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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Erik Scott Maloney,

Plaintiff,

vs.

Charles L. Ryan, *et al.*,

Defendants.

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

O R D E R

Introduction

Plaintiff *pro se* Erik Scott Maloney is a Muslim[1] confined in the Arizona State Prison Complex-Florence in Florence, Arizona. The Muslim holy month of Ramadan is observed by prayer and fasting during daylight hours. Meals are taken

[1] The complaint contains no specific allegation that plaintiff Maloney is Muslim, although that is the obvious inference. Plaintiff Maloney's supporting declarations explicitly state that he is a Muslim though. Maloney Decl'n (Doc. 8) at 3:26, ¶ 2; Maloney Decl'n (Doc. 16), at 3:26-27, ¶ 3. The defendants do not disagree, Resp. (Doc. 22) at 2:3; and, in fact, as in 2012, plaintiff Maloney is on the participation list for Ramadan this year." Mot., exh. I thereto (Doc. 22-1) Declaration of Michael Linderman (June 28, 2013) at 3:16-17, ¶ 6.

pre-dawn and after sunset. The pre-dawn meal is referred to, as Suhoor or Sahur, and the meal eaten after sunset as Iftar. This year Ramadan began "on or about July 9, 2013" and concludes on or about "August 7, 2013[,]" according to the plaintiff. Mot. (Doc. 16) at 1:24-25.[2]

In his second amended complaint ("SAC"), the plaintiff alleges that just prior to Ramadan 2012, defendants created, implemented or enforced a policy which inhibited the exercise of his religion by knowingly setting the time for service of breakfast at 5:00 a.m., after dawn, the religiously mandated time for fasting had begun. As a result of this alleged policy, plaintiff Maloney claims that during Ramadan 2012, he was not provided with a nutritionally adequate diet, and he was not allowed to engage in the exercise of "Sahur."[3] SAC (Doc. 17) at 11, ¶ 3.

Presently before the court is plaintiff's renewed motion for a temporary restraining order "and/or" a preliminary injunction.[4] Mot. (Doc. 16) at 1:13. Based upon "newly developed facts[,]" and focusing solely upon Ramadan 2013, plaintiff Maloney is seeking injunctive relief requiring the defendants to provide him with two hot meals per day, to

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[2] All page number references are to the page numbers generated by the District Court's electronic filing system, *not* to those hand-written by the plaintiff.

[3] One of the seven necessary requirements to [a] proper Ramadan observance[]" is "Sahur[,]" defined as "the predawn meal[.]" Muhammad v. Klotz, 36 F.Supp.2d 240, 241 n. 3 (E.D.Pa. 1999); see also Rice v. Curry, 2012 WL 4902829, at *1 n. 2 (N.D.Cal. Oct. 12, 2012) ("Suhoor meals are eaten by Muslims before sunrise during the month of Ramadan.")

[4] Because the defendants have had notice of this motion it is more properly styled as one for a preliminary injunction. Compare Fed.R.Civ.P. 65(a) with Fed.R.Civ.P. 65(b).

include fruits and vegetables. Declaration of Erik Scott Maloney (July 9, 2013) (Doc. 16) at 3:24, ¶ 2; 6:1-5, ¶ 17. Plaintiff also broadly seeks an injunction "requiring defendants to allow for the religious exercise of Sahur. Id. at 6:7-8, ¶ 18. As plaintiff describes it, Sahur encompasses being "given the opportunity to begin the days [sic] Fast with the group prayer[.]" Mot. (Doc. 16) at 10:26-11:1.

Defendants Charles L. Ryan, the Director of the Arizona Department of Corrections ("ADC"), and Michael Linderman, ADC's Administrator of Pastoral Activities,[5] oppose this motion arguing that they "are in compliance with their constitutional obligations[]" because the plaintiff is receiving nutritionally adequate meals during time frames that allow for full compliance with Ramadan. Resp. (Doc. 22) at 7:18-19. Defendants did not address plaintiff's motion as it pertains to Sahur.

Background[6]

Factually, plaintiff's motion differs markedly from his SAC. The primary, although not the only, difference is that the SAC pertains to what transpired just prior to and during Ramadan 2012, whereas the pending motion concerns Ramadan

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[5] Counsel for defendants Ryan and Linderman executed a waiver of service of summons on behalf of defendant Mason on July 9, 2013 (Doc. 20), but defendants' response does not include Mr. Mason.

[6] "[C]onclusions reached at the preliminary injunction stage are subject to revision[.]" Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 317, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985) (citing University of Texas v. Camenisch, 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1981)), superseded by statute on other grounds as stated in Beamon v. Brown, 125 F.3d 965 (6th Cir. 1997). Therefore, "the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits[.]" Camenisch, 451 U.S. at 395, 101 S.Ct. 1830.

2013.

Count I of the SAC alleges violations of plaintiff's First Amendment rights based upon a policy supposedly implemented just prior to Ramadan in July, 2012. Allegedly, that policy set the time for service of breakfast at 5:00 a.m., after dawn, the religiously mandated time for fasting had begun. As a result, plaintiff claims that during Ramadan 2012 he was forced to choose between eating breakfast or violating the tenets of his religious beliefs.

That is not the situation this year, however. Currently, ADC is serving Muslim practitioners, such as plaintiff Maloney, with "a breakfast sack meal during the evening meal prior to breakfast, so inmates can eat at *whatever time they choose* in the morning." Declaration of Michael Linderman (June 28, 2013) (Doc. 22-1) at 3:11-13, ¶ 5 (emphasis added). Plaintiff Maloney readily acknowledges this, pointing out that the defendants have "abandoned" their 2012 Ramadan policy of providing breakfast at 5:00 a.m. Mot. (Doc. 16) at 8:1-3; see also Reply (Doc. 24) at 8:4 ("[P]laintiff now receives Food inorder [sic] to start his Fast.") Accordingly, as the court and the defendants are construing this motion, plaintiff Maloney is not seeking any preliminary injunctive relief as to count I. In fact, he could not seek such relief because this claim is moot insofar as Ramadan 2013 is concerned, as defendants are no longer enforcing the alleged policy during Ramadan 2012 of serving breakfast to Muslim practitioners at 5:00 a.m. Thus, because there is no evidence that plaintiff is likely to suffer future

irreparable harm during this Ramadan with respect to the time when breakfast is served, he is not entitled to preliminary injunctive relief as to that claim. See Villegas v. Schulteis, 2010 WL 3341888, at *3 (E.D.Cal. Aug. 25, 2010) (declining to issue a preliminary injunction because "[t]he purpose of [such relief] is to prevent future irreparable harm, not to remedy past harm[,] [and] [the] Plaintiff . . . has failed to identify any specific threat of future irreparable harm).

Count II of the SAC alleges that plaintiff has been subjected to cruel and unusual punishment in violation of the Eighth Amendment and denied his Fourteenth Amendment rights to due process and equal protection. The basis for this count is that during Ramadan 2012, the defendants, among other things, knowingly provided plaintiff with "a nutritionally inadequate diet[,]" by providing him with only two meal portions a day instead of three. SAC (Doc. 17) at 8:3-4, ¶ 3. Prior to Ramadan 2013, however, on June 21, 2013, Muslim practitioners were advised that along with a "'mega sack' for breakfast[,]" they "would 'be given a lunch sack for dinner," Monday through Friday. Maloney Decl'n (Doc. 16) at 4:15-17. On Saturdays and Sundays, Muslim practitioners would receive a hot meal for dinner, as well as the "'mega sack' . . . breakfast." Id. at 4:19-20. Despite that change, the plaintiff claims he is "still be[ing] deprived" of adequate nutrition during Ramadan because he and other Muslim practitioners are "only receiv[ing] . . . 8 hot

meals in 30 days, while receiving 54[7] cold meals in a bag which are void of any fruits or vegitables [sic]." Id. at 4:21-25 (footnote added).

Count III of the SAC alleges a Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000-cc, violation against defendants Ryan and Linderman. This count, too, is premised upon the alleged ADC policy of serving breakfast after dawn during Ramadan 2012. Plaintiff Maloney alleges that that supposed policy "effectively rendered the religious exercise of Sahur impracticable" because he had to choose "between ad[e]quate nutrition and observance of the tenets of his Faith." Id. at 12:5-7. For present purposes, however, the plaintiff has shifted his focus away from that nutrition argument. Instead, he asserts that the "[d]efendants are still not allowing for the obligatory religious exercise of Sahur, because allegedly they are not allowing him to "begin[] [his] Fast with a congregational prayer[,]" Maloney Decl'n (Doc. 16) at 5:5, ¶ 9, which he maintains is an "integral aspect[] of Sahur[.]" Reply (Doc. 24) at 8:16; see also Mot. (Doc. 16) at 10:26-11:1 ("Muslim practitioner[]s should be given the opp[o]rtunity to begin the day['s] Fast with the group prayer, in accordance with the religious exercise of Sahur[.]")

[7] By the court's calculations, under this scenario the plaintiff actually would be receiving 8 hot meals and 52 cold meals during the 30 day period of Ramadan.

Discussion

Preliminary Injunction

I. Governing Legal Standard

A preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, by a *clear showing*, carries the burden of persuasion." Lopez v. Brewer, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (per curiam) (citation omitted)) (emphasis added by Mazurek Court); see also Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008) (citation omitted) ("A preliminary injunction is an extraordinary remedy never awarded as a matter of right.") A plaintiff seeking a preliminary injunction must show:

> [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.

Shell Offshore, Inc. v. Greenpeace, Inc., 709 F.3d 1281, 1289 (9th Cir. March 12, 2013) (quoting Winter, 555 U.S. at 20, 129 S.Ct. 365), rehearing en banc denied, ---– F.3d ----, 2013 WL 3456673 (9th Cir. July 10, 2013). "But if a plaintiff can only show that there are 'serious questions going to the merits' – a lesser showing than likelihood of success on the merits – then a preliminary injunction may still issue if the 'balance of hardships tips *sharply* in the plaintiff's favor,' and the other two Winter factors are satisfied." Id. at 1291 (quoting Alliance for the Wild Rockies v. Cottrell, 632 F.3d

1127, 1135 (9th Cir. 2011) (emphasis added by Shell Offshore Court). Under this serious questions variant of the Winter test, "[t]he elements . . . must be balanced, so that a stronger showing of one element may offset a weaker showing of another." Lopez, 680 F.3d at 1072. Regardless of which standard applies, the movant "has the burden of proof on each element of the test." See Nance v. Miser, 2012 WL 6674404, at *1 (D.Ariz. Dec. 20, 2012) (citing Environmental Council of Sacramento v. Slater, 184 F.Supp.2d 1016, 1027 (E.D.Cal. 2000), citing in turn, Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1203 (9th Cir. 1980)).

Likewise, "[r]egardless of which test is applied, there is a heightened burden where a plaintiff seeks a mandatory preliminary injunction" as distinguished from a prohibitory injunction. See White v. Linderman, 2012 WL 5040850, at *2 (D.Ariz. Oct. 18, 2012). "[M]andatory preliminary relief is subject to heightened scrutiny and should not be issued unless the facts and law clearly favor the moving party." Dahl v. HEM Pharmaceuticals Corp., 7 F.3d 1399, 1403 (9th Cir. 1993) (internal quotation marks and citation omitted). Thus, to determine whether there is a heightened burden in the present case, the court must consider whether plaintiff Maloney is seeking prohibitory or mandatory injunctive relief.

An injunction which "'prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits[]'" is prohibitory. Park Vill.

Apartment Tenants Ass'n v. Mortimer Howard Trust, 636 F.3d 1150, 1159 (9th Cir. 2011) (quoting Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 878 (9th Cir. 2009) (alteration and internal quotation marks omitted)). "The status quo means 'the last, uncontested status which preceded the pending controversy.'" N.D. ex rel. Parents Acting as Guardians Ad Litem v. Haw. Dept' of Educ., 600 F.3d 1104, 1112 n. 6 (9th Cir. 2010) (quoting Marlyn Nutraceuticals, 571 F.3d at 879 (citation omitted)). In contrast, "[a] mandatory injunction orders a responsible party to take action," and therefore "goes well beyond simply maintaining the status quo[.]" Marlyn Nutraceuticals, 571 F.3d at 879 (internal quotation marks and citation omitted). As such, mandatory injunctions are "'particularly disfavored.'" N.D., 600 F.3d at 1112 n. 6 (quoting Stanley v. Univ. of S. California, 13 F.3d 1313, 1320 (9th Cir. 1994) (citations omitted)).

Plaintiff Maloney is seeking an injunction requiring the defendants to provide him with two hot meals daily, to include fruits and vegetables, and allowing him to begin the day's fast with group prayer during Ramadan 2013. Granting the requested relief as to the provision of meals certainly would change the status quo because presently, according to plaintiff, over the course of Ramadan 2013 Muslim inmates will receive a total of "only 8 hot meals[.]"[8] Maloney Decl'n (Doc. 16) at 4:21, ¶ 6. Likewise granting the requested

[8] Presumably this is accurate given that defendants do not dispute or in any way refute this statement.

relief as to group prayer, based upon the record as presently constituted, also would change the status quo in that the court would be ordering the defendants "to take action, . . . go[ing] well beyond simply maintaining the status quo[.]" See Marlyn Nutraceuticals, 571 F.3d at 879 (internal quotation marks and citation omitted). Consequently, because plaintiff Maloney is seeking a disfavored mandatory injunction, his motion "is subject to heightened scrutiny and should not be issued unless the law and facts *clearly favor* [him]." See Dahl, 7 F.3d at 1403(emphasis added).

Additionally, the Prison Litigation Reform Act imposes requirements on prisoner litigants, such as plaintiff Maloney, who are seeking preliminary injunctive relief against prison officials. "Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm." 18 U.S.C. § 3626(a)(2). "Thus, § 3626(a)(2) limits the courts power to grant preliminary injunctive relief to inmates; 'no longer may courts grant or approve relief that binds prison administrators to do more than the constitutional minimum.'" Nance, 2012 WL 6674404, at *1 (quoting Gilmore v. People of the State of Cal., 220 F.3d 987, 999 (9th Cir. 2000)).

Keeping these principles firmly in mind, the court will consider whether plaintiff Maloney has met his burden of proof as to each of the four preliminary injunction factors. . . .

II. Likelihood of Success on the Merits/Serious Questions Going to the Merits

A. Eighth Amendment

"The Eighth Amendment's prohibition against cruel and unusual punishment protects prisoners not only from inhumane methods of punishment but also from inhumane conditions of confinement." Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006) (citing, *inter alia*, Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). As a result, "prison officials may violate an inmate's Eighth Amendment rights when they deprive him of 'a single identifiable human need such as food, warmth, or exercise.'" Thomas v. Ponder, 611 F.3d 1144, 1151 (9th Cir. 2010) (quoting Wilson v. Seiter, 501 U.S. 294, 304, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). "[B]ut[,] not every injury that a prisoner sustains while in prison represents a constitutional violation." Norwood v. Cate, 2013 WL 1127604, at *4 (E.D.Cal. March 18, 2013) (citing Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006)), adopted, 2013 WL 1876142 (E.D.Cal. May 3, 2013).

"A prisoner's claim does not rise to the level of an Eighth Amendment violation unless (1) 'the prison official deprived the prisoner of the 'minimal civilized measure of life's necessities,'' and (2) ''the prison official 'acted with deliberate indifference in doing so.''" Norwood, 2013 WL 1127604, at *20 (quoting Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting, in turn, Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002)). Thus, an inmate seeking to

prove an Eighth Amendment violation must make both an objective and a subjective showing. Objectively, an inmate must show "that the deprivation was 'sufficiently serious' to form the basis for an Eighth Amendment violation." Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000)) (quoting Wilson, 501 U.S. at 298, 111 S.Ct. 2321), *abrogated on other grounds by* Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007). Subjectively, an inmate must also show "''that the deprivation occurred with deliberate indifference to the inmate's health or safety.'" Thomas, 611 F.3d at 1150 (quoting Foster v. Runnels, 554 F.3d 807, 812 (9th Cir. 2009) (quoting in turn Farmer, 511 U.S. at 834, 114 S.Ct. 1970). Plaintiff Maloney has shown neither.

1. Objective Prong

"Adequate food is a basic human need protected by the Eighth Amendment." Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996) (citation omitted). The Eighth Amendment thus obligates prison officials "to provide inmates with nutritionally adequate meals on a regular basis." Foster, 554 F.3d at 810. Prison food must be "adequate to maintain health." LeMaire v. Maass, 12 F.3d 1444, 1456 (9th Cir. 1993). Here, despite the plaintiff's contrary protestations, the defendants have met their Eighth Amendment obligation with respect to the meals being served to plaintiff Maloney during Ramadan 2013; and the plaintiff has failed to show otherwise.

During this Ramadan, it is undisputed that plaintiff Maloney is daily being provided with a sack breakfast and a

sack dinner. See Daniels Decl'n (Doc. 22-1), at 6:5-7, ¶ 4; see also Maloney Decl'n (Doc. 16) at 4:11-20, ¶ 5. Yet, plaintiff declares that he is "still be[ing] deprived of adequate nutrition" because the sack meals are "void of fruits and vegitables [sic][,]" and he is receiving only two hot meals per week. Id. at 4:21-25. In his reply, plaintiff acknowledges that during their weekend dinners, vegetables are available to Muslim practitioners, but that "fruits and vegitables [sic] are nowhere to be found during the week[.]" Reply (Doc. 24) at 5:16-18. Neither of these "deprivations" are "sufficiently serious" to satisfy the objective prong of an Eighth Amendment violation, however. See Johnson, 217 F.3d at 731 (internal quotation marks and citation omitted).

First of all, "[p]laintiff has no Eighth Amendment right to meals of his choice." Powers v. Washington Department of Corrections, 2013 WL 1755790, at *14 (W.D.Wash. March 29, 2013), *adopted by* 2013 WL 175787 (W.D.Wash. April 24, 2013). Nor, as plaintiff suggests in his reply, does he have a constitutional right to "well-balanced meal[s]" comprised "of the five basic food groups." Reply (Doc. 24) at 5:15-16. Rather, prison food simply "must be 'adequate to maintain health.'" Keenan, 83 F.3d at 1091 (quoting LeMaire, 12 F.3d at 1456). And in fact, the plaintiff's cited authority in his reply adopts that same standard. See Smith v. Sullivan, 553 F.2d 373, 380 (5th Cir. 1977) ("A well-balanced meal, containing sufficient nutritional value to preserve health, is all that is required.") ADC's 2013 Ramadan meals easily meet that standard, as defendants have shown, in that the

plaintiff's daily caloric and nutritional needs are being met. Furthermore, nothing in the record even suggests that the Ramadan 2013 meals are not sufficient to maintain plaintiff Maloney's health.

Angelo Daniels, ADC's Deputy Warden of Security Operations, is responsible for, among other things, "oversight" of inmate meals, including "accommodation of the religious standards in place for the specific faith to which inmates in ADC's custody belong." Declaration of Angelo Daniels (July 19, 2013) (Doc. 22-1) at 5:26-6:2, ¶ 3. According to Mr. Daniels, "this year, ADC's contractor for inmate food services[] . . . adjusted [the Ramadan] meals through the oversight of a dietician." Id. at 6:3-5, ¶ 4. "This adjustment involves an increase to the caloric value of both the breakfast and dinner sack meals provided to Muslim inmates participating in Ramadan." Id. at 6:5-7, ¶ 4. This "increase compensates for the lack of a mid-day lunch meal, in compliance with Ramadan's requirements[,]" and means that "[i]n total, the calories and nutritional value of the two Ramadan meals per day is the equivalent of three non-Ramadan meals served to other inmates." Id. at 6:8-10, ¶ 4.

In addition to this caloric increase, a registered dietician employed by ADC's contractor for inmate food services analyzed ADC's Ramadan 2013 menu, "for nutrition adequacy . . . using the SQL Food Processor Analysis program from the ESHA Corporation of Salem, Oregon." Resp., exh. 3 thereto (Doc. 22-1) at 8. After conducting that analysis, ADC's 2013 Ramadan menu was found to be in compliance with the

contractual nutrition standards "(2900 calories +/-200)[,]" and to "meet or exceed the recommended nutrient amounts as specified by Recommended Dietary Allowance from the National Academy of Science[.]" Id.

Additionally, ADC's Inmate Datasearch indicates that plaintiff Maloney's date of birth is March 10, 1978.[9] As a 35 year old male, the federal government recommends 2,400 calories daily for sedentary males; 2,600 calories daily for moderately active males; and 3,000 calories daily for active males. Resp., exh. 4 thereto (Doc. 22-1) at 10.[10] ADC's 2013 Ramadan menu comports with the federal government's recommended daily caloric intake for a 35 year old male like the plaintiff.

Plaintiff Maloney offers no evidence to rebut the foregoing. For example, although he complains of "continued physical/mental pain and suffering[,]" he has not come forth with any medical evidence to support that vague assertion.

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[9] The court takes judicial notice of this fact as it "is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned[,]" *i.e.*, the Arizona Department of Corrections website at http://www.azcorrections./gov/Inmate-DataSearch/Index (last visited July 25, 2013). See Fed.R.Evid. 201(b)(2).

[10] The court takes judicial notice of these daily caloric intakes because these facts "can be accurately and readily determined from [a] source[] whose accuracy cannot reasonably be questioned[,]" *i.e.*, a federal government report. See Fed.R.Evid. 201(b)(2). More specifically, these estimated calorie needs per day by age, gender, and physical activity level are found in an appendix to the "Dietary Guidelines for Americans, 2010," released by the United States Department of Agriculture and the United States Department of Health and Human Services. http:/www.cnpp.usda.gov/Publications/Dietary Guidelines/2010 (last visited July 31, 2013). Furthermore, as an "official publication" of "a public authority[,]" this exhibit is self-authenticating pursuant to Fed.R.Evid. 902(5), and falls within the public records exception to the hearsay rule. See Fed.R.Evid. 803(8).

See Maloney Decl'n (Doc. 16) at 5:1. He also fails to explain how those vague complaints resulted from the exclusion of fruits and vegetables from his diet during the week. Nor has he attempted to demonstrate that the provided food is not adequate to maintain his health; and he would be hard pressed to make such a showing given defendants' proof. "At best, Plaintiff's allegations simply show that, during Ramadan, he [is] not receiv[ing] in his pre-sunrise and post-sunset meals certain foods he prefers to eat." See Muhammad v. Arizona Dep't of Corrections, 2013 WL 3864253, at *6 (D.Ariz. July 25, 2013). These alleged deprivations are not, however, "sufficiently serious to form the basis for an Eighth Amendment violation." See Johnson, 217 F.3d at 731 (internal quotation marks and citation omitted).

Just as plaintiff Maloney has no constitutional right to food of his choice, he has no constitutional right to hot meals. See LeMaire, 12 F.3d at 1456 (emphasis added) ("The fact that the food occasionally contains foreign objects or *sometimes is served cold*, while unpleasant, does not amount to a constitutional deprivation."); see also Brown-El v. Delo, 969 F.2d 644, 649 (8th Cir. 1992) (citation omitted) (inmate plaintiff's "claim that his constitutional rights were violated when he was served cold food is frivolous[]"); Smith v. Washington Dep't of Corrections, 2013 WL 1499084, at *6 (W.D.Wash. March 6, 2013) ("Nor does the prison official's decision to provide box meals instead of a hot meal for the one season of Ramadan rise to the threshold level of an Eighth Amendment violation."), *adopted*, 2013 WL 1499064 (W.D.Wash.

April 11, 2013); and Lewis v. Corcoran State Prison Food Services Dep't, 2011 WL 3438419, at *2 (E.D.Cal. Aug. 4, 2011) (citations omitted) ("Plaintiff's claim regarding the prison serving room temperature food does not rise to the level of constitutional proportions and, thus, fails to state a claim.")

Simply put, ADC's Ramadan 2013 menu provides plaintiff Maloney with "nutritionally adequate meals on a regular basis[,]" Foster, 554 F.3d at 810, which are "adequate to maintain [his] health." See LeMaire, 12 F.3d at 1456. The Eighth Amendment requires nothing more. Consequently, plaintiff Maloney has not established, as he must, the objective prong of an Eighth Amendment violation – either with respect to the lack of fruits and vegetables in the Ramadan 2013 meals or because he is being provided with only eight hot meals during this time.[11] Clearly, then, he cannot

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[11] In his reply, for the first time, the plaintiff contends that the breakfast sacks provided during Ramadan 2013 are not nutritionally adequate because they contain two items – "*processed* lunch meat and *sometimes* milk[,]" which he implies could spoil due to lack of "proper refrigeration[] for approximately ten . . . hours before consuming. Reply (Doc. 24) at 6:11-16 (emphasis added). Supposedly, "[by] this time, the meat in the sack and/or the milk are unable to be consumed as they expose Muslim practitioners[]" to unspecified "immediate danger." Id. at 6:16-18.

At the outset, the court is compelled to comment that it stretches the imagination to suggest or imply, as does the plaintiff, that under the circumstances just described "processed lunch meat" would become inedible. In any event, this belated assertion does not alter the court's conclusion that on this record plaintiff Maloney has not shown the "threshold deprivation necessary to form the basis of an Eighth Amendment violation." See LeMaire, 12 F.3d at *1456.

Plaintiff Maloney's preliminary injunction motion includes a detailed recitation of the contents of the sack breakfast which he received on the first day of Ramadan this year. That breakfast contained the following: "(6) slices of wheat bread, (1) 3/4 oz. bag of tortilla chips, (1) slice of T-ham, (1) small bag of turkey, (4) slices of cheese, (1) hard boiled egg, (1) cereal bar, (2) tea bags, (1) coffee pack, [and] (2) packets of salad

show a likelihood of success on the merits, or serious questions going to the merits, as to this aspect of his Eighth Amendment violation.

2. Subjective Prong

Having found that plaintiff Maloney did not establish the objective component of his Eighth Amendment claim, "the court need not inquire as to the existence of the other[,]" subjective component. See Powers, 2013 WL 1755790, at *11 (citing Helling v. McKinney, 509 U.S. 25, 35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993)). Nonetheless, for the sake of completeness, the court will proceed to the second prong – deliberate indifference.

"'Deliberate indifference'" has both subjective and objective components." Labatad v. Corrections Corp. of America, 714 F.3d 1155, 1160 (9th Cir. 2013). "A prison official must 'be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . must also draw the inference. Id. (quoting Farmer, 511 U.S. at 837, 114 S.Ct. 1970). "Liability may follow only if a prison official 'knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Id. (quoting Farmer, 511 U.S. at 847, 114 S.Ct. 1970).

The record here is completely void of any evidence of

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dressing." Mot. (Doc. 16) at 5:15-18. Even if on the occasion when milk is included in these breakfast sacks for some reason it could not be consumed, the court fails to see how on this record that would establish the nutritional inadequacy of the Ramadan sack breakfasts. Consequently, this belated claim cannot salvage the plaintiff's Eighth Amendment claim.

deliberate indifference – subjective or objective. That omission is understandable given, as the record demonstrates, that during Ramadan 2013, plaintiff Maloney is being provided with nutritionally adequate meals, which are adequate to maintain his health. Thus, even if the plaintiff had been able to establish (which he has not) that the Ramadan 2013 meals denied him "the minimal civilized measure of life's necessities," LeMaire, 12 F.3d at 1456 (internal quotation marks omitted), he has not come forth with any evidence whatsoever to show that defendants acted with deliberate indifference. Accordingly, the plaintiff also has failed to establish the subjective prong of an Eighth Amendment violation.

In sum, plaintiff has not shown that he is likely to succeed on the merits, or that there are serious questions going to the merits, as to either element of his claimed Eighth Amendment violation.

B. Fourteenth Amendment

Plaintiff Maloney's reliance upon the Equal Protection Clause of the Fourteenth Amendment is similarly unavailing. The Equal Protection Clause requires that persons who are similarly situated be treated alike. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). "To state a claim . . . for a violation of the Equal Protection Claus . . . a plaintiff must show that the defendants acted with an intent or purpose to discriminate against him based on his membership in a protected class." Furnace v. Sullivan, 705 F.3d 1021, 1030

(9th Cir. 2013) (quotation marks and citations omitted). "Prisoners are protected by the Equal Protection Clause from intentional discrimination on the basis of their religion." Davis v. Flores, 2010 WL 2673458, at *13 (E.D.Cal. July 2, 2010) (citing, *inter alia*, Freeman v. Arpaio, 125 F.3d 732, 737 (9th Cir. 1997)).

Plaintiff Maloney contends that as a Muslim practitioner he is "not being treated equal[]" to other inmates with respect to his meals during Ramadan. Maloney Decl'n (Doc. 16) at 5:9-10, ¶ 10. Plaintiff claims that he is being "fed less than those housed in Level 5, max[imum] custody," who receive "Mega Sack" meals for breakfast and lunch, Monday through Sunday, and hot meals for dinners, Monday through Sunday. Id. at 5:10-13, ¶ 10; and exh. II thereto (Doc. 16) at 21.

Admittedly the plaintiff is receiving only two meals per day during Ramadan. But, significantly, as explained earlier, "the calories and nutritional value of th[os]e two . . . meals . . . [are] the equivalent of three non-Ramadan meals served to other inmates." Daniels Decl'n (Doc. 22-1) at 6:5-10, ¶ 4. This is fatal to plaintiff's Equal Protection claim. Moreover, the record is devoid of any facts which suggest defendants intentionally discriminated against him by treating him differently than other similarly situated inmates. Thus, as with this Eighth Amendment claim, plaintiff has not met his burden of showing either a likelihood of success on the merits, or serious questions going to the merits, with respect to his Fourteenth Amendment Equal Protection Claim.

. . .

C. RLUIPA

In his supporting declaration, the plaintiff broadly seeks a preliminary injunction, "requiring defendants to allow for the religious exercise of Sahur." Maloney Decl'n (Doc. 16) at 6:7-8, ¶ 18. As his motion makes clear, however, the relief which plaintiff Maloney is seeking is actually quite specific. He is seeking injunctive relief requiring the defendants to allow for congregational or group prayer prior to the beginning of the day's fast during Ramadan 2013. See Mot. (Doc. 16) 10:25-11:1.

Plaintiff's reframing of his RLUIPA claim since the filing of his SAC is understandable. As earlier noted, the ADC is providing Muslim practitioners with their pre-dawn meals in the evening, "so inmates can eat at whatever time they choose in the morning." Linderman Decl'n (Doc. 22-1) at 3:12-13, ¶ 5. As a result, plaintiff Maloney is not, as he allegedly was during Ramadan 2012, being deprived of his pre-dawn meal, *i.e.* Sahur. Therefore, this aspect of plaintiff's RLUIPA claim is moot, at least as it pertains to Ramadan 2013. In turn, at this point, the alleged 2012 Ramadan policy cannot be the basis for any injunctive relief.

Plaintiff's RLUIPA claim cannot form the basis for a preliminary injunction for another reason. "Any injunctive relief must be tailored to the *specific harm being complained of*[.]" Rhoades v. Reinke, 671 F.3d 856 860 (9th Cir. 2011) (citations omitted) (emphasis added). Indeed, it would be an abuse of this court's discretion to issue an overbroad injunction. See Rodriguez v. Robbins, 715 F.3d 1127, 1133 (9th

Cir. 2013) (citation omitted).

In the present case, the nature of the injunction which plaintiff Maloney is seeking reaches beyond the scope of the SAC. That is so because the sought injunctive relief, being allowed to engage in congregational prayer prior to the beginning of the day's fast, is not the specific harm of which he complains in his SAC. Rather, as previously explained, the harm, as the SAC alleges, is inadequate nutrition as a result of ADC's policy of not providing Muslim practitioners with breakfast prior to dawn during Ramadan 2012. See SAC (Doc. 17) at 11-12. Accordingly, the court finds that there is not a likelihood of success on the merits, nor are there serious questions going to the merits, of plaintiff's RLUIPA claim as he frames it for purposes of this motion. See Hylton v. Anytime Towing, 2012 WL 3563874, at *1 (S.D.Cal. Aug. 17, 2012) (denying injunction motion "because the relief sought is beyond the scope of the operative complaint" in that the injunction and the first amended complaint were "based on entirely different facts and circumstances"); see also Quiksilver, Inc. v. Kymsta Corp., 466 F.3d 749, 754 n. 4 (9th Cir. 2006) (district court's inclusion in an injunction of prohibition going "beyond the claims asserted in the complaint" was "in contravention of well-settled Ninth Circuit authority holding that a court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings[]") (internal quotation marks and citation omitted).

. . .

III. Likelihood of Irreparable Harm

In general, "a court of equity should not act, . . . , when the moving party . . . will not suffer irreparable injury if denied equitable relief." Younger v. Harris, 401 U.S. 37, 44, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The burden is on the plaintiff to "establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction." Center for Food Safety v. Vilsack, 636 F.3d 1166, 1172 (9th Cir. 2011) (internal quotation marks and citation omitted) (emphasis added by Vilsack Court). Additionally, where, as here, the moving party is seeking a mandatory injunction, ordinarily such an injunction will not be "granted unless extreme or very serious damage will result[.]" Park Village, 636 F.3d at 1160 (internal quotation marks and citation omitted).

In seeking to demonstrate irreparable harm, plaintiff Maloney contends that in the absence of a preliminary injunction requiring that during Ramadan 2013 he be provided with two hot meals a day, he "faces a . . . very . . . real[] threat of denial of adequate nutrition . . . i[n] . . . clear violation of" the Eighth Amendment. Mot. (Doc. 16) at 8:22-26 (citations omitted). In a similar vein, the plaintiff sweepingly contends that this purported "continuing deprivation of [his] constitutional rights constitutes irreparable harm." Id. at 9:5-6 (citations omitted).

To be sure, "'"the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'"" Rodriguez, 715 F.3d at 1144 (quoting Melendres v. Arpaio, 695 F.3d 990,

1002 (9th Cir. 2012) (quoting in turn Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). As already explained though, the plaintiff has not shown a deprivation of his constitutional rights. Hence, he cannot establish irreparable injury on that basis.

Plaintiff fares no better with his bald assertion that he will "suffer irreparable harm in the form of continued physical and mental pain and suffering[]" if, during Ramadan 2013, he is not provided two hot meals a day. Maloney Decl'n (Doc. 16) at 4:26-5:1. This wholly unsubstantiated and vague claim does not show the resultant extreme or very serious damage which usually must be shown before a mandatory injunction will issue. See Park Village, 636 F.3d at 1160.

Lastly, plaintiff Maloney's motion is completely silent as to how he will sustain irreparable harm in the absence of an injunction requiring ADC to allow for group or congregational prayer as part of Sahur during Ramadan 2013. Plaintiff, therefore, has not meet his burden of showing irreparable harm as to either aspect of his preliminary injunction motion.

IV. Balance of Equities

Before addressing this factor, some clarification is necessary. In arguing that "[t]he balance of equities lies in Defendants' favor, not Plaintiff's[,]" the defendants are assuming that if the court were to issue an injunction, it would require "ADC to provide hot meals to all Muslim inmates throughout the State of Arizona[.]" See Resp. (Doc. 22) at 6:24-25; and at 7:2.

For two reasons, however, the court would not issue such a broad injunction. First, the SAC does not seek class certification, or even suggest that possibility. While his pending motion does seek "class-wide relief[,]"[12] Mot. (Doc. 16) at 12:19 (emphasis omitted), because the court has not certified a class herein, such a sweeping injunction would be impermissibly overbroad.

Second, to the extent plaintiff's motion can be read as seeking class certification pursuant to Fed.R.Civ.P. 23, the court denies such request. Plaintiff Maloney is not an attorney; he is appearing *pro se* in this action. "Accordingly, although [p]laintiff may appear on his own behalf, he may not appear as an attorney for other persons in a class action." Chapa v. Arpaio, 2013 WL 474367, at *6 (D.Ariz. Feb. 7, 2013) (citing McShane v. United States, 366 F.2d 286, 288 (9th Cir. 1966) (nonlawyer had no authority to appear as an attorney for other persons in a purported class action); Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975) (plain error to permit an inmate proceeding pro se to represent fellow inmates in a class action)); see also Johns v. County of San Diego, 114 F.3d 874, 876 (9th Cir. 1997) ("While a non-attorney may appear pro se on his own behalf, '[h]e has no authority to appear as an attorney for others than himself.'") (quoting C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697 (9th Cir. 1987)).

[12] More specifically, "to provide complete relief to the Plaintiff[,]" he asserts that this court's order should "include all [M]uslim practitioners within [ADC][.]" Mot. (Doc. 16) at 12:21-22.

Even if the court were to issue a preliminary injunction requiring the defendants to provide only the plaintiff with two hot meals a day during Ramadan 2013, there is a possibility of harm to the defendants in that other inmates, particularly Muslim practitioners, who might perceive that plaintiff Maloney is receiving preferential treatment. More importantly, though, there is no possibility of harm to the plaintiff, and he has not shown otherwise, if he is not provided with two hot meals daily during Ramadan 2013. That is because his current Ramadan meals are nutritionally adequate and provide him with enough calories to allow the plaintiff to maintain his health. Therefore, the court finds that the balance of equities factor is neutral, or tips slightly in favor of defendants, but certainly not *sharply* in" plaintiff's favor, as would be required, assuming he had met the lesser standard of serious questions going to the merits (which he has not). See Shell Offshore, 709 F.3d at 1291 (internal quotation marks and citation omitted) (emphasis added by Shell Offshore Court).

V. Public Interest

Plaintiff Maloney asserts that an injunction is in the public interest "because it is always in the public interest for public officials to obey the law, especially the constitution." Mot. (Doc. 16) at 12:9-11 (citations omitted). Plaintiff is correct: "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." Melendres, 695 F.3d at 1002 (internal quotation marks and citations omitted). Of course, in this case, as previously

discussed, the defendant public officials are obeying the constitution.

In any event, the court must take into account that "[t]he public interest inquiry primarily addresses [the] impact on non-parties rather than parties." Sammartano v. First Judicial Dist. Court, in & for County of Carson City, 303 F.3d 959, 974 (9th Cir. 2002). "When the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be at most a neutral factor in the analysis rather than one that favor[s] [granting or] denying the preliminary injunction." Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138–39 (9th Cir. 2009) (internal quotation marks and citation omitted). Here, because the proposed preliminary injunction addresses ADC's 2013 Ramadan meals, and it would not impact non-parties, this factor is largely neutral. To the extent that this factor affects the court's analysis, however, it favors the defendants because the court would be requiring a change in the status quo with respect to prison administration. Thus, as with the other three preliminary injunction factors, plaintiff Maloney has not met his burden on this one either.

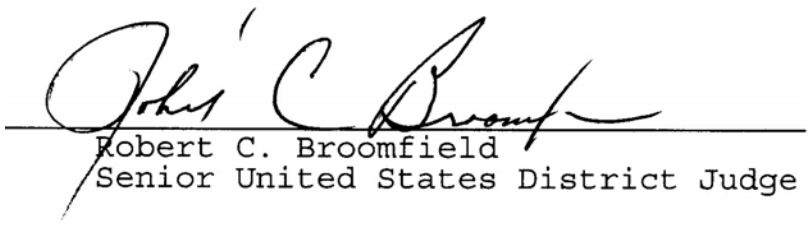
Conclusion

For the reasons discussed herein, the court finds that plaintiff has not met his heightened burden of showing that he is entitled to "the extraordinary and drastic remedy" of a preliminary injunction because he has not met his burden of proof as to any of the four preliminary injunction factors. See Lopez, 680 F.3d at 1071 (internal quotation marks and

citations omitted). Plaintiff Maloney has not shown that: (1) he is likely to succeed on the merits, or that there are serious questions going to the merits as to his Eighth Amendment, Fourteenth Amendment Equal Protection and RLUIPA claims; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. Thus,

IT IS HEREBY ORDERED that plaintiff Erik Scott Maloney's "Motion for a Temporary Restraining Order and/or Preliminary Injunction" (Doc. 16) is **DENIED** in all respects.[13]

DATED this 31st day of July, 2013.



Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record and plaintiff *pro se*

[13] This court's holding renders moot plaintiff's argument that he should not be required to post security.