IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 1:15-cv-00992-RBJ-KLM

AHMAD AJAJ,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,
WARDEN BILL TRUE, in his official capacity,
WARDEN JOHN OLIVER, in his individual capacity,
WARDEN DAVID BERKEBILE, in his individual capacity,
ASSOCIATE WARDEN TARA HALL, in her individual capacity,
ASSOCIATE WARDEN CHRIS LAMB, in his official and individual capacity,
ASSOCIATE WARDEN CALVIN JOHNSON, in his individual capacity,
PHYSICIAN ASSISTANT RONALD CAMACHO, in his individual capacity,
MEDICAL STAFF SAMANTHA MCCOIC, in her individual capacity,
MEDICAL STAFF K. MORROW, in her official and individual capacity,
CHAPLAIN MICHAEL CASTLE, in his official and individual capacity,
CHAPLAIN JASON HENDERSON, in his official and individual capacity,
RELIGIOUS COUNSELOR GEORGE KNOX, in his official and individual capacity,
INMATE TRUST FUND SUPERVISOR KENNETH CRANK, in his official and individual capacity,
NURSE ROGER HUDDLESTON, in his official and individual capacity, and
OFFICER D. PARRY, in his official and individual capacity,

Defendants.

ORDER re INDIVIDUAL DEFENDANTS' MOTION TO DISMISS RFRA DAMAGES CLAIMS

This matter is before the Court on the individual defendants' motion to dismiss the RFRA damages claims based on their claim of qualified immunity. ECF No. 376. The motion is GRANTED IN PART and DENIED IN PART.

BACKGROUND

This suit concerns Mr. Ajaj's allegations that defendants' conduct violated the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb.[1] To support his claims, Mr. Ajaj alleges the following in his operative Amended Complaint. ECF No. 29.

A. Mr. Ajaj and His Imprisonment at USP-Marion and USP-ADX.

Mr. Ajaj is a devout Muslim and an adherent of the Sunni Islam faith. ECF No. 29 at 2, 4. He was incarcerated at United States Penitentiary – Marion ("Marion") from 2010 to 2012 and housed in the Communications Management Unit (CMU) which "severely restrict, manages, and monitors prisoners' communications with the outside world." *Id.* at 7. He was then incarcerated at USP – Administrative Maximum ("ADX") in Florence, Colorado, from 2012 until filing this lawsuit in 2015.[2] *Id.* at 4. As Mr. Ajaj puts it, ADX is known as the "Alcatraz of the Rockies" and is "the most secure facility within the BOP," housing the "worst of the worst" prisoners. *Id.* at 7. Within ADX, Mr. Ajaj was housed in solitary confinement and was locked in his cell the majority of each day. *Id.* at 9.

B. Medication Ingestion during Ramadan and Sunnah Fasts.

Observant Muslims engage in fasting during different periods of the year. *Id.* at 11. Fasting entails refraining from ingesting anything from dawn until sunset. *Id.* The holy month

[1] Mr. Ajaj alleged additional violations of the First Amendment, the Fifth Amendment, and the Federal Tort Claims Act in his amended complaint. ECF No. 29. However, those claims are not at issue for this Order.

[2] Mr. Ajaj has been in the custody of the BOP since 1993. ECF No. 29 at 7. However, his legal claims related to the defendants' motion regard events that occurred while he was a prisoner at Marion and ADX between approximately 2010 and 2015, so the Court only recounts the relevant facts during that period of time. He remained at ADX until January 2018 when he was transferred to USP Terre Haute in Indiana.

of Ramadan is one period during which Mr. Ajaj believes he must fast. *Id.* He also believes he must fast in line with "Sunnah" verbal teachings, which entails fasting during the following days:

> Mondays and Thursdays [every week]; six days during the month of Shawwal (the tenth month of the Islamic calendar); the day of Arafa, which is the ninth day of the month of Zul-Hijjah; Ashura, which is the tenth day of the Islamic month of Muharram; and during most of the month of Sha'ban[.]

Id. at 12. Mr. Ajaj terms these the "Sunnah fasts" collectively, and based on the description in the Amended Complaint, the Court calculates that there are approximately 140 days within the Sunnah fasting period spread throughout the year. *Id.* Thus, during both Ramadan fasting and Sunnah fasting, observant Muslims should not ingest anything—including medication—between dawn and sunset, with the exception of individuals who experience adverse health effects from ingesting medications outside of fasting hours. *Id.* at 24.

Mr. Ajaj has many health ailments which cause chronic pain, numbness in his extremities, and depression. *Id.* He is prescribed medications to treat these ailments. *Id.* at 10. As someone who observes the Ramadan and Sunnah fasts, he believes he must ingest these medications before dawn and after dusk during these periods since doing so will not have an adverse treatment effect. *Id.* at 10. However, if he omits taking his medications, he experiences "worsened depression, irritability, agitation, dizziness, mood and emotional problems, severe night sweats, restlessness, . . . severe pain in his spine and legs, numbness in his hands and feet, cramping, weakness, and stiffness." *Id.* at 9–10.

The Code of Federal Regulations provides that wardens of BOP facilities "shall endeavor to facilitate the observance of important religious days which involve special fasts, dietary regulations, worship, or work proscription." *Id.* at 13 (quoting 28 C.F.R. § 548.18). During the relevant time period, Mr. Ajaj was "locked down in his cell most of the time" and was "at the

mercy" of prison staff to deliver his medications to him, so he had to "take the medication in the presence of the medical personnel staff member" upon delivery. *Id.* at 9, 13. While he requested that medications be delivered outside of fasting hours during the Ramadan and Sunnah fasting periods, Mr. Ajaj enumerates that during Ramadan in 2011, 2013, and 2014, and during the Sunnah fasts "for years" and specifically "[a]fter Ramadan 2015," prison staff did not oblige and instead delivered his medication during fasting hours. *Id.* at 12–25. Thus, Mr. Ajaj chose to forego taking his medications during those time periods and experienced pain and other unpleasant symptoms as a result. *Id.* Mr. Ajaj alleges, however, that outside of the aforementioned Ramadan and Sunnah fasting periods, prison staff would often deliver his medication outside of fasting hours even though he was not required to fast. *Id.*¶

C. <u>Request for Certified Halal Diet with Meat</u>.

Mr. Ajaj believes Muslims must consume a Halal diet, and that consuming non-Halal food (termed "haram" or "forbidden") "destroys the spirituality and morality of the consumer" and renders him a "flagrant sinner." *Id.* at 25. Therefore, in line with his Islamic faith, he believes he must adhere to a very specific diet. *Id.* Such a diet cannot be a vegetarian diet, but rather must contain meats from herbivorous animals that are "fed, raised, and slaughtered according to Islamic dietary laws." *Id.* at 26. The non-meat products in the diet cannot be prepared in factories that process pork or other non-Halal meats, else they are rendered haram. *Id.*

During the relevant period, ADX offered four meal options to its prisoners. *See id.* The first was the "regular diet," which contains haram components like pork or pork byproducts. *Id.* at 26–27. The second was the "no-pork diet," which also contains haram products like meat

slaughtered in a non-Halal manner or ingredients from facilities that process haram foods. *Id.* at 27. The third was the "no meat diet," which lacks meat and contains ingredients from facilities that process haram foods. *Id.* Fourth and finally, the prison offered a "Common Fare diet," which contains Kosher food, including Kosher meats, but is "not necessarily Halal." *Id.* While Mr. Ajaj previously consumed foods from the no-pork diet, he subsequently switched to the vegetarian diet because "he believes it more closely conforms to his religious needs." *Id.* Nonetheless, he "[was] forced to refrain from eating questionable items in order to avoid haram foods and is therefore unable to eat substantial portions of his prison-provided meals." *Id.* Mr. Ajaj repeatedly requested that the prison provide a diet meeting his religious needs, but the prison did not acquiesce to his requests. *Id.* at 27–29.

Beyond the prison-provided meals, prisoners could purchase different food items from the commissary. *Id.* at 29. They could also supplement the typical commissary items using a "special purchase order" (SPO) process for preapproved items. *Id.* While four vegetarian Halal-certified meals were available for SPO purchase, Halal-certified meats were not regularly available. *Id.* Mr. Ajaj repeatedly requested that meals containing Halal-certified meats be available to purchase from the commissary, and he provided names and contact information for potential vendors—some of whom already contracted with BOP prisons—who could provide such meals. *Id.* at 29–30. He also requested ingredients lists for the foods served through the commissary, either prior to or after purchase. *Id.* at 31. His requests were either denied or ignored. *Id.* at 30–32.

D. Meeting with an Imam

Mr. Ajaj believes that he must meet with an Islamic religious leader—an Imam—to properly engage in his religion during incarceration. *Id.* at 35. Imams help guide Islamic adherents in many ways, including leading formal prayer; giving advice regarding family, personal, and financial matters; explaining the Qur'an's application to daily life; and building community and fellowship among Muslims. *Id.*

At ADX, the prison staff coordinated visits between inmates and Imams contracted to provide services in the facility. *Id.* at 35–36. At the beginning of 2013, Mr. Ajaj saw an Imam "once a month at best, and usually only once every few months." *Id.* at 37. He alleges that during these visits, the Imam was prohibited from engaging in prayer, was required to provide spiritual guidance through two separate prison doors including one made of solid steel and was often limited to visiting for less than ten minutes. *Id.* at 37–38. Plaintiff alleges that his "access to a religious representative [was] substantially different from that of other inmates," noting that "Christian and Jewish religious representatives [were] allowed to perform rituals and prayers with prisoners during visits," and that "[r]eligious visits for Christian and Jewish inmates [were] not conducted behind the solid steel door." *Id.* at 36–38.

For eight months toward the end of 2013, and for thirteen months between August 2014 and September 2015, Mr. Ajaj did not receive any visits from an Imam, despite his requests and despite assurances from prison staff that he would receive such visits. *Id.* at 38. Mr. Ajaj also asked to speak to an Imam by telephone or videoconference, but these requests were unsuccessful. *Id.* at 40. After he retained counsel in this matter, Mr. Ajaj received a visit from an Imam in September 2015, which did not take place behind two prison doors like in prior

visits. *Id.* at 41. However, the overall visitation deficit "has drastically inhibited his ability to follow the tenets of his faith and maintain and develop his relationship with Allah." *Id.*

E. <u>Group Prayer</u>.

Every Friday midday, Muslims are "obligated" to engage in group prayer. *Id.* at 42. Prayer is one of the "Five Pillars of Islam," and Mr. Ajaj "believes that Allah punishes those who fail to participate in congregational prayers and rewards those who do." *Id.*

At ADX, prisoners could yell loudly to one another while locked inside their individual cells. *Id.* Prisoners were also allowed out of their cells for recreation time on the "open range." "[C]ongregational prayers of other religious faiths [other than Islam] [took] place in the open range," where "religious groups other than Muslims [were] allowed to spend hours singing and praying[.]" *Id.* Mr. Ajaj asked that he be permitted to pray with others, either during recreation time or by yelling to other Muslim prisoners in their individual cells, but his requests were denied because group prayer was a "security concern." *Id.* at 42–44.

Prison staff threatened him with disciplinary action if he engaged in group prayer. *Id.* One individual defendant, Mr. Parry, "threaten[ed] disciplinary action against Muslim prisoners who attempt to pray with or at the same time as any other Muslim prisoner," going so far as placing Muslim prisoners in the "SHU"—special housing unit which is separate from the general prison population—if they attempted a call to prayer. *Id.* at 43. Mr. Parry also "outwardly mock[ed] and joke[d] about the Islamic ritual of congregate prayer." *Id.* Therefore, Mr. Ajaj had to "decide between practicing a fundamental tenet of his religion and being subject to harsh disciplinary actions." *Id.*

PROCEDURAL HISTORY[3]

The Amended Complaint, which is the operative complaint, was filed in October 2015. ECF No. 29. It alleges that the defendants violated RFRA when they (i) disallowed plaintiff from engaging in medication fasting during Ramadan and the Sunnah fasts, (ii) failed to provide plaintiff with a Halal diet that contained certified halal meats; (iii) failed to facilitate sufficient meaningful meetings with an imam; and (iv) disallowed plaintiff from engaging in group prayer. *Id.* Pursuant to these claims, plaintiff requested money damages from the individual defendants in their individual capacities. *Id.* at 59.

The defendants moved to dismiss the individual capacity damages claims. ECF No. 65. Magistrate Judge Mix recommended dismissing the RFRA claims based on her assessment that RFRA did not provide a damages remedy. ECF No. 97. This Court issued an order which adopted that recommendation, and the RFRA claims were dismissed against the individual defendants. ECF No. 111. Within that order, the Court also dismissed for mootness plaintiff's injunctive claim regarding medication fasting during Ramadan.[4] *Id.* at 7. It did not dismiss the injunctive claim regarding fasting during the Sunnah fasts. *Id.*

The defendants then submitted a motion arguing that Mr. Ajaj's claim regarding his medication fasting had not been administratively exhausted prior to filing this lawsuit. ECF No. 251. While that motion made primary reference to Sunnah fasting specifically, it also generally referenced the plaintiff's "delivery of his medications." *Id.* The Court agreed and determined

[3] This case has a lengthy procedural history with more than 430 docket entries as of the date of this order. The Court only recounts the procedural history relevant to the disposition of the current motion.

[4] At that point, Mr. Ajaj had been transferred to a prison that implemented "pill line" procedures which complied with the plaintiff's requests regarding fasting during Ramadan. ECF No. 111 at 7.

that "any issue concerning the medication" administration during fasting was dismissed. ECF Nos. 258 at 4–7; 265. At that point, the remaining claims in the amended complaint, which requested injunctive relief, proceeded to a two-day bench trial on August 28 and 29, 2018. ECF Nos. 285, 287. The Court issued its findings of fact and conclusions of law on September 13, 2018, ordering judgment in favor of Mr. Ajaj. ECF No. 292.

Nevertheless, plaintiff appealed the Court's judgment, including the Court's determination that RFRA did not allow damages against individual plaintiffs. ECF Nos. 347, 356. While the appeal was pending, the Supreme Court issued its opinion in *Tanzin v. Tanvir*, holding that damages are an available remedy under RFRA. 141 S. Ct. 486, 489 (2020). Following that opinion, the Tenth Circuit remanded the case to this Court to resolve the question of whether the individual-capacity defendants in this case owed damages under RFRA, or rather whether they are qualifiedly immune from suit on plaintiff's RFRA claims. ECF No. 356.

STANDARD OF REVIEW

To survive a Rule 12(b)(6) motion to dismiss, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plausible claim is a claim that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While the Court must accept the well-pled allegations of the complaint as true and construe them in the light most favorable to the plaintiff, *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002), conclusory allegations are not entitled to be presumed true. *Iqbal*, 556 U.S. at 681. However, so long as the plaintiff offers sufficient factual allegations such that the right to

relief is raised above the speculative level, he has met the threshold pleading standard. *See, e.g.*, *Twombly*, 550 U.S. at 556; *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

ANALYSIS

A. Qualified Immunity under RFRA.

Determining the proper qualified immunity standard in the context of RFRA cases at the motion to dismiss stage is a question of first impression in this circuit. The Court discusses the correct standard below.

1. Qualified immunity generally.

"The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Thus, asserting qualified immunity is an "affirmative defense [that] creates a presumption that the defendant is immune from suit." *Est. of Smart by Smart v. City of Wichita*, 951 F.3d 1161, 1168 (10th Cir. 2020).

The Supreme Court "repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter*, 502 U.S. at 227. When qualified immunity is raised in a motion to dismiss, defendants are subjected to "a more challenging standard of review than would apply on summary judgment." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). During this stage of the litigation, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.'" *Behrens v. Pelletier*, 516 U.S. 299, 309, (1996) (emphasis in original). Thus, to defeat qualified immunity, plaintiffs must show both (1) "the facts that a plaintiff has alleged make out a violation of a

[right]," and (2) "the right at issue was clearly established at the time of defendant's alleged misconduct." *Keith v. Koerner*, 707 F.3d 1185, 1188 (10th Cir. 2013). This is a "heavy two-part burden" for plaintiffs. *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir. 2008).

District courts have discretion to proceed directly to the second question and determine whether the alleged right was clearly established at the time of the defendant's conduct. *Pearson v. Callahan*, 555 U.S. 223, 236 (2005). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citing *Anderson v. Creighton,* 483 U.S. 635, 640 (1987) (alterations in original). It must be "beyond debate" that the right at issue was clearly established and thereafter violated by the defendant. *Id.* "It is not enough that the rule is suggested by then-existing precedent." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018). Thus, a right is clearly established only "when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains." *Truman v. Orem City*, 1 F.4th 1227, 1235 (10th Cir. 2021).

The Supreme Court has "reiterate[d] the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 580 U.S. 73, 79 (2017) (citing *Ashcroft*, 563 U.S. at 742). Rather, "law must be 'particularized' to the facts of the case," or else "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* (citing *Anderson*, 483 U.S. at 639–40). Thus, courts proceed in the "clearly established"

analysis in two steps. First, they define the alleged right at "the appropriate level of specificity." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). Second, they determine whether the right was clearly established at the time of the conduct at issue. *Id.* If an official's conduct was "obviously egregious," then "less specificity is required from prior case law." *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004).

2. Religious violations under RFRA.

In relevant part, RFRA establishes that the "[g]overnment shall not substantially burden a person's exercise of religion" unless it can "demonstrate[] that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Thus, for a RFRA violation to exist, plaintiff must first establish a prima facie case by showing (1) the government imposed a substantial burden on a (2) sincere (3) exercise of religion. *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001). After proving these three elements, the burden shifts to the government to show, as an affirmative defense, that the imposed burden was in furtherance of a compelling government interest, and there was no less restrictive means of furthering that interest. *Ghailani v. Sessions*, 859 F.3d 1295, 1305–06 (10th Cir. 2017). If the government fails in proving this defense, then the plaintiff is successful in establishing that a RFRA violation existed.

The religious rights afforded by RFRA are more robust than those afforded by the First Amendment. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 696 (2014) (explaining that Congress amended RFRA to "effect a complete separation from First Amendment caselaw" and mandated that RFRA's protections "be construed in favor of a broad protection of religious

exercise, to the maximum extent permitted by the terms of this chapter and the Constitution" (citing 42 U.S.C. § 2000cc-3(g)) (internal quotation marks omitted)). Moreover, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc et seq., which applies to state- and local-level entities, uses the same test as RFRA in the prison context and protects religious exercises "to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. §§ 2000cc et seq.; *see also Mack v. Yost*, 63 F.4th 211, 232 n.18 (3d Cir. 2023). Therefore, any clearly established religious right under the First Amendment or RLUIPA suffices to serve as clearly established law under RFRA.

3. Qualified immunity applied to RFRA.

As outlined above, the RFRA violation analysis and the qualified immunity analysis are separate exercises. Therefore, even if the Court assumes that the defendants in this case violated plaintiff's rights under RFRA, it is still necessary to inquire whether such violations implicated clearly established rights that existed under RFRA (or the First Amendment or RLUIPA) at the time of the violation. Plaintiff argues that he need only allege that the defendants imposed a "clearly established substantial burden" on Mr. Ajaj's rights to defeat qualified immunity. ECF No. 386 at 7. Plaintiff cites no authority in support of that proposition. In my view that standard tends to conflate what is required to state a prima facie RFRA claim and what is required to counter an assertion of qualified immunity. Rather, the question here is whether a prison officer in the same or similar circumstances should have known that his action placed an unlawful burden on the plaintiff's exercise of religion, based on clearly established law. *See White*, 580 U.S. at 79.

The Court acknowledges, however, that courts analyzing RFRA cases at the motion-to-dismiss stage often focus on the "substantial burden" element. *See, e.g.*, *Tanvir v. Tanzin*, 2023 WL 2216256, at *8 (S.D.N.Y. Feb. 24, 2023) (analyzing qualified immunity by determining whether the defendants would have "known for certain . . . that their conduct would impose a substantial burden on Plaintiff's religious exercise and thus violate RFRA" (citation omitted)). This makes some intuitive sense; of the three prima facie RFRA elements—(1) government-imposed substantial burden on a (2) sincere (3) exercise of religion—"substantial burden" is often the only one that is contested by the parties. Moreover, since showing that the burden was the least restrictive means of furthering a compelling governmental interest is an affirmative defense, *Ghailani*, 859 F.3d at 1305, plaintiffs need not address the defense in their pleadings, making it an ill-suited focus of a motion to dismiss.

Acknowledging that the "substantial burden" inquiry is often the main focus of 12(b)(6) motions in RFRA cases, it is not necessarily the focus when analyzing qualified immunity. Rather, the Court must also consider the full *context* of preexisting case law in which a substantial burden existed. Part of this context includes whether a substantial burden ultimately violated RFRA (or RLUIPA or the First Amendment). Another part is examining the specific circumstances; an unlawful substantial burden that exists in one context does not necessarily give notice to all reasonable government actors in a sufficiently different context that the same substantial burden is unlawful. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (emphasizing that "[c]ontext matters" when applying the "compelling government interest" standard under RLUIPA). This outlook tracks the Supreme Court's admonition "not to define clearly established law at a high level of generality," but rather to examine "the specific context of the

case." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (internal citations omitted); *cf. Hall v. Elbe*, No. 18-CV-01056-PAB-NRN, 2022 WL 16855691, at *6 (D. Colo. Nov. 9, 2022) (granting qualified immunity for a RLUIPA claim, the court looked beyond the "substantial burden" inquiry to analyze whether the claim "violated clearly established law" based on factual similarities to prior cases).

With this framework laid out, the Court now examines each category of alleged RFRA violation to determine if it was a clearly established violation at the time it occurred.

B. <u>Medication fasting during Ramadan</u>.

Plaintiff's amended complaint contains allegations regarding defendants' refusal to deliver his medications outside of fasting hours during both Ramadan and the Sunnah fasts. ECF No. 29 at 9–25, 50–52. Defendants note, and plaintiff concedes, that the Court dismissed his fasting claims related to the Sunnah fasts for a failure to exhaust them pursuant to the Prison Litigation Reform Act (PLRA). ECF Nos. 376 at 7–8; 386 at 15; 258 at 5–6. Therefore, the defendants maintain that this claim is dismissed.

However, plaintiff contends that the Court did not dismiss his Ramadan fasting claims, since defendants never discussed exhaustion evidence related to *Ramadan* medication fasting. ECF No. 386 at 14–15. The Court's statement during the hearing should have made it clear to the plaintiff that the Court's intent was to dismiss all fasting claims relating to delivery of medications for failure to exhaust administrative remedies. But even if the claim had not been dismissed for that reason, the Court would dismiss it now because there was no clearly established law that the government's failure to accommodate a prisoner's fasting of *medication* violated his RFRA (or First Amendment or RLUIPA) rights.

First, avoiding too high of a level of generality, *Mullenix,* 577 U.S. at 12, the Court defines the right as follows: the right to have prison officials deliver medications to prisoners outside of fasting hours during religious fasting holidays.[5] Plaintiff states that the defendants' actions "constituted a substantial burden under clearly established law." ECF No. 386 at 11. But as already discussed, focusing only on whether a *substantial burden* was clearly established is not sufficient in the RFRA qualified immunity analysis, even at this early stage of the litigation. The Court must also pay attention to the larger context in which the substantial burden existed.

Plaintiff did not demonstrate that receipt of medications outside fasting hours in prison was a clearly established right in the Tenth Circuit (or elsewhere) at the time of the alleged violations. The only Tenth Circuit case cited by plaintiff is *Makin v. Colorado Dep't of Corr.*, 183 F.3d 1205, 1209 (10th Cir. 1999), in which the court held that prison guards violated a prisoner's First Amendment rights when they failed to deliver hot meals to his cell during the month of Ramadan outside of fasting hours. *Id.* at 1208, 1214. This was true even though he could save his food in his cell and eat it (cold) later, because it "diminished the spiritual experience he otherwise could gain through Ramadan" which was "sufficient to constitute an infringement on his right to freely exercise his religion." *Id.* at 1213. When examining the reasons underpinning that broad legal proposition and the specific context of the case, I note that the court referenced *Makin*'s emphasis on "self-discipline" and his "state of knowing and feeling

[5] The Court does not believe distinguishing between Ramadan or the Sunnah Fasts makes a material difference in determining whether the right was clearly established.

that everybody throughout the year that has not had food, they are also feeling the pains that I'm also feeling." *Id.* at 1212. It did not discuss fasting in the context of anything other than food.

I find that *Makin* did not put "every reasonable official" on notice that a failure to accommodate a prisoner's *medication* fasting during Ramadan (or other religious observance periods) would violate RFRA. *Mullenix*, 577 U.S. at 11. *Makin*'s broad proposition prohibiting prison officials from causing a "diminished spiritual experience" was at too "high [of a] level of generality" and did not provide fair notice about the unique circumstances of this case (or, really, any case). *See White*, 580 U.S. at 79. Simply being in prison creates a "diminished spiritual experience," but that does not entitle every religious rights claim to escape qualified immunity. More specifically, the court in *Makin* relied on testimony that feelings of hunger and self-discipline underpinned the importance of fasting; but such principles do not obviously apply to medication fasting, and therefore would not provide adequate notice to prison officials at ADX. Finally, in plaintiff's own formulation, Muslims are exempt from medication fasting if it would "have an adverse effect on their health." ECF No. 29 at 11. The requirement itself, then, appears at least partially flexible, which could lead a reasonable prison official to believe it was not necessary to accommodate medication fasting during religious holidays.[6]

[6] Many courts, including the Tenth Circuit, have rejected defendants' attempts to escape liability by arguing that a religious practice is not mandated by a religion. *See Kikumura*, 242 F.3d at 960 ("[A] religious exercise need not be mandatory for it to be protected under RFRA.") For example, in *LaFevers v. Saffle*, the Tenth Circuit noted that "[d]iffering beliefs and practices are not uncommon among followers of a particular creed," and it reversed the district court's dismissal of a First Amendment claim when it relied "on the fact that a vegetarian diet is not required by the Seventh Day Adventist Church." 936 F.2d 1117, 1119 (10th Cir. 1991). But that analysis examined whether a right existed in the first instance, not whether the right was clearly established. Examining how common a religious practice is could, in certain circumstances, help determine whether every reasonable government official would know there was a right to such a practice. *Cf. Saucier v. Katz*, 533 U.S. 194, 206 (2001) (noting that "[o]fficers can have reasonable, but mistaken, beliefs as to the *facts*" or as to the law required in a situation (emphasis added)).

Overall, the Court determines that Mr. Ajaj did not have a clearly established right to have prison officials accommodate his medication fasting during Ramadan. Therefore, even if this claim had not previously been dismissed for failure to exhaust administrative remedies (which it had been), the individual defendants are entitled to qualified immunity.

C. Certified Halal Diet with Meat.

Plaintiff next contends that defendants violated his RFRA rights when they failed to provide a certified Halal diet which contained Halal meat. ECF No. 29 at 25–35. As the first step, the Court defines the alleged right at the appropriate level of specificity as follows: the right to eat a certified Halal diet that contains Halal meat, even when a Kosher diet, a vegetarian diet, and a no-pork diet are offered in its place. This framing accounts for the unique context of the surrounding factual allegations in plaintiff's complaint.

In an effort to refute qualified immunity, plaintiff argues that "the right to consume a religiously consistent diet was clearly established in the Tenth Circuit at the time Defendants denied Mr. Ajaj access to Halal foods." ECF No. 386 at 12. He relies primarily on two Tenth Circuit cases. *Beerheide v. Suthers* concerned prisoners who were not afforded a Kosher diet in line with their practice of Orthodox Judaism. 286 F.3d 1179, 1183 (10th Cir. 2002). In its opinion, the Tenth Circuit determined that the prisoners had a right under the First Amendment to a Kosher diet, writing that "prisoners have a constitutional right to a diet conforming to their religious beliefs." *Id.* at 1185, 1187. Next, in *LaFevers v. Saffle*, a prison refused to provide a vegetarian diet to a Seventh Day Adventist prisoner. 936 F.2d 1117, 1118 (10th Cir. 1991). The district court had dismissed the plaintiff's First Amendment claim, in large part, because a vegetarian diet was not a mandatory element of practicing the religion. *Id.* The Tenth Circuit

reversed to the extent the district court relied on that rationale, stating "the guarantees of the First Amendment are not limited to beliefs shared by all members of a religious sect." *Id.* at 1119. However, while the court generally observed that "an individual's genuine and sincere belief in religious dietary practices warrants constitutional protection," it did not decide whether the defendants violated the plaintiff's rights; that question was remanded to the district court. *Id.* at 1119, 1121.

While both *Beerheide* and *LaFevers* contained sweeping statements of law about the constitutional protections surrounding religious diets, this Court does not construe the Tenth Circuit's broad pronouncements to mean that even the most nuanced of religious dietary needs was guaranteed by the Constitution (or in this case, by RFRA). Moreover, I agree with the defendants that the statements exist at "too high a level of generality" for the purposes of qualified immunity as applied to the facts of this case. ECF No. 394 at 8. Not "every reasonable official" in the defendants' positions "would have understood that what he [was] doing violate[d]" Mr. Ajaj's rights. *Mullenix*, 577 U.S. at 11.

As alleged in the plaintiff's complaint, the prison provided four distinct diets for prisoners to choose from, including the "regular diet," the "no-pork diet," the "no meat diet," and the "Common Fare diet." ECF No. 29 at 26–27. The Common Fare diet contained only Kosher foods, and according to the plaintiff, those foods were "not necessarily Halal." *Id.* at 27. This is hardly an unequivocal statement that Kosher foods do not meet the needs of a Halal diet; indeed, Mr. Ajaj does not explain how these two diets differ. In *Beerheide*, a case cited by the plaintiff, a Kosher diet was described as follows:

> "[K]eeping kosher" includes adherence to specific rules concerning which foods may be eaten and which are forbidden. Foods that may be eaten include all non-

> animal products such as fruits and vegetables, meat from animals without cloven hooves including cows and sheep, and fish which have fins and scales. "Kosher" also dictates specific methods by which allowable foods are prepared for consumption. For example, kosher food is no longer "kosher" if it is prepared in containers which have held non-kosher food. To keep kosher foods untainted, containers, pots and pans, utensils, and all other implements used in their preparation must not come into contact with any item that is or has had contact with nonkosher food. Also, to keep kosher food "kosher," it must be served on plates and bowls and eaten with utensils which have not had nonkosher contact.

286 F.3d at 1183.

From the Court's reading, this description has strong similarities to the plaintiff's description of a Halal diet, which also forbids pork, allows certain kinds of meat if prepared appropriately, and forbids consuming foods prepared in proximity to forbidden foods. *See Jones v. Carter*, 915 F.3d 1147, 1148, 1152 (7th Cir. 2019) (noting that a Muslim inmate's belief that eating meat is a requirement for devout Muslims appears to be a minority view within Islam," and that "some Muslims . . . find kosher food to be an acceptable alternative to a purely halal diet"); *Caruso v. Zenon*, No. 95-MK-1578 (BNB), 2005 WL 5957978, at *2 (D. Colo. July 25, 2005) ("Kosher meat is also considered halal, as the strictures governing the processing of kosher meat are at least as rigorous as the strictures governing the processing of halal meat. Thus, a kosher diet, to the extent it does not contain alcohol, is considered halal.").[7] The Court does not mean to suggest that there are no meaningful differences between a Halal and a Kosher diet; however, based on the similarities between the two, the Court finds no support for the proposition that in the 2012-2015 time frame, "every reasonable official would have understood

[7] *See supra*, footnote 6.

that" providing a Kosher diet but not a Halal diet violated Mr. Ajaj's rights.[8] *Mullenix*, 577 U.S. at 11.

Additionally, a reasonable prison official could have mistakenly believed that the vegetarian diet sufficiently met the requirements of a Halal diet plan to avoid a religious-rights violation. *See Robinson v. Jackson*, 615 F. App'x 310, 313 (6th Cir. 2015) (unpublished) ("We have explicitly held that vegetarian meals are, in fact, Halal." (citing *Abdullah v. Fard*, 173 F.3d 854, at *1 (6th Cir.1999))). As defendants point out, where violations exist inside of prisons regarding religious diets, prisoners are typically given fewer dietary options than what ADX officials offered to Mr. Ajaj. *See, e.g.*, *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1317 (10th Cir. 2010) (favorably citing cases in which there was no substantial burden, and therefore no rights violation, where prisoners could access kosher or meat-substitute meals); *Jones*, 915 F.3d 1147 (prison imposed a substantial burden under RLUIPA when inmate requested Halal diet with meat but was only offered a *vegetarian* Kosher diet).

Overall, in these specific circumstances, it was not clearly established that failing to provide Mr. Ajaj with a certified Halal diet with Halal meat violated his rights under RFRA when he had several other meal options. Therefore, the Court grants qualified immunity and dismisses all named individual defendants from this claim.

[8] The defense points out that plaintiff alleged that Halal meals were available for purchase through the prison commissary. ECF No. 376 at 13. However, it was clearly established by *Beerheide* that the availability of religiously compliant meals for purchase from the commissary was not an adequate substitute for providing special religious diets. 286 F.3d at 1188. Thus, any information about the commissary does not aid the defendants in the qualified immunity analysis.

D. Meetings with an Imam or Other Religious Leaders.

As stated by the plaintiff, "Islamic life mandates regular consultation with an Imam to ensure compliance with religious values in daily life." ECF No. 29 at 35. Plaintiff's complaint alleges that the defendants violated his rights by engaging in various forms of conduct related to Mr. Ajaj's limited access to an Imam. This conduct included failing to provide him with access to an Imam for months at a time, prohibiting prayer during the infrequent meetings that took place between Mr. Ajaj and an Imam, requiring such meetings to take place through two prison doors, failing to provide a religious Muslim volunteer, and failing to provide answers to a list of written religious questions. *Id.* at 35–42.

The Court first defines the alleged rights at an appropriate level of specificity: (i) the right to have prison officials affirmatively provide access to an Imam (either in person, over the phone, or through mail) or Muslim religious volunteers; (ii) the right to have prison staff provide answers to religious questions posed by the prisoner; and (iii) the right for in-person visits with Imams to include prayer and take place face-to-face, when prisoners of other faiths experienced these benefits. If clearly established law shows that any of these rights existed at the time of the alleged conduct, then plaintiff could withstand dismissal for the violation of such a right.

1. Affirmatively providing access to an Imam or to Muslim religious volunteers.

As alleged in the amended complaint, "all pastoral visits must be coordinated and approved by ADX officials." *Id.* at 35. The BOP's policies stated that "[t]he institution's chaplain may contract with representatives of faith groups in the community to provide specific religious services which the chaplain cannot personally deliver[.]" *Id.* Other facility policy provided that "[i]nmates may receive visits from community clergy. The chaplains will assist in

arranging the visits." *Id.* at 36. Plaintiff alleges that there were full-time Chaplains for Christians, Seventh-day Adventist, Catholic, and Jewish inmates. *Id.* at 37. However, for approximately three years, ADX did not have a Muslim chaplain, religious counselor, or full-time religious department staff member. *Id.* at 36–37.

In 2013, the BOP contracted for a part-time Imam to visit ADX and the adjacent prison facilities, but he only visited plaintiff "once a month at best, and usually only once every few months." *Id.* at 37. But by the end of 2013, plaintiff received no visits from an Imam for eight months, and between August 2014 and September 2015, he again received no visits from an Imam. *Id.* at 38. When Mr. Ajaj requested Imam visitation, ADX staff responded by stating that "the contract Imam visits the complex four times a month . . . [and] is responsible for visiting all inmates on the complex who request to see him[.]" *Id.* at 36. After another request, staff told him in 2014 that "[the Imam] visited as many housing units/inmates as he could," but, without explanation, he allegedly did not visit Mr. Ajaj. *Id.* at 39. Responding to another of Mr. Ajaj's requests in January 2015, prison staff told him that "[t]he Imam is currently ill and is undergoing treatment . . . [but] when he returns and makes rounds I will bring him to visit with you." *Id.* And in May 2015, prison staff told plaintiff that "[d]ue to personal reasons, the contract Imam has not been visiting the institution. When the Imam returns to the institution, you will be seen by him." *Id.*

Overall, plaintiff alleged that prison staff "refused to provide Mr. Ajaj with access to an Imam, either in-person or via telephone, for over one year" and "refused to recruit a Muslim volunteer to visit Mr. Ajaj for over one year." *Id.* at 40. He argues this conduct amounted to a RFRA violation.

In response to defendants' motion to dismiss based on qualified immunity, plaintiff cites three cases from the Supreme Court and the Tenth Circuit to show that the defendants' "conduct constituted a *substantial burden* under clearly established law." ECF No. 386 at 21. However, the Court again looks beyond simply whether there was a substantial burden and examines the broader context of preexisting case law, including whether there was ultimately a violation of law. None of the three cases cited by Mr. Ajaj demonstrate that defendants' conduct constituted a clearly established violation of RFRA.

First, plaintiff cites *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), for the proposition that inhibiting a prisoner from attending weekly congregate religious services led by a spiritual advisor constitutes a substantial burden. ECF No. 386 at 21. But *O'Lone* was a case that emphasized the importance of courts' giving deference to prison administrators under a First Amendment free exercise analysis. Moreover, while the Supreme Court stated that a Muslim prisoner's "sincerely held religious beliefs compelled attendance at" weekly congregational services, the opinion was devoid of mentioning individual meetings with an Imam or other spiritual advisor. *Id.* at 344–45. Moreover, the Court ultimately determined that defendants did not violate the prisoner's rights. *Id.* at 346.

Next, plaintiff cites *Kikumura*, 242 F.3d 950, for the proposition that "it is a substantial burden for someone to not have access to pastoral care[.]" ECF No. 386 at 21. While *Kikumura* established that "[p]astoral visits . . . are protected activities under RFRA," 242 F.3d at 960, the context of that case was quite different. There, a prisoner had identified a specific pastor who submitted a request to visit him, but the prison denied the visitation request. *Id.* at 953. The court established that "the *denial* of the visits" from a "particularly well-suited" pastor identified

by the plaintiff amounted to a substantial burden under RFRA, but it stopped short of finding a RFRA violation. *Id.* at 961 (emphasis added). Instead, it remanded the case to determine whether the specifically identified pastor was indeed well-suited to visit the plaintiff. *Id.*

Finally, plaintiff cites a passage from *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995), which stated that RFRA "need not drive a prison to employ clergy from every sect or creed found within its walls; however, the failure to provide or allow reasonably sufficient alternative methods of worship would, in the absence of a compelling state interest, run afoul of the Act." ECF No. 386 at 21. The context of *Werner* had some similarities to the facts of this case; the plaintiff was a Native American prisoner who claimed that the prison "failed to provide him with access either to a Cherokee Native American Spiritual Advisor or to religious literature appropriate to his beliefs." 49 F.3d at 1478. However, the court found that the plaintiff's claim "was without factual merit" because the prison "employ[ed] six part-time chaplains who provide[d] nondenominational religious support to the prison population; while none of these individuals [was] a Native American, two Native American Spiritual Advisors provide[d] appropriate services on a volunteer basis." *Id.* at 1481. Thus, the court did not directly address a specific scenario where a spiritual leader from a particular religion was unavailable to the plaintiff—as is the case here. Contrast that with *Abdulhaseeb*, 600 F.3d 1301 (a case cited by the defendants), where the plaintiff was a Muslim prisoner who alleged, in two separate claims, that the defendant prison was required to "provide a full-time paid Muslim spiritual leader" and to "pay a Muslim spiritual leader" (presumably who would not work full time). *Id.* at 1320–21. The court rejected those claims outright, emphasizing that governments must "refrain from substantially burdening religion, not . . . affirmatively subsidize religion." *Id.* at 1320; *see also*

id. at 1321 (citing the passage from *Werner*, 49 F.3d at 1480, that "[RFRA] need not drive a prison to employ clergy from every sect or creed found within its walls.").

Case law did not clearly establish that the defendants violated Mr. Ajaj's rights under RFRA. *O'Lone* made no mention of visiting Imams or other religious leaders, and the opinion was very deferential to the decisions of prison officials; thus, it did not clearly establish that defendants violated Mr. Ajaj's rights. And unlike in *Kikumura*, Mr. Ajaj's allegations do not indicate that he requested a visit, a phone call, or any sort of communication from a particular Imam which prison staff denied. *See* 242 F.3d 950. Thus, it was not clearly established that prison staff's failure to provide access to—i.e. "affirmatively subsidize"—an Imam's consultations, either in person or over the phone, violated Mr. Ajaj's rights under RFRA. *See Abdulhaseeb*, 600 F.3d at 1320. Finally, since the plaintiff in *Werner* had access to appropriate spiritual advisors, the court's statement that "the failure to provide or allow reasonably sufficient alternative methods of worship," 49 F.3d at 1480, was dicta that did not clearly establish the need for ADX staff to hire or recruit Muslim chaplains.

This same logic applies to prison staff's alleged failure to recruit Muslim volunteers to visit Mr. Ajaj. ECF No. 29 at 40. Whether an affirmatively recruited spiritual advisor visits a prison on a paid versus volunteer basis does not change the Court's analysis. Moreover, the fact that ADX staff *did* facilitate access to an Imam in 2015 after Mr. Ajaj filed this lawsuit, ECF No. 29 at 41, is of no import; at that point, the prison was going beyond what was clearly required under RFRA at that time.

Overall, because Mr. Ajaj did not allege a clearly established violation of RFRA regarding having affirmative access to Muslim spiritual leaders, the Court dismisses this claim as alleged against all individual defendants.

2. Requiring prison staff to answer questions regarding religion.

Plaintiff also alleges that "[d]uring his time without religious guidance or access, Mr. Ajaj submitted at least two sets of religious questions . . . that have never been answered." ECF No. 29 at 40. Plaintiff does not cite, nor could this Court locate, case law from the Tenth Circuit, Supreme Court, or a consensus of other circuit courts, showing that he had a clearly established right to have prison staff provide answers to his written questions regarding religion. ECF No. 29 at 40. This claim is also dismissed as alleged against the individual defendants.

3. Meeting and praying with an Imam face-to-face when prisoners of other faiths were permitted to do so.

However, the Court finds that Mr. Ajaj alleged a clearly established violation of RFRA by stating that the defendants (1) allowed other prisoners the opportunity to pray with their respective chaplains but forbade the Imam from doing the same with plaintiff; and (2) allowed inmates of other religions the opportunity to meet face-to-face with their respective chaplains but required Mr. Ajaj to speak with his Imam through his prison cell doors. ECF No. 29 at 37–38.

In his response, plaintiff did not cite case law clearly establishing that either of these allegations was a violation. Nevertheless, the Court takes note of three precedential cases. The first is *Wilson v. Gunter*, 21 F.3d 1123 (10th Cir. 1994), where the Tenth Circuit stated in a non-binding unpublished opinion that "a prisoner is entitled to a 'reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts.'" *Id.* at *1 (unpublished). While an unpublished opinion "provides little

support for the notion that the law is clearly established on [a] point," *Grissom v. Roberts*, 902 F.3d 1162, 1168 (10th Cir. 2018) (internal citation omitted), *Wilson* was repeating a statement from the second case—a prior Supreme Court case—*Cruz v. Beto*, 405 U.S. 319 (1972). In *Cruz*, a Buddhist prisoner alleged that inmates who belonged to different religious sects—including the Catholic, Jewish, and Protestant faiths—were given preferential treatment; unlike him, they were allowed to use the prison chapel and to earn "points of good merit . . . as a reward for attending orthodox religious services." *Id.* The plaintiff, however, was "denied permission to purchase certain religious publications and denied other privileges enjoyed by [these] other prisoners." *Id.* The Supreme Court held:

> If Cruz was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion, established 600 B.C., long before the Christian era. The First Amendment . . . prohibits government from making a law 'prohibiting the free exercise (of religion).' If the allegations of this complaint are assumed to be true, as they must be on the motion to dismiss, Texas has violated the *First* and Fourteenth Amendments.

Id. (internal citations and footnote omitted) (emphasis added). While *Cruz* employed language regarding religious discrimination—which calls to mind equal protection violations[9]—it ultimately held that a prison's discriminatory practices between religions can violate the *First Amendment*. *See Thompson v. Com. of Ky.*, 712 F.2d 1078, 1082 (6th Cir. 1983) (confirming that "*Cruz* was not decided on equal protection grounds" but rather on First Amendment grounds). It cabined its statement, however, to emphasize that adherents need not receive identical treatment:

[9] While plaintiff originally alleged an equal protection violation under the Fifth Amendment, ECF No. 29 at 56–58, that claim is not at issue here.

> We do not suggest, of course, that every religious sect or group within a prison—however few in number—must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand. But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty.

405 U.S. at 319 n.2.

Finally, the Court observes the rule articulated in a third case—*Shrum v. City of Coweta*—where the Tenth Circuit held that "it is clearly established that *non-neutral* state action imposing a substantial burden on the exercise of religion violates the First Amendment." 449 F.3d 1132, 1145 (10th Cir. 2006) (emphasis added).[10] In *Shrum*, the plaintiff held jobs both as a pastor and a police officer. *Id.* at 1135. He initially arranged a schedule with his law enforcement employer where he would not patrol on Sundays, specifically because he conducted his ministerial obligations those days. *Id.* But after several disputes with his supervisors at the police department, they changed his shifts to require him to work on Sundays in direct conflict with his church duties. *Id.* at 1136. Evidence showed that this schedule change was "motivated by" the intent to create a conflict with his concurrent religious obligations, rather than being a "neutral and generally applicable employment requirement." *Id.* at 1143. The court stated that "[p]roof of hostility or discriminatory motivation may be sufficient to prove that a challenged government action is not neutral," which could amount to a clearly established violation of the Free Exercise Clause. *Id.* at 1145. *Shrum* was not a prisoner case, but it is nonetheless

[10] This standard was repeated in *Ashaheed v. Currington,* 7 F.4th 1236, 1248 (10th Cir. 2021), a post-2015 case brought by a Muslim inmate.

consistent with *Cruz*: both stand for the proposition that a state actor's religiously discriminatory motivations are clearly established violations of the First Amendment.

Thus, based on the principle articulated in *Cruz* and *Shrum*, this Court concludes that, subject to defendants' affirmative defense based on legitimate penological reasons, an individual defendant who personally participated in the alleged conduct of denying Mr. Ajaj the ability to speak to his Imam face-to-face[11] or to pray with him—when inmates of other faiths were allegedly allowed to do both of these things—committed a clearly established violation of Mr. Ajaj's religious rights.[12] *Cf. Hall*, 2022 WL 16855691, at *12 (citing *Wilson* and *Cruz*, determining that plaintiff's First Amendment claim failed because he did not show he "was provided less of an opportunity to access a religious leader than prisoners of other faiths").

---

[11] Of note, some courts have determined that cell-side visits might pose a substantial burden, but ultimately did not find a religious rights violation. *See, e.g.*, *Walker v. Quiros*, 2014 WL 7404550, at *7 (D. Conn. Sept. 30, 2014) (denying defendants' motion for summary judgment while determining a substantial burden existed when an inmate and his Imam were "forced to try to communicate with his imam through his cell door, but it was too loud for them to hear each other"); *Penwell v. Holtgeertz*, 2011 WL 3610052, at *3 (W.D. Wash. July 15, 2011), *report and recommendation adopted*, 2011 WL 3610048 (W.D. Wash. Aug. 16, 2011) (stating that the plaintiff "stated a valid free-exercise claim" when "he was not able to converse privately with a chaplain but instead had to communicate through the cell door," but determining the record was insufficiently developed regarding whether the practice was reasonably related to a legitimate penological interest). However, those cases did not involve allegations—as are present here—that prisoners from other religious backgrounds were allowed in-person visits from their chaplains while the plaintiff was not.

[12] In his amended complaint, Mr. Ajaj also emphasized that the prison "employs full-time Chaplains for other religious groups including Christian, Seventh-day Adventist, Catholic, and Jewish Chaplains," but that "for almost three years, the entire [Florence prison complex operated] without a Muslim Chaplain, a Muslim Religious Counselor, or any full-time Muslim Religious Services Department Staff." ECF No. 29 at 36–37. However, *Cruz* specifically cabined its rule regarding First Amendment violations, specifying that "[a] special chapel or place of worship need not be provided for every faith regardless of size; *nor must a chaplain, priest, or minister be provided without regard to the extent of the demand*." 405 U.S. at *322 n.2 (emphasis added). Thus, the Court finds that *Abdulhaseeb*—and specifically its pronouncement that prisons need not "affirmatively subsidize religion"—disposes of this argument within the confines of *Cruz*. 600 F.3d at 1320.

Moreover, prohibiting the Imam from praying with plaintiff during his cell-side visits, if that indeed did happen, was so "obviously egregious" that precise factual comparisons to preexisting case law are unnecessary. *Pierce*, 359 F.3d at 1298. As alleged, the ADX prison officials did not prohibit the Imam from communicating in other ways; he was only prohibited from engaging in prayer. This was apparently "[d]ue to security concerns regarding space, location, and time restraints." ECF No. 29 at 37–38. It is difficult to imagine how saying a prayer through a cell door implicates space, location, or even time restraints. Likewise, probably the most important role of spiritual advisors is leading prayer with advisees. *Kikumura* established that visits from religious leaders are entitled to some degree of protection under RFRA. 242 F.3d at 960; *see also Hall*, 2022 WL 16855691, at *13 (noting that "prohibition on participating in religious counseling" poses a constitutional problem). Prayer is also a fundamental part of practicing one's religion. *See Sause v. Bauer*, 138 S. Ct. 2561, 2562 (2018) ("There can be no doubt that the First Amendment protects the right to pray. Prayer unquestionably constitutes the 'exercise' of religion."). Thus, at this stage of the litigation, it appears that it was sufficiently and unlawfully arbitrary for the defendants to forbid an Imam's praying while allowing other types of conversing. *Cf. Cutter*, 544 U.S. at 716 (noting congressional statements regarding the passage of RLUIPA that the legislation was intended to address "'frivolous or arbitrary' barriers [that] impeded institutionalized persons' religious exercise").

As an additional pleading requirement, Mr. Ajaj must allege that each defendant personally participated in the rights deprivation. *See Davis v. Fed. Bureau of Prisons*, No. 15-CV-0884-WJM-MJW, 2017 WL 11504857, at *7 (D. Colo. Apr. 7, 2017), *aff'd*, 798 F. App'x

274 (10th Cir. 2020) (unpublished) (applying the personal participation requirement in the RFRA context). *Cf. Bennett v. Passic*, 545 F.2d 1260, 1262–63 (10th Cir. 1976) ("Personal participation is an essential allegation in a § 1983 claim."). As defendants point out, denying an inmate's grievance, without more, does not establish personal participation. *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009) ("[A] denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by plaintiff, does not establish personal participation under § 1983.").

Regarding his inability to pray with his Imam, Mr. Ajaj alleged the following:

> In 2013, Defendant HALL, on behalf of Defendant BERKEBILE, responded to Mr. Ajaj's request for Imam visitation and prayer during visits by saying that "[d]ue to security concerns regarding the space, location, and time restraints of Imam visits, it may not be permissible to conduct prayer during his visits."

ECF No. 29 at 38. While the amended complaint does not specifically state that Mr. Hall communicated this through a grievance, that is the only reasonable inference, given that plaintiff received an almost identical response from the Regional Director of BOP's North Central Office that same year:

> [I]n 2013 Mr. Ajaj was told by the Regional Director of Defendant BOP's North Central Office that "[d]ue to the security concerns regarding the space and location of the Imam visits, it may not be permissible to conduct prayers during his visits."

Id. at 41. That grievance response alone was insufficient to establish Mr. Hall's or Mr. Berkebile's personal participation. However, Mr. Ajaj also alleged that "Defendant KNOX's [sic] told Mr. Ajaj that the reason Mr. Ajaj was forbidden from praying with other Muslims *or an Imam* was a security concern." *Id.* at 43–44. This communication does not necessarily appear to be a response to a grievance, so the Court finds that plaintiff sufficiently alleges Mr. Knox's

personal participation in denying Mr. Ajaj the ability to pray with an Imam. This claim survives, but only against Mr. Knox.

Next, Mr. Ajaj alleged the following regarding the requirement that he speak to his Imam through his prison cell doors:

> In 2014, Defendant BERKEBILE responded to Mr. Ajaj's request for Imam visitation, specifically more private visitation access than behind two doors, by stating "[p]rivate visits will be considered contingent on available space and staff to facilitate a different location other than a cell front visit."

Id. at 38. This was likely in response to a grievance filed by Mr. Ajaj, but the amended complaint contains no near-identical response from someone else. Thus, it is conceivable that Mr. Berkebile could have provided this response outside of the grievance process, and therefore, the Court finds that Mr. Ajaj sufficiently alleged Mr. Berkebile's personal participation. This claim also survives, but only against Mr. Berkebile.

In summary, the Court grants qualified immunity and dismisses all of Mr. Ajaj's personal-capacity claims related to accessing an Imam, except for two: (1) the claim that he was prohibited from engaging in prayer with his Imam survives, but only against Mr. Knox, and (2) the claim that he was required to speak to his Imam through the prison cell doors survives, but only against Mr. Berkebile.

E. <u>Group Prayer</u>.

Finally, plaintiff alleges in his amended complaint that his religion requires him to pray five times daily, that "[t]he Prophet Mohammad rewards those who pray in groups," and that "Allah punishes those who fail to participate in congregational prayers and rewards those who do." ECF No. 29 at 42. He states he was forbidden from engaging in "group prayer" or "congregate prayer" in two respects. First, he alleges that he wasn't allowed to engage in

congregate prayer by yelling from his isolation cell to other inmates in their individual cells.[13] *Id.* at 42–43. Several defendants "threatened Mr. Ajaj and other Muslim inmates with disciplinary action if they perform [prayer] with any other prisoners," and that Mr. Parry "place[s] Muslim prisoners in the SHU who attempt the call to prayer" and "outwardly mocks and jokes about the Islamic ritual of congregate prayer." *Id.* at 43. Second, plaintiff alleges he was not allowed to engage in "group prayer" outside of his cell on the "range," even though "religious groups other than Muslims are allowed to spend hours singing and praying on the range." *Id.* at 43–44. Regarding either form of group or congregate prayer, plaintiff states that he must "decide between practicing a fundamental tenet of his religion and being subject to harsh disciplinary actions, which could keep him confined at ADX indefinitely." *Id.* at 43.

Of note, the allegations of the amended complaint are confusing in one regard. Mr. Ajaj alleges that "[a]t ADX and in the CMU, prisoners are allowed to interact with one another during recreation time. Prisoners are allowed to speak with each other while they are in their individual cells, though." ECF No. 29 at 42, ¶¶ 300–01. It would seem that there might be a typo in the first sentence, i.e., that perhaps it should say that "prisoners are *not* allowed to interact with one another during recreation time." Otherwise, the second sentence, ending in "though," would not make sense. *See* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/though (defining "though" as "in spite of the fact that"). If the seeming typo were corrected as noted, the sentence would be consistent with the remaining paragraphs

[13] Based on the structure of the amended complaint, the Court interprets that plaintiff's allegations related to yelling congregate prayer between the cells are contained in ¶¶ 301–12, and that the allegations regarding group prayer outside of prison cells on the "range" are contained in ¶¶ 314–15. ECF No. 29 at 42–44. While plaintiff includes a paragraph describing group prayer with clergypersons, the Court determines that this claim was already addressed in its discussion about the Imam. *Id.* at 44, ¶ 313.

discussing "group prayer," which do not indicate that inmates can *directly* interact or pray with one another; Mr. Ajaj states that, when on the range, "religious groups other than Muslims are allowed to spend hours singing and praying," and "congregational prayers of other religious faiths take place." ECF No. 29 at 44, ¶¶ 314–15. But these statements do not indicate that inmates are allowed to physically come together to pray while outside of their cells.[14] Thus, the Court understands Mr. Ajaj to allege that when inmates of other religions are on the "range" outside their cells, they can sing songs to one another and can audibly pray together but cannot physically group together to worship.

The Court must identify the alleged rights at issue at "the appropriate level of specificity." *Wilson*, 526 U.S. at 615. While Mr. Ajaj describes the right as the "ability to pray with other Muslims who participate in group worship," ECF No. 386 at 24, the Court defines the right in more detail, and in three different categories based on the allegations in the amended complaint: (i) the right of inmates locked in their cells to shout prayer between cells; (ii) the right of Muslim inmates to physically gather to engage in group prayer; and (iii) the right of Muslim inmates on the range to engage in "congregate prayer" by shouting to one another, when inmates of other faiths could do so. If clearly established law showed that any of these rights existed, then such claims can escape qualified immunity.

Plaintiff states that individual defendants' conduct "constituted a *substantial burden* under clearly established law." ECF No. 386 at 24 (emphasis added). As already discussed,

[14] This would comport with other courts' description of ADX generally. *See, e.g.*, *Chesser v. Dir. Fed. Bureau of Prisons*, No. 15-CV-01939-NYW, 2018 WL 3729511, at *9 (D. Colo. Aug. 6, 2018) ("[I]n most instances, inmates [in the ADX general population] do not have direct contact with one another. . . . BOP policy prohibits congregate religious services at the ADX.").

focusing only on whether a *substantial burden* was clearly established by prior case law is not sufficient in the RFRA qualified immunity analysis. The Court must also consider the larger context in which the substantial burden existed, and whether the burden was ultimately unlawful. Nevertheless, the Court reviews the four cases cited by plaintiff.

First, plaintiff cites *Cutter v. Wilkinson*, 544 U.S. 709 (2005), for the proposition that "group worship is a protected exercise of religion." *Cutter* is inapposite here, because there, the Supreme Court was tasked with determining whether Section 3 of RLUIPA was unconstitutional on its face. *Id.* at 715. In its discussion, it stated a broad principle that "[t]he 'exercise of religion' often involves . . . physical acts [such as] assembling with others for a worship service." *Id.* at 720. Such a statement exists at too "high [a] level of generality" to provide sufficient notice to officers and to preclude qualified immunity. *See White*, 580 U.S. at 79. Plaintiff next cites *O'Lone*, 482 U.S. at 349, for the proposition that "barring Muslims from congregational services constitutes a substantial burden under the First Amendment." ECF No. 386 at 24. However, as already discussed, *O'Lone* emphasized the importance of giving deference to prison administrators under a First Amendment analysis, and it ultimately held that the prison officials did not violate the prisoner's free exercise rights. 482 U.S. at 344–46. Such a case did not give "every reasonable official" at ADX fair warning that restricting congregate prayer would constitute a violation. Third, plaintiff cited *Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008), a Ninth Circuit case, for the proposition that "a jail's policy of prohibiting a maximum-security prisoner from attending group religious worship services substantially burdened his religious exercise under RLUIPA." ECF No. 386 at 24. An out-of-circuit case alone—or even several cases from a minority of other circuits—does not constitute an

"established weight of authority" showing that a right was clearly established. *Truman*, 1 F.4th at 1235. Fourth and finally, plaintiff cites *Sabir v. Williams*, 52 F.4th 51 (2d Cir. 2022), a case that stated that "[a] reasonable officer should have known, based on clearly established law, that denying a Muslim inmate the ability to engage in group prayer without any justification or compelling interest, as alleged in the SAC, violates RFRA." *Id.* at 64. It is a very recent out of circuit opinion, and it contains key facts disparate from the facts of this case, namely, the plaintiffs were housed in a "low security" prison and "ha[d] a relatively high degree of autonomy" where "living quarters remain[ed] unlocked, and inmates regularly gather, with prison approval, in large groups for activities." *Id.* at 54–55. That is a far cry from ADX's status as the "Alcatraz of the Rockies," housing the "worst of the worst" prisoners in "the most secure facility within the BOP". *Id.* at 7. Thus, plaintiff fails to cite law that clearly established the right to group prayer in a case like this.

However, the Court takes note of *Cruz* once again: When a prisoner is "denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts," then a prison engages in "palpable discrimination" that likely violates the First Amendment. 405 U.S. at 319; *see also Shrum*, 449 F.3d at 1145 ("It is clearly established that non-neutral state action imposing a substantial burden on the exercise of religion violates the First Amendment.")

Cruz is inapplicable to the first two rights articulated above. Mr. Ajaj does not allege that (i) inmates of other religions who were locked in their cells could shout prayers from one cell to another, or that (ii) inmates of other religions were allowed to physically group together to

engage in congregate prayer.[15] Therefore, since there was no disparate treatment among faith groups, *Cruz* does not clearly establish that either amounted to a violation. The individual defendants are granted qualified immunity as to these allegations.

However, *Cruz* supports (iii) the right for Mr. Ajaj and other Muslim inmates who were on the range to audibly pray with one another, *specifically because inmates of other faiths could do so*. As alleged, such "palpable discrimination" between Muslims and other adherents in ADX was a clearly established violation under *Cruz*.

Mr. Ajaj must also allege personal participation from specific defendants related to this violation. The amended complaint states the following:

> 305. Defendants BOP, BERKEBILE, OLIVER, HALL, KNOX, PARRY, and JOHNSON threatened Mr. Ajaj and other Muslim inmates with disciplinary action if they perform [prayer] with any other prisoners. . . .
>
> 307. Defendant PARRY threatens disciplinary action against Muslim prisoners who attempt to pray with or at the same time as any other Muslim prisoner.
>
> 308. Defendant PARRY goes so far as to place Muslim prisoners in the SHU who attempt the call to prayer (Ad'han).

ECF No. 29 at 43. The Court finds that these allegations are sufficient to sustain the narrowed group-prayer claim against individual defendants Berkebile, Oliver, Hall, Knox, Parry, and Johnson. However, defendant True is granted qualified immunity.

[15] Even if the Court construed the amended complaint to allege that inmates of other religions could physically group together on the range for prayer, the outcome would be the same. *O'Lone*, 482 U.S. 342—a Supreme Court case that is more recent than *Cruz*—specifically held that a prison did not violate prisoners' First Amendment rights when it disallowed Muslim inmates from gathering for "Jumu'ah" prayer services on Fridays. *Id.* at 348–51. Thus, *O'Lone* could lead reasonable prisoner officials at ADX to conclude that they would not violate a prisoner's religious rights by prohibiting Muslim group prayer.

ORDER

Individual Defendants' "Motion to Dismiss the RFRA Damages Claims in Amended Complaint," ECF No. 376, is GRANTED IN PART and DENIED IN PART. Specifically,

1. The individual defendants are granted qualified immunity as to plaintiff's RFRA damages claims regarding inability to engage in medication fasting and denial of Halal-certified meals with meat.

2. The individual defendants are granted qualified immunity as to plaintiff's RFRA damages claims regarding spiritual advisors with two exceptions:

(1) Defendant Knox is not granted qualified immunity as to plaintiff's RFRA damages claim that he denied plaintiff the ability to pray during Imam visits.

(2) Defendant Berkebile is not granted qualified immunity as to plaintiff's RFRA damages claim that he required plaintiff to speak to his Imam through his prison cell doors.

3. Defendants Berkebile, Oliver, Hall, Knox, Parry, and Johnson are not granted qualified immunity as to plaintiff's RFRA damages claim that he was prohibited from engaging in congregate prayer while outside of his cell on the open range. Defendant True is granted qualified immunity as to this claim.

DATED this 9th day of June, 2023.

BY THE COURT:

R. Brooke Jackson
Senior United States District Judge