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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

William Lamb, Plaintiff, vs. Joseph Arpaio, Defendant.	No. CV 09-0052-PHX-DGC (DKD) **ORDER**

Plaintiff William Lamb, who is confined in the Arizona State Prison Complex-Cimarron Unit in Tucson, Arizona, filed this civil rights action under 42 U.S.C. § 1983 for claims arising while he was in the custody of the Maricopa County Sheriff's Office (MCSO). Maricopa County Sheriff Joseph Arpaio moves for summary judgment (Dkt. # 19). Plaintiff did not respond to the motion. The Court will grant the motion and terminate the case.

I. Background

Plaintiff raised two claims in his Complaint (Dkt. # 1). In Count I, Plaintiff alleged that on December 14, 2008, the MCSO substituted regular television programming with constant Christmas music, which played continuously and repeatedly, between 9:00 a.m. until 7:00 p.m. Plaintiff claimed that the continuous playing of Christmas music "forced [him] to take part in and observe a relig[i]ous holiday without being given a choice" (id. at 3). Plaintiff alleged that Defendant Arpaio ordered the broadcast of the music in violation

of his First and Eighth Amendment rights (id. at 3-4). The Court dismissed Count II, Plaintiff's Eighth/Fourteenth Amendment claim, and directed Defendant Arpaio to answer the claim for violation of the First Amendment (Dkt. # 4 at 4). Defendant Arpaio now moves for summary judgment as to Plaintiff's First Amendment claim, arguing that the playing of holiday music in the jail does not violate the Establishment Clause (Dkt. # 19).

II. Legal Standards

A. Summary Judgment

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. It applies to the States. Lee v. Weisman, 505 U.S. 577, 580 (1992). The basic test for Establishment Clause violations is set out in Lemon v. Kurtzman, 403 U.S. 602, 613, (1971), which requires that government acts (1) have a "secular legislative purpose," (2) not have a "principal or primary effect" which either "advances [or] inhibits religion," and (3) not foster "an excessive government entanglement" with religion. Inouye v. Kemna, 504 F.3d 705, 713 (9th Cir. 2007). In Inouye, the Ninth Circuit observed that a government mandate to attend religious or religion-based events is barred by the second prong of Lemon. Id. (citing Kerr v. Farrey, 95 F.3d 472 (7th Cir.1996)).

III. Parties' Contentions

A. Defendant Arpaio

In support of his motion, Defendant Arpaio submits his Separate Statement of Facts (Dkt. # 20 (DSOF)), the affidavit of MCSO Deputy Chief John MacIntyre (id., Ex. A), and copies of music CDs and a list of songs (id., Exs. B-C). Defendant Arpaio contends that in late 2005, he decided that holiday music would be played in all the jails during the

December-January holiday season. (Dkt. # 19 at 2, DSOF ¶ 10-11). He asserts that he made the decision to boost inmate morale and improve jail security at a sometimes difficult time of year (id.). Further, Defendant Arpaio asserts that he chose and played holiday music that was multi-cultural and inclusive of many traditions. The music chosen also included secular holiday songs from Dr. Demento, "Grandma Got Run Over by a Reindeer," the Chipmunks, and dogs barking Jingle Bells. The music also included two Elvis Presley CDs, the Mormon Tabernacle Choir singing traditional Christmas carols, Celtic chanting, "Feliz Navidad," "Ramadan," "Shut De Do," "Celebrations around the World," "Betelehemu," "Over the Skies of Ysrael," and "A Christmas/Kwanzaa/Solstice/Chanukah/ Ramadan/Boxing Day Song" (DSOF ¶ 13).

At the Lower Buckeye Jail (LBJ), where Plaintiff was housed, the music was played in the day rooms of the housing units through the TV sets that are encased in plexiglass and permanently located in the day rooms (DSOF ¶ 16). Detention officers controlled the TV sets and, therefore, the inmates were not free to turn off the music, to change the channel, or to change the volume (id.). Music was not played in the cells (DSOF ¶ 17).

Defendant Arpaio contends that inmates were free to return to their cells where the music was not played, go to programs such as education classes or AA meetings where there was no music, or ignore the music given its modest volume (DSOF ¶ 19). Defendant asserts that at LBJ, the music was played on a continuous loop because Sergeant Rogers created an MP3 from the CDs he was provided by Defendant Arpaio, so inmates did not hear the same song repeat until they had heard about 5-6 other CDs (DSOF ¶ 15). Defendant Arpaio argues that the purpose of the holiday music policy – to reduce inmate tension and promote safety in the jails – precludes a finding that the music violated the First Amendment (Dkt. # 19 at 6). Further, the breadth and variety of the songs and holiday traditions undermines any claim that any one tradition or belief system was being established within the meaning of the First Amendment (id.).

Defendant Arpaio further argues that courts have held that prison officials did not violate an inmate's First Amendment rights under the Establishment Clause by subjecting him to a Christmas party in the visiting room. Torricellas v. Poole, 954 F. Supp.1405 (C.D. Cal. 1997). The court in Torricellas held that the party had the primarily secular purpose of permitting inmates and their families to celebrate the holidays together. The only religious aspects identified by the inmate were that the party was denominated a Christmas party and included carols and songs with religious lyrics. The court found this insufficient to violate the inmates' First Amendment rights under the Establishment Clause because the party had the secular purpose – permitting inmates and their families to celebrate the holidays together in a festive atmosphere. Id. at 1411-1412.

As to the second prong of Lemon, Defendant Arpaio maintains that in the context of the holiday season, a broad range of songs, including Dr. Demento and the Chipmunks, does not have a principally religious effect. See O'Connor v. State of California, 855 F.Supp. 303, 307-08 (C.D. Cal. 1994) (although the Alcoholics Anonymous program had some religious content, its principal effect was to treat substance abuse and, thus, could be endorsed and promoted by the state); Kreisner v. City of San Diego, 1 F.3d 775, 782, 794 (9th Cir. 1993) (to violate Establishment Clause, action must be motivated wholly by an impermissible purpose; secular components dilute its religious effect) (Dkt. # 19 at 7).

Finally, with respect to the third Lemon prong, Defendant Arpaio argues there was no excessive entanglement by government with religion. Rather, several commercial CDs were provided to the jails to be played, and an officer combined them into an MP3 creating a continuous loop of music (id. at 8-9). Further, the music was multi-cultural and included humorous novelty songs and festive holiday-related secular songs, which indicates that there was no attempt to foster or promote religion or any particular religious tradition (id.).

B. Plaintiff

The Court sent Plaintiff a notice pursuant to Rand v. Rowland, 154 F.3d 952, 962 (9th Cir. 1998) (*en banc*), advising him of his obligation to respond to Defendant Arpaio's motion

(Dkt. # 21). Plaintiff sought and received an extension of time to respond, but never filed a response (Dkt. ## 22-23). A verified complaint may be used as an affidavit opposing summary judgment if it is based on personal knowledge and sets forth specific facts admissible in evidence. Schroeder v. McDonald, 55 F.3d 454, 460 (9th Cir. 1995). Plaintiff alleged in his complaint that he was forced to listen to Christian music continuously for over ten hours per day, thereby requiring him to participate in and observe a religious holiday (Dkt. # 1 at 3).

IV. Analysis

To avoid violation of the Establishment Clause, the government conduct in question must (1) have a secular purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion. Lemon, 403 U.S. at 612-13. The Supreme Court has emphasized that the purpose of the challenged action need not have been "exclusively secular." Lynch v. Donnelly, 465 U.S. 668, 681 n. 6 (1984); see also Kreisner v. City of San Diego, 1 F.3d 775, 782 (9th Cir. 1993) (to violate establishment clause, contested action must be "motivated wholly" by an impermissible purpose). In Lynch, the Supreme Court held that inclusion of a nativity scene in a city's Christmas display did not violate the Establishment Clause where the display included a Santa Clause house, reindeer pulling Santa's sleigh, and other traditional Christmas decorations. 465 U.S. at 671. The Court determined that the narrow question was whether there was a secular purpose for the city's display of the creche. It found that the proffered reasons – the display was sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday – were legitimate secular purposes and that the purposes need not be exclusively secular. Id. at 681 n. 6.

The first Lemon requirement – that the government action have a secular purpose – is satisfied in this case. The undisputed evidence shows that both religious and non-religious music was played in the jails. The music included non-religious titles such as Elvis Presley's *Blue Christmas*, Alvin and the Chipmunks, and non-religious Christmas carols such

as *Deck the Halls* (Dkt. # 20, Exs. B-C). Defendant Arpaio's undisputed justification for the policy – to reduce inmate tension at a difficult time of year for inmates, thereby promoting safety in the jails – constitutes a secular purpose.

The second Lemon requirement – that the challenged practice not have a principal or primary effect of advancing or inhibiting religion – is also satisfied. Although Plaintiff asserts in his Complaint that the purpose of the music was to force him to participate in a religious holiday, he does not explain how playing the music had a primary effect of advancing religion (Dkt. # 1 at 3). To be sure, some of the music was religious, but the Supreme Court held in Lynch that some advancement of religion does give rise to an Establishment Clause violation. A remote or incidental benefit to religion is not enough. 465 U.S. at 683. The advancement of religion in this case was at most incidental and remote. The music was not played throughout the jails. Plaintiff could have chosen to avoid it.[1] More importantly, Defendant Arpaio has presented undisputed evidence that the primary purpose and effect of the music was to reduce inmate tension at a difficult time of year. Plaintiff has presented no evidence from which a reasonable jury could conclude that the music had a principal or primary effect of advancing religion.

The third prong of the Lemon test is also satisfied because playing the music did not foster an excessive entanglement with religion. "Entanglement is a question of kind and degree." Id. at 684. The undisputed evidence shows that Defendant Arpaio purchased music that was recorded by a Sergeant and played on an MP-3 player. Any expenditure of government funds was minimal (id.). There is no evidence of contact with religious groups (id.).

[1] In Inouye, the Ninth Circuit adopted a three-prong test to determine whether there was governmental coercion of religious activity: "first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious rather than secular?" 504 F.3d at 713. Plaintiff has presented no evidence to contradict Defendant Arpaio's assertion that Plaintiff could have avoided exposure to the holiday music by leaving the dayroom or disregarding the relatively quiet music.

The government conduct in this case satisfied the three-part Lemon test. The Court therefore will grant Defendant Arpaio's motion for summary judgment.

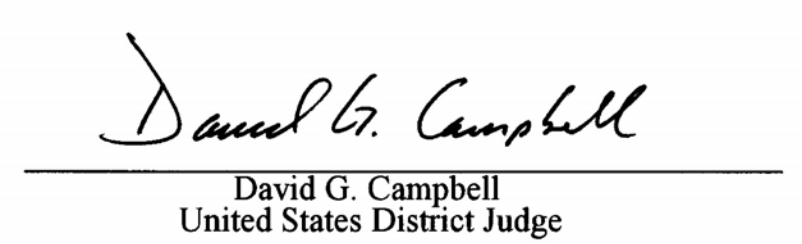
IT IS ORDERED:

(1) The reference to the Magistrate Judge is withdrawn as to Defendant Arpaio's Motion for Summary Judgment (Dkt. # 19).

(2) Defendant Arpaio's Motion for Summary Judgment (Dkt. # 19) is **granted**.

(3) The action is dismissed with prejudice, and the Clerk of Court must enter judgment accordingly.

DATED this 16th day of December, 2009.



David G. Campbell
United States District Judge