accordingly,
12 the court will order service of the SAC (Doc. 17) upon
13 defendants Ryan, Linderman and Mason.

14 **V. Warnings**

15 **A. Address Changes**

16 Plaintiff must file and serve a notice of a change of
17 address in accordance with Rule 83.3(d) of the Local Rules of
18 Civil Procedure. Plaintiff must not include a motion for other
19 relief with a notice of change of address. Failure to comply
20 may result in dismissal of this action.

21 **B. Copies**

22 Plaintiff must serve defendants, or counsel if an
23 appearance has been entered, a copy of every document that he
24 files. Fed. R. Civ. P. 5(a). Each filing must include a
25 certificate stating that a copy of the filing was served. Fed.
26 R. Civ. P. 5(d). Also, plaintiff must submit an additional
27 copy of every filing for use by the court. See LRCiv 5.4.
28 Failure to comply may result in the filing being stricken

1 without further notice to plaintiff.

2 **C. Possible Dismissal**

3 If plaintiff fails to timely comply with every provision
4 of this Order, including these warnings, the court may dismiss
5 this action without further notice. See Ferdik v. Bonzelet,
6 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may
7 dismiss an action for failure to comply with any order of the
8 Court).

9 **E. No Further Amendments Without Leave of Court**

10 Rule 15(a) of the Federal Rules of Civil Procedure allows
11 a party to amend his pleading "once as a matter of course at
12 any time before a responsive pleading is served . . ."
13 Because plaintiff has now amended his complaint more than
14 once, he may not file another amended complaint without first
15 seeking permission from the court.

16 **IT IS ORDERED** as follows:

17 (1) Count IV of the Second Amended Complaint is **dismissed**.

18 (2) Defendant Ryan must answer counts I, II, and III of
19 the Second Amended Complaint.

20 (3) Defendant Linderman must answer counts I, II, and III
21 of the Second Amended Complaint.

22 (4) Defendant Mason must answer count II of the Second
23 Amended Complaint.

24 (5) The Clerk of Court must send Plaintiff a service
25 packet including the Second Amended Complaint (Doc. 17), this
26 Order, and both summons and request for waiver forms for
27 defendants Ryan, Linderman, and Mason.

28 . . .

1 (6) Plaintiff must complete² and return the service packet
2 to the Clerk of Court within 21 days of the date of filing of
3 this Order. The United States Marshal will not provide service
4 of process if Plaintiff fails to comply with this Order.

5 (7) If Plaintiff does not either obtain a waiver of
6 service of the summons or complete service of the Summons and
7 Second Amended Complaint on a defendant within 120 days of the
8 filing of the Second Amended Complaint or within 60 days of
9 the filing of this Order, whichever is later, the action may
10 be dismissed as to each Defendant not served. Fed. R. Civ. P.
11 4(m); LRCiv 16.2(b)(2)(B)(i).

12 (8) The United States Marshal must retain the Summons, a
13 copy of the Second Amended Complaint, and a copy of this Order
14 for future use.

15 (9) The United States Marshal must notify defendants of
16 the commencement of this action and request waiver of service
17 of the summons pursuant to Rule 4(d) of the Federal Rules of
18 Civil Procedure. The notice to defendants must include a copy
19 of this Order. The Marshal must immediately file signed
20 waivers of service of the summons. If a waiver of service of
21 summons is returned as undeliverable or is not returned by a
22 defendant within 30 days from the date the request for waiver
23 was sent by the Marshal, the Marshal must:

24 (a) personally serve copies of the Summons,
25

26 ² If a Defendant is an officer or employee of the Arizona
27 Department of Corrections, plaintiff must list the address of the specific
28 institution where the officer or employee works. Service cannot be effected
on an officer or employee at the Central Office of the Arizona Department
of Corrections unless the officer or employee works there.

1 Complaint, and this Order upon Defendant pursuant to Rule
2 4(e)(2) of the Federal Rules of Civil Procedure; and
3 (b) within 10 days after personal service is
4 effected, file the return of service for Defendant, along with
5 evidence of the attempt to secure a waiver of service of the
6 summons and of the costs subsequently incurred in effecting
7 service upon Defendant. The costs of service must be
8 enumerated on the return of service form (USM-285) and must
9 include the costs incurred by the Marshal for photocopying
10 additional copies of the Summons, Complaint, or this Order and
11 for preparing new process receipt and return forms (USM-285),
12 if required. Costs of service will be taxed against the
13 personally served Defendant pursuant to Rule 4(d)(2) of the
14 Federal Rules of Civil Procedure, unless otherwise ordered by
15 the Court.

16 (10) A defendant who agrees to waive service of the
17 Summons and Complaint must return the signed waiver forms to
18 the United States Marshal, not the Plaintiff.

19 (11) Defendants must answer the Second Amended Complaint
20 or otherwise respond by appropriate motion within the time
21 provided by the applicable provisions of Rule 12(a) of the
22 Federal Rules of Civil Procedure.

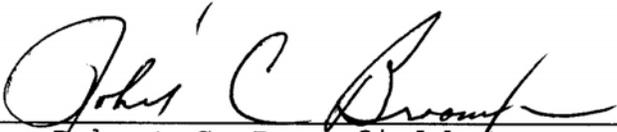
23 (12) Any answer or response must state the specific
24 defendant by name on whose behalf it is filed. The Court may
25 strike any answer, response, or other motion or paper that
26 does not identify the specific Defendant by name on whose
27 behalf it is filed.

28 (13) This matter is referred to Magistrate Judge Bridget

1 S. Bade pursuant to Rules 72.1 and 72.2 of the Local Rules of
2 Civil Procedure for all pretrial proceedings as authorized
3 under 28 U.S.C. § 636(b)(1).

4 DATED this 22nd day of July, 2013.

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record and plaintiff *pro se*