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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PATRICK SHIELDS,

Plaintiff,

v.

CHAPLAIN KHAN, et al.,

Defendant.

Case No.: 17-cv-2597-JLS-MDD

**REPORT AND
RECOMMENDATION GRANTING
IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO
DISMISS**

[ECF No. 12]

This Report and Recommendation is submitted to United States District Judge Janis L. Sammartino pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the Southern District of California.

For the reasons set forth herein, the Court **RECOMMENDS** Defendants' Motion to Dismiss be **GRANTED IN PART** and **DENIED IN PART**.

I. PROCEDURAL HISTORY

Plaintiff Patrick Shields ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis. (ECF Nos. 1, 5). On December 29, 2017, Plaintiff

1 filed a complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1). Plaintiff's
2 complaint sets forth claims against various staff at Richard J. Donovan
3 Correctional Facility ("Donovan") alleging that they allowed Plaintiff's name
4 to be removed from the list of those inmates celebrating Ramadan in violation
5 of the First and Fourteenth Amendments. (*Id.* at 2-4).

6 On October 9, 2018, Defendants moved to dismiss the Complaint. (ECF
7 No. 12). Defendants contend that Plaintiff's request for an injunction is moot
8 as he has been moved from Donovan and that allowing inmates to facilitate
9 religious services and remove Plaintiff from the Ramadan participant list did
10 not violate Plaintiff's civil rights. (*Id.* at 10-13). Additionally, Defendants
11 argue that Plaintiff's claims must also be dismissed as they are entitled to
12 qualified immunity. (*Id.* at 13).

13 A scheduling order was issued and Plaintiff was given until October 26,
14 2018, to file his opposition. (ECF No. 13). As of the date of this Report and
15 Recommendation, Plaintiff has not filed a response.

16 **II. FACTUAL BACKGROUND**

17 These facts, taken from the Complaint, should not be construed as
18 findings of fact by the Court. Chaplain Khan was hired to facilitate Islamic
19 services. (ECF No. 1 at 3). Defendants Paramo, Brown, and Garza—all
20 Donovan staff—allowed Defendant Khan to violate his contract by permitting
21 Defendant Khan's infrequent visits to Plaintiff's yard. Due to the
22 infrequency of Defendant Khan's visits, the regular Islamic services are
23 facilitated by fellow inmates. (*Id.*). Plaintiff claims that these inmate
24 facilitators have "lifestyles in conflict with Plaintiff's beliefs and Islamic
25 teachings." (*Id.*). As such, Plaintiff does not regularly participate in the
26 inmate-led services. (*Id.*).

27 Plaintiff signed up to participate in month-long fasting in observance of

1 Ramadan, however on the day the fast was set to begin, Plaintiff was told by
2 an inmate facilitator that he was “scratched off the list” due to his infrequent
3 participation. (*Id.*).

4 Plaintiff immediately wrote a Form 22 (inmate request for interview,
5 item, or service) to Chaplain Khan objecting to being removed from the
6 Ramadan list. (*Id.*). Chaplain Khan was also notified via email by Sergeant
7 Scharr. Plaintiff received no information or action on his Form 22 and was
8 unable to participate in Ramadan for the entirety of the month-long holiday
9 or attend the banquet celebrating the end of the fast. (*Id.*).

10 Plaintiff filed a grievance that was “granted” by Donovan staff. (*Id.*).
11 As a result of the grievance, staff indicated that “action would come.” (*Id.*).
12 Plaintiff claims, however, that services are still facilitated by inmates and
13 that Chaplain Khan never comes to Plaintiff’s yard to oversee services.

14 Plaintiff’s lawsuit requests an injunction preventing Defendants from
15 “allowing inmates to run, dictate, and control the Islamic services, lists, and
16 programs.” (*Id.* at 7). Plaintiff additionally requests damages in a sum to be
17 determined. (*Id.*).

18 III. LEGAL STANDARD

19 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency
20 of a claim. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “Under
21 Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and
22 plain statement of the claim showing that the pleader is entitled to relief.”
23 *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (internal quotations omitted).
24 The pleader must provide the Court with “more than an un-adorned, ‘the-
25 defendant-unlawfully-harmed-me’ accusation.” *Id.* at 678 (citing *Bell Atl.*
26 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Threadbare recitals of the
27 elements of a cause of action, supported by mere conclusory statements will

1 not suffice.” *Id.* “Although for the purposes of a motion to dismiss [a court]
2 must take all of the factual allegations in the complaint as true, [a court is]
3 not bound to accept as true a legal conclusion couched as a factual
4 allegation.” *Id.* (internal quotations omitted).

5 A pro se pleading is construed liberally on a defendant’s motion to
6 dismiss for failure to state a claim. *Thompson v. Davis*, 295 F.3d 890, 895
7 (9th Cir. 2002) (citing *Ortez v. Washington Cnty.*, 88 F.3d 804, 807 (9th Cir.
8 1996)). The pro se pleader must still set out facts in his complaint that bring
9 his claims “across the line from conceivable to plausible.” *Twombly*, 550 U.S.
10 at 570. A court “may not supply essential elements of the claim that were not
11 initially pled.” *Ivey v. Bd. Of Regents*, 673 F.2d 266, 268 (9th Cir. 1982).

12 A pro se litigant is entitled to notice of the deficiencies in the complaint
13 and an opportunity to amend, unless the complaint’s deficiencies cannot be
14 cured by amendment. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.
15 1987).

16 IV. DISCUSSION

17 First, the Court will consider whether Defendants’ request for judicial
18 notice in support of their motion to dismiss will be granted. Next, the Court
19 will determine whether Defendants’ Motion to Dismiss should be granted.

20 **A. Judicial Notice**

21 Defendants request the Court take judicial notice of the results of a
22 search conducted on the California Department of Corrections and
23 Rehabilitation (“CDCR”) online Inmate Locator showing that Plaintiff is
24 currently incarcerated at San Quentin State Prison pursuant to Federal Rule
25 of Evidence 201(b). (ECF No. 12-2).

26 In ruling on a motion to dismiss brought pursuant to Federal Rule of
27 Civil Procedure 12(b)(6), the Court may take judicial notice of “matters of

1 public record” pursuant to Federal Rule of Evidence 201. *Mack v. South Bay*
2 *Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Judicial notice is
3 properly taken of the official records of the CDCR. *Brown v. Valoff*, 422 F.3d
4 926, 931 n.7 (9th Cir. 2004). The Court may take judicial notice of
5 information displayed on government websites where neither party disputes
6 the accuracy of the information contained therein. *Daniels-Hall v. National*
7 *Educ. Ass’n*, 629 F.3d 992, 998-99 (9th Cir. 2010). Accordingly, this Court
8 takes judicial notice of Plaintiff’s current incarceration as it is a matter of
9 public record.

10 **B. Injunctive Relief**

11 Defendant argues that Plaintiff’s request for injunctive relief should be
12 dismissed as moot and without leave to amend as Plaintiff is no longer
13 housed at Donovan and did not present any evidence indicating an
14 expectation of being transferred back to Donovan. (ECF No 12-1 at 10).

15 A prisoner challenging the conditions of confinement fails to present a
16 viable claim for injunctive relief upon being transferred to a different
17 institution. *Johnson v. Moore*, 948 F.2d 517, 519 (9th Cir. 1991) (per curiam);
18 *Andrews v. Cervantes*, 493 F.3d 1047, 1053 n.5 (9th Cir. 2007). The
19 unavailability of injunctive relief extends to free exercise claims. *Epps v.*
20 *Grannis*, 606 F. App’x 329, 330 (9th Cir. 2015) (“The district court properly
21 dismissed as moot Epps’ RLUIPA claims concerning Calipatria State Prison’s
22 package policy and his request for a Kosher diet, because Epps was
23 transferred to another prison during the pendency of his action.”).

24 Here, the Court has taken judicial notice of public records indicating
25 that Plaintiff is currently housed at San Quentin State Prison. Further,
26 Plaintiff’s complaint does not indicate that expects to return to Donovan at
27 any point in the future.

1 As a result, the Court **RECOMMENDS** that Plaintiff's request for
2 injunctive relief be **DISMISSED** as moot but without prejudice.

3 **C. Free Exercise and Equal Protection Claims**

4 Defendants argue that Plaintiff's claims should be dismissed because
5 allowing inmates to facilitate religious services is not a civil rights violation.
6 (ECF No. 12-1 at 11). Additionally, Defendants argue that a cause of action
7 under 42 U.S.C. § 1983 cannot stand against a private party unless as part of
8 a conspiracy allegation. (*Id.* at 12).

9 The Free Exercise Clause of the First Amendment "requires
10 government respect for, and noninterference with ... religious beliefs and
11 practices" *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). Prisoners retain
12 the protections afforded by the First Amendment and do not forfeit all
13 constitutional protections by reason of their conviction and confinement in
14 prison. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). Nevertheless,
15 "[a]lthough prisoners enjoy First Amendment protection, their rights under
16 the Free Exercise Clause are limited by 'institutional objectives and by the
17 loss of freedom concomitant with incarceration.'" *Walker v. Beard*, 789 F.3d
18 1125, 1138 (9th Cir. 2015) (citation omitted). The protections of the Free
19 Exercise Clause may be implicated when prison officials substantially burden
20 the practice of an inmate's religion. *See Jones v. Williams*, 791 F.3d 1023,
21 1031 (9th Cir. 2015)

22 "A substantial burden ... place[s] more than an inconvenience on
23 religious exercise; it must have a tendency to coerce individuals into acting
24 contrary to their religious beliefs or exert substantial pressure on an
25 adherent to modify his behavior and to violate his beliefs." *Jones*, 791 F.3d at
26 1031-32 (citations omitted).

27 The Equal Protection clause of the Fourteenth Amendment "commands

1 that no State shall deny to any person within its jurisdiction the equal
2 protection of the laws, which is essentially a direction that all persons
3 similarly situated should be treated alike.” *City of Cleburne v. Cleburne*
4 *Living Ctr.*, 473 U.S. 439 (1985) (internal quotation omitted). Equal
5 protection applies to prisoners as well, “subject to restrictions and limitations
6 necessitated by legitimate penological interests.” *Davis v. Powell*, 901 F.
7 Supp. 2d 1196, 1219 (S.D. Cal. 2012) (quoting *Freeman v. Arpaio*, 125 F. 3d
8 732, 737 (9th Cir. 1997)).

9 Here, Defendants point to authority establishing that “prison officials
10 have no affirmative duty to provide clergy, and that when they are provided,
11 prisoners are not entitled to the clergy of their choice,” in an effort to affirm
12 the validity of inmate facilitators. (ECF No. 12-1 at 11). What Defendants do
13 not address, however, is that the challenged conduct here—more so than the
14 use of inmate facilitators—is that Defendant was removed from the Ramadan
15 celebrant list. Fasting during Ramadan is one of the five Pillars of the
16 Islamic faith. This is the exercise of religion that Plaintiff alleges he was
17 denied, and ultimately the basis for his claims. Additionally, Plaintiff’s Form
18 22 request went unanswered for the entirety of the month-long celebration.
19 While it may be true that Plaintiff does not have a constitutional right to the
20 clergy of his choice, Plaintiff does have the constitutional right to participate
21 in religious holidays and on this Defendants’ Motion to Dismiss is silent.

22 Defendants’ contention that it was not a civil rights violation to remove
23 Plaintiff from the Ramadan list as it was done by a private party also fails.
24 Plaintiff did not name the inmate facilitator(s) in his lawsuit. He is suing the
25 individuals to whom the inmate facilitators are ultimately responsible and
26 who should have responded to Plaintiff’s Form 22 in time for Plaintiff to
27 participate in Ramadan. While an inmate removed Plaintiff from the

1 Ramadan list, ultimately responsibility remains with Chaplain Khan and
2 prison staff, whose actions are not discussed in the Motion to Dismiss.

3 Further, as Plaintiff signed up to participate in fasting, it would appear
4 that he was at least somewhat tolerant of inmate facilitation, otherwise he
5 would not have signed up in the first place. Plaintiff's Complaint alleges that
6 he was treated differently from other similarly situated prisoners, that he
7 didn't meet the inmate facilitator's standards to participate in Ramadan, and
8 was therefore excluded. Defendants' do not argue that there was a
9 constitutionally valid basis for that exclusion under the Equal Protection
10 clause.

11 Therefore, the Court **RECOMMENDS** that the Motion to Dismiss
12 Plaintiff's Free Exercise and Equal Protection claims be **DENIED**.

13 **D. Qualified Immunity**

14 Defendants argue that "even if the Court finds that Defendants violated
15 a constitutional right, they are still entitled to qualified immunity" because
16 CDCR allows for inmates to serve as religious facilitators (ECF No. 12-1 at
17 13-14).

18 "Qualified immunity attaches when an official's conduct 'does not
19 violate clearly established statutory or constitutional rights of which a
20 reasonable person would have known.'" *White v. Pauly*, 137 S.Ct. 548, 551
21 (2017) (quoting *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015)). When
22 considering whether an officer is entitled to qualified immunity, the Court
23 considers "(1) whether there has been a violation of a constitutional right;
24 and (2) whether that right was clearly established at the time of the officer's
25 alleged misconduct." *S.B. v. County of San Diego*, 864 F.3d 1010, 1013 (9th
26 Cir. 2017). A plaintiff must prove both topics of inquiry to establish that
27 officials are not entitled to qualified immunity. *Marsh v. County of San*

1 *Diego*, 680 F.3d 1148, 1152 (9th Cir. 2012).

2 A district court may address these questions in the order most
3 appropriate to “the circumstances of the particular case at hand.” *Pearson v.*
4 *Callahan*, 555 U.S. 223, 236, 242 (2009). Thus, if a court determines that
5 Plaintiff’s allegations do not support a statutory or constitutional violation,
6 “there is no necessity for further inquiries concerning qualified immunity.”
7 *Saucier v. Katz*, 533 U.S. 194, 201 (2001). However, in the Ninth Circuit,
8 “[w]hen ... defendants assert qualified immunity in a motion to dismiss under
9 Rule 12(b)(6), dismissal is not appropriate unless [the Court] can determine,
10 based on the complaint itself, that qualified immunity applies.” *O’Brien v.*
11 *Welty*, 818 F.3d 920, 936 (9th Cir. 2016) (internal quotation omitted).
12 “[T]he clearly established law must be ‘particularized’ to the facts of the
13 case.” *White*, 137 S.Ct. at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635,
14 640 (1987)). Although the court “does not require a case directly on point for
15 a right to be clearly established, existing precedent must have placed the
16 statutory or constitutional question beyond debate.” *White*, 137 S.Ct. at 551
17 (internal quotation omitted).

18 Here, as stated above, the actual challenged conduct was not the use of
19 inmate facilitators for Islamic services, but rather that Plaintiff was
20 prevented from participating in a monthlong fast in accordance with his
21 Islamic faith. Defendants do not address this challenged conduct, its
22 constitutionality, or provide a clearly established basis upon which
23 Defendants may have relied. As such the Court **RECOMMENDS** that they
24 are not entitled to qualified immunity.

25 V. CONCLUSION

26 For the reasons set forth herein, it is **RECOMMENDED** that:

27 1) Defendants’ Motion be **GRANTED IN PART** and Plaintiff’s request

1 for injunctive relief be **DISMISSED**;

2 2) Defendants' Motion be **DENIED** as to Plaintiff's free exercise and
3 equal protection claims and Defendants' claim of qualified immunity.

4 3) While Plaintiff has not updated his mailing address of record, in the
5 interests of justice the Clerk is **ORDERED** to mail a copy of this Report
6 and Recommendation to Plaintiff's address as judicially noticed:

7 Patrick Shields

8 CDCR Number AY3237

9 San Quentin State Prison

10 San Quentin, California 94974

11 This Report and Recommendation will be submitted to the United
12 States District Judge assigned to this case, pursuant to the provisions of 28
13 U.S.C. § 636(b)(1). Any party may file written objections with the court and
14 serve a copy on all parties by **February 27, 2018**. The document shall be
15 captioned "Objections to Report and Recommendation." Any reply to the
16 objections shall be served and filed by **March 6, 2019**.

17 The parties are advised that failure to file objections within the
18 specified time may waive the right to raise those objections on appeal of the
19 Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

20 **IT IS SO ORDERED.**

21 Dated: February 13, 2019

22 

23 Hon. Mitchell D. Dembin
24 United States Magistrate Judge