

APPENDIX - A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 17 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ANTHONY JAMES MERRICK,

Plaintiff-Appellant,

v.

CHARLES L. RYAN, Warden; MICHAEL
LINDERMAN,

Defendants-Appellees.

No. 17-16053

D.C. No. 2:15-cv-00820-SPL

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

Submitted April 11, 2018**

Before: SILVERMAN, PAEZ, and OWENS, Circuit Judges.

Arizona state prisoner Anthony James Merrick appeals pro se from the district court's summary judgment in his action under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Merrick's request for oral argument, set forth in his briefs, is denied.

jurisdiction under 28 U.S.C. § 1291. We review de novo, *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011), and we affirm.

The district court properly granted summary judgment on Merrick's free exercise and RLUIPA claims because Merrick failed to raise a genuine dispute of material fact as to whether his proffered religious beliefs were sincerely held. *See Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (inquiry into sincerity of religious belief permitted under RLUIPA); *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) (a claim under the free exercise clause of the First Amendment requires a sincerely held religious belief).

The district court properly granted summary judgment on Merrick's Fourteenth Amendment equal protection claim because Merrick failed to raise a genuine dispute of material fact as to whether Merrick was intentionally denied a reasonable opportunity to pursue his faith as compared to prisoners of other faiths. *See Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997) (under § 1983, plaintiff must show that officials intentionally acted in a discriminatory manner to establish an equal protection claim), *abrogated on other grounds as recognized by Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008).

The district court properly granted summary judgment on Merrick's Establishment Clause claim because Merrick failed to raise a genuine dispute of

material fact as to whether defendants' policies had the primary or principal effect of advancing religion, inhibiting religion, or fostering excessive government entanglement with religion. *See Inouye v. Kemna*, 504 F.3d 705, 712 n. 7 (9th Cir. 2007) (setting forth test for Establishment Clause violation).

The district court did not abuse its discretion by denying Merrick's motion for appointment of counsel because Merrick did not demonstrate exceptional circumstances. *See Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (setting forth standard of review and requirement of "exceptional circumstances" for appointment of counsel).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

APPENDIX - B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 28 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ANTHONY JAMES MERRICK,

Plaintiff-Appellant,

v.

CHARLES L. RYAN, Warden; MICHAEL
LINDERMAN,

Defendants-Appellees.

No. 17-16053

D.C. No. 2:15-cv-00820-SPL
District of Arizona, Phoenix

ORDER

Before: SILVERMAN, PAEZ, and OWENS, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Merrick's petition for rehearing en banc (Docket Entry No. 22) is denied.

No further filings will be entertained in this closed case.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Anthony James Merrick,
Plaintiff,

v.

Charles L. Ryan, et al.,
Defendants.

No. CV-15-00820-PHX-SPL (BSB)

ORDER

Plaintiff Anthony James Merrick, who is currently confined in the Arizona State Prison Complex (ASPC)-Yuma in San Luis, Arizona, brought this civil rights case pursuant to 42 U.S.C. § 1983. Defendants Ryan and Linderman move for summary judgment. (Doc. 54.) Plaintiff was informed of his rights and obligations to respond pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc) (Doc. 56), and he opposes the Motion. (Doc. 57.)

The Court will grant the Motion for Summary Judgment.

I. Background

In his five-count Complaint, Plaintiff asserts a number of federal and state law claims against Arizona Department of Corrections (ADC) Director Charles Ryan, ADC Administrator of Pastoral Activities Michael Linderman, and Senior Chaplain at ASPC-Yuma, Marian Kidwell. (Doc. 1) Plaintiff claims that these Defendants denied him requested accommodations to practice his religious beliefs, which he alleges require numerous practices and materials, including the following: no shaving or cutting of facial

1 hair; a daily tobacco burning/smoking ceremony for spiritual enlightenment; use of a
2 blessed, blue, black, white, or grey blanket for prayer and protection ceremonies; blue,
3 black, white, or grey head coverings of wool or cotton; use of a sacred book or journal to
4 chronicle Plaintiff's spiritual instruction, wisdom, confessions, and knowledge; use of
5 sacred books and sagas of all faiths; education in higher levels of learning, including Life
6 Skills, vocation, and college courses; participation in elder gatherings that last two to
7 three hours once per week; participation in non-elder gatherings of which there are eight
8 ceremonies: earth, water, air, moon, fire, nature, and circle of power; a diet of "clean
9 foods" prepared by "the mother, wife, sister, or other faith member"; "family relations,"
10 including phone calls, visits, and mail; and a "vow of poverty" that involves sending all
11 the "fruits of his labor," i.e. money, to his faith association. (*Id.*)

12 On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff
13 stated claims under the Religious Land Use and Institutionalized Person's Act (RLUIPA),
14 the Arizona Free Exercise of Religion Act (FERA), the Fourteenth Amendment Due
15 Process and Equal Protection clauses, and the First Amendment Free Exercise and
16 Establishment Clauses in Counts One through Five against Ryan and Linderman and
17 directed them to answer these claims. (Doc. 11.) The Court dismissed Defendant
18 Kidwell. (*Id.*)

19 **II. Summary Judgment Standard**

20 A court must grant summary judgment "if the movant shows that there is no
21 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
22 of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23
23 (1986). The movant bears the initial responsibility of presenting the basis for its motion
24 and identifying those portions of the record, together with affidavits, if any, that it
25 believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at
26 323.

27 If the movant fails to carry its initial burden of production, the nonmovant need
28 not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d

1 1099, 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the
2 burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that
3 the fact in contention is material, i.e., a fact that might affect the outcome of the suit
4 under the governing law, and that the dispute is genuine, i.e., the evidence is such that a
5 reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*,
6 477 U.S. 242, 248, 250 (1986); see *Triton Energy Corp. v. Square D. Co.*, 68 F.3d
7 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact
8 conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-
9 89 (1968); however, it must "come forward with specific facts showing that there is a
10 genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475
11 U.S. 574, 587 (1986) (internal citation omitted); see Fed. R. Civ. P. 56(c)(1).

12 At summary judgment, the judge's function is not to weigh the evidence and
13 determine the truth but to determine whether there is a genuine issue for trial. *Anderson*,
14 477 U.S. at 249. In its analysis, the court must believe the nonmovant's evidence and
15 draw all inferences in the nonmovant's favor. *Id.* at 255. The court need consider only
16 the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P.
17 56(c)(3).

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1 **III. Relevant Facts¹**

2 Except where otherwise noted, the following facts are undisputed:

3 **A. Plaintiff's Prior Incarceration (1994) and Religious Claims**

4 Plaintiff was incarcerated by the ADC in 1994, at which time he identified his
5 religious preference as the "Freedom Church of Revelation." (Doc. 55, Defs.' Statement
6 of Facts ¶ 2; Doc. 55-1, Ex. H., Pl. Dep. at 8:24-9:2 (Doc. 55-1 at 84-85).)² During this
7 incarceration, Plaintiff, who then went by the name of Paul Luckette, filed an action in
8 this Court against a number of ADC employees, including Defendant Linderman, for
9 allegedly violating his religious freedoms. (Doc. 55 ¶¶ 19, 75.) In that action, the Court
10 granted in part Plaintiff's Motion for a Preliminary Injunction as to Plaintiff's requests to
11 have a Kosher diet, facial hair, and a specific-colored head covering, but he ultimately
12 ruled against Plaintiff on the merits of his claims, finding that Plaintiff's alleged church
13 was a "sham." (*Id.* ¶ 20; Doc. 55-1, Ex. A, *Luckette v. Lewis*, 883 F.Supp. 471, 483 (D.
14 Ariz. 1995) (Doc. 55-1 at 11); Doc. 55-1, Ex. C, Jul. 2, 2001 9th Cir. Mem. (unpublished)
15 (Doc. 55-1 at 18).)

16
17 ¹ Defendants' 177 factual assertions skip around between topics, are poorly
18 organized, and often provide the same or similar facts in multiple places, making it
19 difficult and time-consuming for the Court to reproduce a coherent version of the relevant
20 facts. Defendants also cite to the wrong letters when referring to some of their attached
21 exhibits. For example they point to Exhibit M, which is a December 27, 2012 Inmate
22 Notification, as a "Public AIMS ("AIMS") record," and they point to Exhibit L, which is
23 Linderman's November 14, 2013 Memorandum to Legal Services, as Plaintiff's
24 Deposition, causing the Court to have to spend unnecessary time searching through
25 Defendants' attachments for the intended exhibits. (*See* Doc. 55 ¶¶ 1, 2, *passim*.)
26 Defendants are reminded of their obligation on summary judgment to cite to "particular
27 parts of the materials in the record." Fed. R. Civ. P. 56(c)(1). The Court is "not required
28 to comb the record" to find supporting evidence. *Carmen v. S.F. Unified Sch. Dist.*, 237
F.3d 1026, 1029 (9th Cir. 2001).

² Unless otherwise specified, all of the Court's citations refer to the automatically
generated page numbers of the Court's electronic filing system (CM/ECF), which can be
found at the top of each filed page.

1 The Ninth Circuit reversed this ruling on the ground that the Court was still
2 required to determine whether Plaintiff's proffered beliefs in the "sham" church were
3 sincerely held, and it remanded for the Court to make this "essential determination."
4 (Doc. 55-1 at 18.) On remand, the Court made additional findings of fact that Plaintiff's
5 professed beliefs in the "tenets" of his "sham" church were not sincerely held and entered
6 judgment against Plaintiff. (See Doc. 55-1, Ex. D, Jan. 25, 2002 Dist. Ct. Order at 1-2,
7 *Luckette v. Lewis*, No. CIV-94-1556-PCT-RGS (Doc. 55-1 at 21-22).) The Ninth Circuit
8 summarily affirmed, finding that Plaintiff's questions on appeal were "so insubstantial as
9 not to require further argument." (Doc. 55-1, Ex. E, July 29, 2002 9th Cir. Order
10 (Doc. 55-1 at 26).) Plaintiff was released from this term of incarceration in 2006.
11 (Doc. 55 ¶ 3.)

12 **B. Plaintiff's Re-Incarceration (2011)**

13 Plaintiff was re-incarcerated in July 2011 and is currently serving a 47-year
14 sentence on charges including fraudulent schemes and artifices, theft, and theft and fraud
15 involving credit cards. (*Id.* ¶¶ 4-5.)

16 At or around the time of his re-incarceration, Plaintiff became affiliated with the
17 Fundamental American Christian Temple Church (F.A.C.T.). (*Id.* ¶¶ 7-8; Doc. 55-1, Ex.
18 H, Pl. Dep. at 7:4-14 (Doc. 55-1 at 84-85).) At the time of his intake into the ADC, an
19 inmate asked Plaintiff his religious preference for purposes of completing the form on
20 which inmates are required to designate their religious preference. (*Id.* ¶ 10; Pl. Dep. at
21 9:7-16 (Doc. 55-1 at 85).) Plaintiff testifies in his deposition that he told the inmate it
22 was the "Fundamental American Christian Temple," or F.A.C.T., but the inmate wrote
23 "Christian" on the form, although Plaintiff also states he did not actually see the form or
24 what the inmate wrote, and, in his declaration, he states that the inmate wrote "other."
25 (*Id.*, Doc. 58-1, Ex. 1, Pl. Decl. ¶ 45 (Doc. 58-1 at 7).) According to Plaintiff, the
26 F.A.C.T. is similar in some ways to his former Freedom Church of Revelation in that
27 both practice vows of poverty, growing facial hair, and wearing prescribed head
28

1 coverings, and they both have religious diets, but the diets are not the same. (Doc. 55 ¶ 9;
2 Pl. Dep. at 50:13-17 (Doc. 55-1 at 111).)

3 **C. ADC Policies Regarding Religious Activities**

4 Inmates' opportunities to practice their chosen religious beliefs at ADC facilities
5 are governed by Department Order (DO) 904. (Doc. 55 ¶ 67.) The ADC currently
6 houses approximately 40,000 inmates with approximately 40 different declared religious
7 preferences. (Doc. 55-1, Ex. G., Linderman Decl. ¶ 7 (Doc. 55-1 at 41).) Paid chaplains
8 are stationed at ADC facilities to serve the inmates' pastoral needs, administer the
9 program, and conduct religious services. (*Id.* ¶¶ 7, 10.) The ADC also permits religious
10 volunteers to visit inmates and to lead religious gatherings. (*Id.* ¶ 10.) Religious
11 organizations currently sponsor services at every ADC prison, and there are about 1,000
12 volunteers working in ADC prisons. (*Id.* ¶ 11.) The ADC does not, itself, "implement"
13 any religions; rather, the inmates implement their own religions and may do so with the
14 help of volunteers or sponsoring organizations. (*Id.* ¶ 19.)³

15 Any inmate may practice his or her religion at will if the practice does not conflict
16 with prison operations. (Doc. 55 ¶ 84.) The ADC only seeks to verify an inmate's
17 religious beliefs if the inmate requests special accommodations, such as a special diet.
18 (*Id.* ¶ 80.) Such requests must be vetted before the inmate receives the requested
19 accommodation. (*Id.* ¶ 81.)⁴ Additionally, under D.O. 904, the inmate must first
20 designate a religious preference before being considered for a religious accommodation.
21 (*Id.* ¶ 87.)

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23
24 ³ Plaintiff disputes this to the extent that he claims he was not able to implement a
25 non-mainstream religion; therefore, he claims, "[The ADC's] unwritten policy
26 implements mainstream faiths." (Pl. Decl. ¶ 148 (Doc. 58-1 at 22).)

27 ⁴ Plaintiff disputes that inmates belonging to mainstream religions are required to
28 verify their beliefs to obtain accommodations, but he points to no evidence to support that
adherents of mainstream faiths are exempt from vetting. (*See* Pl. Decl. ¶ 150 (Doc. 58-1
at 22).)

1 According to Linderman, manipulation of the system to fraudulently gain
2 privileges on the pretense of religious beliefs is contrary to correctional goals and can
3 waste limited prison resources. (Linderman Decl. ¶ 25 (Doc. 55-1 at 43).) For this
4 reason, the ADC implements procedures to minimize the use of religious designations for
5 reasons other than sincere religious practices. (*Id.*) For example, if an inmate changes
6 his religious designation, he may be required to provide documentation to support the
7 change to a newly-declared religion. (*Id.*) Or, if an inmate's request for an
8 accommodation is seemingly inconsistent with his practice, additional investigation may
9 be required to determine the validity of the inmate's request. (*Id.*)

10 Whatever accommodation an inmate seeks must coincide with his declared
11 religious preference. (Doc. 55 ¶ 88.) If the chaplains have no information about an
12 inmate's claimed religion, the inmate must provide information to show that it exists and
13 an explanation of its tenets and practices. (*Id.* ¶ 94.) If the inmate claims that his
14 requests are based only on personal beliefs that cannot be independently verified, he is
15 asked to articulate those beliefs and how his requests are tied to them. (*Id.* ¶ 95.)⁵ If, on
16 the other hand, the inmate claims that certain accommodations are required by his
17 "church" and that this can be confirmed, he is asked to provide a source for confirmation.
18 (*Id.* ¶ 98.)

19 **D. Plaintiff's Requests for Religious Accommodations**

20 After his re-incarceration in 2011, Plaintiff was initially housed at a transitional
21 prison in Phoenix, but he was soon transferred to ASPC-Florence, then to ASPC-Yuma.
22 (Doc. 55 ¶ 38.) At each of these locations, Plaintiff requested some or all of the
23 accommodations at issue in this action. (*Id.* ¶ 100.)

24 On December 5, 2011, Plaintiff filed an inmate letter requesting a religious diet,
25 blanket, head coverings, tobacco, and a shaving waiver on the basis of his membership in
26 the F.A.C.T., for which he gave an address to a residential home at 324 N. 10th Pl. in
27 _____

28 ⁵ Plaintiff disputes this evidence on the ground that this was not done in his case.
(*See* Doc. 58 ¶ 95.)

1 Enid, Oklahoma, that matched the address of Plaintiff's mother, as listed in his prison
2 file. (*Id.* ¶¶ 101, 102.) On December 9, 2011, Plaintiff filed another inmate letter, in
3 which he made similar requests and additionally asked for "a kosher (non-Jewish meal)
4 that does include meat and pork." (*Id.* ¶ 103.) He also requested items for which the
5 ADC requires no special accommodations, including the orange beanies Plaintiff had
6 seen other inmates wearing, which he said were not the right color, per his religion, but
7 were wool and would work, and to be able to smoke outside. (*Id.* ¶¶ 104-105.) Chaplain
8 Henderson responded to both of these letters, stating, "[y]ou have made several claims[,]
9 but you have not substantiated any of them. I am not familiar with the church
10 (Fundamental American Christian Temple) you are claiming as your church. Provide
11 Chaplaincy with more information regarding your church." (*Id.* ¶ 106.) He also
12 requested that Plaintiff provide more information about his requirements for a special
13 diet, blanket, head covering, shaving waiver, and tobacco ceremony, to which Plaintiff
14 filed a new inmate letter listing and describing 12 requested accommodations, largely
15 matching those described in the instant Complaint. (*Id.* ¶¶ 106, 107; Doc. 55-2 at 42.)

16 In a January 9, 2012 inmate letter response, Chaplain Miser noted that the
17 F.A.C.T., which he said had the appearance of being a local church, was not listed as
18 Plaintiff's religion of record, and he requested more information about it, including
19 contact information for Plaintiff's religious leaders. (*Id.* ¶ 108.) Plaintiff responded by
20 reiterating his requests, and he provided an address for his church in Tonopah, Arizona,
21 which, like the one in Oklahoma, also turned out to be a residential address. (*Id.* ¶¶ 109,
22 110.)

23 Plaintiff again wrote Miser on January 30, 2012, stating that his religion required
24 daily tobacco smoking ceremonies, that he understood could only be held outside, and for
25 which he was willing to buy the tobacco at his own expense, if permitted. (*Id.* ¶ 111.)
26 He again listed the Tonopah address for the F.A.C.T. and requested that the church be
27 allowed to send him religious items, including a prayer blanket, a blank notebook, or
28 "remembrance book," and writings from past religious leaders, or "elder scrolls." (*Id.*

1 ¶¶ 111, 113.) Chaplain Miser again responded by asking for clarification to be able to
2 address Plaintiff's religious needs. (*Id.* ¶ 114.) He explained that he needed to verify
3 Plaintiff's religious preference, but he could find no information about the F.A.C.T., and
4 he needed Plaintiff to provide "verifiable information from a credible source" before he
5 could process Plaintiff's requests. (*Id.*)

6 Over the ensuing months, Plaintiff continued to file numerous inmate letters and
7 formal grievances, in which he claimed that his faith was personal and objected to being
8 asked to give third-party verification of his beliefs, and prison officials repeatedly
9 responded that they could not resolve his requests for religious accommodations until he
10 provided the information requested of him. (*See* Doc. 55-2 at 49-65.)

11 On June 15, 2012, Plaintiff appealed this issue to the Warden, and the Warden
12 denied his appeal. (*Id.* at 65-66.) In his response, the Warden stated that Plaintiff's
13 religious preference from his previous incarceration was the Freedom Revelation Church,
14 and Plaintiff must first change his religious preference. (*Id.* at 65.) He also stated that
15 "due to the inability of ADC to verify the authenticity of the Fundamental American
16 Christian Temple, you will be required to provide verifiable documentation from a
17 credible source that will clarify your faith, its practices, and the need for the items . . .
18 you requested, as well as the contact information for your religious leaders that the
19 Chaplaincy has requested of you numerous times." (*Id.*)

20 At the end of July or beginning of August, 2012, Linderman received a
21 handwritten letter that had been sent to Plaintiff on lined paper with the return address
22 "Fundamental American Christian Temple, Att.: J.C. Carter, 5902 W. Royal Palm Rd,
23 Suite 17, Glendale, Arizona 85302." (Doc. 55 ¶ 126; Doc 55-2, Ex. K (Doc. 55-2 at 11-
24 17).) The writer stated that her name was "J.C. Carter" (later identified by Plaintiff as
25 Jenny Carter) and that she was a representative of the F.A.C.T. and was Plaintiff's "elder
26 and clergy." (Doc. 55-2 at 11.) She also stated that Plaintiff was a member of the
27 F.A.C.T. and was required to practice its articles of faith, which she identified in
28 subsequent pages. (*Id.* at 11, 13-17.) She went on to say that she would correspond with

1 the prison chaplain regarding the education courses Plaintiff was required to take to
2 ensure he was able to receive course materials; that the F.A.C.T. could, with approval,
3 supply Plaintiff required foods for feasts and festivals through the ADC's vendor; and
4 that the F.A.C.T. currently had no elders who could go to Yuma to lead gathering
5 ceremonies, but they expected this to change in the next few months, at which point she
6 would contact the chaplaincy to work out arrangements. (*Id.* at 12.)

7 In his regular dealings with representatives of churches and parachurch
8 organizations, Linderman was not accustomed to seeing handwritten correspondence
9 from church leaders on lined paper without an official letterhead. (Linderman Decl.
10 ¶¶ 68-69 (Doc. 55-1 at 51).) Linderman drove to the address listed on the letter to
11 investigate and found it to be to a residential apartment complex. (*Id.* ¶ 69.) For these
12 reasons, and because this was the third time Plaintiff had provided a different residential
13 address for his professed church, Linderman did not consider the letter to be proof of the
14 legitimacy of Plaintiff's religious claims, and he concluded that Plaintiff was repeating
15 what he had previously tried to do in *Luckette v. Lewis*, using a different church name.
16 (*Id.* ¶¶ 70-71.) The chaplaincy office never received any further contact from anyone
17 associated with the F.A.C.T. saying it had enlisted clergy volunteers who could come to
18 any ADC prisons. (*Id.* ¶ 74 (Doc. 55-1 at 52).)

19 Plaintiff continued to pursue his religious requests through the ADC grievance
20 process, and again appealed to the Warden on May 1, 2013, complaining that he was
21 being injured daily by the inability to practice his religious beliefs and that the practices
22 he requested were available to other faiths. (Doc. 55-2 at 71.) The Warden denied
23 Plaintiff's appeal, noting that Plaintiff had previously created his own "church" as a way
24 to seek the same accommodations he was now requesting, and, since it appeared he was
25 attempting to do so again, "it would be imprudent to grant [his] request without some
26 form of legitimacy verification." (*Id.* at 76.)

27 Sometime prior to November 20, 2013, Plaintiff sued Linderman and other ADC
28 officials in the Maricopa County Superior Court for their alleged denials of his religious

1 rights, and the defendants removed that action to federal court. (Doc. 55 ¶ 56; *see*
2 *Merrick v. Ryan*, No. 13-CV-02386-RCB-BSB, Doc. 1.) Plaintiff filed motions to amend
3 and remand—to which the defendants objected—in which he sought to drop all federal
4 claims and have the Court remand the action back to the state court. (*Merrick v. Ryan*,
5 Docs. 4, 5, 8, 9.) On April 22, 2014, the Court granted Plaintiff's motions and remanded
6 the action. (*Id.*, Doc. 12.) On August 7, 2014, the Maricopa County Superior Court
7 dismissed Plaintiff's state law claims as barred by the statute of limitations and by
8 Plaintiff's failure to timely file a notice of claim, as required under Arizona law.
9 (Doc. 55-2, Ex. O, *Merrick v. Ryan*, No. CV 2013-013507 (Doc. 55-2 at 90-91).)
10 Plaintiff additionally filed at least two other lawsuits containing religious claims prior to
11 filing this action, in which his religious claims were either dismissed on screening, or the
12 actions were also remanded, under similar circumstances, to the state court.⁶

13 **E. Defendants' Actions at Issue in the Instant Complaint**

14 The allegations in the instant Complaint concern Defendants Ryan's and
15 Linderman's (collectively "Defendants") failures to grant Plaintiff's requests for religious
16 accommodations, beginning with an inmate letter he submitted on August 17, 2014.
17 (Doc. 1 at 5.)

18 In the August 17, 2014 inmate letter, Plaintiff stated he would like to practice his
19 sincere religious beliefs that he had held for several years. (Doc. 55 ¶ 57; Doc. 55-2 at
20 80.) Plaintiff identified eleven practices: (1) prayer blanket, (2) tobacco ceremonies,
21 (3) no shaving, (4) head coverings, (5) remembrance book, (6) sacred religious books and
22 sagas of all faiths, (7) elder and feast and festival gatherings, (8) feast and festivals,
23 (9) education, (10) vow of poverty, and (11) family relations. (Doc. 55-2 at 80.)⁷ Other

24
25 ⁶ *See Merrick v. Inmate Legal Services*, No. 13-CV-01094-SPL-BSB (religious
26 claims dismissed for failure to state a claim); *Merrick v. Arpaio*, No. 14-CV-01033-RCB-
27 BSB (action remanded to state court following Plaintiff's request to drop federal claims).

28 ⁷ In his Complaint, Plaintiff identifies 12 practices, including the use of "a personal
sacred book/journal" to chronicle his religious thoughts and confessions. (Doc. 1 at 7 ¶
29.) There is no evidence, however, that he requested any accommodations from

1 than to list these practices in conjunction with each of their religious names, Plaintiff did
2 not specify what accommodations he was requesting from prison staff. (*Id.*) He checked,
3 however, that he had previously discussed his issues with the Senior Chaplain and with
4 Linderman, but he needed "to ask again." (*Id.*) He also listed an address of 1602 East
5 Park, in Enid, Oklahoma "for verification of beliefs and practices." (*Id.*) Linderman
6 responded that Plaintiff had provided an address for the F.A.C.T. but no further details; in
7 a previous inmate letter, Plaintiff had indicated that the same organization was in the
8 Phoenix area; Plaintiff had been advised at that time to have a representative of the
9 F.A.C.T. send information to the chaplain's office; and no response or information was
10 ever received. (*Id.* at 81.)

11 On October 9, 2014, Plaintiff submitted an inmate informal complaint resolution
12 to Correctional Officer (CO) III Perez in which he reiterated the same 11 requests he had
13 made in his inmate letter and stated that he "did not ask for anything other than approval
14 to practice[his beliefs,] as [he is] not asking the state to supply materials." (Doc. 55-2 at
15 82.) He complained that he was experiencing daily mental and physical injury, including
16 neck and spine pain and immobility because he is "not allowed to practice [his] beliefs."
17 (*Id.*) He also stated that Linderman had responded to his inmate letter, stating that
18 Plaintiff would have to have someone from the F.A.C.T. contact him before he could
19 consider his requests. (*Id.*) Plaintiff objected that the law does not require him to have a
20 third person verify his practices. (*Id.*) In response, CO III Perez informed Plaintiff that
21 he would need to write an inmate letter or meet with Chaplain Kidwell about the proper
22 procedures for pursuing his requests. (*Id.* at 83.) Perez further stated that he had
23 forwarded a copy of Plaintiff's complaint to Chaplain Kidwell. (*Id.*)

24 On October 22, 2014, Plaintiff filed an inmate grievance with the Deputy Warden
25 in which he complained that his issue remained unresolved and he continued to suffer
26 injuries and was at times bedridden due to his inability to practice his religious beliefs.

27
28 Defendants with respect to keeping a religious journal during the relevant time period of
the current action.

1 (*Id.* at 84.) The Deputy Warden's response to this grievance stated that Chaplain Kidwell
2 had been contacted about Plaintiff's issue; Kidwell was still waiting to receive contact
3 from Plaintiff's religious group to verify whether his claims were consistent with the
4 practices of that asserted group; and, until Plaintiff complied with this request for
5 verification, no further action would be taken. (*Id.* at 85.)

6 Plaintiff appealed to the Warden, who responded, in part, that he had researched
7 Plaintiff's claim and found that there were approximately 75 churches/religious groups in
8 the Enid, Oklahoma area, none of which had the address Plaintiff had listed, and that this
9 address was, instead, that of a single-family home that had paid property taxes for the
10 past several years, indicating it was not a tax-exempt church or religious group. (*Id.* at
11 86, 87.)⁸ The Warden stated that he was not recommending that Plaintiff be allowed to
12 deviate from any ADC policy in regards to his religious claims and he considered the
13 issue resolved. (*Id.* at 87.)

14 On December 11, 2014, Plaintiff filed an inmate grievance appeal to the Director
15 in which he claimed that his church was "not a building," but, like other faiths, "the
16 church is the People!" (*Id.* at 88.) He also complained that the Warden's response did
17 not correctly address the law, which he stated requires the ADC to allow him to practice
18 his faith "unless they can show a compelling interest and a least restrictive means of
19 further that interest is restriction of practices." (*Id.*) Neither party points to evidence that
20 the Director responded to this appeal, and the Court was unable to locate a final grievance
21 appeal response from Ryan on the record. Plaintiff alleges in his Complaint, however,
22 that Ryan "denied the requests[,] stating he (Merrick) had to prove these were his
23 religious practices by having his religious leader of his faith contact ADOC officials to
24 verify the existence of the church, faith, and practices. After this had been done, they
25

26 ⁸ In his March 2, 2016 deposition testimony, Plaintiff identifies this address as
27 belonging to his brother, Frank Luckette, whom Plaintiff claims was once a member of
28 the F.A.C.T., but no longer is. Plaintiff also states that he is unaware of anyone at that
address who is a member of the F.A.C.T. or of any other physical address for the
F.A.C.T. (Pl. Dep. at 41:12-43:15 (Doc. 55-1 at 106-108).)

1 would consider his requests.” (Doc. 1 at 5 ¶ 6.) Plaintiff makes an identical statement
2 with respect to Linderman’s alleged denials of Plaintiff’s requests. (*Id.* ¶ 8.)

3 According to Plaintiff’s deposition testimony, Plaintiff has never been visited in
4 prison by any leaders from the F.A.C.T.; nor is he aware of any F.A.C.T. leader ever
5 conducting religious services or activities in an Arizona prison. (Pl. Dep at 11:19-21,
6 19:24-20:4 (Doc. 55-2 at 87, 92-93).) Plaintiff has met two other inmates since 2014 who
7 are members of the F.A.C.T., but he does not know of any F.A.C.T. members in his
8 prison unit, and he does not currently know the address of any F.A.C.T. church or have
9 any knowledge of any F.A.C.T. officers in Arizona. (*Id.* at 22:6-11, 24:12-25:1 (Doc. 55-
10 2 at 95, 97-98).)

11 **F. ADC Regulations Bearing on Plaintiff’s Requests**

12 **1. Prayer Blanket**

13 The ADC allows inmates to purchase blankets by submitting a completed
14 purchase request. (Doc. 55 ¶¶ 25, 165.) Plaintiff never completed such a request. (*Id.*
15 ¶ 25.)

16 **2. Tobacco Burning/Smoking**

17 The ADC permits inmates to purchase cigarettes and to smoke outside, provided
18 they are not on a lockdown unit. (*Id.* ¶ 24.)

19 **3. Head Covering**

20 The ADC issues orange beanies and other prison clothing to inmates, but the
21 chaplaincy does not issue anything. (*Id.* ¶ 104.) Prisoners may complete a purchase
22 request to purchase a head covering for religious purposes, but Plaintiff never submitted a
23 purchase request. (*Id.*)

24 **4. Religious Journal**

25 The ADC does not permit inmates to use diaries or journals due to security
26 concerns that they may use them to maintain gang lists, hit lists, disturbance plans, or for
27 other disruptive purposes. (Doc. 55 ¶ 30.) Inmates may purchase paper and other letter-
28 writing materials. (*Id.* ¶ 173.) According to Plaintiff, the ADC allows inmates, including

1 himself, to have paper, pencil, and pens to write whatever they want outside of journals.
2 (Pl. Decl. ¶ 108 (Doc. 58-1 at 17).)⁹

3 **5. Religious Books**

4 The ADC allows inmates to have up to ten books at one time in their cells,
5 including religious books. (Doc. 55 ¶¶ 26, 138.)

6 **6. Non-Elder Gatherings**

7 The ADC permits inmates whose custody levels allow it to gather for religious
8 purposes, and it has no restrictions that would prohibit most of the eight types of
9 ceremonies Plaintiff describes in his Complaint. (*Id.* ¶ 28, Doc. 55-1, Ex. G, Linderman
10 Decl. ¶¶ 106-112 (Doc. 55-1 at 58-59); *see* Doc. 1 at 8 ¶ 33(a)-(h).)

11 Inmates are not prohibited from gathering with other inmates to pray and dip their
12 hands in water and may do so by using their personal drinking containers (“water”). (*Id.*
13 ¶ 106 (Doc. 55-1 at 58); *see* Doc. 1 at 8 ¶ 33(b).) They may also stand in a circle and
14 read aloud from religious texts (“air”); share personal reflections (“moon”); honor past
15 heroes of faith (“fire”); take turns reciting religious poems, songs, and sagas (“nature”),
16 and share recitations and engage in self-reflection (“earth” and “circle of power”). (*Id.*
17 ¶¶ 107-110; *see* Doc. 1 at 8 ¶ 33(a), (c)-(e), (g), (h).) The only limitation with respect to
18 what Plaintiff claims he requires in his Complaint is that, for these last two types of
19 gatherings, inmates may not have a sapling to stand around, and, for the “sun” gathering,
20 inmates are not permitted to plant seeds. (*Id.* ¶¶ 111-112 (Doc. 55-1 at 58-59); *see* Doc. 1
21 at 8 ¶ 33(a), (f), (h).)

22 **7. Elder Gatherings**

23 The ADC allows religious volunteers to come to the prison to conduct religious
24 gatherings. (*Id.* ¶ 10 (Doc. 55-1 at 41); *see* DO 904.03 §1.5 (Doc. 55-1 at 67).) Such
25 volunteer-led gatherings are in addition to the religious services already conducted by

26
27 ⁹ Plaintiff also states that Wiccan and Satanist inmates are permitted to keep
28 journals for religious purposes, but he does not show he has personal knowledge of these
facts; nor does he point to any other evidence to support this statement. (*See* Pl. Decl.
¶ 108 (Doc. 58-1 at 17).)

1 ADC chaplains, as required under state law. (*Id.*) Where a volunteer is not available,
2 weekly multi-faith gatherings are scheduled for inmates, whenever a sufficient number of
3 inmates have requested to participate in a group ceremony. (Linderman Decl. ¶ 10
4 (Doc. 55-1 at 41).)

5 **8. Education**

6 The ADC offers inmates a variety of adult basic education and GED classes,
7 including life skills classes, English language classes, high school and college courses,
8 and art. (Doc. 55 ¶¶ 27, 137.)

9 **9. Contributing to a Faith Organization**

10 The ADC permits inmates to send money to outside religious organizations, but
11 inmates are still responsible for paying for certain expenses in prison, including their
12 restitution payments, medical expenses, and electrical usage expenses. (*Id.* ¶ 31,
13 Linderman Decl. ¶ 113 (Doc. 55-1 at 59).)

14 **10. Communication with Family**

15 The ADC permits inmates to communicate with family members by phone and
16 through in-person visits. (*Id.*) Inmates are also allowed to send and receive unlimited
17 letters from family, provided they purchase their own paper, envelopes, and stamps. (*Id.*)

18 **11. Religious Diet**

19 The ADC permits inmates who have declared a religious preference to request a
20 religious diet. (*Id.* ¶ 28 (Doc. 55-1 at 44).) To do so, the inmate must submit a written
21 request and be interviewed for the diet by the chaplain. (*Id.* ¶ 29.)¹⁰

22 **IV. Discussion**

23 **A. Plaintiff's Free Exercise Claims**

24 "Inmates retain the protections afforded by the First Amendment, 'including its
25 directive that no law shall prohibit the free exercise of religion.'" *Shakur v. Schriro*, 514
26 F.3d 878, 883-84 (9th Cir. 2008) (quoting *O'Lone v. Estate of Shabazz*, 482 U.S. 342,
27

28 ¹⁰ Neither party points to any evidence regarding ADC's shaving policies.

1 348 (1987)). To implicate the Free Exercise Clause, a prisoner must show that the belief
2 at issue is both "sincerely held" and "rooted in religious belief." *Malik v. Brown*, 16 F.3d
3 330, 333 (9th Cir. 1994). If the inmate makes this initial showing, he must establish that
4 prison officials substantially burdened the practice of his religion by preventing him from
5 engaging in conduct that he sincerely believes is consistent with his faith. *Shakur*, 514
6 F.3d at 884-85. A regulation that burdens the First Amendment right to free exercise
7 may be upheld only if it is reasonably related to a legitimate penological interest. *Turner*
8 *v. Safley*, 482 U.S. 78, 89 (1987).

9 Under RLUIPA, a government may not impose a substantial burden on the
10 religious exercise of a confined person unless the government establishes that the burden
11 furthers a "compelling governmental interest" and does so by "the least restrictive
12 means." 42 U.S.C. § 2000cc-1(a)(1)-(2); *Warsoldier v. Woodford*, 418 F.3d 989, 994
13 (9th Cir. 2005). To prevail on a RLUIPA claim, the inmate bears the initial burden of
14 establishing that his religious exercise has been substantially burdened. *Warsoldier*, 418
15 F.3d at 994 (citing 42 U.S.C. § 2000cc-2(b)). The government then bears the burden of
16 proving that the substantial burden on the inmate's religious practice both furthers a
17 compelling governmental interest and is the least restrictive means of doing so. *Id.* at 995
18 (citing 42 U.S.C. §§ 2000cc-1(a), 2000cc-2(b)).

19 Defendants argue that, whether analyzed under the First Amendment or RLUIPA,
20 Plaintiff's free exercise claims fail for lack of sincerity. (Doc. 54 at 10-15.) As noted,
21 for purposes of the First Amendment, the plaintiff bears the initial burden of showing that
22 his religious beliefs are sincerely held. *Malik*, 16 F.3d at 333. Additionally, a prima
23 facie showing under RLUIPA, for which the plaintiff bears the ultimate burden of
24 persuasion, involves showing a substantial burden on the exercise of one's religious
25 beliefs. *Warsoldier*, 418 F.3d at 994. Although RLUIPA bars inquiry into whether a
26 professed belief is "central" to the plaintiff's religion, the Act "does not preclude inquiry
27 into the sincerity of a prisoner's professed religiosity." *Cutter v. Wilkinson*, 544 U.S.
28 709, 725 n.13 (2005). For this reason, "[u]nder both the RLUIPA and First Amendment

1 analysis, [the plaintiff] must initially show that the religious practice at issue . . . satisfie
2 two criteria: (1) the proffered belief must be sincerely held, and (2) the claim must be
3 rooted in religious belief and not purely secular philosophical concerns.” *Dean v.*
4 *Corrections Corporation of America*, 108 F.Supp.3d 702, 711 (D. Ariz. 2014).

5 The Court agrees with Defendants that Plaintiff fails to meet this burden. More
6 specifically, Defendants have met their burden on summary judgment of showing that
7 based on the undisputed facts, Plaintiff’s professed religious beliefs were insincere, and
8 Plaintiff has failed to put forth relevant evidence that would show or create a genuine
9 issue of material fact that his professed beliefs were, in fact, sincerely held.

10 **1. Sincerity**

11 As an initial matter, Plaintiff’s previous action involving the purported “Freedom
12 Church of Revelation” shows that Plaintiff then held himself out to be the president,
13 trustee, and priest of a fictitious church, the existence and tenets of which the Court found
14 had no factual bases and were a complete fabrication. (*Luckette v. Lewis*, No. CIV-94-
15 1556-PCT-RGS (Doc. 55-1 at 21-22).) In another prior action, the Court dismissed
16 similar religious claims on screening because Plaintiff failed to allege facts to show that
17 his religious beliefs were burdened in any way. See *Merrick v. Inmate Legal Services*,
18 No. 13-1094-RCB-BSB, Doc. 10 (Dec. 30, 2013 Order). In that Order, the Court also
19 opined that Plaintiff’s sincerity with respect to his religious beliefs was “cast into severe
20 doubt by his conviction in Maricopa County Superior Court, CR 2010-007643-001, for
21 conspiracy to commit tampering with a witness, conspiracy to commit perjury, and
22 obstructing criminal investigations or prosecutions.” (*Id.*) The Court noted that,

23 [a] jury found that Plaintiff attempted to fabricate testimony
24 in another criminal action by inducing witnesses to testify in
25 his favor. Key to Plaintiff’s conviction were written and
26 recorded telephone conversations between Plaintiff and Vicki
27 McFarland, a person Plaintiff claims was his pastor, in which
28 Plaintiff directed McFarland to contact other witnesses for the
purpose of securing testimony favorable to Plaintiff. Plaintiff
argued the calls were “confessions, counseling and spiritual
guidance, as well as other religious sacraments.” However,

1 evidence presented at trial demonstrated that Plaintiff's
2 conversations with McFarland did not mention that Plaintiff
3 was confessing and needed religious or spiritual assistance,
4 but showed Plaintiff intended to create the "'Fundamental
5 Christian Temple' as his church and religion." Plaintiff
6 instructed McFarland to check with the Corporation
7 Commission to determine whether that name was available as
8 a non-profit church and to check with the Internal Revenue
9 Service because Plaintiff was "going to want to incorporate
10 the nonprofit church and get I.R.S. approval as a 501(c)(3)."
11 See *Arizona v. Merrick*, No.11-8034, 2012 WL 5333539, at
12 *3 (Ariz. App. Oct. 30, 2012).

13 *Id.* The Court further quoted the Arizona Court of Appeals' conclusion in that case,
14 which found that "Plaintiff's letter to McFarland

15 demonstrates that the church did not exist before April 2010,
16 McFarland was not then an ordained member of the church
17 and Defendant only wanted to create it to attempt to hide
18 behind religion. The communications did not evince a
19 'human need to disclose to a spiritual counselor, in total and
20 absolute confidence, what are believed to be flawed acts or
21 thoughts and to receive priestly consolation and guidance in
22 return.'"

23 *Id.* (quoting *Arizona v. Merrick*, No.11-8034, 2012 WL 5333539, at *3 (Ariz. App. Oct.
24 30, 2012)).

25 Even though these prior deceptions are not evidence that the beliefs Plaintiff
26 alleges in the instant action are insincere, the evidence on the record concerning his
27 current beliefs is of a kind. As to the F.A.C.T.,¹¹ the evidence shows that, from the time
28 of his re-incarceration in 2011 through the allegations in this action, Plaintiff has
repeatedly refused to comply with requests from ADC staff to have clergy or other

29 ¹¹ Although Plaintiff does not specifically reference the F.A.C.T. in his Complaint,
30 his factual allegations against Defendants in this action pertain to their denials of his
31 requests for accommodation in 2014, in which he identified himself as a member of the
32 F.A.C.T. and listed an address of the F.A.C.T.—in this instance, in Enid, Oklahoma—as
33 a source "for verification of [his] beliefs and practices." (See Doc. 1 at 5; Doc. 55-2 at
34 80, 82.)

1 representatives of the F.A.C.T. contact them regarding his requests, and he has given at
2 least four different addresses for the F.A.C.T., alternating between the addresses of his
3 mother and brother in Enid, Oklahoma, whom he did not identify or claim were members
4 of the F.A.C.T., and residential addresses in the Phoenix area, including the apartment
5 address listed by Jenny Carter as the address of the F.A.C.T. in 2012. To date, Plaintiff's
6 only outside verification from anyone claiming to be part of the F.A.C.T. came from
7 Carter's letter, which Linderman received two years prior to Plaintiff's alleged requests
8 for accommodations in this action. At that time, Carter admitted that the F.A.C.T. had no
9 volunteer clergy available to lead religious activities in Arizona prisons, and she stated
10 she would make further contact in the coming months when the F.A.C.T. expected
11 volunteers to become available, but she never did. Thereafter, there is no evidence that
12 Linderman or any other prison official was contacted by Carter or anyone else associated
13 with the F.A.C.T. to verify that it was an actual church or religious organization that
14 commanded or engaged in the religious practices Plaintiff claimed.

15 To the extent that Plaintiff argues that his religious beliefs are personal, and
16 Defendants therefore violated his rights by seeking outside verification of his claims
17 before considering his requests, this argument is without merit. (*See* Doc. 57 at 4.) First,
18 the law does not demand, as Plaintiff suggests, that prison officials must accommodate
19 every request a prisoner makes so long as he claims he has a personal religious reason for
20 doing so. Rather, as noted above, prison officials are compelled to provide
21 accommodations only where the prisoner's beliefs are sincerely held and are, in fact,
22 rooted in religious concerns. To this end, ADC officials were entitled to look at apparent
23 inconsistencies in Plaintiff's claims and evidence of possible fraudulent behavior to
24 gauge the sincerity of his asserted beliefs before being compelled to accommodate them.
25 *See Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) ("[P]rison officials may
26 appropriately question whether a prisoner's religiosity, asserted as the basis for a
27 requested accommodation, is authentic."). Second, Plaintiff, himself, identified his
28 religious beliefs as stemming from his membership in the F.A.C.T., and this is what

1 Defendants attempted to verify. Defendants were entitled to take this step before
2 considering any accommodations, particularly where the evidence shows that the ADC
3 officials who responded to Plaintiff's requests were unfamiliar with the F.A.C.T. and had
4 no prior dealings with other inmates, prison volunteers, or outside clergy involved in the
5 F.A.C.T. from which to conclude that Plaintiff's asserted needs to comply with its tenets
6 were genuine. The evidence also shows that Defendants were aware of Plaintiff's prior
7 efforts to pass off the Freedom Church of Revelation as a church and of this Court's prior
8 finding that it was a "sham" and that Plaintiff's purported beliefs in its tenets were
9 insincere. In this context, Defendants reasonably requested that Plaintiff provide credible
10 evidence to show that his beliefs connected with the F.A.C.T. were both sincere and
11 based on religious concerns. Plaintiff's repeated refusal to do so, despite multiple
12 requests, is strong evidence that his claims about the F.A.C.T. were fraudulent and his
13 purported beliefs stemming from his association with it were not sincerely held.

14 Further discounting Plaintiff's sincerity, Plaintiff alleged in his inmate letters and
15 grievances that he was daily suffering both physical and mental pain from not being able
16 to practice his sincerely-held religious beliefs, even though the evidence shows that ADC
17 permits most of the practices Plaintiff claims his faith requires. Plaintiff does not claim,
18 for instance, that he ever attempted, but was prevented from doing, such basic things as
19 obtaining religious books, communicating with family and friends, or recording religious
20 thoughts and confessions using available writing supplies. Although in his grievances,
21 Plaintiff summarily accused Defendants of thwarting all of his religious practices (*see*
22 *Doc. 55-2 at 80, 82*), he also does not now claim or point to any evidence to show that he
23 ever filled out a request to purchase a blanket for use as a prayer blanket; attempted to
24 hold outdoor tobacco/smoking ceremonies for which purchasing tobacco products and
25 smoking is permitted; purchased or otherwise attempted to acquire a head covering, such
26 as the orange beanie available to all inmates that Plaintiff previously stated would be
27 acceptable; gathered or attempted to gather with other practitioners for non-elder
28 gatherings; identified or sought out volunteer clergy who could lead elder gatherings;

1 participated in any available adult education classes; or requested any other type of
 2 educational opportunity and was denied. In summary, the lack of evidence that Plaintiff
 3 ever attempted to do any of these widely-permitted activities—even while purportedly
 4 suffering daily from not practicing his faith—further undermines any claim that his
 5 professed beliefs were sincerely held.¹²

6 2. Substantial Burden

7 In the alternative, even if a reasonable jury could find, despite strong evidence to
 8 the contrary, that Plaintiff's asserted religious beliefs were sincere, the evidence does not
 9 show that Defendants substantially burdened those beliefs. A substantial burden is one
 10 that is "'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on
 11 'religious exercise' must impose a significantly great restriction or onus upon such
 12 exercise." *Warsoldier*, 418 F.3d at 995 (quoting *San Jose Christian Coll. v. City of*
 13 *Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)). A substantial burden must be "more
 14 than an inconvenience"; it prevents an inmate from "engaging in [religious] conduct or
 15 having a religious experience." *Worldwide Church of God v. Phila. Church of God, Inc.*,
 16 227 F.3d 1110, 1121 (9th Cir. 2000) (citations omitted).

17 First, the evidence does not show that Defendants imposed a substantial burden on
 18 Plaintiff's ability to exercise his purported religious beliefs simply because they required
 19 him to substantiate those beliefs before being willing to process his requests. Plaintiff
 20 claims that Defendants denied his requests for accommodations based on their own
 21 conceptions of his beliefs and never interviewed him or gave him the opportunity to
 22 demonstrate that his beliefs were sincere. (Doc. 57 at 4.) But this is not what the record
 23 shows. Instead, as Linderman's October 6, 2014 inmate letter response reiterates,
 24 Plaintiff had been advised to have F.A.C.T. representatives send information to ADC
 25 chaplains in support of his religious claims so that his requests could be processed, but he
 26

27 ¹² Conversely, to the extent that Plaintiff actually engaged in the above practices, as
 28 he claims his beliefs require, he cannot now claim that he has been prevented from doing
 so.

1 never complied with this request. (*See* Doc. 55-2 at 81.) Then, when Plaintiff continued
2 to pursue his grievances, CO III Perez informed Plaintiff in response to his October 9,
3 2014 informal complaint resolution that he could meet with Chaplain Kidwell to discuss
4 the proper procedures for pursuing his requests, and Perez forwarded Plaintiff's grievance
5 to Kidwell. (*Id.* at 83.) There is no evidence, however, that Plaintiff sought out Kidwell
6 to discuss his religious claims in person. Again, he merely continued to file grievances
7 and grievance appeals, complaining that his issues were unresolved, despite his own
8 failures to cooperate with basic requirements for assessing the sincerity of his religious
9 claims. Although Plaintiff clearly would have preferred carte blanche approval of any
10 request simply because he claimed it was based on his religious beliefs, this is not what
11 the law requires. On the current record, the evidence does not support, and Plaintiff fails
12 to show or create a genuine issue of material fact, that the actions Defendants requested
13 of him were unreasonable or a substantial burden, effectively preventing him from
14 practicing his religious beliefs. *C.f. Resnick v. Adams*, 348 F.3d 763, 770 (9th Cir. 2003)
15 (upholding in the First Amendment context a uniform procedure by which the prison
16 channeled religious diet requests through the chaplain's office to assesses the sincerity of
17 those requests).

18 Second, Plaintiff's allegations of a substantial burden are largely discredited by
19 facts showing that, even without accommodations, Plaintiff was already free to practice
20 the majority of his asserted religious beliefs, including purchasing a prayer blanket,
21 smoking, having religious books, taking education classes, and communicating with
22 family, without significant restrictions. Even if other things, such as ADC's available
23 beanie color and allowable writing supplies may not strictly comport with what Plaintiff
24 desires, the evidence does not support that these limitations were more than
25 inconveniences or that they effectively prevented him from engaging in religious
26 practice. In any case, Plaintiff has the burden of showing a substantial burden, and he
27
28

1 points to no evidence that he made this showing to Defendants with respect to any of the
2 above requests.¹³

3 Plaintiff's other requests, such as that he be permitted to participate in religious
4 gatherings, including ones led by F.A.C.T. volunteers; give all of his income earned in
5 prison to the F.A.C.T.; or eat only "clean foods" prepared by members of his faith are
6 simply not possible for Defendants to satisfy or are wholly unrealistic. This is
7 particularly true where these practices require the participation of other F.A.C.T.
8 members or clergy, and Plaintiff has consistently failed to produce credible evidence that
9 the F.A.C.T. even exists, or, even assuming it does, that it is capable of providing the
10 resources Plaintiff would require to satisfy his alleged religious beliefs.

11 Specifically, as to the "non-elder gatherings," Plaintiff acknowledges that he
12 knows of no other F.A.C.T. members on his unit; thus it is not clear with whom he would
13 gather or how his alleged inability to do so has anything to do with Defendants. (*See* Pl.
14 Dep. at 24:12-25:1 (Doc. 55-2 at 97-98).) As to the "elder-led gatherings," Plaintiff has
15 not shown that any volunteer F.A.C.T. clergy exist who could lead these gatherings. The
16 only outside contact ADC officials ever received from F.A.C.T. leadership concerning
17 this possibility came from Jenny Carter, two years prior to Plaintiff's requests in this
18 action, at which time Carter admitted that no F.A.C.T. volunteers were available. (*See*
19 Doc. 55-2 at 11.) Plaintiff fails to produce any evidence to show that this has changed or
20 to clarify what more he expected Defendants to do to accommodate his requested
21

22 ¹³ Plaintiff submits 340 statements of fact, backed up by 270 statements in his
23 declaration, in which he largely attempts to set forth the details of his faith and to explain
24 previously-unexplained requirements, such as that he cannot practice his required
25 smoking ceremonies because "the tobacco must come from a vendor that [his] faith and
26 church allows" (Doc. 58-1 ¶ 97), or he cannot purchase a prayer blanket because the only
27 blankets he could obtain through the ADC's available methods are not "blessed by [his]
28 Gods, council" and are "not of the elements and colors permitted." (*Id.* ¶ 105.) To the
extent that Plaintiff fails, however, to point to any evidence to show that he made
Defendants aware of such particular needs or alleged burdens on practicing his religious
beliefs, the Court has not considered his after-the-fact statements relevant in assessing
whether Defendants are liable for substantially burdening his religious exercise.

1 religious practice under such impossible circumstances. He nonetheless incongruously
2 maintains in his Response that “[o]nce [his request for elder-led gatherings] was
3 accommodated, a religious elder would be available within thirty days.” (Doc. 57 at 4,
4 Doc. 58-1 ¶ 22.) But even accepting that Plaintiff told this to Defendants, as he claims he
5 did, absent any contact from any outside elders who would purportedly lead these
6 gatherings, this kind of “if you build it, they will come” proposition goes well beyond
7 what the First Amendment or RLUIPA requires and does not trigger any obligations on
8 the parts of Defendants.

9 Plaintiff’s claim that Defendants have substantially burdened his ability to make a
10 vow of poverty is equally absurd. In essence, Plaintiff maintains that, although he is
11 permitted to give his earnings in prison to a church, he cannot fully exercise his religious
12 beliefs because he must first pay his financial obligations in prison. (Doc. 58-1 ¶ 113.)
13 But no constitutional or federal law mandates that practitioners of *any* faith—even those
14 not in prison—be permitted to escape their individual financial obligations by
15 transferring all of their earnings directly to a church or religious organization, whether
16 they seek to do so to fulfill a “vow of poverty” or for any other purpose. Moreover, to
17 the extent Plaintiff would appear to want to transfer all of his money to the F.A.C.T., it is
18 beyond dispute that Plaintiff has repeatedly flouted, or otherwise failed to satisfy, the
19 basic requests of ADC officials seeking to verify that the F.A.C.T. is an actual church or
20 legitimate religious organization. Likewise, Plaintiff’s request that he be given a diet of
21 “clean foods” prepared for him by his “mother, wife, sister, or other faith member” is
22 entirely vague, and similarly absurd.

23 Lastly, the record does not support that Defendants substantially burdened
24 Plaintiff’s religious exercise with respect to his desire to grow out his facial hair. In
25 support of this allegation, Plaintiff merely points to his own declaration in which he
26 claims in conclusory fashion that “[D]efendants allow inmates to grow their hair to any
27 length they choose and now allow beards up to one inch in length, but deny me the
28 opportunity to grow my facial hair without cutting it.” (*Id.* ¶ 132 (Doc. 58-1 at 20).)

1 This assertion, absent any evidence that Plaintiff articulated to Defendants what length
2 beard he wished to grow and why the one inch limitation was inadequate, is not sufficient
3 to show that Defendants imposed a substantial burden on his religious practice.
4 Moreover, even assuming Plaintiff made such facts clear in his multiple grievances
5 asserting his religious beliefs, Plaintiff fails to make a claim that Defendants, by merely
6 insisting on outside verification, substantially burdened his religious exercise.

7 In summary, the record contains compelling evidence that Plaintiff's asserted
8 religious beliefs are not sincerely held, and Plaintiff fails to point to any evidence that
9 would overcome this showing. But even if a reasonable jury could find on the current
10 record that Plaintiff's beliefs are sincere, there is simply no evidence that Defendants
11 imposed substantial burdens on Plaintiff's ability to exercise those beliefs. Without this
12 primary showing, Defendants were under no obligation to grant Plaintiff's requests for
13 accommodation, and Plaintiff's free exercise claims necessarily fail. Accordingly, the
14 Court will grant summary judgement to Defendants on these claims.

15 **B. Equal Protection**

16 The Equal Protection Clause requires that persons who are similarly situated be
17 treated alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985);
18 *Shakur*, 514 F.3d at 891. An equal protection claim may be established by showing that
19 prison officials intentionally discriminated against a plaintiff based on his membership in
20 a protected class, *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d
21 690, 70203 (9th Cir. 2009); *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003), *Lee*
22 *v. City of L.A.*, 250 F.3d 668, 686 (9th Cir. 2001), or that similarly situated individuals
23 were intentionally treated differently without a rational relationship to a legitimate state
24 purpose, *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 60102 (2008); *Vill. of*
25 *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d
26 580, 592 (9th Cir. 2008). Where religious rights are at issue, an inmate "must set forth
27 specific facts showing that there is a genuine issue' as to whether he was afforded a
28 reasonable opportunity to pursue his faith as compared to prisoners of other faiths" and

1 that "officials intentionally acted in a discriminatory manner." *Freeman v. Arpaio*, 125
2 F.3d 732, 737 (9th Cir. 1997), *abrogated on other grounds by Shakur*, 514 F.3d at
3 884-85.

4 Plaintiff's equal protection claims fail for many of the reasons already discussed.
5 Most fundamentally, the facts do not demonstrate that Defendants intentionally
6 discriminated against Plaintiff, particularly where Plaintiff was not and is not prevented
7 from engaging in the majority of the practices he claims arise from his religious beliefs.
8 Further, to the extent Plaintiff can show that members of other faiths received specific
9 accommodations, such as religious diets, multi-colored bandanas, or tobacco supplied by
10 vendors of their faith, the evidence shows that requests for any such accommodations
11 require verification of the prisoner's religious claims, and all such requests must be vetted
12 before they are approved. (Doc. 55 ¶¶ 81-84.) Plaintiff does not point to any evidence to
13 show that Defendants treated members of other faiths differently from Plaintiff with
14 respect to this requirement. (See Doc. 57 at 8-9.) Finally, even if Plaintiff can show that
15 Defendants required more verification regarding the F.A.C.T. than they typically do for
16 better-known and more readily-verifiable religions, Defendants have shown that they had
17 a legitimate state purpose for doing so: namely, to minimize the use of religious
18 designations for other than sincere religious practices and to prevent the waste of limited
19 prison resources. (Doc. 55-1 at 43, Linderman Decl. ¶ 25.) For all these reasons, the
20 Court will grant summary judgment to Defendants on Plaintiff's equal protection claims.

21 **C. Establishment Clause Claims**

22 The Establishment Clause provides that "Congress shall make no law respecting
23 an establishment of religion." U.S. Const. amend. I; *Lee v. Weisman*, 505 U.S. 577, 580
24 (1992). The Establishment Clause bars governmental approval or disapproval of a
25 particular religion or belief. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,
26 508 U.S. 520, 532 (1993). The basic test for Establishment Clause violations is set out in
27 *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). To avoid violating the Establishment
28 Clause, government acts must (1) have a "secular legislative purpose," (2) not have a

1 “principal or primary effect” that either “advances [or] inhibits religion,” and (3) not
2 foster “an excessive government entanglement” with religion. *Inouye v. Kemna*, 504
3 F.3d 705, 713 (9th Cir. 2007). “The clause means at least that neither a state nor the
4 Federal Government can pass laws which aid one religion, aid all religions, or prefer one
5 religion over another.” *Hartmann v. California Dep’t of Corr. & Rehab.*, 707 F.3d 1114,
6 1125 (9th Cir. 2013) (internal citation omitted). In evaluating Establishment Clause
7 claims, courts must consider whether the legislation or official conduct in question “in
8 reality, . . . establishes a religion or religious faith, or tends to do so.” *Lynch v. Donnelly*,
9 465 U.S. 668, 678 (1984).

10 Plaintiff’s Establishment Clause claim is based on the same allegations as all of
11 his other claims, and the precise Establishment Clause violation he wishes to assert is not
12 clear from the Complaint. (Doc. 1 at 13.) Plaintiff clarifies in his Response that “[t]he
13 policy in question is not allowing a prisoner to practice the same religious practices (and
14 secular practices) that other inmates are allowed to practice, when in many cases it is only
15 the name of the faith that is different.” (Doc. 57 at 16.)

16 In effect, Plaintiff argues that because members of other more-recognized faiths,
17 such as Azteca, Native American, and Wiccan, have received accommodations that he, as
18 a member of the F.A.C.T., has not received, Defendants have impermissibly endorsed
19 those religions, prompting inmates such as himself to want to change their faith in order
20 to receive the accommodations they seek. (*Id.* at 10-12.) As already discussed, however,
21 the facts on the record show that ADC chaplains must vet all requests for specific
22 religious accommodations, regardless of the religious preference, and the impetus for
23 seeking outside verifications for unfamiliar religious designations is based on a legitimate
24 state interest. Moreover, as a way to prevent fraud and misuse of state resources, an
25 inmate may be required under ADC policy to provide evidence to support any request to
26 change his or her religious designation. (See Doc. 55-1 at 43, Linderman Decl. ¶ 25.)
27 Thus, even if Plaintiff, himself, feels compelled to change his religious designation
28 simply to make it easier to receive the accommodations he seeks, the evidence does not

1 support that this is the "principal or primary effect" of ADC's vetting process, such that
2 its policies can be said to "advance or inhibit" or form an "excessive entanglement" with
3 any particular religion or religions. *Inouye*, 504 F.3d at 713 (9th Cir. 2007). The Court
4 will grant summary judgment to Defendants on Plaintiff's Establishment Clause claims.

5 **D. State Law Claims**

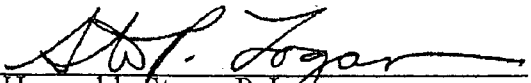
6 In Count Two, Plaintiff claims a violation of Arizona Revised Statutes § 41-
7 1493.01 (FERA). Defendants argue, and the Court agrees, that this claim fails for want
8 of a proper defendant. (*See* Doc. 54 at 17.) Section 41-1493.01.D of the Act provides, in
9 relevant part, that "[a] person whose religious exercise is burdened in violation of this
10 section may assert that violation as a claim . . . in a judicial proceeding and obtain
11 appropriate relief against *a government*." (emphasis added). "Government" is statutorily
12 defined as "this state and any agency or political subdivision of this state." Ariz. Rev. S.
13 § 41-1493.3. Defendants are not proper defendants under this statute, and the Court will
14 grant them summary judgment as to this claim.

15 **IT IS ORDERED:**

16 (1) The reference to the Magistrate Judge is **withdrawn** as to Defendants'
17 Motion for Summary Judgment (Doc. 54).

18 (2) Defendants' Motion for Summary Judgment (Doc. 54) is **granted**, and the
19 action is **terminated with prejudice**. The Clerk of Court must enter judgment
20 accordingly.

21 Dated this 9th day of May, 2017.

22
23 
24 Honorable Steven P. Logan
United States District Judge
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