UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

KYLE ALLEN HULBERT,	)	
Plaintiff,	)	Case No. 7:14cv00472
	)	
v.	)	**REPORT & RECOMMENDATION**
	)	
A. DAVID ROBINSON, *et al.*,	)	By: Joel C. Hoppe
Defendants.	)	United States Magistrate Judge

Kyle Allen Hulbert, a state inmate proceeding *pro se*, filed suit under 42 U.S.C. §§ 1983 and 2000cc-1(b), alleging that the Virginia Department of Corrections' ("VDOC") single-vendor policy and ban on direct in-kind donations violate the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the First and Fourteenth Amendments to the United States Constitution. The parties' cross-motions for summary judgment are before me for a report and recommendation under 28 U.S.C. § 636(b)(1)(B). ECF No. 28. Having considered the parties' pleadings, all supporting materials, and the applicable law, I respectfully recommend that the presiding District Judge deny Hulbert's motion, ECF No. 6, and grant the Defendants' motion, ECF No. 17, in full.

I. Standard of Review

Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Tolan v. Cotton*, --- U.S. ---, 134 S. Ct. 1861, 1866 (2014) (per curiam). Facts are material when they "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute exists if "a reasonable jury could return a verdict in favor of the nonmoving party." *Kolon Indus., Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 173 (4th Cir. 2014) (citing *Anderson*, 477 U.S. at 248).

"The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact," *Appalachian Power Co. v. Arthur*, 39 F. Supp. 3d 790, 796 (W.D. Va. 2014), by "pointing out to the district court . . . an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party makes that showing, the nonmoving party must then produce sufficient admissible evidence to establish a specific material fact genuinely in dispute. *See* Fed. R. Civ. P. 56(c), (e); *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002). The nonmoving party "may not rely merely on allegations or denials in its own pleading but must set out specific facts showing a genuine issue for trial." *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010); *see* Fed. R. Civ. P. 56(c), (e).

When deciding a summary-judgment motion, the court must accept well-pled factual allegations as true and draw all reasonable inferences in the nonmoving party's favor given the materials cited, if not the record as a whole.[1] *See* Fed. R. Civ. P. 56(c)(3); *Tolan*, 134 S. Ct. at 1866; *Scott*, 550 U.S. at 380. The court does not weigh evidence, consider credibility, or resolve disputed issues—it decides only whether the evidence reveals a genuine issue of material fact for trial. *See Tolan*, 134 S. Ct. at 1866; *Scott*, 550 U.S. at 380–81.

II. Background

A brief overview of the relevant VDOC policies and procedures is necessary to give context to Hulbert's claims. Virginia prisons control inmates' access to personal property in

[1] "When faced with cross-motions for summary judgment, the court must review each motion separately on its own merits 'to determine whether either of the parties deserves judgment as a matter of law.'" *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (quoting *Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 62 n.4 (1st Cir. 1997)).

order to promote security, uniformity, and cost-effective administration.[2] *See* Robinson Aff. ¶¶ 5–8, ECF No. 18-1. The VDOC contracts exclusively with Keefe Commissary "to provide all property sold by the prison in its general store, including various food, personal hygiene, and religious items. . . . [A]n inmate must purchase all personal property through the prison's general store and therefore all property through Keefe." *Coleman v. Jabe*, No. 7:11cv518, 2014 WL 2040097, at *1 (W.D. Va. May 16, 2014); *accord* Robinson Aff. ¶¶ 5–8. Inmates must prepay for purchases using funds in their personal trust accounts. OP 802.1 § IV.A.5. Outside parties can deposit money in an inmate's account so that he can purchase any approved item through Keefe. *See* Wright Aff. ¶ 7, ECF No. 18-2. Generally, inmates cannot possess personal property received from "any other source."[3] OP 802.1 § IV.B; 841.3 § IV.F.6; Robinson Aff. ¶¶ 6, 9–10.

Before October 2013, however, VDOC officials "occasionally" allowed inmates to mail-order approved religious items that Keefe did not sell, such as prayer oils. Robinson Aff. ¶ 8. Keefe now sells any religious item "that has been approved by the VDOC for personal possession by offenders,"[4] except for publications. Robinson Aff. ¶ 4; *see also* Wright Aff. ¶ 5; OP 802.1 § IV.A.1(a); OP 841.3 § IV.F.6. On October 1, 2013, VDOC Chief of Operations A. David Robinson issued a policy requiring "all commissary and religious items [to] be ordered through Keefe." Robinson Aff. Encl. A, ECF No. 18-1. Personal property obtained in violation

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[2] *See generally* Va. Dep't of Corr., *Offender Property*, Operating Proc. ("OP") 802.1, Aug. 1, 2012, https://vadoc.virginia.gov/about/procedures/documents/800/802-1.pdf; Va. Dep't of Corr., *Offender Religious Programs*, OP 841.3 § IV.F, Mar. 1, 2012, ECF No. 18-2.

[3] Inmates may possess approved publications without purchasing them from Keefe. *See* OP 802.1 § IV.A.1–2; OP 841.3 § IV.F.6.

[4] Approved religious items include necklaces, medallions, pendants, head coverings, worship beads, non-flammable prayer oils, holy books, and prayer rugs. *See* Wright Aff. Encl. B, Keefe Prod. List, ECF No. 18-2, at 21–22.

of VDOC policy is contraband and may be confiscated. *See* OP 802.1 §§ III ¶ 4, VII.E.4(a); OP 841.3 § IV.F.3.

Outside parties may donate "books, publications, and other items . . . to the Chaplain Service for religious use," OP 841.3 § IV.F.10, in group services. Robinson Aff. ¶ 10; *see also* 841.3 § IV.F.9 (providing that outside parties may "donate[] items for religious activities" directly to a correctional facility). All donated items will be labeled, "Property of Chaplain Service." OP 841.3 § IV.F.10. At the facility chaplain's discretion, "[a]ny free or donated religious texts, books, or items" may be "issue[d] to an offender" to use outside of group religious services.[5] OP 841.3 § IV.F.10(a); *see also* Robinson Aff. ¶ 10. An item issued to a prisoner will be placed on his property inventory list.

Hulbert is an inmate at River North Correctional Center ("RNCC") in Independence, Virginia. *See* Compl. ¶ 3, ECF No. 1. He is a practicing Wiccan and has been studying Wicca for nearly two decades. *Id.* ¶ 11. According to Hulbert, "Wicca is a modern pagan polytheistic religion centered upon reverence for the Natural World and worship of the Goddesses and God in Their many diverse aspects." *Id.* ¶ 12. RNCC does not offer communal worship for Wiccans because only a few inmates have expressed an interest in establishing a regular group service. *See id.* ¶¶ 15, 25; Wright Aff. ¶ 6 (citing OP 841.3 § IV.F.12). Thus, Hulbert "conducts his

[5] The term "other items," OP 841.3 § IV.F.10, apparently includes any approved religious item, even if it is sold in the commissary. *See* Robinson Aff. ¶ 10 ("A religious item that has been received through the donations procedure described above may be provided to an indigent offender."). The policy that the Defendants submitted with their motion suggests that prisons can accept in-kind donations of approved religious items regardless of whether the VDOC offers communal worship to the religion's adherents. *See* OP 841.3 § IV.F.10, ECF No. 18-2. If any doubt existed, the revised policy, issued on July 1, 2015, expressly provides that approved religious items may be donated to the VDOC and distributed to individual inmates by the chaplain. *See* Va. Dep't of Corr., *Offender Religious Programs*, OP 841.3 § IV.F.9, July 1, 2015, http://vadoc.virginia.gov/About/procedures/documents/800/841-3.pdf.

religious observances in his cell on the appropriate [n]ights as dictated by the Lunar calendar and Wiccan Sabbats and Ebats." Compl. ¶¶ 14–15.

"In order to observe many of their rites and rituals, many Wiccans employ various tools and implements, including . . . athames (ritual dagger), scrying mirrors, incense, essential oils, prayer beads, Tarot cards, talismans and medallions, Book of Shadows, and Runes." *Id.* ¶ 13. The VDOC has approved most of these items for possession by all inmates, including Hulbert. *Id.*; *see also* Compl. Attach. at 4, 7, 9, ECF No. 2; Wright Aff. ¶ 5; Keefe Prod. List at 21–22; Pl. Br. 8, ECF No. 22. "The items that [Hulbert] requires for his Wiccan rites are traditionally given as gifts and blessed by a Priest or Priestess of the faith." Compl. ¶ 16. According to Hulbert, "it is preferable to have such items so blessed and given whenever possible." *Id.*; *see also* Pl. Br. 8.

In March 2014, Hulbert asked RNCC's chaplain if churches "could donate to inmates religious items of faith that ha[d] been approved for inmates to possess." Compl. ¶ 36. The chaplain said that they could, but that "the items must be sent in care of the chaplain so that he could check to ensure they were on the" list of approved items. *Id.* ¶ 37. Later that month, Hulbert told Major Amanda Mullins that "he was seeking to receive religious items for his personal possession and use," but that he wanted to make sure churches or non-profits could donate such items directly to him. *Id.* ¶ 38. Hulbert recalls Mullins saying that these organizations "could send religious items of faith to him in care of the chaplain, and after the chaplain ensured that they were on the approved list and not a danger to security, [Hulbert] would be allowed to have them." *Id.*

In late April, Hulbert told Officer David Felts that "a Church would soon be sending religious items of faith to [him]." *Id.* ¶ 39. Felts responded that Hulbert "could not have items donated to him through a [c]hurch." *Id.* When Hulbert told Felts "that he had already received

permission," Felts explained "that items of faith could not be donated to individuals, only to religious groups and only used in services." *Id.* ¶ 40. On May 3, 2014, Hulbert filed an informal complaint stating that OP 841.3 allowed "churches and non-profit organizations [to] donate approved religious items of faith to inmates through the chaplain's office." Compl. Attach. at 2. Felts responded that "churches can donate to religious groups[,] not individuals." *Id.* Thus, Hulbert had to purchase "personal religious items" from the commissary. *Id.*

On May 15, Hulbert submitted a regular grievance stating that he wanted "to receive donated religious items of faith from churches so that [he could] observe [his] religious rites and rituals." Compl. Attach. at 4. He also expressed concern that the donation policy prohibited him "from having these items because [he had] no money to buy from commissary [sic]."[6] *Id.* Officer Walls refused to accept Hulbert's grievance because it was essentially a "request for [religious] services" that could not be approved through the grievance process. Compl. ¶¶ 49–50; *see also* Compl. Attach. at 5. In doing so, Walls noted that "donated religious items must be sent through

[6] The parties dispute whether Hulbert is indigent. *Compare, e.g.*, Compl. ¶¶ 21, 64, *with* Wright Aff. ¶ 7. This dispute is immaterial because, on this record, there is no evidence that Hulbert's personal inability to pay for the desired items substantially burdens his religious exercise. Wright Aff. ¶ 7 ("Hulbert's family, friends, or church may send money for deposit to his spend account. In this way, the money 'gift' may be used to purchase approved religious items."); Robinson Aff. ¶ 10 ("At the discretion of the chaplain, a religious item that has been received through the [VDOC] donations procedure . . . may be provided to an indigent offender."); OP 841.3 § IV.F.10; *see also Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 100 (4th Cir. 2013) ("[T]here is no substantial burden placed on an individual's free exercise of religion where a law or policy merely operates so as to make the practice . . . more expensive."); *Jenner v. Sokol*, No. 11-cv-01497, 2013 WL 500400, at *7 (D. Colo. Feb. 11, 2013) (holding that a policy that required inmates to buy communal sacraments for their religious ceremonies did not substantially burden an inmate's religious exercise where only two other people attended the ceremonies); *Lagervall v. Garringer*, No. CV-09-5013, 2010 WL 1712346, at *3–4 (E.D. Wash. Apr. 9, 2010) (holding that a policy that required inmates to "use personal funds to obtain an authorized religious item" did not substantially burden an inmate's religious exercise where there "were alternative methods for [him] to acquire [the] religious items"), *adopted by* 2010 WL 1712261, at *1 (Apr. 26, 2010).

the chaplain and used for communial [sic] use. All personal religious items must be ordered through [the] commissary." Compl. Attach. at 5.

Hulbert appealed Walls's procedural decision to RNCC Warden Benjamin Wright. *See* Compl. Attach. at 5–7. He again insisted that OP 841.3 did "not stipulate that church donations must be made only to groups." *Id.* at 7. Hulbert noted that the "churches [he] assosicate[d] with" wanted to give him the same religious "items that ha[d] been approved for inmate possession." *Id.* He also expressed concern that the donation policy "force[d] people to either buy religious items of faith or do without." *Id.* Hulbert recalls having a similar conversation with VDOC Regional Ombudsman Adina Pogue around the same time. *See* Compl. ¶¶ 52–61; Collins Aff. 1, July 23, 2014, ECF No. 1-1. She, too, explained that Hulbert had to purchase personal property through Keefe and that churches could not donate religious items directly to individual inmates. Compl. ¶¶ 58–61.

Wright responded to Hulbert's grievance on June 16, 2014. Compl. Attach. at 8. He explained that, per OP 802.1, "[c]hurches can donate permitted items in care of Chaplain Anderson to [RNCC] for communal use; however[,] they cannot donate them directly to an individual." *Id.* He also explained that, per Robinson's October 1, 2013, memo "all commissary and religious items must be ordered through Keefe." *Id.* Thus, "[a]ny personal property religious item must be ordered through [the] commissary and not received through a [direct] donation." *Id.* VDOC Regional Administrator George Hinkle denied Hulbert's appeal on July 8, 2014. Compl. Attach. at 10.

Having exhausted his administrative remedies, Hulbert filed suit against Robinson, Mullins, Felts, Walls, Pogue, and Wright[7] ("Defendants") in August 2014. *See generally* Compl.

[7] All claims against Wright were dismissed without prejudice on June 3, 2015. ECF No. 28 ¶ 1.

¶¶ 1, 3–9, 71–83. In his Complaint, Hulbert alleges that the VDOC's single-vendor policy and ban on direct in-kind donations, as applied to him in this case, violate RLUIPA and the First Amendment's Free Exercise Clause. Compl. ¶ 72. Liberally construed, Hulbert's filings also allege that the policies violate the Fourteenth Amendment's Equal Protection Clause because they discriminate against indigent inmates. *See* Compl. ¶¶ 61, 72, 73, 75–76; Pl. Br. 10–11. He seeks declaratory and injunctive relief; "attorney fees" and litigation costs; and any other relief the Court "deems just, proper, and equitable" against each Defendant "individually and in his or her official capacity."[8] Compl. ¶¶ 4–10, 85–90. Hulbert also filed a one-sentence motion seeking summary judgment in his favor. Pl. Mot. for Summ. J., Aug. 14, 2014, ECF No. 6. In November 2014, the Defendants collectively moved for summary judgment on all claims.[9] Def. Br. 2–21, ECF No. 18.

[8] On these causes of action, damages could be available only under 42 U.S.C. § 1983, and only against the Defendants in their individual capacities. *See Sossamon v. Texas*, --- U.S. ---, 131 S. Ct. 1651, 1658–60 (2011) (holding that state actors sued in their official capacities under 42 U.S.C. § 2000cc-1(b)(1) are immune from damages); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that state actors sued in their official capacities under 42 U.S.C. § 1983 are immune from damages); *Rendleman v. Rouse*, 569 F.3d 182, 189 (4th Cir. 2009) (holding that state actors sued in their individual capacities under 42 U.S.C. § 2000cc-1(b)(1) are immune from damages); *Blount v. Phipps*, No. 7:11cv594, 2013 WL 831684, at *2 n.4 (W.D. Va. Mar. 6, 2014) (Conrad, C.J.) (noting that state actors sued in any capacity under 42 U.S.C. § 2000cc-1(b) are immune from damages).

[9] The Defendants moved for summary judgment on the merits and on qualified-immunity grounds. *See generally* Def. Br. 7–20, 20–21. However, they only cursorily argue that they are entitled to qualified immunity from civil damages. *See* Def. Br. 21 ¶ 3 (citing *Coleman*, 2014 WL 2040097, at *3–4 (holding that VDOC's single-vendor policy was the least restrictive means of furthering a compelling governmental interest)). Hulbert did not specifically request monetary damages, *see* Compl. ¶ 90, and in his response to the Defendants' motion for summary judgment, he confirmed that he is not seeking them. Pl. Br. 12.

III. Discussion

A. Free Exercise Clause & RLUIPA

The Free Exercise Clause "forbids the adoption of laws designed to suppress religious beliefs and practices." *Morrison v. Garraghty*, 239 F.3d 648, 656 (4th Cir. 2001). "Its protections, including its directive that no law shall prohibit the free exercise of religion, extends to the prison environment." *Id.* (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)). Courts evaluate "prison regulation[s] that impinge[] on an inmate's free exercise rights" using a reasonableness standard. *O'Lone*, 482 U.S. at 349; *see, e.g.*, *Jehovah v. Clarke*, --- F.3d ---, 2015 WL 4126391, at *4 (4th Cir. July 9, 2015); *Wall v. Wade*, 741 F.3d 492, 499 (4th Cir. 2014). A regulation that substantially burdens an inmate's religious exercise is permissible, *Wall*, 741 F.3d at 499, "if it is reasonably related to legitimate penological interests," *Turner v. Safley*, 482 U.S. 78, 89 (1987).[10] The plaintiff bears the burden of proving that the regulation substantially burdens his sincere religious exercise and disproving the regulation's validity. *Jehovah*, 2015 WL 4126391, at *3 (citing *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)).

"RLUIPA provides more stringent protection of prisoners' free exercise than does the First Amendment, applying strict scrutiny instead of reasonableness." *Id.* at *4. The statute "prohibits prisons from imposing a substantial burden on an inmate's religious exercise unless

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[10] The *Turner* test asks:

> (1) whether there is a "valid, rational connection" between the prison regulation or action and the interest asserted by the government, or whether this interest is "so remote as to render the policy arbitrary or irrational"; (2) whether "alternative means of exercising the right remain open to prison inmates"; (3) what impact the desired accommodation would have on security staff, inmates, and the allocation of prison resources; and (4) whether there exist any "obvious, easy alternatives" to the challenged regulation or action.

Lovelace v. Lee, 472 F.3d 174, 200 (4th Cir. 2006) (quoting *Turner*, 482 U.S. at 89–92) (brackets omitted).

prison officials can demonstrate that the burden furthers a compelling governmental interest by the least restrictive means," *Miles v. Moore*, 450 F. App'x 318, 319 (4th Cir. 2011), "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000cc-1(a).

RLUIPA creates a private cause of action against the "government," including any "person acting under color of State law," that "imposes a substantial burden on" the plaintiff-prisoner's religious exercise. 42 U.S.C. §§ 2000cc-1(b), -2(a), -5(4). "If a plaintiff produces prima facie evidence to support a claim alleging a violation of [RLUIPA] . . . the government shall bear the burden of persuasion on any element of the claim[] except" whether the challenged policy "substantially burdens the plaintiff's exercise of religion." *Id.* § 2000cc-2(b); *see Jehovah*, 2015 WL 4126391, at *4. On a motion for summary judgment, the government is entitled to "prevail on [a] RLUIPA claim as a matter of law" when "no reasonable fact finder could conclude" that the plaintiff carried his initial burden of persuasion. *Incumaa v. Stirling*, --- F.3d ---, 2015 WL 3973822, at *6 (4th Cir. July 1, 2015); *accord* 42 U.S.C. §§ 2000cc-2(b), -5(2).

B. Equal Protection Clause

The Equal Protection Clause prohibits state government "decision makers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). To succeed on an equal-protection claim, a plaintiff-prisoner must first show that he was treated differently than similarly situated inmates and that the unequal treatment resulted from intentional or purposeful discrimination. *Morrison*, 239 F.3d at 654. If the plaintiff makes that showing, the court would then consider whether the disparate treatment was "justified under the requisite level of scrutiny." *Id.* A prison regulation that treats differently similarly situated inmates is permissible so long as "the disparate treatment is 'reasonably related to [any] legitimate penological interests.'" *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002) (quoting

Shaw v. Murphy, 532 U.S. 223, 225 (2001)) (citing *Turner*, 482 U.S. at 89–90). The plaintiff bears the burden of disproving the regulation's presumed validity. *Id.*

C. The Defendants' Motion

To survive summary judgment on his RLUIPA and Free Exercise Clause claims, Hulbert must first show that the VDOC's single-vendor policy and ban on direct in-kind donations "implicate[] his religious exercise" and that his "request for an accommodation [was] sincerely based on a religious belief and not some other motivation." *Holt*, 135 S. Ct. at 862 (RLUIPA); *accord Wall*, 741 F.3d at 499 (Free Exercise Clause). Hulbert alleges that the policies "effectively den[y]" him access, Compl. ¶ 33, to "a religious medallion or other items," *id.* ¶ 21, that he "requires for his Wiccan rites," *id.* ¶ 16, which he performs in his cell, *id.* ¶ 15. He also produced evidence that he sought an accommodation, "so that I may observe my religious rites and rituals." Compl. Attach. at 4. The Defendants do not question Hulbert's motivations or suggest that using these items is not an "exercise of religion," 42 U.S.C. § 2000cc-5(7). *See* Def. Br. 1–6, 8–18. The Court considers both material facts undisputed. Fed. R. Civ. P. 56(e)(2); *see also Krieger v. Brown*, 496 F. App'x 322, 325 (4th Cir. 2012).

Next, Hulbert must show that the policies substantially burden his religious exercise. *Holt*, 135 S. Ct. at 862 (RLUIPA); *Jehovah*, 2015 WL 4126391, at *5 (Free Exercise Clause). A "substantial burden on religious exercise occurs when a state or local government, through act or omission, 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" *Lovelace*, 472 F.3d at 187 (RLUIPA) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (Free Exercise Clause)). Substantial pressure "directly coerces the religious adherent to conform his or her behavior accordingly," which in turn "tends

to force [the] adherent[] to forego religious precepts." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

In making this determination, the court must "not judge the significance of a particular belief or practice to the religion at issue." *Krieger*, 496 F. App'x at 326. At a minimum, however, the plaintiff must produce enough evidence for the court "to evaluate the degree to which" the challenged policy "impaired" the religious exercise in question. *Id.* In some cases, the plaintiff may need to demonstrate why a policy that simply forecloses his "preferred method for engaging in that religious exercise," *Shabazz v. Va. Dep't of Corr.*, 3:10cv638, 2013 WL 1098102, at *7 (E.D. Va. Mar. 15, 2013), "would compromise his beliefs," *Krieger*, 496 F. App'x at 325 (noting that a policy does not substantially burden an inmate's religious exercise simply because it requires him to observe the practice "differently than he otherwise would have"). A policy "that makes the 'religious exercise more expensive or difficult,' but does not pressure the adherent" to modify his behavior and to violate his beliefs, cannot substantially burden the plaintiff's religious exercise. *Marron v. Miller*, No. 7:13cv338, 2014 WL 2879745, at *2 (W.D. Va. June 24, 2014) (Conrad, C.J.) (quoting *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 739 (6th Cir. 2007)); *see also Blount v. Johnson*, No. 7:04cv429, 2006 WL 542600, at *7 (W.D. Va. Mar. 2, 2006) (Conrad, C.J.) ("A government action does not cause a substantial burden if it merely results in an inconvenient or less desirable situation.").

Liberally construed, the "religious exercise" in question here is Hulbert's ability to acquire the items he needs to "properly" conduct his Wiccan rites and rituals. *See* Pl. Br. 7; *accord* Compl. ¶¶ 15, 21, 29. To Hulbert, this means that "all items that are used in any kind of ritual" should be "blessed and given as gifts whenever possible." Pl. Br. 8; *accord* Compl. ¶¶ 16,

31. "[W]ithout the blessings of the Gods bestowed upon such religious items by Priests or Priestesses of [Hulbert's] faith, those items are bereft of the Divine connection to the Gods, and any and all of [his] religious practices suffer because of it."[11] Pl. Br. 8; *accord* Compl. ¶¶ 31–33.

The Defendants argue that they are entitled to judgment as a matter of law on Hulbert's RLUIPA and Free Exercise Clause claims because Hulbert has not produced evidence that could persuade a reasonable fact finder that VDOC's single-vendor policy and ban on direct in-kind donations substantially burden his religious exercise. I agree. *See Incumaa*, 2015 WL 397382, at *6; *Van Wyhe v. Reisch*, 581 F.3d 639, 657–58 (8th Cir. 2009) ("Where an inmate has not put forth sufficient evidence under RLUIPA to demonstrate a substantial burden on his religious exercise, his claim fails under the Free Exercise Clause . . . as well.").

First, Hulbert relies entirely on "blanket assertion[s]," *Krieger*, 496 F. App'x at 325, and "generalized[,] non-specific explanations," *Marron v. Jabe*, No. 1:12cv468, 2014 WL 585850, at *5 n.5 (E.D. Va. Feb. 14, 2014), in trying to articulate how these policies affect his religious exercise. *See* Compl. ¶¶ 21, 29, 32–34, 75; Pl. Br. 6–9. His complaint details the disagreements he had with VDOC officials about the contours of VDOC policy on religious property. He never alleges that he actually went without or was deprived of a necessary religious item, or, even if he had been deprived, how "doing without" an item, Compl. Attach. at 7, "had an impact on [his] rituals and violated his beliefs," *Krieger*, 496 F. App'x at 326. "Without this information," the Court cannot "evaluate the degree to which [Hulbert's] religious exercise [is] impaired." *Id.*

Second, Hulbert admits that the items he "requires for his Wiccan rites are *traditionally* given as gifts and blessed by a Priest or Priestess of the faith," and that "it is *preferable* to have such items so blessed and given whenever possible." Compl. ¶ 16 (emphasis added). To be sure,

[11] Hulbert follows the Lothlörien Tradition of Wicca. Pl. Br. 9. His personal spiritual leader resides in Kirkland, Washington. *Id.*

Hulbert need not show that this "particular aspect of his religious exercise is essential to his faith in order to establish that the exercise has been substantially burdened." *Krieger*, 496 F. App'x at 326 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005)). When the VDOC has made available Wiccan items through Keefe, Hulbert must adequately explain why the Defendants' supposed refusal to accommodate his "preferred" practice forced him to modify his behavior and to violate his beliefs. *See id.*; *Shabazz*, 2013 WL 1098102, at *7. Hulbert's pleadings and exhibits contain no admissible evidence on either point. *See Marron*, 2014 WL 585850, at *5 n.5 (citing *Krieger*, 496 F. App'x at 326; *United States v. Roane*, 378 F.3d 382, 401 (4th Cir. 2004) (noting that the nonmoving party's "airy generalities [and] conclusory assertions" cannot "stave off summary judgment")).

Finally, the Defendants aver that, under current VDOC policy, Hulbert can acquire the items that he says he needs to properly conduct his rituals. Wright Aff. ¶¶ 7–8; Robinson Aff. ¶ 10. Religious items may be donated to the VDOC, rather than directly to an individual, and then distributed to an individual prisoner by the chaplain.[12] Robinson Aff. ¶ 10; *see also* OP 841.3 § IV.F.10. Items associated with the Wiccan faith also are available for purchase from the prison commissary. Hulbert complains that VDOC's single-vendor policy requires him to buy these items from Keefe instead of from his preferred vendor, Azure Green. *See* Pl. Br. 7–9. He speculates that Keefe's products are not of acceptable authenticity, *see id.* at 9; Compl. ¶ 23, but

[12] I recognize that some dispute may exist about the boundaries of the VDOC's donation policy. The dispute appears to arise from Hulbert's perception that the VDOC prohibits direct donations as well as donations of items for distribution by the chaplain to individual prisoners. The responses from RNCC staff and Mr. Hinkle to Hulbert's inquiries appear to have caused this confusion. Robinson's sworn statements clarify that VDOC policy authorizes a chaplain to distribute donated religious items to a prisoner, and he does not limit that distribution to only those prisoners whose religion has communal services. Robinson Aff. ¶ 10. Thus, according to Robinson, Hulbert may receive a donation of an approved item, albeit through a VDOC intermediary.

he has not shown that the necessary religious items are unavailable through action attributable to VDOC officials. Hulbert can purchase the items from Keefe with his own money or money donated from his family, friends, or church, and then have those items "blessed during his religious counseling and visitation." Wright Aff. ¶¶ 7–8. Hulbert concedes that those alternatives are available to him. *See* Pl. Br. 9. Still, he objects that it would be "unreasonable to expect" his personal spiritual leader to fly to Virginia just to bless the items he buys from Keefe. That may be, but Hulbert has not produced any evidence that having the purchased items "blessed by a [local] Priest or Priestess of the faith," Compl. ¶ 16, "would compromise his beliefs," *Krieger*, 496 F. App'x at 325. Certainly any complications in practicing his religion that Hulbert encounters because he chose a faith leader who lives across the country in Washington State are not burdens imposed by the VDOC.

Several federal courts have found that similar regulations do not substantially burden an inmate's religious exercise simply because they foreclose his preferred method of acquiring religious items. *See, e.g.*, *Smith v. U.S. Congress*, No. 3:12cv45, 2015 WL 1011545, at *14–15 (E.D. Va. Mar. 6, 2015); *Marron*, 2014 WL 585850, at *5; *Shabazz*, 2013 WL 1098102, at *8; *Lagervall*, 2010 WL 1712346, at *4–5; *Roy v. State*, No. CV-03-2150, 2006 WL 120328, at *8 (D. Ariz. Jan. 13, 2006). The district court's opinion in *Roy*, 2006 WL 120328, at *7–8, is particularly instructive. Like Hulbert, Roy challenged a policy banning "donations of religious items" and requiring "that all religious items be purchased from the inmate store." *Id.* at *7. The district court held that "[t]his policy [was] far from a substantial burden on [p]laintiff's practice of his religion because it [did] not actually prevent [him] from practicing his religion; it simply dictate[d] the methods by which [he] and other inmates may obtain desired religious items." *Id.* at *8. As in Hulbert's case, it appeared that Roy wanted to "obtain religious items from any

source he please[d] through a manner of his choosing." *Id.* Roy's RLUIPA claim "fail[ed] as a matter of law," *id.*, because he did not produce any evidence that the policy pressured him to modify his behavior and to violate his beliefs, *id.* at *7. Hulbert's claims fail on the same reasoning.

Furthermore, if any doubt about the lawfulness of the policy exists, the VDOC's recently revised Operating Procedure 841.3 removes it. The policy now allows a prisoner to order any religious item that is not available through the commissary. OP 841.3 § IV.F.6 (July 1, 2015). It also expressly allows donations of "individual faith items" to the VDOC for distribution by the chaplain to prisoners who request them. *Id.* § IV.F.9.

In sum, viewing the record in Hulbert's favor, no reasonable fact finder could conclude that VDOC's single-vendor policy and ban on direct in-kind donations substantially burden Hulbert's religious exercise. *Incumaa*, 2015 WL 397382, at *6. At most, the policies foreclose his preferred method of acquiring items and conducting his rituals while leaving open arguably less desirable, less convenient avenues for the same. *Blount*, 2006 WL 542600, at *7. But the record contains no admissible evidence suggesting that these policies forced Hulbert to modify his behavior and to violate his beliefs. Accordingly, I recommend that the District Court **GRANT** the Defendants' motion for summary judgment on the merits of Hulbert's RLUIPA and Free Exercise claims. *Incumaa*, 2015 WL 397382, at *6; *Van Wyhe*, 581 F.3d at 657–58.

To survive summary judgment on his Equal Protection Clause claim, Hulbert must first show that he was treated differently than similarly situated inmates and that the unequal treatment resulted from intentional or purposeful discrimination. *Morrison*, 239 F.3d at 654; *Veney*, 293 F.3d at 731–32. The VDOC's single-vendor policy and ban on direct in-kind donations apply to all VDOC inmates and all incoming personal property, except publications.

OP 802.1 §§ IV.A.1, IV.B, IV.E; OP 841.3 §§ IV.F.6, IV.F.10; *see also* Pl. Br. 11 (conceding the same). Thus, whatever Hulbert's financial situation, he is in all relevant respects like all of his fellow VDOC inmates. *See Harrison v. Fed. Bureau of Prisons*, 611 F. Supp. 2d 54, 63 (D.D.C. 2009).

Even liberally construed, Hulbert's filings do not contain any allegations suggesting that the Defendants treated him differently than any other VDOC inmate in applying these regulations. *See generally* Compl. at 5–8; Def. Br. 11. That omission entitles the Defendants to judgment as a matter of law. *Harrison*, 611 F. Supp. 2d at 63. Accordingly, I recommend that the District Court **GRANT** the Defendants' motion for summary judgment on the merits of Hulbert's Equal Protection Clause claim.

D. Hulbert's Motion

Hulbert's one-sentence motion asks the Court to enter summary judgment in his favor "on the ground that there is no genuine issue as to any material fact, and that plaintiff is entitled to judgment as a matter of law." ECF No. 6. It is not accompanied by any written document, *see* W.D. Va. Civ. R. 11(c)(1), indentifying the claims on which he seeks summary judgment, Fed. R. Civ. P. 56(a), and "it contains no arguments or other information," *Hicks v. Catholic Relief Servs.*, No. 1:11cv03057, 2012 WL 415460, at *2 (D. Md. Feb. 8, 2012), that would allow the Court to properly consider its merits, W.D. Va. Civ. R. 56(b). *See Celotex Corp.*, 477 U.S. at 325. Accordingly, I recommend that the District Court **DENY** Hulbert's motion for summary judgment. *See Hicks*, 2012 WL 415460, at *2–3; Fed. R. Civ. P. 56(c)(1), (e)(4).

IV. Conclusion

The Defendants carried their initial burden of pointing out a lack of evidence supporting Hulbert's allegations that VDOC's single-vendor policy and ban on direct in-kind donations

substantially burden Hulbert's religious exercise and/or discriminate against indigent inmates. Hulbert's response brief restates his unsupported factual assertions and his legal conclusions, but it contains no admissible evidence establishing a genuine issue for trial on the merits of any claim. Therefore, I respectfully recommend that the presiding District Judge **DENY** Hulbert's motion for summary judgment, ECF No. 6, **GRANT** the Defendants' motion for summary judgment on the merits, ECF No. 17, and **DISMISS** this action.

Notice to Parties

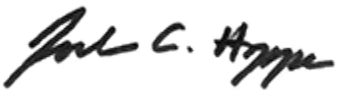
Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

> Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is directed to transmit the record in this matter to the Honorable Glen E. Conrad, Chief United States District Judge.

The Clerk shall send certified copies of this Report and Recommendation to the parties.

ENTER: July 31, 2015



Joel C. Hoppe
United States Magistrate Judge