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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Keith Preston Nance,
10 Plaintiff,

No. CV 14-0500-PHX-SMM (DKD)

11 v.

ORDER

12 Allen Miser, et al.,
13 Defendants.
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15 Plaintiff Keith Preston Nance, who is incarcerated in the Arizona State Prison
16 Complex-Florence, brought this civil rights case pursuant to 42 U.S.C. § 1983. (Doc. 1).
17 On January 12, 2015, Plaintiff filed a “Motion for Temporary Restraining Order and
18 Preliminary Injunction.” (Doc. 18.) On January 26, 2015, Plaintiff filed a “Motion for
19 Emergency Temporary Restraining Order and Preliminary Injunction.” (Doc. 20.)
20 Defendants Ryan, Linderman and Miser filed Responses to Plaintiff’s Motions. (Docs.
21 19, 21.) Plaintiff did not file replies.

22 The Court will deny Plaintiff’s Motions without prejudice.

23 **I. Background**

24 **A. Plaintiff’s Complaint**

25 In his Complaint, Plaintiff alleges one count for violation of his religious exercise
26 rights and names as Defendants Arizona Department of Corrections (“ADC”) Director
27 Charles Ryan, Pastoral Administrator Mike Linderman, and Florence Complex Senior
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1 Chaplain Allen Miser. (Doc. 1.) Plaintiff seeks injunctive, compensatory, and punitive
2 relief.

3 Plaintiff alleges that he has been denied halal religious oils and has been restricted
4 from growing a beard more than a ¼-inch long, even though at least one other inmate has
5 been permitted to grow a beard several inches long. Plaintiff contends that policies
6 concerning halal religious oils and beard restrictions substantially burden his religious
7 exercise and the policies are not the least restrictive means to further any legitimate,
8 compelling penological interest. He also alleges that the beard-length policy has not been
9 equally enforced as to similarly situated inmates and thereby violates his equal protection
10 rights. Plaintiff seeks damages and an order allowing him to grow a beard longer than
11 ¼ -inch in length and to purchase halal religious oils.

12 On screening, the Court found that Plaintiff sufficiently alleged a violation of his
13 First Amendment religious exercise rights, his Fourteenth Amendment equal protection
14 rights, and the Religious Land Use and Institutionalized Persons Act of 2000
15 (“RLUIPA”) and ordered all three Defendants to respond to the Complaint. (Doc. 11.)

16 **B. The Motions**

17 In his first Motion, Plaintiff seeks an order restraining Defendants and their
18 subordinates “from further inmate disciplinary actions against” Plaintiff regarding
19 enforcement of ADC Department Order (“DO”) 704, which prohibits Plaintiff from
20 growing a beard longer than ¼ inch. (Doc. 18 at 1-2.)

21 Plaintiff avers that in December 2014, he was questioned by Lieutenant Silvas
22 about trimming his moustache and growing his beard. (Doc. 18 at 2.) Plaintiff explained
23 to Silvas that he is a practicing Muslim and that growing a beard was his sincerely held
24 religious belief. Plaintiff also told Silvas that he was in litigation challenging the ADC’s
25 grooming policy and that in 2012 the ADC settled a similar case involving an inmate’s
26 religious beard.

27 On January 7, 2015, Lieutenant Silvas again spoke to Plaintiff about ADC’s
28 grooming policy and informed Plaintiff that he was on disciplinary report as this was the

1 second time addressing Plaintiff's beard. (Doc. 18 at 3.) Plaintiff asserts that he faces
2 irreparable harm because disciplinary action can lead to a loss of privileges and
3 reclassification. Plaintiff cites to another case involving an inmate's religious beard in
4 which the court issued a temporary restraining order prohibiting officials from further
5 disciplining that inmate "where the disciplinary action had led to reclassification and a
6 transfer from a security level III to a security level IV unit." (*Id.* (citing Doc. 104 in
7 *Abdullah v. Ryan*, CV 08-255-TUC-CKJ).)

8 In his second Motion, Plaintiff again seeks an order restraining Defendants and
9 their subordinates "from further disciplinary actions, retaliation, and harassment"
10 regarding DO 704. (Doc. 20 at 2.) Plaintiff asserts that on January 14, 2015, he appeared
11 before Disciplinary Officer CO III Staab and was found guilty of violating DO 704.02
12 regarding his beard. (*Id.* at 3 and Pl.'s Ex. 40.) On January 21, 2015, Plaintiff
13 encountered Lieutenant Silves¹ and explained that the Supreme Court had issued a
14 decision on January 20 allowing inmates "to grow beards in compliance with sincerely
15 held religious beliefs." (Doc. 20 at 3.) Silves told Plaintiff that she will enforce ADC
16 policy until the chaplain informs her of the Supreme Court decision. Plaintiff states that
17 he was placed on report a second time and faces irreparable harm because the disciplinary
18 actions by Silves will lead to Plaintiff losing privileges and being reclassified to a higher
19 custody unit.

20 In response to Plaintiff's Motions, Defendants assert that in light of the Supreme
21 Court's decision in *Holt v. Hobbs*, 135 S. Ct. 853, __ U.S. __ (Jan. 20, 2015), they "are
22 prepared to maintain the status quo, allow [Plaintiff] a ½-inch religious shaving waiver,
23 and refrain from disciplining, withdrawing privileges, or reclassifying him for keeping a
24 beard up to that length." (Doc. 21 at 1.) Defendants assert that the Disciplinary Report
25 attached to Plaintiff's second Motion does not specify the length of Plaintiff's beard and
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27 ¹ In his first Motion, Plaintiff wrote "Lieutenant Silvas" and in his second Motion
28 wrote "Lieutenant Silves" and so it is not clear Plaintiff is speaking about the same
person in the two Motions.

1 only states that it “was grown past authorized lengths.” (*Id.* at 1-2.) Defendants aver that
2 as long as Plaintiff “maintains facial hair no greater than ½ inch in length, Defendants do
3 not anticipate any further disciplinary action.” (*Id.* at 2.) Defendants therefore contend
4 that “no injunctive relief is necessary or appropriate.” (*Id.*)

5 Plaintiff did not file a Reply to Defendants’ Response.

6 **II. Legal Standard**

7 “A preliminary injunction is ‘an extraordinary and drastic remedy, one that should
8 not be granted unless the movant, by a clear showing, carries the burden of persuasion.’”
9 *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*,
10 520 U.S. 968, 972 (1997) (per curiam); see also *Winter v. Natural Res. Def. Council, Inc.*,
11 555 U.S. 7, 24 (2008) (citation omitted) (“[a] preliminary injunction is an extraordinary
12 remedy never awarded as of right”). A plaintiff seeking a preliminary injunction must
13 show that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable
14 harm without an injunction, (3) the balance of equities tips in his favor, and (4) an
15 injunction is in the public interest. *Winter*, 555 U.S. at 20. “But if a plaintiff can only
16 show that there are ‘serious questions going to the merits’—a lesser showing than
17 likelihood of success on the merits—then a preliminary injunction may still issue if the
18 ‘balance of hardships tips sharply in the plaintiff’s favor,’ and the other two *Winter*
19 factors are satisfied.” *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th
20 Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th
21 Cir. 2011)). Under this serious questions variant of the *Winter* test, “[t]he elements . . .
22 must be balanced, so that a stronger showing of one element may offset a weaker
23 showing of another.” *Lopez*, 680 F.3d at 1072.

24 Regardless of which standard applies, the movant “has the burden of proof on each
25 element of the test.” See *Envtl. Council of Sacramento v. Slater*, 184 F. Supp. 2d 1016,
26 1027 (E.D. Cal. 2000). Further, there is a heightened burden where a plaintiff seeks a
27 mandatory preliminary injunction, which should not be granted “unless the facts and law
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1 clearly favor the plaintiff.” *Comm. of Cent. Am. Refugees v. I.N.S.*, 795 F.2d 1434, 1441
2 (9th Cir. 1986) (citation omitted).

3 The Prison Litigation Reform Act (“PLRA”) imposes additional requirements on
4 prisoner litigants who seek preliminary injunctive relief against prison officials and
5 requires that any injunctive relief be narrowly drawn and the least intrusive means
6 necessary to correct the harm. 18 U.S.C. § 3626(a)(2); see *Gilmore v. People of the State*
7 *of Cal.*, 220 F.3d 987, 999 (9th Cir. 2000).

8 **III. Discussion**

9 In failing to file a reply, Plaintiff does not contest Defendants’ assertions that they
10 will comply with the standard announced in *Holt v. Hobbs*. In *Holt*, the prisoner plaintiff
11 used RLUIPA to challenge the Arkansas Department of Corrections’ grooming policy,
12 which prohibited prisoners from growing beards at all, except for those with diagnosed
13 skin conditions, who were allowed to grow ¼-inch beards. 135 S. Ct. at 856-57. The
14 plaintiff, a devout Muslim, sought an exemption from the policy to grow a beard based
15 on his religious beliefs. Although he believed his faith required him not to trim his beard
16 at all, the plaintiff proposed a compromise allowing him to maintain a ½-inch beard, but
17 prison officials denied his request. The Supreme Court held that the Arkansas
18 Department of Corrections’ grooming policy violated RLUIPA “insofar as it prevents
19 petitioner from growing a ½-inch beard in accordance with this religious beliefs.” *Id.* at
20 867.

21 In this case, because Defendants state that they are willing to comply with *Holt*
22 and will refrain from disciplining Plaintiff if he keeps his beard at no more than ½ inch,
23 Plaintiff has not shown that he is likely to succeed on the merits of his claim.

24 As to the irreparable injury factor, Plaintiff argues in his Motions that “without an
25 injunction he will continue to suffer disciplinary consequences arising from his failure to
26 comply with ADOC’s grooming policy” and that disciplinary actions by Lieutenant
27 Silves will lead to a loss of privileges and a higher custody level. ((Doc. 18 at 9; Doc. 20
28 at 4.) Defendants respond that in light of *Holt* they will refrain from disciplining,

1 withdrawing privileges, or reclassifying Plaintiff for keeping a beard up to ½-inch long.
2 Because Plaintiff has not replied to Defendants’ assertion that they will comply with
3 *Holt*, Plaintiff has failed to meet his heightened burden of showing irreparable injury.

4 Nor has Plaintiff shown what hardships he will suffer, if any, by Defendants
5 allowing him to keep a ½-inch beard; therefore, he has failed to show that the balance of
6 equities tips in his favor.

7 Finally, Plaintiff argues that the public interest “is best served when the state is
8 required to comply with federal law.” (Doc. 18 at 9-10.) Defendants respond that they
9 will comply with the Supreme Court’s recent decision in *Holt* and allow Plaintiff a ½-
10 inch beard and will refrain from disciplining, withdrawing privileges, or reclassifying
11 Plaintiff for keeping a beard up to ½-inch long. Because Plaintiff has not replied to
12 Defendants’ assertion that they will comply with *Holt*, Plaintiff has failed to meet his
13 heightened burden to show it is in the public interest to grant some other type of
14 preliminary relief.

15 In sum, Plaintiff has failed to meet his burden on each element of the *Winter* test.
16 Accordingly, Plaintiff’s Motions for a preliminary injunction and temporary restraining
17 order are denied.

18 **IT IS ORDERED:**

19 (1) The reference to the Magistrate Judge is withdrawn as to Plaintiff’s
20 “Motion for Temporary Restraining Order and Preliminary Injunction” (Doc. 18) and
21 “Motion for Emergency Temporary Restraining Order and Preliminary Injunction (Doc.
22 20).

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