124 F.3d 205, 1997 WL 527769 (C.A.7 (Ill.))
(Cite as: 124 F.3d 205, 124 F.3d 205 (Table))

H

Saleem v. Helman
C.A.7 (Ill.),1997.
NOTICE: THIS IS AN UNPUBLISHED OPINION.(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA7 Rule 53 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Seventh Circuit.
Thabit Y. SALEEM, Plaintiff-Appellant,
v.
David W. HELMAN, Warden, et al.,
Defendants-Appellees.
No. 96-2502.

Submitted Aug. 21, 1997.[FN*]

FN* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary in this case; accordingly, the appeal is submitted on the briefs and the record. *See*Fed. R.App. P. 34(a); Cir. R. 34(f).

Decided August 21, 1997.
Rehearing Denied Sept. 18, 1997.

Appeal from the United States District Court for the Central District of Illinois, No. 96 C 1057; Joe B. McDade, Judge.

Before CUMMINGS, BAUER and WOOD, Judges.

ORDER

***1** Thabit Saleem, a federal prisoner incarcerated in the Federal Correctional Institution ("FCI") in Peoria, Illinois, brought this suit against the warden at the FCI and various other prison officials. Saleem alleged that the defendants' refusal to allow him to have conjugal visits with his wife violated the Religious Freedom Restoration Act ("RFRA"), the First, Fifth, Eighth and Thirteenth Amendments to the Constitution, and 18 U.S.C. § 1091. After Saleem paid a partial filing fee and the defendants were served with process, the district court-acting *sua sponte*-issued an order to show cause why Saleem's complaint should not be dismissed for failure to state a claim for which relief could be granted. Fed.R.Civ.P. 12(b)(6). After Saleem responded, the district court rejected his arguments and dismissed his case. This appeal followed.

Saleem first argues that the district court improperly dismissed his case *sua sponte* after he paid a partial filing fee. However, district courts possess the authority under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss a case *sua sponte* if it is clear from the plaintiff's pleading that he does not state a claim. *Lelford v. Sullivan*, 105 F.3d 354, 356 (7th Cir.1997); *English v. Cowell*, 10 F.3d 434, 437 (7th Cir.1993); *Apostol v. Landau*, 957 F.2d 339, 343 (7th Cir.1992). Moreover, for claims filed *in forma pauperis*,28 U.S.C. § 1915-as modified by the Prison Litigation Reform Act of 1995 ("PLRA"), Pub.L. No. 104-134, 110 Stat. 1321 (effective April 26, 1996)-provides: "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court *shall* dismiss the case at any time if the court determines that ... the action ... fails to state a claim on which relief may be granted ..." 28 U.S.C. § 1915(e)(2)(B)(ii) (emphasis added).[FN1] This requirement of dismissal is mandatory. Thus, there was nothing procedurally improper about the district court's *sua sponte* dismissal of Saleem's suit.

FN1. Saleem contends that § 1915(e)(2) is unconstitutional because it differentiates between indigent plaintiffs who are incarcerated and those who are not. Without addressing the question of whether that distinction-made in other subsections of § 1915-is valid, we note simply that nothing in § 1915(e) makes

such a distinction. Rather, that subsection applies to all cases in which the plaintiff is proceeding *in forma pauperis* under § 1915 .

Saleem also argues that the district court abdicated its judicial role and became an advocate for the defendants by dismissing his case *sua sponte*, rather than waiting for the defendants to respond to his complaint. As stated above, however, there was nothing improper about the district court's *sua sponte* dismissal of Saleem's case: a district court is not required to await the defendants' answer before dismissing a meritless case. Rather, once a plaintiff has paid a filing fee (whether partial or full), he need be given only notice and an opportunity to respond before the district court dismisses his case. *English*, 10 F.3d at 437. The district court did so in this case, and thus, the district court did not err procedurally by dismissing Saleem's case.

Saleem next argues that the district court erred substantively by dismissing his case-that is, Saleem contends his claims have merit. We review *de novo* the district court's dismissal of Saleem's claims. *Ledford*, 105 F.3d at 356.

***2** While this case was pending on appeal, the Supreme Court of the United States held the RFRA, 42 U.S.C. §§ 2000bb to -4, to be unconstitutional. *City of Boerne v. Flores*, 117 S.Ct. 2157, 2160 (1997). Accordingly, we need not consider Saleem's claim under the RFRA; we therefore consider only his claims under the First, Eighth and Thirteenth Amendments and 28 U.S.C. § 1991.[FN2]

FN2. Saleem makes no mention of his Fifth Amendment claim in his appellate brief. Accordingly, he has waived that claim. Fed. R.App. P. 28(a)(6). *See Gogos v. American Cablevision, Inc.*, 77 F.3d 951, 965 (7th Cir.1996) (failure to cite any factual or legal basis for an argument waives it); *Brown v. Roadway Package Sys., Inc.*, 77 F.3d 168, 173 n. 1 (7th Cir.1996) (argument that is not developed in any meaningful way is waived).

Under pre-RFRA First Amendment law, prison regulations that impinge upon a prisoner's exercise of his religion are constitutional so long as they are reasonably related to a legitimate penological interest. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987); *Canedy v. Boardman*, 91 F.3d 30, 33 (7th Cir.1996); *Hunafa v. Murphy*, 907 F.2d 46, 47 (7th Cir.1990). The Supreme Court has held explicitly that the denial of contact visits is a legitimate means of ensuring prison security. *Block v. Rutherford*, 468 U.S. 576, 586 (1984). A contact visit is one in which a prisoner is allowed physical contact with his visitor. *See, e.g., Caldwell v. Miller*, 790 F.2d 589, 593 n. 2 (7th Cir.1986). Such contact may be limited to kissing, hugging and handshaking, *id.*, or may-in the case of a conjugal visit-include sexual relations. It necessarily follows that if prisons may prohibit all contact between prisoners and visitors to protect prison security, prisons may deny conjugal visits for that reason. Because the FCI's prohibition against conjugal visits is reasonably related to a legitimate penological interest, any incidental infringement on Saleem's practice of his religion does not violate the First Amendment.[FN3]

FN3. Moreover, we note that Saleem does not allege that the defendants have in any other way limited his ability to practice his religion. The availability of other avenues of religious observance supports the conclusion that the FCI's prohibition of conjugal visits is reasonable. *See O'Lone*, 482 U.S. at 352.

A condition of confinement-such as the denial of conjugal visits-violates the Eighth Amendment only if it deprives a prisoner of "the minimal civilized measure of life's necessities"; "routine discomfort is part of the penalty that criminal offenders pay for their offenses against society." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (citations and internal quotation marks omitted). We have previously held that a denial of contact visitation altogether does not violate the Eighth Amendment. *Caldwell*, 790 F.2d at 601 n. 16. Moreover,

although most other courts to consider the denial of conjugal visits to prisoners have done so in the context of Fourteenth Amendment due process claims, not one court has ever held such a denial to violate the Constitution.[FN4] Thus, we agree with the district court that as a matter of law, the denial of conjugal visits to a prisoner does not violate the Eighth Amendment.

> FN4. *See, e.g., Hernandez v. Coughlin,* 18 F.3d 133, 137 (2d Cir.), *cert. denied,* 513 U.S. 836 (1994); *Toussaint v. McCarthy,* 801 F.2d 1080, 1113 (9th Cir.1986), *cert. denied,* 481 U.S. 1069 (1987); *Montana v. Commissioner's Court,* 659 F.2d 19, 21 (5th Cir.1981), *cert. denied,* 455 U.S. 1026 (1982); *Barcus v. Lamm,* 629 F.2d 559, 580 n. 26 (10th Cir.1980), *cert. denied,* 450 U.S. 1041 (1981); *Feeley v. Sampson,* 570 F.2d 364, 372-73 (1st Cir.1978); *McCray v. Sullivan,* 509 F.2d 1332, 1334-35 (5th Cir.), *cert. denied,* 423 U.S. 859 (1975); *Devenpeck v. Williams,* 509 F.2d 1405, 1407 (10th Cir.1975).

Saleem's reliance on the Thirteenth Amendment is misplaced. That Amendment specifically excludes from its scope "punishment for crime whereof the party shall have been duly convicted." U.S. Const. amend XIII, § 1. Saleem does not deny that he has been duly convicted of a crime, and thus, he has no claim under the Thirteenth Amendment.

Finally, we address Saleem's claim under 18 U.S.C. § 1091. Section 1091 is a criminal statute that prohibits genocide. Saleem asserts that, given the number of Black males currently incarcerated, the denial of conjugal visits to them constitutes genocide. However, private persons generally have no right to enforce criminal statutes or to sue under them unless the statute also creates a private right of action. *Reynolds v. Turnock,* 941 F.2d 501, 509 (7th Cir.1991) (Posner, J., concurring), *cert. denied,* 502 U.S. 1035 (1992). Nothing in § 1091 suggests that Congress intended to create a private right of action, and it is the burden of the party seeking to assert an implied private right of action to demonstrate that Congress intended to create such a right available. *See Suter v. Artist M.,* 503 U.S. 347, 363-64 (1992) (citing *Cort v. Ash,* 422 U.S. 66 (1975)). Saleem does not even attempt to meet his burden, and thus, we conclude that he has no cause of action based upon § 1091.

*3 Accordingly, none of the theories Saleem advanced before the district court stated a claim for which relief could be granted. The district court therefore correctly dismissed his case.

AFFIRMED.

C.A.7 (Ill.),1997.
Saleem v. Helman
124 F.3d 205, 1997 WL 527769 (C.A.7 (Ill.))

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168 F.3d 489, 1998 WL 791830 (C.A.6 (Tenn.))
(Cite as: 168 F.3d 489, 168 F.3d 489 (Table))

C

Ali v. Tennessee Dept. of Corrections
C.A.6 (Tenn.),1998.
NOTICE: THIS IS AN UNPUBLISHED OPINION.(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Sixth Circuit.
Suzanna ALI; Mohamed F. Ali, Plaintiffs-Appellants.
v.
TENNESSEE DEPARTMENT OF CORRECTIONS, Defendant-Appellee.
No. 97-6234.

Nov. 5, 1998.

Before JONES, NEWMAN, and BATCHELDER, Circuit Judges.

ORDER

***1** This is an appeal from a district court judgment dismissing a civil rights complaint filed under 42 U.S.C. § 1983 and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb*et seq.* This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed.Fed. R.App. P. 34(a).

In 1997, Tennessee inmate Mohamed Ali and his non-inmate wife, Suzanna Ali, filed a complaint against the Tennessee Department of Corrections seeking declaratory and injunctive relief over violations of their claimed right to conjugal visitation. The defendant moved to dismiss the complaint and the district court ultimately granted the defendant's motion.

The plaintiffs argue on appeal that the district court erred in failing to permit an amendment to their complaint, in denying a motion for default judgment and in dismissing the complaint for failure to state a claim for relief. The decisions to deny the plaintiffs the chance to amend their complaint and to dismiss the complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim for relief are subject to de novo review. *Fisher v. Roberts*, 125 F.3d 974, 977 (6th Cir.1997) (motion to amend) when denied for failure to state a claim; *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir.1996), *cert. denied*,520 U.S. 1251, 117 S.Ct. 2409, 138 L.Ed.2d 175 (1997) (Rule 12(b)(6) dismissal). The decision to deny the motion for default judgment is subject to review for an abuse of discretion. *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 846 (6th Cir.1983). Upon examination of the record and law, no error is apparent.

Mohamed Ali has been incarcerated in the Tennessee prison system since 1994. In 1996, he and Suzanna Ali were married in a prison wedding ceremony at the Northeast Correctional Center, but were not permitted contact/conjugal visitation at any time after the ceremony. The denial of contact/conjugal visitation was pursuant to established policy of the Tennessee corrections system. The plaintiffs filed the present action on May 14, 1997, seeking a declaratory judgment that the Tennessee prohibition against contact/conjugal visitation is a violation of their First Amendment right to freedom of religion and is unable to withstand scrutiny under the test set forth in the Religious Freedom Restoration Act. The plaintiffs also sought an injunction to direct the Tennessee Department of Corrections to permit the requested visitation.

The plaintiffs moved for default judgment on June 19, 1997, in the absence of any responsive pleading. The defendant filed a motion to dismiss the complaint on June 23, 1997, on Eleventh Amendment grounds and the plaintiffs subsequently

moved to amend their complaint to add the Commissioner of the Tennessee Department of Corrections in his official and individual capacities.

The district court disposed of the action in one memorandum opinion. The court concluded that, to the extent that the complaint was based on the Religious Freedom Restoration Act, the complaint was subject to dismissal as the Act had been found unconstitutional subsequent to the filing of the complaint. The court also found that the defendant enjoyed Eleventh Amendment immunity for the requested relief. Finally, the court noted that the plaintiffs had absolutely no right in law to the relief they sought. The court denied the motion to amend the complaint and ordered the action dismissed. On appeal, the Alis seek review of the decisions to deny the default judgment, to refuse to permit the amendment of the complaint and to order the dismissal of the complaint.

***2** The appeal lacks merit as there is absolutely no basis in law for the relief sought. The district court properly noted that the aspect of the claim based on the statutory review provisions of the Religious Freedom Restoration Act did not survive the Act being declared unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). The only other basis for the plaintiffs' action is that they have a constitutional right to contact conjugal visitation. Although it is clear that prisoners have a fundamental right to marry, this constitutionally protected guarantee is substantially limited as a result of incarceration. *See Turner v. Safley*, 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). The Constitution does not create any protected guarantee to conjugal visitation privileges while incarcerated. *See, e.g., Dunn-bey v. Coughlin*, 78 F.3d 103, 105 (2d Cir.), *cert. denied*, 513 U.S. 836, 115 S.Ct. 117, 130 L.Ed.2d 63 (1994).

Accordingly, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

C.A.6 (Tenn.),1998.
Ali v. Tennessee Dept. of Corrections
168 F.3d 489, 1998 WL 791830 (C.A.6 (Tenn.))

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Not Reported in F.Supp.2d, 2006 WL 2439760 (W.D.Mich.)
(Cite as: Not Reported in F.Supp.2d)

Marsh v. Granholm
W.D.Mich.,2006.
Only the Westlaw citation is currently available.
United States District Court,W.D. Michigan,Northern Division.
David MARSH a/k a Jason K. Mithrandir, Plaintiff,
v.
Jennifer GRANHOLM, et al., Defendants.
No. 2:05-cv-134.

Aug. 22, 2006.

David Marsh, Ionia, MI, pro se.
Julia R. Bell, MI Dept. Attorney General, Corrections Division, Lansing, MI, for Defendants.

OPINION APPROVING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

ROBERT HOLMES BELL, Chief District Judge.

***1** The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge on July 11, 2006. The Report and Recommendation was duly served on the parties. The Court received objections from both Plaintiff and Defendants. In accordance with 28 U.S.C. § 636(b)(1) the Court has performed *de novo* consideration of those portions of the Report and Recommendation to which objection has been made. The Court finds the objections to be without merit.

In the report and recommendation, the Magistrate Judge recommended that the court grant Defendants' motion for summary judgment on Plaintiff's First, Seventh and Eighth claims, which implicate the fact or duration of Plaintiff's confinement because such claims should be brought in the context of a petition for habeas corpus and are not proper subjects of a civil rights action brought pursuant to § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 484-493 (1973) (The essence of habeas corpus is an attack by a person in custody upon the legality of that custody and the traditional function of the writ is to secure release from illegal custody).

In his objections, Plaintiff states that this recommendation is erroneous because "he is not seeking a 'release' from prison."Plaintiff claims that parole is a continuation of custody, so that his claims regarding a release on parole do not implicate the fact or duration of Plaintiff's confinement. However, contrary to Plaintiff's assertions, a release on parole is a release from confinement. The fact that a parolee continues to be under the jurisdiction of the state does not mean the parole is equivalent to imprisonment. Therefore, for the reasons set forth in the report and recommendation, Plaintiff's First, Seventh and Eighth claims, which implicate the fact or duration of Plaintiff's confinement, are properly dismissed.

Plaintiff also objects to the Magistrate Judge's recommendation that Defendants are entitled to summary judgment on Plaintiff's claims that he should be allowed to adopt a "familiar," to possess a dagger, to engage in private heterosexual procreation, and to worship privately outdoors. However, as noted in the report and recommendation, Plaintiff has been convicted of murder. Consequently, there are obviously serious safety concerns regarding his continued incarceration. Because the mere fact of Plaintiff's incarceration is at odds with the ability to engage in the above listed behavior, the court concludes that preventing him from doing so is the least restrictive means to further the government's interest in institutional safety. Therefore, Plaintiff's objections on this issue are without merit.

Plaintiff objects to the Magistrate Judge's finding that he has failed to show that his inability to purchase items from Azure Green imposes a substantial burden on his ability to practice his religion. Plaintiff claims that, as previously alleged, Azure Green is the only vendor which can supply

his religious needs. However, Plaintiff does not state which items may only be obtained from Azure Green, nor does he explain his need for those specific items. The court notes that it is unlikely that every practicing Wiccan purchases all of their religious supplies from Azure Green. Therefore, the court concludes that Plaintiff's objections on this issue are without merit.

***2** Plaintiff contends that the Magistrate Judge erred in recommending that Defendants are entitled to qualified immunity with regard to their individual liability for damages under the RLUIPA. However, as noted in the report and recommendation, the case law with regard to whether Defendants are liable for damages under the RLUIPA is currently unsettled in this and other circuits. *See Goodeen v. Crain*, 405 F.Supp.2d 714, 2005 WL 3436769, at *9 (E.D.Tex. Dec. 13, 2005) (appearing to hold claims for damages, especially those against officials in individual capacities, unavailable under the RLUIPA); *Smith v. Haley*, 401 F.Supp.2d 1240, 1246 (M.D.Ala.2005) ("Because there is simply nothing in the statute that clearly suggests that government employees can be liable for damages in their individual capacities, the court doubts that RLUIP[A] provides for such."); *Rich v. New*, 402 F.Supp.2d 1237, 1240 (D.Colo.2005) ("The Court understands [the RLUIPA] to permit cases against a governmental entity, but not against an individual officer, except perhaps in his or her official capacity."); *Chesser v. City of Portsmouth*, No. Civ. A. 2:05CV446, 2005 WL 3073065, at *5 (E.D.Va.Nov.16, 2005) ("Appropriate relief may include injunctive and declaratory relief as well as nominal damages."); *Farrow v. Stanley*, No. Civ. 02-567-PB, 2005 WL 2671543, at *11 n. 13 (D.N.H.Oct.20, 2005) ("There is substantial uncertainty as to whether [42 U.S.C. § 2000cc-2] ever provides a right to money damages."); *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 326 F.Supp.2d 1140, 1161 (E.D.Cal.2003) ("the issue of whether RLUIPA allows the recovery of damages is an open question"); *Agrawal v. Briley*, No. 02C807, 2005 WL 1644225, at *2 n. 2 (N.D.Ill.Jan.27, 2005) ("It is unclear whether [42 U.S.C. § 2000cc-2] also authorizes a claim for damages as well as injunctive relief."). *But see Williams v. Bruce*, 379 F.Supp.2d 370 (M.D.Pa.2005) (recognizing corrections employees and officials' exposure to liability in individual capacities on inmate's § 1983 claim asserting violation of the RLUIPA); and *Baker v. Ferrero, et al.*, 2006 WL 346440, slip op. p. 9 (N.D.Ga. Feb. 13, 2006) (also recognizing officials' exposure to liability in individual capacities on inmate's § 1983 claim asserting violation of the RLUIPA). Therefore, the Magistrate Judge properly found that Defendants could have reasonably have believed that their conduct did not expose them to liability in their individual capacities under the RLUIPA. *Dietrich*, 167 F.3d at 1012; *Anderson*, 483 U.S. at 641. Consequently, the court finds that Defendants are entitled to qualified immunity on the issue of liability for damages in their individual capacities.

In Defendants' objections, they contend that the Magistrate Judge erred in finding that Plaintiff's claims with regard to group religious meetings and religious paraphernalia should be equitably tolled because of the uncertainty of the state of the RLUIPA between November 7, 2003, and May 31, 2005. Defendants state that this is so because equitable tolling should be applied only sparingly and because Plaintiff did not exercise due diligence. However, as noted by the Magistrate Judge in the report and recommendation, there was a period of approximately one and a half years during which any claim filed raising the RLUIPA would have been dismissed for lack of merit. Plaintiff cannot be faulted for not filing his claims during this time period. Should the court adopt Defendants' reasoning on this issue, Plaintiff's statute of limitations for filing his group meeting claim would be effectively shortened by one year, and the statute of limitations for filing his religious paraphernalia claim would be shortened by one and a half years. Given the fact that such a significant time period is involved, the court concludes that the application of equitable tolling appears to be warranted. Moreover, the fact that Plaintiff filed this lawsuit less than a week after the United States Supreme Court found the RLUIPA to be constitutional, shows due diligence. Therefore, Defendants' objections on this issue lack merit.

***3** Defendants further claim that they are entitled to summary judgment on Plaintiff's group worship and

religious paraphernalia claims because the mere fact of Plaintiff's incarceration is at odds with these requests. As noted above, many of Plaintiff's requests are at odds with the mere fact of his incarceration. However, it is not clear that Defendants are entitled to deny Plaintiff any type of group service or deny him the ability to possess at least some of the requested items. Therefore, Defendants' objections on this issue lack merit.

THEREFORE, IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is approved and adopted as the opinion of the court. TIMOTHY P. GREELEY, Magistrate Judge.

REPORT AND RECOMMENDATION

Plaintiff David Marsh, an inmate currently confined at the Riverside Correctional Facility, filed this *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against Michigan Governor Jennifer Granholm and several employees of the Michigan Department of Corrections (MDOC). Specifically, Defendants include MDOC Director Patricia Caruso, Michigan Parole Board Chairperson Joan S. Rubitschun, St. Louis Correctional Facility Plaine Butler, and Chippewa Correctional Facility Fabian Lavigne.

In his complaint, Plaintiff asserts that Defendants violated his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) by failing to adequately accommodate his religious beliefs. Plaintiff has been a self-professed Wiccan for the past 30 years. Plaintiff alleges that he is serving a natural life sentence and has been unable to practice his religious beliefs since his incarceration. Plaintiff states that his religious beliefs require that he be allowed to live in a natural setting and that his sacred objects and books not be profaned by being touched by others. Plaintiff explained that the greatest sacrament of the Wiccan religion is the celebration of life, most manifest through heterosexual union and procreation. In addition, Plaintiff claims that an integral component necessary for the practice of the Wiccan religion is the possession and use of an athame, which is a ritual knife, and unhampered ceremonial magick or ceremonial rituals.

Plaintiff contends that Defendant Caruso approved and maintains Policy Directive 05.03.150, Attachment B, which specifically prohibits Wiccan prisoners from conducting or participating in group religious meetings or rituals and from openly displaying Wiccan symbols. Plaintiff states that the only religious paraphernalia he may possess is one deck of Tarot cards and one Pentagram. Plaintiff states that, at a bare minimum, he requires various herbs and herbal teas, various anointing oils, various candles, a scrying bowl and/or crystal ball, an alter, an alter cloth, a chalice, an anthame, a ceremonial robe, an alter mixing/offering bowl, an alter pentacle, a bell, a book of shadows, an incense burner, various crystals, and various living plants and flowers. Plaintiff also states that he requires the presence of a "familiar," which is an animal companion, to consummate his obligation to his deities to form a bond with the natural world, and to join him in the performance of various religious rituals.

*2 Plaintiff alleges that on October 24, 2001, Defendant Lavigne prohibited Plaintiff from purchasing or possessing necessary Wiccan religious paraphernalia. On December 19, 2001, Defendant Butler prohibited Plaintiff from ordering merchandise from a mail order vendor doing business as "Azure Green." Plaintiff states that this is the only mail order business which can fully supply Plaintiff with his necessary religious paraphernalia, books, periodicals, and cassette tapes. On March 1, 2005, Plaintiff submitted an "application for executive clemency" to Defendant Rubitschun citing the RLUIPA and seeking the ability to exercise his religious beliefs. On March 24, 2005, Defendant Rubitschun transmitted the application to Defendant Granholm for a final decision, and Defendant Granholm failed to comply with the RLUIPA with regard to Plaintiff's religious exercise.

Plaintiff alleges that Defendant Caruso presently lists the book *Buckland's Complete Book of Witchcraft* (Llewellyn, 1986) on the MDOC's restricted publications list, citing "bondage" as the reason for the restriction. Plaintiff claims that the definition of "bondage," as applied to *Buckland's Complete Book of Witchcraft* applies to harmless

Wiccan initiation rituals, unlike the crucifixion which lies at the core of Christianity.

In addition, Plaintiff has filed a supplemental pleading (docket # [illegible]) in which he seeks to assert a claim against Defendant Caruso for approving Policy Directive 05.03.118 ¶ W on June 6, 2005.[FN1] Policy Directive 05.03.118 ¶ W provides:

> FN1. Because Plaintiff's claim involves the content of policy, it may not be grieved. Policy Directive 03.02.130. Therefore, Plaintiff need not have filed an administrative grievance on this claim before presenting it to the court.

Prisoners shall not be permitted to receive mail identified as being sent "bulk rate" or "pre-sorted standard," as identified by the U.S. Postal Service marking, unless it was sent from a federal or state agency or a court, is a catalog allowed pursuant to Paragraph [illegible], is a publication received from the publisher or an authorized vendor pursuant to Paragraph [illegible], is correspondence course material approved pursuant to PD 05.03.[illegible] [illegible] Correspondence Courses." All other mail identified by the U.S. Postal Service marking as being sent "bulk rate" or "pre-sorted standard" may be discarded upon receipt by the facility without notice to the prisoner.

Plaintiff claims that he has solicited catalogs from Azure Green, but has not received a catalog since Policy Directive 05.03.118 ¶ W took effect. Plaintiff states that Azure Green is the only mail order vendor of Wiccan religious paraphernalia and books which can fulfill all of his religious needs, so that ¶ W has substantially burdened Plaintiff's religious exercise.

Plaintiff claims that Defendants' actions as stated in his original and supplemental complaints violated his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA). Plaintiff is seeking nominal, compensatory, and punitive damages, as well as declaratory relief.

Presently before the Court is the Defendants' Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6), and/or Motion for Summary Judgment, pursuant to Fed.R.Civ.P. 56. Plaintiff has filed a response, a "cross motion for summary judgment," a supplemental complaint, and a motion for immediate consideration and the matter is ready for decision. Because both sides have asked that the Court consider evidentiary materials beyond the pleadings, the standards applicable to summary judgment apply. *See*Fed.R.Civ.P. 12(b).

*5 Summary judgment is appropriate only if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323 (1986). If the movant carries the burden of showing there is an absence of evidence to support a claim or defense, then the party opposing the motion must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Id.* at 324-25. The nonmoving party cannot rest on its pleadings but must present "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed.R.Civ.P. 56(e)). The evidence must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986). Thus, any direct evidence offered by the plaintiff in response to a summary judgment motion must be accepted as true. *Muhammad v. Close,* 379 F.3d 413, 416 (6th Cir.2004) (*citing Adams v. Metiva,* 31 F.3d 375, 382 (6th Cir.1994)). However, a mere scintilla of evidence in support of the nonmovant's position will be insufficient. *Anderson,* 477 U.S. at 251-52. Ultimately, the court must determine whether there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. *See also [illegible] v. [illegible] Jones, Inc.,* 996 F.2d 136, 139 (6th Cir.1993) (single affidavit, in presence of other evidence to the contrary, failed to present genuine issue of fact); *cf. Moore, Owen, Thomas & Co. v. Coffey,* 992 F.2d 1439, 1448 (6th Cir.1993) (single affidavit concerning state of mind created factual issue).

In Plaintiff's complaint, he sets forth eight separate claims or "causes of action":

1. That Defendants Granholm, Caruso, and

Rubitschun have caused Plaintiff to be imprisoned within such boundaries and conditions of confinement which [illegible] with the exercise of the [illegible] religion which other less restrictive means of custody (e.g., parole) were and are readily available.

2. That Defendants Caruso and Lavigne have prohibited Plaintiff from exercising his religion in group meetings.

3. That Defendants Caruso and Lavigne have prohibited Plaintiff from exercising his religion by denying him access to or possession of necessary religious paraphernalia.

4. That Defendant [illegible] has prohibited Plaintiff from exercising his religion by denying him access to or the use of [illegible] vendor d/b/a [illegible] which is the only vendor which can fully supply Plaintiff's religious needs.

5. That Defendant Caruso has prohibited Plaintiff from exercising his religion by requiring him to hide his religious symbols and emblems from plain sight.

6. That Defendant Caruso has prohibited Plaintiff from exercising his religion by refusing to allow him to purchase, possess, or read *Buckland's Complete Book of [illegible]*

*6 7. That [illegible] maintain [illegible] towards Plaintiff's exercise of the [illegible] religion in Michigan's [illegible] prisons.

8. That Defendants Grinholm, Caruso, and Rubitschun refuse to expand the boundaries of Plaintiff's confinement, and intend for Plaintiff to live the rest of his life in a secure prison thereby prohibiting Plaintiff from the meaningful exercise of his religion.

In their motion for summary judgment, Defendants assert [illegible] time-barred. [illegible] claim is that Defendants Caruso and Lavigne prohibited him from exercising his religion in group meetings. This claim is based on Defendant Lavigne's denial [illegible] which occurred on September 8, 2001. Plaintiff exhausted his administrative remedies with regard to this claim on November [illegible] (See Plaintiff's complaint, ¶¶ 18-20, 81-[illegible]) Plaintiff's third claim, regarding the denial of the ability to possess certain religious paraphernalia by Defendants Caruso and Lavigne, is based on Defendant Lavigne's November 9, 2001, denial. Plaintiff exhausted his administrative remedies with regard to this claim on February 22, 2[illegible] (See Plaintiff's complaint, ¶ ¶ 21-23, 83-84.)

Federal courts apply state personal injury statutes of limitations to claims brought under § 1983. *Wilson v. Garcia,* 471 U.S. 261, 276, 105 S.Ct. 1938, 1947 (1985); *Collard v. Kentucky Bd. of Nursing,* 896 F.2d 179, 180-181 (6th Cir.1990). For civil rights suits filed in Michigan under § 1983, the statute of limitations is three years. *See*MICH. COMP. LAWS § 600.5805(8); *Carroll v. Wilkerson,* 782 F.2d 44, 44 (6th Cir.) (per curiam), *cert. denied,*479 U.S. 923, 107 S.Ct. 330 (1986); *Stafford v. Vaughn,* No. 97-2239, 1999 WL 96990, *1 (6th Cir. Feb. 2, 1999). Although state tolling provisions must be applied to § 1983 suits brought by prisoners, *Hardin,* 490 U.S. at 544;*Jones v. City of Hamtrack,* 905 F.2d 908, 909 (6th Cir.1990), *cert. denied,*498 U.S. 903 (1990), Michigan's tolling provision for imprisoned persons does not provide plaintiff any additional benefit in this case. *See*MICH. COMP. LAWS § 600.5851(9).

The Prison Litigation Reform Act amended 42 U.S.C. § 1997e to provide: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."42 U.S.C. § 1997e(a) (1999). This language unambiguously requires exhaustion as a mandatory threshold requirement in prison litigation. Prisoners are therefore prevented from bringing suit in federal court for the period of time required to exhaust "such administrative remedies as are available."For this reason, the statute of limitations which applied to Plaintiff's civil rights action was tolled for the period during which his available state remedies were being exhausted. *Brown v. Morgan,* 209 F.3d 595, 596 (6th Cir.2000)(citing *Harris v. Hegmann,* 198 F.3d 153, 157-59 (5th Cir.1999) (per curiam); *Cooper v. Nielson,* 194 F.3d 1316, 1999 WL 719514 (9th Cir.1999)).

*7 Therefore, the undersigned notes that absent any tolling provisions, Plaintiff had three years from November 7, 2001, or until November 7, 2004, to raise his [illegible] in federal court. Likewise, Plaintiff had [illegible] February [illegible] or until February 22, 2005, to raise [illegible] claim in federal court. Plaintiff did not file the instant action until June [illegible] well after the statute of limitations has run on both his second and third claims. However, Plaintiff claims that he is entitled to equitable tolling of the statute of limitations from November [illegible] until May 31, 2005, during which time the constitutionality of the RLUIPA was in question. [illegible] 2005, the Sixth Circuit [illegible] the RLUIPA, 42 [illegible] 2000cc [illegible] *Cutter v. Wilkinson*, [illegible] F.3d 257 (6th Cir. 2003). On May 31, 2005, the United States Supreme Court reversed the Sixth Circuit's holding, finding that the RLUIPA, which increases the level of protection for prisoners' and other institutionalized persons' religious rights, does not violate the Establishment Clause. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

The doctrine of equitable tolling allows federal courts to toll a statute of limitations when a party's failure to [illegible] deadline [illegible] arose from circumstances [illegible] control. *Keenan v. Bagley*, [illegible] F.3d 417, [illegible] (6th Cir. 2005) (*citing* [illegible] *Museum of* [illegible] F.3d 552, 560-61 (6th Cir. 2000)). [illegible] equitable tolling claims involve [illegible] consideration of the following factors: [illegible] of filing requirement; (2) lack of constructive knowledge of filing requirement; [illegible] in pursuing one's rights; [illegible] to the defendant; and (5) [illegible] ignorant of [illegible]

As noted [illegible] Plaintiff [illegible] lack of [illegible] knowledge [illegible] the filing requirement, [illegible] factor of [illegible] equitable tolling [illegible] Defendants contend that Plaintiff [illegible] his rights because [illegible] approximately two years from the time [illegible] and approximately [illegible] and a half years from the time his religious [illegible] the Sixth Circuit held that the RLUIPA was unconstitutional. However, as noted above, there was a period of approximately one and a half years during which any claim filed raising the RLUIPA would have been dismissed for lack of merit. Plaintiff cannot be faulted for not filing his claims during this time period. Should the court adopt Defendants' reasoning on this issue, Plaintiff's statute of limitations for filing his group meeting claim would be effectively shortened by one-year, and the statute of limitations for filing his religious paraphernalia claim would be shortened by one and a half years. Given the fact that such a significant time period is involved the undersigned concludes that the application of equitable tolling appears to be warranted. Moreover, the fact that Plaintiff filed this lawsuit less than a week after the United States Supreme Court found the RLUIPA to be constitutional, shows due diligence. Defendants claim that they would be prejudiced by the application of equitable tolling because Defendant Lavigne has retired and Defendant Caruso is employed in a different capacity than she was at the time of the alleged constitutional violation. However, the undersigned concludes that neither of these facts prevents Defendants Caruso and Lavigne from defending this lawsuit. In the opinion of the undersigned, Defendants' claim of prejudice is insufficient to overcome the fact that the legal theory for Plaintiff's claim was unavailable to Plaintiff for a significant time period during the running of the statute of limitations. The undersigned concludes that Defendants are not entitled to summary judgment on the issue of the statute of limitations.

*8 Defendants next state that Plaintiff's first, seventh and eighth causes of action are not cognizable as § 1983 claims because a finding in Plaintiff's favor would operate to reduce Plaintiff's term of confinement. In these claims, Plaintiff asserts that incarceration within a Michigan prison is inconsistent with the requirements of his religion. Plaintiff further states that the State of Michigan " [illegible] several statutes which control the boundaries and conditions of Plaintiff's confinement. Plaintiff specifically cites MCL § 791.234, which creates judicial review rights with respect to all adverse parole decisions, MCL § 791.265, which

deals with the transfer of prisoners and MCL § 791.265a, which governs consideration for eligibility of prisoners [illegible] community placement programs.

As noted above, Plaintiff's first, seventh and eighth claims assert that Defendants Grarholm, Caruso and Rubitschun [illegible] caused Plaintiff to be imprisoned within such boundaries and conditions of confinement which [illegible] incompatible with the exercise of the Wiccan religion. Defendants have created and continue to maintain a pervasive atmosphere of hostility towards Plaintiff's exercise of the Wiccan religion in Michigan's state prisons, and that Defendants [illegible] and Rubitschun [illegible] extended the [illegible] of Plaintiff's confinement [illegible] Plaintiff [illegible] live [illegible] prohibiting Plaintiff from the meaningful exercise of his religion [illegible] stated by Defendants, these claims appear to [illegible] the fact [illegible] duration of Plaintiff's confinement [illegible] to the fact or duration of [illegible] petition for habeas corpus and is not the proper subject of a civil rights action brought pursuant to § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475, 484, 493 (1973) [illegible] habeas corpus is [illegible] attack by a person [illegible] legality of that custody [illegible] of the writ is to secure [illegible] Therefore, to the extent that Plaintiff's claims challenge the fact or duration of [illegible] confinement, they must be dismissed. *See Barnes* [illegible] WL [illegible] appropriate [illegible] relief [illegible] duration of confinement [illegible] (7th Cir.1993) [illegible] § 1983 action [illegible] include (1) potential [illegible] U.S. 477 [illegible] (3) differing [illegible] (4) differences [illegible] application [illegible] doctrine [illegible] § 1983 [illegible].

Plaintiff [illegible] *Mayweathers v. Terhune*, [illegible] 2004). *Preiser* does not [illegible] brought under the RLUIPA. In *Mayweathers*, the inmates sought relief from the prison disciplinary convictions they received as a result of attending the Friday Muslim Jumu'ah service. *Id.* The undersigned notes that the situation in *Mayweathers* is distinct from the instant situation in that the plaintiffs were not seeking an early parole or other release from prison in order to be able to practice their religion. In addition, the undersigned notes that the *Mayweathers* decision has no precedential value in this court. Because the undersigned is not persuaded by the reasoning in *Mayweathers*, it is recommended that the court grant Defendants' request for summary judgment on Plaintiff's first, seventh and eighth claims.

[illegible] Defendants assert that they are entitled to summary judgment on Plaintiff's first, fifth, sixth, seventh, and eighth causes of action because the RLUIPA does not compel the relief being sought by Plaintiff in this case. The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 states:

(a) General Rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person-

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

The RLUIPA applies a strict-scrutiny standard when [illegible] substantial burden is imposed on religious exercise by a state government and occurs in a program or activity that receives Federal financial assistance, or affects, or removal of that substantial burden would affect, interstate or foreign commerce. *Cutter v. Wilkinson*, 423 F.3d 579, 582 (6th Cir.2005).

In his complaint, Plaintiff asserts that his religious beliefs require that he be allowed to do business with a prohibited vendor, adopt a "familiar," possess a dagger, engage in private heterosexual procreation, and worship among the meadows.

Defendants ... consist of ... are ... society. Defendants ... inherent right ... right to ... or to ... control ... inability ... symbols ... anything ... somewhat ... Defendants ... Plaintiff's ... approved ... of 2000 ... accommodate ... his account ..., which ... Defendants ... the ... Green ... practices.

As noted ... imposed ... burden ... unless ... impositions ... furthering ... v. O'Lone, ... Feb. 1, ... for ... do ... U.S. ... describe ... the ... session ... do ... worship ... celebrate ... marriage ... documents ... groups ... generally ... about ... Director ... practice. Defendants ... Runs ...

Wiccans "circles" bless and share a cup of wine, water or juice as part of the ritual, and almost all Wiccans use an individual ceremonial knife (an athame) to focus and direct personal energy. A Wiccan's ritual tools and jewelry are highly personal and should never leave the possession of their owner for fear of contamination of the energies they are charged with. Wiccans also frequently require items such as incense, candles, a chalice or bowl for water, a disk with a pentagram engraved on it, statues, crystals, cords, a scourge, and fruit, flowers or other seasonal decorations. (Exhibit C to Plaintiff's response to the motion for summary judgment, docket # 46).

*3 Defendants do not offer any evidence that Plaintiff's beliefs are not sincere or that the items he requests are not important to his religious practice. However, as noted above, the government may impose a substantial burden on the religious exercise of a prisoner if it is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C.A. § 2000cc-1(a). Because Plaintiff has been convicted of murder, there are legitimate serious safety concerns regarding his continued incarceration. The undersigned notes that although Defendants do not address whether they have a compelling interest in continuing to deny Plaintiff's requests, some of his requests, such as the desire to adopt a "familiar," to possess a dagger, to engage in private heterosexual procreation, and to worship privately outdoors would appear to implicate a compelling governmental interest. Because the mere fact of Plaintiff's incarceration is consistent with the inability to engage in the above listed behavior, the undersigned concludes that preventing Plaintiff from doing so is the least restrictive means to further the government's interest in institutional safety.

With regard to Plaintiff's claim that he should be allowed to do business with a prohibited vendor, Azure Green, Plaintiff has failed to show that the only way he can obtain the desired items is by purchasing them from Azure Green. Therefore, Plaintiff has failed to show that his inability to do business with Azure Green is a substantial burden on his ability to practice his religion. Likewise, Plaintiff has failed to show that Defendant Caruso's

... o Claim ... Works.

co[illegible] practice [illegible] that Plaintiff cannot obtain [illegible] to show [illegible] religious [illegible] or confined [illegible] 2000cc-1. The [illegible] that Defendant [illegible] Plaintiff's [illegible] and the bulk [illegible]

Defendant [illegible] under [illegible] support of [illegible] RLUIPA [illegible] that [illegible] individual [illegible] Defendants [illegible] RLUIPA [illegible] clause [illegible] defendants [illegible] holding them liable for individual damages under the Act would be contrary to principles of contract law. As noted [illegible] United States District Court in the Northern District [illegible] continued [illegible]

[A] growing [illegible] expressed [illegible] the RLUIPA [illegible] government [illegible] capacities. See [illegible] Supp. [illegible] 2005 WL 34[illegible] to [illegible] official [illegible] the RLUIPA [illegible] Haley, [illegible] Supp.2d 1240, 1246 [illegible] "[illegible] is simply nothing [illegible] suggests [illegible] government [illegible] liable for damages in their individual [illegible] RLUIPA [illegible] F.Supp.2d [illegible] understanding [illegible] government [illegible] individual officers [illegible] capacity [illegible] 2005 [illegible] D.N.[illegible] Nov. 16, 2005 [illegible] include injunctive [illegible] nominal damages [illegible]

[illegible] 2005 WL 2671541, at *11 n. 13 ([illegible] Oct. 21, 2005) ("There is substantial uncertainty as to whether [42 U.S.C. § 2000cc-2] [illegible] provides a right to money damages."); *Guru Nanak Sikh Society of Yuba City v. County of Sutter,* 326 F.Supp.2d 1140, 1162 (E.D.Cal.2003) ("the issue of whether RLUIPA allows the recovery of damages is an open question"); *Agrawal v. Briley,* No. 02C6807, 2003 WL 164225, at *2 n. 2 (N.D.Ill.Jan.22, 2003) ("it is unclear whether [42 U.S.C. § 2000cc-2(a)] authorizes a claim for [illegible] as well as injunctive relief").*But see* [illegible] *Bitner,* 359 F.Supp.2d 370 ([illegible] Pa.2005) (recognizing corrections employees and officials' exposure to liability in individual capacities in inmate's § 1983 claim asserting violation of the RLUIPA).

[illegible] D.Acre v. [illegible] et al., 2006 WL 346440, slip op. [illegible] (N.D.Ga. Feb. 13, 2006).

The cases reviewed by the *Baker* court rely, in part, on the language of the RLUIPA, which provides for appropriate relief against a "government." *Id.*;42 U.S.C. § 2000cc-2(a). In addition, 42 U.S.C. § [illegible] states that no "government" shall impose a substantial burden on the religious exercise of a prisoner. *Id.* (emphasis added). However, for purposes of the RLUIPA, the term government includes:

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); **and**

(iii) *any other* **person acting under color of State law.**

[illegible] 2006 WL 346440 at *9 (emphasis in original) ([illegible] 42 U.S.C.2000cc-5(4)). As noted by the *Baker* court, if the statute's definition of "government" was limited to (i) and (ii), "its remedial reach would no doubt be susceptible to a construction that embraces only those claims asserted against officials in their official capacities." *Id.* Consequently, the addition of section (iii), which language tracks closely that found in 42 U.S.C. § 1983, appears to provide for actions against state officials in their individual capacities.

Daker, [illegible] at [illegible]

The *Daker* [illegible] provide [illegible] questions [illegible] on [illegible] injunct[illegible] observed [illegible] explicitly [illegible] damages [illegible] *Id.* [illegible] RLUIPA's provision [illegible] incorporation [illegible] respecting [illegible] government and government [illegible] including, e.g. [illegible] and the [illegible]

The un[illegible] addressed [illegible] defendants un[illegible] the Sixth Circuit has allowed [illegible] RLUIPA against individ[illegible] without consenting [illegible] lawsuit. [illegible] 579 (6th Cir.2005). [illegible] the reason[illegible] recommend [illegible] Defendan[illegible] issue of [illegible]

Defendants [illegible] official capacit[illegible] Eleventh Amendment [illegible] requests [illegible] immun[illegible] in [illegible] immunity [illegible] Eleventh Amendment [illegible] by statute. *Pennhurst* [illegible] 465 U.S. 89 [illegible] 781 [illegible] 823, 826 [illegible]

*1[illegible] The [illegible] 2000cc[illegible] un[illegible]
(a) Ca[illegible]
A [illegible] claim [illegible] appro[illegible] as a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

As noted previously, this cause of action arises whenever a substantial burden is imposed on religious exercise by a state government and occurs in a program or activity that receives Federal financial assistance, or affects, or removal of that substantial burden would affect, interstate or foreign commerce. 42 U.S.C. § 2000cc-1(b)(1-2); *Cutter*, 423 F.3d 579, 582 (6th Cir.2005).

As stated by the district court for Southern District of Ohio, Eastern Division, a state is not immune under the Eleventh Amendment from suit by a [illegible] alleging violation of the RLUIPA, if the state has accepted federal funds for prison activities or programs on condition that it comply with the RLUIPA. *Gerhardt v. Lazaroff*, 221 F.Supp.2d 827, 851 (S.D.Ohio 2002), *aff'd Cutter v. Wilkinson*, 423 F.3d 579 (6th Cir.2005). Such acceptance " [illegible] establishes [the state's] acquiescence to § [illegible] of the Act providing that '[a] person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government,' where the term 'government' includes a state, its departments, [illegible] officials." *Id.* at 851-52 (*citing* 42 U.S.C. § 2000cc-5(4)(A)). Therefore, in the opinion of the undersigned, Defendants are not entitled to summary judgment on the issue of Eleventh Amendment immunity.

[illegible] Defendants claim that they are entitled to qualified immunity with regard to their individual liability for damages under the RLUIPA. Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir.1999); *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir.1997); *Noble v. Schmitt*, 87 F.3d 157, 160 (6th Cir.1996); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). An "objective reasonableness" test is used to determine whether the official could reasonably have believed his conduct was lawful.

Dietrich [illegible] 167 F.3d [illegible] (1999); *Anderson v. Creighton*, 483 U.S. 635, [illegible] (1987).

The procedure for [illegible] claims of qualified immunity is [illegible]. First, [illegible] determine whether a constitutional violation occurred. Second, we determine whether the right that was violated was a clearly established one of which a reasonable person would have known. Finally, we determine whether the plaintiff has [illegible] and supported the [illegible] sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights. *Williams v. Mehra*, 186 F.3d 685, 691 [illegible].

*13 When [illegible] clearly established [illegible] decisions of the United States Supreme Court, then to decisions of the [illegible] and to other courts within this Circuit, and finally to decisions of other circuits. *Dietrich* [illegible] necessarily [illegible] merely because [illegible] the previously been held unlawful. Rather, in light of pre-existing law [illegible] of the official's conduct [illegible] 167 F.3d at 10[illegible] 39 [illegible].

When [illegible] the facts [illegible] the right was [illegible] to [illegible] whether [illegible] of immunity [illegible] (6th Cir. [illegible]) [illegible] question [illegible] not the [illegible] notwithstanding that the trial judge [illegible] defendants [illegible] be [illegible] for the [illegible] this stage of [illegible].

The operation of [illegible] qualified immunity [illegible] depends [illegible] which the [illegible] The contours of the [illegible] that a reasonable [illegible] what he is doing violates [illegible] is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of the preexisting law the unlawfulness must be apparent.

Anderson, 483 U.S. at 639-40. *See also Durham v. Nu'Man*, 97 F.3d 862, 866 (6th Cir.1996), *cert. denied*, 520 U.S. 1157 (1997). The Sixth Circuit has observed:

A right is not considered clearly established unless it has been authoritatively decided by the United States Supreme Court, the Court of Appeals, or the highest court of the state in which the alleged constitutional violation occurred.

Durham, 97 F.3d at 866 (citing *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir.1988)).

Thus, qualified immunity is not triggered only where the very action in question was previously held unlawful. *Anderson*, 483 U.S. at 639-40. Rather, the test is whether the contours of the right were sufficiently clear that a reasonable official would understand that what he is doing violated plaintiff's federal rights. *Id.*

Furthermore, a defendant need not actively participate in unlawful conduct in order to be liable under Section 1983. Rather, a defendant may be liable where he has a duty to protect a plaintiff and fails to comply with this duty. *Durham*, 97 F.3d at 866-868 (holding that a nurse and a security guard at a state hospital may be liable under Section 1983 where they do not take action to prevent a patient from being beaten); *See also McHenry v. Chadwick*, 896 F.2d 184 (6th Cir.1990) (a correctional officer who observes an unlawful beating may be liable under Section 1983 even though he did not actively participate in the beating); and *Bruner v. Dunaway*, 684 F.2d 422 (6th Cir.1982), *cert. denied sub nom. Bates v. Bruner*, 459 U.S. 1171 (1983) (police officers who stood by and observed an unlawful beating by fellow officers could be held liable under Section 1983).

*14 When faced with a qualified immunity defense, the court must first determine whether or not the plaintiff has stated a claim upon which relief can be

granted. *Saucier v. Katz*, 533 U.S. 194, [illegible] (2001); *Turner*, 119 F.3d at 428. If the court answers that question in the affirmative, the court goes on to determine whether or not the right allegedly violated was clearly established. *Turner*, 119 F.3d at 425. These are both purely legal questions. The immunity issue should not be resolved if there are factual disputes on which the issue of immunity turns such that it cannot be determined before trial whether the defendant's conduct violated clearly established rights. *Poe v. Haydon*, 853 F.2d 418, [illegible] (6th Cir. 1988).

As noted above, the question of whether Defendants are liable for damages under the RLUIPA is currently unsettled in the [illegible] circuits. See [illegible] 405 F.Supp.2d [illegible], 2005 WL [illegible] (appearing to find damages, especially those against officers in individual capacities, unavailable under the RLUIPA); *Boles v. [illegible]*, 401 F.Supp.2d [illegible] (M.D. [illegible] 2005) [illegible]. Because [illegible] clearly [illegible] that government employees can be liable for damages in their individual capacities, the court [illegible] RLUIPA [illegible]. *Boles v. Neet*, [illegible] F.Supp.2d [illegible] (D.Colo. 2005) [illegible] RLUIPA to [illegible] government entity, but not [illegible] officials [illegible] performing [illegible]. *City of [illegible]*, 2005 WL [illegible]. Argument [illegible] declaratory [illegible]. *[illegible] v. [illegible]*, [illegible], 2005 WL [illegible]. There [illegible] U.S.C. [illegible] damages [illegible] *County of [illegible]* [illegible] (E.D.C. [illegible]) [illegible] RLUIPA all [illegible]; *[illegible]*, 2003 WL 1642[illegible] (2003) [illegible] authority [illegible] relief [illegible] 373 [illegible].

employees and officials' exposure to liability in individual capacities on inmate's § 1983 claim asserting violation of the RLUIPA); and *Daker v. Ferrero, et al.*, 2006 WL 346440, slip op. p. 9 (N.D.Ga. Feb. 13, 2006) (also recognizing officials' exposure to liability in individual capacities on inmate's § 1983 claim asserting violation of the RLUIPA). Therefore, in the opinion of the undersigned, Defendants could have reasonably believed that their conduct did not expose them to liability in their individual capacities under the RLUIPA. *Dietrich*, 167 F.3d at 1012; *Anderson*, 483 U.S. at 641. Consequently, the undersigned recommends finding that Defendants are entitled to qualified immunity on the issue of liability for damages in their individual capacities.

*15 In summary, in the opinion of the undersigned, Plaintiff has failed to sustain his burden of proof in response to Defendants' motion for summary judgment with regard to his First, Seventh and Eighth claims, which implicate the fact or duration of his confinement, as well as with regard to Plaintiff's claim that he should be allowed to adopt a "Standing" [illegible] a ceremonial dagger, engage in [illegible] sexual intercourse, worship privately [illegible], and do business with a prohibited vendor [illegible] receive bulk mail. The undersigned also recommends that Defendants are entitled to qualified immunity on the issue of liability for damages in their individual capacities. However, in the opinion of the undersigned, Defendants are not entitled to summary judgment on Plaintiff's remaining claims regarding the denial of group [illegible] and religious paraphernalia against Defendants in their official capacities. Accordingly, it is recommended that Defendants' motion for [illegible] motion for summary judgment (Docket #37) be granted in part and denied in part.

Finally, the undersigned recommends that Plaintiff's cross motion for summary judgment (docket #42) be denied, as Plaintiff's contentions fail to resolve the remaining issues of material fact on the pending claims. In addition, the undersigned recommends that Plaintiff's motion for [illegible] consideration (Docket #55) be denied as unnecessary.

NOTICE TO PARTIES: Objections to this Report

Not Reported [illegible] (W.D. Mich.)
(Cite as: Not Reported [illegible])

and [illegible]
parties [illegible]
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END OF [illegible]

[illegible] Thomson West. No Claim to Orig. U.S. Govt. Works.