Case No. 18-1141

In the United States Court of Appeals
For the Tenth Circuit

Reverend Matt Hale,
Plaintiff-Appellant,

v.

Federal Bureau of Prisons, et al.
Defendants-Appellees.

Appeal from the United States District Court
For the District of Colorado
Civil Case No. 14-cv-00245
Judge Marcia Krieger, presiding

Brief of Plaintiff-Appellant Reverend Hale

Rev. Matt Hale, J.D.
pro se

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(Throughout this Brief, Hale follows the practice of the district court and cites to the record by docket number ("Doc.") followed by the page number which appears on the bottom of the page of the material in question, not the top. His citations to the Separate Appendix are marked "Appx." followed by the page number which appears on the bottom right corner of the page.)

Statement of Jurisdiction

The district court had jurisdiction pursuant to 28 U.S.C. sec. 1331 because this is a lawsuit arising under amendments to the Constitution of the United States as well as under federal statutory law (the Religious Freedom Restoration Act, 42 U.S.C. sec. 2000bb, et seq.) (hereafter "RFRA"). This Court has jurisdiction pursuant to 28 U.S.C. sec. 1291 because the district court has made a final adjudication, dismissing some of Hale's claims and his claims against the individual capacity defendants on September 30, 2015 pursuant to a Rule 12(b)(6) motion (Appx. 33-63) and the rest of his claims on March 28, 2018 pursuant to a motion for summary judgment (Appx. 64-96). Judgment was entered on March 29, 2018 (Doc. 213). Hale filed a timely notice of appeal on April 9, 2018 (Doc. 216).

Statement of the Issues

1) Whether the district court's clear failure to apprehend that Hale's First Amendment claim involving the treatment of his correspondence was not limited to the Free Exercise Clause component of that claim — but also contained Freedom of Speech and Freedom of Association components — constitutes reversible error (Claim One).

2) Whether the belief system of Creativity is a religion for purposes of the Free Exercise Clause of the First Amendment and RLFRA (Claims One, Three, Eight, and Nine).

3) Whether a prisoner held in solitary confinement has a liberty interest in his mail, and whether Fifth Amendment due process requires notice and an opportunity to be heard prior to that mail being taken away from him for an indefinite period of time absent exigent circumstances (Claim Four).

4) Whether the district court erred in dismissing Hale's otherwise valid First Amendment retaliation claim on the ground that the Federal Bureau of Prisons has a legitimate penological interest, as a matter of law, in retaliating against purely lawful and peaceful speech related to his church and religion (Claim Two).

5) Whether a prisoner states an equal protection claim when he alleges that individuals of other religious faiths are encouraged in their religious exercise by government but that he, as a believer in a different faith, is discouraged and in fact mistreated on the basis of that faith (Claim Six).

6) Whether the district court erred in dismissing Hale's individual capacity claims against the defendant prison employees here for lack of personal participation (All Claims except Eleven).

7) Whether, in order to state a free exercise

or RFRA claim by virtue of not allowing a religious adherent the scripture of his faith, the complainant is required to allege additional facts for the court to infer that this deprivation burdened his ability to exercise his religion (Claims Five and Seven).

8) Whether a prisoner is required to state in his complaint that he "still" desires an interview with a member of the news media that had previously been rejected by prison staff in order to state a First Amendment freedom of speech claim (Claim Ten).

Statement of the Case

Reverend Matt Hale, a federal prisoner at ADX in Florence, Colorado, brought this case in the district of Colorado in January 2014 seeking money damages, injunctive relief and a declaratory judgment (that 28 C.F.R. sec. 540.15 is unconstitutional on its face and as applied) for the violation of his First,

Fifth, and Eighth Amendment rights as well as his rights under RFRA (Appx. 4, 32). He sued twelve named defendants — employees of the Federal Bureau of Prisons — as well as the Bureau (hereafter "BOP") itself (Appx. 1).

Claim One alleged a violation of the First Amendment, "the taking away of Reverend Hale's mail rights due to his exercise of constitutionally protected speech, exercise of religion, and association with those of like mind" (Appx. 6).

Claim Two alleged First Amendment retaliation, "the taking away of Reverend Hale's mail rights because of his engagement in constitutionally protected activity" (Appx. 21).

Claim Three alleged a violation of RFRA, "the taking away of Reverend Hale's mail rights because of his involvement in his church and religious faith" (Appx. 22).

Claim Four alleged a violation of Fifth Amendment due process, "the taking away of

Reverend Hale's mail rights without affording him a prior opportunity to be heard" (Appx. 22).

Claim Five alleged a violation of the First Amendment by virtue of "the refusal by defendants Berkebile, Redden, and B.O.P. to allow Reverend Hale to have the scripture of his religious faith" (Appx. 23). Claim Seven likewise alleged a violation of RFRA for this conduct (Appx. 26).

Claim Six alleged a violation of the Fifth Amendment Equal Protection Clause, "treating Reverend Hale worse than other prisoners on account of his constitutionally-protected religion, speech, and associations" (Appx. 24).

Claim Eight alleged a violation of the First Amendment, "the refusal by defendants Berkebile and B.O.P. to provide Reverend Hale with meals that comply with his Creativity religious dietary requirements" (Appx. 27). Claim Nine alleged likewise a violation of RFRA (Appx. 28), for this conduct.

Claim Ten alleged a violation of the First Amendment, "the refusal by defendants

Berkebile and B.O.P. to allow Reverend Hale to be interviewed in person by Larry Yellen of Fox News Chicago" (Appx. 28).

Claim Eleven alleged a violation of the Eighth Amendment by virtue of "the imposition of broad mail bans and religious scripture bans upon a prisoner housed in solitary confinement for indefinite duration" (Appx. 29).

On September 30, 2015, the district court dismissed, for failure to state a claim, Claims Four, Five (to the extent that it sought to allege a violation of the Free Exercise Clause), Six, Seven, Ten, and Eleven, and dismissed, for failure to allege "requisite discriminatory motive," all of Hale's remaining First Amendment claims against the individual prison employees for money damages (Appx. 53-56), as well as Hale's remaining RFRA claims for money damages against those individuals likewise (Appx. 57).

On March 28, 2018, following discovery in the case, the district court granted summary judgment to the [redacted] remaining defendant BOP, on Hale's remaining claims (Appx. 64-96).

Hale appeals the 12(b)(6) dismissal of all of his claims, against all of the defendants, in their entirety, as well as the granting of summary judgment to the BOP in all respects.

Statement of Facts

Reverend Hale is an ordained minister in The Church of the Creator (hereafter "Church") and has been since 1995 (Appx. 6). The Church embraces and espouses the religion of Creativity (Id). Adherents of the Creativity religion are called "Creators" (Id). Whereas the Christian religion is concerned with the immortality of the "soul," Creativity is concerned with the immortality of the White Race here on earth (Id at 6-7). Whereas Christians believe in a deity variously known as "Yahweh," "Jehovah," "God" or "Jesus Christ," Creators believe that Nature is their god (Doc. 193 at 25). Thus, whereas Christians seek to obey "the word of God" Creators seek to follow the Laws of Nature

("Following the Laws of Nature is what our religion CREATIVITY is all about." Doc. 186-12 at 67) (capitalization in original). Hence the first affirmation of Creativity, which Creators recite daily, reads as follows: "We Believe in the Eternal Laws of Nature as revealed through science, history, logic, and common sense" (Doc. 186-29 at 6). Hence why the first text of the Creativity religious faith is entitled Nature's Eternal Religion. Creativity is a Nature-based religion, as opposed to a super-natural based religion, and Nature in effect provides the religion to which Creators adhere (Doc. 186-1 at 1 and Doc. 186-10).

All of Creativity's other beliefs derive from this overarching belief in Nature: e.g. its belief in racial purity and in the separation of the races in order to maintain that purity (Nature disdains the genetic mixing of different races); its belief in a raw food diet (no creature cooks its food before eating it in Nature); its disdain for

all "medicines" and "vaccines" (no creature in Nature consumes artificial substances as a means of healing itself, or injects itself with disease as a means of preventing disease); its belief in fasting (creatures do not eat when they are ill or injured in Nature); and finally all of Creativity's preoccupation with race and a racial way of thinking about the world: in Nature, each race of mammal, fish, bird, amphibian, or whatever is concerned exclusively with the welfare of its own kind. All of their values are racial in nature and unabashedly so, since that is what Nature ordains. Thus, since Nature is itself racist, Creators practice and believe in racism as part of their religion (see e.g. Doc. 186-1 at 15-19; Doc. 186-12 at 43-48; Doc. 186-12 at 53-62; and Doc. 186-1 at 4-26 for all of the foregoing). Since Nature is herself racist through and through, and since Nature is the god of Creators, it follows necessarily that Creators believe in a racist

view of the world or Nature's Eternal Religion as they call it (see e.g. Doc. 193 at 25-28 and 45-48). However, that religion, Creativity, is by no means limited to the concept of race itself; rather it encompasses all of the facets of Nature's Laws (see e.g. Doc. 193 at 47-50).

Reverend Hale brought this lawsuit in order to practice his religion in his solitary prison cell, and in order to participate in his Church in the outside world without fear of punishment or persecution as the ordained minister of the Creativity religion that he is — rights which have been viciously and flagrantly violated by the Defendants-Appellees in this case. Not only had his mail been taken away from him on two occasions in the past — in July 2010 and January 2013 respectively — purely on the basis of his lawful and peaceful exercise of religious or ideological speech and association with those in the outside world (Appx. 11-12, 15-16, et al.) but since bringing this lawsuit, his treatment at the

BOP's hands has only gotten worse, for whereas he could discuss his religion and church within his correspondence at the time he filed this suit — albeit at the risk of his mail being taken away from him again — now he is banned from all mention of his ministry, religion, or church by the BOP entirely. If he or anybody else mentions that he is Reverend Matt Hale, the name "Creativity," or the word "church," the letter in question is rejected and returned to sender, and if Hale specifically tries to send out a sermon to his congregation, he is punished for having supposedly engaged in "gang activity." Finally, he is banned from speaking to his own 79 year old mother on the telephone because she too believes in the Creativity religion and the BOP's employees deem their conversations to be "gang activity" (see Doc. 172-1 at 9-12; Doc. 214 at 3 and throughout). As amazing as it may seem, all of these things are actually going on in the United States of America.

Thus, though the particular specific mail bans complained of in Hale's Complaint are no longer in effect, the district court recognized that he still has standing to obtain injunctive relief against the anti-Creativity censorship that the BOP is continuing to impose upon him (Appx. 68-69) that was the basis for his bringing this lawsuit. In other words, since Hale brought this lawsuit to stop the censorship of his mail and persecution of his person by virtue of his religious exercise, the case is not moot because the BOP is continuing to censor his mail and persecute his person by virtue of that religious exercise.

Summary of the Arguments

This is a case that should not have been dismissed by the district court in any respect, nor was the BOP even remotely entitled to summary judgment on any of the claims remaining once it became the sole defendant. Rather, the case should have ultimately proceeded

to trial on each and every claim, against each and every defendant, because Hale stated claims for which relief can be granted and a reasonable trier of fact could have found in his favor on those claims. The district court essentially turned the law upside down by viewing Hale's Complaint and the facts of the case in the light most favorable to the moving party — the defendants — instead of in his favor as the law requires. For this reason, the judgment of the district court should be reversed and the case remanded.

Hale's Complaint (Appx. 1-32) meets, and indeed exceeds the notice pleading standards of the federal courts. Hale likewise adequately alleged the personal participation of each of the individual capacity defendants, especially considering the fact that he is consigned to a solitary prison cell by the BOP and thus was unable to allege greater particularity of facts in their regard due to his confinement. Discriminatory motive on the

part of the individual defendants, for its part, is alleged overwhelmingly, and thus the district court likewise erred in dismissing them from the case. Finally, a prisoner's correspondence is a liberty interest for purposes of the Due Process Clause of the Fifth Amendment, requiring pre-deprivation notice and an opportunity to be heard absent exigent circumstances, which were not present in this case. Thus the Rule 12(b)(6) dismissal of a substantial portion of this suit was erroneous on numerous grounds.

As for the subsequent granting of summary judgment to the BOP, the district court erred in its opinion that Creativity is not a religion; at a minimum, a reasonable trier of fact examining the beliefs of Creativity in their entirety and in the light most favorable to Hale on that score, could have found that it is. A reasonable trier of fact could have also found that the defendants do not have a compelling interest in the suppression of completely legal and peaceful speech, and that the taking away

of literally all of Hale's correspondence with those not of his immediate family — on the basis of whatever concerns the defendants did have — was unnecessary to meet those concerns, and that the complete suppression of Hale's religious, ideological, and associational speech is likewise unnecessary now. In sum, the BOP has no conceivable legitimate penological interest that needs to be met by the complete suppression, and indeed destruction, of Hale's Creativity speech and ministry to the outside world, nor by Hale's punishment for "gang activity" for engaging in same. Finally, the district court remarkably failed to realize that the Free Exercise Clause of the First Amendment was a mere component of Hale's Claim One, and thus erroneously granted summary judgment to the BOP on the basis that Creativity is not a religion standing alone without any freedom of speech or association analysis.

Standard of Review

I. The 12(b)(6) dismissals.

This Court reviews the district court's Rule 12(b)(6) dismissals de novo. Khalik v. United Air Lines, 671 F.3d 1188, 1190 (10th Cir. 2012). In doing so, "we accept as true the well pleaded factual allegations and then determine if the plaintiff has provided enough facts to state a claim to relief that is plausible on its face... A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged... The 12(b)(6) standard does not require that the plaintiff establish a prima facie case in the complaint, but rather requires only that the plaintiff allege enough factual allegations in the complaint to set forth a plausible claim." Iselin v. Bama Companies, 690 Fed. Appx. 593, 595 (10th Cir. 2017) (citations and internal quotation marks

omitted).

The federal rules are still governed by the basic notice pleading standard. Khalik, 671 F.3d at 1191-1192. ("In other words, Rule 8(a)(2) still lives. There is no indication the Supreme Court intended a return to the more stringent pre-Rule 8 pleading requirements." Id at 1191.) Thus, "under Rule 8, specific facts are not necessary; the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests." Id at 1192, quoting Erickson v. Pardus, 551 U.S. 89, 93 (2007) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (emphasis added).

"The burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." Robbins v. Okla. ex rel Dep't of Human Services, 519 F.3d [redacted] 1242, 1247 (10th Cir. 2008) (emphasis added), quoting Twombly. "[I]n examining a complaint under Rule 12 (b)(6), [the court] will disregard conclusory statements

and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." Khalik, 671 F.3d at 1191 (emphasis added). Pleadings that allow for at least a "reasonable inference" of the legally relevant facts are sufficient. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (emphasis added).

"[T]he degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context: 'Context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case...'". Robbins v. Okla. ex rel Dep't of Human Services, 519 F.3d 1242, 1248 (10th Cir. 2008), quoting Phillips v. County of Allegheny, 515 F.3d 224, 2008 WL 305025, at *4 (3rd Cir. 2008) (emphasis added). Courts have thus generally held pro se complaints to less stringent standards than formal pleadings drafted by retained counsel (Hughes v. Rowe, 449 U.S. 5, 9 (1980), and have acknowledged the special problems in writing detailed complaints

that are caused by incarceration. "The peculiar perversity of imposing heightened pleading standards in prisoner cases — a course of highly doubtful propriety after Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, [507 U.S. 163]... — is that it is far more difficult for a prisoner to write a detailed complaint than for a free person to do so, and again this is not because the prisoner does not know the law but because he is not able to investigate before filing suit." Billman v. Indiana Dep't of Corr., 56 F.3d 785, 789-790 (7th Cir. 1995)(Posner, C.J.); accord Rodriguez v. Plymouth Ambulance Service, 577 F.3d 816, 821 (7th Cir. 2009); Alston v. Parker, 363 F.3d 229, 233 n. 6 (3rd Cir. 2004).

This Court "assume[s] the truth of all well-pleaded facts in the complaint, and draw[s] reasonable inferences therefrom in the light most favorable to the plaintiff[]." Dias v. City and County of Denver, 567 F.3d 1169, 1178 (10th Cir. 2009). Thus "granting a motion

to dismiss is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." Dias, 567 F.3d at 1178 (quotation marks and citation omitted). "[O]nly if a reasonable person could not draw ... an inference [of plausibility] from the alleged facts would the defendant prevail on a motion to dismiss." Mocek v. City of Albuquerque, 3 F. Supp. 3d 1002, 1077 note 7 (D.N.M. 2014), quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). "Dismissal of a pro se complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged ...". Kay v. Bemis, 500 F.3d 1214, 1217 (10th Cir. 2007), quoting Curley v. Perry, 246 F.3d 1278, 1281 (10th Cir. 2001) (emphasis added).

II. The granting of summary judgment to the BOP.

The Court likewise reviews this de novo. J.V. ex rel C.V. v. Albuquerque Pub. Sch., 813 F.3d 1289, 1294 (10th Cir. 2016). It must view the facts in the light most favorable to Hale, resolving all factual disputes and inferences in his favor. Galbreath v. City of Oklahoma, 568 Fed. Appx. 534, 537 (10th Cir. 2014). Judgment was only properly granted to the BOP if "there is no genuine dispute as to any material fact" and the BOP was "entitled to judgment as a matter of law" Id. "An issue is genuine if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." Albuquerque Pub. Sch, 813 F.3d at 1295 (citations and internal quotations omitted) (emphasis added).

Arguments

I. The district court erred when it granted summary judgment to the BOP on Claim One on the basis that Creativity is not a religion for purposes of the Free Exercise Clause, not

realizing that Claim One also contains freedom of speech and freedom of association components.

Hale's Claim One indicates that he is not only alleging that his First Amendment right to free exercise of religion is being violated by virtue of the defendants' treatment of his mail but that his right to freedom of speech and freedom of association are being violated as well. See heading C ("Violation of the First Amendment (the taking away of Reverend Hale's mail rights due to his exercise of constitutionally protected speech, exercise of religion, and association with those of like mind") (emphasis added) (Appx. 6). See also para. 64 ("Part of the motivation of the defendants in violating Reverend Hale's First Amendment right to free exercise of religion, freedom of speech, and freedom of association...") and para. 76 ("with this lawsuit, Reverend Hale... complains about the imposition of any restriction upon whom

he can correspond with and any censorship of his mail on grounds that violate the First Amendment guarantees of speech, free exercise of religion, and association.") (Appx. 18, 20-21).

In granting summary judgment to the BOP however, the district court's decision is totally devoid of any freedom of speech or freedom of association analysis (Appx. 68-85). Instead, the decision dealt exclusively with the Free Exercise Clause component of his various claims (Id), ignoring the freedom of speech and association components of Claim One altogether. The district court simply assumed that if Creativity is not a religion, the BOP must be granted summary judgment on [redacted] Hale's remaining claims, including Claim One. ("The BOP contends that CREATIVITY is not a religion for purposes of the Free Exercise Clause or the Religious Freedom Restoration Act, which would proscribe Claims 1, 3, 5, and 6." Id at 68.) (Emphasis added). (See also Appx. 70.)

The district court was quite simply incorrect. Freedom of speech and freedom of association are

considerably broader by their very nature than the freedom of religion which of course requires that a religion exist in the first place; thus, even if Creativity were not a religion, Hale's allegations under the freedom of speech clause — and under the right to freedom of association generally with those in the outside world — could still lie. Speech (and association) does not have to be religious in nature in order to be protected by the First Amendment and the censorship of mail implicates the freedom of speech clause on its face. A claim that a person's right to freedom of speech is being violated is not somehow negated by any adjudication about the religious nature of the speech in question; the whole (speech) is obviously not swallowed by the part (religion).

While Hale was unable to locate any case law that covers this specific situation, he submits that if a court dismisses a claim that actually contains three components,

each of which is valid in its own right, on the basis that one of the components alone cannot stand, it has committed reversible error. No full adjudication of Hale's Claim One took place here because that Claim One was not dependent upon Creativity being a religion; Hale's allegations therein state their own causes of action regardless of whether Creativity is a religion or not and yet they have been left hanging in the wind by virtue of the district court's exclusive treatment of the Free Exercise Clause. By assuming that Claim One required that Creativity be a religion in order to go forward to trial when that is simply not the case, the district court erred.

II. Since a reasonable trier of fact could have found that Creativity fulfills the low threshhold for what constitutes a religion under United States v. Meyers, 95 F.3d 1475 (10th Cir. 1996), the district erred in granting summary

judgment on Claims 1, 3, 8, and 9.

Regardless of the argument of the section above, the record of this case shows, overwhelmingly, that Creativity is in fact a religion for purposes of the Free Exercise Clause. Thus the district court erred when it granted summary judgment to the BOP on Claim One on the basis that Creativity is not a religion for this reason as well. It also erred when it granted judgment to the BOP on Claims 3, 8, and 9 on the same basis (Appx. 68-85, 93). In sum, since a reasonable trier of fact could have found that Creativity is indeed a religion under the law of this circuit, the district court erred in granting judgment to the BOP on Claims One, Three, Eight, and Nine on the basis that it is not. (Notably, there is a misprint in the lower court's decision at Appx. 68. It should read "1, 3, 8, and 9," not "1, 3, 5, and 6.") (Ditto Appx. 70.)

It must be said, at the outset, that

the district court was likewise confused about the facts of this case. Nor did it recount the facts in the light most favorable to Hale as promised (Appx. 64). Rather, it recounted the facts in the light most favorable to the BOP, at best, or got the facts wrong altogether at worst. Its characterizations of Creativity are incorrect likewise. In sum, instead of actually accepting the facts of Creativity as they are, viewing those facts in the light most favorable to their religiosity as the law requires, the district court viewed the facts in the light least favorable to their religiosity and thus erred accordingly. It was not Hale's burden to prove that Creativity is a religion at the time the BOP filed its motion for summary judgment, only that a rational factfinder could find that it is. In other words, if a rational person could believe that Creativity is a religion under the criteria which have been established by this Court, it is,

as a matter of law, a religion for purposes of a summary judgment motion. That was Hale's only burden.

In any event, as stated supra at 23, this Court reviews the decision that Creativity is not a religion de novo along with the rest of the summary judgment decision. Thus, in a sense, it doesn't matter why the district court erred here; what matters is that it did err, as Hale will show below.

A. A reasonable trier of fact could have found that Creativity fulfills the "ultimate ideas" factor for determining whether a particular belief system is religious (Appx. 75-77).

As the district court correctly noted, "[i]n this Circuit, to determine if a belief system is truly 'religious,' the Court considers whether it (1) addresses ultimate ideas, (2) contains metaphysical beliefs, (3) prescribes a particular moral or ethical system, (4) involves comprehensive beliefs, and (5) is accompanied by accoutrements

of religion" (Appx. 71). What it left out is that "the threshold for establishing the religious nature of [] beliefs is low" (Meyers, 95 F.3d at 1482-1483; emphasis added) and that "the factors should be seen as criteria that, if minimally satisfied, counsel the inclusion of beliefs within the term 'religion'" (Id at 1284; emphasis added). Thus, for purposes of the BOP's summary judgment motion, if any reasonable trier of fact could have found that Creativity minimally satisfies the low Meyers threshold for establishing the religious nature of a particular belief system, the district court erred in its judgment that Creativity is not a religion. When phrased in that manner, there can be no doubt but that the district court erred in its judgment of this case. Let us begin then with the "ultimate ideas" factor of the Meyers criteria.

Fundamentally, the district court ignored the fact that it is Nature, not race, which provides the basis for all of Creativity's beliefs (see again pages 9-12, supra) and it

is that error, more than perhaps any other, which led to its erroneous judgment, a judgment which has effectively destroyed the religious freedom of Reverend Hale in a country which supposedly values same. This is important, for the Supreme Court has defined religion as an individual's sincere belief, even though not theistic in nature, "based upon a power or being, or upon a faith, to which all else is ultimately dependent." U.S. v. Seeger, 380 U.S. 163, 176 (1965). "[W]hen a person sincerely holds beliefs dealing with issues of 'ultimate concern' that for her occupy a 'place parallel to that filled by . . . God in traditionally religious persons,' those beliefs represent her religion." Kaufman v. McCaughtry, 419 F.3d 678, 681 (7th Cir. 2005) (emphasis added), quoting Welsh v. United States, 398 U.S. 333, 340 (1970). The district court failed to appreciate that Creativity's racial beliefs — and to be sure, they are strong and many — are only a result of Creativity's belief in Nature and that

Nature can be the basis for a religion as much as "God." The "survey" which the district court engaged in (Appx. 65) failed to observe and recognize the very basis for the principles put forward. In other words, the district court missed the forest for the trees. It ignored the source from which all else springs.

It is thus not so that Creativity involves "the singular goal of promoting the purity of the white race and advocating for the geographic, political, and social segregation (if not the outright destruction) of other races" (Id). Indeed, this statement reflects a fundamental misunderstanding of Creativity, for not only is there nothing "singular" about Creativity but Creativity is about the fulfillment of Nature's Laws, not a mere "goal." (That said, "[t]hat a religion may be formed in response to social or political factors or may advocate political goals does not mean that it is not entitled to First Amendment protection." Loney v. Scurr, 474 F. Supp. 1186, 1194-1195 (S.D. Iowa 1979), citing Welsh,

398 U.S. at 333.) The district court's failure to understand Creativity on this basic point, as well as in general, illustrates how problematic it is for a court to decide that a particular belief system is not a religion at the summary judgment stage of a lawsuit. A court simply does not have a full record that would enable it to make that decision fairly, adequately, and without the risk of error in those cases involving religions which adhere to principles far different than the norm; hence why district courts in other jurisdictions have also erred as to Creativity's religiosity (Appx. 71). It was all too easy for the district court here, for example, to look at Creativity's racial beliefs and say to itself, "well, people can believe in these things without being religious," without realizing that when it comes to Creativity, those racial beliefs only spring from a basis that is analogous to that of "God" in every way; if belief in God and loyalty to God is religious, so must

belief in Nature and loyalty to Nature be, quite simply, and whatever Creativity believes in as far as race is concerned is effectively beside the point. It is the basis for the belief system that matters, not the details which merely spring from that basis, for otherwise one could look at the details of any religion, say that they are not sufficiently "religious," and deny that religion constitutional protection accordingly. One could look at every one of the commandments of Christianity after Commandment No. 1, for example, say that they are not religious, and deny Christianity constitutional protection. These commandments, after all, only stem from a belief in something else (God) just as Creativity's do (Nature).

The danger of the district court's reasoning is thus clear. It is not this or that detail of a particular belief system which is the issue for determining its religiosity but rather whether it is "based upon a power or being, or upon a faith, to which all else

is ultimately dependent" as the Supreme Court has stated. The Supreme Court got it right and the district court got it wrong. Whether Creativity is right in believing that Nature prescribes a racial, or even racist, view of the world is irrelevant: what matters is that it believes that whether it is right or wrong. It is "based upon a power... to which all else is ultimately dependent": Nature. The first Bible of the Creativity religious faith is called "Nature's Eternal Religion" for a reason: Creators believe in the religion of Nature and it violates their constitutional right to freedom of religion to deny that belief constitutional protection alongside the religions of God. The Supreme Court has said that it is impermissible to favor theistic religions over non-theistic religions — see Torcaso v. Watkins, 367 U.S. 488, 495 (1961) — and yet that is exactly what the district court did. The district court failed to realize that Creativity does address an ultimate issue or ultimate concern (Appx.

72-73, 77): that the true path of Man is to follow the Eternal Laws of Nature. That belief is just as religious, as a matter of law, as the belief that Man is to follow the laws of God. The bases are analogous.

The district court's error on this point renders all of the cases which it cites inapposite (Appx. 72-74), for the professed religions in those cases were not "based upon a power or being, or upon a faith, to which all else is ultimately dependent." They did not have a basis for their beliefs which was analogous to that of God. Rather, they were quite obviously arbitrarily created and entirely Man-based. The believers in the professed religions did not look to a source outside themselves for their beliefs, unlike Creativity, and that is what makes the difference between a religion and a non-religion under the law. To be more specific, none of the practitioners of these professed religions cited Nature or God as the source of their beliefs or that they were compelled by Nature or God

to live in a certain way, and it is because of that lack of a direction from some source outside themselves that rendered their beliefs non-religious to the courts in question. Religion is not "each individual [being] the arbiter of his own truth" (Appx. 73). As the Meyers district court aptly observed, the original meaning of the word "religion" — which comes from the Latin verb religare — is to "tie back" or "rebind". United States v. Meyers, 906 F. Supp. 1494, 1502 n.7 (D. Wyoming 1995). While Creativity's beliefs do "tie back" to something (i.e. Nature), the beliefs of the professed religions cited by the district court in this case did not. That is why their practitioners lost — among other reasons — and probably rightly so. (That said, the district court remarkably relied the most upon a case which has been effectively reversed — Versatile v. Johnson, 2011 WL 5119259 (E.D. Va. 2011) — and which is thus no longer good law in the first place (Appx. 74-75, 77-80). The district court for the Eastern District of Virginia

has in fact ordered the Virginia Department of Corrections to recognize NGE, the belief system at issue in that case, as a religion. See Coward v. Robinson, 2017 U.S. Dist. LEXIS 138263 (E.D. Va. 2017) ("The Department will be ordered to remove the STG designation from the NGE, recognize it as a religion, and afford it the rights and privileges enumerated in the Department's operating procedure for offender Religious Programs..."). Thus every analogy which the district court sought to draw between Creativity and NGE only confirms that Creativity is a religion. Furthermore, numerous other courts have also ruled that NGE is a religion. See Hardaway v. Haggerty, 2011 U.S. Dist. LEXIS 18579 (E.D. Mich. 2011); Wright v. Fayram, 2012 U.S. Dist. LEXIS 84804 (N.D. Iowa 2012); and Marria v. Broaddus, 2003 U.S. Dist. LEXIS 13329 (S.D.N.Y. 2003). As will be seen further below, Creativity has far more indicia of a religion than NGE; therefore, if NGE is a religion, so is Creativity.) The district

court utterly failed to realize that the "ultimate motivation" of Creativity (Appx. 74) is not arbitrary or personal or self-driven — as it was in the cited cases — but rather is to fulfill Nature's Laws, and that its beliefs towards this end are indeed "parallel to that filled by the orthodox belief in God in other religions" (Appx. 75) as a result. It failed to appreciate that just as other religions derive their beliefs from God or gods, Creativity derives its beliefs from Nature, and that if one is religious, so must the other be. Creativity's belief in Nature is "parallel to that filled by the orthodox belief in God in other religions" (Id), quite simply. Thus it is a religion.

The "ultimate ideas" factor of the Meyers criteria is thus fulfilled by Creativity: the "ultimate idea" of Creativity is the fulfillment of the Eternal Laws of Nature, which is analogous to the fulfillment of the word of God in "traditionally religious persons." Welsh, 398 U.S. at 340. At a minimum, a reasonable factfinder could have thought so and that is all

that matters in order to defeat a summary judgment motion.

As stated earlier, it doesn't matter what the details of Creativity's beliefs are; what matters is that they are derived from a source (Nature) which is analogous to that of God in traditionally religious persons. Thus the district court's entire discussion at Appx. 75-77 is misplaced. That said, it is wrong again and again about what Creativity actually teaches. It does not have a "monofaceted concern" with race for instance (Appx. 75); rather, its concern is with following the Laws of Nature. It has nothing to do with "white supremacy" or "white dominance" (Appx. 77); that is because there is no such thing as "white supremacy" or "white dominance" without the white Race [redacted] living amongst the other races, which Creativity rejects (Doc. 186-29 at 29); indeed, Hale swore under oath that he is not a "white supremacist" (Doc. 193 at 9-10) and explained in detail, also under oath, why Creativity is against "white supremacy" (Doc. 205 at 64-68),

facts which the district court improperly chose to disregard (yes, Creativity is racist but it is not white supremacist; Doc. 186-29 at 51). Creativity does not "limit[] itself to the basic questions of white people" (Appx. 77); rather, by following Nature's Laws, Creators simply realize that their obligation is to their own kind just as is the case with every other creature in Nature. It is not Hale's fault that the district court failed to understand what Creativity actually teaches, but fail to understand it, it did. That is hardly unusual, as religions are misunderstood all the time. Creativity does have an "ultimate belief system" (Appx. 77): Nature answers each and every question that arises, including the issues that the district court cited.

In effect, the district court did precisely what Meyers said it should not do: it relied "solely on established or recognized religions to guide it in determining whether a new and unique set of beliefs [Creativity] warrants inclusion." Meyers, 95 F.3d at 1484. For example, it

demanded that Creativity have non-temporal objectives, that its tenets be "spiritual," and that it care about an "afterlife" (Appx. 76-77). However, such demands are impermissible under the law; religions are not required to be non-temporal and spiritual in nature, or be concerned with an alleged afterlife, in order to fulfill the Meyers factors. (To the extent that the court in United States v. Quaintance ruled out belief systems as religious just because they are non-spiritual in nature, it likewise erred. Religions can be confined to the physical world. Appx. 75.) "Religion" is not restricted to belief systems which adhere to some sort of spiritual eternity beyond Cloud Nine. What the district court did here is use Christianity for its template as to whether Creativity is a religion or not and this is exactly what courts should not do. Remarkably, however, the idea that Creativity is "temporal" is a bit of a mischaracterization in itself, as Creativity seeks the immortality of the White Race (Appx. 6-7) (verified at

32). In other words, Creativity is not concerned merely with the well-being of those white people who are living today, but rather with making sure that white people live forever which is a non-temporal idea on its face. Indeed, Creativity is yet again analogous to Christianity in this respect: while the Christian wants his soul to live forever, the Creator wants his race to live forever and both are non-temporal concepts accordingly. The idea that Creativity's "beliefs address only the relative positions of people of different races during their lifetimes" (Appx. 77) is thus belied by the facts of this case. See also Doc. 186-29 at 16 ("It is the avowed duty and holy responsibility of each generation to assure and secure for all time the existence of the White Race upon the face of this planet.") (First Commandment of Creativity; emphasis added).

Lastly, with all due respect to the district court, who is it to say that Nature is "just a solipsistic justification" for Creativity's precepts?

(Appx. 76-77)? Aside from the fact that racial sentiment is innate to all of the creatures of the natural world — as simple observation will show — it was error of the district court to assume some sort of insincerity on Creativity's part when Creativity states that it derives its racist beliefs from Nature and her laws. "[A] court may not make credibility determinations or weigh evidence, which are functions of the jury, not the judge." Starr v. QuickTrip Corp., 655 Fed. Appx. 642, 644 (10th Cir. 2016). The district court's contention is furthermore belied by the record (see e.g. Doc. 186-1 at 4-16). Without any kind of record support for its contention, the idea that Creativity's reliance on Nature is "solipsistic" is a matter for trial, not resolution via a summary judgment motion. Finally, Creativity does not need "a spiritual quality" to be religious (Appx. 77) and the district court's mistaken belief that it does marred and contaminated its entire judgment.

B. Creativity admittedly is not "metaphysical" (Appx. 77-78).

As this Court stated in Meyers, "[r]eligious beliefs often are 'metaphysical,' that is, they address a reality which transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities." Meyers, 95 F.3d at 1483 (emphasis added). Quite clearly then, belief systems don't have to believe in such things in order to be religions. Rather, this is merely a factor for the Court to consider like all of the others set forth by Meyers: whether Creativity happens to be "metaphysical" or not. In point of fact, Creativity is not "metaphysical" in that no, it does not believe in another world someplace outside the reality of this one. Rather, this is the only one of the Meyers factors that is not fulfilled by Creativity, with

the other four easily capable of being found to be fulfilled by a rational trier of fact as we will continue to see below.

As for the district court's reliance upon Peloza v. Capistrano Unified Sch. Dist. (Appx. 78), it is misplaced. Courts have since then limited Peloza to the proposition only that the teaching of evolutionary biology does not violate the Establishment Clause. See American Humanist Ass'n v. United States, 63 F. Supp. 3rd 1274, 1282-1283 (D. Oregon 2014) (humanism is a religion for purposes of the Establishment Clause). See also Center for Inquiry, Inc. v. Marion Circuit Court Clerk, 758 F. 3d 869, 873-75 (7th Cir. 2014) (same). In sum, while Peloza did not resolve the matter as to whether or not humanism is a religion, other courts have: it is. See also Grove v. Mead Sch. Dist., 753 F.2d 1528, 1534 (9th Cir. [redacted] 1985) (secular humanism might be covered by Establishment Clause). In any case, the fact of the matter is that Creativity has far more indicia of a religion than mere "humanism" ever did. Thus, if humanism is a religion, so must Creativity

be. The matter is not even close.

C. A [redacted] reasonable trier of fact could have found that Creativity has "a moral or ethical system" (Appx. 78-80).

By the district court's own admission, "Creativity does have a moral or ethical system" (Appx. 79). Therefore, quite simply, a reasonable trier of fact could have found that it fulfills this factor of the Meyers criteria, for if Creativity does have a moral or ethical system, a reasonable trier of fact could obviously find that it does. Thus the district court's ruling that Creativity, as a matter of law, does not fulfill this factor of the Meyers criteria makes very little sense. The district court seems to have forgotten entirely that as long as a reasonable trier of fact could find that Creativity possesses a moral or ethical system, that factor of Meyers is fulfilled here and that court's personal objections to the nature of that moral or

ethical system are irrelevant. Meyers does not require professed religions to have moral or ethical systems which meet with the approval of the courts in order for them to be religions. Rather, if the belief system in question has a moral or ethical system period, that factor of the Meyers criteria is met.

What is furthermore remarkable about the district court's analysis is that it did not even understand the meaning of the term "self-interest" (Appx. 79-80): the interest of the self. Thus self-interest and the best interests of the White Race — which Creativity espouses — are concepts which contradict one another on their face. By teaching its adherents to do what is best for their race, Creativity is, by that very fact, telling them not to do what is best for their individual selves and telling them not to pursue their own self-interest. By teaching its adherents that "[t]he guiding principle of all your actions shall be: what is best for the White Race?" (Doc. 186-29 at 16; Fourth Creativity Commandment),

Creativity teaches its adherents to deny their individual self-interest, quite simply. It is remarkable that the district could fail to grasp this basic fact.

The district court's contention that "[n]o tenet of Creativity causes adherents to reject what would benefit their own elemental self-interest" (Appx. 80) is thus plainly refuted by the record of this case, for if a belief system tells its adherents to put what is best for their race first, it is not telling them to pursue the interest of one's individual self. As a matter of fact, Creativity is far less about self-interest than Christianity is, for is it not a fact that Christians follow Christ so that they may obtain eternal life for their individual selves, the very epitome of self-interest? Is Christianity then not a religion? The district court's analysis thus falls apart. Creativity teaches its adherents to put their race first, for its own sake. Christianity, on the other hand, teaches that people should believe

in Christ so that their selves may obtain eternal life. Thus, if anything, Creativity is the religion here and Christianity isn't under the district court's own reasoning.

Lastly, the district court is of course again wrong when it says that "Creativity creates duties to itself, not to a higher power" (Appx. 79), that "it is entirely based on the secular concern of white supremacy" (Id), and that it exhibits an "express disavowal of a higher power" (Appx. 80)(note 5) because, as stated earlier, Creativity does believe in a higher power upon which all of its teachings are based: Nature. Why else does the district court think Creativity's Founder, Ben Klassen, entitled the first Bible of Creativity Nature's Eternal Religion (Doc. 186-1 at 1)? The "higher power" is clear.

Thus, for these multiple reasons, a reasonable trier of fact could have easily found that Creativity fulfills the moral or ethical system factor of the Meyers criteria and the district court erred accordingly in not finding that factor fulfilled.

D. A reasonable trier of fact could have found that Creativity's beliefs are comprehensive (Appx. 80-83).

As always, the district court failed to grasp that Nature and obedience to her Laws is the basis for everything that Creativity believes in, and that failure led it into error after error accordingly (see again p. 10, supra). It is not Hale who "misunderstands the array of beliefs Meyers seeks to articulate" (Appx. 81) but rather that the district court failed to understand that all of Creativity's beliefs stem from its belief in a higher power: Nature, and that Nature provides the answers to "human kind's basic questions" (Id.) accordingly. Nature is the "cohesive belief system" (Id.) here which the district court amazingly overlooked even though it was as plain as day. Thus on this factor of Meyers, the district court again missed the forest for the trees.

In point of fact, Creativity answers each and every question which the district court posed

at the top of Appx. 82. (Those answers can be found throughout Nature's Eternal Religion, The White Man's Bible, and The Little White Book, Doc. 186-1 to 186-9; Doc. 186-11 to 186-20; and Doc. 186-29 respectively.) However, the simple fact of the matter is that Meyers does not require of a religion that it answer every question that a court may personally think is important. Rather, it only requires that its beliefs be comprehensive and Creativity's are (see Doc. 193 at 44-50). The idea that Creativity's "theology" — "theology" literally means "word of God," notably enough — is confined "to a single teaching" (Appx. 82) is belied utterly by the record of this case. Rather, its teachings are as multitudinous as the facets of the natural world itself. (After all, the reason why Creativity opposes the mixing of the races, the consumption of cooked food, the ingestion of medicines and the injection of vaccines, artificial chemicals of all kinds, homosexuality, charity, and on and on is because such things are a transgression against Nature (see e.g.

Doc. 186-29 at 16, 29, 19, 20, and 15; Doc. 186-12 at 61 and 315-316; and Doc. 186-1 at 15-16) and again, Creators are thoroughly racist because all creatures in the natural world are racist (Id). Every race of creature in the natural world is preoccupied with the welfare of its own kind and thus Creators are as well.) It is not necessary that Creativity invent values which do not already exist within the natural world; rather, the values of the natural world are themselves "comprehensive."

Again, what the district court has done here is show favoritism towards theistic religions, precisely what the Supreme Court, as well as this Court, has said that courts must not do. It defined "religious sin" as "transgression against deity" for example (Appx. 82), oblivious to the fact that transgression against Nature can be a religious sin too. It demands that Creativity have "faith" in things unseen (Id) and yet Meyers does not require that at all, either within its comprehensiveness factor or within any

of its other factors. It is untrue, patently, that "the only thing [Creators] believe in is themselves and their collective power as a unit of white people" (Appx. 82). Rather, Creators first and foremost "believe in the Eternal Laws of Nature" (Doc. 186-29 at 6) (emphasis added) and that way of thinking and living which those Laws of Nature consequently prescribe. The Christian bias of the district court is on display the most though when it states, "where Christianity provides a canvas upon which to paint a rich collection of views on the more mundane questions in human kind, Creativity offers a paint-by-number kit rigid in its dogmatic views on current events" (Appx. 83). Not only is there nothing about the Meyers criteria that says that religions cannot have a concern with current events but religion is dogma, by definition, and what is a "rich" collection of views is certainly in the eye of the beholder. In any case, it is irrelevant to the Meyers criteria whether a religion possesses "a rich collection of views," especially to a non-

believer who does not happen to adhere to the religion in question. The natural world is quite rich enough to Creators in its own right.

E. Conclusion

For the foregoing reasons, the district court erred when it held, as a matter of law, that Creativity is not a religion, granting summary judgment to the BOP on Claims 1, 3, 8, and 9 on that basis. That is because a rational trier of fact, looking at what Creativity teaches and comparing it to the Meyers criteria for what constitutes a religion, could easily find 1) that it meets the low threshold for establishing the religious nature of a particular set of beliefs and 2) that it minimally satisfies the Meyers factors. Meyers, 95 F.3d at 1482-1484. Specifically, a reasonable trier of fact could have found that Creativity reflects: (1) ultimate ideas (that adherents should follow the Eternal Laws of Nature and base their lives upon that natural view of the world); (2) a moral system (that

allegiance to Nature's Laws requires adherents to do what is best for their own kind and eschew what is bad for their own kind, just as all other creatures do in Nature); (3) comprehensiveness (that Creativity's Sixteen Commandments, Eighteen Daily Affirmations, Twenty Point Creed and Program, Five Fundamental Beliefs, Three Basic Books and eleven supplementary books — all based upon following the Eternal Laws of Nature and covering every aspect of human existence — provide adherents a comprehensive view of the world); and (4) accoutrements of religion (as the district court itself conceded; Appx. 83-85). Since a reasonable trier of fact could have found that Creativity fulfills four out of five of the Meyers factors, it follows that a reasonable trier of fact could have easily found the Meyers factors to be "minimally satisfied" in this case. Put another way, it would not have been irrational for a trier of fact to have found that Creativity is a religion and that was Hale's only burden here. "The moving

party is entitled to summary judgment [only] where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." 19 Solid Waste Dep't Mechs. v. City of Albuquerque, 156 F.3d 1068, 1071 (10th Cir. 1998), quoted by Farley v. Stacy, 645 Fed. Appx 684, 686 (10th Cir. 2016). That is simply not the case here.

III. A reasonable trier of fact could have easily found that the taking away of Hale's correspondence with those in the outside world — on the basis of two individual pieces of mail whose contents were wholly lawful in their own right — was either not in furtherance of "a compelling government interest" or not "the least restrictive means" of furthering that interest even if it were (Appx. 85-92).

As is the case with whether Creativity is a religion or not, the issue here is not whether the district court would find against Hale were it the trier of fact, but whether any rational

trier of fact could find in Hale's favor. Thus most of the district court's analysis here is quite simply irrelevant. Hale only had to show that it would not be irrational for a trier of fact to conclude: 1) that the professed interests of the BOP here were not compelling or 2) that those interests could have been met in another way short of taking his mail away (for a year) entirely. Hence since a rational trier of fact could indeed easily conclude one or both propositions, the district court erred by ruling that the BOP was entitled to judgment as a matter of law.

On its face, a rational trier of fact could have found that the taking away of Hale's correspondence with the outside world for an entire year — on the mere basis that the BOP did not want him to be the temporary PM of his church or to encourage the NSM to engage in (lawful) mass activism in the free world for their common cause — was not "the least restrictive means" of furthering those professed government interests, which is what

RFRA actually requires for that government conduct to be lawful. See Kikumura v. Hurley, 242 F.3d 950, 962 (10th Cir. 2001). After all, the BOP officials could have simply rejected and returned to him the letters in question instead of divesting him of his mail altogether. They could have instructed him not to mail out such correspondence in the future, explaining what their concerns were thus alerting Hale as to how those concerns could be met. A rational person could thus easily find that the BOP did not employ the "least restrictive means" of dealing with the situation here. Indeed, a rational person could conclude that it chose the most restrictive means: the taking away of Hale's mail altogether.

As always, the district court would turn the law upside down: it would demand that Hale prove, without trial, that the BOP was wrong, that the BOP should not call his religion and church a "security threat group" (Appx. 90), that Blake Davis should have taken a different course of action (Appx. 91) and the

like, but these are matters for trial, not matters which are capable of resolution via a summary judgment motion. That is because a rational factfinder could have disagreed with the district court's opinion on all of these matters, to the extent that these matters are even relevant to the issues of this case in the first place. In effect, the district court has violated Hale's right to a trial in this case by "trying" the case by means of a summary judgment motion. It took this case away from the trier of fact on the basis of its own view of the facts, which is impermissible. What may be "adequate evidence" to the district court for this or that opinion which it may hold about the various facts of this case for example (Appx. 90), is not necessarily "adequate evidence" to any and every rational trier of fact. Indeed, the very notion of whether evidence is "adequate" falls within the province of the jury, not the judge (see again p. 45, supra). Quite simply, the district court failed to grasp that its

own personal opinions on these facts are irrelevant at this stage of the proceedings of the case; what matters rather is merely whether any rational trier of fact could have found the professed concerns of the BOP to be non-compelling or that the total divestiture of Hale's mail was not the least restrictive means of furthering those interests, quite simply. Everything else is a pseudo-trial improperly held within a summary judgment motion.

It is possible that the trier of fact would have ultimately come to the same conclusions as the district court. However, that is not the point. The point is the BOP's summary judgment motion had to be denied if any rational trier of fact could have found that the BOP failed to meet the two part RFRA test, and a rational trier of fact could have easily found the professed concerns of the BOP regarding Hale being the mere temporary leader of his church, or encouraging lawful activism in public, to be un-compelling on their face. Indeed, except in regards to

the BOP's clear interest in preventing actual crime, what is "compelling" is patently a jury question by its very nature as reasonable minds can differ on that. Furthermore, since the intent of RFRA is to protect religious freedom, a rational person could easily find that the BOP's preventing Hale from being the leader of his church is not a legitimate government interest of any kind, let alone a "compelling" one. After all, is that not the exercise of religion, on its face, which a rational person could think is protected by RFRA? Likewise, as stated earlier, a rational trier of fact could have easily found that the BOP did not employ the "least restrictive means" of addressing those concerns when it took away all of Hale's mail. Numerous other, less restrictive means could have been chosen instead.

For these reasons, the district court erred by granting summary judgment to the BOP on the mail restrictions claims (Claims One and Three) on the basis that it, personally, found

the restrictions to be justified (see e.g. Appx. 86-87). That was not the correct legal standard at all, and the district court's analysis is devoid entirely of the actual legal standard that is applicable to a case which is at the summary judgment stage of its proceedings: what a rational trier of fact, looking at the facts in the light most favorable to the non-moving party, could find. It would not have been irrational for a trier of fact, looking at the facts favorably to Hale, to find that the BOP does not have a compelling interest in stopping him from being the (temporary) leader of his church or urging people on the outside to exercise their lawful civil rights, nor would it have been irrational to find that the BOP did not choose the least restrictive means of furthering those interests even if they were compelling. Thus the district court erred as a matter of law. (Even under the more deferential Turner standard which the district court would have deigned to apply to Claim One had it not

chosen to treat with the standards of RFRA exclusively (Appx. 70), a rational trier of fact could have easily found that stopping a man from merely wanting to lead his church and merely urging people to exercise their civil rights in the free world are not, standing alone, "legitimate penological interests." That, after all, is what Hale is accused of trying to do here and nothing more.)

Finally, the district court erred in its refusal to consider the present ban on all of Hale's Creativity correspondence within its analysis (Appx. 96). That is because Hale's Claims One and Three were by no means limited to the 2010-2011 and 2013 mail restrictions (Id). As stated in Hale's Complaint: "This case involves continuous and ongoing violations of Reverend Hale's First Amendment... rights as well as his rights under the Religious Freedom Restoration Act by virtue of the defendants taking away and interfering with his mail rights, forbidding his participation in his church..." (Appx. 4) (emphasis added) and, as

also stated in para. 76: "With this lawsuit, Reverend Hale complains about the two particular mail bans heretofore described as well as any mail bans imposed upon him in the future by whatever authority . . . So long as he is a prisoner, he complains about the imposition of any restriction upon whom he can correspond with and any censorship of his mail on grounds that violate the First Amendment guarantees of speech, free exercise of religion, and association." (Appx. 20). He also alleged that "[t]he defendants desire that Reverend Hale convert to a different religion, one that meets their personal approval." (Appx. 19). (emphasis added for both). Not "desired."

Thus it is simply not so that the current ban on all of Hale's Creativity correspondence is not part of the instant case. Indeed, if Hale "has standing to bring the current constitutional and RFRA claims," as the district court ruled (Appx. 69) (emphasis added), it is difficult to conceive of why and how he would need to file a separate suit in order to [redacted] bring his claims against the current mail restrictions (Appx. 96) (and

see again p. 14, supra). Thus the statements of the district court at Appx. 68-69 and Appx. 96 flatly contradict one another. In addition, the current ban on all of Hale's Creativity correspondence is exhausted (see Doc. 201). The district court simply ignored this docket entry, for whatever reason, and erred accordingly. Hale did not have to "amend" his Complaint to cover the current ban on all of his Creativity correspondence because he clearly gave notice to the defendants in his Complaint, as is, that he is complaining about any infringement upon his mail rights and did so quite specifically. The gravamen of the entire complaint (Appx. 1-32) was an intent to stop the anti-Creativity persecution he has suffered and continues to suffer. Thus the district court erred by failing to consider the mail restrictions now in effect, leaving Claims One and Three effectively un-adjudicated, likewise requiring reversal.

IV. Since a reasonable trier of fact could have found that the suppression of Hale's peaceful involvement in his church is not, in itself, a "legitimate penological interest," the district court likewise erred by granting judgment to the BOP on Hale's Claim Two First Amendment retaliation claim (Appx. 92-93).

This follows from everything that has already been said in section III. above. The district court once again forgot that this was a summary judgment motion, not a trial. Thus the question was solely whether a rational trier of fact could agree with Hale. Its personal opinion on the facts is thus irrelevant. What matters instead is what a rational trier of fact, looking at the facts in the light most favorable to Hale, could find, and a rational trier of fact could find that the suppression of Hale's peaceful and lawful involvement in his church is illegitimate on its face. The district court applied the wrong legal standard on review.

V. The district court erred by dismissing Hale's Claim Four Due Process Claim (Appx. 57-59).

The district court, first of all, ignored more than forty years of precedent from the Supreme Court, as well as this Court, that a prisoner's mail is a protected liberty interest. "The interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment...". Procunier v. Martinez, 416 U.S. 396, 418 (1974). "Correspondence between a prisoner and an outsider implicates the guarantee of freedom of speech under the First Amendment and a qualified liberty interest under the Fourteenth Amendment." Whitington v. Moschetti, 423 Fed. Appx. 767, 771 (10th Cir. 2011); Florez v. Johnson, 63 Fed. Appx. 432, 437 (10th Cir. 2003)(same); Treff v. Galetka, 74 F.3d 191, 194 (10th Cir. 1996)(same). Also see Barrett v. Orman, 373 Fed. Appx. 823,

825-826 (10th Cir. 2010). (Though it is true that all of these cases involved the Fourteenth Amendment as applied to the states, there is no reason whatever why they would not also apply under the Fifth Amendment to the federal government. Indeed, if anything, the right not to be deprived of life, liberty, or property without due process of law is even more clear under the Fifth Amendment than under the Fourteenth.)

All of these Tenth Circuit cases occurred after Sandin v. Conner — which the district court cited but notably misspelled and misdated — and thus Procunier's holding that prisoner mail is a liberty interest obviously survived that decision. (Indeed, all of these cases cite Procunier, not Sandin.) Furthermore, Whitington and Barrett, for their part, also occurred after Wilkinson v. Austin — which the district court also cites — and thus Wilkinson is inapposite as well. (Neither Sandin nor Wilkinson had anything to do with the deprivation of mail.)

Thus it was unnecessary that Hale allege in his Complaint "facts from which the Court

could plausibly infer that the mail ban [sic] was more severe than the ordinary restrictions of incarceration" (Appx. 58). That is because, not only does a Complaint not require the alleging of such facts but an ultimately successful claim on the merits does not require proof of such facts either. Rather, since mail is a protected liberty interest by itself, the deprivation of mail without a prior hearing states a claim in its own right. The liberty interest of prisoners in their correspondence with the outside world is not a right which requires those facts which the district court deemed must be alleged, nor does the district court cite any authority for the proposition that it does. Indeed, none of the cases which it does cite are applicable to this case. The only case even remotely similar to this case is that of Kennedy v. Blackenship but that case involved the loss of mail for a mere thirty days while the loss of mail here was for an indefinite period of time on each occasion (though each mail ban ended up being lifted after six months, they were each imposed

for an indefinite period of time. See Doc. 41 Ex. 1 and 2). There is thus a stark difference between a mere thirty day loss and that of an indefinite period of time. Plus, Blankenship is not even a Tenth Circuit case. It was simply unnecessary, under the law of this circuit, for Hale to allege facts indicating that the mail bans were more "severe" than the ordinary restrictions of incarceration. Thus the district court erred as a matter of law.

Nor were Hale's allegations "bare and conclusory" and failed "to state sufficient facts" (Appx. 58). Indeed, reading his full allegations, from para. 1-77 and 84-86 (eighty paragraphs in all), it is difficult to conceive of what else Hale could have possibly stated to put the defendants on notice that he was alleging that they had violated his Fifth Amendment, due process rights by taking away his mail without affording him a prior hearing. What other facts could he have possibly stated? The defendants took away his mail without affording him a hearing; there is no other "fact" in that equation which

he could have alleged.

As for Hale's allegation itself that he had a Fifth Amendment right to a hearing prior to his mail being taken away from him on both occasions it is certainly "plausible" under clearly established law. "[D]ue process usually requires a pre-deprivation hearing." Coleman v. Turpen, 697 F.2d 1341, 1344 (10th Cir. 1982), citing Parratt v. Taylor, 451 U.S. 527 (1981) (emphasis added). "When protected interests are implicated, the right to some kind of prior hearing is paramount." Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972). "The right to prior notice and a hearing is central to the Constitution's command of due process." United States v. James Daniel Good Real Property, 510 U.S. 43, 53 (1993). "In almost every instance where First Amendment rights are to be restricted, [prior] notice and a hearing must be provided to the one whose rights are to be limited." Wheeler v. United States, 640 F.2d 1116, 1121 (9th Cir. 1981) ("Before placing an inmate on a restricted correspondence

list, the warden must follow certain notice and hearing procedures to accord the prisoner his due process rights." Id at 1124, note 17 (emphasis added). As this Court stated in Gonzales v. City of Castle Rock, 366 F.3d 1093, 1110-1112 (10th Cir. 2004), "if the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented... No later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred."

Thus the district court erred by dismissing Hale's Fifth Amendment due process claim pursuant to the defendants' Rule 12(b)(6) motion.

VI. The district court erred by dismissing Hale's Claim Six Equal Protection Claim (Appx. 59-61).

The district court dismissed Hale's equal

protection claim for two reasons: 1) because he did not identify other prisoners whose mail had not been harassed on account of the exercise of their religious beliefs and 2) because he did not identify other, non-Creator prisoners who were allowed to have a copy of Nature's Eternal Religion (Appx. 60-61). However, Hale has found no case anywhere which would require that such matters be alleged in a complaint, nor is the alleging of such matters in fact required. The district court therefore erred in dismissing Hale's equal protection claim.

The gravamen of an equal protection claim is that the government treated the plaintiff differently than other similarly situated individuals (Appx. 59). Hale alleged that very thing specifically and repeatedly in his Complaint: since he is an adherent of a 'non-approved' religion, he is treated worse than other prisoners at ADX, specifically the Christian, Jewish, and Muslim prisoners as well as those black Muslim prisoners who have similar views as him regarding race and racial separation (see Appx.

24-26 throughout). He also alleged, in para. 98-102, that other prisoners are allowed to write articles and sermons for their religious faiths and churches without penalty and are allowed the scriptures of those faiths (Appx. 25-26). Thus other, similarly situated prisoners were identified by Hale in accordance with the cases the district court cited (Appx. 59); it is not necessary that he identify them more than he already did, nor was it necessary that he allege that non-Creator prisoners were allowed Nature's Eternal Religion.

Indeed, the idea that a Creator prisoner would have to allege that non-Creator prisoners were allowed the Creativity Bible but he wasn't — which the district court would require for him to state an equal protection claim with respect to the book (Appx. 61) — is frankly bizarre; why exactly would adherents of other faiths be receiving it in the mail and where is it in the law that a plaintiff is required to allege that they were allowed to have the same exact book — but he wasn't — in order to state an equal

protection claim for the denial of religious scripture? Rather, the salient fact here is that members of other religions are allowed their scriptures at ADX while he, as a Creator, is not, and that states an equal protection claim on its face: the rights of same religious adherents are protected at ADX but Hale's are not. It is not necessary for a plaintiff to allege that adherents of other religions are allowed his religious book; it is only necessary that they are allowed their religious books but he is not. The BOP is not treating religious adherents at ADX equally and that is the claim.

For the foregoing reasons, therefore, the district court erred in dismissing Hale's Claim Six equal protection claim. Hale clearly gave notice to the defendants as to the contours of that claim and that was all he was required to do.

VII. The district court erred by dismissing Hale's Claim Ten, the denial of the interview with the television reporter (Appx. 52).

The district court dismissed this First Amendment claim on the basis that Hale had failed to allege facts in his Complaint inferring that he still wanted the interview (Appx. 28-29). Yet again, however, no law is cited by the district court for the demand it would make of him; indeed, if Hale did not still want the interview, he obviously would not have brought the claim in the first place, and if every claim of a lawsuit were thrown out because the plaintiff in question had failed to allege facts stating that he 'still' wanted whatever it was that had been denied to him, there would be hardly any lawsuit claims anywhere left. Plaintiffs are not under an obligation to allege in their complaints that they 'still' want whatever it [redacted] is that has been denied to them; rather, that is understood as a matter of law, and here it would have been inane for Hale to allege that he "continues to discuss the possibility of an interview with Fox News or any other media outlet" when the defendants had already denied a perfectly

valid interview with the reporter in question. Hence why Hale brought the lawsuit: to obtain the interview which had been denied to him. The defendants denied the interview and the clear inference from reading Hale's allegations is that he wants the interview. Thus the live case or controversy here is inferred (Appx. 52). Hence the district court erred by dismissing Hale's claim Ten.

VIII. The district court erred by dismissing all of Hale's claims for money damages against the individual defendants on the grounds that he had failed to sufficiently allege their personal participation and discriminatory motive in the violation of his constitutional and RFRA rights (Appx. 53-57) (claims One through Ten).

As with Hale's due process claim above at pages 72-73 but even more so, it is difficult to conceive of what else he could have alleged here in order to satisfy the heightened pleading requirements erroneously imposed by the district court.

Indeed, again and again, Hale alleged the very personal participation of each individual defendant and discriminatory motive on his or her part which the district court asserts are lacking. The Complaint is thus replete with allegations of personal participation and discriminatory motive — some of which are even cited by the district court (Appx. 55) but to no avail of Hale as always — and the Complaint in fact exceeds what he was required to do in order to assert a plausible claim under the law (see again pages 18-22, supra). Hence the district court erred as a matter of law in its dismissal of Hale's claims for money damages against the twelve individual BOP officials.

Also as usual, the district court attributes to the cases which it cites principles which are simply not there. It seems to have come up with legal principles of its own and then proceeded to find a case — any case — which could conceivably stand for the principles cited but which do not in fact stand for those principles. For example, it cites Monell v. New

York City Dep't of Social Services and Adams v. Wiley at Appx. 55 (note 14) but Monell doesn't apply at all since it dealt with the unique requirements of section 1983 liability for state actors and Adams doesn't apply at all because it dealt with the mere denial of an administrative grievance, not the specific and direct urging of others to violate a person's constitutional rights. The Court will thus read those cases in vain for any bearing on the instant case whatever.

Nor does Ashcroft v. Iqbal, cited by the district court at Appx. 54, say anything about purposeful discrimination, at least at the pages indicated. In any event, Hale did allege purposeful discrimination in his Complaint, and overwhelmingly so. The whole gravamen of his Complaint is that the defendants mistreated him — and is continuing to mistreat him — on the grounds of his religion or ideological beliefs. It is difficult to conceive of how he could have alleged that their discrimination is more "purposeful" than that. Indeed, were Hale to recite here all of the paragraphs alleging that

purposeful discrimination, he would come fairly close to reciting the entire Complaint. Hale can thus only ask that this Court read the entire Complaint for itself and ask itself, "what else could Hale, in a solitary prison cell, have alleged?" If anything, Hale went beyond what he was required to allege in the federal courts and his Complaint in fact approaches the fact pleading standards of the state courts. With that being the case, there can be little doubt but that he stated plausible claims against the individual defendants and that the dismissal of his claims for money damages against them was erroneous.

For instance, he alleged that the defendants, in mistreating him so, "desire that [he] convert to a different religion, one that meets their personal approval" (Appx. 19). He also alleged that they "wanted to impede and stymie the progress of [his] Church and Creativity religion in the conversion of others to their Creativity religious faith" (Appx. 18). What, Hale asks, could be more "purposeful discrimination" than that? The district court is wrong in the idea that these

allegations which apply to all of the individual officials are "not sufficiently detailed to state a claim for individual liability" (Appx. 56, note 15). That is because those allegations do assert purposeful discrimination and there are no other details which Hale could have possibly alleged in order to assert exactly that. For example, Hale could hardly have alleged that each defendant uttered this or that statement on BOP property evincing his or her personal animosity towards the Creativity religion and Hale for believing in it. After all, Hale is a prisoner in a solitary prison cell and thus not privy to the conversations which the defendants have amongst themselves. So, he alleged that animosity itself and that they acted based upon it and that was enough. A prisoner plaintiff cannot be expected to allege in a verified complaint facts which he cannot know; he can only allege the purposeful discrimination that he believes he suffered and continues to suffer, and Hale did that.

As for the individual acts of the defendants

— their personal participation in other words — the district court erred by seeming to consider that personal participation only in regards to the imposition of the mail bans themselves instead of the surrounding facts which also indicate the personal participation of the defendants in the purposeful discrimination alleged. For example, when Defendant Rangel moved Hale to a more restrictive part of the prison after the 2010 mail ban was imposed (Appx. 12-13), that too indicates the purposeful discrimination on her part. The same goes for Defendants Brieschke's and Redden's warnings to Hale not to become too involved with his church (Appx. 13), and Berkebile's refusal to allow Hale to be interviewed by the television reporter (Appx. 29). All of the claims support one another, as do all of the facts of those claims. It is thus all of the facts which make out the claims, not just the actual imposition of the two particular mail bans which are part of those claims, for instance. In any case, it is difficult to conceive of what more Hale was required to say along these particular lines than that each official "participated

individually and personally in the decision, "which the district court deemed to be "bare and conclusory and do not sufficiently allege personal participation" (Appx. 55) for again, Hale is in a solitary prison cell without the capacity to know every fact concerning the imposition of the bans in order to write it down in a complaint. (Rather, the federal rules require notice and Hale provided that notice.) He thus alleged every fact known to him and which could be known to him. What would the district court have him and other prisoner plaintiffs do, be perjurers who make up facts in order to surmount a Rule 12(b)(6) motion? Furthermore, the district court cites no case law whatever for the proposition that personal participation — which Hale undeniably did allege here, in numerous paragraphs, against all of the individual defendants to a greater or lesser extent depending upon what he knew — is not enough by itself and that the legal standard is the alleging of "sufficient" personal participation instead. Rather, if personal participation is alleged, the requirement of personal participation is met, quite

simply. A complainant need do no more than that and "sufficient" personal participation is not an ascertainable legal standard on its face. The facts of Ashcroft v. Iqbal, for their part, are sui generis and bear little to no relationship to the case at bar. Thus the district court's reliance upon that case was misplaced (Appx. 55).

For the foregoing reasons, the district court erred by dismissing all of Hale's claims against the individual defendants for money damages (Claims One through Ten). Since both personal participation is alleged of each defendant as well as purposeful discrimination to the best of Hale's ability considering his confined status, whatever pleading requirements along those lines were met.

IX. The district court erred by granting summary judgment to the BOP on Claim Five on mootness grounds (Appx. 94-95).

Were it the case that Nature's Eternal Religion and the other Creativity scriptures were

actually free from any threat at the hands of the BOP and its employees, Hale would agree that his Claim Five (for injunctive relief) would be moot (Appx. 23-24). However, that is not the case at all. Indeed, subsequent to Hale filing this appeal and while he was composing this brief, all of his Creativity literature was seized from his cell in direct violation of the "representations" the Defendant had made to the district court (see Doc. 186 at 134-135). (Such a seizure had also occurred on a prior occasion. See Doc. 11 at 2-3.) As a result, Hale has filed a motion for relief from judgment pursuant to Rule 60 as to Claim Five only (Doc. 229).

Regardless of however that motion is resolved, the threat to Hale's Creativity scriptures clearly exists and since there is that threat, a live case or controversy exists, and since a live case or controversy exists, the case is not "moot." The district court thus erred in granting summary judgment to the BOP on mootness grounds. There is more than "speculation" here (Appx. 94): the

BOP's employees have actually taken Hale's Creativity books, including Nature's Eternal Religion.

X. Also with respect to Nature's Eternal Religion, the district court erred by dismissing the free exercise component of Hale's Claim Five as well as his entire Claim Seven pursuant to the defendants' Rule 12(b)(6) motion (Appx. 50-51 and 56).

Finally, it is a fair inference that if a religious adherent has been denied the scripture of his religious faith, he has, on that basis alone, been substantially burdened in the exercise of his religion. After all, it is the scripture that provides the basis for the exercise. That is additionally the case here, however, since Hale alleged in his Complaint that he is an ordained Creativity minister (Appx. 6), that NER is sacred (Id), that NER caused his own conversion to Creativity (Appx. 9), and that he writes sermons for his church (Appx. 14). These facts thus plausibly infer that the lack of NER burdens his

religious exercise; indeed, if a Christian minister needs his Christian Bible in order to perform his duties, it is plausible to infer that a Creativity minister needs his Creativity Bible as well. Therefore it was not necessary that Hale allege additional, specific facts along those lines and the district court erred accordingly in its dismissal of the free exercise component of his Claim Five as well as that of his entire RFRA Claim Seven. As always, the district court read Hale's Complaint too narrowly instead of in the light most favorable to him as the law requires (see again pp. 18-22, supra).

Conclusion and Requested Relief

For the foregoing reasons, the judgment of the district court should be reversed as to Claims One through Ten in all respects (including any imposition of costs) and the case remanded for further proceedings. Claim Eleven is herewith abandoned.

Respectfully submitted,

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May 14, 2018

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Declaration of Timely Filing

I declare under penalty of perjury under the laws of the United States of America that I deposited a copy of this Brief of Plaintiff-Appellant Reverend Hale and a copy of the Separate Appendix of Plaintiff-Appellant Reverend Hale into the inmate mailing system, postage fully prepaid, addressed to the Court, on May 17, 2018.

Rev. Matt Hale

Certificate of Compliance

Since the average page of this 89 page handprinted, large print brief contains 145 words, I am able to certify that it complies with Fed. R. App. P. 32(a)(7)(B) in that it contains approximately 12,905 words (89 x 145 = 12,905). I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Trev. Matt Hale

Certificate of Service

I hereby certify that on May 17, 2018, I sent a copy of this Brief and the Separate Appendix to Susan Prose, Asst. U.S. Attorney and Counsel for the Defendants-Appellees, at 1801 California St. Suite 1600, Denver, CO 80202, the last known address, via 1st class mail.

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