

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA

3 KENNETH EVANS,  
4 Plaintiff,

5 v.

6 EDMOND G. BROWN, et al.,  
7 Defendants.  
8

Case No. [16-cv-07318-YGR](#) (PR)

**ORDER OF PARTIAL DISMISSAL AND SERVICE**

9 **I. INTRODUCTION**

10 Plaintiff, a state prisoner currently incarcerated at San Quentin State Prison (“SQSP”) and  
11 a practicing Muslim, has filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983.  
12 He alleges that prison officials at SQSP have denied him the opportunity to participate in the  
13 prison’s “Ramadan Diet Program,” in accordance with his Muslim religious beliefs and in  
14 violation of his constitutional rights and those guaranteed under the Religious Land Use and  
15 Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc-1. Dkt. 1 at 4. He has been  
16 granted leave to proceed *in forma pauperis*.

17 In his complaint, Plaintiff names the following Defendants: Governor of the State of  
18 California Edmund G. Brown, Jr.; California Department of Corrections and Rehabilitation  
19 (“CDRC”) Secretary Scott Kernan; SQSP Muslim Chaplain Q. Kawsar Hossain; SQSP Appeals  
20 Coordinator L. Rangel; and SQSP Correctional Officer C. Koenig. *Id.* at 5. Plaintiff seeks  
21 declaratory and injunctive relief, as well as monetary and punitive damages. *Id.* at 8-10.

22 Venue is proper because certain events giving rise to the claims are alleged to have  
23 occurred at SQSP, which is located in this judicial district. *See* 28 U.S.C. § 1391(b).

24 **II. DISCUSSION**

25 **A. Standard of Review**

26 A federal court must conduct a preliminary screening in any case in which a prisoner seeks  
27 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
28 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims

1 that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek  
2 monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b)(1), (2). *Pro se*  
3 pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th  
4 Cir. 1988).

5 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
6 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that  
7 the alleged violation was committed by a person acting under the color of state law. *West v.*  
8 *Atkins*, 487 U.S. 42, 48 (1988).

9 **B. Legal Claims**

10 **1. Religious Practices Claims**

11 As mentioned above, Plaintiff is a practicing Muslim incarcerated at SQSP. He has been  
12 practicing Muslim since February 9, 2003. As part of his religious beliefs, Plaintiff must eat only  
13 Halal food. Because SQSP does not offer Halal food, Plaintiff received a CDCR-issued  
14 “Religious Diet Card” granting him access to a vegetarian “Religious Diet” and the “Jewish  
15 Kosher” meal plan, because “vegetarian and/or Kosher” food is the only acceptable substitute to  
16 eating strictly Halal recognized by his Muslim faith. Dkt. 1 at 5, 7, 14, 20. However, Plaintiff  
17 contends that as a result of obtaining these “Religious Diet Card[s]” and attending Jewish  
18 Services, Defendants have denied him of his right to participate in the 30-day “Ramadan Meal  
19 Plan” because of “[his] Jewish Diet.” *Id.* at 7, 22.

20 In the present complaint, Plaintiff alleges that Defendants have denied him of the right to  
21 participate in the “Ramadan Meal Program” for the past two years. *Id.* at 22. Plaintiff has  
22 attached to his complaint copies of his requests to participate in the meal program, which include  
23 the grievances Plaintiff submitted to Defendants Hossain, Rangel, and Koenig, as well as  
24 Defendants’ responses and explanations with regards to the decision to deny Plaintiff’s request for  
25 entry into the Ramadan Meal Program. *Id.* at 13, 28, 33. As explained by a memorandum  
26 authored by SQSP Warden Ron Davis, and subsequently provided to Plaintiff in July 2015,  
27 Plaintiff’s aforementioned request was denied as follows: “The Religious Diet Program  
28 Agreement (CDC 3030A) states you may change your religious diet no more than once each year.

1 It further states that you will eat only those food items served as part of the Religious Diet  
2 Program, which you indicated as the Jewish Kosher specific menu.” *Id.* at 38. Thus, Plaintiff  
3 claims that Defendants “determined the Ramadan once a year diet in the month of Ramadan is  
4 reserved exclusively for Muslims who did not have a court order[ed] diet.” *Id.* at 4. He argues  
5 that “[t]his religious discrimination is based upon violating Plaintiff’s [rights under the] First and  
6 Fourtee[nth] Amendment to the U.S. Constitution, the [RLUIPA] . . . .” *Id.*

7 Giving it the liberal construction to which it is entitled, the complaint states cognizable  
8 claims for violation of Plaintiff’s First Amendment right to the free exercise of religion, First  
9 Amendment Establishment Clause, Fourteenth Amendment equal protection rights, and rights  
10 under RLUIPA. The complaint adequately links Defendants Hossain, Rangel, and Koenig.

11 **2. Supervisory Liability Claims**

12 Plaintiff also has named Defendants Brown and Kernan for their alleged supervisory  
13 liability. Dkt. 1 at 5. However, Plaintiff does not claim that the aforementioned Defendants  
14 personally violated his constitutional rights. Rather, Plaintiff seems to contend that these  
15 Defendants are liable based on the conduct of their subordinates—Defendants Hossain, Rangel,  
16 and Koenig. Respondeat superior liability is not available under section 1983. *See Taylor v. List*,  
17 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, Plaintiff must allege that the supervisory liability  
18 Defendants “participated in or directed the violations, or knew of the violations and failed to act to  
19 prevent them.” *Id.* Here, no facts are alleged to establish supervisory liability on the part of  
20 these Defendants. Accordingly, Plaintiff’s supervisory liability claims against Defendants Brown  
21 and Kernan are DISMISSED without prejudice.

22 **III. CONCLUSION**

23 For the foregoing reasons, the Court orders as follows:

- 24 1. The complaint, liberally construed, states cognizable religious practices claims  
25 under section 1983 against Defendants Hossain, Rangel, and Koenig.
- 26 2. Plaintiff’s supervisory liability claims against Defendants Brown and Kernan are  
27 DISMISSED without prejudice.
- 28 3. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of

1 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint  
2 and all attachments thereto (dkt. 1), and a copy of this Order to the following Defendants: **SQSP**  
3 **Muslim Chaplain Q. Kawsar Hossain; SQSP Appeals Coordinator L. Rangel; and SQSP**  
4 **Correctional Officer C. Koenig.** The Clerk also shall mail a copy of the complaint and a copy of  
5 this Order to the State Attorney General’s Office in San Francisco. Additionally, the Clerk shall  
6 mail a copy of this Order to Plaintiff.

7 4. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure  
8 requires them to cooperate in saving unnecessary costs of service of the summons and complaint.  
9 Pursuant to Rule 4, if Defendants, after being notified of this action and asked by the Court, on  
10 behalf of Plaintiff, to waive service of the summons, fail to do so, Defendants will be required to  
11 bear the cost of such service unless good cause be shown for the failure to sign and return the  
12 waiver form. If service is waived, this action will proceed as if Defendants had been served on the  
13 date that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be  
14 required to serve and file an answer before **sixty (60) days** from the date on which the request for  
15 waiver was sent. (This allows a longer time to respond than would be required if formal service of  
16 summons is necessary.) Defendants are asked to read the statement set forth at the foot of the  
17 waiver form that more completely describes the duties of the parties with regard to waiver of  
18 service of the summons. If service is waived after the date provided in the Notice but before  
19 Defendants personally have been served, the Answer shall be due **sixty (60) days** from the date on  
20 which the request for waiver was sent or **twenty (20) days** from the date the waiver form is filed,  
21 whichever is later.

22 5. Defendants shall answer the complaint in accordance with the Federal Rules of  
23 Civil Procedure. The following briefing schedule shall govern dispositive motions in this action:  
24 a. No later than **sixty (60) days** from the date their answer is due, Defendants  
25 shall file a motion for summary judgment or other dispositive motion. The motion must be  
26 supported by adequate factual documentation, must conform in all respects to Federal Rule of  
27 Civil Procedure 56, and must include as exhibits all records and incident reports stemming from  
28

1 the events at issue. A motion for summary judgment also must be accompanied by a *Rand*<sup>1</sup> notice  
2 so that Plaintiff will have fair, timely, and adequate notice of what is required of him in order to  
3 oppose the motion. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out  
4 in *Rand* must be served concurrently with motion for summary judgment). A motion to dismiss  
5 for failure to exhaust available administrative remedies must be accompanied by a similar notice.  
6 However, the Court notes that under the new law of the circuit, in the rare event that a failure to  
7 exhaust is clear on the face of the complaint, Defendants may move for dismissal under Rule  
8 12(b)(6), as opposed to the previous practice of moving under an unenumerated Rule 12(b)  
9 motion. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (overruling *Wyatt v. Terhune*, 315  
10 F.3d 1108, 1119 (9th Cir. 2003), which held that failure to exhaust available administrative  
11 remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), should be raised by a  
12 defendant as an unenumerated Rule 12(b) motion). Otherwise, if a failure to exhaust is not clear  
13 on the face of the complaint, Defendants must produce evidence proving failure to exhaust in a  
14 motion for summary judgment under Rule 56. *Id.* If undisputed evidence viewed in the light most  
15 favorable to Plaintiff shows a failure to exhaust, Defendants are entitled to summary judgment  
16 under Rule 56. *Id.* But if material facts are disputed, summary judgment should be denied and the  
17 district judge rather than a jury should determine the facts in a preliminary proceeding. *Id.* at  
18 1168.

19 If Defendants are of the opinion that this case cannot be resolved by summary judgment,  
20 Defendants shall so inform the Court prior to the date the summary judgment motion is due. All  
21 papers filed with the Court shall be served promptly on Plaintiff.

22 b. Plaintiff's opposition to the dispositive motion shall be filed with the Court  
23 and served on Defendants no later than **twenty-eight (28) days** after the date on which  
24 Defendants' motion is filed.

25 c. Plaintiff is advised that a motion for summary judgment under Rule 56 of  
26 the Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you  
27

28 

---

<sup>1</sup> *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998).

1 must do in order to oppose a motion for summary judgment. Generally, summary judgment must  
2 be granted when there is no genuine issue of material fact—that is, if there is no real dispute about  
3 any fact that would affect the result of your case, the party who asked for summary judgment is  
4 entitled to judgment as a matter of law, which will end your case. When a party you are suing  
5 makes a motion for summary judgment that is supported properly by declarations (or other sworn  
6 testimony), you cannot rely simply on what your complaint says. Instead, you must set out  
7 specific facts in declarations, depositions, answers to interrogatories, or authenticated documents,  
8 as provided in Rule 56(c), that contradict the facts shown in the defendant’s declarations and  
9 documents and show that there is a genuine issue of material fact for trial. If you do not submit  
10 your own evidence in opposition, summary judgment, if appropriate, may be entered against you.  
11 If summary judgment is granted, your case will be dismissed and there will be no trial. *Rand*, 154  
12 F.3d at 962-63.

13 Plaintiff also is advised that—in the rare event that Defendants argue that the failure to  
14 exhaust is clear on the face of the complaint—a motion to dismiss for failure to exhaust available  
15 administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your case, albeit without  
16 prejudice. To avoid dismissal, you have the right to present any evidence to show that you did  
17 exhaust your available administrative remedies before coming to federal court. Such evidence  
18 may include: (1) declarations, which are statements signed under penalty of perjury by you or  
19 others who have personal knowledge of relevant matters; (2) authenticated documents—  
20 documents accompanied by a declaration showing where they came from and why they are  
21 authentic, or other sworn papers such as answers to interrogatories or depositions; and  
22 (3) statements in your complaint insofar as they were made under penalty of perjury and show that  
23 you have personal knowledge of the matters state therein. As mentioned above, in considering a  
24 motion to dismiss for failure to exhaust under Rule 12(b)(6) or failure to exhaust in a summary  
25 judgment motion under Rule 56, the district judge may hold a preliminary proceeding and decide  
26 disputed issues of fact with regard to this portion of the case. *Albino*, 747 F.3d at 1168.

27 The notices above do not excuse Defendants’ obligation to serve similar notices again  
28 concurrently with motions to dismiss for failure to exhaust available administrative remedies and

1 motions for summary judgment. *Woods*, 684 F.3d at 935.

2 d. Defendants shall file a reply brief no later than **fourteen (14) days** after the  
3 date Plaintiff's opposition is filed.

4 e. The motion shall be deemed submitted as of the date the reply brief is due.  
5 No hearing will be held on the motion unless the Court so orders at a later date.

6 6. Discovery may be taken in this action in accordance with the Federal Rules of Civil  
7 Procedure. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to Defendants to  
8 depose Plaintiff and any other necessary witnesses confined in prison.

9 7. All communications by Plaintiff with the Court must be served on Defendants or  
10 Defendants' counsel, once counsel has been designated, by mailing a true copy of the document to  
11 them.

12 8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court  
13 informed of any change of address and must comply with the Court's orders in a timely fashion.  
14 Pursuant to Northern District Local Rule 3-11, a party proceeding *pro se* whose address changes  
15 while an action is pending must file a notice of change of address promptly, specifying the new  
16 address. *See* L.R. 3-11(a). The Court may dismiss without prejudice a complaint when: (1) mail  
17 directed to the *pro se* party by the Court has been returned to the Court as not deliverable, and  
18 (2) the Court fails to receive within sixty days of this return a written communication from the *pro*  
19 *se* party indicating a current address. *See* L.R. 3-11(b).

20 9. Upon a showing of good cause, requests for a reasonable extension of time will be  
21 granted provided they are filed on or before the deadline they seek to extend.

22 IT IS SO ORDERED.

23 Dated: July 26, 2017

24 

25 YVONNE GONZALEZ ROGERS  
26 United States District Judge  
27  
28