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

WILLIAM ROUSER,

Plaintiff,

No. CIV S-93-0767 LKK GGH P

vs.

THEO WHITE, et al.,

Defendants.

O R D E R

_____/

Plaintiff is a prisoner proceeding with counsel bringing claims arising out of the alleged failure of prison officials to accommodate the practice of his religion. At issue here is plaintiff's most recent motion for a preliminary injunction enjoining various officials. The motion seeks an order allowing plaintiff to obtain and maintain certain articles, which he characterizes as religious, and to satisfy certain requirements with respect to his religious services. For the reasons stated below, plaintiff's motion is granted as to most of the relief he seeks.

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1 **I. BACKGROUND**

2 On May 7, 1993, plaintiff filed his original complaint
3 seeking damages and injunctive relief from, inter alia, defendant
4 Theo White ("White"), warden of California State Prison -
5 Sacramento ("CSP-Sac"), and defendant James H. Gomez ("Gomez"),
6 former director of the California Department of Corrections and
7 Rehabilitation ("CDCR"), under several theories of liability
8 alleging their infringement of his religious practice. On
9 December 5, 1997, the court dismissed the case pursuant to the
10 parties' private settlement. On March 23, 2004, the court
11 reopened the case pursuant to the Prison Litigation Reform Act,
12 which provides that the only way for courts to enforce private
13 settlement agreements is to reinstate civil proceedings. 18
14 U.S.C. § 3626(c)(2).

15 On January 30, 2006, plaintiff filed an amended complaint
16 adding defendants and claims relating to his treatment at Mule
17 Creek State Prison ("MCSP"). In June 2007, plaintiff was
18 transferred to Pleasant Valley State Prison ("PVSP"). On
19 September 23, 2008, plaintiff filed his third amended complaint,
20 bringing claims against four defendants, White, Gomez, Matthew
21 Cate ("Cate"), Secretary of CDCR, and James A. Yates ("Yates"),
22 warden at PVSP. This complaint sued all defendants in their
23 individual and official capacities, and plaintiff sought both
24 damages and injunctive relief.

25 On May 14, 2009, this court granted in part and denied in
26 part defendants' motion for summary judgment. The motion was

1 denied insofar as plaintiff sought injunctive relief.
2 Specifically, the court concluded that "were the factfinder to
3 credit even some of plaintiff's evidence of the violations he has
4 suffered since 1992 in attempting to exercise his religious
5 rights, a factfinder could infer a pattern of Constitutional
6 violations sufficient to call into question the permanence of any
7 changes defendants have voluntarily made now." May 14, 2009
8 Order, Doc. 420, at 74. The court discusses the specific holdings
9 of this decision and the relevance of the holding below.

10 On December 10, 2009, this court granted plaintiff's motion
11 to supplement his complaint to include claims for conduct
12 occurring after he filed his Third Amended Complaint. Plaintiff
13 sought to add three defendants to his complaint. Plaintiff
14 alleges that defendant correctional counselors P. Ortiz ("Ortiz")
15 and B. Flores ("Flores") retaliated against his filing of
16 grievances and litigation of this case by placing plaintiff in
17 administrative segregation and then causing plaintiff to be
18 transferred from PVSP to California State Prison Los Angeles
19 County ("LAC"). Plaintiff also added defendant Brian Haws
20 ("Haws"), warden of LAC.

21 **II. STANDARD OF REVIEW FOR FED. R. CIV. P. 65 MOTION FOR**
22 **PRELIMINARY INJUNCTION**

23 A preliminary injunction is an "extraordinary remedy."
24 Winter v. Natural Resources Defense Council, Inc., ___ U.S. ___,
25 129 S. Ct. 365, 376 (2008) (internal citation omitted). When a
26 court considers whether to grant a motion for a preliminary

1 injunction, it balances "the competing claims of injury, . . .
2 the effect on each party of the granting or withholding of the
3 requested relief, . . . the public consequences in employing the
4 extraordinary remedy of injunction," and plaintiff's likelihood
5 of success. Id. at 374, 376-77 (quoting Amoco Prod. Co. v.
6 Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romero-Barcelo,
7 456 U.S. 305, 312 (1982)). In order to succeed on a motion for a
8 preliminary injunction, the plaintiff must establish that "he is
9 likely to succeed on the merits, that he is likely to suffer
10 irreparable harm in the absence of preliminary relief, that the
11 balance of equities tips in his favor, and that an injunction is
12 in the public interest." Winter, 129 S. Ct. at 374.

13 An even more stringent standard is applied where mandatory,
14 as opposed to prohibitory, preliminary relief is sought. The
15 Ninth Circuit has noted that although the same general principles
16 inform the court's analysis, "where a party seeks mandatory
17 preliminary relief that goes well beyond maintaining the status
18 quo pendente lite, courts should be extremely cautious about
19 issuing a preliminary injunction." Martin v. International
20 Olympic Committee, 740 F.2d 670, 675 (9th Cir. 1984). Thus, an
21 award of mandatory preliminary relief is not to be granted unless
22 both the facts and the law clearly favor the moving party and
23 extreme or very serious damage will result. See Anderson v.
24 United States, 612 F.2d 1112, 1115 (9th Cir. 1979). "[I]n
25 doubtful cases" a mandatory injunction will not issue. Id.

26 ////

1 **III. ANALYSIS**

2 Rouser is a practicing Wiccan, who argues that defendants
3 have infringed upon his ability to practice his religion.
4 Plaintiff moves for a preliminary injunction against defendants
5 Cate and Haws. Specifically, plaintiff argues that these
6 defendants are violating his rights under the Religious Land Use
7 and Institutionalized Persons Act ("RLUIPA"), the Free Exercise
8 and Establishment Clauses of the First Amendment, as incorporated
9 through the Fourteenth Amendment, and the Equal Protection Clause
10 of the Fourteenth Amendment. Plaintiff seeks the following
11 injunctive relief:

12 (1) that defendants allow Mr. Rouser to keep and maintain
13 religious texts (including but not limited to A Witches' Bible
14 Compleat (the "Wiccan Bible")), to the maximum extent allowed
15 under CDCR policies and as applied to all inmates; this includes
16 allowing Mr. Rouser to have his Wiccan Bible while he is in
17 Administrative Segregation;

18 (2) that defendants allow Mr. Rouser to obtain group Wiccan
19 items prior to Wiccan group services;

20 (3) that defendants cannot take and/or destroy Mr. Rouser's
21 approved religious articles;

22 (4) that defendants provide a means for Mr. Rouser to order
23 and receive religious items;

24 (5) that when Wiccan services are scheduled, defendants must
25 allow Mr. Rouser to access the nature-based religious area for
26 group services for the entire scheduled time, unless the Yard is

1 on modified program and no religious group is allowed to meet
2 that day;

3 (6) that defendants grant Mr. Rouser access to a fire pit
4 during religious services;

5 (7) that defendants provide Mr. Rouser an outdoor
6 nature-based religious area, similar to the outdoor nature-based
7 religious area at Pleasant Valley State Prison, in which Mr.
8 Rouser may participate in Wiccan group services;

9 (8) that defendants cannot take unreasonable steps to
10 interrupt Mr. Rouser's group services, including but not limited
11 to blaring Christian music in the direction of Mr. Rouser's group
12 services or turning on the sprinkler system during Mr. Rouser's
13 group services; and

14 (9) that defendants announce Wiccan services to the same
15 extent they announce services for the main stream faiths (i.e.,
16 Catholic, Protestant, Jewish, Muslim, and Native American).

17 Defendants oppose this motion on several grounds. First,
18 defendants argue that the motion should be denied for several
19 jurisdictional reasons. Second, defendants argue that the motion
20 should be denied under the requirements to issue a preliminary
21 injunction. The court will first dispose of defendants'
22 jurisdictional concerns, and then turn to the preliminary
23 injunction factors.

24 **A. Whether the Court Has Jurisdiction to Issue a**
25 **Preliminary Injunction.**

26 **1. Whether Defendants Gomez's and Ortiz's**

1 **Interlocutory Appeal of this Court's Decision**
2 **Denying Qualified Immunity Bars this Court's**
3 **Ability to Issue a Preliminary Injunction.**

4 On May 14, 2009, this court denied defendants Gomez's and
5 Ortiz's motion for summary judgment on the grounds that they are
6 entitled to qualified immunity for violation of the Free Exercise
7 Clause and the Equal Protection Clause. The court also denied
8 defendants' motion on the grounds that they were entitled to
9 qualified immunity for violation of the Establishment Clause, but
10 only insofar as plaintiff was denied access to a Witches Bible
11 while in administrative segregation. The court held that
12 defendants were entitled to qualified immunity as to plaintiff's
13 other claims for violation of the Establishment Clause. The court
14 granted defendants' motion insofar as plaintiff's claim for
15 violation of the Establishment Clause concerned his denial of
16 Tarot cards, candles, incense, and access to a chapel. On June
17 12, 2009, defendants filed a notice of appeal as to the "denial
18 of their motion for summary judgment asserting the defense of
19 qualified immunity from all damages asserted in plaintiff's Third
20 Amended Complaint" Defendants' Notice of Appeal, Doc. No.
21 421, at 2. Plaintiff seeks to enjoin defendants Cate and Haws,
22 successors in office to defendants Gomez and White, the
23 defendants who are appealing this court's decision on qualified
24 immunity. Defendants argue that this court does not have
25 jurisdiction to enter a preliminary injunction against Cate and
26 Haws because their liability for injunctive relief is
"necessarily intertwined with the question on appeal" and,

1 therefore, the court cannot grant a preliminary injunction.

2 As this court held in its December 10, 2009 order,
3 “[i]nterlocutory appeal of denial of qualified immunity may
4 deprive the district court of jurisdiction.” December 10, 2009
5 Order at 8. Specifically, the court “is automatically divested of
6 jurisdiction to proceed with trial pending appeal.” Id. (quoting
7 Shuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992)). Because
8 qualified immunity is only immunity from damages, this court held
9 that it “presently [only] lacks jurisdiction over the claims for
10 damages against Gomez and White.” The court continued to state
11 that “[a]ppeal does not deprive the court of jurisdiction over
12 other aspects of this case, including plaintiff’s claims for
13 injunctive relief and as to other defendants.” December 10, 2009
14 Order at 9 (citing Plotkin v. Pacific Tel. & Tel. Co., 688 F.2d
15 1291 (9th Cir. 1982)).

16 Defendants argue that this court’s reliance on Plotkin is
17 misguided.¹ Specifically, defendants argue that “Plotkin holds
18 that an appeal from an interlocutory order does not divest the
19 court of jurisdiction to proceed with all ‘other aspects’ of the
20 case, but divests the court of jurisdiction only as to those
21 issues that do implicate issues on appeal.” Opposition at 35.
22 However, as this court explained in its previous order, Plotkin
23 held that “an appeal from an interlocutory order does not stay
24

25 ¹Throughout this section defendants’ refer to the court’s
26 analysis in the December 10, 2009 order as if these were
arguments merely raised by plaintiffs.

1 the proceedings, as it is firmly established that an appeal from
2 an interlocutory order does not divest the trial court of
3 jurisdiction to continue with other phases of the case." Plotkin,
4 688 F.2d at 1293. Defendants contend that any matter that seems
5 somewhat related to the matter on appeal constitutes the same
6 "phase[] of the case." That is not so. For example, in Plotkin,
7 the Ninth Circuit held that the district court could entertain
8 defendant's motion for summary judgment while denial of
9 plaintiff's motion for a preliminary injunction was on appeal.
10 December 10, 2009 Order (citing Plotkin, 688 F.2d at 1293). The
11 subject matter of the two motions in Plotkin was virtually
12 identical. Specifically, the preliminary injunction was denied
13 because plaintiff failed to exhaust the available administrative
14 remedies, and the motion for summary judgment was granted for the
15 same reason. Plotkin, 688 F.2d at 1292. Nonetheless, the Ninth
16 Circuit held that the district court had jurisdiction over the
17 summary judgment motion while its order denying the preliminary
18 injunction order was on appeal. Clearly, the Ninth Circuit did
19 not hold that district courts lack jurisdiction only as to those
20 issues that do not implicate the issues raised in the appeal.

21 Here, the only similarity between the issues on appeal and
22 the issue at bar is the possibility that the Ninth Circuit would
23 adopt reasoning that could conflict with this court's
24 understanding of the constitutional and statutory requirements
25 concerning plaintiff's religious practice. As an initial matter,
26 defendants are mistaken to argue that if the Ninth Circuit

1 reverses this court's decision on qualified immunity that then
2 Cate and Haws would necessarily be dismissed from the case. The
3 appeal only concerns the extent to which White and Gomez are
4 liable in their individual capacity for damages, and not in the
5 official capacity for injunctive relief. Despite this difference,
6 the ruling of the Ninth Circuit may only possibly effect this
7 court's reasoning under the First and Fourteenth Amendments, and
8 not under RLUIPA. For example, if the Ninth Circuit were to
9 reverse this court's decision as to whether Gomez and White are
10 entitled to qualified immunity on the grounds that the law was
11 not clearly established, this decision would not effect Cate's
12 and Haws' liability. First, Gomez and White would only be
13 dismissed from the action because they are retired, and thereby
14 no longer liable for injunctive relief. Cate and Haws, as active
15 officials, remain liable for injunctive relief even if Gomez and
16 White were entitled to qualified immunity. Second, it is not
17 clear that Cate and Haws would even be entitled to such immunity
18 where Gomez and White acted before this court issued orders
19 concerning the constitutional and statutory requirements, and
20 Cate and Haws allegedly infringed plaintiff's rights after the
21 court described these requirements. The only possibility for the
22 Ninth Circuit's decision on defendant's qualified immunity appeal
23 to implicate the instant motion would be for the court of appeals
24 to decide that this court was wrong as to whether a reasonable
25 jury could conclude that Gomez and White violated the
26 constitution. If the Ninth Circuit were to so decide, the proper

1 avenue for defendants would be to file a motion to reconsider an
2 order granting a preliminary injunction based on those theories,
3 and not to preemptively oppose a motion for a preliminary
4 injunction on the grounds that there is a chance that the Ninth
5 Circuit could resolve their appeal in a way that could implicate
6 this order. As such, defendants' argument does not prevent the
7 court from issuing a preliminary injunction.

8 **2. Whether this Court's Decision on Defendants'**
9 **Motion to Dismiss Plaintiff's Claims of**
10 **Retaliation Against Flores and Ortiz Bars the**
11 **Court's Ability to Issue a Preliminary Injunction.**

12 Defendants also argue that the court lacks jurisdiction to
13 issue injunctive relief as to the alleged retaliation claim
14 against defendants Flores and Ortiz because they anticipated that
15 this court will grant its motion to dismiss this claim for
16 failure to exhaust administrative remedies. On March 10, 2010,
17 this court denied defendant's motion to dismiss on this ground.
18 Moreover, even if the court had granted the motion to dismiss,
19 this argument is irrelevant in that Rouser is seeking to enjoin
20 Cate and Haws, the officials responsible for his treatment at
21 LAC, and not Ortiz and Flores, the officials at PVSP, plaintiff's
22 previous place of institution. Accordingly, defendants' have not
23 demonstrated this court's lack of jurisdiction for failure to
24 exhaust a retaliation claim against Flores and Ortiz.

25 **3. Whether Plaintiff's Motion Is Moot.**

26 Defendants also argue that the court should not issue a
preliminary injunction here because plaintiff's motion is moot.

1 Defendants seem to contend that their conduct at the correctional
2 institutions where plaintiff was previously incarcerated should
3 not bear on whether plaintiff is entitled to a preliminary
4 injunction at the institution where he is currently incarcerated.
5 In support of this argument, defendants refer to this court's
6 previous order dismissing a preliminary injunction as moot where
7 plaintiff sought to enjoin officials at Mule Creek State Prison,
8 but was later transferred to PVSP. This argument conflates two
9 issues. While it is clear that plaintiff could not seek to enjoin
10 officials at prisons where he is no longer incarcerated, evidence
11 of conduct from those prisons is nonetheless relevant in deciding
12 whether defendants are engaging in a pattern and practice of
13 preventing plaintiff from practicing his religion. This is
14 especially so where Cate, one of the defendants plaintiff seeks
15 to enjoin, is secretary of the entire California Department of
16 Corrections and Rehabilitation ("CDCR"). Because plaintiff does
17 not seek to enjoin officers at his prior prisons, his motion is
18 not moot. Evidence from the previous institutions, however, is
19 relevant to plaintiff's claims and shall be considered when
20 evaluating plaintiff's likelihood of success on the merits.

21 Given that the court concludes it has jurisdiction over
22 plaintiff's motion for a preliminary injunction, I now turn to
23 whether such an injunction should issue.

24 **B. Whether Plaintiff Is Entitled to a Preliminary**
25 **Injunction.**

26 **1. Likelihood of Success on the Merits.**

1
2 **a. Whether Plaintiff Has Demonstrated a Causal**
3 **Connection Between the Actions of Defendants**
4 **Haws and Cate and His Treatment at LAC.**

5 Defendants assert that plaintiff "has not shown any causal
6 connection between the actions of Warden Haws and the alleged
7 conduct of prison staff at CSP-Los Angeles County; . . ." ²
8 Opposition at 37. Defendants do not argue that plaintiff has not
9 demonstrated such a connection between CDCR Secretary Cate and
10 the alleged conduct at LAC, but because the reasoning is
11 identical, and because the court decides that plaintiff has
12 demonstrated such a connection, the court considers defendants'
13 argument as if it sought to deny a connection between both
14 defendants that plaintiff seeks to enjoin and the alleged conduct
15 at LAC.

16 To succeed on a claim under 42 U.S.C. § 1983,³ plaintiff
17 must show "(1) that a person acting under color of state law
18 committed the conduct at issue, and (2) that the conduct deprived
19 the claimant of some right, privilege, or immunity protected by

20 ² The court construes defendants' argument as to causal
21 connection as an argument under the likelihood of success element
22 for a preliminary injunction even though defendants did not
23 include this discussion under the likelihood of success on the
24 merits section of their opposition. The reason for including it
25 in this section is that if plaintiff has not sufficiently shown a
26 causal connection, he would not be likely to succeed on the
27 merits. This argument is not a jurisdictional bar to entry of an
28 injunction, but rather goes to the strength of plaintiff's
29 claims.

³ The court notes that this analysis only applies to
30 plaintiff's § 1983 claim, and not for his claim under RLUIPA.

1 the Constitution or laws of the United States." Leer v. Murphy,
2 844 F.2d 626, 632-33 (9th Cir. 1988) (internal citations
3 omitted). The Ninth Circuit construes the second element to
4 require that plaintiff show that a defendant deprived him "of a
5 constitutional right, within the meaning of section 1983, [where]
6 he does an affirmative act, participates in another's affirmative
7 acts, or omits to perform an act which he is legally required to
8 do that causes the deprivation of which [the plaintiff
9 complains]." Id. at 633 (internal quotation omitted). "The
10 inquiry into causation must be individualized and focus on the
11 duties and responsibilities of each individual defendant whose
12 acts or omissions are alleged to have caused a constitutional
13 deprivation." Id.

14 _____The Ninth Circuit applies a less stringent standard for
15 causation where plaintiffs seek injunctive relief as opposed to
16 damages. Id. Because the inquiry here is whether plaintiff is
17 likely to succeed on the merits of his claim for an injunction,
18 the court need only address whether he is likely to show
19 sufficient causation for injunctive relief. The circuit's
20 standard for injunctive relief is "whether the combined acts or
21 omissions of the state officials responsible for operating the
22 state's penal system created living conditions that violate the"
23 constitution. Id. While this analysis "undeniably focuses on the
24 duties and responsibilities of each of the individual defendants
25 whose acts or omissions are alleged to have caused the
26 constitutional deprivation," it nonetheless "is broader and more

1 generalized than when that same prisoner seeks damages for the
2 harmful effects" of the constitutional violation. Id.
3 Accordingly, in order to demonstrate that he is entitled to
4 injunctive relief under § 1983, plaintiff need not demonstrate
5 Cate's and Haws' personal participation in each allegedly
6 unconstitutional act, as defendants contend, but rather that they
7 are responsible for policies or practices that resulted in
8 violations of plaintiff's First Amendment rights.

9 Plaintiff has clearly met this standard to the extent that
10 he seeks injunctive relief for policies that burden his religious
11 practice. While not completely clear from plaintiff's motion, it
12 appears to the court that the injunctive relief that plaintiff is
13 seeking under § 1983 only concerns "prison policies that prevent
14 Mr. Rouser [from] access to group worship, religious articles,
15 and a fire pit." Motion at 19. As the court reasoned in Rouse v.
16 Washington State Dep't of Corrs., No. C08-5620 FDB, 2009 WL
17 1011623, at *4 (W.D. Wash. Apr. 15, 2009), "the proper defendant
18 for injunctive relief regarding the implementation of a [CDCR]
19 policy would be the Secretary of the [CDCR], [Cate] in his
20 official capacity" or, to the extent that the policy is
21 institution-specific, the warden of LAC, Haws in his official
22 capacity. Id. These policies are discussed in greater depth below
23 in the court's description of the scope of preliminary relief.
24 Accordingly, plaintiff has met his burden of alleging a causal
25 connection sufficient to entitle him to injunctive relief against
26 Cate and Haws. The court addresses in the next section, whether

1 plaintiff is likely to succeed on these claims upon review of the
2 evidence provided in support and in opposition to this motion.

3 **b. Whether Plaintiff Has Demonstrated That it Is**
4 **Likely That Defendants Are Violating His**
5 **Federal Constitutional and Statutory Rights.**

6 **i. Evidence Before April 2009**

7 As an initial matter, this court has already considered
8 evidence provided by both parties as to whether defendants were
9 engaging in a pattern and practice of violating his rights under
10 RLUIPA and the Constitution by preventing him from practicing his
11 faith as of May 14, 2009 in response to defendants' motion for
12 summary judgment. The court need not discuss these facts in depth
13 again. But, rather, suffice to say, these findings of fact also
14 reveal that plaintiff is likely to succeed on the merits of his
15 claims as of, at earliest, April 3, 2009, the date plaintiff
16 submitted his opposition to defendants' motion for summary
17 judgment.⁴

18 In particular, the claims for which plaintiff has a
19 sufficient likelihood of success as to his entitlement to
20 injunctive relief include the following:

21 ⁴ The court notes that this approach only considers
22 admissible evidence. While inadmissible evidence may be
23 considered when determining the likelihood of success on the
24 merits, doing so here is not warranted. See Flynt Distrib. Co.,
25 Inc. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984). Where
26 discovery is complete as to actions occurring before April 3,
2009, plaintiff's likelihood of success is closely tied to the
admissible evidence he can present at trial. However, the court
will give some weight to inadmissible evidence for more recent
occurrences in that the parties have not yet conducted discovery
on those matters. See id.

1 (1) Defendants Cate and Yates substantially burdened
2 plaintiff's religious exercise in violation of RLUIPA and of the
3 Free Exercise Clause of the First Amendment by:

4 (a) Inhibiting plaintiff's timely receipt of religious
5 articles through policies at PVSP surrounding the ordering and
6 receipt of religious items from vendors;

7 (b) Inhibiting group worship by plaintiff and other
8 Wiccans through, inter alia, restrictions on Wiccans' use of
9 chapel space, failure to announce Wiccan group worship to the
10 general population, prohibition of Wiccans' use of certain items,
11 such as a fire pit, that are part of group worship, and a policy
12 for use of lockers by religious groups that has resulted in
13 plaintiff and other Wiccans being unable to access the items
14 desired for group religious worship;⁵

15 (c) Inhibiting plaintiff from attending group worship
16 approximate 46 times due to actions by the guards in failing to
17 escort him to the outdoor area on time, requiring him to return
18 to his cell early, or interrupting his worship; and

19 (d) Failing to retain a paid chaplain for plaintiff and
20 other Wiccans at PVSP, in that only paid chaplains can approve
21 religious order forms, retrieve orders from the mailroom, approve
22 or deny grievances, access prison keys, and ensure inmates are
23 released on time for services.

24
25 ⁵ Testimony from Lisa Morgenstern indicates that Wiccan
26 practice is sufficiently individual that it is unlikely any
article is required. Nonetheless, there is no suggestion that
the articles in question are not generally used in group worship.

1 (2) Defendants Gomez and White inhibited plaintiff's free
2 exercise rights in violation of the First Amendment through:

3 (a) Preventing plaintiff from accessing Tarot cards,
4 candles, incense, and a Witches Bible, which made the exercise of
5 plaintiff's religion significantly more difficult; and

6 (b) Denying some grievances filed by plaintiff
7 concerning his access to these items.

8 (3) Defendants violated the Establishment Clause of the
9 First Amendment by:

10 (a) Promulgating the CDCR policy which allows wardens
11 to hire chaplains only of "Muslim, Jewish, Catholic, Protestant .
12 . . and Native American" faiths;

13 (b) Allowing Native American inmates to access a sweat
14 lodge and fire pit at PVSP, while Wiccan inmates are not allowed
15 access;

16 (c) Securing the locker containing Wiccan items at PVSP
17 with a keyed lock where only the guards have access to the key,
18 while the lockers for the Native American and Catholic items are
19 secured with a combination lock of which Native American and
20 Catholic inmates know the combination, and the locker containing
21 Protestant items has no lock; and

22 (d) Rarely announcing Wiccan services to the general
23 population, while frequently announcing Protestant, Catholic, and
24 Muslim services.

25 (4) Defendants violated plaintiff's rights under the Equal
26 Protection Clause of the Fourteenth Amendment by impeding his

1 practice of the Wiccan faith in ways that other religious
2 practitioners are not. In particular, the actions include those
3 described above of denial of a paid chaplain, denial of his
4 Witches Bible in Administrative Segregation in 1993, denial of
5 access to a firepit and sweat lodge, denial of access to a chapel
6 for a period of time, and policies regarding access to items from
7 third-party vendors, use of lockers by religious groups, and
8 announcements of religious services.

9 **ii. Evidence During and After April 2009**

10 **a. Evidence from PVSP**

11 Rouser ordered religious items from a vendor in early 2009.
12 Declaration of William Rouser in Support of Plaintiff's Motion
13 for a Preliminary Injunction ("Rouser's First Decl.") ¶ 113-15.
14 On April 14, 2009, Rouser was informed by prison officers that
15 the items had arrived, yet would be returned to the sender if he
16 did not have a copy of an official religious order request form.
17 Id. Because Rouser was not allowed to make religious copies, he
18 did not have the copy. Id. Accordingly, his order was returned to
19 the vendor. Id.

20 On or about June 2009, prison officers confiscated Rouser's
21 candle holders, even though these candle holders were previously
22 approved religious items. Id. at ¶ 117; Declaration of Tramaine
23 Hunter in Support of Plaintiff's Motion for Preliminary
24 Injunction ("Hunter Decl.") ¶ 9.

25 Twice in June 2009, prison officers released Rouser one hour
26 late for his two and a half hour religious service. Rouser's

1 First Decl. at 120. Other Wiccan inmates have testified to
2 similar experiences. Declaration of James J. Burian in Support of
3 Plaintiff's Motion for Preliminary Injunction ¶¶ 7-12; Hunter
4 Decl. ¶¶ 5, 8; Declaration of Douglass Hysell in Support of
5 Plaintiff's Motion for Preliminary Injunction ("Hysell's First
6 Decl.") ¶¶ 10-11; Second Declaration of Douglass Hysell in
7 Support of Plaintiff's Motion for Preliminary Injunction
8 ("Hysell's Second Decl.") ¶¶ 6-8. Rouser has presented evidence
9 that at around the same time Muslim inmates were allowed to have
10 services fairly on time. Declaration of Kajauna Irvin in Support
11 of Motion for Preliminary Injunction ¶ 28.

12 On or about June 21, 2009, the sprinklers went off in the
13 nature based religious area for about five minutes while Wiccan
14 inmates were celebrating Sabbat. Rouser's First Decl. ¶ 125;
15 Hunter Decl. ¶ 10. Defendants have presented evidence that the
16 sprinklers would have only gone off at that time if someone went
17 to the sprinkler controls, turned them on, and remained there for
18 five minutes, and then turned them off or if there was a
19 malfunction. Lynch-Auniga Decl. ¶ 5. Defendants also claim that
20 if a person were at the sprinkler controls, he would have been
21 visible from the nature based religious area. Id.

22 Rouser was placed in Administrative Segregation on July 2,
23 2009, yet did not receive his Wiccan bible until July 24, 2009.
24 Id. at ¶ 128. Others in Administrative Segregation were promptly
25 given Christian Bibles and Qurans. Id. at ¶ 129. See also
26 Declaration of Claude Powell in Support of Plaintiff's Motion for

1 Preliminary Injunction ¶ 9 ("After being placed in Administrative
2 Segregation [in April of 2009], I received my personal belongings
3 and my Christian Bible. I saw a property officer going to the
4 cells passing out Christian Bibles and Qurans."). Rouser has also
5 presented some evidence that prison officers have gone through
6 and thrown out his personal items including Rouser's legal
7 documents and religious items. Declaration of Rickey Adams in
8 Support of Motion for Preliminary Injunction ¶¶ 5-8; Declaration
9 of Marcus Barnhardt in Support of Motion for Preliminary
10 Injunction ¶¶ 8-9.

11 **b. Evidence from LAC⁶**

12 On August 7, 2009, plaintiff was transferred to LAC.
13 Rouser's First Decl. ¶ 130. Rouser was informed by prison
14 officers at the time of his transfer that there is no religious
15 program for Wiccans at LAC. Id.

16 On August 27, 2009, the Muslim Chaplain at LAC informed
17 Rouser that a Wiccan volunteer chaplain, Lisa Morgenstern,
18 volunteers at LAC. Second Declaration of William Rouser in
19 Support of Motion for Summary Judgment ("Rouser's Second Decl.")
20 ¶ 9. As of September 4, 2009, the Wiccans were not scheduled for
21 group services, even though there are approximately thirty
22

23 ⁶Rouser argues that his transfer to LAC was in retaliation
24 for this litigation, which defendants deny. However, this
25 argument is not relevant here where plaintiff does not seek
26 injunctive relief prohibiting or requiring his transfer to
different prisons. For this reason, the court does not consider
the evidence offered in support of and in opposition to Rouser's
claims of retaliation.

1 inmates interested in such services, and Wiccans do not have a
2 locker of any kind to keep their religious items. Id. at ¶ 14;
3 Rouser's First Decl. ¶ 131. Furthermore, there is no nature based
4 religious area at LAC. Rouser's Second Decl. ¶¶ 15-16. Rouser has
5 also been told by LAC officers that he cannot practice his
6 religion unless he has a sponsor or a court order. Id. at ¶¶ 17-
7 19.

8 Between November 9, 2009 and January 8, 2010, Rouser has
9 only been released for services on three occasions. Third
10 Declaration of William Rouser in Support of Plaintiff's Motion
11 for Preliminary Injunction ("Rouser's Third Decl.") ¶ 4. Rouser
12 was able to lead one service, but did not have access to all of
13 the items necessary for such a service nor was he able to light
14 candles and incense as necessary for the service. Id. at 6-7.⁷
15 Rouser attempted to purchase these items, but his request was
16 denied, as was his appeal of the denial. Id. at ¶ 8. Rouser was
17 also not able to participate in the Yule service on December 23,
18 2009 because he was not released for the service. Id. at 12.

19 Native American inmates are released to outdoor areas for
20 services at LAC on Saturday mornings. Id. at 11.

21 Defendants have presented some evidence that rather than
22 contradicting Rouser's evidence, differently interprets the
23 course of events. As to these arguments, Rouser has at least
24

25 ⁷ According to Ms. Morgenstern's testimony, Rouser is a
26 magician, which the court takes to mean he is the Wiccan
equivalent of a religious leader in more conventional faiths.

1 characterized as Morgenstern's supervisor at LAC.⁸ In turn,
2 Rouser submitted an additional declaration in response. The
3 parties have submitted numerous objections to each other's
4 declarations. Initially, as discussed above, the evidentiary
5 objections are of little weight. The Ninth Circuit has held that,
6 "The trial court may give even inadmissible evidence some weight,
7 when to do so serves the purpose of preventing irreparable harm
8 before trial." Flynt Distrib. Co., Inc. v. Harvey, 734 F.2d 1389,
9 1394 (9th Cir. 1984). The remaining objection is that of
10 defendants who claim that significant sections of Rouser's
11 declaration should be stricken because they are beyond the scope
12 of Morgenstern's testimony.

13 Ultimately, however, this is a situation where most of the
14 evidence provided in Morgenstern's testimony and the responsive
15 declarations is beyond the scope of this motion. Plaintiff seeks
16 specific enumerated relief. The court's inquiry is limited to
17 plaintiff's likelihood of success on the merits insofar as he is
18 likely to obtain such injunctive relief at trial. For example,
19 plaintiff is not now seeking as preliminary injunctive relief the
20 hiring a Wiccan chaplain. Nonetheless, a large part of Ms.
21 Morgenstern's testimony and portions of the responsive
22 declarations only concern this issue. Further, a significant
23 portion of the relevant testimony is uncontested. For example,

24
25 ⁸ Precisely what this means is uncertain. Clearly Omeira
26 cannot supervise Ms. Morgenstern's performance of religious
services. Thus, the court assumes he is her supervisor in
relation to administrative matters.

1 the parties agree that plaintiff does not have access to outdoor,
2 nature-based religious practice at LAC. The remaining facts
3 concern to what extent Wiccan practitioners are treated
4 differently than members of other religions. While these facts
5 may ultimately be relevant in determining the extent to which
6 Rouser is entitled to damages, they are not pertinent here where
7 (1) plaintiff has demonstrated a strong likelihood of success in
8 proving at trial that defendants have in the past treated Wiccans
9 less favorably than other faiths and (2) plaintiff seeks
10 preliminary relief of equal treatment. Specifically, if
11 defendants' treatment of Wiccan religious activity over the past
12 few months is equal to that of other religious activity, it does
13 not make moot his claims for injunctive relief. Voluntary
14 cessation of unconstitutional behavior does not preclude an
15 order. See Friends of the Earth, Inc. v. Laidlaw Environmental
16 Servs. (TOC), Inc., 528 U.S. 167, 189 (2000). Accordingly, the
17 court does not resolve these disputes as they have no or little
18 bearing on the likelihood of plaintiff's success on the merits of
19 his claims for injunctive relief.

20 **2. Irreparable Injury.**

21 In order for the court to award a preliminary injunction,
22 plaintiff must demonstrate that he is likely to suffer
23 irreparable harm without preliminary relief. Winter v. Nat'l Res.
24 Def. Council, Inc., ___ U.S. ___, 129 S. Ct. 365, 374 (2008).
25 Here plaintiff seeks relief for alleged constitutional
26 violations. Such violations generally constitute irreparable harm

1 because they "cannot be adequately remedied through damages."
2 Stormans, Inc. v. Selecky, 586 F.3d 1109, 1138 (9th Cir. 2009)
3 (interpreting Winter and quoting Nelson v. N.A.S.A., 530 F.3d
4 865, 881 (9th Cir. 2008); see also Mayweathers v. Newland, 258
5 F.3d 930, 938 (9th Cir. 2001) ("[I]nmates suffer irreparable
6 injury when they are unable to attend religious services that are
7 commanded by" their religion.). Inhibition of religious practice
8 is a clear example of such constitutional injury that cannot be
9 adequately remedied through damages. As such, to the extent that
10 plaintiff is likely suffering or likely to suffer injuries
11 arising from the inhibition of his religious practice, his
12 injuries are irreparable. In other words, if "a trial on the
13 merits shows that such [inhibition] violates [his] constitutional
14 rights, [plaintiff] will have suffered irreparable injury."
15 Stormans, Inc., 586 F.3d at 1138.

16 Defendants do not challenge whether constitutional
17 violations constitute irreparable injuries. Rather, defendants
18 argue that Rouser is unlikely to experience irreparable injury
19 because defendants are already in compliance with most of the
20 terms of his proposed preliminary injunction.⁹ The court need not
21 address the factual dispute between the parties as to defendants'
22 current compliance with the proposed terms of the preliminary
23

24 ⁹ Defendants also raise some arguments that more properly
25 concern the scope of the preliminary injunction than whether
26 plaintiff is likely to experience irreparable injury. These
arguments will be addressed in the final section of this order
addressing the scope of the injunction.

1 injunction. Specifically, the Supreme Court has held that
2 voluntary cessation of allegedly illegal conduct by a defendant
3 does not moot a plaintiff's claim for injunctive relief. Friends
4 of the Earth, Inc., 528 U.S. at 189 (2000). Doing so would "leave
5 the defendant free to return to his old ways." Id. (internal
6 quotation omitted). Rather, a case does not become moot by a
7 defendant's voluntary cessation of the allegedly illegal conduct
8 unless the defendant satisfies the "heavy burden of persuading
9 the court that the challenged conduct cannot reasonably be
10 expected to start up again" Id. (internal quotation
11 omitted).

12 While this reasoning concerns mootness, and not whether a
13 plaintiff is entitled to a preliminary injunction, it is
14 immediately relevant to defendant's argument. Specifically,
15 plaintiff would be entitled to injunctive relief at trial even if
16 defendants could demonstrate that at the time of trial they were
17 not infringing the practice of his religion. Here, where the
18 alleged conduct infringing Rouser's religious practice extends
19 through decades, it would be nearly impossible for defendants to
20 show that their conduct could not be expected to start up again.
21 This is especially so where the court reopened the case due to
22 defendants' alleged failure to comply with the terms of the
23 settlement agreement. Similarly, because a preliminary injunction
24 is only awarded where plaintiff has shown that he is likely to
25 receive such a permanent injunction after trial, the same
26 reasoning applies. Accordingly, even if Rouser's religion were

1 not currently being infringed by defendants, plaintiff's claim
2 for injunctive relief has not become moot because defendants
3 could resume their conduct at any time. Furthermore, to the
4 extent that defendant is actually currently in compliance with
5 the terms of plaintiff's proposed preliminary injunction,
6 plaintiff's burden is merely to show that the voluntary cessation
7 does not demonstrate assurance of revival of the conduct.

8 **3. Balance of Hardships and Public Interest.**

9 Defendants do not make any arguments as to the balance of
10 hardships or the public interest. Suffice to say, the court is
11 persuaded that the balance of hardship tips sharply in favor of
12 plaintiff to the extent that he is unable to practice his
13 religion and allowing inmates to practice religion while
14 incarcerated is clearly within the public interest in that
15 Congress specifically passed the RLUIPA to serve such a purpose.

16 **C. Scope of Preliminary Injunction.**

17 The Prison Litigation Reform Act ("PLRA") allows courts to
18 enter an order for preliminary injunctive relief. 18 U.S.C. §
19 3626(a)(2). This relief, however, "must be narrowly drawn, extend
20 no further than necessary to correct the harm the court finds
21 requires preliminary relief, and be the least intrusive means
22 necessary to correct that harm." Id. Courts are also instructed
23 to "give substantial weight to any adverse impact on public
24 safety or the operation of a criminal justice system." Id.
25 Defendants similarly do not raise any specific concerns with
26 whether plaintiff's proposed preliminary injunctive relief

1 conforms with PLRA. Nonetheless, it seems to the court that the
2 relief described below is directly responsive to specific conduct
3 of defendants, and conforms with these requirements. For example,
4 plaintiff has provided evidence that defendants have prevented
5 him from practicing his religion by taking his religious items
6 and plaintiff seeks to enjoin defendants from taking these items.
7 Further, because defendants have presented no evidence as to how
8 any of this narrowly drawn relief would have an adverse impact on
9 public safety or the operation of a criminal justice system and
10 because the court is not otherwise aware of the possibility of
11 this relief causing such an adverse impact, this relief is proper
12 under the PLRA.

13 The relief the court grants results from institutional
14 policies and practices. Specifically, Rouser's claims concerning
15 his religious articles are the result of policies and practices
16 concerning Rouser's ability to maintain possession of his
17 religious articles and to obtain new articles. Similarly,
18 Rouser's claims concerning his access to group worship, with
19 respect to location and announcement, result from policies that
20 prohibit access to a nature-based religious area and a fire pit
21 at LAC and the administrative difficulties in announcing Wiccan
22 services because LAC does not have a paid Wiccan chaplain.

23 To this extent, the court orders the following preliminary
24 injunctive relief:

25 (1) that defendants allow Mr. Rouser to keep and maintain
26 religious texts (including but not limited to A Witches' Bible

1 Compleat (the "Wiccan Bible")), to the maximum extent allowed
2 under CDCR policies and as applied to all inmates; this includes
3 allowing Mr. Rouser to have his Wiccan Bible while he is in
4 Administrative Segregation;

5 (2) that defendants allow Mr. Rouser to obtain the group
6 Wiccan items prior to Wiccan group services;

7 (3) that defendants cannot take and/or destroy Mr. Rouser's
8 approved religious articles;

9 (4) that defendants provide a means for Mr. Rouser to order
10 and receive religious items;

11 (5) that defendants announce Wiccan services to the same
12 extent they announce services for the mainstream faiths (i.e.,
13 Catholic, Protestant, Jewish, Muslim, and Native American).

14 (6) that when Wiccan services are scheduled, defendants must
15 allow Mr. Rouser to access the outdoor, nature-based religious
16 area at LAC for group services for the entire scheduled time,
17 unless the Yard is on modified program and no religious group is
18 allowed to meet that day; and

19 (7) that defendants grant Mr. Rouser access to the fire pit
20 adjacent to the Native American sweat lodge during religious
21 services.¹⁰ The parties represented at the hearing on this motion

22
23 ¹⁰ Defendants argue that Rouser is not entitled to this
24 relief because "Rouser did not exhaust his claim for a fire pit
25 prior to commencing this action." Opposition at 42. To the extent
26 that defendants are arguing that Rouser need to have exhausted
his claim for access to a fire pit before he filed his original
complaint, such an argument is not grounded. See Order Denying
Motion to Dismiss, Dkt. No. 501. To the extent that defendants
are arguing that the claim for access to a fire pit was not

1 that practitioners of Native American faiths have access to a
2 sweat lodge. Outside of this sweat lodge is a area where rocks
3 are heated by fire to be moved into the sweat lodge. Plaintiff
4 stated that access to this fire pit would be sufficient.

5 Defendant stated that it was unsure whether the use of the fire
6 pit by Rouser would desecrate the site, but presented no evidence
7 one way or the other on this issue. Based on the evidence before
8 it, the court holds that Rouser is entitled to use this fire pit
9 during group services because (1) it is narrowly drawn with
10 respect to the constitutional violations described above and (2)
11 defendants have presented no evidence that doing so would have an
12 adverse impact on public safety or the operation of a criminal
13 justice system.

14 The court nonetheless declines to order defendants to
15 construct an outdoor nature-based religious area, similar to the
16 outdoor nature-based religious area at PVSP because plaintiff has
17 not provided sufficient evidence to demonstrate that the nature-
18 based religious area at LAC is insufficient. Rather, plaintiff
19 has only argued that he has not been allowed to access this area.
20 The court also declines to grant plaintiff's request that the
21 court enjoin defendants from taking unreasonable steps to
22

23 exhausted before filing of the Fourth Amended Complaint, the
24 court notes that G. Duran, Correctional Counselor II, has
25 declared that Rouser has filed two grievances requesting access
26 to the fire pit. Declaration of G. Duran, ¶ 6. The first was
filed on March 5, 2009 and the second was filed on April 7, 2009.
Defendants have not made any arguments that these claims were not
properly appealed through the administrative system.

1 interrupt Mr. Rouser's group services, including but not limited
2 to blaring Christian music in the direction of Mr. Rouser's group
3 services or turning on the sprinkler system during Mr. Rouser's
4 group services because plaintiff has not demonstrated that these
5 actions were the result of CDCR or LAC policy.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the court orders that plaintiff's
8 motion for a preliminary injunction, Dkt. No. 425, is GRANTED as
9 to the relief described above.

10 Defendants are hereby ordered as follows,

- 11 (1) that defendants allow Mr. Rouser to keep and maintain
12 religious texts (including but not limited to A
13 Witches' Bible Compleat (the "Wiccan Bible")), to the
14 maximum extent allowed under CDCR policies and as
15 applied to all inmates; this includes allowing Mr.
16 Rouser to have his Wiccan Bible while he is in
17 Administrative Segregation;
- 18 (2) that defendants allow Mr. Rouser to obtain the group
19 Wiccan items prior to Wiccan group services;
- 20 (3) that defendants cannot take and/or destroy Mr. Rouser's
21 approved religious articles;
- 22 (4) that defendants provide a means for Mr. Rouser to order
23 and receive religious items;
- 24 (5) that defendants announce Wiccan services to the same
25 extent they announce services for the main stream
26 faiths (i.e., Catholic, Protestant, Jewish, Muslim, and

1 Native American).


2 (6) that when Wiccan services are scheduled, defendants
3 must allow Mr. Rouser to access the outdoor,
4 nature-based religious area for group services for the
5 entire scheduled time, unless the Yard is on modified
6 program and no religious group is allowed to meet that
7 day; and

8 (7) that defendants grant Mr. Rouser access to the fire pit
9 adjacent to the Native American sweat lodge during
10 religious services.

11 The court further orders that plaintiff shall not be
12 required to post bond.

13 IT IS SO ORDERED.

14 DATED: April 15, 2010.

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16 
17 LAWRENCE K. KARLTON
18 SENIOR JUDGE
19 UNITED STATES DISTRICT COURT
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