

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JASON SMITH,  
Plaintiff,

v.

A. TAMAYO, et al.,  
Defendants.

Case No. 19-00537 BLF (PR)

**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; REFERRING CASE TO SETTLEMENT PROCEEDINGS; STAYING CASE; INSTRUCTIONS TO CLERK**

(Docket No. 16)

Plaintiff, a state prisoner at the Correctional Training Facility ("CTF"), filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against CTF prison officials and the Chief of the Office of Appeals in Sacramento. Dkt. No. 1.<sup>1</sup> Finding the complaint stated cognizable claims, the Court ordered service upon Defendants. Dkt. No. 4. Defendants M. Voong, M. Atchley, Y. Friedman, and A. Tamayo filed a motion for summary judgment based on various grounds, including failure to exhaust administrative remedies, on the merits, and qualified immunity. Dkt. No. 16.<sup>2</sup> Plaintiff filed an

<sup>1</sup> All page references herein are to the Docket pages shown in the header to each document and brief cited, unless otherwise indicated.

<sup>2</sup> In support of their motion, Defendants provide the declarations from Defendant M. Atchley, Dkt. No. 16-1, Defendant A. Tamayo, Dkt. No. 16-2, Defendant Y. Friedman, Dkt. No. 16-3, J. Vila (the litigation coordinator for the Office of Appeals) with exhibits,

1 opposition, Dkt. No. 18, exhibits in support, Dkt. No. 18-1, and an affidavit, Dkt. No. 18-2.  
 2 Defendants filed a reply, Dkt. No. 22, and a declaration from counsel Ryan Gille with an  
 3 exhibit in support, Dkt. No. 22-1. For the reasons discussed below, Defendants' motion is  
 4 **GRANTED IN PART and DENIED IN PART.**

## 5 6 DISCUSSION

### 7 **I. Statement of Facts**<sup>3</sup>

8 This action is based on Plaintiff's claim that he is a practicing Rastafarian and needs  
 9 a special diet in accordance with his religious beliefs. Smith Decl. ¶¶ 2, 3; Dkt. No. 18-2.  
 10 He applied for a kosher diet at CTF and was denied. Dkt. No. 1 at 9. Defendant M.  
 11 Atchley was the Chief Deputy Warden at CTF during the relevant period. Atchley Decl. ¶  
 12 1; Dkt. No. 16-1. Defendant A. Tamayo is the Community Resources Manager at CTF.  
 13 Tamayo Decl. ¶ 1; Dkt. No. 16-2. Defendant Y. Friedman is a Jewish Rabbi at CTF.  
 14 Friedman Decl. ¶ 1; Dkt. No. 16-3. Defendants Atchley, Tamayo, and Friedman are  
 15 members of CTF's Religious Review Committee ("RRC"). Defendant M. Voong was the  
 16 Chief of the Office of Appeals in Sacramento during the relevant period. Voong Decl. ¶ 1;  
 17 Dkt. No. 16-6.

#### 18 **A. Plaintiff's Application for Kosher Diet**

19 Inmate applications to the Religious Diet Program are guided by the Cal. Code  
 20 Regs. tit. 15, § 3054 et seq. Tamayo Decl. ¶ 2. The policies and procedures related to the  
 21 Kosher Diet Program ("KDP") are set out in § 3054.2. Inmates may seek participation in  
 22 the KDP by submitting to any chaplain a CDCR Form 3030, Religious Diet Request. *Id.* ¶  
 23 5; Friedman Decl. ¶ 3; Cal. Code Regs. tit. 15, § 3054.4(a). As part of the process, an  
 24 inmate is interviewed by a chaplain to assist in determining eligibility for a religious diet.

25 \_\_\_\_\_  
 26 Dkt. No. 16-4, A. Steiber (a Correctional Food Manager for the CDCR), Dkt. No. 16-5,  
 and Defendant M. Voong, Dkt. No. 16-6.

27 <sup>3</sup> The following facts are undisputed unless otherwise indicated.

1 Tamayo Decl. ¶ 2. Form 3030 consists of three parts, with the inmate filing out Part I, a  
2 chaplain or designee completing Part II after interviewing the inmate, and Part III is  
3 completed by the RRC. *Id.* ¶ 5. According to the regulations, any chaplain or the RRC  
4 shall determine inmate entry into the KDP upon review of Form 3030. Cal. Code Regs. tit.  
5 15, § 3054.2(g)(2). Only the RRC may make the determination to deny the CDCR Form  
6 3030. Cal. Code Regs. tit. 15, § 3054.2(g)(3). The RRC meets once a month to examine  
7 inmate applications to the Religious Diet Program. Tamayo Decl. ¶ 2; Atchley Decl. ¶ 6.  
8 In determining eligibility, the RRC considers the inmate's responses to a chaplain  
9 interview, their past food purchases, and any supporting documentation provided by an  
10 inmate. Atchley Decl. ¶ 6.

11 On April 1, 2018, Plaintiff submitted a CDCR Form 3030 requesting to be placed  
12 on the KDP. Dkt. No. 1 at 26-28; Dkt. No. 16-1 at 18; Dkt. No. 18-2 at 2. Plaintiff's  
13 stated reason for requesting the KDP was to satisfy his religious beliefs as a member of the  
14 House of the Lion of Judah, also known as Rastafarian. *Id.* Plaintiff was interviewed by  
15 Pastor B.D. Min on April 16, 2018, and the application was forwarded to the RRC for  
16 review. Dkt. No. 16-1 at 20; Dkt. No. 18-2 at 2.

17 The RRC's next monthly meeting took place on June 28, 2018. Atchley Decl., Ex.  
18 A at 5; Dkt. No. 16-2 at 4. While Defendant Atchley was present along with other RRC  
19 members not a party to this action, neither Defendants Tamayo nor Friedman attended that  
20 meeting. Tamayo Decl. ¶ 4, Ex. A at 1; Friedman Decl. ¶ 4. Plaintiff's application was  
21 discussed and denied. Tamayo Decl. ¶ 3, Ex. A. Plaintiff's responses to interview  
22 questions six and seven, as well as non-kosher food purchases in April 2018, were listed as  
23 the basis for the denial. Dkt. No. 1 at 28; Dkt. No. 16-2 at 5. Plaintiff's answers to  
24 questions 6 and 7 on his application indicated that he needed to avoid food made with  
25 preservatives or additives, and that he did not eat meat. Dkt. No. 16-4 at 31. According to  
26 A. Steiber, the Correctional Food Manager for the CDCR, inmates who participate in the  
27 KDP receive prepackaged kosher meals prepared by an off-site vendor, and because they  
28

1 are prepacked off-site, the kosher meals have the greatest amount of preservatives when  
 2 compared with normal (mainline) meal, vegetarian, and halal diets. Steiber Decl. ¶ 3.  
 3 Defendant Tamayo completed Part III of Plaintiff's Form 3030 on July 22, 2018, which  
 4 informed Plaintiff that the application was denied by the RRC based on his answers to  
 5 interview questions and non-kosher food purchases. *Id.*; Tamayo Decl. ¶ 6.

6 According to Plaintiff, Defendant Tamayo told him on July 13, 2018, that the  
 7 reason why his application had not been processed was because kosher diets were  
 8 exclusively reserved for Orthodox Jewish prisoners, and that when his application was  
 9 processed, it was more likely than not that it would be denied since Plaintiff was not of the  
 10 Jewish faith.<sup>4</sup> Smith Decl. ¶ 10; Dkt. No. 18-2 at 3.

11 Plaintiff also states that the answers which were submitted to the RRC on his  
 12 application under questions 4, 6, and 7 were not the actual answers that he gave to Pastor  
 13 Min during his interview on April 16, 2018. Smith Decl. ¶ 6; Dkt. No. 18-2 at 2. Plaintiff  
 14 described the correct answers during a deposition<sup>5</sup> taken in connection with this lawsuit on  
 15 October 15, 2019. Dkt. No. 18-1. Question 4 of the application asked how long the

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16  
 17 <sup>4</sup> In reply, Defendants object to the admission into evidence Defendant Tamayo's comment  
 18 regarding Kosher diets only being available to Jewish inmates. Dkt. No. 22 at 7.  
 19 Defendants assert that the statement is being offered for the truth of the matter asserted and  
 20 is therefore inadmissible hearsay. *Id.* at 8. The objection is **OVERRULED** because  
 21 Defendant Tamayo's statement is not hearsay under Rule 801(d)(2) of the Federal Rules of  
 22 Evidence as an opposing party's statement. Fed. R. Civ. P. 801(d)(2).

23 Defendants also object to the admission of several declarations from other inmates  
 24 submitted by Plaintiff in support of his opposition. Dkt. No. 22 at 8. The objection is  
 25 moot because the Court did not find it necessary to consider those declarations.

26 <sup>5</sup> In reply, Defendants object to Plaintiff's submission of this deposition as evidence  
 27 because it contains settlement discussions. Dkt. No. 22 at 6-7. Defendants assert that the  
 28 entire transcript filed as Exhibit D should be excluded and not considered. *Id.* at 7.  
 However, the Court notes that nowhere in the transcript does it indicate that the deposition  
 was solely for the purpose of settlement discussions. Dkt. No. 18-1 at 28-50. On the  
 contrary, counsel states at the outset of the deposition: "we're here to take your deposition  
 today related to lawsuit that you filed against a couple of the staff here at CTF related to a  
 religious food request you've made back in 2018..." *Id.* at 29. Accordingly, the Court  
 finds striking the entire transcript is overly broad. However, the objection to the parts of  
 the deposition that includes settlement discussions is **SUSTAINED**. Furthermore, the  
 portion of Plaintiff's affidavit that refers to those settlement discussions will also not be  
 considered. Dkt. No. 22 at 7.

1 inmate had participated in the religious/spiritual activities, and the written response was  
2 “Recently. The service began in February 2018.” Dkt. No. 16-1 at 20. Plaintiff stated in  
3 his deposition that the correct answer was March 2018. Dkt. No. 18-1 at 38. Question 6  
4 asked for a description of the religious/spiritual needs as they pertain to food, and the  
5 written response was “No food made with the preservatives or additives.” Dkt. No. 16-1 at  
6 20. Question 7 asked for the “characteristics of the religious diet you selected that meet  
7 your religious/spiritual needs,” and the written response stated, “Any food with  
8 preservatives or additives are not good. Vegetables and fruits are good. Only Fish are  
9 good, meat is not good.” *Id.* Plaintiff stated in deposition that during the interview with  
10 Pastor Min, he only recalled being asked Questions 6 and 7 “in pertaining to the Ital diet,”  
11 which was the diet he had previously requested specifically because it did not have  
12 preservatives and additives and was primarily a fish diet. Dkt. No. 18-2 at 38-39, 41.  
13 Plaintiff explained that he did eat foods with preservatives or additives because that was  
14 the only available food source that he had while incarcerated. *Id.* at 39. Plaintiff affirmed  
15 that the written responses on the interview questions were not the responses he recollected  
16 giving during the interview. *Id.* at 41.

17 **B. Administrative Grievance**

18 Prior to the issuance of a denial of his application, Plaintiff submitted a grievance to  
19 the CTF appeals office on July 19, 2019, that was issued log number CTF- 18-02047.  
20 Atchley Decl., Ex. A at 5-7, (Dkt. No. 16-1); Vila Decl. ¶ 6, Ex. C, (Dkt. No. 16-4). In the  
21 appeal, Plaintiff claimed that he was the subject of religious discrimination because he had  
22 still not received a response to his application as of July 17, 2018. *Id.* He also claimed  
23 that Defendant Tamayo informed him that the KDP is reserved only for Orthodox Jewish  
24 inmates. *Id.* Plaintiff filed the grievance based on Defendant Tamayo’s statement that his  
25 accommodation would likely be denied. Smith Decl. ¶¶ 10, 11; Dkt. No. 18-2. Plaintiff  
26 did not allege in this grievance that his application had actually been denied, since that had  
27 not yet occurred. *Id.*

1 The grievance bypassed the first level of review and received a second level review.  
2 Atchley Decl., Ex. A at 2. Defendant Tamayo conducted the second level inquiry into  
3 Plaintiff's grievance. Vila Decl., Ex. C at 28-29. Defendant Tamayo submitted proposed  
4 findings and recommendations for review and approval as part of the second level  
5 grievance response to Defendant Atchley, who approved Defendant Tamayo's findings  
6 and recommendations on August 14, 2018. *Id.* Plaintiff contested Defendant Tamayo's  
7 finding and requested a third-level review, which included for the first time, the issue of  
8 his application being denied. Vila Decl., Ex. B; Ex. C at 2 ¶ F; *id.* at 4 ¶ F. On December  
9 18, 2018, the grievance was reviewed and denied at the third level of review by Defendant  
10 Voong's office in Sacramento, based on the determination that Plaintiff's application was  
11 appropriately denied without discrimination. Vila Decl. ¶ 6, Exs. A-B. According to  
12 Plaintiff's Appellate Appeal History for third-level reviews, this appeal was the only one  
13 that Plaintiff exhausted concerning the issues in this case. *Id.*

14 **C. Plaintiff's Claims**

15 Based on the allegations in the complaint, the Court found Plaintiff stated the  
16 following cognizable claims: (1) a violation of his First Amendment right to the free  
17 exercise of his religion; (2) a violation of Equal Protection based on the allegation that  
18 Plaintiff was discriminated against and was denied rights that are afforded other religions;  
19 and (3) a violation of his rights under the Religious Land Use and Institutionalized Persons  
20 Act ("RLUIPA"), 42 U.S.C. § 2000c-a(a), based on his claim that the denial of a kosher  
21 diet created a "substantial burden" on the exercise of his religion. Dkt. No. 4 at 3.

22 **II. Summary Judgment**

23 Summary judgment is proper where the pleadings, discovery and affidavits show  
24 that there is "no genuine dispute as to any material fact and the movant is entitled to  
25 judgment as a matter of law." Fed. R. Civ. P. 56(a). A court will grant summary judgment  
26 "against a party who fails to make a showing sufficient to establish the existence of an  
27 element essential to that party's case, and on which that party will bear the burden of proof

1 at trial . . . since a complete failure of proof concerning an essential element of the  
2 nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex Corp. v.*  
3 *Cattrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it might affect the outcome of  
4 the lawsuit under governing law, and a dispute about such a material fact is genuine “if the  
5 evidence is such that a reasonable jury could return a verdict for the nonmoving party.”  
6 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

7 Generally, the moving party bears the initial burden of identifying those portions of  
8 the record which demonstrate the absence of a genuine issue of material fact. *See Celotex*  
9 *Corp.*, 477 U.S. at 323. Where the moving party will have the burden of proof on an issue  
10 at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other  
11 than for the moving party. But on an issue for which the opposing party will have the  
12 burden of proof at trial, the moving party need only point out “that there is an absence of  
13 evidence to support the nonmoving party’s case.” *Id.* at 325. If the evidence in opposition  
14 to the motion is merely colorable, or is not significantly probative, summary judgment may  
15 be granted. *See Liberty Lobby*, 477 U.S. at 249-50.

16 The burden then shifts to the nonmoving party to “go beyond the pleadings and by  
17 her own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on  
18 file,’ designate specific facts showing that there is a genuine issue for trial.” *Celotex*  
19 *Corp.*, 477 U.S. at 324 (citations omitted). If the nonmoving party fails to make this  
20 showing, “the moving party is entitled to judgment as a matter of law.” *Id.* at 323.

21 The Court’s function on a summary judgment motion is not to make credibility  
22 determinations or weigh conflicting evidence with respect to a material fact. *See T.W.*  
23 *Elec. Serv., Inc. V. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).  
24 The evidence must be viewed in the light most favorable to the nonmoving party, and the  
25 inferences to be drawn from the facts must be viewed in a light most favorable to the  
26 nonmoving party. *See id.* at 631. It is not the task of the district court to scour the record  
27 in search of a genuine issue of triable fact. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir.

1 1996). The nonmoving party has the burden of identifying with reasonable particularity  
 2 the evidence that precludes summary judgment. *Id.* If the nonmoving party fails to do so,  
 3 the district court may properly grant summary judgment in favor of the moving party. *See*  
 4 *id.*; *see, e.g., Carmen v. San Francisco Unified School District*, 237 F.3d 1026, 1028-29  
 5 (9th Cir. 2001).

6 **A. Exhaustion**

7 The Prison Litigation Reform Act of 1995 (“PLRA”) amended 42 U.S.C. § 1997e to  
 8 provide that “[n]o action shall be brought with respect to prison conditions under [42  
 9 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or  
 10 other correctional facility until such administrative remedies as are available are  
 11 exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory and no longer left to the  
 12 discretion of the district court. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (citing *Booth v.*  
 13 *Churner*, 532 U.S. 731, 739 (2001)). An action must be dismissed unless the prisoner  
 14 exhausted his available administrative remedies before he or she filed suit, even if the  
 15 prisoner fully exhausts while the suit is pending. *McKinney v. Carey*, 311 F.3d 1198, 1199  
 16 (9th Cir. 2002); *see Vaden v. Summerhill*, 449 F.3d 1047, 1051 (9th Cir. 2006) (where  
 17 administrative remedies are not exhausted before the prisoner sends his complaint to the  
 18 court it will be dismissed even if exhaustion is completed by the time the complaint is  
 19 actually filed).

20 Compliance with prison grievance procedures is all that is required by the PLRA to  
 21 “properly exhaust.” *Jones v. Bock*, 549 U.S. 199, 217-18 (2007). The level of detail  
 22 necessary in a grievance to comply with the grievance procedures will vary from system to  
 23 system and claim to claim, but it is the prison’s requirements, and not the PLRA, that  
 24 define the boundaries of proper exhaustion. *Id.* at 218. In California,<sup>6</sup> the regulation

25 \_\_\_\_\_  
 26 <sup>6</sup> The California Department of Corrections and Rehabilitation (“CDCR”) provides its  
 27 inmates and parolees the right to appeal administratively “any departmental decision,  
 28 action, condition, or policy which they can demonstrate as having an adverse effect upon  
 their welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). It also provides its inmates the right



1 requires the prisoner “to lodge his administrative complaint on CDC form 602 and ‘to  
2 describe the problem and action requested.’” *Morton v. Hall*, 599 F.3d 942, 946 (9th Cir.  
3 2010) (quoting Cal. Code Regs. tit. 15 § 3084.2(a)); *Wilkerson v. Wheeler*, 772 F.3d 834,  
4 839 (9th Cir. 2014) (claim properly exhausted where inmate described nature of the wrong  
5 and identified defendant as a responding officer). California regulations also require that  
6 the appeal name “all staff member(s) involved” and “describe their involvement in the  
7 issue.” Cal. Code Regs. tit. 15, § 3084.2(a)(3).

8 Nonexhaustion under § 1997e(a) is an affirmative defense. *Jones*, 549 U.S. at 211.  
9 Defendants have the burden of raising and proving the absence of exhaustion, and inmates  
10 are not required to specifically plead or demonstrate exhaustion in their complaints. *Id.* at  
11 215-17. Defendants must produce evidence proving failure to exhaust in a motion for  
12 summary judgment under Rule 56. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014)  
13 (en banc). If undisputed evidence viewed in the light most favorable to the prisoner shows  
14 a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. *Id.* at  
15 1166. But if material facts are disputed, summary judgment should be denied and the  
16 district judge rather than a jury should determine the facts in a preliminary proceeding. *Id.*  
17 The defendant’s burden is to prove that there was an available administrative remedy and  
18 that the prisoner did not exhaust that available administrative remedy. *Id.* at 1172; *see id.*  
19 at 1176 (reversing district court’s grant of summary judgment to defendants on issue of  
20 exhaustion because defendants did not carry their initial burden of proving their  
21 affirmative defense that there was an available administrative remedy that prisoner  
22 plaintiff failed to exhaust). Once the defendant has carried that burden, the prisoner has  
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24  
25 to file administrative appeals alleging misconduct by correctional officers. See *id.* §  
26 3084.1(e). Under the current regulations, in order to exhaust available administrative  
27 remedies within this system, a prisoner must submit his complaint on CDCR Form 602  
28 (referred to as a “602”) and proceed through three levels of appeal: (1) first formal level  
appeal filed with one of the institution’s appeal coordinators, (2) second formal level  
appeal filed with the institution head or designee, and (3) third formal level appeal filed  
with the CDCR director or designee. *Id.* § 3084.7.

1 the burden of production. *Id.* That is, the burden shifts to the prisoner to come forward  
2 with evidence showing that there is something in his particular case that made the existing  
3 and generally available administrative remedies effectively unavailable to him. *Id.* But as  
4 required by *Jones*, the ultimate burden of proof remains with the defendant. *Id.*

5 Defendants assert Plaintiff did not exhaust his claims against Defendants Atchley,  
6 Voong, or Friedman before filing suit. Dkt. No. 16 at 20. Plaintiff's allegations against  
7 Defendants Atchley and Voong are that they failed to modify "A. Tamayo's conflict of  
8 interest denial." Dkt. No. 1 at 10-11. Defendants assert that there is no allegation that  
9 these Defendants did anything other than adjudicate the grievance that Plaintiff relies on to  
10 demonstrate that he exhausted administrative remedies in this case, nor does the record  
11 show that Plaintiff later filed an administrative grievance to exhaust this claim against  
12 Defendants Atchley and Voong. Dkt. No. 16 at 20. Furthermore, Defendants assert that  
13 Defendant Friedman is not identified anywhere in the grievance. Dkt. No. 1 at 17-20; Dkt.  
14 No. 16-4 at 12-19. Plaintiff's only claim against Defendant Friedman was that he was a  
15 member of the Committee, but the evidence submitted by Defendants shows that  
16 Defendant Friedman was not present at the meeting when the decision was made on  
17 Plaintiff's application. Defendants also assert that Plaintiff was clearly familiar with the  
18 grievance process as his record shows that he submitted at least eight appeals from three  
19 different institutions that received a third-level review. Dkt. No. 16 at 20; Dkt. No. 16-4 at  
20 6-7. Accordingly, Plaintiff could have, but did not, submit a subsequent administrative  
21 grievance regarding the alleged decisions of these Defendants.

22 In opposition, Plaintiff asserts that when prison officials address the merits of a  
23 grievance instead of enforcing a procedural bar or defect, the state's interests in  
24 administrative exhaustion have been served. Dkt. No. 18 at 22. He asserts that the  
25 grievance process is only required to alert prison officials to a problem, not to provide  
26 personal notice to a particular official that he/she/may be sued. *Id.* Plaintiff asserts that he  
27 stated in the appeal that he was "now putting ALL Supervisory and Managerial staff on  
28

1 notice to protect [his] State and Federal Rights,” that Defendant Tamayo signed off on the  
2 RRC’s denial and Defendants Atchley and Voong are both “Managerial staff,” such that  
3 they were effectively alerted to a problem. *Id.* at 23. In reply, Defendants assert that  
4 Plaintiff failed to exhaust his administrative remedies against Defendant Voong because he  
5 was never identified during the grievance process and the grievance procedures require  
6 that “[a]dministrative remedies shall not be considered exhausted relative to any new issue,  
7 information, or **person later named** by the appellant that was not included in the  
8 originally submitted CDCR Form 602.” Dkt. No. 22 at 3-4, citing Cal. Code Regs., tit. 15,  
9 § 3084.1(b) (emphasis added).

10 Plaintiff is correct and is essentially relying on the Supreme Court decision in *Jones*  
11 *v. Bock*, 549 U.S. 199. In *Jones*, the Supreme Court held that because the Michigan  
12 Department of Corrections’ procedures made no mention of naming particular officials, the  
13 Sixth Circuit’s rule imposing such a prerequisite to proper exhaustion was unwarranted.  
14 *Jones*, 549 U.S. at 217. The Court stated that the “name all defendants” requirement under  
15 the Sixth Circuit rule may promote early notice to those who might later be sued, but that  
16 has not been thought to be one of the leading purposes of the exhaustion requirement.  
17 *Jones*, 549 U.S. at 219 (citing *Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004) (“We  
18 are mindful that the primary purpose of a grievance is to alert prison officials to a problem,  
19 not to provide personal notice to a particular official that he may be sued; the grievance is  
20 not a summons and complaint that initiates adversarial litigation.”)). The Court did not  
21 determine whether the grievances filed by petitioners satisfied the requirement of “proper  
22 exhaustion,” but concluded that exhaustion is not *per se* inadequate simply because an  
23 individual later sued was not named in the grievances. *Id.* (citation omitted).

24 Subsequently, the Ninth Circuit held that if an inmate’s grievance does not comply  
25 with a procedural rule but prison officials decide it on the merits anyway at all available  
26 levels of administrative review, it is exhausted. *Reyes v. Smith*, 810 F.3d 654, 656, 658  
27 (9th Cir. 2016) (plaintiff’s claim exhausted as to prison doctors named in federal action  
28

1 where grievance plainly put prison officials on notice of the nature of the wrong alleged in  
2 federal action – denial of pain medication by defendant doctors – and prison officials  
3 easily identified the named prison doctors’ involvement in the issue). Thus, a California  
4 inmate whose grievance failed to name all staff members involved in his case, as required  
5 by 15 Cal. Code Regs. § 3084.2(a)(3), nevertheless exhausted his claim of deliberate  
6 indifference to his serious medical needs because that claim was decided on its merits at all  
7 levels of review. *See id.* at 656-57.

8 In Plaintiff’s case, prison officials decided the merits of his religious discrimination  
9 claim at the second and third level reviews, which were the only available levels of review  
10 because the matter was bypassed at the first level. *See supra* at 4-5; Dkt. No. 16-4 at 10.  
11 Even though Plaintiff’s grievance was premature on the issue at the time he filed it, the  
12 RRC rejected Plaintiff’s request while his grievance was pending such that the second and  
13 third level reviews went ahead and decided the issue of whether that rejection involved  
14 religious discrimination; both levels found that no discrimination took place. *Id.*  
15 Accordingly, the claim challenging the denial of his KDP application is exhausted. *See*  
16 *Reyes*, 810 F.3d at 656, 658.

17 However, because the administrative reviews only addressed the RRC’s denial, the  
18 exhaustion is only with respect to the claim that the RRC wrongfully denied Plaintiff’s  
19 application and therefore only against those involved in that decision.<sup>7</sup> There is no  
20 allegation that Defendant Voong was involved in the RRC’s decision, or that he was even  
21 aware of this particular claim before it came to his attention at the third level review.  
22 Therefore, in order to exhaust a claim against Defendant Voong for wrongfully rejecting  
23 this particular grievance at the third level review, Plaintiff had to file a separate grievance  
24 to that affect before filing this suit. He could have but did not. *See supra* at 5.

25 Based on the foregoing, the Court finds that Defendants have shown that Plaintiff

26 \_\_\_\_\_  
27 <sup>7</sup> Defendants appear to concede by their silence in this regard that the claim against  
28 Defendant Atchley is exhausted as he was undisputedly involved in that decision.

1 failed to properly exhaust all available administrative remedies with respect to his claim  
 2 against Defendant Voong, but not with respect to any other Defendant. In response,  
 3 Plaintiff has failed to show that there was something in his particular case that made the  
 4 existing and generally available administrative remedies effectively unavailable to him.  
 5 *See Albino*, 747 F.3d at 1172. Accordingly, Defendant Voong is entitled to summary  
 6 judgment under Rule 56 based on Plaintiff's failure to exhaust administrative remedies  
 7 with respect to any claim against him. *Id.*

8 **B. Individual Liability**

9 Defendants also assert that Plaintiff's allegations are not sufficient to establish  
 10 Defendants Tamayo and Friedman's individual liability because they were not involved in  
 11 the decision to deny Plaintiff's KDP application. Dkt. No. 16 at 14. Defendants also  
 12 assert that Defendant Atchley's participation in Plaintiff's grievance and appeal is  
 13 insufficient as a basis for liability. *Id.* at 15.

14 Liability may be imposed on an individual defendant under 42 U.S.C. § 1983 if the  
 15 plaintiff can show that the defendant's actions both actually and proximately caused the  
 16 deprivation of a federally protected right. *Lemire v. Cal. Dept. of Corrections &*  
 17 *Rehabilitation*, 726 F.3d 1062, 1085 (9th Cir. 2013); *Leer v. Murphy*, 844 F.2d 628, 634  
 18 (9th Cir. 1988). A person deprives another of a constitutional right within the meaning of  
 19 § 1983 if he does an affirmative act, participates in another's affirmative act or omits to  
 20 perform an act which he is legally required to do, that causes the deprivation of which the  
 21 plaintiff complains. *See Leer*, 844 F.2d at 633; *see, e.g., Robins v. Meecham*, 60 F.3d  
 22 1436, 1442 (9th Cir. 1995) (prison official's failure to intervene to prevent 8th Amendment  
 23 violation may be basis for liability).

24 ///

25 **1. Defendants Tamayo and Friedman**

26 In support, Defendants Tamayo and Friedman attest to the fact that they were not  
 27 involved in the decision to deny Plaintiff's KDP application. Tamayo Decl. ¶ 4; Friedman

1 Decl. ¶ 4. Their statements are corroborated by the RRC’s Meeting Minutes of the June  
2 28, 2018 meeting, which indicates that Defendants Tamayo and Friedman were absent  
3 from the meeting during which Plaintiff’s KDP application was reviewed and denied.  
4 Tamayo Decl., Ex. A at 1; Dkt. No. 16-2 at 4. Therefore, Defendants assert that these  
5 Defendants did not “personally participate” in denying Plaintiff’s KDP application. Dkt.  
6 No. 16 at 14.

7 In opposition, Plaintiff asserts that Defendant Tamayo told him on June 13, 2018,  
8 that kosher diets were reserved for Jewish prisoners only. Dkt. No. 18 at 17. Plaintiff  
9 asserts that his KDP application was subsequently denied, and that Defendant Tamayo  
10 “signed off” on the decision. *Id.* He also points out that his appeal on the matter was  
11 denied by Defendant Tamayo at the second level review. *Id.* With respect to Defendant  
12 Friedman, Plaintiff asserts that Defendant Friedman is a Jewish Rabbi and “routinely  
13 denies prisoners religious diet accommodations request for Kosher Diet unless a prisoner  
14 can ‘prove’ he was born Jewish or that he had been converted by a sanctioned Temple or  
15 Rabbi in free society.” *Id.* at 19. Plaintiff asserts that Defendant Friedman is the only  
16 Jewish Rabbi on the RRC and “as such, he was a decision-maker member of the prison’s  
17 RRC[] and was responsible for reviewing and considering prisoners’ request for religious  
18 accommodation.” In reply, Defendants assert that Plaintiff has failed to rebut the evidence  
19 that Defendant Friedman was not present at the RRC meeting when his application was  
20 reviewed, even if it were true that Defendant Friedman routinely denies religious  
21 accommodations for the reasons asserted. Dkt. No. 19 at 2. Furthermore, Defendants  
22 assert that Plaintiff relies on inadmissible hearsay statements by Defendant Tamayo which  
23 cannot form a basis to dispute the admissible evidence submitted by Defendant Tamayo.  
24 *Id.* at 3. They assert that Plaintiff has failed to produce any evidence that Defendant  
25 Tamayo’s ministerial act of signing Plaintiff’s form memorializing the denial was done  
26 with discriminatory intent. *Id.*

27 Based on the foregoing, the Court finds that Plaintiff has shown that there remain  
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1 genuine issues of material fact with regards to his claim against Defendant Tamayo. The  
2 evidence must be viewed in the light most favorable to Plaintiff, and the inferences to be  
3 drawn from the facts must be viewed in a light most favorable to the nonmoving party.  
4 *See T.W. Elec. Serv., Inc.*, 809 F.2d at 631. Although Defendant Tamayo was not present  
5 when the RRC decided to deny Plaintiff's application at the June 28, 2018 meeting, there  
6 is no dispute that she completed Part III of Plaintiff's application informing him of the  
7 RRC's decision, *see supra* at 4, and that she later conducted the second level review  
8 response denying Plaintiff's grievance on the matter. Dkt. No. 16-4 at 39-40. In his  
9 appeal, Plaintiff alleged that Defendant Tamayo told him that the KDP was reserved only  
10 for Orthodox Jewish inmates. *See supra* at 5. Defendants' objection to the admission of  
11 this statement is denied as explained above. *See supra* at 4, fn. 4. Based on her statement  
12 and the delay in his KDP application, Plaintiff claimed religious discrimination. *Id.*  
13 Although the grievance contained allegations against her, Defendant Tamayo conducted  
14 the second level review and stated in her response that "CRM A. Tamayo was consulted  
15 and she asserted that she did not make any statement like the one claimed by the  
16 [Plaintiff]." *Id.* In reviewing the allegations against herself and rejecting the grievance,  
17 Defendant Tamayo clearly had a conflict of interest in the matter. Furthermore, the Court  
18 notes that Defendant Tamayo is silent with respect to the allegation that she made such a  
19 statement to Plaintiff in the declaration submitted in this matter. *Id.* Dkt. No. 16-2.  
20 Clearly, there is a dispute over whether Defendant Tamayo made the statement. Lastly,  
21 based on the undisputed fact that Defendant Tamayo rejected Plaintiff's grievance on the  
22 merits at the second level of review even though she was the subject of the appeal, the  
23 Court finds that there are disputed issues of material fact with respect to Defendant  
24 Tamayo's involvement in the deprivation of Plaintiff's rights. *See Leer*, 844 F.2d at 633.  
25 Accordingly, Defendant Tamayo is not entitled to summary judgment on this ground. *See*  
26 *Celotex Corp.*, 477 U.S. at 324.

27 With respect to Defendant Friedman, the Court finds there is no genuine dispute of  
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1 any material fact as to whether Defendant Friedman was present at the RRC meeting when  
2 Plaintiff's application was reviewed and denied. Even if it were true that Defendant  
3 Friedman "routinely" denies religious accommodations as Plaintiff alleges, he fails to  
4 provide any evidence that Defendant Friedman was at all involved in the denial of  
5 Plaintiff's application in this instance. In other words, it cannot be said that Defendant  
6 Friedman deprived Plaintiff of his religious freedom in the absence of evidence showing  
7 that Defendant Friedman did an affirmative act, participated in another's affirmative act or  
8 omitted to perform an act which he was legally required to do, that caused the  
9 constitutional deprivation. *See Leer*, 844 F.2d at 633. Accordingly, Defendant Friedman  
10 is entitled to summary judgment on all the claims against him because there is no basis to  
11 impose liability. *Id.*; *see Celotex Corp.*, 477 U.S. at 323.

## 12 **2. Defendant Atchley**

13 Defendants assert that the only allegation in the complaint against Defendant  
14 Atchley is his involvement in the second level review of Plaintiff's grievance. Dkt. No. 16  
15 at 15. But as Plaintiff points out in opposition, Defendant Atchley was present at the RRC  
16 meeting when his application was denied, a fact that is undisputed. Dkt. No. 18 at 17; *see*  
17 *supra* at 3. Although Defendants assert in reply that Plaintiff cannot now impose liability  
18 on Defendant Atchley based on new allegations, the Court finds good cause to do so.  
19 Plaintiff alleged in the complaint that the RRC was comprised of Defendants Tamayo,  
20 Friedman and "other unknown defendants." Dkt. No. 1 at 8. Although he was unaware at  
21 the outset, Plaintiff would certainly have been allowed to amend his complaint to  
22 specifically allege that Defendant Atchley participated in the RRC decision denying his  
23 application once he discovered that Defendant Atchley was one of the "unknown  
24 defendants" alleged in the complaint. *See Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir.  
25 1980) (plaintiff should be given an opportunity through discovery to identify the unknown  
26 defendants unless it is clear that discovery would not uncover their identifies or that the  
27 complaint should be dismissed on other grounds); *also Brass v. County of Los Angeles*,



1 328 F.3d 1192, 1195-98 (9th Cir. 2003) (district court has discretion to permit plaintiff to  
 2 substitute named individuals for Doe defendants where he did not seek leave to amend to  
 3 do so). Furthermore, since he was involved in the RRC’s decision, it cannot be said that  
 4 Defendant Atchley’s participation in the deprivation of Plaintiff’s constitutional rights was  
 5 based merely on his involvement in the appeals process as Defendants assert. *See Ramirez*  
 6 *v. Galaza*, 334 F/3d 850, 860 (9th Cir. 2003). Lastly, the Court has already decided that  
 7 the claim challenging the denial of his KDP application against any individual involved in  
 8 the RRC decision was properly exhausted so that Plaintiff is not barred from proceeding on  
 9 a claim against Defendant Atchley on that basis. *See supra* at 10-12. Accordingly,  
 10 Defendant Atchley is not entitled to summary judgment on this ground. *See Celotex*  
 11 *Corp.*, 477 U.S. at 324.

12 Based on the foregoing discussion, all claims against Defendants Voong and  
 13 Friedman have been dismissed and the only claims that remain are those against  
 14 Defendants Tamayo and Atchley. The Court will now consider the remaining claims  
 15 against them on the merits.

16 **C. First Amendment - Free Exercise of Religion Claim**

17 Prisoners retain the protections afforded by the First Amendment, “including its  
 18 directive that no law shall prohibit the free exercise of religion.” *O’Lone v. Estate of*  
 19 *Shabazz*, 482 U.S. 342, 348 (1987) (citation omitted). But lawful incarceration “brings  
 20 about the necessary withdrawal or limitation of many privileges and rights, a retraction  
 21 justified by the considerations underlying our penal system.” *Id.* (citation and internal  
 22 quotation marks omitted). For a prisoner to establish a free exercise violation, he therefore  
 23 must show that a prison regulation or official burdened the practice of his religion without  
 24 any justification reasonably related to legitimate penological interests. *See Shakur v.*  
 25 *Schriro*, 514 F.3d 878, 883-84 (9th Cir. 2008). A prisoner is not required to objectively  
 26 show that a central tenet of his faith is burdened by a prison regulation to raise a viable  
 27 claim under the Free Exercise Clause. *Id.* at 884-85. Rather, the sincerity test of whether  
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1 the prisoner's belief is "sincerely held" and "rooted in religious belief" determines whether  
 2 the Free Exercise Clause applies. *Id.* (finding district court impermissibly focused on  
 3 whether consuming Halal meat is required of Muslims as a central tenet of Islam, rather  
 4 than on whether plaintiff sincerely believed eating kosher meat is consistent with his faith).  
 5 The prisoner must show that the religious practice at issue satisfies two criteria: (1) the  
 6 proffered belief must be sincerely held and (2) the claim must be rooted in religious belief,  
 7 not in purely secular philosophical concerns. *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir.  
 8 1994) (cited with approval in *Shakur*, 514 F.3d at 884)

9 Inmates "have the right to be provided with food sufficient to sustain them in good  
 10 health that satisfies the dietary laws of their religion." *McElyea v. Babbitt*, 833 F.2d 196,  
 11 198 (9th Cir. 1987). Allegations that prison officials refuse to provide a healthy diet  
 12 conforming to sincere religious beliefs states a cognizable claim under § 1983 of denial of  
 13 the right to exercise religious practices and beliefs. *See Ward v. Walsh*, 1 F.3d 873, 877  
 14 (9th Cir. 1993) (Jewish inmate claiming denial of kosher diet), *cert. denied*, 510 U.S. 1192  
 15 (1994); *McElyea*, 833 F.2d at 198 (same); *Moorish Science Temple, Inc. v. Smith*, 693 F.2d  
 16 987, 990 (2d Cir. 1982) (Muslim inmate claiming denial of proper religious diet). The  
 17 burden then falls on the prison officials to prove that the burden on plaintiff's exercise of  
 18 religion was reasonably related to a legitimate penological objective. *See Ashelman v.*  
 19 *Wawrzaszek*, 111 F.3d 674, 677-78 (9th Cir. 1997) (applying test from *O'Lone v. Estate of*  
 20 *Shabazz*, 482 U.S. 342 (1987), and *Turner v. Safley*, 482 U.S. 78 (1987), to determine  
 21 reasonableness of decision denying Jewish inmate's request for an all-kosher diet).

22 Defendants assert that Plaintiff cannot establish that their alleged conduct  
 23 substantially burdened the practice of his religion. Dkt. No. 16 at 16. They assert that  
 24 although Plaintiff claims that they improperly considered his prior food purchases when  
 25 considering his religious diet application, Dkt. No. 1 at 9-10, there is no evidence that the  
 26 prior food purchases formed the basis of a denial by any Defendant. Dkt. No. 16 at 16.  
 27 Rather, Defendants assert that the opposite is true. *Id.* Defendant Atchley states in his  
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1 declaration that in his training and experience, “food purchases can be an indicator of  
2 whether an inmate is following their espoused diet, it has not been used on its own to deny  
3 [] a Religious Diet Application” at CTF. Atchley Decl. ¶ 6. Defendant Tamayo also states  
4 in her declaration that in her experience and training, “non-kosher food purchases are a  
5 consideration when reviewing an inmate’s application, but by itself would not form the  
6 basis to deny an inmate’s application to a Religious Diet Program.” Tamayo Decl. ¶ 7.  
7 Based on these facts, Defendants assert they are entitled to summary judgment.

8 In opposition, Plaintiff asserts that it is undisputed that Defendants denied him  
9 access to a kosher diet. Dkt. No. 18 at 11. Plaintiff states that he sincerely believes that  
10 the kosher diet provided to Jewish inmates would be consistent with his religious faith. *Id.*  
11 Plaintiff asserts that although Defendants deny that his food purchases made prior to  
12 submitting his religious food application was the basis for the denial, they still fail to  
13 provide the actual basis for the denial. *Id.* at 12. Plaintiff asserts that in light of these  
14 “conflicting assertions” by Defendants, the Court should consider whether the real basis  
15 was Plaintiff not being registered as a Jewish prisoner. *Id.* Plaintiff also asserts that  
16 Defendants “incorrectly stated” in their summary judgment motion that Plaintiff’s  
17 application was discussed and denied because of Plaintiff’s response to interview questions  
18 six and seven, but that his application denial never specified which interview question(s).  
19 *Id.* Defendants argue in reply that Plaintiff fails to submit any evidence in opposition to  
20 show that it was not his responses to interview questions that led to the denial of his kosher  
21 diet application. Dkt. No. 19 at 2.

22 Having reviewed the submitted briefs and documents in support and viewing the  
23 evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff has shown  
24 there exist genuine issues of material fact that precludes summary judgment. *See Celotex*  
25 *Corp.*, 477 U.S. at 324. Defendants assert that there is no evidence that Plaintiff’s prior  
26 food purchases was the basis of their denial. However, it is undisputed that they actually  
27 did in fact deny his Kosher diet application based in part on the food purchases as stated in  
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1 Plaintiff's application: "Denied based on answers to interview questions and non-Kosher  
2 food purchases." Dkt. No. 16-1 at 18. Plaintiff need only show that Defendants' actions  
3 resulted in a burden on the exercise of his religion. *McElyea*, 833 F.2d at 198. Plaintiff  
4 claims that he is a practicing Rastafarian and needs a special diet in accordance with his  
5 religious beliefs, which is supported by his detailed and lengthy responses in deposition.  
6 Smith Decl. ¶¶ 2, 3; Dkt. No. 18-1 at 28-50; *see Malik*, 16 F.3d at 333. Furthermore,  
7 Plaintiff's response to Question 8 of the interview stated, "RMA or Vegetarian is not good  
8 for my religion. Kosher is the closest diet to my religion." Dkt. No. 16-1 at 20.  
9 Defendants were aware of this information when they reviewed the application, and it was  
10 not for Defendants to determine what type of food or diet qualified or was inconsistent  
11 with Plaintiff's religious beliefs. If Plaintiff shows he had a sincerely held religious belief  
12 that a Kosher diet satisfied the tenets of his religion, then Defendants must show that  
13 denying him that accommodation was reasonably related to a legitimate penological  
14 interest. *See Ashelman*, 111 F.3d at 677-78. However, Defendants make no argument in  
15 this regard, having rested on their assertion that there is no evidence of a burden on  
16 Plaintiff's practice of religion. Accordingly, the Court finds there exist genuine issues of  
17 material fact with respect to the constitutionality of Defendants' actions.

18 Based on the foregoing, the Court finds summary judgment is not appropriate  
19 because there remain genuine issues of material facts with respect to Plaintiff's free  
20 exercise of religion claim. *See Celotex Corp.*, 477 U.S. at 323. Accordingly, Defendants  
21 are not entitled to summary judgment on this claim.

#### 22 **D. RLUIPA Claim**

23 Defendants assert that Plaintiff fails to establish their liability on his RLUIPA  
24 claim, and that the Eleventh Amendment forecloses Plaintiff's claim for official-capacity  
25 damages under RLUIPA. Dkt. No. 16 at 14.

26 RLUIPA targets two areas of state and local action: land-use regulation, 42 U.S.C. §  
27 2000cc (RLUIPA § 2), and restrictions on the religious exercise of institutionalized

1 persons, § 2000cc-1 (RLUIPA § 3). Section 3 of RLUIPA provides: “No government shall  
 2 impose a substantial burden on the religious exercise of a person residing in or confined to  
 3 an institution, as defined in section 1997 [which includes state prisons, state psychiatric  
 4 hospitals, and local jails], even if the burden results from a rule of general applicability,  
 5 unless the government demonstrates that imposition of the burden on that person (1) is in  
 6 furtherance of a compelling governmental interest; and (2) is the least restrictive means of  
 7 furthering that compelling governmental interest.” 42 U.S.C. § 2000cc-1(a). The statute  
 8 applies “in any case” in which “the substantial burden is imposed in a program or activity  
 9 that receives Federal financial assistance.” 42 U.S.C. § 2000cc-1(b)(1). RLUIPA also  
 10 includes an express private cause of action that is taken from RFRA: “A person may assert  
 11 a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain  
 12 appropriate relief against a government.” 42 U.S.C. § 2000cc-2(a); cf. § 2000bb-1(c). For  
 13 purposes of this provision, “government” includes, inter alia, States, counties,  
 14 municipalities, their instrumentalities and officers, and “any other person acting under  
 15 color of state law.” 42 U.S.C. § 2000cc-5(4)(A). “Congress has explicitly directed us to  
 16 resolve any ambiguities in RLUIPA ‘in favor of a broad protection of religious exercise, to  
 17 the maximum extent permitted.’” *Khatib v. County of Orange*, 639 F.3d 898, 900-01 (9th  
 18 Cir. 2011) (en banc) (citing and adding emphasis to 42 U.S.C. § 2000cc-3(g)).

19 RLUIPA does not define “substantial burden.” *San Jose Christian College v.*  
 20 *Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). Construing the term in accord with its  
 21 plain meaning, the Ninth Circuit holds that “a ‘substantial burden’ on ‘religious exercise’  
 22 must impose a significantly great restriction or onus upon such exercise.” *Id.*; see *Greene*  
 23 *v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. .2008) (jail’s outright ban prohibiting  
 24 plaintiff, a maximum security prisoner, from attending group religious worship services  
 25 substantially burdened his ability to exercise his religion). A burden is substantial under  
 26 RLUIPA when the state “‘denies [an important benefit] because of conduct mandated by  
 27 religious belief, thereby putting substantial pressure on an adherent to modify his behavior  
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1 and to violate his beliefs.” *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008) (quoting  
2 *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981)).

3 Defendants assert that Plaintiff fails to show that they placed a “substantial burden”  
4 on his religious practice. Dkt. No. 16 at 19. They make the same argument as in  
5 Plaintiff’s free exercise claim -- that he cannot show a substantial burden because the  
6 alleged improper conduct, *i.e.*, consideration of Plaintiff’s prior food purchases, was not  
7 the basis upon which his application was denied. *Id.* Defendants assert that they  
8 considered Plaintiff’s response to interview questions, which indicated that his religious  
9 need was to have “[n]o food made with the preservatives or additives” and that “meat is  
10 not good.” *Id.* Defendants assert his interview responses were inconsistent with the  
11 kosher food provided by the CDCR, which are pre-packaged by an off-site vendor and  
12 therefore contain the greatest amount of preservatives when compared with other diets that  
13 are offered. *Id.* They also point out that the kosher diet is not free of meat, and that the  
14 only diet available that does not offer meat is the vegetarian diet. *Id.* at 20. Defendants  
15 assert, therefore, that since the kosher diet was the least compatible diet offered by the  
16 CDCR, denying Plaintiff’s application for kosher meals cannot have substantially  
17 burdened his religious beliefs. *Id.*

18 In opposition, Plaintiff asserts that Defendants’ denial of access to a kosher diet “is  
19 and continues to place a substantial burden on his religious exercise.” Dkt. No. 18 at 15.  
20 Plaintiff asserts that he is pressured to significantly modify his religious behavior, and in  
21 doing so “has significantly violated his religious belief.” *Id.* As evidence, Plaintiff  
22 submits his deposition wherein he explained that the tenets of the Rastafarian diet involved  
23 adhering “to the Hebrew dietary law as it related to the consumption of ceremonially clean  
24 and unclean animals in the books of Leviticus and Deuteronomy,” and was able to explain  
25 in detail what were considered clean or unclean animals and the other specific parameters  
26 for eating meat. Dkt. No. 18-1 at 35-36. Plaintiff also explained why the alternative diets  
27 were not sufficient. *Id.* Accordingly, Plaintiff has satisfied his burden of submitting  
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1 evidence showing that the denial of a kosher diet placed a substantial burden on the  
2 practice of his religion. *See Shakur*, 514 F.3d at 888.

3         Once a plaintiff makes the requisite showing under RLUIPA of a substantial burden  
4 on the exercise of his religion, it becomes the defendant's responsibility to establish that  
5 the burden furthers "a compelling government interest" and does so by "the least  
6 restrictive means." *Greene*, 513 F.3d at 988 (quoting 42 U.S.C. §2000cc-1(a) and  
7 § 2000cc-2(b)) (finding district court erred in granting summary judgment where a genuine  
8 issue of fact remained as to whether the jail's total ban on group religious worship by  
9 maximum security prisoners was the least restrictive means of maintaining jail security).  
10 However, Defendants make no argument in this regard, having only rested on their  
11 argument that Plaintiff's religious exercise was not substantially burdened. Dkt. No. 16 at  
12 20. As with Plaintiff's Free Exercise claim, it matters not how Defendants arrived at their  
13 decision to deny Plaintiff's application for a Kosher diet, only that they did in fact deny it  
14 and that the denial resulted in a substantial burden of Plaintiff's practice of religion. It was  
15 therefore Defendants' responsibility to show that their denial furthers a "compelling  
16 government interest" and does so by "the least restrictive means." *Greene*, 513 F.3d at  
17 988. They have made no such showing.

18         On the other hand, Defendants are correct that the Eleventh Amendment immunity  
19 bars damages claims under RLUIPA. The availability of money damages from state  
20 officials sued in their official capacity turns on whether the State has waived its Eleventh  
21 Amendment immunity from such suits or congress has abrogated that immunity under its  
22 power to enforce the Fourteenth Amendment. *Holley v. Cal. Dep't of Corr.*, 599 F.3d  
23 1108, 1112 (9th Cir. 2010). The Ninth Circuit has specifically found that California did  
24 not waive its Eleventh Amendment immunity against RLUIPA claims for damages under  
25 either RLUIPA or the Rehabilitation Act Amendments of 1986. *Id.* at 1111-14.  
26 Consequently, RLUIPA does not authorize money damages against state officials, whether  
27 sued in their official or individual capacities. *See Jones v. Williams*, 791 F.3d 1023, 1031  
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1 (9th Cir. 2015). Accordingly, to the extent that Plaintiff is seeking damages for violations  
2 of his rights under RLUIPA, such a claim for money damages must be dismissed as barred  
3 by the Eleventh Amendment.

4 Based on the evidence presented, the Court finds that Plaintiff has submitted  
5 sufficient evidence to show there remain disputed issues of material facts. *See Celotex*  
6 *Corp.*, 477 U.S. at 324. Accordingly, Defendants are not entitled to summary judgment on  
7 this claim. However, Plaintiff is barred by the Eleventh Amendment from obtaining  
8 money damages as a form of relief if he should prevail on this claim.

9 **E. Equal Protection Claim**

10 Defendants assert that Plaintiff's equal protection claim ultimately fails because  
11 there is no evidence that an inmate from any other religion was permitted a religious diet  
12 when his prior food purchases are inconsistent with that diet. Dkt. No. 16 at 17.

13 The Equal Protection Clause requires that an inmate who is an adherent of a  
14 minority religion be afforded a "reasonable opportunity of pursuing his faith comparable to  
15 the opportunity afforded fellow prisoners who adhere to conventional religious precepts,"  
16 *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (Buddhist prisoners must be given opportunity to  
17 pursue faith comparable to that given Christian prisoners), as long as the inmate's religious  
18 needs are balanced against the reasonable penological goals of the prison, *O'Lone v. Estate*  
19 *of Shabazz*, 482 U.S. 342, 349 (1987). *Allen v. Toombs*, 827 F.2d 563, 568-69 (9th Cir.  
20 1987). The court must consider whether "the difference between the defendants' treatment  
21 of [the inmate] and their treatment of [other] inmates is 'reasonably related to legitimate  
22 penological interests.'" *Shakur v. Schriro*, 514 F.3d 878, 891 (9th Cir. 2008) (citation  
23 omitted) (finding district court erroneously applied rational basis review to plaintiff's  
24 claim that defendants violated equal protection clause by providing only Jewish inmates  
25 with kosher meat diet and remanding claim so record could be more fully developed  
26 regarding defendants' asserted penological interests).

27 An inmate "'must set forth specific facts showing a genuine issue' as to whether he  
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1 was afforded a reasonable opportunity to pursue his faith as compared to prisoners of other  
2 faiths” and that “officials intentionally acted in a discriminatory manner.” *Freeman v.*  
3 *Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997), *abrogated on other grounds by Shakur*, 514  
4 F.3d at 884-85. *See, e.g., Hartman v. California Dep’t of Corrections*, 707 F.3d 1114,  
5 1124 (9th Cir. 2013) (affirming dismissal of equal protection claim based on denial of  
6 request for a paid Wiccan chaplain where pleadings suggested a reasoned and vetted denial  
7 – paid Wiccan chaplain not necessary because a volunteer Wiccan chaplain provides  
8 services at prison and staff chaplains are available to provide inmates with religious  
9 assistance – rather than discriminatory intent).

10 Defendants assert that there is no evidence that an inmate from any other religion is  
11 permitted a religious diet when his prior food purchases are inconsistent with that diet.  
12 Dkt. No. 16 at 17. In opposition, Plaintiff contends that the CDCR provides kosher diets to  
13 Jewish inmates while denying him access to the same diet. Dkt. No. 18 at 8. Plaintiff  
14 asserts that the kosher diet serves the same purpose for both Jewish and Rastafarian  
15 inmates, and yet he has not been permitted to receive a kosher diet. *Id.* Therefore,  
16 Plaintiff asserts, Defendants are treating him differently from similarly situated Jewish  
17 inmates. *Id.* In reply, Defendants assert there is no evidence that Plaintiff was denied a  
18 kosher diet because of his religious faith rather than the reasons set forth by the RRC. Dkt.  
19 No. 22 at 5. Defendants also assert that there is nothing preventing Plaintiff from  
20 reapplying for the kosher diet, and that the only thing preventing him from doing so is his  
21 own belief that doing so is futile. *Id.*; Dkt. No. 22-1.

22 Having reviewed the submitted briefs and documents in support and viewing the  
23 evidence in the light most favorable to Plaintiff, the Court finds that there remain disputed  
24 issues of material fact. *See Celotex Corp.*, 477 U.S. at 323. Plaintiff claims that Defendant  
25 Tamayo made a statement to him, indicating that only those of the Jewish faith were  
26 granted kosher diets. *See supra* at 5. Defendant Tamayo does not deny making this  
27 statement in her declaration. Dkt. No. 16-2. This silence on the part of Defendant  
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1 Tamayo must be construed in the light most favorable to Plaintiff: that Defendant Tamayo  
2 actually made the statement which is evidence of discriminatory treatment.

3 Based on the evidence presented, the Court finds there remain genuine issues of  
4 material facts with respect to Plaintiff's equal protection claim. *See Celotex Corp.*, 477  
5 U.S. at 323. Accordingly, Defendants are not entitled to summary judgment on this claim.

6 **F. Qualified Immunity**

7 Defendants assert in the alternative that they are entitled to qualified immunity  
8 which bars liability. Dkt. No. 16 at 21.

9 The defense of qualified immunity protects "government officials . . . from liability  
10 for civil damages insofar as their conduct does not violate clearly established statutory or  
11 constitutional rights of which a reasonable person would have known." *Harlow v.*  
12 *Fitzgerald*, 457 U.S. 800, 818 (1982). The rule of qualified immunity protects "all but the  
13 plainly incompetent or those who knowingly violate the law;" defendants can have a  
14 reasonable, but mistaken, belief about the facts or about what the law requires in any given  
15 situation. *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (quoting *Malley v. Briggs*, 475 U.S.  
16 335, 341 (1986)). "Therefore, regardless of whether the constitutional violation occurred,  
17 the [official] should prevail if the right asserted by the plaintiff was not 'clearly  
18 established' or the [official] could have reasonably believed that his particular conduct was  
19 lawful." *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991).

20 A court considering a claim of qualified immunity must determine whether the  
21 plaintiff has alleged the deprivation of an actual constitutional right and whether such right  
22 was clearly established such that it would be clear to a reasonable officer that his conduct  
23 was unlawful in the situation he confronted. *See Pearson v. Callahan*, 555 U.S. 223  
24 (2009) (overruling the sequence of the two-part test that required determination of a  
25 deprivation first and then whether such right was clearly established, as required by  
26 *Saucier*, 533 U.S. at 194); *Henry A.*, 678 F.3d at 1000 (qualified immunity analysis  
27 requiring (1) determining the contours of the clearly established right at the time of the  
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1 challenged conduct and (2) examining whether a reasonable official would have  
2 understood that the challenged conduct violated such right). The court may exercise its  
3 discretion in deciding which prong to address first, in light of the particular circumstances  
4 of each case. *See Pearson*, 555 U.S. at 236 (noting that while the *Saucier* sequence is  
5 often appropriate and beneficial, it is no longer mandatory). “[U]nder either prong, courts  
6 may not resolve genuine disputes of fact in favor of the party seeking summary judgment,”  
7 and must, as in other cases, view the evidence in the light most favorable to the non-  
8 movant. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014).

9 **1. Free Exercise Clause and RLUIPA Claims**

10 Viewing the evidence in the light most favorable to Plaintiff, the Court finds  
11 Defendants are entitled to qualified immunity on the Free Exercise Clause and RLUIPA  
12 claims. In evaluating Defendants’ conduct, the Court considers only the information  
13 before Defendants at the time they made their decision, i.e., Plaintiff’s application  
14 containing the interview answers as provided by the chaplain and Plaintiff’s prior food  
15 purchases. The information Plaintiff later provided in deposition, contesting the accuracy  
16 of the answers provided in the application, is not relevant because there is no allegation or  
17 evidence that Defendants were aware of the inaccuracies during the relevant period.

18 Assuming Defendants’ conduct violated Plaintiff’s rights under the first prong,  
19 Defendants have shown the absence of clearly established law by which a reasonable  
20 official would have understand that his conduct violates that right under the second prong.  
21 *See Romero*, 931 F.2d at 627. A right is clearly established if it were “sufficiently clear [at  
22 the time of the conduct at issue] that every reasonable official would have understood that  
23 what he is doing violates that right.” *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015).  
24 “The right must be settled law, meaning that it must be clearly established by controlling  
25 authority or a robust consensus of cases of persuasive authority.” *Tuuamalemalu v.*  
26 *Greene*, 946 F.3d 471, 477 (9th Cir. 2019). If the law did not put the officer on notice that  
27 his conduct would be clearly unlawful, summary judgment based on qualified immunity is  
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1 appropriate. *Saucier*, 533 U.S. at 202. The plaintiff bears the burden of proving the  
2 existence of a “clearly established” right at the time of the allegedly impermissible  
3 conduct. *Maraziti v. First Interstate Bank*, 953 F.2d 520, 523 (9th Cir. 1992).

4 Defendants assert that courts have consistently held that prison officials can  
5 evaluate evidence of food purchases that are inconsistent with a professed religious belief.  
6 Dkt. No. 16 at 22, citing *Curry v. California Dep’t of Corr.*, 2013 WL 75769, at \*7 (N.D.  
7 Cal. June 4, 2013) (evidence of plaintiff’s snack food consumption could be considered to  
8 evaluate the sincerity of his religious beliefs), *aff’d sub nom. Curry v. California Dep’t of*  
9 *Corr. & Rehab.*, 616 F.App’x 265 (9th Cir. 2015) (affirming grant of summary judgment  
10 on plaintiff’s RLUIPA and free exercise claim where defendants met their burden of  
11 showing denial of Kemenic food diet was the least restrictive means of furthering prison’s  
12 compelling interests and was reasonably related to those interests); *Lute v. Jonson*, 2012  
13 WL 913749, \*7 (D. Idaho 2012). Defendants also assert that prison officials can use that  
14 information to assist in evaluating the sincerity of an inmate’s religious beliefs, and that  
15 courts have consistently held that prison officials may do so before providing an inmate  
16 with a religious diet. Dkt. No. 16 at 23, citing *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13  
17 (2005) (“prison officials may appropriately question whether a prisoner’s religiosity,  
18 asserted as the basis for a requested accommodation, is authentic”) and *Resnick v. Adams*,  
19 348 F.3d 763, 771 n.8 (9th Cir. 2003) (quoting *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th  
20 Cir. 1987) (“It is appropriate for prison authorities to deny a special diet if an inmate is not  
21 sincere in his religious beliefs.”). The Court agrees that this body of cases indicate the  
22 absence of a clearly established right that Plaintiff’s prior food purchases may not be  
23 considered when evaluating a religious diet accommodation. Accordingly, Defendants’  
24 use of prior food purchases in denying Plaintiff’s application for a religious diet did not  
25 violate a clearly established right.

26 In opposition, Plaintiff requests the Court take judicial notice of four cases by which  
27 it appears he is contesting Defendants’ qualified immunity argument. Dkt. No. 18 at 20-

21. However, as Defendants assert in reply, Dkt. No. 22 at 5-6, these cases do not satisfy Plaintiff's burden of proving the existence of a clearly established right. *See Maraziti*, 953 F.2d at 523. Two of the cases, *Russell v. Wilkinson* and *Hodges v. Sharon*,<sup>8</sup> involve circumstances where an inmate was already granted kosher meals, but the privilege was later revoked because of evidence that the inmate was purchasing non-kosher food. *Id.* In the third case, *Caruso v. Zenon*, 2005 WL 5957978, (D, Colo. July 25, 2005), the district court determined that inmate-plaintiff's non-halal purchases did not establish an insincerity of belief. *Id.* at 6. Lastly, *Saenz v. Friedman*, Case No. 17-0046-SK-PR (N.D. Cal.), involves a matter that was settled and voluntarily dismissed with prejudice. *Id.* It cannot be said that these four cases constitute a "robust consensus of cases of persuasive authority" by which Defendants would have been on notice that their particular conduct was unlawful. *Tuuamalemalu*, 946 F.3d at 477. Accordingly, summary judgment based on qualified immunity is appropriate with respect to Plaintiff's claims under the Free Exercise Clause and RLUIPA. *Saucier*, 533 U.S. at 202

## 2. Equal Protection

Defendants are not entitled to qualified immunity on Plaintiff's equal protection claim because they fail to make any specific arguments in this regard. Dkt. No. 16 at 21-22. Rather, it is well established under the Equal Protection Clause that inmates who adhere to a minority religion be afforded a "reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts," *Cruz v. Beto*, 405 U.S. 319, 322 (1972), as long as the inmate's religious needs are balanced against the reasonable penological goals of the prison, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). *Allen v. Toombs*, 827 F.2d 563, 568-69 (9th Cir. 1987). Accordingly, it cannot be said that a reasonable official would have understood that it was lawful to discriminate between inmates of different religions in the

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<sup>8</sup> *Russell v. Wilkinson*, 79 F. App'x 175 (6th Cir. 2003); *Hodges v. Sharon*, No. 2016 WL 6542696, (E.D. Cal. Nov. 3, 2016). Dkt. No. 18 at 20-21; Dkt. No. 22 at 5-6.

1 absence of legitimate penological interests. As discussed above, there are disputed issues  
 2 as to whether Defendants did or did not act in a discriminatory manner. *See supra* at 25.  
 3 Accordingly, Defendants motion based on qualified immunity with respect to Plaintiff's  
 4 equal protection claim is DENIED.

### 5 **III. Referring Case to Settlement Proceedings**

6 The Court has established a Pro Se Prisoner Settlement Program under which  
 7 certain prisoner civil rights cases may be referred to a neutral Magistrate Judge for  
 8 settlement. In light of the existence of triable issues of fact as to whether Defendants  
 9 Tamayo and Atchley violated Plaintiff's rights under Equal Protection, the Court finds the  
 10 instant matter suitable for settlement proceedings. Accordingly, the instant action will be  
 11 referred to a neutral Magistrate Judge for mediation under the Pro Se Prisoner Settlement  
 12 Program.

### 14 **CONCLUSION**

15 For the reasons stated above, the Court orders as follows:

16 1. Defendants' motion for summary judgment is **GRANTED IN PART** and  
 17 **DENIED IN PART**. The motion is **GRANTED** with respect to the claims against  
 18 Defendant Voong for failure to exhaust administrative remedies and against Defendant  
 19 Friedman for lack of individual liability. *See supra* at 12, 15. Accordingly, the claims  
 20 against Defendants M. Voong and Y. Friedman are **DISMISSED**. Defendants Voong and  
 21 Friedman shall be terminated from this action. Furthermore, although the motion for  
 22 summary judgment based on the merits of Plaintiff's Free Exercise Clause and RLUIPA  
 23 claims is denied, it is **GRANTED** based on qualified immunity. However, the motion  
 24 based on the merits and on qualified immunity with respect to Plaintiff's Equal Protection  
 25 claim is **DENIED**.

26 2. The instant case is **REFERRED** to Judge Robert M. Illman pursuant to the  
 27 Pro Se Prisoner Settlement Program for settlement proceedings on the claims in this action,

United States District Court  
Northern District of California

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as described above. The proceedings shall take place **within ninety (90) days** of the filing date of this order. Judge Illman shall coordinate a time and date for a settlement conference with all interested parties or their representatives and, within ten (10) days after the conclusion of the settlement proceedings, file with the court a report regarding the prisoner settlement proceedings.

3. Other than the settlement proceedings ordered herein, and any matters Magistrate Judge Illman deems necessary to conduct such proceedings, this action is hereby **STAYED** until further order by the court following the resolution of the settlement proceedings.

4. The Clerk shall send a copy of this order to Magistrate Judge Illman in Eureka, California.

**IT IS SO ORDERED.**

**Dated: August 10, 2020**

  
BETH LABSON FREEMAN  
United States District Judge

Order Granting and Denying MSJ; Referring to PSP  
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