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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE MARCIA S. KRIEGER
D.C. NO. 1:14-CV-00245-MSK-MJW

APPELLEES' ANSWER BRIEF

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ORAL ARGUMENT IS NOT REQUESTED

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There are no prior or related cases or appeals.

CITATION CONVENTION

This brief cites to the record on appeal by volume and page: e.g., "I:100" refers to page 100 of Volume 1. The use of the letter "l." indicates specific lines of a transcript, e.g., "V:605,**l.**9-606,**l.**10."

INTRODUCTION

Before he was sent to prison for soliciting the murder of a federal judge, Hale was the leader of a white supremacist group known as the "Creativity Movement," or "Creativity." Hale was the group's Pontifex Maximus—its "highest priest"—at the time he solicited the murder. The undisputed record shows that Hale's adherence to Creativity was the motivating force behind the crimes for which he is now serving a 40-year sentence at the United States Penitentiary—Administrative Maximum ("ADX"), the highest-security prison in the Federal Bureau of Prisons ("BOP").

The BOP has designated the Creativity Movement as a Security Threat Group because it has a long record of association with violence, both within and outside the prison. But Hale claims

that Creativity is a "religion" that confers on him religious rights, including the right to lead the group from his prison cell at the ADX. He brought this case challenging mail restrictions that had been imposed on him in 2010 and 2013, claiming that those restrictions had interfered with his alleged religious right to hold a leadership role in Creativity. He also demanded that the BOP provide him a "religious" diet consisting entirely of raw foods.

The district court correctly concluded that, based on a comprehensive review of the undisputed record, Hale's claims fail because Creativity is not a religion. Rather, it is an ideology directed toward restructuring society to achieve white dominance. According to the core texts of Creativity, that political agenda must be achieved even if persons of other races are degraded, physically removed from the United States, or "destroyed" in the process. No other court has found that Creativity is a religion for purposes of the First Amendment or the Religious Freedom Restoration Act ("RFRA").

STATEMENT OF THE ISSUES

The undisputed record shows that Creativity is a group directed toward securing societal dominance for whites. It routinely engages in violence to forward its political program of destroying and degrading Judaism and others deemed to be "mud races."

1. Did the district court correctly rule that Creativity is not a "religion" entitled to protection under the Free Exercise Clause and RFRA?

2. Did it correctly rule that BOP had legitimate penological interests for restricting Hale's mail relating to Creativity?

3. Did it correctly rule that BOP did not violate Hale's due process rights by implementing mail restrictions?

4. Did it correctly rule that Hale's claim seeking access to a Creativity book was moot once he had access to it?

5. Did it correctly dismiss Hale's remaining miscellaneous claims, including claims for monetary damages against individual BOP staff members?

STATEMENT OF THE CASE

I. Creativity's focus is white societal dominance.

A. Creativity originated in a white supremacist political party.

Creativity began as a political party based on secular maxims of white supremacy and anti-Semitism. In 1970, Ben Klassen founded the Nationalist White Party, a "movement" based on the "guiding principle" that, "[e]very law that is passed, every action that is taken will have this as its basic and only consideration: **Will it benefit the White Race?**" V:133, V:785¶46.

The "sacred determination" of the Nationalist White Party was "to drive the Jew from all vestiges of power and influence, first in America, and finally, render him harmless in, and to the whole family of White nations throughout the world." V:131. Only "members of the White Race"—which explicitly excluded "members of the Jewish race and the Black race"—could become citizens of the United States, hold public office, or "be allowed in the professions, in banking, in the judiciary, in the news media, in radio and television, and in positions of education and cultural leadership." V:131.

Klassen saw the United States as "the only nation powerful enough to dislodge the Jew from its national body." V:132.

B. Klassen relabeled his political party a "religion."

Klassen recast the anti-Semitic maxims of the Nationalist White Party as the "religion" of Creativity in 1973, when he published *Nature's Eternal Religion*. III:149-505; *see also* V:605,l.9-606,l.10. Like the guiding principle of the Nationalist White Party—benefitting the white race—the Golden Rule of Creativity is defined as "what is good for the White Race is the highest virtue; what is bad for the White Race is the ultimate sin." III:344.

Nature's Eternal Religion laid out a "total program of cutting down the Jew." III:347. Klassen set forth Sixteen Commandments of Creativity, each of which exhort followers to take practical steps to elevate the white race and degrade non-white "enemies." III:340-354. Creators must "secure the existence" of whites, "populate the world," maintain "racial purity" and "racial loyalty," make a "lasting contribution to the White Race," and "up-breed." III:340,341,345,348,351.

> **Commandment 3**: Remember that the inferior colored races are our deadly enemies, and the most dangerous of

> all is the Jewish race. It is our immediate objective to relentlessly expand the White Race, and keep shrinking our enemies.

III:340. Creators must destroy and expunge these "inferior colored races":

> We must therefore always keep in mind that: (a) the Jews are our most dangerous natural enemy; (b) the n*****s are, next to the Jews, our most deadly menace, *one with which we cannot co-exist in the same country, or even on the same continent*; (c) all colored races are hostile to the White Race and its natural enemy.
>
> Throughout Nature the laws are quite clear: in order to survive when a menace or danger threatens, that menace is attacked and destroyed. We must therefore make it *our prime goal to expunge the Jews and the n*****s from America*, in fact from all White areas.

III:344 (emphasis added).

"Nature" in *Nature's Eternal Religion* means the supremacy of the "White Race," which is "Nature's finest handiwork"; the "crowning glory of Nature"; and "Nature's finest accomplishment." III:219,249,339,345,388,483. Non-white persons—especially Jews and African Americans—are repeatedly vilified and degraded throughout *Nature's Eternal Religion*. They are "scum": "colored and

inferior," "abysmal brown," and a "mongrelized" and "half-savage mass[.]" III:207,219,344 & *passim* III.149-505.[1]

This scum must be "clear[ed] out" pursuant to a "planned systematic program" for white colonization: "**Clear out the Scum**: **The Third Step we must take** after stopping mud migration into White countries, **is to expel those coloreds already here.** We must ship the American n*****s back to Africa, the Jamaicans back to Jamaica, the Mexicans back to Mexico, the Cubans back to Cuba, the Chinese back to China, the Hindus back to India, etc. The same steps must be taken in England, Sweden, Germany, France, and all the other basically White countries." IV:109 (emphasis in original). Jews must be fought "every inch of the way until we have driven every last vestige of Jewish influence from our land and the parasites themselves from our shores." III:335,347,348. *Nature's Eternal Religion* explains that Creators are "proud to be the enemies of Christianity." III:422. Creators are directed to repeat as a "Daily

[1] There are over 200 variants of the word "n****r" and over 2000 references to Jews and "k***s" in *Nature's Eternal Religion*.

Affirmation" that Christians must be "exposed, defeated, and eliminated." V:539; V:622,l.3-16 (authenticating *Little White Book*).

For Hale, *Nature's Eternal Religion* is the truth. V:613,l.19-22. The only statement that Hale thinks Klassen got factually wrong is Klassen's assertion that Hitler died in combat. V:614,l.22-615:12, 616,l.15-19. Hale wrote that *Nature's Eternal Religion* "lays out an effective program for the solution of the ills that beset us." V:528, V:618,l.7-14. According to Hale, this program requires that adherents of Creativity "***achieve social and political power***." VI:212 (emphasis added). The program is founded on "racial socialism"— "a socialist government" in which the "White Man" "maintains control of his own destiny and protects himself from the destructive intrusion of the Jew." III:380. Hale sees Creativity as "incorporat[ing] all the great things of National Socialism within its ten(ets)." V:602,l.22-603,l.3.

Writing after the beheading of *Wall Street Journal* reporter Daniel Pearl, Hale said: "We couldn't care less about the death of this Jew who along with the rest of his parasitic race are clearly a form of

vermin far more dangerous in fact than the kind that run on four legs." VI:138.

C. Creativity's texts and maxims focus on advancing societal white supremacy.

After *Nature's Eternal Religion*, Klassen set forth the "Five Fundamental Beliefs" of Creativity, in which he reduced the "religion" of Creativity to being white and defined "Nature" as the supremacy of the "White Race":

> 1. **WE BELIEVE** that *our Race is our Religion*.
>
> 2. **WE BELIEVE** that the White Race is Nature's Finest.
>
> 3. **WE BELIEVE** that racial loyalty is the greatest of all honors, and racial treason is the worst of all crimes.
>
> 4. **WE BELIEVE** that what is good for the White Race is the highest virtue, and what is bad for the White Race is the ultimate sin.
>
> 5. **WE BELIEVE** that the one and only, true and revolutionary White Racial Religion – Creativity – is the only salvation for the White Race.

V:541.

Klassen also created a twenty-point "Creed and Program" in which he reemphasized the Golden Rule of Creativity and set forth

pragmatic steps for achieving the "prime goal" of "the survival, expansion and advancement of the White Race." V:552-555. The Creed and Program addresses practical problems and approaches for building a "WHITER AND BRIGHTER WORLD," including eugenics, environmental pollution, "farmlands and soil fertility," and the physical and mental health of whites. *Id.*

Creativity's Creed and Program focuses particularly on Jews, as perpetrators of a "worldwide . . . drive of race-mixing and proliferation of the mud races . . ." V:553. Jews, as well as "n*****s and mud races," must be gotten off the backs of whites. *Id.* White territories must be cleansed of Jews:

> *We mean to cleanse our own territories of all the Jews, n*****s and mud races, and send them back to their original habitat*. Starting first with the United States, we then want to help each White country to free their territories of the contamination of mud races, and prevent not only race-mixing, but geographic mixing of races within any of the lands now occupied by the White Race.

Id. (emphasis in original). Creators must "**boycott . . . every Jew and every aspect of Jewish influence in our society:**"

> This includes boycotting the Jews in business, in their professions, in their political activities, in education, in religion, in the news media, theater, etc. Not only will we boycott them, but **we will expose them, point them out**

> and wage propaganda warfare against them, just as they are presently doing against the White Race.

V:567 (emphasis in original). After Creators have driven Jews from political office, they will pass laws to ensure that Jews are further degraded "as did Hitler in Germany . . ." *Id.*

The Creativity Creed and Program directs that, ultimately, Judaism itself must be destroyed:

> A thorough and comprehensive study of history has convinced us that the Jews, with their odious Talmudic and Judaic religion, are the most sinister and dangerous parasites in all history, and that they now control and manipulate the finance, the propaganda, the media and the governments of the world. It is our sacred duty and unswerving goal to get these parasites off the back of the White Race, and enable the White Race to again take control of its destiny and restore it into its own capable hands. **DELENDA EST JUDAICA**!

V:553 (emphasis in original). Hale explained that "Delenda est Judaica" means that "Judaism must be destroyed." VII:43; *see also* V:563 ("When Creativity triumphs the White Race will be Jew-proof for all time.").

Creators must wage a Racial Holy War ("RAHOWA")—"to destroy our enemies . . ." V:551-552. Rahowa! is "the battle cry and

greeting of Creators; the struggle for the survival, expansion, and advancement of our White Race." V:528.

D. Creativity disavows metaphysical beliefs.

Creativity rejects any notion of a metaphysical realm that transcends the physical, observable world. Creators "disdain[] belief in the supernatural" and reject the "'spooks in the sky' swindle that the Jew foisted on the White Man, nearly 2,000 years ago." IV:119; V:543. Hale said that Creators "don't worship nature." V:623,l.17. Creators "do not regard Nature as our god," nor do they "worship Nature, or the White Race, or anything else." V:236. Hale personally finds the concept of "worship . . . demeaning," and rejects the existence of the supernatural. V:621,l.9-10, 623,l.5-17.

E. The "accoutrements" of Creativity promote white supremacy.

Hale and Klassen created rituals and ceremonies that parrot those practiced by Christians. V:520-527. But there is no evidence in the record of any adherent of Creativity actually practicing them.

Creativity has "reverends"—a position Klassen created to lend credibility to Creativity:

> WHEN THEY PICKED an alleged communist, panderer and car thief by the name of Martin Luther K**n to head

> up the "civil rights" movement of the sixties, they first of all made sure that he had the title of "Reverend."
> . . .
>
> WELL, TWO CAN PLAY THAT GAME. **We now have a religion of our own, a White Man's religion, established for the survival of the white Race, for the White Man's benefit. It is called CREATIVITY. Since religion is like fire, let us make sure we utilize ours to burn down the treacherous façade that is being used against us, and to fuel our own engines to steamroller the Jews and other mud races out of our culture.**

V:570-571 (emphasis in original). Klassen saw the tactical advantage of having Creativity "ministers" as including "prestige and recognition," "legal protection under the First Amendment," and a "legitimate claim of exemption from the tyrannical and voracious Jewish tax collectors." V:571-572. There is no evidence in the record of any Creativity "reverend" ministering to an actual congregation.

Creativity's "holidays" exalt white supremacists and celebrate political victories over non-whites. Hale himself is honored on "Matt Hale Day," on which Creators remember that Hale was "framed by" the "Jewish Occupation Government." V:826; *see also* V:785¶42 (authenticating Creativity Prison Ministries Membership Manual). July 4 is "Benjamin Smith Memorial Day." V:826. Smith, a follower

and close associate of Hale, went on a killing spree within a few days of the decision to deny Hale an Illinois law license. *United States v. Hale*, 448 F.3d 971, 975-77 (7th Cir. 2006) ("Hale recounted Smith's shooting spree, joking that Smith's 'aim got better as he went along'"). Smith targeted blacks, Asians, and Jews, killing two people and wounding nine others before killing himself. *Id.* at 975. Hale, who had named Smith "Creator of the Year," eulogized Smith as his "prodigy" and "among the finest." V:657-658¶37; V:737,739-740. On "West Victory Day," Creators remember that "the White Man defeated the inferior red Indian at the battle of Wounded Knee Creek," thus "making America unquestionably the territory of the White Man." V:827-828.

Klassen created Fourteen Principles of Salubrious Living, a set of maxims about lifestyle choices that included the admonition to eat raw foods exclusively. V:545-546. But Klassen never commanded that adherents of Creativity follow the diet, and he personally ignored it. V:547 (clarifying the "prevalent misconception that one cannot join the Creativity Movement without changing his eating habits"). Klassen drank "highballs" and wine and wrote at length

about indulging in large meals, including "a good prime rib dinner" and a "big seafood lunch at the Red Lobster Restaurant." V:785¶47; V:355,357,386,398,405,406,416,417,451,470.

II. Creativity is a BOP-designated Security Threat Group.

The BOP designated Creativity as a Security Threat Group ("STG") in 1993. V:644¶6. BOP intelligence personnel have determined that STGs pose unique security threats, based on an assessment of the groups' history, resources, and special skills. V:645¶7. The purpose of an STG designation is to protect the security and orderly running of BOP institutions, the community, and, in some cases, national security, by increasing awareness of the group and its potential dangers within and outside the prison. V:645¶¶7,9. The STG designation for Creativity is based on its documented history of violence, including Hale's own crimes and his recent "press release" in which he threatened a federal judge. V:649-670¶¶16-75.

A. Hale's crimes were connected to Creativity.

Hale led the Creativity Movement as its Pontifex Maximus for ten years, beginning in 1996. V:652¶24; V:596,l.17-597:2. During his

tenure, the group became embroiled in a trademark dispute. *Hale v. United States*, No. 1:08 CV 94, 2010 WL 2921634, at *1 (N.D. Ill. July 22, 2010), *aff'd*, 710 F.3d 711 (7th Cir. 2013). The group, then known as the "World Church of the Creator" ("WCOTC"), won the trademark case in the district court but lost on appeal. *TE-TA-MA Truth Foundation-Family of URI, Inc. v. World Church of the Creator*, 297 F.3d 662 (7th Cir. 2002). Afterwards, Hale put out a contract on the life of United States District Judge Joan Lefkow when she implemented the Seventh Circuit's order and entered a permanent injunction against the group. *Hale*, 710 F.3d at 712.

Hale solicited a cooperating witness, a WCOTC member and head of Hale's "security force," to murder Judge Lefkow. V:652-656¶¶24-32; V.712-715,717-733. On November 29, 2002, Hale wrote an email to the cooperating witness and other associates of WCOTC in which he anticipated Judge Lefkow's order, stating that it would place "our Church *in a state of war with this federal judge and any acting on authority from her kangaroo court*." V:653-654¶27 (emphasis added); V:722-723¶3. Hale invoked his "Church", his "religion," and its "holy books," and quoted Klassen's *White Man's*

Bible: "[T]he Jewish Occupational government . . . *obviously are the criminals and we can then treat them like the criminal dogs they are and take the law into our own hands*. This is the obvious, logical thing to do. We must then meet force with force and *open warfare exists*. . ." *Id.* (emphasis added); *see also White Man's Bible*, IV:330. Hale ended the email with "RAHOWA!"—a call to "Racial Holy War." V:722-723¶3.

A few days later, Hale sent another email to the cooperating witness, seeking the home addresses of Judge Lefkow and others he deemed to be "Jews" and a "traitor." V:655¶30; V:723¶4. Hale explicitly invited the cooperating witness to take "any action of any kind . . . according to the dictates of his own conscience. RAHOWA!" V:655¶30; V:723¶4.

In recorded conversations that followed, when the confidential informant discussed "exterminat[ing]" the "Jew rat," Hale told the witness to do "whatever you wanna do basically." V:655-656¶31; V:723-724¶5. Hale was convicted of soliciting a crime of violence (the murder of Judge Lefkow) in violation of 18 U.S.C. § 373, and two

counts of obstruction of justice, in violation of 18 U.S.C. § 1503. V:652¶24; V:712-715.

B. Hale and other Creativity adherents have committed racially motivated crimes of violence.

The BOP has incarcerated at least 94 known members and associates of Creativity—a group that had only 300 paid members on its rolls when Hale was arrested. V:665-666¶¶61-63; V:586,l.1-14; V:746-750; V:752. Members and associates of Creativity incarcerated in the BOP have committed violent crimes triggered by racial animus, including bombing plots aimed at Jews and African Americans, murder, lynching, hostage taking, and torture, among other crimes. V:666-667¶¶64-65; V:746-750; V:752. They have solicited the murder of a federal judge (Hale), threatened public officials, conspired to kill a government witness, and attacked a U.S. Border Patrol agent and other law enforcement officers. *Id.*

Creativity inmates have committed violence in BOP facilities, including murdering other inmates and instigating the Hitler-day riot at the United States Penitentiary in Florence, Colorado, on April 20, 2008—one of the most violent race riots in recent BOP history. V:667-668, ¶¶ 67-70; V:746-750. Hale claims to have subsequently

mentored the inmate who incited that riot, after the inmate was sent to the ADX. V:668-669¶¶71-72: V:764-765.

In addition to Benjamin Smith—a "martyr," according to Hale—other Creativity adherents and admirers of Hale have committed race-driven crimes. William White was convicted of soliciting the murder of the foreperson of Hale's criminal jury. *United States v. White*, 610 F.3d 956 (7th Cir. 2010). White posted on a website that "'everyone associated with the Matt Hale trial *has deserved assassination* for a long time.'" *Id.* at 957 (emphasis added). White identified the juror by name and telephone number on the website overthrow.com, describing the juror as "Gay anti-racist," with a "gay black lover[.]" *Id.* at 957-58. The next day, White posted the juror's place of employment. *Id.*; *see also* V:658-659¶40.

Hal Turner, a radio talk show host, was convicted of threatening to assault or murder three Seventh Circuit judges, based on a written statement that discussed Hale, Judge Lefkow, and the murders of members of Judge Lefkow's family. *United States v. Turner*, 720 F.3d 411 (2d Cir. 2013). "Apparently, the 7th U.S. Circuit court didn't get the hint after those killings [of Judge

Lefkow's family]. It appears another lesson is needed." *Id.* at 415. Turner posted addresses for the Seventh Circuit judges, with an exhortation to "[b]ehold these devils[.]" *Id.*

C. After he filed this lawsuit, Hale issued a threatening "press release" about a federal judge.

In May 2016, Hale was transferred from the ADX to the Federal Correctional Institution in Terre Haute, Indiana, where he used his email privileges to send out a "Press Release" about a United States Magistrate judge, who had previously prosecuted Hale's criminal case as an Assistant United States Attorney. V:659-662¶¶42-43,47-50. The press release used racially charged and blatantly hostile language, in which Hale called the judge a "Jewish crypto-homosexual communist who prosecuted the Reverend Matt Hale, leader of the pro-White and anti-Jewish Church of the Creator, on blatantly false charges that he had 'solicited' the murder of a federal judge in late 2002[.]" Supplemental App'x at 8. Hale further stated:

> After all, the federal government is full of criminals so why not add yet another criminal like [the federal judge] to its federal bench? I'm sure he'll do great there for the federal, Jewish tyranny that presently rules over us and help

> consign some more innocent people to a prison cell for decades like he did me.

Id. Prison officials did not release this first version of the press release, but were unsuccessful in stopping a second, nearly identical, version because of a problem with the BOP's email system. V:662¶¶49-50. The press release was sent to Hale's mother, who transmitted it to multiple white supremacist websites, where it continues to be accessible. *Id.*

BOP intelligence officials assessed Hale's communication as a credible threat to the judge, in light of Hale's leadership role and influence in the Creativity Movement and the existence of other communications in the weeks immediately prior to the dissemination of the press release. V:660-661,664¶¶43-46,56; V:781-782¶32. In a July 2016 telephone call, Hale told one follower that he blamed the outcome of his criminal trial on the closing argument of the federal judge who was the subject of the "press release." V:660¶44. The follower then called Mr. Hale his "Fuhrer" and told him he would follow Hale "to the ends of the earth! I would jump out of an airplane for you!", to which Hale replied: "[T]hat's what every leader wants to know." V:660¶45. Shortly after that telephone conversation, a second

follower informed Hale that the follower with whom Hale had spoken by telephone had stated that he was willing to "take out" a prosecutor or judge for Hale. V:661¶46.

The press release incident led to Hale's re-referral back to the ADX in April 2017. V:665¶58; V:777-778¶21.

On June 2, 2017, Hale confirmed his continuing desire to lead the Creativity Movement. V:664¶55; V:743-744. In a sworn statement, Hale stated that he rejects the recent election of a new Pontifex Maximus for the Creativity Movement, and that his personal involvement is required for such an election to have legitimacy:

> [T]hough I have been told that a new Pontifex Maximus for my church has been chosen, I am personally compelled to reject that selection since it goes against the guidelines set forth by our founder Ben Klassen in his final book, Trials, Tribulations and Triumphs.
>
> *I furthermore remain interested in the possibility of myself assuming the position of Pontifex Maximus pro tempore* so that I can successfully oversee a true, legitimate election of our next Pontifex Maximus pursuant to our teachings.

V:744,l.8-17 (emphasis added).

III. Hale's mail was limited for two six-month periods after he sought to lead Creativity and other white supremacists from the ADX.

A. June 2010: Hale's communications were restricted after he attempted to resume the role of Pontifex Maximus.

In June 2010, then-ADX Warden Blake Davis placed Hale on Restricted General Correspondence Status under 28 C.F.R. § 540.15, which limited Hale's social mail to members of his immediate family but did not restrict his telephone or visiting privileges. I:121. The restrictions were issued after Hale issued an "address" proclaiming himself Pontifex Maximus *Pro Tempore* of Creativity. V:840-841¶19; V:850-855. Hale wrote that he was "the only man uniquely capable of bringing about" the "vital unity of our Creativity family across the globe." V:841¶20; V:851. He gave specific guidance and directions for white supremacists about tactics, public relations, managing group infighting, and living in accordance with Creativity's "commandments." V:841¶20; V:853-855.

In Warden Davis's correctional judgment, Hale's proclamation posed a threat to security. V:841¶21. Warden Davis took into account that Hale had been Pontifex Maximus when he solicited the murder

of a federal judge by means of subtle communications that allowed him to distance himself from the murder; that Hale's "address" expressed his strong desire to lead a BOP-designated STG; and that affiliates of Creativity and other white supremacist groups had sought to communicate with Hale as soon as he was removed from restrictions associated with Special Administrative Measures ("SAMs") in August 2009. V:837-839, 842¶¶10-14, 24; *see also* 28 C.F.R. § 501.3 (Attorney General can limit inmate communications to prevent acts of violence and terrorism). Warden Davis's assessment also took into account that, as a federal inmate, Hale is prohibited from holding a leadership role in *any* group or organization outside the prison, particularly an STG. V:842-844¶¶25,27.

Hale received notice of his placement on Restricted General Correspondence Status and an opportunity to challenge the restrictions. He was informed that his continued correspondence with Creativity Movement members and leaders, along with other white nationalist extremists, poses a special threat to institution and the public. I:120-21. According to Hale, Warden Davis personally told him that his mail was restricted because he was not allowed to be

Pontifex Maximus. V:846¶33; V:594,l.9-595,l.6. Hale was also told that he could respond to the restrictions and could use the BOP's Administrative Remedy program to challenge the decision. I:120.

Warden Davis reviewed and removed Hale's correspondence restrictions in January 2011. V:846¶34.

B. January 2013: Hale's communications were restricted after he sought to guide another white supremacist group.

Hale was placed on Restricted General Correspondence again in January 2013, after he attempted to send directions to Jeff Schoep, the "commander" of the National Socialist Movement, one of the largest neo-Nazi groups in the United States. V:864-865¶14; V:871-873. The restrictions again limited Hale's social mail to members of his immediate family but did not restrict his telephone or visiting privileges. I:124; *see also* V:875-876.

Hale encouraged Schoep to employ "mass activism tactics" as the "only way that we can win," and to "make sure . . . the Holy Swastika is seen everywhere!" V:873. In placing Hale on Restricted General Correspondence status, ADX Warden David Berkebile relied on his knowledge of Hale and the Creativity Movement. He knew

that Creativity was an STG and that Hale was recognized as an international leader among white supremacists. V:861-862¶¶6,7. He knew that Hale had many followers outside the prison. *Id.* He knew that Hale had been convicted for soliciting the murder of a federal judge who had issued an order against the Creativity Movement. V:861-862¶6. And he knew that Hale was a sophisticated communicator who had graduated from law school. V:861¶5.

Warden Berkebile was also aware of Creativity's expressed hatred for "non-white" people. V:862-863¶8. He knew about Creativity's association with violence, and that Creativity was part of a larger white supremacist movement associated with acts of extreme violence. *Id.* And he knew that a Creativity adherent was one of the instigators of the Hitler-day riot at USP Florence on April 20, 2008. V:863¶9.

In Warden Berkebile's correctional judgment, the "street demonstrations" of white supremacists to which Hale referred in his letter to Schoep are dangerous gatherings that frequently turn violent. V:865¶15. Warden Berkebile believed that it was extremely dangerous to allow the long-time leader of Creativity to encourage

the well-recognized leader of the National Socialist Movement to engage in such activities. V:864-866¶¶14,17. Warden Berkebile viewed the correspondence as different in kind from any of Hale's prior correspondence. V:865¶16. Hale was asserting a leadership role in an STG to attempt to bridge or merge multiple white supremacist factions, to engage another national leader within white supremacy circles, and to encourage another white supremacist leader to pursue specific means to fight for their perceived common cause. V:865-866¶17. Hale's communications were designed to activate followers and sympathizers outside the prison, which posed increasing risks to the safety and security of the public. *Id.*

Hale again received notice of both the reason for his placement on Restricted General Correspondence Status and of his opportunity to be heard, both informally and through the BOP's Administrative Remedy Program. I:123-124.

Warden Berkebile reviewed Hale's mail restrictions in July 2013 and approved their removal. V:867-868¶22. Warden Berkebile wanted to give Hale yet another chance to demonstrate that he could

refrain from directing the activities of white supremacist groups outside the prison. *Id.*

IV. Hale's current restrictions allow him to communicate with whomever he chooses but not to discuss matters related to Creativity, a Security Threat Group.

Hale has not been on Restricted General Correspondence Status since the second mail restrictions were lifted in July 2013. V:782¶34. He can correspond with anyone outside the prison, including members and associates of Creativity. *Id.* But he cannot communicate about Creativity because it is a designated STG. V:778-779¶24.

The restriction barring STG-related communications applies to all ADX inmates. V:779-780,¶¶25,27. The BOP maintains this bar to protect the safety and security of the prison and the public. Intelligence about STG activities is fluid. V:780¶28. It is difficult to decipher and to completely understand the meaning of STG-related communications, to track the identities and activities of all associates of the group, and to know whether STG-related communications are benign or dangerous. *Id.* ¶¶27-28. Dangers may not be fully apparent until a plan or threat comes to fruition, such as an executed hit on a

targeted individual on a person outside the prison or a deadly fight on a prison yard. *Id.* ¶28.

V. The district court's orders.

In his amended complaint, Hale brought a total of eleven claims. I:27-52. He has since abandoned Claim 11. Opening Br. at 89.

(1) Mail restrictions (Claims 1-4): In claims 1-3, Hale alleged that the mail restrictions imposed by the BOP violated his free exercise and freedom of association rights (Claim 1), constituted illegal First Amendment retaliation (Claim 2), and violated his RFRA rights (Claim 3). I:27-44. In claim 4, Hale alleged that the imposition of these mail restrictions violated his procedural due process rights. I:44-45.

The district court granted summary judgment on Claims 1-3. VII:443-468. The district court concluded, based on the undisputed record, that Creativity is not a religious belief system, so Hale lacked any protections under the Free Exercise Clause or RFRA. VII:446-460. Hale's First Amendment claims, including his free association claim, also failed because the BOP had a legitimate penological reasons for imposing the restrictions. VII:460-468. Finally, the

district court dismissed Hale's due process claim, concluding that the mail restrictions did not implicate any protected liberty interest and, in any event, Hale received all the process that could be due.

(2) "Religious" diet (Claims 8-9): In claims 8-9, Hale alleged that his free exercise and RFRA rights were violated because the BOP failed to provide him a "religious" raw-food diet. I:49-50. The district court granted summary judgment on this claim because Creativity is not a religious belief system. VII:468.

(3) Access to *Nature's Eternal Religion* (Claims 5, 7): In claims 5 and 7, Hale alleged that the BOP denied him access to *Nature's Eternal Religion* in violation of his First Amendment and RFRA rights. I:45-46,48. The district court dismissed the free-exercise and RFRA claims, but allowed the free-speech portion to proceed. I:523, 529. On summary judgment, the court found the free-speech claim moot because Hale was allowed access to the book. VII:469-470.

(4) Equal protection (Claim 6): In claim 6, Hale alleged that, as a follower of Creativity, the BOP treated him differently than followers of other religions. I:46-48. The district court dismissed this

claim, concluding that Hale failed to sufficiently plead that he was similarly situated to any other inmate. I:532-534.

(5) Ability to participate in on-camera media interview (Claim 10): In claim 10, Hale alleged that BOP violated his First Amendment rights by refusing to allow him to participate in an on-camera media interview from the ADX. VII:50-51. The district court dismissed this claim, concluding that there was no live controversy because Hale did not allege or present any evidence that there remained any prospect of such an interview in the near future. I:525.

(6) Money damages claims: In addition to injunctive-relief claims against the BOP, Hale sought to bring money-damages claims against BOP staff members for each of the ten claims described above. I:27-51,54. The district court dismissed these claims, concluding that Hale had failed to allege that any of the individual defendants had personally committed a constitutional or RFRA violation. I:528-529,530,536.

STANDARD OF REVIEW

I. Summary judgment

This Court reviews de novo a district court's order granting summary judgment. *Lamb v. Norwood*, 895 F.3d 756, 758-59 (10th Cir. 2018). The Court construes the evidence in the light most favorable to the plaintiff and determines whether sufficient evidence exists such that a fact-finder could reasonably find for the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). In undertaking this analysis, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 381 (2007). Where a prisoner attempts to dispute the BOP's professional judgment, the Court's "inferences must accord deference to the views of prison authorities." *Beard v. Banks*, 548 U.S. 521, 529-30 (2006) (courts "must distinguish between evidence of disputed facts and disputed matters of professional judgment"). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the

requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48.

II. Motion to dismiss

This Court reviews de novo the district court's grant of a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Western Watersheds Project v. Michael*, 869 F.3d 1189, 1193 (10th Cir. 2017). In assessing a motion to dismiss, the Court must evaluate whether the alleged facts plausibly establish the legal elements of the claim plaintiff attempts to plead. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 682-83 (2009). "[W]here the well-pleaded facts do not permit the court to infer more that the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679. If the allegations "are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012); *see also Iqbal*, 556 U.S. at 678.

To survive a motion to dismiss on a constitutional claim, a prisoner must account for the "core holding" of *Turner v. Safley*, 482

U.S. 78 (1987), pleading facts that show the *absence* of a rational connection between the challenged restriction and any legitimate penological interests. *Al-Owhali v. Holder*, 687 F.3d 1236, 1239 (10th Cir. 2012). "Government conduct that would be unacceptable, even outrageous, in another setting may be acceptable, even necessary, in a prison." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Consequently, the complaint must show, through specific factual allegations, why the government's justifications do not have a rational connection to the challenged restrictions. *Id.* This generally requires a prisoner to "recite facts that might well be unnecessary in other contexts to surmount a motion to dismiss." *Al-Owhali*, 687 F.3d at 1240. It is plaintiff's "burden to demonstrate that there is no legitimate, rational basis" for the restrictions. *Id.* at 1241.

III. Construing Hale's filings

Although pro se, Hale is a law school graduate. V:532. He is thus "not a typical pro se litigant," *Libretti v. Courtney*, 633 F. App'x 698, 698 & n.1 (10th Cir. 2016). And the rationales for liberally construing pro se filings—the lack of legal training and being "unskilled in the law," *Tatten v. City & Cty. of Denver*, 730 F. App'x

620, 623 (10th Cir. 2018)—do not apply. Accordingly, this Court need not construe his papers liberally as if he were a "true" pro se litigant. *Cody v. Corrections Officer Karen Slusher*, No. 17-3764, 2018 WL 3587003, *1 (6th Cir. March 8, 2018) (unpublished).

Regardless, "the court cannot take on the responsibility of serving as [Hale's] attorney in constructing arguments and searching the record." *Garrett v. Shelby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). And Hale "must abide by this court's procedural rules." *United States v. Coleman*, 660 F. App'x 657, 658 (10th Cir. 2016) (unpublished) (citing *Ogden v. San Juan Cty.*, 32 F.3d 452, 455 (10th Cir. 1994)). This includes pointing to specific legal authority and record citations to support each of his claims. *See, e.g.*, *Bronson v. Swensen*, 500 F.3d 1099, 1105 (10th Cir. 2007) ("[C]ursory statements, without supporting analysis and case law, fail to constitute the kind of briefing that is necessary to avoid application of the forfeiture doctrine.").

SUMMARY OF ARGUMENT

The district court properly rejected each of Hale's claims against the BOP and every individual defendant. This Court should affirm the district court's orders.

I. Injunctive-relief claims.

Based on the undisputed record, the court correctly found that the BOP was entitled to summary judgment on Hale's claims about the mail restrictions and his diet, each of which hinged on the purported religiosity of Creativity (Claims 1-3, 8-9). VII:450-460,468. The record evidence overwhelmingly supports the district court's conclusion that Creativity is not a religion, but an ideology directed exclusively toward the narrow political goal of promoting whites, while segregating, denigrating, and affirmatively destroying persons of other races. Creativity satisfies none of the five criteria this Court evaluates to determine whether a belief system is religious in nature. *United States v. Meyers*, 95 F.3d 1475, 1483 (10th Cir. 1996). Hale presented no evidence to create a genuine dispute about the material facts showing that Creativity is not a religion under the *Meyers* test.

First, the undisputed record shows that Creativity's core beliefs are the same as the secular maxims of white supremacy and anti-Semitism of Klassen's political party, which he founded just a few years before he recast that political ideology in "religious" garb. Those beliefs are narrow, political, secular, and violent, and do not focus at all on ultimate ideas or existential issues. *Meyers*, 95 F.3d at 1483; VII:450-452. Second, the Creativity ideology is unquestionably not metaphysical. *Id.* Klassen, and Hale too, explicitly disavow metaphysical beliefs and do not worship anything. VII:452-453. Third, Creativity does nothing more than encourage white supremacy. The binary precept of what is good for whites is good, and what is bad for whites is bad, is not a moral or ethical system that impels its follows to look beyond their elemental self-interest. *Meyers*, 95 F.3d at 1483; VII:453-455. Fourth, Creativity's beliefs lie in the narrow band of achieving white dominance while degrading others, which the district court correctly discerned as not comprehensive under the *Meyers* test. *Id.*; VII:455-458. Finally, the feigned accoutrements of Creativity, *id.*, which parrot the rituals and customs of Christianity, do nothing more than support secular ideas

of white supremacy and anti-Semitism. Based on this undisputed record, the district court correctly concluded that Creativity is not a religion.

As for the restrictions on Hale's mail, the undisputed evidence showed that Hale's communications about Creativity, a Security Threat Group, are dangerous. The district court correctly found that, even if Creativity were a religion, the restrictions the BOP selected were the least-restrictive that could be used without compromising its compelling security interests to protect others from Hale—including a federal judge he made the subject of a press release calculated to incite his followers. *See* VII:460-468. And this Court can affirm Hale's injunctive-relief claims about the mail restrictions on the alternative ground that he failed to exhaust administrative remedies prior to filing suit. *See* III:54-56.

The district court correctly dismissed Hale's procedural-due-process claim based on imposing mail restrictions (Claim 4). I:530-532. Hale failed to allege that he was deprived of a protected liberty interest, and that he did not receive constitutionally adequate process. *Elliott v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012).

The district court correctly found that Hale's First Amendment claim about access to *Nature's Eternal Religion* (Claims 5, 7) is moot because he has the book and will be allowed to keep it at the ADX. VII:469-470. But even if the issue were not moot, access to the book could lawfully be restricted in a prison setting, where materials produced or distributed by STGs espousing racial hatred and violence may properly be restricted. *See*, *e.g.*, *Ind v. Wright*, 44 F. App'x 917, 918 (10th Cir.), *on reh'g en banc in part*, 52 F. App'x 434 (10th Cir. 2002).

The district court correctly dismissed Hale's equal protection claim (Claim 6) because he failed to allege with any specificity that he was treated differently than similarly situated individuals who were like him in all relevant respects, and whose mail or books were not restricted. I:532-534; *Coal. for Equal Rights, Inc. v. Ritter*, 517 F.3d 1195, 1199 (10th Cir. 2008). Hale's restrictions on correspondence and literature were based on safety concerns about inflammatory content inconsistent with the management of a multi-racial prison environment. He pleaded no facts plausibly suggesting that such concerns were inherent in materials associated with any

other inmate associated with any other group, including Christianity, Judaism, or Islam.

Finally, the district court correctly dismissed Hale's claim demanding an in-person media interview with a Fox News affiliate (Claim 10). The district court correctly found that the claim no longer presented a live controversy because Hale does not contend that there are ongoing discussions for such an interview. I:50-51. But this Court can also affirm on the alternative ground that the BOP has a legitimate penological interest in preventing Hale from exerting influence over a group with a history of violence, whose members wish to receive "guidance" from him. I:31¶16.

II. Damages claims against individuals.

The individual defendants are entitled to qualified immunity on each of Hale's claims, whether arising under the Constitution or RFRA.[2] The district court correctly dismissed all individual-capacity claims. I:528-529,530,532-533.

[2] The defense of qualified immunity was raised on every claim. I:74-76,89-92,100-101,106-107,110-112.

Hale failed to meet either prong of the heavy two-part qualified immunity test, which requires him to show (1) that each defendant's own conduct violated any constitutional or RFRA rights, and (2) that the right allegedly violated was clearly established at the time of the conduct. *Patel v. Hall*, 849 F.3d 970, 980 (10th Cir. 2017). He pointed to no law establishing that Creativity is a religion, nor has any court ever found that it is for First Amendment or RFRA purposes.

Further, Hale pointed to no law clearly establishing (1) that it would be unlawful to restrict his communications to prevent him from leading a Security Threat Group outside the prison, or from engaging in communications that threatened a federal judge (Claims 1-3); (2) that Hale had a protected liberty interest in avoiding mail restrictions imposed for security reasons, or that he was entitled to a hearing prior to imposing those restrictions (Claim 4); (3) that Hale was required to be fed a "religious" diet of raw food, when every court to have addressed Hale's requested diet has ruled that it need not be provided (Claims 8, 9); (4) that BOP staff must allow an inmate like Hale to have a book that spews hatred and contempt of non-whites and demands that Jews and others be destroyed or expunged from

society (Claims 5, 7); (5) that refusing to allow Hale to lead white supremacists or possess a book advocating racial hatred violated his equal-protection rights (Claim 6); and (6) that it was constitutionally impermissible to deny an in-person media interview for an inmate like Hale (Claim 10).

In the alternative, this Court should decide to refrain from taking the disfavored approach of implying a new *Bivens* remedy for Hale's constitutional claims. Each of these claims arises in a new context in which *Bivens* relief has never been awarded by the Supreme Court, and where Hale has alternative remedial processes to vindicate any rights he may have. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1864-65 (2017). And special factors counsel hesitation in implying a *Bivens* remedy here, where prison officials were attempting to manage safety and security risks and prevent harm to institutional security and public safety in every instance. Prison officials are entitled to deference when they make decisions designed to protect prison security and public safety. *See*, *e.g.*, *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (courts "must accord substantial deference to the professional judgment of prison administrators");

ARGUMENT

I. The district court correctly rejected Hale's claims challenging mail restrictions (Claims 1-4).

Hale's primary challenge, in Claims 1-4, is a claim that the BOP and the individual defendants violated his First Amendment, RFRA, and due process rights by imposing social mail restrictions related to his activities with Creativity. These claims lack merit because Creativity is not a religious belief system that qualifies for protections under the Free Exercise Clause or RFRA. In any event, the BOP had legitimate penological reasons for imposing the restrictions. And the BOP did not violate Hale's due process rights because the mail restrictions do not implicate any protected liberty interest. Hale also received any process that could be due.

A. Injunctive relief against the BOP.

1. The district court correctly ruled that Hale's free exercise and RFRA claims fail because Creativity is not a religion (Claims 1-3).

The district court granted summary judgment on Hale's free exercise and RFRA challenges to his mail restrictions because it

correctly concluded that Creativity is not a religious belief system.[3] Whether a belief system is religious in nature is analyzed using five factors outlined in *United States v. Meyers*, 95 F.3d 1475, 1483 (10th Cir. 1996):

> (1) whether the beliefs encompass "ultimate ideas";
>
> (2) whether the beliefs are "comprehensive";
>
> (3) whether the beliefs are "metaphysical";
>
> (4) whether the beliefs constitute a "moral or ethical system"; and

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[3] As detailed previously, Hale has been subject to three sets of mail restrictions. In 2010 and 2013, Hale was subject to restricted general correspondence pursuant 28 C.F.R. § 540.15, which restricted Hale from corresponding by mail with any individuals other than his immediate family. I:121,124. Those restrictions expired in January 2011 and July 2013, respectively. V:846¶34; V:867-868¶22. Hale filed this lawsuit in January 2014. I:4. At that time (and since then), Hale has only been subject to the current restriction, which prevents him from communicating about Creativity because it is an STG. V:778-779¶24.

BOP understands Hale to be seeking injunctive relief concerning his current mail restrictions. But to the extent that Hale seeks injunctive relief concerning the past general correspondence restrictions, he lacks standing to do so because he has not shown that, at the time he filed his complaint, he faced any ongoing or certainly impending future injury relating to those past, expired restrictions. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

> (5) whether the beliefs are accompanied by "accoutrements of religion."

Applying *Meyers*, the court concluded that Creativity is not a religious belief system:

> Suffice it to say that a survey of the roughly 41 principles of Creativity set forth by the parties—5 fundamental beliefs, 16 commandments, and 20 points of creed—reveals that nearly all of those principles comprise exhortations or instructions to adherents to accomplish 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.

VII:440. The district court's comprehensive analysis of the undisputed record demonstrates that Creativity is a secular ideology designed solely to elevate whites above all others in the temporal world. This Court should affirm that decision.

a. *Meyers* factor no. 1: Creativity does not address "ultimate ideas," but merely white dominance.

The "[u]ltimate ideas" factor concerns "fundamental questions about life, purpose, and death . . . . These matters may include existential matters, such as man's sense of being; teleological matters, such as man's purpose in life; and cosmological matters, such as man's place in the universe." *Meyers*, 95 F.3d at 1483; *see*

also Africa v. Pennsylvania, 662 F.2d 1025, 1032 (3d Cir. 1981). The district court concluded that "Creativity beliefs arguably touch on life and purposes, as well as existential, teleological, and cosmological matters, but do so only in service of temporal objectives—to *further dominance of the white race*." VII:451 (emphasis in original).

The undisputed record evidence about Creativity itself—which Hale scarcely references or acknowledges—overwhelmingly supports the district court's conclusion that immediate white dominance is the essence of the ideology. Virtue is defined entirely in terms of "what is good for the White Race," and sin in terms of "what is bad for the White Race." III:344; V:541. Creativity's program of "racial socialism" outlines pragmatic logistical steps for achieving white dominance. III:380.

Creativity's step-by-step program includes a boycott of "every Jew and every aspect of Jewish influence" throughout every strata of earthly society, including politics, education, religion, media, and the arts. V:567. After taking "legal measures" to eviscerate Jewish presence from society, Creativity adherents will declare Jews "as open criminals" and "treat them like the criminal dogs they are and

take the law into our own hands." IV:330; V:722-723¶3. Creativity's final political solution is to rid society entirely of Judaism itself: "DELENDA EST JUDAICA!"—"Judaism must be destroyed!" V:553.

Hale attempts to recast this plainly political and sociological program of race-based destruction by contending that "Nature" is the basis for the Creativity "belief system." Opening Br. at 68. But in Creativity, "Nature" is merely a euphemism for a secular goal: white supremacy through white survival and dominance of other races. Indeed, the "White Race" *is* the "religion" itself. V:541 ("We believe that our Race is our Religion.").

The district court accurately concluded that Hale's contentions about "Nature" reveal no "ultimate ideas" beyond an earthly concern about race:

> By limiting itself to the basic questions of white people and a single idea to answer all such questions, Creativity makes it all too clear that it is not a religion, but instead a secular, monofaceted belief in white supremacy masquerading as a religion.

VII:452 (internal quotation marks and citation omitted).

Other courts have correctly reached the same conclusion. *Conner v. Tilton*, C 07-4965, 2009 WL 4642392, at *12 (N.D. Cal.

Dec. 2, 2009) ("[T]he end that Creativity seeks is a society that has been restructured through white segregation, the attainment of which is not intertwined in any way with the contemplation of 'deep and imponderable' matters analogous to those with which traditional religions are concerned."), *aff'd*, 430 F. App'x 617 (9th Cir. 2011); *Birkes v. Mills*, No. 03:10-cv-00032, 2011 WL 5117859, at *4 (D. Ore. Sept. 28, 2011) (holding that "[t]he secular philosophical concern underlying Creativity is evinced by the fact that Creators celebrate 'Matt Hale Day' and 'Benjamin Smith Memorial Day,' and observing that "Hale gave a eulogy at Smith's memorial service, praising Smith's willingness to take action and spread Creativity's 'sacred message'"), *adopted*, 2012 WL 930243 (D. Ore. March 19, 2012); *Prentice v. Nevada Dep't of Corrs.*, No. 3:09-cv-0627, 2010 WL 4181456, at *4 (D. Nev. Oct. 19, 2010) (Creativity is "not a religion for purposes of the rights guaranteed under the First Amendment"); *Stanko v. Patton*, 568 F. Supp. 2d 1061, 1072 (D. Neb. July 24, 2008) (finding that "the 'White Man's Bible' and the organization founded by Klassen are not religious in any legally recognized sense of the

word, but are fonts and fronts for white supremacist hate mongers"), *aff'd*, 357 F. App'x 738 (8th Cir. 2009).[4]

The only "ultimate idea" underlying Creativity is a narrowly political and sociological one—unadulterated white supremacy. The first *Meyers* factor weighs against Creativity being a religion. VII:452.

b. *Meyers* factor no. 2: Creativity has no "metaphysical beliefs."

The second *Meyers* factor addresses whether the allegedly religious beliefs are metaphysical in nature—whether they "address a reality which transcends the physical and immediately apparent world." 95 F.3d at 1483. But "Hale concedes that Creativity has no metaphysical aspects and, indeed, eschews them like secular humanism." VII:453; *see also* IV:119 ("If there is one erroneous idea that set in motion all the other suicidal ideas the White Man now nurtures, it is the 'spooks in the sky' swindle that the Jew foisted on

[4] *See also United States v. Magleby*, 241 F.3d 1306, 1317-18 (10th Cir. 2001) (referring to the Church of the Creator as "a hate group").

the White Man, nearly 2,000 years ago."). The second *Meyers* factor weighs against Creativity being a religion. VII:453.

c. *Meyers* factor no. 3: Creativity's "ethics" focus on the narrow issue of furthering white supremacy.

The third *Meyers* factor evaluates whether a set of beliefs amounts to a moral or ethical system, which the district court accurately described as a system in which "thoughts and actions are considered on a largely binary spectrum in normative terms like good, evil, right, and wrong." VII:453 (discussing *Meyers*, 95 F.3d at 1483). "A moral or ethical belief structure also may create duties—duties often imposed by some higher power, force, or spirit—that require the believer to abnegate elemental self-interest." 95 F.3d at 1483. But the undisputed record here show that Creativity does the opposite: "clearly counsel[ing] pursuit of elemental self-interest." VII:455.

The whites-at-all-costs dogma of Creativity—compelling the destruction, boycotting, degrading, and removal of "colored scum"—is the very definition of pursuing elemental self-interest:

> Creativity clearly mandates the furtherance of the white race at all costs, which is the embodiment of *elemental* self-

> interest. *Elemental* self-interest concerns a human's primary, fundamental, baseline requirements and impulses, not a career choice.[5] Thousands of years of history have been rife with warring ethnic groups, characterized by people banding together and taking up arms with genetically similar people. Finding and aligning oneself with ethnic brethren is perhaps the pursuit of self-interest at its *most* elemental.

VII:455 (emphasis in original).

Creativity's "Golden Rule"—"What is good for the White Race is the highest virtue; what is bad for the White Race is the ultimate sin" (III:344)—makes clear that the ideology has no broader moral or ethical system other than white supremacy.

The undisputed record shows that the only "duties" associated with Creativity are "duties to itself . . . There is no religious connotation to Creativity's moral or ethical system; it is entirely based on the secular concern of white supremacy." VII:454. Hale's own admissions emphasize the point. As he acknowledged, Creativity counsels callous indifference to a Jewish child facing a life-or-death situation: "[M]ost Creators would probably say, Well, that person's

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[5] Hale asserts that he chose Creativity over playing the violin for a living. *See* VII:455.

Jewish; they're not my concern," and "I will do what nature commands me to do *and be indifferent*." V:624,l.23-625,l.1;626,l.5-18 (emphasis added).

The moral-ethical factor weighs against the purported religiosity of Creativity. VII:455.

d. Meyers factor no. 4: Creativity lacks a "comprehensive" belief system.

The *Meyers* test also asks whether the claimant's asserted religious beliefs are comprehensive in nature. 95 F.3d at 1483. "Religious beliefs usually provide a *telos*, an overreaching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans. In other words, religious beliefs generally are not confined to one question or a single teaching." *Id.*; *see also Africa*, 662 F.3d at 1035 (a religion "has a broader scope" than "one question or one moral teaching"). *Id.* Creativity is not comprehensive.

The whites-above-all dogma of Creativity is the very definition of a single question or teaching. The district court went to the heart of the matter by observing that the "beliefs," "commandments," and "creeds" of Creativity "can be boiled down to *all things in furtherance*

of the white race." VII:456 (emphasis in original). Creativity attempts to compensate for its dearth of a comprehensive worldview in two ways: (1) "by repetitive use of words that have a religious connotation," and (2) "proliferation of dogma." VII:457-458.

Neither ploy succeeds.

As to its use of words commonly associated with genuine religions, Creativity merely mimics the religious terminology of Judaism and Christianity, defining concepts like "faith," "salvation," and "sin" in terms of Creativity's "single-dimensional precept" of "all things in furtherance of the white race." VII:457-458 (observing that faith, salvation, and sin "are words that mean something different in Creativity than in the world's religions"); *see also Conner*, 2009 WL 4642392, at *12 (observing "that the essence of Creativity is confined to 'one question or one moral teaching' which, again, can be summed up by Creativity's Golden Rule").

Creativity texts show that the group's "proliferation of dogma" reduces to political white supremacy:

> The creeds in Creativity's Creed and Program (to say nothing of the Articles for Defense of the White Race)[6] read more like a political party's articles of belief or manifesto, or even plans of conquest, advocating for the expansion of white territory "similar to the history 'Winning of the West.'" Creativity even has a battle cry—RAHOWA!—that stands for racial holy war. Thus, Creativity's overarching concern is with personal, social, and political questions.

VII:458 ("Creativity offers a paint-by-number kit rigid in its dogmatic views on current events"). The core texts and maxims of Creativity show that Creativity focuses entirely on the overarching goal of achieving white dominance while degrading others. The district court correctly found that such an ideology is not comprehensive in its scope. *Id.*

e. *Meyers* factor no. 5: Creativity uses feigned accoutrements to support merely secular white supremacist beliefs.

The presence of certain "external signs may indicate that a particular set of beliefs is 'religious[.]'" *Meyers*, 95 F.3d at 1483. But "a belief system that is secular in nature does not become a religion

[6] The "Articles for Defense of the White Race" set forth a detailed platform of anti-government beliefs also tied to furthering white supremacy. IV:331-334.

simply by its use of religious terminology." *Conner*, 2009 WL 4642392, at *11.

As the district court recognized, Creativity has many accoutrements associated with religions. *See* VII:458-460. While the district court found that the accoutrements factor weighed in favor of Creativity being a religion, VII:460, this Court can evaluate the undisputed facts to find that its accoutrements do not reveal any religious purpose or meaning.

The undisputed record shows that Creativity's accoutrements are solely focused on the secular goal of promoting white supremacy. The "game" of naming "reverends"—who at one time swore their loyalty to Hale personally—was a means "to fuel our own engines to steamroller the Jews and other mud races out of our culture." V:570-571; *see also* V:570-572 (stating that "two can play that game" of naming "reverends" in order to gain "prestige and recognition," legal protections, and avoidance of "tyrannical and voracious Jewish tax collectors").

Creativity copied its ceremonies from Christianity, but reduced them to an entirely white supremacist meaning. V:520-527. There is

no evidence in the record of these ceremonies actually being used. Creativity holidays are political statements about white supremacy, V:825-828, including a day to honor Hale's personal "prodigy" Benjamin Smith, V:737,739-740,826; days to celebrate the defeat of "the inferior red Indian" and the running of "the Mexicans out of Texas," V:825-826; and a day to honor Hale himself. V:826. Creativity's raw-food diet is not required to join the group and was routinely ignored by its founder. V:355,357,386,398,405,406,416,417,451,470,546.

The sole purpose of Creativity's accoutrements "is to support . . . a secular belief system." *Conner*, 2009 WL 4642392, at *13 (finding that evidence about these externalities failed "to create a triable issue with respect to whether such characteristics qualify Creativity [as] a religion"). Because these accoutrements merely support a narrow, secular, political program of racial socialism, the fifth *Meyers* factor weighs against finding that Creativity is a religion.

f. Hale's arguments on appeal fail to show any genuine issue of material fact.

Hale's primary contention on appeal is that his religion-based claims should have gone to trial "if any reasonable trier of fact could have found that Creativity" satisfies the *Meyers* factors. Opening Br. at 30, 48, 56 & *passim*. But the problem for Hale is that he failed to present evidence creating a genuine dispute about the voluminous record exposing the entirely secular, white-supremacist political program of Creativity. That record—including unabridged copies of each of the group's foundational texts and Hale's own extensive writings about Creativity—was on full display. *See*, *e.g.*, III:148-505; IV:1-365; V:1-237 (full texts of Klassen's books). Hale's contention isn't really a factual one, but rather a legal one. He challenges the district court's application of the law deciding whether something is religious to the undisputed facts in the record.

Hale's assertion that "Nature" is the "ultimate idea" of Creativity, Opening Br. at 31, is unavailing because the record here

shows that nature means nothing more than white supremacy. *See*, *e.g.*, III:219,249,345,388,483; *see also Meyers*, 95 F.3d at 1483.[7]

Hale admits that Creativity has no metaphysical beliefs whatsoever, Opening Br. at 46-47 & *Meyers*, 95 F.3d at 1483, but argues that, because some courts have found that "humanism" is a

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[7] Hale argues the district court incorrectly relied on *Versatile v. Johnson*, No. 3:09CV120, 2011 WL 5119259 (E.D. Va. Oct. 27, 2011), *aff'd*, 474 F. App'x 385 (4th Cir. 2012), which he claims was "reversed" by another judge in the Eastern District of Virginia. Opening Br. at 38-39 (discussing *Versatile* and *Coward v. Robinson*, 276 F. Supp. 3d 544 (2017)). The trial judges in *Versatile* and *Coward* reached different decisions about whether a group called the Nations of Gods and Earths ("NGE") was a religion, based on the records before them. Neither decision has any bearing here. The Fourth Circuit applies a different test from *Meyers* for determining whether beliefs are religious. *See Coward*, 276 F. Supp. 3d at 565.

Moreover, the record about Creativity differs sharply from the record about NGE. NGE, unlike Creativity, does not seek to denigrate or destroy entire races or religions. *Id.* at 568 (finding that "there is insufficient evidence in this record to conclude that the NGE is a violent, racially supremacist gang"). The plaintiff in *Coward* was not "a racial supremacist[.]" *Id.* None of the NGE-specific texts "contains any discussion of violence or racial supremacy." *Id.* at 571.

NGE adherents espouse a transcendent philosophy in which they attempt to "kill" the four "devils" of "lust, greed, envy, and hate," *id.* at 552—in contrast with Creativity, whose adherents seek to destroy Judaism, "eliminate" Christians, and "cleanse [their] own territories of all the Jews, n*****s and mud races . . ." V:539,553.

religion, "so must Creativity be." Opening Br. at 47-48. His syllogism does not work. There is no evidence in the record about the beliefs of humanism, let alone any evidence indicating that humanism shares a common core purpose with Creativity to denigrate and destroy others on the basis of their race or religion.

As to the third and fourth *Meyers* factors, Hale simply claims that a "reasonable trier of fact could have found" that Creativity has a "moral or ethical system" and is "comprehensive." Opening Brief at 48, 51, 52; *Meyers*, 95 F.3d at 1483. But he again fails to point to any actual evidence in the record to show a genuine dispute to support this assertion. His characterizations, generalizations, and rhetorical questions are not evidence required to raise a dispute. *See generally* Opening Br. at 48-55. No dispute arises by recasting facts, disagreeing with what the record shows, and arguing that his views are religious.

* * *

The district court thoroughly reviewed the record taking "all factual disputes in the light most favorable to" Hale and concluded "that Creativity is not a religion for purposes of the Free Exercise

Clause of the Constitution and RFRA." VII:460. That decision is correct and should be affirmed.

2. The district court correctly concluded that the mail restrictions were supported by a compelling government interest (Claims 1-3).

The district court separately concluded, based on the undisputed record, that the mail restrictions imposed by the BOP were justified based on a compelling security interest and were the least-restrictive means to achieve that compelling interest. VII:460-466. For that reason, even if Creativity were a religion, the BOP would still be entitled to summary judgment on the RFRA claim (Claim 3). VII:466-467.

The BOP is likewise entitled to summary judgment on Hale's First Amendment claims (Claims 1-2) because, under the less-exacting *Turner* standard, there is a legitimate penological reason supporting the restrictions. See VII:467-468 (finding that "restrictions were justified by legitimate penological interests").

a. The restrictions were the least restrictive means of furthering a compelling governmental interest.

Under RFRA, even if a government action substantially burdens a person's free exercise of religion, that action must be

upheld where the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb–1(b).

The district court correctly concluded that the mail restrictions furthered a compelling security interest. VII:466-467. There is no dispute that the government has a compelling interest in maintaining security inside and outside of the prison. *See Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) ("[P]rison security is a compelling state interest" and "deference is due to institutional officials' expertise in this area."); *Kikumura v. Hurley*, 242 F.3d 950, 962 (10th Cir. 2001) (discussing 139 Cong. Rec. S14,468 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch) ("[P]rison officials clearly have a compelling interest in maintaining order, safety, security, and discipline.")); *Cole v. City of Memphis*, 839 F.3d 530, 543 (6th Cir. 2016) (recognizing protecting public safety as a compelling government interest), *cert. denied*, 137 S. Ct. 2220 (2017). Even Hale conceded that the government has a compelling interest in

preventing criminal activity. VII:460-461 (referencing Hale's statements that "the [BOP] has the right to prevent crime").

The district court further concluded that the mail restrictions were the least-restrictive measures that could be employed to facilitate the BOP's compelling interest in preventing Hale from inciting law-breaking and violence. The record supports this conclusion: a complete prohibition on communications about a dangerous STG is the least-restrictive means to avoid compromising the BOP's compelling security interests. V:780¶¶27-28.

Hale's recent actions prove that no less-restrictive means would suffice. The BOP has a compelling security interest in ensuring that Hale is never again allowed to transmit a communication like the August 2016 "press release" about a federal judge—which contained language designed to incite Hale's followers. V:660-661,664¶¶43-46,56; V:781-782¶32. The transmittal of that press release shows that BOP monitoring is far from foolproof and that a complete ban on STG-related communications is the least-restrictive means to protect others from violence—particularly, here, a federal judge.

BOP intelligence personnel can never be certain which STG-related communications are benign and which are not. V:780¶¶27-28. Intelligence about STGs is fluid, and the BOP does not have access to real-time information that can change on a daily basis. V:780¶28. The BOP may never understand the meaning of communications among a complex web of associates, and dangers may not be fully apparent until a dangerous plan comes to fruition. V:780¶¶27-28. In this imperfect world, the only option is to proactively limit all communications about the Creativity Movement. V:780-781¶29.

The record emphasizes the necessity for this rule in Hale's case. Hale's danger lies primarily in his communications. V:781¶30. His criminal conviction was based on his communications, not his personal involvement in violent conduct. *Id.* He still wants to lead the Creativity Movement. V:744,l.8-17. Because investigative personnel who monitor Hale's communications cannot be certain of the precise meaning and implications of his words, or how his communications will be interpreted or used by others, a complete prohibition on all communications about the STG is necessary to

ensure that dangerous communications are stopped. V:781¶30. The risk of a less-restrictive approach is too great: "The Bureau cannot afford to make another mistake that might result in the dissemination of a communication like the 'press release' from FCI Terre Haute." V:782¶33.

These correctional judgments receive deference under RFRA. *See Cutter*, 544 U.S. at 717 (recognizing that the compelling interest and least-restrictive means standards are applied "with due deference to the experience and expertise of prison and jail administrators"). Indeed, the Supreme Court has told courts that they "must distinguish between evidence of disputed facts and disputed matters of professional judgment." *Beard v. Banks*, 548 U.S. 521, 530 (2006). Whereas disputed facts may require a trial, disputed matter of professional judgment require deference to the BOP. Hale does not dispute any relevant facts, only the judgments that BOP made regarding the need to impose restrictions on his mail to ensure safety inside and out of the prison.

The record shows, based on undisputed facts, that the mail restrictions are justified by a compelling security interest and are the least-restrictive means to achieve that interest.

b. The restrictions relate to legitimate penological interests.

For similar reasons, the district court easily (and correctly) concluded that the BOP's actions satisfied the more deferential *Turner* standard that applies to Hale's constitutional claims. VII:467-468. In *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court established that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89; *see also Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007). Under this standard, the burden is not on the BOP to prove the validity of its actions, but on Hale to disprove it. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). Because the mail restrictions are rationally related to the BOP's security interests, they do not violate his constitutional rights.

Contrary to Hale's arguments, the district court's decision is not devoid of analysis on his free speech and free association claims. Opening Br. at 25. The *Turner* standard applies to all of his

constitutional claims. And once the district court concluded that the restrictions were reasonably related to a legitimate penological interest, VII.468, it did not need to separately address each type of First Amendment claim because they all rise and fall under the same standard.

While *Turner* identified four factors to be analyzed, the legitimate penological interest factor is the "most important." *Al-Owhali*, 687 F.3d at 1240. Indeed, "it is not simply a consideration to be weighed but rather an essential requirement" of the *Turner* standard.[8] *Id.* The same undisputed facts described above establish that Hale failed to meet his heavy burden to show that the BOP acted irrationally in prohibiting him from communicating about the business of an STG now.

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[8] The four *Turner* factors are: (1) whether "there [is] a valid, rational connection between the prison regulation and the legitimate governmental interest"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; (4) whether there are "obvious, easy alternatives" that suggest that the restriction is an "exaggerated response" to governmental concerns. *See* 482 U.S. at 89-90.

As the district court's decision recognized, the rational-basis standard is a lenient standard that defers to prison officials who must decide how to evaluate and defuse risks. *See*, *e.g.*, *Overton*, 539 U.S. at 132 (courts "must accord substantial deference to the professional judgment of prison administrators"); *Beard*, 548 U.S. at 530 (same).

Prison officials are afforded broad discretion to exercise their professional judgment to impose restrictions that they believe will advance their desired goals, even if threats may never materialize. "[I]t 'does not matter whether we agree with' the [BOP] or whether the policy 'in fact advances' the jail's legitimate interests. The only question that we must answer is whether the [BOP's] judgment was 'rational,' that is, whether [it] might reasonably have thought that the policy would advance its interests." *Sperry v. Werholtz,* 413 F. App'x 31, 40 (10th Cir. 2011); *see also Johnson v. California*, 543 U.S. 499, 513 (2005) (observing that the *Turner* test does not require proof that the policy at issue in fact advances the stated goal, but that it is sufficient that officials "might reasonably have thought" it would); *Jones v. N. Carolina Prisoners' Labor Union*, 433 U.S. 119, 132-33,

136 (1977) ("[R]esponsible prison officials must be permitted to take reasonable steps to forestall . . . a threat.").

The undisputed record shows that there is no genuine dispute that the restrictions were justified by legitimate penological interests. The BOP could rationally conclude (1) that it should restrict Hale's communications after he attempted to reassume a leadership role in an STG and after he encouraged the head of one of the largest neo-Nazi groups in the United States to engage in "mass activism" tactics; or (2) that it could prohibit him from engaging in communications about Creativity, an STG, after he was returned to the ADX for having written a press release (in which he invoked his role as an STG "leader") that was deemed to be a threat against a federal judge.[9] As Hale has proved repeatedly, his primary danger is

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[9] The undisputed record evidence concerning the remaining *Turner* factors further shows that restrictions on Hale's mail have been rationally imposed.

As to the second *Turner* factor, Hale did not show the absence of alternative means of communicating with others and receiving information. Hale can communicate with persons of his choosing, including his followers in the Creativity Movement. V:782-783¶34. They can talk about any matter unrelated to the Creativity Movement, provided those communications are not detrimental to

using communications to incite members of Creativity to engage in violence. *Cf. Gowadia v. Stearns*, 596 F. App'x 667, 673 (10th Cir. 2014) (upholding more restrictive communications limitations because there was a "reasonable relationship" between the inmate's crimes and conduct and the restrictions).

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the security, good order, or discipline of the institution, to the protection of the public, or if they might facilitate criminal activity. *Id.* Moreover, Hale faces no restrictions on several activities that could be deemed "religious," including praying, engaging in contemplation about Creativity, or reciting the "Fundamental Beliefs" or "Daily Affirmations" of Creativity. He is allowed to have Creativity books that he deems to be "sacred" and to retain those books in his cell, including *Nature's Eternal Religion* and *The White Man's Bible*, provided he does not give them to other inmates or use them in some way that might incite disruption in the prison. V:784-785¶¶39-41.

As to the third *Turner* factor, Hale did not show that allowing the communications he sought in the past, and that prompted the former mail restrictions, or that his communicating about an STG now, would not have a negative impact on the security of others.

Finally, on the fourth factor, Hale presented no proper evidence showing the existence of obvious, easy alternatives—particularly in view of the fact that, when he was allowed to engage in communications about Creativity and to hold himself out as "the leader of the pro-White and anti-Jewish Church of the Creator," Supplemental App'x at 8, he was able to issue a credible threat against a federal judge. V:660-661,664¶¶43-46,56; V:781-782¶32.

Hale has not shown any genuine dispute of fact. He simply disagrees with the considered judgment of correctional professionals, but such disagreements on matters of professional judgment are not sufficient to survive summary judgment. *Beard*, 548 U.S. at 530. The district court correctly ruled in favor of the BOP.

3. Hale's injunctive-relief claim may alternatively be dismissed for failure to exhaust his administrative remedies.

This Court may alternatively rule that Hale's injunctive-relief claim regarding his mail restrictions should be dismissed for failure to exhaust administrative remedies prior to filing suit. *Amro v. Boeing Co.*, 232 F.3d 790, 796 (10th Cir. 2000) (court of appeals may affirm the district court for any reason supported by the record); *see also* III:54-56 (raising exhaustion issue in motion for summary judgment). Under the Prison Litigation Reform Act, a prisoner must exhaust all of his available administrative remedies *before* filing a civil action. *Jones v. Bock*, 549 U.S. 199, 202 (2007); *Jernigan v. Stuchell*, 304 F.3d 1030, 1033 (10th Cir. 2002). Hale did not exhaust his challenge to his current mail restrictions—which prevent him from corresponding about Creativity because it is an STG—until

after he had filed this suit. Indeed, Hale filed a notice in the middle of this district court proceeding alerting the Court that he exhausted this claim on October 19, 2017, more than three years after he filed this lawsuit. VII:220-221. Accordingly, Hale's injunctive-relief claim concerning his current mail restrictions was not properly exhausted and should be dismissed on this alternative ground.

4. The district court correctly dismissed Hale's procedural-due-process claim (Claim 4).

In Claim 4, Hale argues that the district court erred when it dismissed his allegations that BOP violated his due process right by imposing mail restrictions in 2010 and 2013. He is incorrect.

Before reaching the merits of this claim, the Court must consider whether it has jurisdiction. Hale alleges that he was denied due process back in 2010 and 2013 when the BOP implemented general mail restrictions, preventing him from corresponding with anyone other than his immediate family. I:121,124. These restrictions expired more than five years ago, before he ever filed suit. V:782¶34; V:846¶34. To maintain his injunctive-relief claim, Hale needed to show that he faced ongoing injury or certainly impending future injury, at the time of his complaint, from the

alleged lack of process.[10] *Amnesty Int'l USA*, 568 U.S. at 408-09; *Lyons*, 461 U.S. at 102. He has shown neither. Instead, he simply wants a ruling that he was wronged in the past. *Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2011) (holding "a plaintiff must be seeking more than a retrospective opinion that he was wrongly harmed"). Because Hale faced no ongoing injury (and no immediate threat of future injury) at the time he filed suit, he lacked standing to seek injunctive relief. *See* III:51-54 (raising standing issue in motion for summary judgment).

In any event, Hale's due process claim lacks merit. To state a claim for a violation of procedural due process, a plaintiff must allege facts sufficient to establish (1) that he was deprived of a protected liberty interest, and (2) that he did not receive constitutionally adequate process. *Elliott v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012). Hale failed to do both.

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[10] Because the restrictions expired prior to filing suit, the issue is one of standing, not mootness. And none of the exceptions to mootness are applicable to standing inquiries. *Friends of the Earth, Inc. v. Laidlaw Envt'l Services (TOC), Inc.*, 528 U.S. 167, 191 (2000).

Prisoners like Hale retain only an extremely narrow set of liberty interests. *See Rezaq v. Nalley*, 677 F.3d 1001, 1011 (10th Cir. 2012). Their liberty is implicated only by restrictions or conditions that impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents in prison life." *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005). "Any lesser hardship does not rise to the level of a deprivation of liberty for one whose freedom has already been lost through conviction of a crime." *Elliott*, 675 F.3d at 1245.

This Court considers four nondispositive factors in determining what qualifies as an atypical and significant hardship:

> (1) whether the treatment relates to and furthers legitimate penological interests;
>
> (2) whether "the conditions complained of are extreme;
>
> (3) whether the treatment increases the duration of confinement; and
>
> (4) whether the treatment is of indeterminate length.

Rezaq, 677 F.3d at 1012.

In *Gowadia v. Stearns*, 596 F. App'x 667, 673-75 (10th Cir. 2014), this Court applied these factors and concluded that the imposition of Special Administrative Measures for an inmate at the ADX, which limited the inmate's communications to his immediate

family, did not implicate a liberty interest. For identical reasons, this Court should rule that the temporary mail restrictions imposed in 2010 and 2013 do not implicate a protected liberty interest.

The Court need not go further, but Hale also failed to establish that, even if he had a protected interest, he did not receive the process that was due. Once incarcerated, inmates are not entitled to full process. The Supreme Court has explained that, "[w]here the inquiry draws more on the experience of prison administrators, and where the State's interest implicates the safety of other inmates and prison personnel, the informal, nonadversary procedures set forth in *Greenholtz* [*v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979)] . . . and *Hewitt v. Helms*[, 459 U.S. 460 (1983)], . . . provide the appropriate model." *Wilkinson*, 545 U.S. at 228-29. Under those procedures, *some* notice and opportunity to be heard are constitutionally sufficient, even if significantly limited. *Hewitt*, 459 U.S. at 462, 464.

In this case, there is no dispute that Hale received *some* notice and opportunity to be heard. As the district court recognized, Hale received Notices of Restricted General Correspondence Status that were given to him when the bans were imposed. I:508n.2,531-32.

The notices informed Hale of the reasons for the restriction, gave him an opportunity to respond, and told him how to seek formal review of this decision. I:120,123. This was sufficient process.

Hale does not allege that he did not receive process, rather he argues only that he was entitled to process *before* the restriction was imposed. But neither the Tenth Circuit nor the Supreme Court has ever held that due process requires a hearing before prisoner mail is restricted.

Courts look to three factors to determine whether a procedural framework satisfies due process:

> (1) "the private interest that will be affected by the official action,"
>
> (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and
>
> (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Wilkinson, 545 U.S. at 224-25 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

The private interest here is the freedom of inmates—whose freedoms are, by definition, extremely limited—to send and receive mail from non-family members. The risk that a prisoner will be erroneously deprived of that freedom for some short period of time is not a particularly grave one. Moreover, the probable value of providing inmates with a hearing before such restrictions are imposed, as opposed to afterward, is low. At the same time, the government has a significant and legitimate interest in preventing inmates from using mail to direct criminal activities. *See, e.g.*, *Turner*, 482 U.S. at 91-93 (discussing the reasons for restrictions on inmate correspondence). There is a significant risk that inmates, like Hale, may attempt to send coded messages if they are given prior notice that their mail may be restricted. Given this serious concern, the Fifth Amendment does not require that prisoners receive a hearing *before* their mail is restricted, especially prisoners whose mail is being restricted for security reasons. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (recognizing the "necessity of quick action" when coupled with post-deprivation review satisfies the

requirements of due process). Because that was Hale's only complaint, his allegations failed to state a claim as a matter of law.

B. Damages against individual defendants.

In addition to seeking injunctive relief against the BOP, Hale sought damages against all twelve BOP staff members, in their individual capacities, on Claims 1-4 relating to the imposition of mail restrictions. The district court dismissed all of these claims. I:528-529,530,532-533.

1. The individual defendants are entitled to qualified immunity.

The district court concluded that Hale's allegations did not state a claim that any individual defendant personally violated Hale's constitutional or RFRA rights. I:529-530. Because all of the defendants are entitled to qualified immunity, this Court should affirm.[11]

[11] While the district court did not couch its analysis in terms of qualified immunity, the court, in fact, simply concluded at the first step of the qualified-immunity analysis that Hale had failed to allege that each defendant's own conduct violated Hale's statutory or constitutional rights.

Government officials are generally shielded from liability for damages when their conduct does not violate "clearly established" constitutional rights of which every reasonable officer would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This immunity recognizes the "social costs [of litigation against public officials, which] include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* at 814. Qualified immunity represents "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). It allows "ample room for mistaken judgments." *Malley v. Briggs*, 475 U.S. 335, 343 (1986).

To overcome qualified immunity, the plaintiff bears a heavy two-part burden. He must show:

> (1) that each defendant's own conduct violated a constitutional or statutory right; and
>
> (2) the right allegedly violated was clearly established at the time of the conduct.

Patel v. Hall, 849 F.3d 970, 980 (10th Cir. 2017). Unless the record "clearly demonstrate[s]" that the plaintiff has satisfied this heavy

burden, the defendants are entitled to qualified immunity. *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001).

To be clearly established, the contours of a right must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quotation marks omitted). Existing precedent must have placed the question "beyond debate." *Id.* The Supreme Court has repeatedly emphasized that the clearly established law "must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 551-52 (2017). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). Established precedent must "speak clearly to the specific circumstances."[12] *Id.* at 312.

[12] "A plaintiff may show clearly established law by pointing to either a Supreme Court or Tenth Circuit decision, or the weight of authority from other courts, existing at the time of the alleged violation." *Knopf v. Williams*, 884 F.3d 939, 944 (10th Cir. 2018) (quotation marks omitted). The plaintiff must identify the authorities that create the clearly established right. *Apodaca v. Raemisch*, 864 F.3d 1071,1076 n.3 (10th Cir. 2017).

In this case, Hale has not met either prong of the qualified-immunity analysis. For the reasons above, Hale has not established any violation of constitutional or RFRA rights. And his conclusory allegations did not state a claim that any of the defendants personally violated his rights. *See, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017); *Cox v. Glanz*, 800 F.3d 1231, 1254 (10th Cir. 2015) (holding that the focus in an individual-capacity case must always be on the *defendant* and his own conduct and motives).

Even more clearly, Hale has failed to establish that any of the defendants violated his clearly established rights. Hale points to no case establishing that Creativity is a religious belief system. Indeed, no Court—including the district court here—has ever found that Creativity is a religion for First Amendment or RFRA purposes. *See also United States v. Magleby*, 241 F.3d 1306, 1317-18 (10th Cir. 2001) (referring to Creativity's prior incarnation as "a hate group").

Likewise, Hale points to no case law clearly establishing that it was unlawful to impose mail restrictions upon him. There is no clearly established law that would place any official on clear notice that they could not take actions to limit Hale's communications to

prevent him from resuming his leadership role in a white supremacist group outside the prison. Indeed, this Court has upheld more severe communication restrictions, recognizing that such restrictions may be reasonably taken against dangerous inmates like Hale. *Gowadia*, 596 F. App'x at 673.

Finally, Hale identifies no clearly established law that he had a protected liberty interest or that a prison must provide a due process hearing prior to restricting mail for security reasons. Again, as explained earlier, numerous cases have suggested to the contrary. *Gowadia*, 596 F. App'x at 673 (no protected liberty interest); *Hudson*, 468 U.S. at 531 (recognizing the "necessity of quick action" when coupled with post-deprivation review satisfies due process).

"Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Atkinson v. City of Mountain View*, 709 F.3d 1201, 1218 (8th Cir. 2013); *Coollick v. Hughes*, 699 F.3d 211, 221 (2d Cir. 2012); *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). None of the individual defendants transgressed any bright lines in addressing Hale's dangerous communications. These defendants are each entitled to qualified immunity.

2. The Court should alternatively hold that no *Bivens* remedy is available in this context.

The Court should alternatively rule that there is no available *Bivens* damages remedy in this context for Hale's constitutional claims regarding the mail restrictions (Claims 1-2 and 4). The Supreme Court made clear in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) and *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017), that the "antecedent" question in any *Bivens* case is whether to imply a remedy. A court must engage in this analysis whenever there is any extension, however modest, of the three specific *Bivens* claims approved by the Supreme Court. *Abbasi*, 137 S. Ct. at 1859-60, 1864. Extending *Bivens* to any new context is a disfavored judicial activity. *Id.* at 1857. Here, Hale's First Amendment and due process claims relating to his mail restrictions present a new context.

a. Hale's *Bivens* claims involve a new context.

In *Abbasi*, the Supreme Court held that a court must engage in a full analysis regarding the propriety of implying a *Bivens* remedy whenever there is any extension, however modest, of the three specific *Bivens* claims approved by the Supreme Court. 137 S. Ct. at 1864 ("[E]ven a modest extension is still an extension."). The

Supreme Court's examples of new contexts show that small differences matter. A new context may be found, for example, "because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider." *Abbasi*, 137 S. Ct. at 1860.

The *Bivens* claims against the individual defendants here constitute a new context. The Supreme Court has never recognized a *Bivens* claim under the First Amendment at all. *Iqbal*, 556 U.S. at 672 ("[W]e have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment."); *see also Bush v. Lucas*, 462 U.S. 367, 390 (1983) (refusing to recognize a *Bivens* cause of action in the First Amendment context). Nor has the Supreme Court recognized a procedural due process *Bivens* claim. *See, e.g.*, *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988) (refusing to allow a

Bivens claim for alleged due process violations resulting from the denial of Social Security disability benefits).

Not only do Hale's claims involve different constitutional rights, they also differ factually from any of the three claims previously accepted by the Supreme Court: "a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; and a claim against prison officials for failure to treat an inmate's asthma." *Abbasi*, 137 S. Ct. at 1860. Whether and under what conditions a prison may impose mail restrictions on a dangerous inmate is an entirely new context.

b. The Court should refuse to devise a new *Bivens* remedy.

In determining whether to imply a new *Bivens* remedy, a reviewing court must be fully cognizant "that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Abbasi*, 137 S. Ct. at 1857. The Supreme Court's approach to implied damages remedies, such as *Bivens*, has changed significantly over the past decades. The Court now recognizes that Congress, and not the courts, should generally devise any causes of action and remedies for constitutional

violations. *Id.* at 1856 ("[I]t is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials."). Accordingly, the Supreme Court has steadfastly refused to expand *Bivens* in any manner for the past 30 years. *Id.*

The inquiry as to whether to devise a new *Bivens* remedy contains two components: first, whether there is any alternative remedial process; and second, whether any special factors counsel hesitation before authorizing a new kind of federal litigation. *Id.* at 1858-1860; *see also Wilkie v. Robbins*, 551 U.S. 537, 549-550 (2007). The Court has made clear that either step alone may prevent devising a new remedy. *Abbasi*, 137 S. Ct. at 1858-1860; *Wilkie*, 551 U.S. at 550. Therefore, a plaintiff must demonstrate *both* that there is no alternative remedial process and that there are no special factors counseling hesitation to creating a new cause of action.

Here, at the first step, there are alternative existing processes for Hale to vindicate his rights, which he has exercised through the BOP's administrative remedy program and by filing claims in federal court against the agency for injunctive relief. *Abbasi*, 137 S. Ct. at

1865 (recognizing the availability of injunctive relief or habeas relief may preclude a *Bivens* remedy because "the existence of alternative remedies usually precludes a court from authorizing a *Bivens* action"). This Court has concluded that remedies of these types preclude implying a *Bivens* remedy in *K.B. v. Perez*, 664 F. App'x 756, 759 (10th Cir. 2016) (declining to extend *Bivens* remedy to right of "familial association"). The availability of such remedies alone precludes a *Bivens* remedy in this context.

At the second step, there are several special factors counseling hesitation in creating a new *Bivens* remedy. The special factor inquiry "concentrate[s] on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1858. A "special factor" is any factor that "cause[s] a court to hesitate" before answering in the affirmative that it, rather than Congress, should devise a damages remedy. *Id.*

The first special factor that should cause the Court to hesitate is the particular context in which the mail restrictions were imposed. Hale sought to resume a leadership role in an STG and to guide the activities of other white nationalists outside the prison. At the time—

and to this day—no court had recognized Creativity as a "religion" entitled to protection under the First Amendment.

Another special factor in this context is the deference prison officials receive when they make judgments about security matters. Prison officials exercised their correctional judgment to conclude that Hale's communications posed a security threat. I:121,124. Where correctional officials have made a considered choice about how to prevent inmate communications from compromising institutional security or public safety, that security decision is entitled to deference. *Overton*, 539 U.S. at 132; *see also O'Lone v. Estate of Shabazz*, 482 U.S. at 342, 353 (1987) (refusing "to substitute our judgment on difficult and sensitive matters of institutional administration for the determinations of those charged with the formidable task of running a prison."); *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

"[T]he decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide," including "the burdens on Government employees sued personally, as well as the projected costs and consequences to the Government

itself." *Abbasi*, 137 S. Ct. at 1858. Here, the risk of interfering with the correctional judgment of prison officials in handling these types of sensitive security decisions weighs strongly against a new remedy. There are "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" in this context, *id.* at 1865.

Another special factor that "counsels hesitation here" is the recognition in A*bbasi* that the enactment of the Prison Litigation Reform Act of 1995 may "suggest[] that Congress chose not to extend the *Carlson* damages remedy [for deliberate indifference to serious medical needs] to cases involving other types of mistreatment." *Id.* at 1865. In other words, Congress' decision not to provide a remedy for circumstances outside of constitutionally deficient medical care, "when it had specific occasion to consider the matter," counsels hesitation to courts devising new remedies instead of Congress. *Id.* Congress, rather than the judiciary, is in better position to determine the appropriate remedies for prisoners against BOP officials, and to weigh the benefits and the costs of such claims.

This special factor applies with added force here, where there is no allegation of physical injury. Congress has expressly considered

and determined that "[n]o Federal civil action may be brought by a prisoner . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). This provision demonstrates Congress' clear desire to avoid damages remedies for prisoners in the absence of physical injury and constitutes a special factor weighing heavily against a court stepping in to create a *Bivens* remedy in these circumstances—especially where the Supreme Court has repeatedly refused to extend *Bivens* liability to First Amendment claims. Following *Abbasi*, courts have consistently refused to imply a *Bivens* remedy for alleged violation of the an inmate's religious rights under the First Amendment. *See*, *e.g.*, *Barker v. Conroy*, 282 F. Supp. 3d 346, 367-68 (D.D.C. 2017) (finding new context and declining to allow *Bivens* remedy for First and Fifth Amendment claims when congressional chaplain declined to invite an atheist to give a secular invocation to the House of Representatives), *appeal dismissed*, 2018 WL 3159047 (D.C. Cir. June 13, 2018); *Crowder v. Jones*, No. 2:14-cv-00202, 2017 WL 5889717, at **2-3 (S.D. Ind. Nov. 29, 2017) (finding a new

context and declining to allow a First Amendment *Bivens* remedy for an inmate who alleged he was not given kosher meals).

Because there are alternative remedial processes and special factors counseling hesitation, the Court should refuse to expand *Bivens* to allow Hale to bring his damages claims against the individual defendants relating to the mail restrictions. Thus, the lack of a *Bivens* remedy provides an alternative ground for affirmance on Claims 1-2 and 4.[13]

II. The district court correctly rejected Hale's claims based on the denial of his "religious diet" request (Claims 8-9).

Hale argues in Claims 8 and 9 that his free exercise and RFRA rights were violated by the BOP and Warden Berkebile because he did not receive a raw-food "religious diet." I:49-50. As the district court concluded, this claim fails because Creativity is not a religion

[13] The individual defendants additionally raised the argument that there is no damages remedy available for RFRA claims. The district court did not address the issue, and instead simply found that Hale failed to state a claim. I:530. This Court need not reach the issue because each of the individual defendants is entitled to qualified immunity, and the district court's order should be affirmed. But if the Court deems it necessary to reach this issue, this Court should remand to the district court to address it in the first instance.

and BOP was under no obligation to accommodate Hale's dietary requests. VII:468.

A. Injunctive relief against the BOP.

Because Creativity is not a religion, as explained above, Hale has no free exercise or RFRA claim. As a result, the district court correctly granted summary judgment on Hale's "religious diet" claims. VII:468.[14]

B. Damages against individual defendants.

Because Warden Berkebile is entitled to qualified immunity, Hale's damages claim against the warden was rightly dismissed. The holding that Creativity is not a religion defeats any free exercise or RFRA claims. But without doubt, there is no clearly established law that Creativity is a religion or that a prison must provide an adherent with a raw food diet.

All of the courts to address this question have concluded that Creativity is not a religion. And the courts that have addressed

[14] The BOP also demonstrated below that it has compelling government interests that support denying Hale's request for a diet of raw fruits, vegetables, nuts, or seeds. *See generally* VI:2-81, 83-91, 93-127.

Hale's requested diet have ruled that it need not be provided. *Conner*, 2009 WL 4642392, at *15; *Stanko*, 568 F. Supp. 2d at 1072. Without clearly established law placing Warden Berkebile on clear notice that he had to ensure Hale received his requested diet, the damages claims fail.

Further, this court should not extend *Bivens* to this new context. As noted above, the Supreme Court has never extended *Bivens* to First Amendment claims and Hale has alternative remedial processes available, including the injunctive relief that he is pursuing in this action. Congress should decide whether to afford a damages remedy to prisoners based on the diet they receive.

III. The district court correctly dismissed claims relating to access to *Nature's Eternal Religion* (Claims 5,7).

In Claims 5 and 7, Hale alleges that the BOP and Defendants Redden and Warden Berkebile violated his First Amendment and RFRA rights by denying access to the book *Nature's Eternal Religion*, which he claims is the "scripture" of Creativity. I:45,48. These claims are without merit.

A. Injunctive relief against BOP.

The district court correctly ruled that Hale's claim became moot when BOP provided the book to him. VII:469-470. Hale has been allowed to keep this book in his ADX cell since April 1, 2014, more than four years ago. V:608,l.23-609,l.5. An ADX official has stated under oath that Hale will be allowed to possess the book while at the ADX, provided he does not give it to other inmates or use it in a way that may incite disruption. V:784¶¶39-40. There is no live case or controversy.

And the district court's "adoption of that representation . . . [will] likely prevent the BOP from taking the position in the future that *Nature's Eternal Religion* could be declared contraband at ADX." VII:469. So there is no reasonable expectation that the same complaining party will be subject to the same action again. *Ghailani v. Sessions*, 859 F.3d 1295, 1301 (10th Cir. 2017); *Brown v. Buhman*, 822 F.3d 1151, 1166-67 (10th Cir. 2016).

In response, Hale claims that "while he was composing this brief" all of his Creativity material was seized, Opening Br. at 87. This self-serving allegation is both improper and irrelevant. His

Motion for Relief from Judgment (Doc. 229), filed weeks after the Notice of Appeal, is not properly before this Court. Federal Rule of Appellate Procedure 10(e) "allows a party to supplement the record on appeal, but does not grant a license to build a new record." *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1240 (10th Cir. 2017) (internal quotations and citation omitted). Rule 10(e) "authorizes modification of the record only to the extent it is necessary to 'truly disclose what occurred in the district court." *Id.* (internal quotations and citation omitted).

This case exemplifies why this must be so. If Hale's unsubstantiated claims in his Motion for Relief From Judgment are to be credited, then the BOP's response (Doc. 233), explaining that the deprivation was limited to seven days while a specific security concern was investigated, should be as well. Inasmuch as the motion remains pending, this Court should resist Hale's invitation to anticipate the district court's ruling. *Cf. Swaim v. Moltan Co.*, 73 F.3d 711, 719 (7th Cir. 1996).

Even if the issue were not moot, the BOP could lawfully restrict Hale's access to the book, if it chose.[15] Material produced or distributed by STGs promoting white supremacy principles may properly be restricted. *Ind*, 44 F. App'x at 918. Prison restrictions on such materials, even if there is a religious component, are analyzed for reasonableness under the deferential *Turner* standards. *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989). "[T]o allow plaintiffs to receive and possess materials that espouse hatred or contempt of others would negatively impact other prisoners, guards who must prevent any resulting animosity, and prison resources aimed at preventing violence." *Ind*, 44 F. App'x at 920.

Nature's Eternal Religion espouses hatred or contempt of others throughout the manuscript. *Supra* pp. 5-8. It describes a social program "to expunge the Jews and the n*****s" and demands contempt of anyone other than the white race. *Id.* There can be no doubt that BOP officials have a rational basis to believe that

[15] Again, the BOP has no intention of removing Hale's access to the book while he remains housed at the ADX.

possession of this book may negatively affect prison security and could cause animosity and violence within the prison. So even if the claim were not moot, Hale would still lose on the merits.[16]

B. Damages against individual defendants.

Hale's damages claim against Defendants Redden and Warden Berkebile were rightly dismissed. Both defendants are entitled to qualified immunity. There is certainly no clearly established law that *required* any BOP staff member to provide Hale with access to this book. Hale can point to no case requiring that he be given this book that spews hatred and contempt of non-whites and demands that Jews and n*****s be expunged from society. And this Court should refuse to devise a new *Bivens* remedy for this new context.

Hale's complaint also fails to allege any facts that these particular defendants personally violated any of Hale's rights. I:528-529.

[16] Hale's RFRA claim would likewise fail because Creativity is not a religion. *Supra* pp. 44-57.

IV. The district court correctly rejected Hale's equal protection claim (Claim 6).

Hale alleged in Claim 6 that his Fifth Amendment equal protection rights were violated by BOP and all twelve individual defendants because he was not allowed to practice Creativity but other inmates were allowed to practice their faith. I:46-48. He alleged in conclusory manner that he would not have had any mail restrictions imposed or been denied a copy of *Nature's Eternal Religion*, if he were "Christian, Muslim, or Jew." I:47. In contrast, he complained that black prisoners who are members of the Nation of Islam can watch religious programs on the ADX television system. I:46-47.

A. Injunctive relief against BOP.

The district court correctly dismissed Hale's equal protection claim because he failed to allege with any specificity that he was treated differently than other similarly situated individuals. I:533-534. On appeal, Hale argues that the law does not require him to specifically identify any prisoners not subject to similar mail or literature restrictions. Opening Br. at 76. But this Court has affirmed that "to assert a viable equal protection claim, plaintiffs

must first make a threshold showing that they were treated differently from others who were similarly situated to them." *Brown v. Montoya*, 662 F.3d 1152, 1172-73 (10th Cir. 2011) (quotation omitted). And in this respect, it is not enough to simply assert, in a conclusory fashion, that there are "others" who received better treatment. Rather, Hale must provide "specific allegations about the personal circumstances of the other prisoners to demonstrate they were similarly situated[.]" *Payne v. Maye*, 525 F. App'x 854, 857 (10th Cir. 2013); *see also Deberry v. Davis*, 460 F. App'x 796, 801 (10th Cir. 2012); *Rocha v. Zavaras*, 443 F. App'x 316, 319 (10th Cir. 2011).

Individuals are "similarly situated" only if they are alike "in all relevant respects." *Coal. for Equal Rights, Inc. v. Ritter*, 517 F.3d 1195, 1199 (10th Cir. 2008) (quotation marks omitted). And even if there is differing treatment of "similarly situated" prisoners, Hale has the burden of demonstrating that "the difference in treatment was not reasonably related to legitimate penological interests." *Fogle v. Pierson*, 435 F.3d 1252, 1261 (10th Cir. 2006) (quotation omitted).

Here, Hale was not "treated unequally by the defendants because of his religious beliefs and Church affiliation." I:48. Rather, the restrictions regarding *Nature's Eternal Religion* and his correspondence flow from safety concerns not inherent in comparable Christian, Jewish, and Muslim materials. In particular, Hale's book contains racial inflammatory content inconsistent with the management of a multi-racial prison environment. His writings have implicated control or guidance issues relating to a validly-designated STG. *See Rojas v. Heimgartner*, 604 F. App'x 692, 695 (10th Cir. 2015) ("Although the regulations permit black kufi caps or tams and disallow bandanas, the former types of headwear do not present the same security concerns as bandanas, justifying differential treatment in light of legitimate penological interests.") (citing *Benjamin v. Coughlin*, 905 F.2d 571, 579 (2d Cir. 1990)).

Any difference in Hale's treatment relates to the difference in the *materials* in question, not to the difference in Hale's particular *beliefs*. The differential treatment has everything to do with legitimate penological interests regarding safety. *Fogle*, 435 F.3d at 1261; *see also Johnson v. Stewart*, No. 08-1521, 2010 WL 8738105, *2

(6th Cir. May 5, 2010) (unpublished) (ban on written materials related to group designated as STG owing to racial supremacist views and links to violence "is reasonably related to the legitimate penological goal of preventing violence and maintaining security").

B. Damages against individual defendants.

Hale's claim against the individual defendants likewise fails. Each defendant is entitled to qualified immunity not only because Hale has failed to state a claim but also because there is no clearly established law holding that Creativity is a religion or that the literature and correspondence restrictions improperly impinge on any constitutionally protected interest. Hale identifies no case law in his argument, let alone precedent that clearly established that any of the defendants impinged his Fifth Amendment rights. And the Court should again refuse to devise a new *Bivens* remedy in this context.

V. The district court correctly dismissed Hale's claim related to the denial of a media interview (Claim 10).

In Claim 10, Hale alleges that his First Amendment rights were violated by BOP and Warden Berkebile based on the denial in May 2013 of a request for an in-person, on-camera interview with a Fox News reporter in Chicago. I:50-51. Like his others claims, this

one lacks merit. I:83-85 (raising argument that Hale failed to state a claim).

A. Injunctive relief against BOP.

The district court dismissed the injunctive relief claim on the grounds that there remained no live case or controversy. I:525. The complaint does not allege, and Hale does not contend, that he remains in any discussions with Fox News (or any other media outlet) to engage in an interview. *O'Shea* v. *Littleton,* 414 U. S. 488, 496-497 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."). Hale has put forward no allegation or evidence to suggest that any interview remains a realistic possibility in the immediate future. *Lyons*, 461 U.S. at 102 (holding that plaintiff must show he is "immediately in danger of sustaining some direct injury as the result of the challenged official conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical"); *Amnesty Int'l USA*, 568 U.S. at 408-09 (requiring "certainly impending" injury). As a result, the past denial of an interview does

not provide jurisdiction for a forward-looking, injunctive-relief claim. Hale's mere wish to engage in an in-person interview at some unknown date with some unidentified media outlet is not sufficient to present a live controversy. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 & n. 2 (1992).

In any event, there is a clear alternative ground for affirmance. Hale's allegations do not plausibly show the absence of a legitimate penological interest in restricting his ability to communicate to his followers and the public at large through the mass media. BOP does not violate the First Amendment when it makes such decisions. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (finding no First Amendment violation in BOP prohibition on face-to-face interviews between reporters and inmates). A no in-person interview policy *is* reasonably related to legitimate security interests. *Id.*; *see also Hammer v. Ashcroft*, 570 F.3d 798, 801 (7th Cir. 2009) (discussing *Washington Post* and *Pell v. Procunier*, 417 U.S. 817 (1974), in holding that BOP officials who enforced a policy that prevented prisoners from giving face-to-face interviews to the media did not violate the First Amendment or Equal Protection Clause).

A legitimate penological interest exists in preventing Hale from exerting influence over the actions of a demonstrably violent group of followers who, according to Hale, wish to receive his "guidance" now. I:31¶16 (alleging that his correspondents "look to him for guidance as their minister"). Prison officials do not act irrationally under *Turner* by taking steps to prevent Hale from obtaining the celebrity status he obviously seeks among those who have "sworn allegiance" to him and from inciting others to follow his violent path.[17] *See Hammer*, 570 F.3d at 803-04 (recognizing that some crimes are "potentially attractive to imitators; the most notorious criminals can be trend-setters," and holding that "this is a good basis to curtail press

[17] In the prison context, it is well established that officials can take preventive actions like prohibiting television press interviews without being able to definitively confirm that any actual harm would have occurred. *See*, *e.g.*, *Florence v. Bd. of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 334 (2012) (rejecting the argument that detainees should be exempt from invasive searches absent a "particular reason to suspect them"); *Jones*, 433 U.S. at 133 n.9 (holding that for a district court to require "a demonstrable showing that [a prison union] was in fact harmful" would be "inconsistent with the deference federal courts should pay to the informed discretion of prison officials"); *Beard*, 548 U.S. at 535 (upholding a restriction even absent any showing that it had "proven effective" or "had any basis in real human psychology").

access"). Accordingly, Hale fails to state a claim that his First Amendment rights were violated.

B. Damages against Warden Berkebile.

Any claim for damages against Warden Berkebile was rightly dismissed. Warden Berkebile is entitled to qualified immunity. As explained above, the limited allegations fail to state a First Amendment claim and fail to rebut the government's legitimate penological interest in denying an in-person interview. Hale has again failed to identify any clearly established violation. To the contrary, Supreme Court precedent holds that it *is* constitutionally permissible to deny in-person interviews for prisoners like Hale. *Saxbe*, 417 U.S. at 850.

And this Court should refuse to devise a new *Bivens* remedy for the denial of an in-person media interview. Congress is the proper branch for deciding whether a damages remedy is appropriate for prisoners denied access to on-camera media interviews. There are significant reasons to believe that Congress would find such a cause of action unnecessary and unwarranted.

CONCLUSION

This Court should affirm the district court's decisions below.

DATED this 17th day of August, 2018.

Respectfully submitted,

ROBERT C. TROYER
United States Attorney

/s/ Susan Prose
SUSAN PROSE
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that the attached brief contains 19,431 words.

DATED: August 17, 2018

/s/ Susan Prose
SUSAN PROSE
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that on August 17, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit, using the appellate CM/ECF system.

I further certify that I directed that personnel in the U.S. Attorney's office send the foregoing by U.S. mail, postage prepaid, to:

Matthew Hale
Reg. No. 15177-424
ADX – Florence
P.O. Box 8500
Florence, CO 81226

/s/ Amanda Bell
AMANDA BELL
U.S. Attorney's Office

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing

(1) all required privacy redactions have been made;

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Amanda Bell
AMANDA BELL
U.S. Attorney's Office

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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE MARCIA S. KRIEGER
D.C. NO. 1:14-CV-00245-MSK-MJW

APPELLEES' SUPPLEMENTAL APPENDIX
VOLUME 1

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Mr. Hale is a federal inmate who is incarcerated at the United States Penitentiary—Administrative Maximum, and therefore was not consulted concerning his position on this Supplemental Appendix.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-cv-00245-MSK-MJW

REVEREND MATT HALE,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,

Defendant.

REPLY IN SUPPORT OF PLAINTIFF'S OBJECTIONS TO MINUTE ORDER OF MAGISTRATE JUDGE WATANABE

Now comes Plaintiff Reverend Matt Hale, replying to Defendant's response to his objections (Doc. 145) as follows:

Reverend Hale first notes that even though the Defendant's response was filed on March 7, 2017, he was only served with a copy of it on March 20, 2017. Therefore, since this reply is being mailed to the Court and Defendant within 14 days of that latter date, it is timely under the rules. Why the Defendant's response was given to him so tardily by the Defendant's employees, Hale does not know.

I. This Court does have the legal power to release Hale from the SHU.

The Defendant sidesteps, naturally enough, the core issue presented by Hale's motion for an order from this Court compelling the Defendant to release him from the SHU (Special Housing Unit) at FCI-Terre Haute: whether the Court has the legal power to do so under Rule 26(c) of the Federal Rules of Civil Procedure. The answer to that question is "yes" under the Rule's fairly unambiguous terms:

"A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending...The court may, for good cause, issue an order to protect a party or person from annoyance, embarassment, oppression, or undue burden or expense...".

Here, Hale is a party from whom discovery is sought and he is plainly being

annoyed and oppressed by his interminable SHU confinement. Furthermore, Fed. R. Civ. P. 72(a) does not say that a magistrate's decision regarding the discovery process may only be set aside when it is "clearly erroneous or contrary to law" as the Defendant suggests (Doc. 145 at 1). Rather, the Court has the power to decide for itself whether Hale is in fact being annoyed and oppressed by the Defendant's actions and he "clearly" is. Thus the Defendant is wrong when it claims that "[t]here is no legal justfication" for the order which Hale seeks (Id). Rather, that legal justification is provided by rule as well as the facts of this case, which Hale will elaborate upon as follows:

II. The Defendant's shifting explanations as to why it continues to keep Hale in the SHU--a situation whose duration is now at seven months and counting--indicates that Hale is indeed being harassed for his having brought this suit and in order to hinder his prosecution of it.

Hale has alleged these improper motives on the part of the Defendant all along (see e.g. Doc. 95) but in any case, the long and the short of it is that the Defendant always seems to have an excuse for keeping Hale in the SHU. First he needed to be in the SHU pending an "investigation" (Doc. 101-1 at para. 11). Then he had to remain in the SHU because he was to be "reclassified" (Doc. 101-1 at para. 14). Then he had to remain in the SHU because he was no longer "appropriate for placement in general population at this time" (Doc. 108-1 at para. 3). Now, lo and behold, he has to remain in the SHU because he has the audacity to appeal the Defendant's decision to transfer him back to ADX (Doc. 145 at 3-4), a decision which is based upon outright fraud as shown below. In short, unlike the case with other prisoners who don't have a lawsuit going on, Hale just has to remain in the SHU no matter what, indefinitely, for whatever reason the Defendant sees fit to con this Court into believing at the moment. While defense counsel's excitement is palpable about the supposed "recent development" that Hale has now (drum roll, please!) "been referred for placement in another prison" (Doc. 145 at 3), that does not change his predic-

ament for the better one iota. In fact, it rather makes it worse, in a sense, for now the Defendant will use--and is indeed using right now--the fact that he is appealing his transfer back to ADX as yet another excuse to keep him in the SHU, doing so for the several more months which that appeal process will no doubt (conveniently) take. The two constant facts, however, are 1) that Hale has a pending lawsuit against the Defendant and 2) that the Defendant refuses, no matter what, to let him go from its Nature-forsaken SHU at Terre Haute so that he can prosecute it (see more on this below). In light of the Defendant's shifting explanations for its actions--with all roads always quaintly leading to Hale's continued SHU confinement month after month after month no matter what--it does not take a rocket scientist to realize that the Defendant is, and has been, engaged in a pattern of deception before this Court in order to penalize and hinder Hale in his prosecution of this lawsuit, and that this is exactly the sort of misconduct which the Court has the power to put a halt to under its Rule 26(c) protective power. Seven months of Hale's mistreatment at the hands of these vengeful lunatics is enough. The Defendant's own conduct has made Hale's case for him that his SHU confinement is for the purpose of harassing and oppressing his prosecution of this lawsuit, and the remedy for that falls squarely under Rule 26(c).

III. Since Hale is supposedly "now" being kept in the SHU because he is appealing the ADX transfer decision, this Court likewise should release him from the SHU at this juncture pursuant to Rule 26(c) since that transfer decision is in fact based upon a clear and provable fraud.

Find attached two documents which will demonstrate the fraudulent basis for the transfer clearly enough: 1) the original version of the press release which Reverend Hale had written and which the prison actually rejected (Exhibit A) and 2) the report of the Hearing Administrator upon which it was decided to send Hale back to ADX (Exhibit B).

As the Court can see for itself on pages 2-3 of Exhibit B, the entire basis for the decision to send Hale back to ADX is his use of the word "comeuppance" in the press release. It is his use of that word which supposedly rendered the press release "a dangerous and threatening communication" (Doc. 145 at 2). The Hearing Administrator quoted Hale as follows:

"Well, in any case, it is my hope the [sic] Weisman will one day receive his comeuppance. David Weisman has no business ever wearing a robe of justice and it is a true indictment of the legal system of this country that it would [sic] such a scoundrel as him with a robe."

The problem, however, is that the Hearing Administrator deleted the very sentence from the press release which defined Hale's usage of the word "comeuppance," a sentence which made clear and in no uncertain terms that the "comeuppance" was to be LAWFUL. An examination of the fourth paragraph of the press release (Exhibit A) reveals this beyond all doubt. What Hale actually said is as follows:

"Well, in any case, it is my hope that Weisman will one day receive his comeuppance. I will be filing a misconduct complaint against him in the near future in the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. sec. 351 and I will certainly be suing him when the day comes that I am finally vindicated of this pathetic nonsense. Sarcasm aside, David Weisman has no business ever wearing a robe of justice and it is a true indictment of the legal system of this country that it would [sic] such a scoundrel as him with that robe."

As is plain, the "day" of Weisman's "comeuppance" was to be the "day" when Hale was going to file a misconduct complaint and sue him in court, not "orchestrate violence" against him as the Hearing Administrator put in his "report." The Hearing Administrator's deletion of the very sentence which defined what kind of "comeuppance" Hale had in mind shows just how low and the Defendant and its employees are. It will do anything it can to lie about and misrepresent Hale's words, as well as the words of other adherents of his religious faith, in order to maintain this sick farce of his SHU confinement and its defamations of Hale generally. However, since the very basis for that continued

SHU confinement is now, by the Defendant's own admission, due to Hale's appeal of the ADX transfer decision, and since that decision is indeed fraudulent as shown by the above and the attached exhibits, it follows that the Court should release him from the SHU forthwith. There is simply no reason why this Court should tolerate the Defendant's actions here any further. Rule 26(c) gives the Court the power to issue a protective order compelling the Defendant to release Hale from the SHU and it should exercise that power since Hale is being prevented from conducting his discovery in the case as explained below.

IV. Since Hale is unable to go forward with his depositions due to his continued SHU confinement at FCI-Terre Haute, the Court should order his release pursuant to Rule 26(c).

Herein lies the core reason why the Court should order Hale's release from the SHU: his (wrongful) SHU confinement is preventing him from prosecuting the case that he has before this Court. It is that fact which gives the Court the power to release him pursuant to Fed. R. Civ. Pro. Rule 26(c), a fact which the Defendant naturally enough tries to sidestep in its response (see Doc. 145 at 3).

It is not true that Hale "can conduct discovery in the case from the SHU" as the Defendant claims (Id at 2). That is because, aside from the inadequate amount of food that he continues to receive there and the problem of the Defendant demanding that his wrists be chained to his waist for the twelve depositions which the Court has allotted to him--problems which Hale has discussed in previous filings (see e.g. Doc. 106 at 3-5, Doc. 109 at 8, and Doc. 110-1 at 2)--there is now the new problem of the SHU repeatedly going into "lockdown" in recent weeks along with the fact that the court reporter service is requiring that Hale pay for his depositions in advance. How exactly is Hale to avoid the possibility that the Defendant will unilaterally cancel his depositions due to a "lockdown," whether sincerely or fraudulently, with Hale having to "eat" the financial loss to the court reporter, a not inconsiderable sum

since he has to pay for the entire day in advance? Where is the assurance, indeed guarantee, that this will not happen? Indeed, with all of the misconduct and mistreatment which the Defendant has already committed the past seven months in his regard, starting with him being put into the SHU in the first place, Hale fully expects tht the Defendant will call "lockdowns" to coincide with the depositions he schedules. As always it is the Defendant which has total power while Hale has nothing but his Creativity religion, the truth, and his well-meaning supporters on his side. The Court should resolve this problem without any further ado: order the Defendant to release him from the SHU and return him to a regular housing unit at FCI-Terre Haute. That way he can actually conduct his depositions without any interference or harassment and finally get them done.

V. Had the magistrate actually read and considered the Declaration which Hale filed in this matter (Doc. 109), he would have referred to it at least in some manner in his order.

The Defendant claims that there is "no support" for Hale's contention that the magistrate failed to consider his Declaration (Doc. 145 at 2) but it is the Defendant's argument which is lacking in support, not Hale's. The fact of the matter is that the magistrate's order (Doc. 126) is utterly devoid of any reference to Hale's Declaration whatever and that fact is sufficient to indicate that the Declaration was indeed not read or considered.

Finally, Hale notes that his mother, Evelyn Hutcheson, has filed a Declaration of her own (Doc. # unknown) in recent weeks and he submits that that Declaration should likewise be considered by the Court.

Conclusion

Since the facts surrounding Reverend Hale's continued SHU confinement as well as the law both support his release from the SHU, the Court should order the Defendant to release him from the SHU immediately so that he can finally

complete the discovery process free from the oppression which Rule 26(c) was designed to prevent. Hale has shown "good cause" for such an order and that is all Rule 26(c) requires.

Respectfully submitted,

Rev. Matt Hale

Reverend Matt Hale, Plaintiff

March 22, 2017

Reverend Matt Hale
#15177-424
FCI
P.O. Box 33
Terre Haute, IN 47808

Certificate of Service

I hereby certify that on March 26th, 2017 I served the foregoing document upon the Defendant by mailing a true and correct copy of it to Susan Prose, Asst. U.S. Attorney, 1801 California Street, Suite 1600, Denver, CO 80202 via first class mail, postage fully prepaid, Ms. Prose being the Defendant's counsel in this case.

Rev. Matt Hale

Reverend Matt Hale, Plaintiff

TRULINCS 15177424 - HALE, MATTHEW - Unit: THA-J-A

FROM: 15177424
TO: Hutcheson, Evelyn
SUBJECT: Press Release (1st)
DATE: 08/21/2016 05:41:53 PM

Dear Ma!

Okay, here is the press release about Weisman. You can email it out to the news media and supporters just as it but you'll need to center the heading and format it otherwise for your faxes, okay? Also send me two copies of it via regular mail. Let 'er rip! I think you'll like it. When you fax it, try to get it on two pages; three would be too much.

Your Fig

Press Release
(For Immediate Release)

August 23, 2016

Contact: evelynhutcheson1938@gmail.com
Websites: freematthale.net, creativitymovement.net, firstfreedom.net

Hale Persecutor (Prosecutor) Appointed Federal Magistrate Judge!

In a move that is sure to outrage anybody who cares about truth, justice, and honor in this world, M. David Weisman, the Jewish crypto-homosexual communist who prosecuted the Reverend Matt Hale, leader of the pro-White and anti-Jewish Church of the Creator, on blatantly false charges that he had "solicited" the murder of a federal judge in late 2002, has been appointed a federal magistrate judge in the very courthouse where that show trial took place in 2004. As reported by The Chicago Daily Law Bulletin, Weisman has been sworn in to an eight-year term by Chief U.S. District Judge Ruben Castillo.

It is important to understand that Weisman not only prosecuted the "case" against Reverend Hale but that he was intimately involved in the entire sickening setup that led to the charges being brought against Hale in the first place. He had personally instructed government agent provocateur, Tony Evola, to send Hale an unsolicited email announcing plans on Evola's part to murder the judge who was presiding over a trademark case involving his church, and then argued to the jury that, since Hale did not bother to respond to that email, Hale wanted Evola to murder the judge! At no time, however, did Hale ever ask, instruct, or order Evola to harm anybody and, in fact, expressed his concerns to Evola that the law might require that he report EVOLA to the authorities for Evola's own (professed) plans to commit murder. All of this can be confirmed by reading the trial transcript at freematthale.net. Thus Weisman was both the compiler of the supposed "evidence" against Hale as well as the prosecutor of a case based on that evidence, thus calling into question his moral character and fitness to be a judge in light of the case that he fabricated and pursued against Hale. The entire "case" against Hale was and is an outright fraud engineered by the Jew Weisman in an effort to destroy one of the most well-known critics of Jewish power in America, Reverend Matt Hale, for personal reasons and nothing more. As a result of Weisman's actions, Hale was sent to prison on a 40 year sentence for crimes he not only did not commit but opposed. Reverend Hale challenges anyone to read the trial transcript and see for himself that he committed no crime.

From his prison cell in general population at FCI-Terre Haute, here is what Reverend Hale had to say about the appointment of Weisman to the position of federal magistrate judge:

"I think it's typical and makes sense. After all, the federal government is full of criminals so why not add yet another criminal like Weisman to its federal bench? I'm sure he'll do great there for the federal, Jewish tyranny that presently rules over us and help consign some more innocent people to a prison cell for decades like he did me. Weisman is living proof of why people would have the silly idea that the Nazis would try to kill six million Jews, for in my particular case he prosecuted a man he knew to be innocent all along only so that a critic of the Jewish domination of our country could be silenced. He caused enormous grief to me, my family, and my church. Well, in any case, it is my hope that Weisman will one day receive his comeuppance. I will be filing a misconduct complaint against him in the near future in the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. sec. 351 and I will certainly be suing him when the day comes that I am finally vindicated of this pathetic nonsense. Sarcasm aside, David Weisman has no business ever wearing a robe of justice and it is a true indictment of the legal system of this country that it would such a scoundrel as him with that robe."

Exhibit A (page one)

TRULINCS 15177424 - HALE, MATTHEW - Unit: THA-J-A

For further comment, contact Evelyn Hutcheson at (309) 699-0785 or evelynhutcheson1938@gmail.com. Reverend Hale is currently suing the Federal Bureau of Prisons in Denver District Court, case number 14-cv-00245. His latest bid for freedom was turned down by the Tenth Circuit Court of Appeals last month.

End of Press Release

Exhibit A (page two)

ADX GENERAL POPULATION HEARING ADMINISTRATOR'S REPORT		
Inmate's Name	**Register Number**	**Institution**
Hale, Matthew	**15177-424**	**THA**

1.	**Notice of Hearing**
The Notice of Hearing on Referral for Transfer to the General Population at the ADX in Florence, Colorado, which outlines the basis for the placement recommendation was given to the inmate on February 14, 2017, at 12:45 p.m. (Eastern Time). The hearing was held on February 16, 2017, at 9:00 a.m. (Eastern Time), via telephonic hearing.	
2.	**Attendance**
The inmate was advised in the Notice of General Population Hearing form of the opportunity to be present during the hearing.	
X	The inmate was present during the hearing.
	The inmate was not present during the hearing for the following reason(s): N/A
3.	**Inmate's Statement**
The inmate was advised in the Notice of General Population Hearing form of the opportunity to make a statement during the hearing, pertaining to the referral for his placement in the ADX General Population (ADX-GP). The information below was confirmed during the hearing.	
	The inmate did not make a statement during the hearing for the following reason(s): N/A
X	"I don't meet the criteria. There are nine guidelines and I don't meet any of them (all nine guidelines were reviewed). None of them apply to me. I don't mind the ADX, but don't agree that I meet the criteria to go. I have documentary evidence that I would like include and it will show that I have criticized judges in the 7th circuit in emails when I was at the ADX before I was transferred and staff there did not have any issues with it. I have that right. I'm a supporter of President Trump and he is very vocal and dissatisfied with federal judges. Staff at Terre Haute do not want me here and they made me aware of that as soon as I arrived. My first draft of the email was rejected and SIS staff told me to reword it. So instead of using the word comeuppance, I revised it to legal comeuppance. Staff sent this out, I did not have another inmate send this. Staff let it go out on purpose so they could use it to have me transferred."
4.	**Presentation of Documentary Evidence**
The inmate was advised in the Notice of General Population Hearing form of the opportunity to submit documentary information.	
	The inmate did not present any documentary evidence.
X	The inmate presented the following documentary evidence: Yes – 12 pages of various documents.
	The inmate asked to present documentary evidence, but was denied for the following reason(s): N/A
5.	**Finding**
	The inmate does not appear to meet the criteria for placement in the ADX-GP for the following reason(s): N/A
X	The inmate appears to meet the following criteria for placement in the ADX-GP:
X	The inmate's conduct within correctional institutions creates a risk to institution security, good order, and the safety of staff, inmates, others, and/or the public safety.

Exhibit B

ADX GENERAL POPULATION HEARING ADMINISTRATOR'S REPORT		
Inmate's Name	**Register Number**	**Institution**
Hale, Matthew	**15177-424**	**THA**

X	As a result of the inmate's status either before or after incarceration, he may not be safely housed in the general population of a regular correctional institution.
6.	**Information Utilized**

Pre-Sentence Report:

In the Pre-Sentence report revised on 2-16-2005, inmate Hale is identified and is considered as the supreme leader of the World Church of the Creator (WCOTC) with holds a position of authority over some of the WCOTC followers and admirers. The group is now known publicly as "The Creativity Movement (TCM)."

On or about November 29, 2002, through at least on or about December 17, 2002, inmate Hale and another person engaged in conduct constitution a felon that has as an element the use, attempted use, and threatening use of physical force against the person of another – namely, the forcible assault upon, and the murder of, United States District Judge Joan Humphrey Lefkow.

Inmate Hale is now serving 480 month sentence for Obstruction of Justice (2 counts) and Solicitation of a Crime of Violence (1 count). He has a projected release date of December 30, 2037.

Institution Conduct:

Inmate Hale is a validated Leader of the Security Threat Group (STG) World Church of the Creator (WCOTC). The group is now known publicly as "The Creativity Movement (TCM)."

Inmate Hale arrived at the ADX in Florence, Colorado, for service of his sentence. He was transferred to FCI Terre Haute on May 31, 2016, for lesser security. On August 21, 2016, he sent an email to his mother. The content of the email consisted of a "press release" he had written that advocated violence and criminal activity. Specifically, on June 27, 2016, inmate Hale placed a phone call to Michael Cook, a loyal follower of the WCOTC. The call detailed Cook's recognition of and loyalty to inmate Hale's leadership of the group. On July 13, 2016, inmate Hale received an email from James Logsdon, a WCOTC leader. Mr. Logsdon wrote about meeting Michael Cook and provided inmate Hale with details of their conversation during the meeting. Specifically, Mr. Logsdon wrote, "Soon as our food arrived he leaned over and said, 'You know James if you want me to take out any of the judges or prosecutors you just let me know.'". Mr. Logsdon was referring to Michael Cook.

On July13, 2016, inmate Hale received an email from an email address belonging to James Logsdon. Mr. Logsdon has also communicated with Mr. Hale via the telephone and is identified as a longstanding friend of inmate Hale and shares the same ideology. Mr. Logsdon is heavily involved in the TCM and is considered by some followers to be the current public face of the movement. Mr. Logsdon also communicates with Mr. Cook.

In the email, Mr. Logsdon informs inmate Hale that Mr. Cook was released from a mental hospital and has formed his own church, declaring himself it's "Pontifex Maximus." Mr. Logsdon does not trust Mr. Cook and explains in his email to you, "Now, Matt, I'm not saying not to use these parasites. If you can use them, then by all means, get what you can out of them. Just realize their true intentions."

On August 21, 2016, inmate Hale sent an email to his mother, who is the primary means of mass communication with the white supremacist movement on the internet. The content of the email consisted of a "press release" inmate Hale had written. Inmate Hale addresses the recent promotion of David Weisman, a federal prosecutor, to Federal Magistrate Judge. Judge Weisman was the prosecutor in inmate Hale's case. The verbiage in the press release is racially charged and blatantly hostile toward Judge Weisman, referring to him as a "Jewish crypto-homosexual communist." Inmate Hale further alleges Judge Weisman "prosecuted a man he knew to be innocent all along only so that a critic of the Jewish domination of our country could be silenced." Inmate Hale continues, "He (Weisman) caused enormous grief to me, my family, and my church. Well, in any case, it is my hope the

ADX GENERAL POPULATION HEARING ADMINISTRATOR'S REPORT		
Inmate's Name	**Register Number**	**Institution**
Hale, Matthew	**15177-424**	**THA**

Weisman will one day receive his comeuppance. David Weisman has no business ever wearing a robe of justice and it is a true indictment of the legal system of this country that it would such a scoundrel as him with a robe."

It was determined the email advocated violence and criminal activity.

Inmate Hale has incurred one disciplinary action findings in the High Category prohibited act for Code 296A, Abuse of the Mail Which Circumvents Mail Monitoring Procedures, (Attempted).

Due to his stature and influence the statements in inmate Hale's "press release" specifically referring to his hope that Judge Weisman will receive his "comeuppance" are believed to be another attempt by inmate Hale to orchestrate violence against the judge, either by Mr. Cook or another disciple of similar mindset. As he continues a pattern of this behavior, it appears he would be unable to function in a less restrictive correctional environment without being a threat to others or to the secure and orderly operation of a less secure correctional facility.

During the hearing, the Hearing Administrator reviewed the notice of hearing with inmate Hale. He indicated he understood the details of the report and advised the Hearing Administrator that he had documentary evidence to be considered during the proceedings. His statement and documentary evidence was considered by the Hearing Administrator and is included in this packet.

In conclusion, based on his status within the WCOTC and the influence of devote admirers and followers, it is this Hearing Administrators belief that based on the information identified above, his placement at the ADX is warranted.

7.	**Recommendation**		
	The inmate should not be placed in the ADX-GP.		
X	The inmate should be placed in the ADX-GP.		
8.	**Appeal Rights**		
Upon receipt of the Assistant Director's decision regarding your placement, you have 30 days to appeal the decision through the Administrative Remedy Program. Your appeal must be submitted on the appropriate form (Regional Administrative Remedy Appeal BP-10) and must be sent to the Chief, Designation & Sentence Computation Center, Grand Prairie Complex, U.S. Armed Forces Reserve Complex, 346 Marine Forces Drive, Grand Prairie, Texas 75051			
J.M. Carey			February 16, 2017
Hearing Administrator's Name	Signature		Date
9.	**Delivery of Hearing Administrator's Report to Inmate**		
X			
Inmate's Signature		Date	
The inmate refused to sign for a copy of the ADX General Population Hearing Administrator's Report. I have personally delivered a copy of the report to the above mentioned inmate.			
Staff Name (Printed)	Signature		Date

FCI
P.O. Box 33
Terre Haute, IN 47808

013

Special Mail

Office of the Clerk
United States District Court
901-19th St. Room A105
Denver, CO 80294-3589

Mailed 3-26

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing

(1) all required privacy redactions have been made;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) The digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, McAfee Agent, Version 5.0.6.220, dated 8/17/2018, and according to the program are free of viruses.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Amanda Bell
Amanda Bell
U.S. Attorney's Office

CERTIFICATE OF SERVICE

I certify that on August 17, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit, using the appellate CM/ECF system.

I further certify that I directed that personnel in the U.S. Attorney's office send the foregoing by U.S. mail, postage prepaid, to:

Matthew Hale
Reg. No. 15177-424
ADX – Florence
P.O. Box 8500
Florence, CO 81226

/s/ Amanda Bell
Amanda Bell
U.S. Attorney's Office