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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 ANTHONY SMITH,  
12 Plaintiff,  
13 v.  
14 GIPSON, *et al.*  
15 Defendants.  
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) Case No. 3:20-cv-01110-WHO (PR)  
)

) **PLAINTIFF’S NOTICE OF**  
) **MOTION AND MOTION FOR**  
) **SUMMARY JUDGMENT, OR,**  
) **ALTERNATIVELY, FOR PARTIAL**  
) **SUMMARY JUDGEMENT**

) Date: December 14, 2021  
) Time: 2:00 p.m.  
) Place: The Courtroom of the Honorable  
) William H. Orrick

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1 **NOTICE OF MOTION**

2 TO ALL PARTIES AND COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on December 14, 2021, at 2:00 p.m. in the Courtroom of the  
4 Honorable William H. Orrick, Plaintiff Anthony Smith will move this Court for an order granting  
5 summary judgment, or, in the alternative, for partial summary judgment. This motion is based on  
6 Rule 56 of the Federal Rules of Civil Procedure; the enclosed Memorandum of Points and  
7 Authorities; the Declaration of Anthony Smith in Support of the Motion for Summary Judgment; the  
8 Declaration of Joseph D. Elford in Support of Motion for Summary Judgment, or, Alternatively, for  
9 Partial Summary Judgment (with Exhibits 1-14); the Proposed Order; the oral argument in this  
10 matter; the records and files in this case, and such other further argument as may be deemed  
11 necessary by this Court.

12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13 **INTRODUCTION**

14 No one should have to choose between their religion and going hungry. Yet, this is precisely  
15 what happened to Plaintiff Anthony Smith (“Smith”) here. For the month of Ramadan in 2019, the  
16 Director of the California Department of Corrections and Rehabilitation (“CDCR”) Division of Adult  
17 Institutions, Connie Gipson (“Gipson”), issued a memorandum to all California prisons forbidding  
18 them from serving Ramadan participating inmates their Kosher Diet Program (“KDP”) meals  
19 (“Gipson Memo” or “Ramadan Memo”). The Gipson Memo is clearly targeted at observant Muslim  
20 inmates who elect the KDP.

21 Although this policy had existed under Gipson’s predecessor, Kathleen Sullivan, it was not  
22 enforced at many, if not most, California institutions, until two days into Ramadan on May 7, 2019.  
23 On that day, when Smith went to pick up his KDP meal with the other Ramadan observing inmates  
24 near sundown, he was told that there was no KDP meal available to him because of the Gipson  
25 Memo. By sharp contrast, Muslim inmates who were participants in the Religious Meat Alternative  
26 Program (“RMA” or “RMAP”) observing Ramadan continued to receive their evening meals at the  
27 prison at that time. This continued for the remaining twenty-eight (28) days of Ramadan.  
28

1 Due to the harsh prison policy promulgated through the Gipson Memo, Smith, who  
2 participates in the KDP for religious reasons, was deprived of all meals whatsoever for those  
3 remaining 28 days of the holiday, except for one or two times during lockdown, since he refused to  
4 compromise his religious beliefs to eat prison meals.

5 To survive these twenty-eight days, Smith relied on peanut butter and jelly sandwiches and  
6 soups he received from other inmates. His hunger ruined his observance of Ramadan, which is a time  
7 for prayer and introspection. Because this statewide prison policy violates the Religious Land Use  
8 and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000c, et seq., the First Amendment Free  
9 Exercise Clause, the Eighth Amendment and Equal Protection, Smith filed the instant action for  
10 declaratory and injunctive relief, and damages on February 12, 2020.

### 11 STATEMENT OF FACTS

12 Plaintiff Smith was an inmate in Facility D at Pelican Bay State Prison (“PBSP”) from  
13 December 28, 2017, to April 28, 2021, when he was transferred to Solano State Prison in Vacaville,  
14 California. Declaration of Anthony Smith in Support of Motion for Summary Judgment (“Smith  
15 Decl.”) ¶ 1; *see* Deposition of Anthony Smith, dated January 13, 2021 (“Smith Dep.”) at 13:12-17  
16 (attached to the Declaration of Joseph D. Elford in Support of Motion for Summary Judgment  
17 (“Elford Decl.”) as Exhibit (“Exh.”) 1). Smith has been a devout Muslim since 2011 and, through his  
18 reading of Muslim texts and other research, he learned that his faith did not regard as Halal  
19 (permissible) food that was cooked with pots and pans, and served with unkosher plates, that had  
20 been used for Haram (impermissible) foods, since this created a “cross-contamination” problem,  
21 rendering such food Haram according to Anthony’s faith. *See* Smith Decl. ¶¶ 2 & 4; Smith Dep. at  
22 37:5-38:7 & 132:3-133:4 (Smith testifying that Halal (or RMA)<sup>1</sup> meals become Haram  
23 (impermissible) when cross-contaminated by being placed in pots and pans used to cook Haram food  
24 or eaten with utensils touched by Haram food); *see also* Department Operations Manual (“DOM”)  
25  
26  
27

28 <sup>1</sup> The PBSP has three alternative meal plans: (1) the Vegetarian Diet Program, (2) the KDP, and  
(3) the RMAP. *See* 15 Cal. Code Regs. § 3054(c) (AGO000002 col.2) (Elford Decl., Exh. 2).



1 Ch. 9 (AGO000430) (attached to Elford Decl. as Exh. 2) (generally, “[c]ross-contamination is the  
2 transfer of microorganisms from one food or surface to another”).<sup>2</sup>

3 After reading about the cross-contamination issue in various Islamic texts, Smith submitted  
4 his application for enrollment in the KDP, with supporting materials, to the prison Chaplin on March  
5 15, 2018. See Smith Decl. ¶¶ 2-6. That application was later approved by the Community Resources  
6 Manager, Robert Losacco. See AGO00185 (Chrono, dated March 15, 2018) (“The necessary  
7 verification has been made for the above-named inmate (Smith), justifying his request to receive the  
8 Kosher Religious Diet”) (emphasis in original); Smith Decl. ¶ 6; cf. Memorandum from Robert  
9 Losacco, dated June 5, 2018 (“Losacco Memo”) (attached to Elford Decl. as Exh. 3).

10 The KDP avoids the cross-contamination problem because KDP meals are prepared offsite in  
11 a kosher kitchen supervised by Rabbis and are double-wrapped before being delivered to the prison  
12 for distribution to inmates. See AGO000031, AGO000044; AGO000134; AGO 000138;  
13 AGO000152 & AGO000179-80; Smith Decl. ¶ 5; cf. *Abdul-Aziz v. Lanigan*, 2020 WL 328722, at \*4  
14 (D.N.J. June 18, 2020) (“kosher meals are prepackaged so as not to come into contact with non-  
15 kosher foodstuff”). Once at the prison, the double-wrapped KDP meals are heated, and served to the  
16 inmates with disposable utensils to avoid any cross-contamination with utensils that have touched  
17 Haram foods. See AGO000048 at 4.3; AGO000448; cf. Smith Dep. 127:2-10 (Smith testifying that  
18 separate set of dishes would avoid cross-contamination problem); see also 15 Cal. Code Regs. §  
19 3054.2(d) (AGO000016) (“All institutions will adhere to standardized departmental Kosher Diet  
20 Program menus and approved procedures for purchasing, preparing, and serving kosher meals”).<sup>3</sup>  
21 The RMA meals, by contrast, are prepared onsite where cross-contamination is very likely. See  
22 Elford Decl., Exh. 11 (Chief, Office of Policy Standardization, stating “The kosher meals are  
23 prepared and packaged by an outside vendor and delivered frozen to CDCR. All other diets are  
24 prepared within CDCR facilities.”)

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25  
26 <sup>2</sup> Excerpts of all documents produced by defendants in discovery (bates labelled AGO) are attached  
to the Elford Decl. as Exhibit 2.

27 <sup>3</sup> Prior to the court’s decision in *In re Garcia*, 202 Cal.App.4th 892 (2012), which held that the  
28 prison’s exclusion of non-Jewish inmates from the KDP violated RLUIPA, the KDP meal program  
was called the “JKDP” program, since, at that time, California prisons only allowed Jewish inmates  
to participate. See *id.* at 906-07.

1           Since his conversion to Islam in 2011, Smith has always observed Ramadan. Smith Decl. ¶ 7.  
2 Ramadan is a ninth lunar month worldwide celebration in the Islamic faith, involving fasting during  
3 daylight hours, prayer, reflection and community. *Id.* Celebrating Ramadan is regarded as one of  
4 the five pillars of Islam. *Id.* ¶ 8.

5           In 2017, then-Director of the CDCR, Kathleen Allison (“Alison”), issued a Ramadan  
6 memorandum very much like the Gipson Memo at issue here (“Allison Ramadan Memo”)  
7 AGO000373-374. The Memo forbade prison staff from serving KDP meals to (Muslim) inmates  
8 during Ramadan. *Id.* at AGO000373. Notwithstanding the Allison Memo, however, prison staff at  
9 PBSP and other California institutions did not enforce Allison’s Ramadan directive, or simply  
10 ignored, it. *See* Smith Decl. ¶ 10; *see, e.g.*, Declaration of Paul Hamilton (“Hamilton Decl.”) (Elford  
11 Decl., Exh. 5) ¶¶ 1-4 (declaring that he received KDP meals at San Quentin Prison for years,  
12 including 2019, without incident). It was only when the Ramadan policy was reaffirmed by Gipson  
13 in 2019, *see infra*, that prison staff at PBSP stopped serving KDP meals to Smith. Smith Decl. ¶¶ 10-  
14 12; *see* Smith Dep. 69:16-70:3 & 70:12-72:25; *see also* Smith Dep. 74:14-75:3 (“They were  
15 imposing that memo.”). Prior to this, prison staff brought Ramadan evening meals (both KDP and  
16 RMA) from the main kitchen to Facility D using “hot carts,” which maintain the food’s temperature.  
17 *See* Smith Decl. ¶ 10; Smith Dep. 70:17-17; *cf.* Defendant Williams’ Response to Plaintiff’s First Set  
18 of Interrogatories, Nos. 5 & 8, pp. 3-4 (attached to Elford Decl. as Exh. 6) (“During Ramadan 2019,  
19 KDP meals continued to be sent from the main kitchen to Facility D’s kitchen” “Ramadan dinner  
20 meals are kept warm until an inmate could be escorted to pick up his meal”); *see also* AGO000466  
21 (“Most institutions prepare the trays in the main kitchen area and deliver them to the housing units”).  
22 These meals KDP were served to Ramadan observing inmates approximately thirty minutes before  
23 sundown. *See* Smith Dep. at 70:4-71:7; Smith Decl. ¶ 10. Then, in May of 2019, things dramatically  
24 changed.

25           On March 12, 2019, the new CDCR Director of the Division of Adult Institutions, defendant  
26 Connie Gipson, issued her Gipson Memo, which was disseminated to California prisons throughout  
27 the state, and provides as follows:  
28

1 The purpose of this memorandum is to provide information to institutional staff  
2 regarding meal service and inmate participation in the fast of Ramadan.

3 \* \* \*

4 There are a variety of ways meals may be distributed, depending on operational need.  
5 Most institutions have local procedures in place to facilitate the necessary meal  
6 schedule changes during Ramadan. One option may be to provide the evening meal in  
7 a paper tray or clamshell at regular dinner feeding time to be consumed after sunset.  
8 Breakfast and lunch bags could also be distributed with the evening meal.

9 \* \* \*

10 *Please note Kosher Diet Program (KDP) meals are not shelf stable and cannot be*  
11 *served to inmates participating in Ramadan. The Religious Meat Alternate Program*  
12 *(RMAP) and the mainline diet meals will be shelf stable to allow inmates to*  
13 *participate in the fast of Ramadan. Inmates who have been placed on the KDP may*  
14 *request transfer the RMAP.*

15 AGO000384-385 (Elford Decl., Exh. 8) (ECF Doc. 1, Exh. B) (emphasis added); *cf.* AGO000388  
16 (describing dissemination of Ramadan Policy in 2020).<sup>4</sup>

17 And this time around, Gipson made prison staff at PBSP enforce her Ramadan Policy. To this  
18 end, on May 7, 2019, Smith went to Facility D to get his KDP meal with the other Ramadan  
19 participating inmates who were enrolled in the RMAP, but he was denied his KDP meal, due to the  
20 Gipson Memo. *See* Smith Decl. ¶ 11; Smith Dep. 69:16-70:3, 70:12-72:25 & 75:14-76:13; ECF Doc.  
21 1, Exh. E at 1-2 (Elford Decl., Exh. 8). After returning several more times to get his KDP meals with  
22 the Ramadan observing inmates on the RMAP in the evening, Smith was told that he would not be  
23 receiving the KDP meals for the rest of Ramadan. *See* Smith Decl. ¶ 12; Smith Dep. 85:13-24.

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24 <sup>4</sup> While the Gipson Memo permitted Ramadan participating inmates who are enrolled in the KDP to  
25 transfer diets “no later than Monday, April 29, 2019,” *see* AGO000384, that date had passed by the  
26 time Smith learned he would not be receiving KDP meals during Ramadan 2019, as he had in the  
27 past. Furthermore, it was prison policy that an inmate can only transfer diets once per year, *see*  
28 Losacco Memo (Elford Decl., Exh. 3), so, if Smith elected to transfer diets, he ran a serious risk that  
he would be prevented from returning to the KDP for another year. In any event, this “choice”  
between the KDP meals or a cross-contaminated option is highly coercive because it compels an  
inmate to choose between adhering to his religious faith and receiving meals. *Cf.* Elford Decl., Exh.  
6 at 4 (PBSP’s Correctional Food Manager, Defendant Williams, stating “Ramadan Participants who  
were still on the KDP were given the choice of participating in Ramadan after sundown [without  
receiving KDP meals] or continuing with the KDP at regular feeding times,” *i.e.*, not celebrating  
Ramadan at all). Both options offend Smith’s religious beliefs.



1 If the moving party meets its initial responsibility, the burden shifts to the opposing party to  
2 establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus.*  
3 *Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish the existence of this  
4 factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is  
5 required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery  
6 material, in support of its contention that the dispute exists. *See Fed.R.Civ.P. 56(e); Matsushita*, 475  
7 U.S. at 586 n. 11. The party opposing summary judgment must demonstrate that the fact in  
8 contention is (1) material, i.e., a fact that might affect the outcome of the suit under the governing  
9 law, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific*  
10 *Elec. Contractor Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987), and (2) that the dispute is genuine, i.e., the  
11 evidence is such that a reasonable jury could return a verdict for the nonmoving party, *see Celotex*,  
12 477 U.S. at 323 (quoting Fed.R.Civ.P. 56(c)); *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436  
13 (9th Cir. 1987). If the opposing party is unable to do this, summary judgment should be granted, “so  
14 long as whatever is before the district court demonstrates that the standard for entry of summary  
15 judgment, as set forth in Rule 56(c), is satisfied.” *Celotex*, 477 U.S. 317 at 323.

## 16 ARGUMENT

### 17 I. THE GIPSON MEMO VIOLATES THE RELIGIOUS LAND USE AND 18 INSTITUTIONALIZED PERSONS ACT (“RLUIPA”), 42 U.S.C. § 2000cc, *et seq.*

#### 19 A. Legal Standards for a RLUIPA Claim

20 RLUIPA mandates that “[n]o government shall impose a substantial burden on the religious  
21 exercise of a person residing in or confined to an institution . . . even if the burden results from a rule  
22 of general applicability,” unless the government can satisfy strict scrutiny. 42 U.S.C. § 2000cc-  
23 1(a)(1)-(2); *see Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008) (quoting RLUIPA); *accord*  
24 *Greene v. Solano County Jail*, 513 F.3d 982, 986 (9th Cir. 2008). RLUIPA was enacted to combat  
25 “egregious and unnecessary” restrictions on religious exercise, “[w]hether from indifference,  
26 ignorance, bigotry, or lack of resources.” 146 Cong. Rec. 16698-99 (2000). RLUIPA expressly  
27 defines “religious exercise” to include “any exercise of religion, whether or not compelled by, or  
28 central to, a system of religious beliefs.” 42 U.S.C. § 2000cc-5(7)(A) (quoted in *Shakur* and *Greene*).  
RLUIPA “shall be construed in favor of a broad protection of religious exercise, to the maximum

1 extent permitted by the terms of this chapter and the Constitution.” 42 U.S.C. § 2000cc-3(g); *see*  
2 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014); *Holt v. Hobbs*, 574 U.S. 352, 356  
3 (2015) (same); *Warsoldier v. Woodford*, 418 F.3d 989, 994-95 (9th Cir. 2005) (“By its terms,  
4 RLUIPA is to be construed broadly in favor of protecting an inmate’s right to exercise his religious  
5 beliefs”).<sup>5</sup>

6       Once a substantial burden on the exercise of sincere religious belief is shown, the burden  
7 shifts to the defendant to show that the regulation serves a “compelling governmental interest” and  
8 “is the least restrictive means of furthering of furthering that compelling government interest.” 42  
9 U.S.C § 2000cc-1(a)(1)-(2). In conducting this inquiry, it is not the Court's purview to question the  
10 reasonableness of the belief or “to say that [plaintiffs’] religious beliefs are mistaken or  
11 insubstantial.” *Hobby Lobby*, 573 U.S. at 725. Where there are viable, less restrictive alternatives,  
12 prison officials must set forth detailed evidence that identifies the failings in these alternatives. See  
13 42 U.S.C § 2000cc et seq.; *May v. Baldwin*, 109 F.3d 557, 564-65 (9th Cir. 1997) (“Where a prisoner  
14 challenges the [prison’s] justifications, prison officials must set forth detailed evidence, tailored to the  
15 situation before the court, that identifies the failings in the alternatives advanced by the prisoner”); *cf.*  
16 *Warsoldier*, 418 F.3d at 996 (admonishing that prison “cannot meet its burden to prove least  
17 restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of  
18 less restrictive measures before adopting the challenged policy”).

19  
20       *B. Smith Has Shown that the Prison Policy Disseminated Through the Gipson Memo*  
21       *Places a Substantial Burden on His Sincerely Held Religious Beliefs*

22       As an initial matter, there should be little question that Smith held a sincere religious belief  
23 that was substantially burdened by the imposition of the Gipson Memo.<sup>6</sup> The religious belief at issue

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24 <sup>5</sup> RLUIPA is implicated when a correctional institution receives federal funding. *See* 42 U.S.C. §  
25 2000cc-1(b)(1). Such is the case here. *See* Response to California Public Records Act Request,  
26 dated July 30, 2021 (Elford Decl., Exh. 10) (describing federal funding to CDCR from January 1,  
2019, to January 1, 2021); *cf. Cutter v. Wilkinson*, 544 U.S. 709, 716 n.4 (2005) (“Every state . . .  
27 accepts federal funding for its prisons.”).

28 <sup>6</sup> Because Gipson is the Director of the CDCR’s Division of Adult Institutions, her Ramadan Memo  
has the force of policy. *Cf. Lemire v. California Dep’t of Corr. and Rehab.*, 726 F.3d 1062, 1073  
(9th Cir. 2013) (noting that CDCR amended its policy through a memorandum issued by its acting  
Director); *Barros v. Wetzel*, 2017 WL 1179970 at \*2 (M.D. Pa. March 2, 2017) (First and Fourteenth

1 here is the avoidance of Halal food likely to be cross-contaminated by Haram food. *Cf. Baranowski*  
2 *v. Hart*, 486 F.3d 112, 124 (5th Cir. 2007) (relevant religious exercise was keeping kosher and  
3 observing the Jewish sabbath); *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994) (“there is no dispute  
4 that the religious practice at issue here—the provision of an adequate kosher diet—concerns a  
5 sincerely held belief and that [plaintiff’s] claim is rooted in religious belief”); *see also Barros v.*  
6 *Wetzel*, 2017 WL 1179970 at \*2 (M.D. Pa. March 2, 2017) (“meals to accommodate therapeutic  
7 diets must be prepared separately from other meals to avoid cross-contamination from food items to  
8 which an inmate is allergic”). Smith’s application for entry into the KDP was confirmed by the  
9 prison Chaplin and prison officials. *See supra* at 2-3. Indeed, Smith’s religious beliefs were so  
10 sincerely held that he was willing to go hungry, rather than be compelled to eat food that was cross-  
11 contaminated, in derogation of his religion. *See id.*; Smith Decl. ¶ 15.

12  
13 *C. The Government Cannot Meet Its Burden of Providing a Compelling Government*  
14 *Interest that is Served by the Gipson Memo*

15 The defendants, by contrast, cannot meet their burden of demonstrating a compelling state  
16 interest that is served by the Ramadan Policy and that it is the least-restrictive means of  
17 accomplishing this. *See supra* at 9. The Supreme Court explained in *Holt* that the least-restrictive  
18 means standard is “exceptionally demanding” and “requires the government to show that it lacks  
19 other means of achieving its desired goal without imposing a substantial burden on the exercise of  
20 religion by the objecting party.” *Holt*, 574 U.S. at 364-65 (citations omitted).

21 Here, the defendants cannot do this. *First*, whereas it was incumbent on the defendants to  
22 consider alternatives to their absolute ban on the serving of KDP meals during Ramadan *before* they  
23 implemented the policy, it appears that defendant Gipson did even inquire into the basis for the  
24 Ramadan Policy until October 2, 2020, well after she issued the Ramadan Memo. *See* Email from  
25 Ralph Jackson (“Jackson”), Chief, CDCR Office of Policy Standardization, to Connie Gipson, dated  
26 October 2, 2020 (“Jackson Email”) (Elford Decl., Exh. 11). And the answer she received could not  
27 have been what she had hoped for. Jackson’s response was that “[i]nmates who participate in the

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28 Amendment Claims against Secretary of Department of Corrections, should proceed, based on his  
role in establishing [or] maintaining a practice volatile of Barros’ First Amendment rights).

1 KDP who elect to participate in the month long fasting of Ramadan, *would be able to consume the*  
2 *evening kosher meal*; however, the components of the Kosher breakfast and lunch would not be  
3 suitable for use during Ramadan as they are not shelf stable.” *Id.* (emphasis added). In other words,  
4 all along, the KDP dinner meals were sufficiently shelf-stable that they could have been served for  
5 dinner.

6 *Second*, the defendants have not articulated what alternatives, if any, they considered and  
7 rejected prior to banning KDP meals during the month of Ramadan. This dereliction belies any claim  
8 that the Gipson Ramadan meal policy was narrowly tailored to address a compelling government  
9 interest. *See May*, 109 F.3d at 564-65 (“Where a prisoner challenges the [prison’s] justifications,  
10 prison officials must set forth detailed evidence, tailored to the situation before the court, that  
11 identifies the failings in the alternatives advanced by the prisoner”). Indeed, defendant Gipson  
12 appears to have abdicated her responsibility to formulate prison policy in this regard to Community  
13 Resources Manager, Charles Richey (“Richey”). *See AGO000325* (describing responsibilities of  
14 CDCR Director of the Division of Adult Institutions (Gipson’s position) as including “formulating  
15 and implementing departmental policies, rules, regulations, and guidelines as they relate to the  
16 administration and operation of adult prisons, camps and community based facilities and/or centers”);  
17 Defendant Gipson’s Responses to Plaintiff’s First Set of Interrogatories (Elford Decl., Exh. 12) at 2  
18 (“Defendant Gipson did not author the memorandum. Defendant Gipson instead reviewed, signed,  
19 and authorized the distribution of the memorandum, which was prepared by [Community Resource  
20 Manager Richey] knowledgeable about the subject matter of the memorandum.”); Defendant  
21 Gipson’s Responses to Plaintiff’s Interrogatories, Set Two (Elford Decl., Exh. 13) at 2-3 (“Defendant  
22 did not make independent inquiries or determinations regarding the Kosher Meal Program.  
23 Defendant Gipson relied on the inquiries, expertise, and conclusions of . . . the Community Resources  
24 Manager.”). This apparent failure by defendant Gipson to consider alternatives to the Ramadan  
25 Policy when she enacted it is made all the more conspicuous by the ability of PBSP and other  
26 California prisons to accommodate Ramadan observant inmates who participate in the KDP. *See*  
27 *supra* at 4; *infra* at 13.



1 Specifically, the obvious alternatives that Gipson apparently failed to consider include the  
2 following examples. *First*, the KDP meals could be kept hot and served after sundown, to avoid the  
3 shelf stability issue, as PBSP did for other Ramadan participating inmates in 2018 and the first two  
4 days of Ramadan 2019. *See* Smith Decl. ¶10. In particular, in 2018, PBSP allowed Ramadan  
5 participants to pick up their food trays at approximately 2100 hours (9:00 p.m.), which is after or near  
6 sundown. *See* Williams Memo (AGO000380) (RMA meals were available during Ramadan in 2018  
7 at 2100 hours); *cf. Barros v. Wetzel*, 2017 WL 1179970 at \*2 (M.D. Pa. March 2, 2017) (“[o]ver the  
8 last three years, [the Pennsylvania Department of Corrections served] the Ramadan evening meal for  
9 those participating inmates [] shortly after sundown, i.e., at 8:00 p.m. or later”). The trays could also  
10 be delivered from the mainline kitchen to Facility D with hot carts or insulated trays, which maintain  
11 the food’s temperature. *See* DOM Ch. 9 (AGO000431) (“Facilities should use hot-holding uprights  
12 or carts [to maintain temperature of cooked foods for serving]”); AGO000433 (showing pictures of  
13 hot carts and describing how they are to be used); AGO000464 (discussing use of mobile hot carts);  
14 AGO000466 (discussing use of insulated trays); Smith Decl. ¶ 10 (testifying to use of hot carts at  
15 Facility D during Ramadan).<sup>7</sup> Defendants have given no reason was these practices could not be  
16 continued for Muslim inmates who were enrolled in the KDP during Ramadan in 2019, especially  
17 when their own agency head determined that “[i]nmates who participate in the month long fasting of  
18 Ramadan, would be able to consume the evening kosher meal. . . .” *See* Elford Decl., Exh. 11.

19 *Second*, the CDCR could serve the KDP meals frozen to Ramadan participants at the end of  
20 the dinner shift, which provides them an opportunity to heat the frozen portion of the meal after  
21 sundown in the communal microwave oven in Facility D. *See* Smith Decl. ¶ 18. To the extent that  
22 prison officials remain concerned about shelf-stability, which strains credulity when the KDP meals  
23 are served in this manner, it could require the inmate to sign a release and/or remove the non-shelf  
24 stable items from the bag (or let the inmate do so). *Cf. Barros*, 2017 WL 1179970 at \*8 (inmates  
25

26  
27 <sup>7</sup> *See also* AGO000466 (stating that “Tray delivery” includes trays “designed to hold hot and cold  
28 food on the same tray. Most insulated trays are secured in stacks of 10 to 12. Each  
stack is secured with a strap and placed on carts. The trays are then delivered to  
the housing units and the C/Os distribute them to the inmates in their cells”); *see also* DOM Ch. 7  
(AGO000447 & 49) (“Transport equipment [includes] . . . (1) heated cart , AND/OR insulated

1 “who wish to receive a special religious diet bag [during Ramadan] may do so provided the inmates  
2 sign the DOC’s release from responsibility form”). The prison could also serve the bagged KDP  
3 breakfasts and lunches to Ramadan observing inmates before sunrise, as it did with milk. *See*  
4 Williams Memo (AGO000380) (noting that milk will be available to Ramadan participants at 0400  
5 hours).

6 *Third*, the CDCR regularly accommodates Jewish inmates during their six annual religious  
7 fasting days by giving them two KDP bagged lunches to be eaten after sundown, *see* AG000003 col  
8 1; AGO000449; & AGO000452, so it could have done the same for Ramadan observing inmates. No  
9 explanation has been made by the defendants why these KDP meals are shelf-stable for Jewish  
10 inmates, but not for Muslim inmates. These enhanced KDP meals not only satisfy nutritional  
11 guidelines, but they would accommodate Smith’s religious beliefs, as required by RLUIPA, the  
12 Constitution, and the CDCR’s own Guidelines. *Cf. Hallman v. Metts*, 2012 WL 44055, at \*3 (D.S.C.  
13 Jan. 19, 2012) (“During Ramadan in 2010, Trinity [Prison] prepared enhanced Kosher Diet meals in  
14 accordance with the Kosher Diet menu” by serving Ramadan observant inmates with an extra half  
15 portion of the breakfasts and lunches that they receive with their dinner meal” “[T]he one and a half  
16 size portions of the Kosher Diet breakfast and dinner meals that Trinity prepared during Ramadan  
17 2010 provided approximately 3,400 calories per day,” which exceeds the nutritional guidelines).

18 Further proof that the Gipson Memo violates RLUIPA is provided by comparing its Ramadan  
19 Policy with those of other institutions. The Ninth Circuit explained in *Warsoldier*:

20 [W]e have found comparisons between institutions analytically useful when  
21 considering whether the government is employing the least restrictive means. Indeed,  
22 the failure of a defendant to explain why another institution with the same compelling  
23 interests was able to accommodate the same religious practices may constitute a  
24 failure to establish that the defendant was using the least restrictive means.

25 *Warsoldier*, 418 F.3d at 1000 (quoted in *Shakur*, 14 F.3d at 890-91); *cf. Cheema v. Thompson*, 67  
26 F.3d 883, 885 n. 3 (9th Cir. 1995) (finding fault with defendant’s failure to explain fact that another  
27 school district had managed to accommodate Sikh students’ religious practices without sacrificing  
28 school safety) (cited in *Warsoldier*).

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transport containers OR insulated transport bags. . . . All other equipment and utensils shall be  
disposable”) (citing 15 Cal. Code Regs. § 3054).

1 And the same is true here. That other institutions, including PBSP at one time, were able to  
2 accommodate Ramadan-observant inmates who are enrolled in the KDP is demonstrated by the  
3 Declarations of CDCR inmates Damian Mitchell and Paul Christopher Hamilton who stated that they  
4 received their KDP meals during Ramadan at Solano State Prison and San Quentin State Prison,  
5 respectively, in 2019 without incident. *See* Elford Decl., Exhs. 4 & 5; *cf. Barnett v. Gipson*, 2020  
6 WL 3803933, at \*2-\*3 (C.D. Cal. April 15, 2020) (Slip Copy) (“Plaintiff asserts that, while at his  
7 previous facility, Calipatria State Prison, [he] “was able to participate in Ramadan and receive his  
8 kosher diet after sunset”); *see also Ashelman v. Wawrzaszek*, 111 F.3d 674, 677 (9th Cir. 1997)  
9 (plaintiff “points out that other prison systems, including the federal system, and the New York state  
10 system, provide completely kosher diets”); *Barros*, 2017 WL 117990, at \*2 (“Inmates who  
11 participate in Ramadan [in Pennsylvania] may fast and still receive their evening meals  
12 approximately five to ten minutes after sundown following their evening prayers”). These other  
13 institutions demonstrate that the accommodation Plaintiff seeks here is obtainable, if only  
14 correctional officials had considered it. *Cf. Holt*, 574 U.S. at 367-68 (holding that grooming  
15 regulation that did not allow any religious exceptions, such as one-half beard for Muslims, violated  
16 RLUIPA); *Warsoldier*, 418 F.3d at 998-100 (9th Cir. 2005) (granting preliminary injunction in  
17 RLUIPA challenge to former California prison grooming regulations); *Love v. Reed*, 216 F.3d 682,  
18 689-90 (8th Cir. 2000) (holding prison’s failure to accommodate prisoner’s diet was substantially  
19 burdensome and rejecting prison’s suggestion that the prisoner could fast as an alternative to the  
20 prison’s accommodation of the desired diet); *Abdul-Aziz v. Lanigan*, 2020 WL 3287229, at \*12  
21 (D.N.J. June 18, 2020) (“the [New Jersey Department of Correction’s] food policy provides Plaintiff  
22 two meal options – both of which violate his religious beliefs.”); *see also Washington v. Brown*, 2010  
23 WL 2737141, at \*9 (C.D. Cal. July 12, 2010) (“[S]pecial arrangements are made to ensure that  
24 Islamic inmates [in the SHU at High Desert State Prison in California] receive food before sunrise  
25 and after sundown”).

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27 ///

1 **II. THE GIPSON MEMO VIOLATES THE FIRST AMENDMENT FREE EXERCISE**  
2 **CLAUSE**

3 A. *Legal Standards*

4 Under the First Amendment, “Congress shall make no law respecting an establishment of  
5 religion, or prohibiting the free exercise thereof.” U.S. Const., amend. I. “[C]onvicted prisoners do  
6 not forfeit all constitutional protections by reason of their conviction and confinement in prison.”  
7 *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); *see O’Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987)  
8 (citation omitted); *see also Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (describing the First  
9 Amendment as including a “Free Exercise Clause, require[ing] government respect for and  
10 noninterference with, the religious beliefs and practices of our Nation’s people”); *Shakur v. Schriro*,  
11 514 F.3d 878, 883 -84 (9th.Cir. 2008) (“Inmates retain the protections afforded by the First  
12 Amendment, ‘including its directive that no law shall prohibit the free exercise of religion’”) (quoting  
13 *O’Lone*). More particularly, inmates have a constitutional right to “food sufficient to sustain them in  
14 good health that satisfies the dietary laws of their religion.” *See, e.g., McElyea v. Babbitt*, 833 F.2d  
15 196, 198 (9th Cir. 1987). The competing interests of the free exercise of religion versus legitimate  
16 correctional goals must be balanced under a “reasonableness test.” *Id.* at 197.

17 In *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court articulated four factors that are  
18 relevant to a reasonableness determination. *Id.* at 89-91. These factors are: (1) whether the  
19 regulation has a valid, rational connection to legitimate governmental interests invoked to justify it;  
20 (2) whether there are alternative means of exercising the asserted constitutional right; (3) what impact  
21 accommodation of the asserted right will have on correctional staff and other inmates, and on the  
22 allocation of prison resources in general; and (4) whether there are ready alternatives to the regulation  
23 or policy in question, the absence of which is evidence of the reasonableness of the prison regulation.  
24 *See id.* at 89-91; *McElyea*, 833 F.3d at 545

25 Although courts must accord deference to the decisions of prison administrators, *see Jones v.*  
26 *North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 126 (1977), “deference does not mean  
27 abdication,” *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990). Prison officials cannot rely on  
28 conclusory assertions to support their policies, but, instead, must identify the specific penological  
interests they seek to advance and show that those specific interests are the actual bases for their

1 policy. *Id.* The Free Exercise Clause of the First Amendment is triggered when an inmate’s religious  
2 practice is “sincerely held” and “rooted in religious belief.” *Shakur*, 514 F.3d at 884-85 (quoting  
3 *Malik*, 16 F.3d at 333; accord *DeHart v. Horn*, 227 F.3d 47, 51 (3d Cir. 2000) (en banc) (“[O]nly  
4 those beliefs which are both sincerely held and religious in nature are entitled to constitutional  
5 protection”). Furthermore, “the prison must provide a diet sufficient to sustain [the inmate] in good  
6 health without violating the [inmate’s kosher] laws.” *Ashelman*, 111 F.3d at 678.

7 *B. The Gipson Memo Violates the Free Exercise Clause of the First Amendment*

8 Here, as described *supra*, Smith has a sincerely held belief rooted in Islam that it violates the  
9 laws of Halal to eat food that is, or may be, cross-contaminated. *Cf. Hunafa v. Murphy*, 907 F.2d 46,  
10 47 (7th Cir. 1990) (reasoning that failure to ensure that meals be prepared separately from pork  
11 products burdened Muslim inmate’s religious practice “because it forced him to choose between  
12 adequate nutrition and observance of the tenants of his faith”); *see also Ashelman*, 111 F.3d at 675  
13 (testimony at trial was that, for orthodox Jews, “Kosher food must remain physically separate from  
14 nonkosher food, as must utensils and plates”). Indeed, observing Ramadan is central to the Islamic  
15 faith. *See* Smith Decl. ¶ 8.

16 . On the other side of the balance, defendants cannot demonstrate that the policy espoused by  
17 the Gipson Memo serves a compelling government interest. While the shelf-stability issue cited in  
18 the Memo is not to be taken lightly, this issue can be ameliorated, if not avoided altogether, by  
19 employing any of the alternatives described *supra* by Smith. The shelf-stability issue does not seem  
20 to be a problem for the CDCR when it serves two bagged KDP lunches to Jewish inmates for  
21 consumption after sundown during their observance of six 24-hour annual fasting days. *See supra* at  
22 11-12. Because other institutions can accommodate the religious beliefs of devout Muslims who are  
23 enrolled in the KDP, there is no reason that similar accommodations could not be made to Muslim  
24 inmates when fasting for Ramadan. *See supra* at 4 & 13. Thus, three of the four *Turner* factors –  
25 one, two and four -- weigh in favor of Smith. *Cf. Turner*, 482 U.S. at 90 (“existence of obvious, easy  
26 alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to  
27 prison concerns”); *Shakur v. Schriro*, 514 F.3d 878, 887 (9th Cir. 2008) (same) (quoting *Turner*);  
28

1 *Warsoldier*, 418 F.3d at 996 (“The existence of reasonable alternatives tips the balance in favor of  
2 [plaintiff’s free exercise rights”).

3 With respect to the third *Turner* factor – the impact accommodation will have on others and  
4 prison resources – defendants fare no better. The alternatives described by Smith would hardly be a  
5 drop in the bucket when compared to the CDCR’s approximately \$13 billion annual budget. *See*  
6 Governor’s Budget Summary – 2020-21 (found a [www.ebudget.ca.gov/2020-](http://www.ebudget.ca.gov/2020-21/pdf/BudgetSummary/PublicSafety.pdf)  
7 [21/pdf/BudgetSummary/PublicSafety.pdf](http://www.ebudget.ca.gov/2020-21/pdf/BudgetSummary/PublicSafety.pdf)) (last visited August 11, 2021) (Elford Decl., Exh. 14); *cf.*  
8 *VanGessel v. Moore*, 2020 WL 905216, at \*5 (E.D. Cal. Feb. 25, 2020) (“[D]efendant Madan has  
9 spent thousands of dollars on new kitchen equipment such as tables, cooking kettles, eight new hot  
10 carts for the Satellite Feeding Room, and hot and cold boxes for the serving line, yet he cannot even  
11 spend \$2,000 of his budget to purchase brand new quality work boots and personal protective  
12 equipment for inmate employees to be safe while performing their jobs); *Ashelman*, 111 F.3d at 678  
13 (“The evidence shows that disposable utensils are also available, at modest cost”). Accommodating  
14 only a handful of Muslim inmates who participate in the KDP during Ramadan, will not greatly  
15 impact the prison’s annual budget. *See* Smith Dep. 65:3-22 (testifying that he and five other Muslim  
16 inmates who are enrolled in the KDP signed the administrative grievance regarding Ramadan Policy);  
17 Elford Decl., Exh. 8 at 3; *cf. Barros*, 2017 WL 1179970 at \*2 (Chief of the Food Service Division for  
18 the Pennsylvania Department of Corrections stating in her declaration “that delivering fast meals to a  
19 smaller number of Jewish inmates has minimal impact upon the efficient operations of the  
20 institution.”).

21 Nor does Smith’s requested accommodation negatively impact other inmates or prison guards.  
22 Prison staff already provides hot meals to inmates during Ramadan near or after sundown, *see supra*  
23 at 11, and prison staff does not appear to be disturbed by this. Because the “favoritism argument” is  
24 “present in every case that requires special accommodations for adherents to particular religious  
25 practices,” the Ninth Circuit has criticized it. *See Ward v. Walsh*, 1 F.3d 873, 878 (9th.Cir. 1993)  
26 (quoted in *Shakur*, 514 F.3d at 886).

27 Further proof that the Gipson Memo violates the Free Exercise Clause of the First  
28 Amendment is provided by the fact that it leaves Smith with the Hobson’s choice of abiding by the

1 sacred tenants of his religion or going hungry. *Cf. Thompson v. Holm*, 809 F.3d 376, 379-80 (7th Cir.  
2 2015) (“We have repeatedly held that forcing an inmate to choose between daily nutrition and  
3 religious practice is a is a substantial burden. . . . A substantial burden “put[s] substantial pressure on  
4 an adherent to modify his behavior and to violate his beliefs.”) (citations omitted) (quoting *Thomas v*  
5 *Review Bd.*, 450 U.S. 707, 717-18 (1981)); *cf. Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1316-17  
6 (10th Cir. 2010) (“It is a reasonable inference that [the Oklahoma Department of Corrections’] failure  
7 to provide a halal diet either prevents Mr. Abdulhaseeb’s religious exercise, or, at the least, places  
8 substantial pressure on Mr. Abdulhaseeb not to engage in his religious exercise by presenting him  
9 with a Hobson’s choice—either he eats a non-halal diet in violation of his sincerely held beliefs, or he  
10 does not eat”); *see also Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450-51 (1988)  
11 (explaining that strict scrutiny is triggered under the First Amendment when the governmental burden  
12 on religion has a “tendency to coerce individuals into acting contrary to their religious beliefs”); *May*  
13 *v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997) (noting “that ‘putting substantial pressure on an  
14 adherent to modify his behavior and to violate his beliefs infringes on the free exercise of religion”)  
15 (quoting *Thomas*, 450 U.S. at 718). If such coercion as that existing here is not “substantial pressure  
16 on an adherent to modify his behavior and to violate his beliefs,” than it is hard to imagine what is.  
17 *See Thomas*, 450 U.S. at 718.

18 In *Ashelman v. Wawrzasek*, 111 F.3d 674 (9th Cir. 1997), the Ninth Circuit reversed the  
19 Magistrate Judge’s judgment in a Free Exercise case in favor of the prison and remanded the case to  
20 the district court to “fashion an appropriate order requiring [the plaintiff] be provided a diet sufficient  
21 to sustain him in good health without violating the [Jewish] laws of kashruth (kosher diets).” *Id.* at  
22 678. In reaching this decision, the Court explained:

23 The evidence also shows that the prison accommodates the dietary requirements of  
24 other religious groups, including Muslims, Sikhs, and Seventh–Day Adventists,  
25 without disruption. Under these circumstances, it does not appear that the difficulties  
26 envisioned by the prison are insurmountable. To the contrary, this evidence of  
27 “obvious, easy alternatives” shows that the policy is unreasonable as applied to  
28 Ashelman.

*Id.* The same is true here. *Cf. Makin*, 183 F.3d at 1211 (prison officials’ failure to accommodate  
inmate’s meal requirements during the Muslim holy month of Ramadan violated his First

1 Amendment right to free exercise of his religion); *Thompson*, 89 F.3d at 380 (holding that denial of  
2 meal bags to an inmate for two days during Ramadan substantially burdened his free exercise rights);  
3 *Ashelman*, 111 F.3d at 678 (9th Cir. 1997) (holding that prison must provide inmates with  
4 nutritional diet in conformity with kosher laws).

### 5 **III. THE GIPSON MEMO VIOLATES THE EIGHTH AMENDMENT**

#### 6 *A. Legal Standards*

7 The Eighth Amendment’s prohibition against cruel and unusual punishment imposes a duty  
8 on prison officials to “provide humane conditions of confinement.” *Farmer v. Brennan*, 511 U.S.  
9 825, 832 (1994). “[P]rison officials must ensure that inmates receive adequate food, clothing, shelter,  
10 and medical care.” *Id.* “Adequate food is a basic human need protected by the Eighth Amendment.”  
11 *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996); see also *Farmer*, 511 U.S. at 832 (noting that  
12 there is no question that an inmate’s Eighth Amendment right to adequate food is clearly established).

13 Establishing a violation of the Eighth Amendment requires a two-part showing. *First*, an  
14 inmate must objectively show that he was deprived of something “sufficiently serious.” *Farmer*, 511  
15 U.S. at 834. A deprivation is sufficiently serious when the prison’s when the prison official’s act or  
16 omission results “in the denial of ‘the minimal civilized measure of life’s necessities.’” *Id.* (quoting  
17 *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

18 *Second*, the inmate must make a subjective showing that the deprivation occurred with  
19 deliberate indifference to the inmate’s health or safety. *Id.* at 834-36 (citing *Wilson v. Seiter*, 501  
20 U.S. 294, 302-03 (1991)). The deliberate and unnecessary withholding of food essential to maintain  
21 normal health is a sufficiently serious deprivation that it can constitute a violation of the Eighth  
22 Amendment. *Johnson v. Lewis*, 217 F.3d 726, 734 (9th 2000). “[A] factfinder may conclude that a  
23 prison official knew of a substantial risk from the very fact that the risk was obvious.” *Farmer*, 511  
24 U.S. at 842; accord *Simmons v. Cook*, 154 F.3d 805, 808 (8th Cir. 1998) (quoting *Farmer*).

#### 25 *B. The Policy Promulgated by The Gipson Memo Violates the Eighth Amendment*

26 Here, PBSP’s denial of meals to Smith for 28 consecutive days during Ramadan was a  
27 “sufficiently serious” deprivation of his right to an adequate diet to warrant Eighth Amendment  
28 protection. See cases cited *supra*; see also *Johnson v. Lewis*, 217 F.3d at 734-35 (“The Eighth



1 Amendment does not tolerate prison officials' deliberate indifference . . . to substantial deprivations  
2 of adequate shelter, food, drinking water and sanitation"). Director Gipson was certainly aware that  
3 her Ramadan Memorandum would place at risk the health and safety of Ramadan-observant inmates  
4 who would not bow to her pressure to deviate from their religion by switching to the RMA diet, yet  
5 she deliberately chose to ignore that obvious risk. *Cf. Farmer*, 511 U.S. at 842 (quoted above).  
6 Gipson's knowledge, or willful ignorance, of this obvious risk of malnutrition is especially suspect in  
7 light of the ability of other institutions to accommodate Ramadan participating inmates. *See supra* at  
8 4 & 13. In a word, defendants' deliberate indifference to Smith's right to adequate nutrition during  
9 Ramadan violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Cf. Foster*  
10 *v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009) (depriving an inmate of 16 meals over 23-day period  
11 violated Eighth Amendment's prohibition of cruel and unusual punishment); *Reed v. McBride*, 178  
12 F.3d 849, 853-56 (7th Cir. 1999) (reversing grant of summary judgment on inmate's Eighth  
13 Amendment claim because the alleged deprivation of food was sufficiently serious and prison  
14 officials' deliberate indifference was obvious); *Simmons*, 154 F.3d at 807-09 (finding Eighth  
15 Amendment violation where inmates were deprived of four consecutive meals while defendants  
16 failed to ensure that they received their meal trays; "[The] circumstantial evidence demonstrates 'very  
17 obvious and blatant circumstances' from which it is proper to infer that [defendants] knew such risk  
18 existed but were deliberately indifferent to [plaintiffs'] health and safety") (quoting *Spruce v.*  
19 *Sargent*, 149 F.3d 783, 785-86 (8th Cir. 1998)); *see also Phelps v. Kapnolas*, 308 F.3d 180, 187 (2d  
20 Cir. 2002) (reversing dismissal of inmate's Eighth Amendment claim because inmate had alleged that  
21 his diet was nutritionally inadequate ).

#### 22 **IV. THE GIPSON MEMO VIOLATES EQUAL PROTECTION**

##### 23 *A. Legal Standards*

24 The Equal Protection Clause, made applicable to the states under the Fourteenth Amendment,  
25 requires the State to treat all similarly situated people equally. *Shakur*, 514 F.3d at 891 (citing *City of*  
26 *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (9th Cir. 1985)). In the prison context, Equal  
27 Protection requires a reasonable opportunity for each inmate to pursue his faith comparable to the  
28 opportunity afforded fellow prisoners who adhere to conventional religious beliefs. *See Shakur*, 514

1 F.3d at 891. The proper standard of review for equal protection claims is the four-part balancing test  
2 set forth by Turner, focusing on Plaintiff’s status as a Muslim, rather than his status as a prisoner. *Id.*  
3 at 891.

4 A plaintiff, however, cannot succeed on his equal protection challenge, if the disparate  
5 treatment of Plaintiff compared to inmates of other faiths is reasonably related to legitimate  
6 penological interests, which is not the case here. Because the Gipson Memo reflects an obvious  
7 attempt to discriminate against Muslim inmates who participate in the KDP, it should be subject to  
8 strict scrutiny under the Equal Protection Clause. *See Larson v. Valente*, 456 U.S. 228, 244, 246  
9 (1982) (“when we are presented with a state law granting a denominational preference, our  
10 precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its  
11 constitutionality”); *Bowman v. United States*, 564 F.3d 765, 772 (6th Cir. 2008) (“Strict scrutiny  
12 applies where the classification challenged . . . is based on religion or burdens the exercise of  
13 religion”); *Davis v. Powell*, 901 F.Supp.2d 1196, 1218 (S.D. Cal. 2012) (“Courts apply strict scrutiny  
14 ‘when distinctions are made on the basis of a suspect class, like religion’”) (quoting *Ass’n of*  
15 *Christian Schools Int’l v. Sterns*, 362 Fed.Appx. 640, 646 (9th Cir. 2010)); *Martinez v. Clark County,*  
16 *Nevada*, 846 F.Supp.2d 1131, 1146 (D. Nev. 2012) (“Religion is a suspect classification”) (citing  
17 *Friedman v. Rogers*, 440 U.S. 1 (1979)); *see also Prudential Prop. & Cas. Co. v. Ins. Comm’n of*  
18 *S.C. Dept of Ins.*, 534 F.Supp. 571, 575-76 (D.S.C. 1982) (under the Equal Protection Clause,  
19 challenged government action that “caus[es] disparate treatment based on a ‘suspect classification’  
20 such as race or religion . . . receives very strict scrutiny by the courts”). In applying strict scrutiny,  
21 the court asks “whether the [ordinance] is narrowly tailored to serve a compelling governmental  
22 interest.” *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). But even under a rational basis test,  
23 the policy promulgated by the Gipson Memo does not pass constitutional muster.

24 ***B. The Gipson Memo Violates the Equal Protection Clause***

25 The Gipson Memo violates equal protection in several ways. *First*, it reflects a not so thinly  
26 veiled attempt to discriminate against Muslim inmates, since they are almost exclusively the only  
27 ones who celebrate Ramadan.

1           *Second*, the prison finds a way to accommodate devout Jewish inmates when they fast for  
2 their six holy days by providing them with two sack lunches to eat after sundown, *see* AG000003 col  
3 1; AGO000449 & AGO000452, yet it cannot find a way to do this for Muslim inmates when they are  
4 observing Ramadan -- their most important holiday of the year. *See also* AGO000449 (a “kosher  
5 inmate whose chooses to fast will not be provided any regular kosher meals for the recognized fasting  
6 day. The fasting inmate will instead be provided with 2 kosher lunches to be eaten at the end of the  
7 fasting period.”) Although these same KDP bagged lunches would not be shelf stable for Muslim  
8 inmates participating in Ramadan, that did not seem to be a concern for the defendants when the  
9 prison served these “non-shelf-stable” meals to Jewish inmates for their consumption after sundown  
10 during their six fasting holy days. *See supra* at 12.<sup>8</sup> These attributes of the Ramadan Policy enforced  
11 harshly against Smith at PBSP in 2019 represent religiously motivated disparate treatment of Jews  
12 and Muslims that is prohibited by the Equal Protection Clause. *Cf. Fowler v. Rhode Island*, 345 U.S.  
13 67, 70 (1953) (“[A] religious service of Jehovah’s Witnesses is treated differently that a religious  
14 service of other sects. That amounts to the state preferring some religious groups over this one”);  
15 *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994) (“A government  
16 practice has the effect of impermissibly . . . disapproving of religion if it is ‘sufficiently likely to be  
17 perceived by nonadherents [of the controlling denomination] as a disapproval of the individual  
18 religious choices”) (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)).

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27 <sup>8</sup> The timing of the CDCR’s shift in policy is also conspicuous. On June 26, 2016, the CDCR  
28 responded to the *Garcia* decision by enacting religious diet emergency regulations striking the word  
“Jewish” from the JKDP. *See* Elford Decl., Exh. 11. It was the very next Ramadan that the CDCR’s  
Ramadan Policy first went into effect.

1 **CONCLUSION**

2 The Ramadan Policy implemented by Gipson and her staff applies harshly to Muslim inmates,  
3 such as Smith, who are enrolled in the KDP and celebrate Ramadan. Rather than consider  
4 alternatives to their overbroad Ramadan meal policy, defendants took and axe to a situation that  
5 requires a scalpel. Their approach left Smith without meals for nearly all of Ramadan in 2019. The  
6 Ramadan Policy espoused by Gipson in her March 12, 2019, Memo not only violates RLUIPA and  
7 the Free Exercise Clause of the First Amendment, but it also violates the Eighth Amendment  
8 prohibition on cruel and unusual punishment and the Equal Protection Clause of the Fourteenth  
9 Amendment. For the foregoing reasons, Smith’s Motion for Summary Judgment, or, Alternatively,  
10 for Partial Summary Judgment should be granted.

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12 DATED: August 12, 2021

Respectfully Submitted,

13 /s/ Joseph D. Elford

14 Counsel for Plaintiff  
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