

Case No. 18-1141

In the United States Court of Appeals
For the Tenth Circuit

Reverend Matt Hale,
Plaintiff-Appellant,

v.

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

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

Separate Appendix of Plaintiff-Appellant Reverend Hale

Rev. Matt Hale, J.D.
pro se

#15177-424
U.S.P. - Max.
P.O. Box 8500
Florence, CO 81226

FILED
United States Court of Appeals
Tenth Circuit

MAY 25 2018

ELISABETH A. SHUMAKER
Clerk

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 14-CV-00245-BNB
(To be supplied by the court)

Reverend Matt Hale, Plaintiff,

v.

Federal Bureau of Prisons,
David Bertebile (individually),
Blake Davis (individually),
Christopher Synsvall (individually),
Benjamin Brieschke (individually),
S. M. Kuta (individually),
L. Milusnic (individually),
Patricia Rangel (individually),
Wendy Heim (individually),
S. Smith (individually),
H. Redden (individually),
Diana Krist (individually),
A. Tuttoilmondo (individually),

_____, Defendant(s).

(List each named defendant on a separate line.)

Amended PRISONER COMPLAINT

A. PARTIES

1. Reverend Matt Hale, #15177-424 U.S.P. - Max.
(Plaintiff's name, prisoner identification number, and complete mailing address)
P.O. Box 8500 Florence, CO 81226-8500

2. Federal Bureau of Prisons U.S.P. - Max.
(Name, title, and address of first defendant)
5880 Hwy. 67 South Florence, CO 81226

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? Yes No (CHECK ONE). Briefly explain your answer:

Federal law

3. David Bertebile, warden U.S.P. - Max.
(Name, title, and address of second defendant)
5880 Hwy. 67 South Florence, CO 81226

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? Yes No (CHECK ONE). Briefly explain your answer:

Federal law

4. Blake Davis, Former Warden U.S.P. - Max.
(Name, title, and address of third defendant)
5880 Hwy. 67 South Florence, CO 81226

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? Yes No (CHECK ONE). Briefly explain your answer:

Federal law

(If you are suing more than three defendants, use extra paper to provide the information requested above for each additional defendant. The information about additional defendants should be labeled "A. PARTIES.")

A. Parties (cont)

5. Christopher Synsvoll, Lead Supervisory Attorney U.S.P. - Max.
5880 Hwy. 67 South Florence, CO 81226

6. Benjamin Brieschke, Asst. Supervisory Attorney U.S.P. - Max.
5880 Hwy. 67 South Florence, CO 81226

7. S. M. Kuta, Assistant Warden U.S.P. - Max.
5880 Hwy. 67 South Florence, CO 81226

8. L. Milysaic, Former Assistant Warden U.S.P. - Max.
5880 Hwy. 67 South Florence, CO 81226

9. Patricia Rangel, Unit Manager U.S.P. - Max.
5880 Hwy. 67 South Florence, CO 81226

10. Wendy Heim, Asst. Inmate Systems Manager U.S.P. - Max.
5880 Hwy. 67 South Florence, CO 81226

11. S. Smith, Former SIS Technician U.S.P. - Max.
5880 Hwy. 67 South Florence, CO 81226

12. H. Redden, SIS Technician ~~U.S.P.~~ U.S.P. - Max.
5880 Hwy. 67 South Florence, CO 81226

13. Diana Krist, Special Investigative Agent
5880 Hwy. 67 South Florence, CO 81226

14. A. Tuttailmendo, Former Unit Manager U.S.P. - Max.
5880 Hwy. South Florence, CO 81226

★ None of these defendants were acting under color of state law at the time the claims alleged in this complaint arose but rather, federal law. ★

B. JURISDICTION

1. I assert jurisdiction over my civil rights claim(s) pursuant to: (check one if applicable)

28 U.S.C. § 1343 and 42 U.S.C. § 1983 (state prisoners)

28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (federal prisoners)

2. I assert jurisdiction pursuant to the following additional or alternative statutes (if any):

Religious Freedom Restoration Act (RFRA) 42 U.S.C.

Sec. 2000 66-1

C. NATURE OF THE CASE

BRIEFLY state the background of your case. If more space is needed to describe the nature of the case, use extra paper to complete this section. The additional allegations regarding the nature of the case should be labeled "C. NATURE OF THE CASE."

This case involves continuous and ongoing violations of Reverend Hale's First Amendment, Fifth Amendment, and Eighth Amendment rights as well as his rights under the Religious Freedom Restoration Act by virtue of the defendants taking away and interfering with his mail rights, forbidding his participation in his church, and denying him his religious diet.

D. CAUSE OF ACTION

State concisely every claim that you wish to assert in this action. For each claim, specify the right that allegedly has been violated and state all supporting facts that you consider important, including the date(s) on which the incident(s) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific cases to support your claim(s). If additional space is needed to describe any claim or to assert more than three claims, use extra paper to continue that claim or to assert the additional claim(s). The additional pages regarding the cause of action should be labeled "D. CAUSE OF ACTION."

1. Claim One: Violation of the First Amendment

Supporting Facts:

The defendants, acting personally and individually, imposed two mail bans upon ^(Plaintiff) ~~him~~ because of their disdain for his religious beliefs and his desire to participate in his church. The first mail ban was imposed in July 2010 and ended in January 2011 and the second mail ban was imposed in January 2013 and ended in July 2013. However, Plaintiff remains under ~~the~~ threat of further bans.

The instructions above require that I state all of the supporting facts that I consider important, all of the dates on which the incidents occurred, and how each defendant was involved in the violation of my First Amendment rights. The instructions further state that I am to use extra paper if that is "needed to describe any claim or to assert more than three claims." This I in fact need and therefore attach this extra paper to assert my eleven claims in the detail required by the instructions. The attached pages are further necessary to provide the defendants with fair and clear notice of my allegations against them, that each one personally participated in the violation of my

(Rev. 1/30/07)

rights, that all of the elements of my cause of action are met, and to otherwise meet the requirements of the rules. Thanks. Also see FRCP 8(f).

D. Cause of Action. (cont)

Claim One Violation of the First Amendment (the taking away of Reverend Hale's mail rights due to his exercise of constitutionally protected speech, exercise of religion, and association with those of like mind)

1. The individual defendants are employees, officers, and agents of the Federal Bureau of Prisons ("B.O.P.") which is also a defendant in this case.
2. The Plaintiff, Reverend Matt Hale, was ordained as a minister in The Church of the Creator (hereafter "Church") in 1995. The Church is also sometimes referred to as The Creativity Movement.
3. The Church embraces and espouses the religion of Creativity. Creativity has been recognized as a bona fide religion under federal law. See *Peterson v. Wilmur Communications, Inc.*, 205 F.Supp.2d 1014 (E.D. Wisc. 2002).
4. Adherents of the Creativity religion are called "Creators."
5. The Church and the Creativity religious faith were founded by Ben Klassen in 1973 with the publication of his first book, Nature's Eternal Religion. Creators deem this book, as well as others written by Ben Klassen including The White Man's Bible, to be their Holy Scripture and sacred. ~~████████████████████~~
~~████████████████████~~
6. The Creativity religion has Sixteen Commandments, a Golden Rule, Daily Affirmations which adherents repeat five times daily, sacred texts, a Creed and Program, as well as child pledging and marriage ceremonies. It also observes several holidays including Klassen Day (Ben Klassen's birthday) on February 20th as well as Martyrs' Day on September 15th marking the martyrdom of several of its adherents by death and imprisonment on account of their faith.
7. The overriding mission of the Church and the Creativity religion is the permanent prevention of the cultural, genetic, and biological genocide of the White Race worldwide and thus the

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achievement of White racial immortality. In order to accomplish this mission, the Church and Creativity religion advocate total racial separation so as to stop the mixture, and hence destruction, of White culture and genetic stock as well as murder at the hands of non-white attackers. Creativity thus espouses the collective salvation of the White Race through its immortality on earth rather than individual, personal salvation in a supposed "afterlife" as is the case with some other religions. Nevertheless, with Creativity, the individual also finds his personal salvation in that the focus of his mind is taken away from his own troubles and struggles in life and is placed instead on his personal duty to devote himself to the survival of his race. The salvation of the individual is thus attained through his devotion to his race of which he is a part and he lives on after death through the continued life of his race.

8. The means by which the Church seeks to accomplish its mission of racial salvation consists exclusively in the legal and peaceful proselytizing of Creativity to others. Creativity Scripture specifically forbids any and all illegal and violent acts by its adherents in its fight to attain the salvation of the White Race.

9. Creativity is a proselytizing faith, meaning that its adherents must bring it to the non-converted in order to follow fully its teachings. Thus it is not possible for a Creator to exercise his religion by himself. Rather, he must proselytize it to others. Since it is the salvation and immortality of his race that is at issue, the Creator must proselytize for his White Race to others so that salvation and immortality may be attained.

10. ~~The Church and Creativity religion further believe that the White Race is the elite species on this earth and despises the current dogma of "racial equality" as being an obvious and destructive falsehood.~~ Analogous to Judaism, Creativity believes that there is a chosen people on earth.

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D. Cause of Action (cont)

However, rather than the Jews, that chosen people is the non-semitic White Race. Also like Judaism, Creativity only seeks the conversion of one's own kind and shuns any proselytizing of the faith to other races.

~~11. The symbol of the Creativity religion is that of a capital "W" standing for the White Race, with a crown and halo atop the crown representing Creativity's belief that the White Race is a people by Nature and the halo represents that of the Creator. This symbol is a~~
~~12. The symbol of the Creativity religion is that of a capital "W" standing for the White Race, with a crown and halo atop the crown representing Creativity's belief that the White Race is a people by Nature and the halo represents that of the Creator. This symbol is a~~

12. Creators make pilgrimages to the site of Ben Klassen's grave and in 1997, Reverend Hale made such a pilgrimage. Today, Ben Klassen is considered a Prophet by those who adhere to the religion he began.

~~13. Creativity addresses the suffering, anxiety, and loneliness of Man by transferring the focus of his thoughts away from himself and onto the well-being of the White Race of which he is a part. By doing so, Man's personal struggles in life become far less harsh and more endurable to his mind and he is better able to cope with life.~~

14. Creativity addresses all of the ultimate questions of life, including the meaning of life and its purpose. The meaning of life for those who embrace Creativity is the benefit of one's own kind and the purpose of life for every White man, woman, and child is to seek the preservation and betterment of their White Racial Family. Creativity thus includes the striving for a sound mind, in a sound body, in a sound society, in a sound environment. Creativity hence teaches its adherents to build their minds, to eat salubriously, to create a society conducive to their mental and physical well-being, and to preserve a pure and natural environment. Morality is that which is in the best interests of the White Race.

4 (c)

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D. Cause of Action (cont)

15. The Creativity religious diet consists of raw fruits, vegetables, nuts, and seeds only – in their uncooked natural state. Only by eating food in its natural state can Creators properly fulfill their allegiance to Nature’s Laws and thus fully fulfill the tenets of their religious faith.

16. Reverend Hale’s duties as an ordained minister include the espousal and promotion of Creativity to those with whom he corresponds and associates as well as to White people at large. Reverend Hale’s ministry also includes providing counseling to his correspondents who look to him for guidance as their minister.

~~Reverend Hale also serves as a minister for the Church of Creativity in the state of Illinois. He is a member of the Church of Creativity and is a member of the Church of Creativity in the state of Illinois.~~

18. Before he was imprisoned, Reverend Hale performed marriage ceremonies in his home state of Illinois recognized by that state as valid, gave many public speeches and sermons, and edited a monthly newsletter. Thousands of Creators worldwide recognize Reverend Hale as a minister in the Church and recognize Creativity as their religion.

19. Creativity functions totally as a religion in the life of Reverend Hale. Reverend Hale has been a convert to Creativity since he first read Nature’s Eternal Religion at the age of 18 in 1990. He is sincere in his belief and considers himself intensely religious. No other faith occupies a role in his life.

20. From 1996 until the expiration of his term of office in 2006, Reverend Hale was the leader of the Church or Pontifex Maximus (“greatest priest”). There has not been a Pontifex Maximus pursuant to Church guidelines since that time.

~~Reverend Hale is a graduate of Southern Illinois University School of Law and has a law degree. In addition, he is a member of the Illinois State Bar Association.~~

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D. Cause of Action (cont)

~~Reverend Hale is an innocent man who has proven his innocence of having committed the crimes of his conviction throughout the proceedings of his criminal case. (See e.g. Doc. 29 at pages 6-8, 23-32 of Case No. 11-3868 of the Seventh Circuit Court of Appeals.)~~

22. Reverend Hale was arrested on federal charges in January 2003. Since that time, he has spent his entire imprisonment without a cellmate in solitary confinement.

23. Reverend Hale has never been given any indication whatsoever by the B.O.P. that he will ever be removed from solitary confinement before the expiration of his forty year sentence.

24. Reverend Hale is an innocent man who has proven his innocence of having committed the crimes of his conviction throughout the proceedings of his criminal case. (See e.g. Doc. 29 at pages 6-8, 23-32 of Case No. 11-3868 of the Seventh Circuit Court of Appeals.)

25. As someone (an innocent man) serving a forty year sentence in solitary confinement, Reverend Hale's right to communicate with his friends, supporters, and religious congregation assumes an especially heightened significance in his life far exceeding that which would be the case were Reverend Hale to have the freedom of movement and opportunities for social interaction that the average prisoner has. In essence, his ability to correspond with others forms a major component of what limited life he has managed to retain for himself despite his wrongful conviction. It is through his mail that Reverend Hale is able to engage in his free exercise of religion. It is through his mail that Reverend Hale is able to associate with others in his Church and with those of like mind. It is through his mail that Reverend Hale is able to share with others his religious, ideological, and philosophical views on a host of subjects. It is through his mail that Reverend Hale is able to have any kind of normal social life at all. His mail is thus not only vital for the fulfillment and exercise of his religious, association, and free-speech rights but also for his mental and psychological well-being.

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D. Cause of Action (cont.)

26. Since April 2005, Reverend Hale has been housed at the United States Penitentiary, Administrative Maximum (hereafter "Supermax"), in Florence, Colorado. However, he has no record whatsoever of having committed any violent or illegal act during his imprisonment that would justify such a severe security classification. Rather, he was assigned to Supermax due to hostility towards his religious and ideological beliefs, his participation in and leadership of his Church, and because he was a well-known public figure before his arrest.

~~_____~~
~~_____~~

28. In all of the years that Reverend Hale has been a federal prisoner, he has never been accused by prison staff of having committed a crime with his mail or having tried to do so. Nor has he ever been accused by prison staff of ever having fomented or encouraged violence in any way with his mail.

29. Reverend Hale has never done anything with his mail since becoming a federal prisoner that would in any way justify or legitimize the taking away of his mail rights and nor has Reverend Hale ever been accused of having done so by prison staff.

30. Reverend Hale's mail has thus always been legal, peaceful, and otherwise squarely within the law since he became a federal prisoner.

31. In July 2010, defendants Davis, Milusnic, Krist, Rangel, Synsvoll, Brieschke, Smith, and the B.O.P. placed Reverend Hale on "Restricted General Correspondence" status (hereafter "mail ban") for, in part, having written an article for his Church in which Reverend Hale stated that he was reassuming his leadership as Pontifex Maximus, pro tempore ("for the time being"), until the next Pontifex Maximus could be elected by the Church membership pursuant to the guidelines set forth

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D. Cause of Action (cont.)

by Ben Klassen. The restriction banned all personal correspondence between Reverend Hale and anyone aside from his immediate family members and was imposed for an indefinite duration with review every six months.

32. Each of the defendants in the preceding paragraph participated individually and personally in the decision to ban Reverend Hale's mail and each of them agreed to the decision. At the time that they did so, they filled the following offices at Supermax and as officers of the B.O.P.: Defendant Davis was the Warden; Defendant Milusnic was the Assistant Warden; Defendant Synsvoll was the lead Supervisory Attorney; Defendant Brieschke was the Assistant Supervisory Attorney; Defendant Krist was the Special Investigative Agent; Defendant Rangel was the Unit Manager of D Unit where Reverend Hale is housed; and Defendant Smith was the "SIS Technician" who regularly handled Reverend Hale's mail. Since imposing this mail ban, Defendants Davis, Milusnic, Krist and Smith are believed to have left Supermax for other positions in the B.O.P.

33. Defendants Brieschke and Smith specifically told Reverend Hale that his mail was being taken away because Reverend Hale was trying to "direct" his Church.

34. Defendant Davis specifically told Reverend Hale that "we don't want you to be Pontifex Maximus."

35. In September 2010, Reverend Hale asked Defendant Redden what he could write about in his mail in the future, when he got his mail back, without there being a danger that his mail could be taken away from him again. She replied, "you can talk about the weather."

36. In November, 2010, Defendant Rangel ordered that Reverend Hale be moved to a more restrictive part of Supermax from where he had been because of her personal disdain for Reverend Hale's exercise of his religious beliefs and to punish and penalize him for his attempts to participate

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D. Cause of Action (cont)

in his Church. Reverend Hale has been kept in this more restrictive part of Supermax ever since. Reverend Hale and the seven other prisoners on his "range" are not allowed to interact with prisoners from other ranges. Reverend Hale is the only prisoner on this range who has no history of causing anyone's death. Had the mail ban not been imposed, Defendant Rangel would not have had Reverend Hale moved.

37. Pursuant to this mail ban imposed in July 2010, Defendant Milusnic personally approved and signed off on the rejection and return of letters that were mailed to Reverend Hale by his correspondents.

38. Also pursuant to this mail ban, Defendants Smith and Redden personally arranged for the rejection and return of letters that were mailed to Reverend Hale by his correspondents.

39. Reverend Hale was informed by Defendants Brieschke and Redden on January 9, 2011, or thereabouts, that the mail ban had been lifted. However, Defendants Brieschke and Redden told Reverend Hale to avoid becoming too involved with his Church with his correspondence and that they could not guarantee that his mail would not be taken away again if they saw fit. Reverend Hale specifically asked if everything would be okay if he refrained from directing, or attempting to direct, his Church, but Brieschke and Redden refused to commit to that.

40. Reverend Hale was thus left in fear concerning the resumption of his correspondence rights not knowing what would, or what would not, trigger another mail ban.

41. The defendants who ~~enforced~~^{imposed} the mail ban (as stated in para. 32 above), as well as Defendant Redden who began enforcing it after its imposition, deliberately sought to intimidate Reverend Hale from exercising his First Amendment speech, association, and free exercise of religion rights by refusing to explain what exactly would trigger another mail ban and by holding over Reverend

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10 Cause of Action (cont)

Hale's head the threat that another ban on his mail would be forthcoming if he engaged in First Amendment protected activity with the resumption of his correspondence.

42. Defendants Davis, Milusnic, Synsvoll, Brieschke, Krist, Rangel, Smith, and Redden, through their imposition and enforcement of the July 2010-January 2011 mail ban and through their willingness and threat to impose another one should they not like Reverend Hale's particular exercise of his First Amendment protected rights in his resumed correspondence, deliberately sought to chill Reverend Hale's exercise of these rights and to intimidate Reverend Hale from exercising those rights in the future. In this, they succeeded: they prevented Reverend Hale from reasserting his leadership of his Church, prevented him from being actively involved with his Church, and in general made him fearful regarding all of his correspondence since it could be taken away from him at any time, for any arbitrary reason, regardless of his compliance with all statutory laws and prison rules to which Reverend Hale accepts that he is bound. Thus the wrong that the defendants committed through their imposition of the mail ban in July 2010 continued long after that imposition began.

43. Beginning in July 2012, Reverend Hale began issuing written sermons to the Church on a monthly basis, each sermon being called a "Sermon from Solitary." Among other things, the sermons urged Creators and others to stay within the law, refrain from any violence, and use persuasion to win over others to Creativity and to the cause of Racial Loyalty generally.

44. Reverend Hale felt that such a message (as stated in para. 43) would be helpful both to his Church, his religious faith, his fellow believers and those of like mind, as well as to law enforcement and society in general.

45. From July 2012 until January 29, 2013, the defendants made no complaint to Reverend Hale

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D. Cause of Action (cont)

regarding the sermons and he mailed them out accordingly.

46. From the lifting of the mail ban in January 2011 until January 2013, the defendants in fact made no complaint to Reverend Hale regarding the content of his outgoing mail generally.

47. Lest his mail rights be taken away from him again, Reverend Hale tried to avoid any possibility that he could be accused of "directing" or trying to direct his Church and thus sought to keep his involvement in the Church to a minimum consistent with his duties as an ordained minister.

48. Nevertheless, on January 29, 2013, Defendant Redden came to Reverend Hale's cell and informed him that he was being placed on "Restricted General Correspondence" status again and gave him paperwork to that effect.

49. This second ban of Reverend Hale's mail was personally and individually imposed by Defendants Berkebile, Kuta, Synsvoll, Brieschke, Rangel, Tuttoilmundo, Heim, Redden, and the B.O.P. and each agreed to the decision. At the time of its imposition, the individual defendants held the following positions at Supermax: Defendant Berkebile was Warden; Defendant Kuta was Assistant Warden; Defendant Synsvoll was Supervisory Attorney; Defendant Brieschke was Assistant Supervisory Attorney; Defendant Rangel was Acting Special Investigative Agent; Defendant Tuttoilmundo was Acting Unit Manager of D unit where Reverend Hale was housed; Defendant Heim was Assistant Inmate Systems Manager; and Defendant Redden was "SIS Technician" who handled Reverend Hale's mail.

50. When he was informed of the new mail ban, Reverend Hale asked Defendant Redden why it was being imposed and she said, "you're trying to be something that you are not allowed to be anymore," meaning an ordained minister for his Church, and she also said, "we don't like you writing your Church." Defendant Redden also told Reverend Hale that the ban had "been in the

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D. Cause of Action (cont)

works for a long time.”

51. This second mail ban, like the first, was imposed for an indefinite duration with review every six months.

52. Defendant Redden refused to provide Reverend Hale with her first name for purposes of this lawsuit.

53. Defendants Synsvoll and Brieschke, attorneys for Supermax, routinely counsel the employees of the B.O.P. and those of Supermax specifically, to violate the constitutional and other legal rights of prisoners. They do so with malice and with the deliberate intent that prisoners be deprived of their legal rights to the maximum extent desired without subjecting the B.O.P. and themselves to civil liability if at all possible. They hope and assume that prisoners are ignorant of their legal rights and even if they are not, that they will lack the courage, money, patience, or endurance to vindicate their legal rights through prolonged proceedings in the courts. Their sole concern and sole role as attorney employees of the B.O.P. is that the B.O.P. and its employees succeed in and get away with violating the legal rights of prisoners as much as happens to be desired at the given time. They have no regard for the Constitution of the United States nor for any decision of any court making clear the constitutional rights of prisoners unless there is a specific court order in question that is directed at a specific prisoner in which case they will obey the court’s decision in regards to that specific prisoner only while continuing to violate the same exact rights of other prisoners as before.

54. In accordance with this modus operandi of Defendants Synsvoll and Brieschke as stated in paragraph 53, they urged and advised the other defendants to impose both mail bans on Reverend Hale knowing full well that the bans violated his constitutional and other legal rights.

55. All of the defendants imposed and enforced both mail bans with the realization and

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D. Cause of Action (cont.)

understanding that Reverend Hale's correspondence was perfectly in comportment with all federal and state laws as well as B.O.P. policy.

56. The defendants, in imposing both mail bans, did not believe that his correspondence posed a threat of violence or any illegality in any way.

57. Rather, the defendants took his mail rights away totally because of their disdain for his exercise of his First Amendment rights, because of their personal animosity for his Church and religion, and because they wanted to eliminate his First Amendment rights and hurt Reverend Hale personally because of the religion he adheres to and the opinions he holds otherwise.

58. On February 16, 2013, Defendant Redden informed Reverend Hale that even though Defendant Davis is no longer warden at Supermax, he played a personal and important role in the decision to impose the second mail ban. Defendant Davis, apparently as an assistant to the Director of the B.O.P. in Washington DC, urged the other defendants to impose the ban.

59. On February 19, 2013, Defendant Rangel stopped by Reverend Hale's cell, telling Reverend Hale that the new mail ban "was a management decision made by all of us."

60. Pursuant to this second mail ban, Defendant Kuta personally approved and signed off on the rejection and return of each letter that was mailed to Reverend Hale by his correspondents.

61. Pursuant to the second mail ban, Defendant Redden personally arranged for the rejection and return of the letters that were mailed to Reverend Hale by his correspondents.

62. When letters to Reverend Hale are rejected, he is supposed to receive a notice of the rejection. However, on numerous occasions, Reverend Hale's correspondents wrote him during the two mail bans without Reverend Hale being given any rejection notice and nor was the correspondence returned to the sender. Indicative of their malicious intent to interfere with and

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D. Cause of Action (cont.)

stymie Reverend Hale's free exercise of religion rights as well as to cause him grief for daring to exercise his First Amendment freedom of speech, association, and religious rights, Defendants Smith and Redden deliberately failed to provide him with rejection notices so that he would think that his congregation and others had failed to try to write him and thus abandoned him. Defendants Smith and Redden thus deliberately sought to cause Reverend Hale psychological anguish for exercising his First Amendment rights. Furthermore, both Defendants Smith and Redden would deliberately cover up the addresses on the rejection notices that they did issue to Reverend Hale in an effort to prevent him from writing his correspondents back once his mail rights were restored, again in an effort to thwart his exercise of his First Amendment rights.

63. As evidence indicating his own religiously discriminatory intent in imposing the second mail ban, Defendant Kuta told Reverend Hale that he does not want him to be associated with his Church and has prohibited him from going to the Supermax "step down unit" because of that association.

64. Part of the motivation of the defendants in violating Reverend Hale's First Amendment right to free exercise of religion, freedom of speech, and freedom of association with those of like mind through the imposition of the mail bans is to coerce Reverend Hale into abandoning his religious faith and his Church.

65. Part of the motivation of the defendants in imposing the mail bans is that they wanted to impede and stymie the progress of Reverend Hale's Church and Creativity religion in the conversion of others to their Creativity religious faith. They consider Reverend Hale important to that progress and believe that by taking away his correspondence, that progress would be undermined if not eliminated.

66. Part of the motivation of the defendants in imposing the mail bans is that the defendants

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D. Cause of Action (cont)

wanted to destroy Reverend Hale's relationships with those who care about him in the outside world.

67. The defendants specifically desire that Reverend Hale convert to a different religion, one that meets their personal approval.

68. The defendants, through their imposition of the mail bans, sought to punish and persecute Reverend Hale for the religious faith that he adheres to, for the religious beliefs and other ideological beliefs he espouses, and because of the Church to which he belongs.

69. The defendants acted with malice when they imposed both mail bans upon Reverend Hale and desired to inflict psychological and emotional harm upon him.

70. The defendants were fully aware that Reverend Hale's correspondence is within all prison rules and statutory laws and that it poses no threat to anyone or anything. Nevertheless, the defendants lied to Reverend Hale when they claimed to him that his correspondence posed a "special threat" when they notified him about the imposition of the mail bans. They did so in an attempt to justify their own unlawful conduct in imposing the mail bans, knowing that their conduct was indeed unlawful.

71. The defendants, when they impose mail bans upon prisoners, routinely in fact claim that the prisoners' correspondence poses a "threat" regardless of whether this is sincerely believed or not. They do this as a means of discouraging prisoners from contesting the mail bans, from bringing lawsuits against the bans in court, and as a means of prevailing in such lawsuits should they be brought all the same. The defendants thus routinely hide behind what is facially a legitimate basis for the mail bans without necessarily believing in its legitimacy themselves and the claimed justification for the mail bans is actually meaningless since the claim of a "threat" is made regardless of whether there is any truth to the assertion as happened with Reverend Hale.

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D. Cause of Action (cont)

77. On August 6, 2013, Defendant Redden came to Reverend Hale's cell and informed him that the latest mail ban had been lifted.

78. Creativity, like other religions, teaches the existence of a struggle between good and evil. Good is personified by the White Race and the crusade for its future while evil is personified by its antithesis in this world, the Jewish Race. The symbol of Creativity is holy while the symbol of Judaism is wicked. Analogous to Jesus Christ's denunciation of the Jews in John 8:44 as being the children of the devil, and St. Paul's denunciation of the Jews in I Thessalonians 2:14 as being "contrary to all men," Creativity teaches that "The Jew is the root of all evil" and that Judaism is essentially a conspiracy against all non-Jews designed to manipulate and dominate the world. Thus both religions, Creativity and Christianity, condemn the Jews as an evil. However, Creativity teaches that since Christianity has a Jewish origin, it is necessarily tainted with the very evil that it condemns. Creativity thus calls for a new day altogether, trusts in Nature and her laws, and strives for eternal salvation.

Wherefore, Reverend Hale prays that this Honorable Court issue judgment in his favor on Claim One.

*Adoption by reference of claim one allegations in subsequent claims is specifically allowed by Rule 10(c) of FRCP. **

Claim Two First Amendment Retaliation (the taking away of Reverend Hale's mail rights because of his engagement in constitutionally protected activity)

79. Reverend Hale repeats and realleges paragraphs 1 through 77 as if fully stated herein.

80. By imposing mail bans upon him because of his trying to participate in his Church and religious faith as well as his exercise of his freedom of speech, the defendants have intimidated

4(p)

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D. Cause of Action (cont)

Reverend Hale from continuing to engage in these constitutionally protected activities.

Wherefore, Reverend Hale prays that this Honorable Court issue judgment in his favor on Claim Two.

Claim Three Violation of the Religious Freedom Restoration Act, 42 U.S.C. sec. 2000 bb-1 (the taking away of Reverend Hale's mail rights because of his involvement in his Church and religious faith)

- 81. Reverend Hale repeats and realleges paragraphs 1 through 80 as if fully stated herein.
- 82. By imposing and threatening to impose mail bans upon him because of his exercise of his religious faith and involvement in his Church through his correspondence, the defendants have substantially burdened Reverend Hale's religious exercise in violation of 42 U.S.C. sec. 2000 bb-1(c).

Wherefore, Reverend Hale prays that this Honorable Court issue judgment in his favor on Claim Three.

Claim Four Violation of Fifth Amendment due process (the taking away of Reverend Hale's mail rights without affording him a prior opportunity to be heard)

- 83. Reverend Hale repeats and realleges paragraphs 1 through 77 as if fully stated herein.
- 84. Prior to the imposition of the (July 2010-January 2011 and the January 2013-August 2013) mail bans, Reverend Hale was given no notice or opportunity to be heard whatsoever. Rather, his mail rights were taken away from him without his being afforded any notice that such an imposition

4(9)

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D. Cause of Action (cont)

was to be forthcoming nor being given any opportunity prior to its imposition to raise any objection or evidence against it.

85. B.O.P. policy, recognizing that prisoners have a Fifth Amendment due process right to notice and a hearing prior to the deprivation of their mail rights, codifies the constitutional requirement that a hearing be held before placing an inmate on restricted general correspondence status. As stated by 28 C.F.R. sec. 540.15(c), in pertinent part:

“The warden shall use one of the following procedures *before* placing an inmate on restricted general correspondence.

- 2. Where there is no incident report, the warden:
 - (ii) shall give the inmate the opportunity to respond to the classification or change in classification.”

(emphasis added)

86. Since Reverend Hale was not provided said opportunity before being placed on the mail restrictions, the defendants deprived him of his liberty interest without due process of law.

Wherefore, Reverend Hale prays that this Honorable Court issue judgment in his favor on Claim Four.

Claim Five Violation of First Amendment (the refusal by defendants Berkebile, Redden, and B.O.P. to allow Reverend Hale to have the scripture of his religious faith)

87. Reverend Hale repeats and realleges paragraphs 1 through 80 as if fully stated herein.

88. In February 2013, defendants Redden, Berkebile and B.O.P. rejected and refused to allow Reverend Hale to have Nature’s Eternal Religion, the main Bible of Reverend Hale’s Creativity religious faith, when it arrived for him at Supermax.

4 (r)

23

D. Cause of Action (cont)

89. Defendants Redden, Berkebile, and B.O.P. refused to allow Reverend Hale to have Nature's Eternal Religion due to their disdain of the beliefs contained therein and in an effort to deny Reverend Hale access to those beliefs. They also wanted to inhibit his ministerial duties.

90. The defendants did not and do not believe that allowing Reverend Hale to have Nature's Eternal Religion poses any kind of threat or risk of harm to anyone or anything in any way. Rather, the defendants simply wished, and wish, to deny Reverend Hale his scripture for the reasons stated in the above paragraphs. The same motivations that inspired all of the defendants to impose the mail bans inspired the refusal to allow Reverend Hale to have his religious scripture.

Wherefore, Reverend Hale prays that this Honorable Court issue judgment in his favor on Claim Five.

Claim Six Violation of Equal Protection of Rights (treating Reverend Hale worse than other prisoners on account of his constitutionally-protected religion, speech, and associations)

91. Reverend Hale repeats and realleges paragraphs 1 through 90 as if fully stated herein.

92. Supermax regularly administers to the religious needs and interests of its black prisoners by showing Nation of Islam and Louis Farrakhan videos, as well as other black religious programming, on its religious television channel.

93. As is well known, the Nation of Islam and Louis Farrakhan espouse black pride and black separatism, as well as anti-semitism according to many. The address of the Nation of Islam is provided on the programs so that black prisoners may be able to write and get involved with that organization.

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D. Cause of Action (cont)

94. Even though the defendant B.O.P. is willing to show black separatist programs on its television channel, as alleged in the proceeding paragraphs, the defendants took away Reverend Hale's mail rights because of his espousal of White pride and White separatism in correspondence that, unlike videos shown on the prison television channel, have nothing to do with the prison.

95. Had Reverend Hale instead been a black prisoner and ordained minister of a black-oriented church, the defendants would not have imposed the bans on his mail or the denial of his religious scripture that occurred in this case. Thus the defendants treated Reverend Hale worse than other similarly-situated prisoners on account of his beliefs, religion, and race.

96. If Reverend Hale were a Christian, Muslim, or Jew, the defendants would leave him alone and let him exercise his religious and ideological speech, exercise, and association rights without interference or punishment. However, since Reverend Hale does not adhere to the aforesaid religious faiths, the defendants feel free to treat him worse than other similarly-situated prisoners who adhere to those faiths and in fact do so.

97. Had Reverend Hale been a Christian, Muslim, or Jew instead of a Creator, the defendants would not have imposed the mail bans or denied him his scripture.

98. The defendants do not like the fact that Reverend Hale writes articles and sermons for his faith and church and took his mail away on both occasions, in part, for so doing. However, other similarly-situated prisoners in the B.O.P. engage in same or similar conduct without penalty.

99. If Reverend Hale were a Christian, defendants Redden, Berkebile, and B.O.P. would have allowed him to receive the scripture of his religious faith. Instead, because he is a Creator, they denied him his scripture, Nature's Eternal Religion.

100. While defendants Redden, Berkebile, and B.O.P. refused to allow Reverend Hale Nature's

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D. Cause of Action (cont)

Eternal Religion, the bible of his own religious faith, defendant B.O.P. distributes the Christian Bible and the Muslim Koran to prisoners upon request.

101. Reverend Hale has in fact received both the Christian Bible and the Muslim Koran, upon his request to the Religious Services Department, since arriving at Supermax.

102. Reverend Hale is treated unequally by the defendants because of his religious beliefs and Church affiliation.

103. By imposing the mail bans, the defendants denied Reverend Hale his fundamental right to freedom of speech, freedom of association, and freedom to exercise the religion of his choosing.

104. Similarly-situated prisoners of other religious faiths are allowed by the defendants to participate freely in their religions and religious organizations whereas the defendants do not allow Reverend Hale to do so because they disdain his particular religion and church.

Wherefore, Reverend Hale prays that this Honorable Court issue judgment in his favor on Claim Six.

Claim Seven Violation of Religious Freedom Restoration Act, 42 U.S.C. sec. 2000 bb-1 (the refusal by defendants Berkebile, Redden, and B.O.P. to allow Reverend Hale to have his religious scripture so that he can exercise his faith)

105. Reverend Hale repeats and realleges paragraphs 1 through 90 as if fully stated herein.

106. By refusing to allow Reverend Hale to have the scripture of his religious faith, Nature's Eternal Religion, the defendants have substantially burdened Reverend Hale's religious exercise in violation of 42 U.S.C. sec. 2000 bb-1.

Wherefore, Reverend Hale prays that this Honorable Court issue judgment in his favor on Claim

4(4) ■

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D. Cause of Action (cont)

Seven.

Claim Eight Violation of First Amendment (the refusal by defendants Berkebile and B.O.P. to provide Reverend Hale with meals that comply with his Creativity religious dietary requirements)

107. Reverend Hale repeats and realleges paragraphs 1 through 20 as if fully stated herein.

108. In June 2013, Reverend Hale asked defendants Berkebile and B.O.P. to provide him with meals that meet his religious dietary needs but they refused his request in July 2013.

109. The Creativity religious diet is integral to the Creativity religion itself. There is no such thing as fully following the Creativity religion without following its religious diet.

110. Reverend Hale practiced his Creativity religious diet when he was a free man and has requested it on several occasions during his imprisonment but it has always been denied.

111. Since the Creativity religious diet consists merely of raw fruits, vegetables, nuts, or seeds, it is extremely easy to fulfill in regards to B.O.P. staff and budgetary concerns since no cooking or processing is necessary or allowed.

112. The Tenth Circuit Court of Appeals has stated that "this circuit recognizes that prisoners have a constitutional right to a diet conforming to their religious beliefs." *Berheide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002).

113. The meals provided to Reverend Hale by defendant B.O.P. violate his religious beliefs in numerous ways. Specifically, they are cooked, contain animal products, and do not consist of fruits, vegetables, nuts, or seeds only.

Wherefore, Reverend Hale prays that this Honorable Court issue judgment in his favor on Claim

4 (v) ■

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D. Cause of Action (cont)

Eight.

Claim Nine Violation of Religious Freedom Restoration Act, 42 U.S.C. sec. 2000 bb-1 (the refusal by defendants Berkebile and B.O.P. to provide Reverend Hale with his Creativity religious diet)

114. Reverend Hale repeats and realleges paragraphs 107 through 113 as if fully stated herein.

115. By refusing to provide Reverend Hale with meals that comply with his Creativity religious dietary requirements, defendants Berkebile and B.O.P. have substantially burdened Reverend Hale's religious exercise in violation of 42 U.S.C. sec. 2000 bb-1.

Wherefore, Reverend Hale prays that this Honorable Court issue judgment in his favor on Claim Nine.

Claim Ten Violation of First Amendment (the refusal by defendants Berkebile and B.O.P. to allow Reverend Hale to be interviewed in person by Larry Yellen of Fox News Chicago)

116. In March or April 2013, Larry Yellen, a reporter for Fox News in Chicago, made a request to defendants Berkebile and the B.O.P. that he be allowed an in-person, on camera interview with Reverend Hale.

117. Reverend Hale's family had contacted Yellen to inform him that Reverend Hale desired the interview in order to bring public awareness to the fact of his innocence and wrongful convictions.

118. Reverend Hale, as a well-known public figure, had interviewed with Yellen several times when he was a free man concerning his Church and religious pro-white activism.

119. The fact that a prisoner maintains that he is innocent of any crime and that he is being

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D. Cause of Action (cont.)

wrongfully imprisoned is a matter of significant public concern.

120. 28 C.F.R. sec. 540.63 allows prisoners to have personal interviews with representatives of the news media. An interview can only be denied for the reasons stated in paragraph (g), none of which apply in Hale's case.

121. Nevertheless, Defendant Berkebile and Defendant B.O.P. denied Yellen's request for the interview on May 13, 2013, citing "institution safety and security concerns."

122. Defendant Berkebile is well aware that Yellen's requested interview with Reverend Hale poses no "institution safety and security concerns" but made that false claim merely in an effort to justify the denial of the interview.

123. Defendant Berkebile does not want the public to know that there are innocent men being held at his "Supermax" prison and this motivated his decision, in part, to deny Yellen's interview request.

124. Defendant Berkebile was also motivated by a desire to silence Reverend Hale because of his religious and ideological beliefs and to stop any of those beliefs from being presented to the public.

125. The denial of the interview is part of the same pattern of religious and ideological oppression that Reverend Hale has stated in the previous claims of this complaint.

126. Defendants Berkebile and B.O.P. had no legitimate basis for denying the interview request.

Wherefore, Reverend Hale prays that this Honorable Court issue judgment in his favor on Claim Ten.

Claim Eleven Violation of Eighth Amendment (the imposition of broad mail bans and religious scripture bans upon a prisoner housed in solitary confinement for indefinite duration)

4(x)

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D. Cause of Action (cont)

127. Reverend Hale repeats and realleges paragraphs 1 through 106 as if fully stated herein.

128. Reverend Hale is confined to his cell for an average of 22 hours per day with two hours out of his cell for recreation periods.

129. Due to the onerous restrictions on social visits at Supermax as well as his having had no previous ties to the state of Colorado, Reverend Hale has only been able to receive two social visits at Supermax since he arrived there in 2005.

130. As a prisoner who has been kept in solitary confinement for more than 10 years and who has no indication that he will ever be freed by the B.O.P. from that status before the expiration of his 40 year sentence, the defendants have an obligation to refrain from imposing additional onerous conditions upon his confinement that would cumulatively render his imprisonment cruel and unusual under the Eighth Amendment. They have failed to do so here. Taking away a prisoner's personal mail who is already in solitary confinement, without him having done anything wrong, as happened here, is cruel and unusual. It is cruel and unusual for a prisoner kept in solitary confinement also to lose his personal mail without evidence that he has committed, or attempted to commit, any illegal or unlawful activity.

Wherefore, Reverend Hale prays that this Honorable Court issue judgment in his favor on Claim Eleven.

~~G. Request for Relief~~

~~Request for Declaratory Judgment~~

~~Request for Injunctive Relief~~

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E. PREVIOUS LAWSUITS

Have you ever filed a lawsuit, other than this lawsuit, in any federal or state court while you were incarcerated? Yes No (CHECK ONE). If your answer is "Yes," complete this section of the form. If you have filed more than one lawsuit in the past, use extra paper to provide the necessary information for each additional lawsuit. The information about additional lawsuits should be labeled "E. PREVIOUS LAWSUITS."

- 1. Name(s) of defendant(s) in prior lawsuit: John Ashcroft, Alberto Gonzalez, et al
- 2. Docket number and court name: 06-cv-00541 U.S. Dist. Ct. for Dist. of Colorado
- 3. Claims raised in prior lawsuit: First Amendment, Fifth Amendment
- 4. Disposition of prior lawsuit (for example, is the prior lawsuit still pending? Was it dismissed?): dismissed
- 5. If the prior lawsuit was dismissed, when was it dismissed and why? 2009 dismissed as moot
- 6. Result(s) of any appeal in the prior lawsuit: N/A

F. ADMINISTRATIVE RELIEF

- 1. Is there a formal grievance procedure at the institution in which you are confined?
 Yes No (CHECK ONE).
- 2. Did you exhaust available administrative remedies? Yes No (CHECK ONE).

G. REQUEST FOR RELIEF

State the relief you are requesting. If you need more space to complete this section, use extra paper. The additional requests for relief should be labeled "G. REQUEST FOR RELIEF."

- 1) declaratory judgment that 28 C.F.R. sec. 540.15 is unconstitutional on its face and as applied
- 2) injunctive relief against B.O.P. and individual defendants
- 3) money damages against each person named as a defendant only

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I am the plaintiff in this action, that I have read this complaint, and that the information in this complaint is true and correct. See 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Executed on February 21, 2014
(Date)

Rev. Matt Hale
(Prisoner's Original Signature)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

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

REVEREND MATT HALE,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS;
DAVID BERKEBILE, individually;
BLAKE DAVIS, individually;
CHRISTOPHER SYNSVALL, individually;
BENJAMIN BRIESCHKE, individually;
S.M. KUTA, individually;
L. MILUSNIC, individually;
PATRICIA RANGEL, individually;
WENDY HEIM, individually;
S. SMITH, individually;
H. REDDEN, individually;
DIANA KRIST, individually; and
A. TUTTOILMONDO, individually,

Defendants.

OPINION AND ORDER ADOPTING RECOMMENDATION
AND GRANTING MOTION TO DISMISS

THIS MATTER comes before the Court pursuant to a Motion to Dismiss (#41) filed by Defendants, the Federal Bureau of Prisons (BOP) and twelve individual BOP Officials (the Officials) (collectively, Defendants). The Plaintiff, Matt Hale, filed a Response (#49). The motion was referred to the Magistrate Judge, who issued a Recommendation (#58) that the Motion be granted as to all claims. Mr. Hale, filed timely Objections (#59), the Defendants filed a Response (#64), and Mr. Hale replied (#65).

I. JURISDICTION

The Amended Complaint (#10) (hereinafter, the Complaint) asserts various claims under the First, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution, the Religious Freedom Restoration Act (RFRA), and raises a facial challenge to the constitutionality of a Federal Bureau of Prisons (BOP) regulation found at 28 C.F.R. § 540.15. Because these claims are brought under the Constitution or laws of the United States, this Court has jurisdiction under 28 U.S.C. § 1331. *See Bell v. Hood*, 327 U.S. 678, 680 (1946).¹

¹ The Recommendation concluded that the Court lacked subject matter jurisdiction to determine Mr. Hale's First Amendment claims for injunctive relief regarding the first and second mail bans (including those brought under the First, Fifth, and Sixth amendments, as well as under RFRA). Specifically, the Recommendation found that because the bans are no longer in place, there is no live case or controversy.

A plaintiff bears the burden to "clearly allege facts demonstrating" jurisdiction; standing cannot be inferred. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). As relevant here, the plaintiff must allege a live case or controversy—that the issues involved are ongoing and the parties have a legally cognizable interest in the outcome. *Chafin v. Chafin*, 133 S.Ct. 1017, 1023 (2013). But even where a challenged action is no longer in place (and therefore a challenge to the action could be considered moot), a court may still decide a case that is "capable of repetition, yet evading review." *See Spencer v. Kemna*, 523 U.S. 1, 17 (1998); *see also Gannett Co. v. DePasquale*, 443 U.S. 368, 377 (1979). For this exception to mootness to apply, a complaint must plead sufficient facts on which a court could conclude that: (1) the duration of the challenged conduct is too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. *Gannett*, 443 U.S. at 377; *see Pearlman v. Vigil-Giron*, 71 Fed. App'x 11, 13 (10th Cir. 2003). Specifically, the Tenth Circuit has rejected a nearly identical mootness argument to the one presented by Defendants here. *See Al-Owhali*, 687 F.3d at 1242. In *Al-Owhali*, the Circuit found that the government's contention that a prisoner could not challenge a Special Administrative Matter (SAM) because it had since been lifted was misplaced. *Id.* The Circuit noted that "all SAMs expire, at the latest, one year after they are imposed," and if courts "prohibited any challenge to a lapsed SAM, inmates would only have one year to litigate and appeal a case," an almost "impossible feat." *Id.* Therefore, the case was not moot as the challenged action was capable of repetition and too short in duration to be fully litigated prior to its cessation. *Id.* Here, the Complaint pleads that both challenged mail bans were reviewed and lifted after some six months, likely too brief to be resolved by litigation. It also states that Mr. Hale remains in fear that his mail rights again "could be taken away from him at any time, for any arbitrary reason." Specifically, Mr. Hale was told that Defendants "could not guarantee that his mail would not be taken away again if [BOP officers] saw fit." Repetition is thus particularly possible here because Mr. Hale alleges he was not told what sort of correspondence may trigger

II. FACTUAL BACKGROUND

A summary of the factual allegations in the Complaint follows, and the Court will elaborate as necessary in its analysis.² All well-pled facts are accepted as true.

Mr. Hale appears *pro se*.³ He is an inmate in the custody of the BOP and is incarcerated at the Administrative Maximum facility in Florence, Colorado (ADX). Mr. Hale is a member and practitioner of the Church of the Creator, which advocates the practice of the “Creativity” religious faith. For at least ten years, Mr. Hale was the “Pontifex Maximus,” or “greatest priest,” and “thousands of Creators” recognize him as an ordained minister. The mission of the Creativity faith is the “permanent prevention of the cultural, genetic, and biological genocide of the White race worldwide.” Creativity doctrine advocates “total racial segregation so as to stop the mixture, and hence destruction, of White culture and genetic stock.”

Creativity followers believe that salvation is achieved on earth rather than the afterlife. The “mission of racial salvation” is furthered only in a “legal and peaceful” manner, and Creativity “forbids any and all illegal and violent acts by its adherents in its fight to attain the salvation of the White Race.” Mr. Hale has “no record whatsoever of having committed any

another ban. The Court therefore has little doubt that Mr. Hale has plead sufficient facts to warrant review of the mail bans.

² The facts are derived from Mr. Hale’s Complaint and, in very limited circumstances, the Notices of Restricted General Correspondence Status provided to Mr. Hale, which are central to Mr. Hale’s claims deriving from these restrictions. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) (when reviewing a motion to dismiss, the Court may consider documents that are “central to the plaintiff’s claim,” where the documents’ authenticity is not disputed); *accord Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002). The Court declines Defendants’ request to take judicial notice of factual findings in prior cases involving Creativity, with the narrow exception of Mr. Hale’s habeus corpus case, *Hale v. United States*, No. 08-cv-94, 2010 WL 2921634 (N.D. Ill., July 22, 2010).

³ Due to Mr. Hale’s *pro se* status, the Court construes his pleadings liberally. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

violent or illegal act” during his incarceration, but followers of Creativity, including Mr. Hale, have resorted to violent means to further their beliefs.⁴

Mr. Hale complains of various administrative restrictions, summarized in turn, which allegedly inhibit his ability to freely exercise his right to practice Creativity.

A. Mail Bans

According to the Complaint, it is “not possible for a Creator to exercise his religion by himself. Rather, he must “proselytize it to others,” namely, the “non-converted.” Mr. Hale’s “duties as an ordained minister include the espousal and promotion of Creativity to . . . White people at large,” and “counseling to his correspondents.” It is “through his mail” that he accomplishes these duties, specifically by writing articles and sermons from prison.

In July 2010, Mr. Hale wrote an article asserting that he was “resuming his leadership as Pontifex Maximus.”⁵ Afterward, the BOP, namely, Offs. Davis, Milusnic, Krist, Rangel, Synsvoll, Brieschke, and Smith, placed Mr. Hale on Restricted General Correspondence status (more colloquially, a “mail ban”).⁶ Particularly, Offs. Brieschke and Smith told Mr. Hale that his mail was taken away because he was “trying to direct his church,” and Off. Davis told him that “we don’t want you to be Pontifex Maximus.” Concurrent with this mail ban, Offs. Smith and Redden not only restricted Mr. Hale’s outgoing mail, but also “deliberately” “reject[ed] and return[ed] letters that were mailed to [Mr.] Hale by his correspondents.” Off. Kuta “personally approved and signed off on the rejection and return of each letter that was mailed to [Mr.] Hale

⁴ Mr. Hale was convicted of one count of solicitation of the murder of a federal judge. *See Hale v. United States*, No. 08-cv-94, 2010 WL 2921634, *1, (N.D. Ill., July 22, 2010). Motivation for this crime was presumed to be a belief that the Judge presided unfavorably over a civil suit involving the Church of the Creator. *Id.*

⁵ The Court is unable to discern to whom Mr. Hale sent this article (or any of his other mailed sermons, for that matter).

by his correspondents.” Contrary to BOP policy, Mr. Hale was not given rejection notices. For the incoming letters that were delivered to Mr. Hale, Offs. Smith and Redden covered up the return addresses so that Mr. Hale could not respond.

When the mail ban was imposed, the BOP notified Mr. Hale that it would review the restriction in six months. In the interim, Mr. Hale could respond to the restrictions by attempting “informal resolution under the Bureau’s Administrative Remedy Program.” The Notice informed Mr. Hale that the ban was imposed because his “correspondence with Creativity Movement members . . . and other white nationalist extremists poses a special threat to the security and good order of the institution, protection of the public and national security insofar as [Mr. Hale’s] unlimited general written correspondence might facilitate further criminal activity.” The mail ban did not restrict Mr. Hale from corresponding with his immediate family.

In January 2011, after the conclusion of its initial six month imposition, the BOP lifted the mail ban. When Mr. Hale inquired as to what he could write about to avoid having his mail rights taken away again, Off. Redden told him, “the weather.” Offs. Brieschke and Redden also directed Mr. Hale to “avoid becoming too involved with his Church.”

In July 2012, Mr. Hale began writing “Sermons from Solitary,” in which he urged followers to “win over others to Creativity.” The Complaint states that these sermons encouraged “peaceful” actions, “urged Creators and others to stay within the law, refrain from any violence, and use persuasion to win over others to Creativity and to the cause of Racial Loyalty generally.” The Complaint states that Mr. Hale’s writings were thus “helpful to his Church, his religious faith, his fellow believers and those of like mind, as well as to law enforcement and society in general.” Still, on January 29, 2013, Mr. Hale was again placed on Restricted General Correspondence status, and the BOP issued him a nearly identical notice informing him of the

particulars of the ban, the reason for its imposition, and how he could contest it. In August 2013, after six months expired, the second mail ban was lifted.

The Complaint alleges that the mail bans were imposed because Mr. Hale was “trying to be something that [he is] not allowed to be anymore,” and to “eliminate his First Amendment rights and hurt [Mr.] Hale personally.” The mail bans further “sought to punish and persecute [Mr.] Hale for the religious faith that he adheres to,” with a desire to “inflict psychological and emotional harm.” Particularly the Complaint accuses Offs. Davis, Milusnic, Synsvoll, Brieschke, Krist, Rangel, Smith, and Redden, of having a “personal animosity for [Mr. Hale’s] Church.” Mr. Hale identifies a statement made by Off. Redden, that the BOP officials “don’t like [Mr. Hale] writing for his Church.” Mr. Hale states that Off. Rangel informed him that the mail ban was a “management decision made by all of us.”

The Complaint contends that Offs. Synsvoll and Brieschke, in their role as attorneys for the BOP, routinely counseled BOP officials to violate prisoners’ rights, and the BOP categorically imposed mail bans with “malice and with the deliberate intent that prisoners be deprived of their legal rights . . . with no regard for the Constitution of the United States.” It alleges that BOP officials “routinely . . . claim that the prisoners’ correspondence poses a ‘threat’ regardless of whether this is sincerely believed or not . . . as a means of discouraging prisoners from contesting the mail bans.”

B. Creativity’s Bible

In February of 2013, Offs. Redden, Berkebile, and the BOP refused to allow Mr. Hale to have a copy of “Nature’s Eternal Religion,” that was mailed to him. Mr. Hale describes the text as the “main Bible of [Mr.] Hale’s Creativity religious faith.” The Complaint alleges that this prohibition was due to certain officials’ “disdain of the beliefs contained therein” and was an

attempt to “inhibit [Mr. Hale’s] ministerial duties.” It alleges that Nature’s Eternal Religion does not pose “any kind of threat or risk of harm to anyone or anything in any way,” nor did Defendants truly believe that it posed a threat. The Complaint alleges that because Mr. Hale is in solitary confinement, there is no legitimate penological interest, such as institutional order and security, that justifies denying the book to Mr. Hale.

C. Special Diet

In June of 2013, Mr. Hale requested that the BOP provide meals conforming to Mr. Hale’s religious diet, which consists only of raw fruits, vegetables, nuts, or seeds. The Complaint alleges that the diet is “easy to fulfill in regards to BOP staff and budgetary concerns since no cooking or processing is necessary or allowed.” The BOP, specifically, Off. Berkebile, refused Mr. Hale’s request, which Mr. Hale pleads “substantially burdened [Mr. Hale’s] religious exercise.”

D. Media Interview

Finally, Mr. Hale challenges the BOP’s, specifically Off. Berkebile’s, refusal to allow him an in-person interview with a Fox News reporter. Mr. Hale interviewed with this reporter before his incarceration to promote his Church and “pro-white activism,” and the Complaint alleges that Mr. Hale sought the interview to “bring public awareness to the fact of his innocence.” The BOP told Mr. Hale that he could not interview due to “institution safety and security concerns,” but the Complaint alleges that the real reason for denying the interview was because the BOP and Off. Berkebile do not “want the public to know that there are innocent men” incarcerated and wish to “silence [Mr.] Hale because of his religious and ideological beliefs.”

III. ISSUES PRESENTED

Interpreting the Complaint liberally, the Court understands Mr. Hale to assert the following claims:

1. Violation of his rights of free exercise of religion, speech, and association under the First Amendment when the BOP (1) imposed the first and second mail bans; (2) denied him a copy of Nature's Eternal Religion; (3) failed to accommodate his religious diet; and (4) denied him permission to interview with a Fox News reporter. The Complaint also alleges that the mail bans were retaliatory, that is, they were imposed because Mr. Hale exercised his freedoms of religion;
2. Violation of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, *et seq.*, with regard to (1) the mail bans, (2) the refusal to allow him to have Nature's Eternal Religion, and (3) the failure to provide a special diet;
3. Violation of his Fifth Amendment rights when the BOP imposed the mail bans without sufficient procedural due process;
4. Violation of his right to equal protection when he was denied a copy of Nature's Eternal Religion; and
5. Violation of his Eighth Amendment right to be free from cruel and unusual punishment based on his isolation in solitary confinement, coupled with the "imposition of broad mail bans."

Mr. Hale requests monetary and injunctive relief on all claims, as well as a declaratory judgment that 28 C.F.R. 540.15 is facially unconstitutional.

Upon referral, the Magistrate Judge's Report and Recommendation concluded that all claims should be dismissed.⁷ Mr. Hale filed timely Objections (#59), Defendants filed a Response (#64), and Mr. Hale Replied (#65).

IV. STANDARD OF REVIEW

Ordinarily, the Court reviews only the portions of a recommendation to which a specific objection is made *de novo*. Fed. R. Civ. P. 72(b). But in deference to the liberal interpretations afforded to *pro se* pleadings, the Court will consider the Motion to Dismiss *de novo*. *Morales-Fernandez v. INS*, 418 F.3d 1116, 1119-20 (10th Cir. 2005); *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

To survive a motion to dismiss, Mr. Hale must plead a sufficient factual basis for each claim. Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To be factually sufficient, a claim must be "plausible on its face." *Id.* A claim is plausible on its face if a plaintiff alleged factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on the its judicial experience and common sense. *Id.* at 679.

⁷ The Recommendation first found that Mr. Hale's request for a declaratory judgment that 28 C.F.R. § 540.15 is facially unconstitutional should be dismissed as a matter of law because other federal courts have rejected this argument and found the regulation constitutional. As to Mr. Hale's claims seeking monetary relief, the Recommendation concluded that: (1) claims brought under RFRA and the First Amendment are barred by *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and the subsequent line of cases; and (2) the Defendants are entitled to qualified immunity on Mr. Hale's Eighth and Sixth Amendment claims. Last, the Recommendation found that the claims requesting injunctive relief should be dismissed on the grounds that: (1) the Court lacks subject matter jurisdiction over Mr. Hale's claims regarding the mail bans and refusal to permit the Fox News interview because these claims do not seek redress for a live case or controversy; (2) Mr. Hale's claims related to the refusal to allow him to have a copy of Nature's Eternal Religion and provide him with a special diet fail as a matter of law; and (3) Mr. Hale has not adequately plead a sufficient factual basis to sustain his equal protection claims.

The Court limits its review to the four corners of the Complaint plus any documents referenced therein that are central to the claims and for which authenticity is not disputed. *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002); *Oxendine v. Kaplan*, 241 F.3d 1272, 1275 (10th Cir. 2001). All well-pleaded allegations are accepted as true and viewed in the light most favorable to the non-moving party. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). However, threadbare recitations of the elements of a cause of action, supported by mere conclusory statements or “naked assertions” are not entitled to presumptions of truth and need not be considered. *Iqbal*, 556 U.S. at 678. Likewise, allegations so general that they encompass a wide swath of conduct, both permissible and not, may be disregarded. *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012).⁸

V. ANALYSIS

A. Sincerely-Held Religious Beliefs

As an initial matter, Mr. Hale’s Complaint raises claims under both the Free Exercise Clause of the First Amendment and RFRA. Both claims require a preliminary finding that the plaintiff has sufficiently pled that the existence of sincerely-held religious beliefs. *See Kay v. Bemis*, 500 F.3d 1214, 1218-19 (10th Cir. 2007) (claims under the Free Exercise Clause require plaintiff to demonstrate sincerely-held religious beliefs); *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001) (RFRA claim requires the existence of sincerely-held religious beliefs).

Defendants argue that, as a matter of law, Creativity is not a religion. They rely upon opinions issued by other federal district courts addressing the issue. *See, e.g., Todd v. Cal. Dep’t of Corrs. & Rehab.*, No. 12-cv-01003, 2013 WL 1281611 (E.D. Cali., Mar. 26, 2013), *rev’d*

⁸ The Court also notes that ordinarily, it is not sufficient for a plaintiff to state that a claim alleges or incorporates by reference all previous paragraphs, as it is not the role of the Court to piece together a plaintiff’s arguments for him. *See Al-Owhali*, 687 F.3d at 1244. But because of Mr. Hale’s *pro se* status, the Court will examine all of his factual allegations when examining particular claims.

Todd v. Cali. Dep't of Corr., No. 1:12-cv-01003-LJO-DLB, 2015 WL 5042850, *1 (9th Cir., Aug. 27, 2015); *Connor v. Tilton*, No. 07-4965-MMC, 2009 WL 4642392 (N.D. Cali., Dec. 2, 2009) (noting that the fact that Creativity is a white supremacist organization does not necessarily preclude it from also being a religion, but ultimately concluding at summary judgment that Creativity is not a religion); *Birkes v. Mills*, No. 10-cv-00032-HU, 2011 WL 517859 (D. Ore., Sept. 28, 2011) (finding at summary judgment that "Creativity is [not] a religion).

These opinions are not determinative, but they are instructive. As noted, the Court is limited to the four corners of the Complaint in determining whether a cognizable claim has been pled. The question of whether the Complaint has pled that Creativity is a religion is, first and foremost, a question of pleading sufficiency that is unaffected by the decisions by other courts. Whether Creativity is a religion could also be a factual matter, subject to conclusive resolution by application of judicial precedent, under the doctrines of collateral estoppel or doctrine of *res judicata*. But these doctrines have not been invoked by the Defendants.

The proffered case-law is instructive, however, particularly in identifying the point in the judicial process when a determination of whether Creativity is a religion was made. Whether Creativity is a religion is a factual question, and at the motion to dismiss stage, the showing required for a plausible claim is something less than is required for a prima facie claim at summary judgment. *See Al-Owhali v. Holder*, 687 F.3d 1236, 1240 (10th Cir. 2012).

Consequently, the *Connor* and *Birkes* courts reserved their determinations to the summary judgment stage – based on a complete factual record.⁹ *Todd* is also noteworthy because the Ninth

⁹ The Court is aware of two opinions dismissing claims on motions to dismiss based on inadequate pleading relative to whether Creativity is a religion. *See Stanko v. Patton*, 568 F.Supp.2d 1061, 1072-73 (D. Neb. 2008); *see also Prentice v. Nev. Dep't of Corrs.*, No. 09-cv-0627, 2010 WL 4181456 (D. Nev. Oct. 19, 2010). These two opinions are also instructive, in

Circuit concluded that the trial court, “prematurely dismissed” the plaintiff’s Free Exercise claim on the basis that Creativity was a not religion entitled to constitutional protections on a Fed. R. Civ. P. 12(b)(6) motion. It remanded the case with directions that the trial court more carefully apply the legal standard to examine in detail whether Creativity is a religion. *Todd*, 2015 WL 5042850, *1.

Finding the case-law cited by the Defendants to have only procedural significance, the Court must assess whether the allegations made in this Complaint are sufficient, beginning with the legal standard to be applied. Whether a person’s beliefs (religious or not) are sincerely held is a question of fact and does not categorically require a plaintiff to submit direct evidence of sincerity. *See Mosiser v. Maynard*, 937 F.2d 1521, 1526-27 (10th Cir. 1991). Beliefs are insincere only if they are “so bizarre, [and] so clearly nonreligious in motivation.” *See Kay*, 500 F.3d at 1219-20. The question is exclusively a credibility determination, thus, summary dismissal on the grounds that a plaintiff’s beliefs are not sincerely held is proper only in the “very rare case.” *Id.*

There can be little dispute that the Complaint states sufficient facts, which if true, demonstrate that Mr. Hale’s beliefs are sincerely held. He converted to Creativity in 1990, has acted as an active minister since 1995, and purports to follow Creativity’s requirements, including observing a special diet and proselytizing his faith.

The more difficult question is whether Creativity may be considered a “religion.” Only belief systems that may properly be considered religious are entitled to constitutional protections.

part because the facts alleged differ from those in the Complaint here. In *Stanko*, the court considered allegations, including passages from the White Man’s Bible, that are not contained in this Complaint. *Stanko*, 568 F.Supp.2d at 1072. Moreover, *Stanko* chose to “tread lightly on the question of whether [the plaintiff’s] beliefs equate to the practice of religion,” and relied more heavily on the fact that prison officials had a valid reason for denying the plaintiff’s requests. *Id.* at 1072-73. In *Prentice*, the court relied entirely on facts found in the *Connor v. Tilton* opinion rather than conducting an independent analysis of the pleadings. 2010 WL 4181456 at *3.

See Thomas v. Review Bd. of Indiana Emp't Sec. Div., 450 U.S. 707, 713-14 (1981). To determine if a belief system is truly "religious" a court considers whether it (1) addresses fundamental and ultimate questions of deep and imponderable matters, such as human sense of being, purpose in life, or place in the universe; (2) contains "metaphysical" thoughts that "transcend the physical and immediately apparent world;" (3) prescribes a particular manner of acting that is moral or ethical and imposes duties on believers; (4) involves comprehensive beliefs that hope to broadly answer a great deal of humanity's problems rather than focusing on a single teaching; and (5) is accompanied by accoutrements of religion such as holidays, prophets, writings, ceremonies, or diets. *United States v. Meyers*, 95 F.3d 1475, 1483 (10th Cir. 1996). No one factor is dispositive, but "purely personal, political, ideological, or secular beliefs" will not likely suffice. *Id.* at 1503. Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. *United States v. Seeger*, 380 U.S. 163, 184-85 (1965). Particularly, that white supremacy is "secular, in the sense that it is a racist idea, does not necessarily preclude it from also being religious." *Wiggins v. Sargent*, 753 F.2d 663, 667 (8th Cir. 1985).

The Complaint identifies certain "commandments" of Creativity that, facially address these sorts of questions. Mr. Hale alleges that "Creativity addresses all the ultimate questions of life, including the meaning of life and its purpose," which, for Creators, is to halt the mixing of races and devote themselves to the salvation and survival of the white race. Creativity "teaches its adherents to build their minds, to eat salubriously, to create a society conducive to their mental and physical well-being, and to preserve a pure and natural environment," and thus imposes duties on its members. Mr. Hale alleges that Creators celebrate certain holidays, perform ceremonies, repeat daily affirmations, follow a prophet, and direct members to proselytize, all of

which are done with the idea that these practices allow a follower to achieve salvation. True, the Complaint does not identify any metaphysical components of Creativity, and it characterizes Creativity as having a single secular goal – the “achievement of white racial immortality.” But, however bigoted as Creativity’s beliefs may appear, the Complaint states facts which, taken as true, suggest that Creativity addresses the purpose for life and means of salvation, imposes duties on its members, and denotes certain holidays and religious ceremonies to be celebrated or performed.

Constrained to the four corners of the Complaint, the Court finds that there are sufficient factual allegations to support an inference that Creativity is a religion for purposes of Rule 12(b)(6) review. With this finding in mind, the Court turns its attention to the factual sufficiency of Mr. Hale’s particular claims.

B. First Amendment Claims

The Complaint raises five claims for relief under the First Amendment. Though the Complaint focuses on the First Amendment’s protection of religious freedom, it also contends that the Defendants’ actions violate free speech and association guarantees. The First Amendment is intended to protect all three rights. *See Christian Legal Soc. Chapter of the Univ. of Cali., Hastings College of Law v. Martinez*, 561 U.S. 661, 673 (2010).

That prisoners retain constitutional rights despite incarceration is supported by a “long line” of Supreme Court cases. *Berheide v. Suthers*, 286 F.3d 1179, 1184 (10th Cir. 2002). Although “prison walls do not form a barrier separating prison inmates from the protections of the Constitution,” inmates’ rights may be “restricted in ways that would raise grave First Amendment concerns outside the prison context.” *Gee v. Pacheco*, 627 F.3d 1178, 1187 (10th Cir. 2010) (internal quotations omitted). But regulations impinging on these rights must be

reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

Turner recognized that courts are ill-equipped to deal with the “increasingly urgent problems of prison administration and that deference must be afforded to prison officials trained in running penal institutions.” *Id.*; *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987).

Turner directs a court to engage in a balancing test to evaluate prison regulations that curtail constitutional rights, examining: (1) whether there is a rational connection between the prison policy or regulation and a legitimate government interest advanced as its justification; (2) if there are alternative means of exercising the right available to inmates notwithstanding the regulation; (3) the effect of accommodating the right on prison staff; and (4) if there are easy-to-implement alternatives that could accommodate the inmates’ rights. *Id.* at 89-91; *accord Beerheide*, 286 F.3d at 1185.

At the summary judgment stage, a plaintiff must make a showing on all four factors, but at the motion to dismiss stage, a prisoner must simply “plead facts from which a plausible inference can be drawn that the restriction was not reasonably related to a legitimate penological interest.” *See Al-Owhali*, 687 F.3d at 1240; *see also Doe v. Heil*, 533 Fed. App’x 831, 838-39 (10th Cir., Aug. 26, 2013). Thus, in a complaint, a plaintiff need not anticipatorily rebut the defendant’s reason for imposing certain restrictions, but need only to plead “some plausible facts support his claim that [the restriction] . . . did not serve the [stated] purpose.” *Id.* at 1241.

As noted, inmates retain the right to the free exercise of religion. *O’Lone*, 482 U.S. at 348; *see Peterson v. Lampert*, 499 Fed. App’x 782, 785 (10th Cir. 2012). To plead a constitutional violation based on the Free Exercise Clause in the prison context, a plaintiff must allege that a prison regulation “substantially burdened sincerely-held religious beliefs,” and, again, was not rationally related to a penological purpose. *Kay*, 500 F.3d at 1218-19; *Boles v.*

Neet, 486 F.3d 1177, 1182 (10th Cir. 2007). A “substantial” burden need not be a complete or total one. *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014). A substantial burden may be demonstrated by, among other things, facts contending that the regulation or policy required the plaintiff to participate in activity prohibited by his religion, preventing the plaintiff from participating in an activity motivated by sincere religious beliefs, or presenting the plaintiff with a “Hobson’s choice,” where the only realistic course of action available to the plaintiff results in a violation of his religion. *Id.*

Like the right to free exercise of religion, the rights of free speech and association may be limited to meet the needs of a penal institution. *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 125 (1977). To sustain a free speech or association claim, a complaint must allege facts upon which a court, under *Turner*, could infer that the impinging actions were not in furtherance of legitimate penological interests. *Jones*, 433 U.S. at 126; *see Brown v. Saline Cnty. Jail*, 303 Fed. App’x 678, 684 (10th Cir. 2008) (a complaint alleging that defendants’ actions were unrelated to a legitimate government interest is sufficient at the dismissal stage).

1. Mail Bans

Mr. Hale alleges that his ability to practice his religion was substantially burdened. The Complaint alleges that Creativity’s “overriding mission . . . is the permanent prevention of the cultural, genetic, and biological genocide of the White Race worldwide,” and to accomplish this, Creators advocate for “total racial segregation.” Thus, by nature, Creativity is a “proselytizing faith.” “Its adherents must bring it to the non-converted in order to follow fully its teachings.” “The Creator must proselytize for his White Race to others so that salvation and immortality may be attained.” Accordingly, the “ability to correspond with others forms a major component” of Mr. Hale’s religious practice. The mail bans prohibited Mr. Hale from corresponding with

anyone outside his immediate family. The Complaint therefore contains sufficient factual allegations to infer that the mail bans substantially burdened Mr. Hale's exercise of religion by preventing him from engaging in an activity central to his religious practice.

The Court's analysis, however, does not end here. The Complaint must also allege facts that plausibly suggest that there is no legitimate penological interest for the mail bans. It states that the proffered reason for the mail bans was that Mr. Hale's correspondence was a threat to institutional and public security. Though the Court ignores the bare legal conclusions asserted in the Complaint, there are some factual allegations refuting the existence of a penological interest. Particularly, Mr. Hale states that his mail never "fomented or encouraged violence in anyway," and has "always been . . . peaceful." In addition, Defendants allegedly censored or rejected Mr. Hale's incoming mail, which does not appear in line with protecting the public (though it is foreseeably related to institutional security and Mr. Hale does not allege with particularity how it is not). Moreover, in contradiction to the BOP's stated reason of security, Mr. Hale was told that the mail bans were imposed because he was "too involved with his Church with his correspondence," "trying to be something that [he] is not allowed to be anymore," and that Defendants "don't like [him] writing for [his] Church."

Taking these factual assertions in the Complaint as true, the Court finds that the Complaint states facts permitting a plausible inference that the mail bans were both a substantial burden to Mr. Hale's religious exercise and were not in furtherance of a penological interest. Accordingly, the Court denies Defendants' Motion to Dismiss Mr. Hale's First Amendment claims related to the mail bans.

2. Nature's Eternal Religion

Defendants next move for dismissal of Mr. Hale's First Amendment claim challenging the Defendants' refusal to allow him a copy of Nature's Eternal Religion, the Creativity bible.

The Complaint does not allege any facts from which the Court could infer that this denial substantially burdened his ability to exercise Creativity.¹⁰ Thus, any claim that the denial violated the Free Exercise Clause cannot survive a motion to dismiss. However, to the extent that Mr. Hale contends the refusal to allow him Nature's Eternal Religion violates his right to free speech, the Court examines whether there are sufficient facts alleged to support an inference that the restriction does not further a legitimate penological interest. Mr. Hale alleges that he received a copy of Nature's Eternal Religion in the mail, and that the BOP and Offs. Redden and Berkebile refused to allow him to have it. The Complaint continues that the book is not a "threat or risk of harm to anyone or anything," and that Mr. Hale is prohibited from having the book because Defendants "wish to deny [Mr.] Hale his scripture" because of their biases against Creativity and to inhibit Mr. Hale from performing his "ministerial duties." Although there are no particular allegations as to why the book is not a threat, *e.g.* that it does not contain inflammatory material or that because Mr. Hale is confined to solitary his personal possession of the book cannot be a security concern, the Court finds that at the dismissal stage, the allegations are sufficient.

¹⁰ The Complaint, in support of a RFRA claim regarding Defendants' refusal to allow Mr. Hale a copy of Nature's Eternal Religion, states that this refusal "substantially burdened [Mr.] Hale's religious exercise." The Court disregards this statement because it is a bare assertion of the legal standard without any supporting facts. *See Twombly*, 550 U.S. at 555-56.

The Defendants again argue that the existence of prior federal district court opinions upholding a prison's refusal to allow an inmate to possess the book¹¹ demonstrate that Mr. Hale's claim fails because, as a matter of law, the book is not permitted in the prison context. The Court is not persuaded by Defendants' argument. Defendants do not indicate that the previous cases were decided on nearly identical facts. For example, Defendants do not argue that, in the prior cases the inmates, like Mr. Hale, were in solitary confinement. Moreover, the Court, at this stage, relies only on the Complaint, which alleges facts that could permit a finding that the refusal to allow Mr. Hale a copy of Nature's Eternal Religion was not rationally connected to a legitimate penological interest.

3. Special Diet

Defendants move to dismiss Mr. Hale's claim challenging the refusal to accommodate his religious diet. First, the Court examines whether the Complaint alleges a substantial burden on Mr. Hale's religion. Here, it alleges that the requested diet is "integral to the Creativity religion itself" and "there is no such thing as fully following the Creativity religion without following its diet." Though thin, this allegation suffices. *See Holland v. Goord*, 758 F.3d 215, 221 (2d. Cir. 2014) (inmate's assertion that a religious meal was "critical to his observance as a practicing Muslim" sufficiently alleged a substantial burden on religion).

Thus, the Court turns to whether the Complaint alleges that refusing Mr. Hale's diet is unrelated to a legitimate penological interest. The single allegation that there is no such interest is that the Creativity diet is "extremely easy to fulfill in regards to BOP staff and budgetary concerns" as it requires no cooking or preparation but consists only of seeds, nuts, and fresh fruit

¹¹ Two other federal courts concluded that Nature's Eternal Religion is properly banned in the prison context because it encompasses Creativity's tenets, namely, beliefs that the white race is superior and that "Jews, blacks, and what it labels 'mud races'" should be eliminated. *See Byrnes v. Biser*, No. 06-cv-249J, 2007 WL 3120296, *3 (W.D. Penn., Oct. 23, 2007); *see also Birkes v. Mills*, No. 10-cv-0032, 2011 WL 5117859 (D. Ore. Sept. 28, 2011).

and vegetables. But again, for purposes of dismissal the Court finds that, though thin, the Complaint sufficiently pleads that the burden on Mr. Hale's religion could plausibly be unrelated to a legitimate penological interest.

4. Fox News Interview

Defendants move to dismiss Mr. Hale's claim that the refusal to allow him to interview in-person with a Fox News reporter violates his First Amendment rights.

The Complaint alleges that Mr. Hale desired the interview to "bring public awareness to the fact of his innocence and wrongful convictions" and that denying the interview was motivated by Defendants' attempt to hide from the public the fact that "innocent men [are] being held [at ADX]" and a desire to "silence [Mr.] Hale because of his religious and ideological beliefs" rather than Defendants' stated "institution safety and security concerns." But, even read liberally, what the Complaint does not allege are any facts from which the Court could infer that there is a live case or controversy or that any refusal to permit the interview with Fox News is capable of repetition. There are no allegations, for example, that Mr. Hale continues to discuss the possibility of an interview with Fox News or any other media outlet. The Court therefore dismisses all claims related to denial of the media interview against Defendants due to a lack of jurisdiction.

5. Retaliation

Lastly, Defendants seek dismissal of Mr. Hale's claim that the mail bans were in retaliation for Mr. Hale exercising his First Amendment rights. To be sure, prison officials may not harass an inmate because the inmate exercised his rights. *Gee v. Pacheco*, 627 F.3d 1178, 1189 (10th Cir. 2010); *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir. 1990). Retaliation claims require slightly different elements than other First Amendment claims. A pleading must allege

facts that if true would establish that: (1) the plaintiff engaged in protected activity; (2) the defendant took a responsive action that would “chill a person of ordinary firmness from continuing to engage in that activity”; and (3) the defendant’s action was “substantially motivated” by the plaintiff engaging in protected activity. *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007); *Fogle v. Pierson*, 435 F.3d 1252, 1264 (10th Cir. 2006).

Here, the Complaint alleges that Mr. Hale engaged in constitutionally protected activity by attempting to exercise his religion through correspondence with his followers in a “peaceful” manner. When Mr. Hale corresponded with followers, however, Defendants imposed a ban on his mail. The Complaint alleges that the ban was in response to his exercise of religion and was intended to intimidate Mr. Hale through threats to impose more mail bans and that the bans “deliberately sought to cause [him] psychological anguish” for exercising his First Amendment rights and were motivated by a “disdain” for Creativity. As a result, Mr. Hale “tried to avoid any possibility that he could be accused of ‘directing’ his Church.” Thus, Defendants “succeeded” in preventing Mr. Hale from exercising his constitutional rights.

Assuming, as the Court must, that these allegations are true, there are sufficient facts to show all three elements of a retaliation claim — protected activity and resulting retaliatory acts.

6. Available Relief

For the reasons detailed above, Mr. Hale’s First Amendment claims for injunctive relief as to the mail bans, denial of Nature’s Eternal Religion, the religious diet, and retaliation may proceed.

The Complaint also seeks monetary relief for these claims. *Bivens* actions permit an individual deprived of constitutional rights by a state actor to bring an action for monetary relief against the actor. *Bivens*, 403 U.S. 388 (1971). But the Supreme Court recognizes the availability

of *Bivens* relief only from select violations and has frequently rejected invitations to expand *Bivens* to other types of claims. *See generally Minneci v. Pollard*, 132 S.Ct. 617 (2012). Particularly, the Supreme Court has declined to extend *Bivens* to certain claims sounding in violation of the First Amendment. *Ashcroft*, 556 U.S. at 675; *accord Bush v. Lucas*, 462 U.S. 367 (1983).¹²

However, there is no hard and fast categorical ban against *Bivens* relief from First Amendment violations by individual defendants, and for purposes of its analysis, the Court assumes without deciding that such relief might be available. Nevertheless, the Court finds that Mr. Hale has not sufficiently alleged facts which, taken as true, allow the Court to infer that relief against the individual defendants is plausible.

To maintain a claim for relief against individual defendants, a complaint must set forth sufficient facts on which the Court can find that each individual defendant was an active participant in the action and, moreover, that the defendant acted with purposeful discrimination. *Iqbal*, 556 U.S. at 676-77; *Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976); *see Bell v. Wolfish*, 41 U.S. 520, 535 (1979). Purposeful discrimination requires more than intent, rather, a plaintiff must allege that the defendant undertook a course of action because of the adverse effects such action would have against a particular class. *Iqbal*, 556 U.S. at 676-77. A complaint must explain “what each defendant did to him or her; when the defendant did it; how the defendant’s actions harmed him or her; and, what specific legal right the plaintiff believes the defendant violated.” *Nasious v. Two Unknown B.I.C.E. Agents*, 494 F.3d 1158, 1163 (10th Cir.

¹² Because the Court dismisses any claims for monetary relief arising out of alleged First Amendment violations, the Court dismisses the First Amendment claims against the individual Officials, as injunctive relief is available only against the BOP. Accordingly, the Court need not address the Officials’ qualified immunity defense. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 at n.5 (1998) (noting qualified immunity is not available to block relief in the form of a determination of law or to enjoin future conduct).

2007). It is not, for example, sufficient for a plaintiff to contend that a defendant was a “principal architect” of or “instrumental” in an invidious policy or action. *Iqbal*, 556 U.S. at 680-81. Put simply, without more, allegations that an individual defendant played a primary role in a discriminatory policy are not sufficiently detailed. *Id.*

Viewing the pleading liberally, the Court contrives that Mr. Hale purports to seek relief against Offs. Davis, Milusnic, Krist, Rangel, Synsvoll, Brieschke, Smith, Kuta, Tutoilmundo, Redden, and Heim. The Complaint alleges generally that these individuals imposed the mail bans and that each “participated individually and personally in the decision” and they took his mail away because of “personal animosity for his Church.”¹³ These statements are bare and conclusory and do not sufficiently allege personal participation or discriminatory motive.

The Complaint more specifically alleges that Offs. Milusnic, Redden, and Kuta “personally approved and signed off on the rejection and return of letters that were mailed to [Mr.] Hale,” while Offs. Smith and Redden “personally arranged for the rejection and return of his letters.” It continues that Offs. Brieschke and Redden directed him not to refrain from involvement in his church if he wanted to avoid another ban because “[they] don’t like [him] writing for [his] Church.” The Complaint accuses Offs. Smith and Redden likewise “deliberately” failed to give Mr. Hale rejection notices or covered up return addresses, and that Off. Davis “urged” others to impose the mail ban.¹⁴ Lastly, it alleges that Off. Berkebile refused

¹³ He also identifies what each Official’s job was — warden, assistant warden, supervisory attorney, assistant supervisory attorney, unit manager, SIS technician, special investigative agent, and assistant inmate systems manager — but without explaining the majority of their roles in the bans.

¹⁴ Mr. Hale’s contention that Off. Davis should be liable because he encouraged imposition of the mail bans, is also legally insufficient, as indirect participation cannot satisfy *Bivens*’ personal participation requirement. *See Monell v. New York City Dep’t of Social Servs.*, 436 U.S. 658, 691 (1978); *see also Adams v. Wiley*, 398 Fed. App’x 372, 375 (10th Cir. 2010).

Mr. Hale's dietary request. Notably absent are any factual allegations to suggest that the refusal was intentional or motivated by a discriminatory purpose.¹⁵

Therefore, the Court finds that they are insufficient to allow the Court to plausibly infer that the individual defendants acted with the requisite discriminatory motive. Mr. Hale's claims for individual monetary relief under the First Amendment are dismissed.

C. Religious Freedom Restoration Act

The Complaint alleges that the mail bans, the refusal to allow him a copy of Nature's Eternal Religion, and the failure to provide a special diet all violate RFRA in addition to the First Amendment. Defendants move for dismissal on all claims.

To state a RFRA claim, a plaintiff must allege that the challenged action imposed a substantial burden on a sincere exercise of religion. 42 U.S.C. § 2000bb-1(a); *Kaemmerling v. Lappin*, 553 F.3d 669, 676-77 (D.C. Cir. 2008); *cf. Kikumura*, 242 F.3d at 960.

1. Nature's Eternal Religion

As the Court previously noted, the Complaint does not allege sufficient facts from which the Court could conclude that the refusal to provide Mr. Hale with a copy of Nature's Eternal Religion substantially burdened his ability to practice his religion. Mr. Hale's RFRA claim as to Nature's Eternal Religion is therefore dismissed as to all Defendants.

2. Mail Bans and Special Diet

The Complaint does, however, allege sufficient facts demonstrating that the mail bans and the refusal to accommodate Mr. Hale's special diet substantially burdened his ability to exercise sincere religious beliefs for the same reasons discussed in the Court's First Amendment

¹⁵ To the extent the Complaints seeks to rely on general allegations that the Defendants' actions were all committed out of disdain for Mr. Hale's religion, this is not sufficiently detailed to state a claim for individual liability.

analysis. Accordingly, the Complaint has sufficiently pled RFRA violations based on the mail bans and refusal to provide a religious diet.

3. Available Relief

The Complaint again requests both monetary and injunctive relief for the RFRA violations. Without further analysis, the two surviving claims (related to the mail bans and refusal to provide the Creativity diet) may proceed on the request for injunctive relief.

As for monetary relief, a party asserting a claim for money damages against a state actor must point to a specific waiver of governmental immunity. *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1151 (10th Cir. 2015). Mr. Hale has not identified an express waiver of sovereign immunity for RFRA claims. Regardless, RFRA does not permit monetary relief against federal and state actors. *See Sossamon v. Texas*, 563 U.S. 277, 131 S.Ct. 1651, 1660 at n.6 (2011); *see Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 841 (9th Cir. 2012); *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022 (D.C. Cir. 2006); *Said v. Teller Cnty.*, No. 14-cv-02745-RPM, 2015 WL 1598098, *3 (D. Colo., April 9, 2015). Thus, the claim for monetary relief under RFRA against the BOP is dismissed as a matter of law.

Remaining is whether the individual Officials may be liable for monetary damages arising out of Mr. Hale's two remaining RFRA claims. For the same reasons stated by the Court in its First Amendment analysis, the Court finds that the Complaint does not allege sufficient facts plausibly demonstrating that there was deliberate and personal participation in either the mail bans or refusal to provide the religious diet. Mr. Hale's claims for monetary relief against individual Defendants under RFRA are therefore dismissed.

D. Fifth Amendment Claim

Defendants move to dismiss Mr. Hale's Fifth Amendment claim that imposing the mail bans without prior notice and an opportunity to be heard violated his due process rights.

To state a Fifth Amendment claim for violation of procedural due process a plaintiff must allege (1) deprivation of a protected liberty interest and (2) that the procedures followed to deprive an individual of that interest were constitutionally insufficient. *Elliot v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012). As relevant here, incarcerated persons retain only a narrow range of protected liberty interests. *Sandin v. Connor*, 515 U.S. 472, 480 (1992). To state the existence of a protected liberty interest an inmate must therefore allege that the challenged action "impose[d] atypical and significant hardship" on the inmate, beyond what is akin to the "ordinary incidents of prison life." *See Wilkinson v. Austin*, 545 U.S. 209, 223 (2005). Particularly, a number of courts have concluded that communication restrictions similar to that challenged by Mr. Hale do not rise to the level of a protected liberty interest. *See, e.g., Kennedy v. Blackenship*, 100 F.3d 640, 642 (8th Cir. 1996) (no liberty interest in sanction that included restrictions on mail, telephone, and visitation privileges); *Villareal v. Harrison*, 1999 WL 1063830, *2 (10th Cir., Nov. 23, 1999) (two-year confinement with restricted telephone privileges and requiring inmate to eat alone did not give rise to a protected liberty interest); *Chappell v. McKune*, 1999 WL 1079618 (10th Cir., Nov. 23, 1999) (1000 day confinement to administrative segregation does not give rise to a protected liberty interest).

The Complaint alleges that the restrictions on Mr. Hale's use of the mail ("general correspondence status") without a hearing or prior notice amounted to a due process violation. Without more specification, this allegation is bare and conclusory and fails to state sufficient facts. More pertinent, Mr. Hale has not alleged any facts from which the Court could plausibly infer that the mail ban was more severe than the ordinary restrictions of incarceration.

The Court's analysis is unchanged by Mr. Hale's allegation that BOP policy required notice and an opportunity to respond before placing an inmate on restricted correspondence. To be sure, 28 C.F.R. 540.15(c) states that before placing an inmate on Restricted General Correspondence a warden shall advise the inmate in writing of the reasons the inmate is placed on restricted correspondence and give the inmate the opportunity to respond orally or in writing. But here, as evidenced by the Notice to Mr. Hale, this procedure was complied with. In any event, violation of an internal policy or procedure does not necessarily amount to a constitutional violation. *See Cole v. Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993). Accordingly, the Fifth Amendment claim for violation of procedural due process is dismissed.

E. Equal Protection Claim

Defendants next move to dismiss Mr. Hale's claim that he was deprived of his right to equal protection as a result of the Defendants' refusal to allow him a copy of Nature's Eternal Religion.

To plead claim for violation of equal protection, a complaint must set forth facts from which a court can plausibly infer that a government entity treated the plaintiff differently than other "similarly situated" individuals. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *Brown v. Montoya*, 662 F.3d 1152, 1172-73 (10th Cir. 2011). The complaint must first and foremost identify the existence of similarly-situated individuals, not of the protected class, that were treated differently. *See Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998). For example, in the prison context, a plaintiff might identify prisoners serving similar sentences, in similar conditions, who were treated differently. *Id.* But, for example, a female prisoner cannot sustain an equal protection claim on the basis that male prisoners at a different

facility were similarly situated. *Women Prisoners v. Dist. of Columbia*, 93 F.3d 910, 925-26 (D.C. Cir. 1996).

In support of the equal protection claim, the Complaint alleges that the BOP “regularly administers to the religious needs and interests of its black prisoners by showing Nation of Islam and Louis Farrakhan videos, as well as other black religious programming.” Like Creativity, the Nation of Islam and Louis Farrakhan “espouse black pride and black separatism,” but while the BOP broadcasts black separatism programs, Defendants will not allow Mr. Hale to correspond with others regarding white pride and white separatism. Though Mr. Hale is not permitted to have a copy of Nature’s Eternal Religion, the BOP freely distributes the Christian Bible and the Muslim Koran. Further, “if [Mr.] Hale were a Christian, Muslim, or Jew, the [D]efendants would leave him alone and let him exercise his religious and ideological speech, exercise, and association rights without interference or punishment.” Lastly, Mr. Hale alleges that the Defendants do not like that “[Mr.] Hale writes articles and sermons for his faith and church ... however, other similarly-situated prisoners . . . engage in same or similar conduct without penalty.”

Liberalizing the Complaint, it appears to raise equal protection claims based on (1) the mail bans and (2) the refusal to allow him a copy of Nature’s Eternal Religion. To the extent that the Complaint raises an equal protection claim based on the mail ban, it has not alleged sufficient facts to support this claim because it does not identify any similarly-situated prisoners who, unlike Mr. Hale, have been allowed to promote their religious beliefs or corresponded with religious followers via the mail. Indeed, it alleges only that other prisoners are permitted to watch religious program. This allegation is insufficient to plead the similarities necessary to proceed with an equal protection claim.

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For the same reason, the equal protection claim based on the Defendants' refusal to allow Mr. Hale to retain a copy of Nature's Eternal Religion fails. The Complaint has not alleged that similarly-situated persons, not of the protected class (individuals adhering to Creativity) were allowed a copy of Nature's Eternal Religion. That other individuals, including Mr. Hale, are permitted other religious texts has no bearing. Accordingly, the equal protection claims are dismissed in their entirety.

F. Eighth Amendment Claim

Defendants lastly move to dismiss Mr. Hale's claim that the restrictions imposed by Defendants, coupled with his confinement in solitary, result in cruel and unusual punishment in violation of the Eighth Amendment.

The Eighth Amendment prohibits only punishment that is "cruel and unusual"; and, as relevant, though it reaches beyond "barbarous physical punishments," to constitute cruel and unusual, the punishment must be "unnecessary and wanton." *Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1980). When an incarcerated plaintiff challenges the conditions of confinement under the Eighth Amendment, the plaintiff must sufficiently allege deliberate indifference (the subjective test) to a substantial risk of serious harm (the objective test). *See Perkins v. Kansas Dep't of Corrs.*, 165 F.3d 803, 807 (10th Cir. 1999); *see also Tennant v. Miller*, 589 Fed. App'x 884, 885-86 (10th Cir. 2014); *Hill v. Pugh*, 75 Fed. App'x 715, 721 (10th Cir. 2003) (mere "lack of companionship" does not constitute cruel and unusual punishment). Particularly, a plaintiff must allege deprivation of a basic human need, such as "food, warmth or exercise." *See Wilson v. Seiter*, 501 U.S. 294, 304-05 (1991). Conditions that are merely "harsh" or "restrictive" are merely "part of the penalty that criminal offenders pay for their offenses against society." *Rhodes*, 452 U.S. at 347. An Eighth Amendment claim based on lack of social interaction must

allege total deprivation. *See Silverstein v. Fed. Bureau of Prisons*, 559 Fed. App'x 739, 756 (10th Cir. 2014) (where an inmate “maintains a degree of social contact” no Eighth Amendment violation occurred); *see also Hugh*, 75 Fed. App'x at 721 (confinement in solitary for twenty-three hours a day does not rise to the level of “intolerable or shocking conditions” necessary to amount to an Eighth Amendment violation).

The Complaint alleges that Mr. Hale is “confined to his cell twenty-two hours a day,” “has only been able to receive two social visits” since 2005,¹⁶ and, because he “has been kept in solitary confinement for over ten years,” the Defendants “have an obligation to refrain from imposing additional onerous conditions upon his confinement that would cumulatively render his imprisonment cruel and unusual,” like taking away his mail. But the Complaint acknowledges that Mr. Hale was allowed to communicate with his family, and there are no allegations that he was deprived of all human interaction. Thus, taking these allegations as true, they are insufficient to allege an Eighth Amendment violation.

Mr. Hale’s Eighth Amendment claims are therefore dismissed.

VI. CONCLUSION

For the forgoing reasons, the Court **ADOPTS IN PART** the Recommendation (#58). The Defendants’ Motion to Dismiss (#41) is **GRANTED IN PART AND DENIED IN PART**. The Motion is **DENIED only** with respect to the following claims: (1) the First Amendment claim that the mail bans and the refusal to provide a special diet violate the right to free exercise of religion; (2) the First Amendment claim that denial of a copy of Nature’s Eternal Religion was a violation of the right to free speech; (3) the First Amendment claim for retaliation as related to the mail bans; and (4) the claims under the Religious Freedom Restoration Act (RFRA) as

¹⁶ The Complaint attributes the lack of visits at least in part to no fault of the Defendants — namely, that Mr. Hale has no “ties to the state of Colorado.”

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Marcia S. Krieger

Civil Action No. 14-CV-0245-MSK-MJW

REVEREND MATT HALE,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,

Defendant.

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on the Defendant's Motion for Summary Judgment (# 186), the Plaintiff's Response (# 193), and the Defendant's Reply (# 199); the Plaintiff's Motion to Strike and Response to So-Called "Fact Exhibit" (# 202), the Defendant's response (# 203), and the Plaintiff's reply (# 205); the Plaintiff's Motion to Allow Declarations by Nonparties (# 206) and the Defendant's response (# 207); and the Defendant's Motion to Strike Exhibits (# 210) and the Plaintiff's response (# 211). For the following reasons, the motion for summary judgment is granted and the remaining motions are denied as moot.

I. JURISDICTION

The Court exercises jurisdiction under 28 U.S.C. § 1331.

II. BACKGROUND¹

The Court summarizes the pertinent facts here and elaborates as necessary in its analysis.

¹ The Court recounts the facts in the light most favorable to Mr. Hale, the nonmoving party. *See Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002). In large part, the parties do not dispute the material facts.

I. Mr. Hale and his beliefs

Plaintiff Matt Hale, proceeding *pro se*,² is an inmate in the custody of Defendant Federal Bureau of Prisons (BOP) and housed at the Administrative Maximum facility in Florence, Colorado (ADX). He is a member, practitioner, and former leader of the Church of the Creator (also referred to as “Creativity”). Members of the Church of the Creator consider Creativity to be a religion. It is undisputed that a central tenet of Creativity is the premise of the superiority of the white race and the need for racial purity and segregation.

For the sake of convenience, the Court will not reproduce the parties’ recitation of Creativity’s religious texts. 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. The most prominent secondary points found in those principles are instructions to preserve the environment of the Earth, to restore soil fertility and improve farming yields, and to promote a natural lifestyle so as to advance the physical and mental health of adherents.

II. BOP actions giving rise to this suit

From July 2010 to January 2011 and again from January to August 2013, the BOP imposed

² The Court understands that Mr. Hale is a law school graduate, although he is not licensed by the bar of any state. Where licensed attorneys appear as *pro se* litigants, they are not entitled to liberal construction of the pleadings under *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972). *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001). Licensure — *e.g.*, good standing — is not the key feature, as the Tenth Circuit has also stated that “trained” attorneys appearing *pro se* do not enjoy liberal construction either. *Porta v. OPM*, 580 F. App’x 636, 640 n.2 (10th Cir. 2014). In any event, whether Mr. Hale is afforded liberal construction of his pleadings or not does not meaningfully alter the analysis herein.

a mail restriction on Mr. Hale's incoming and outgoing correspondence. The restriction was imposed in response to Mr. Hale's efforts to direct affairs within the Church of the Creator. For the same reasons, the BOP denied Mr. Hale a copy of a book entitled *Nature's Eternal Religion* (a Creativity religious text), the diet outlined in *Salubrious Living* (another Creativity religious text), and the ability to conduct an on-camera interview with a Chicago television station.

III. Mr. Hale's claims

Mr. Hale brought this suit alleging that the mail restriction and various other prison restrictions violated his constitutional rights. Currently pending are six claims, which the Court groups by subject matter. The first three claims focus on the mail restrictions, alleging that the restrictions (1) violated Mr. Hale's constitutional right to free exercise of religion under the First Amendment, (2) violated his rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*; and (3) were imposed as retaliation against him because of his exercise of his First Amendment rights. The second set of claims relate to Mr. Hale's claims that he was denied access to a diet consistent with the principles of Creativity, and that the denial (4) deprived him of his free-exercise rights under the First Amendment, and (5) violated RFRA. Finally, the final claim is that (6) Mr. Hale was denied the opportunity to possess a copy of *Nature's Eternal Religion*, in violation of his right to free speech under the First Amendment.

IV. The BOP's Motion

The BOP moves for summary judgment on all claims (# 186). In the course of briefing, the BOP attached an exhibit to its reply that organized its evidence and Mr. Hale's response thereto. Mr. Hale moves to strike this "fact exhibit" (# 202). Mr. Hale has also asked to submit declarations from nonparties in support of his summary-judgment response (# 206). The BOP moves to strike a notice filed by Mr. Hale (# 210).

III. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure facilitates the entry of a judgment only if no trial is necessary. *See White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary adjudication is authorized when there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Substantive law governs what facts are material and what issues must be determined. It also specifies the elements that must be proved for a given claim or defense, sets the standard of proof, and identifies the party with the burden of proof. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 565 (10th Cir. 1989). A factual dispute is "genuine" and summary judgment is precluded if the evidence presented in support of and opposition to the motion is so contradictory that, if presented at trial, a judgment could enter for either party. *See Anderson*, 477 U.S. at 248. When considering a summary judgment motion, a court views all evidence in the light most favorable to the non-moving party, thereby favoring the right to a trial. *See Garrett v. Hewlett Packard Co.*, 305 F.3d 1210, 1213 (10th Cir. 2002).

If the movant has the burden of proof on a claim or defense, the movant must establish every element of its claim or defense by sufficient, competent evidence. *See Fed. R. Civ. P. 56(c)(1)(A)*. Once the moving party has met its burden, to avoid summary judgment the responding party must present sufficient, competent, contradictory evidence to establish a genuine factual dispute. *See Bacchus Indus. Inc. v. Arvin Indus. Inc.*, 939 F.2d 887, 891 (10th Cir. 1991); *Perry v. Woodward*, 199 F.3d 1126, 1131 (10th Cir. 1999). If there is a genuine dispute as to a material fact, a trial is required. If there is no genuine dispute as to any material fact, no trial is required. The court then applies the law to the undisputed facts and enters judgment.

If the moving party does not have the burden of proof at trial, it must point to an absence of

compelling justification for applying *that* policy to *that* inmate. *Id.* Moreover, under RFRA, the government bears the burden of proof that its interests are compelling and narrowly-tailored.

Ghalani v. Sessions, 859 F.3d 1295, 1305 (10th Cir. 2017). Thus, the RFRA claim places a more substantial burden on the government than does the free-exercise claim.

Here, the BOP moves for summary judgment on both claims, arguing that: (1) the principles of Creativity are not “religious” in nature; and (2) to the extent they are, the BOP is nevertheless entitled to summary judgment on the RFRA claim³ because it has a compelling interest in preventing Mr. Hale from corresponding about Creativity and the restrictions on Mr. Hale are narrowly-drawn to effectuate that interest.

2. *Whether Creativity is a Religion*⁴

In this Circuit, to determine if a belief system is truly “religious”, the Court considers whether it: (1) addresses ultimate ideas, (2) contains metaphysical beliefs, (3) prescribes a particular moral or ethical system, (4) involves comprehensive beliefs, and (5) is accompanied by accoutrements of religion. *Meyers*, 95 F.3d at 1483. No one factor is dispositive, but “purely personal, political, ideological, or secular beliefs” will not likely suffice. *Id.* at 1484 (citing *Yoder*, 406 U.S. at 216). Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. *United States v. Seeger*,

³ And, by extension, the free-exercise claim, as that claim is even more deferential to the BOP.

⁴ The Court notes that several district courts have entertained this question and have uniformly found that, at least for free-exercise and RFRA purposes, Creativity is not a religion. *See, e.g., Stanko v. Patton*, 568 F. Supp. 2d 1061, 1072 (D. Neb. 2008); *Conner v. Tilton*, 2009 WL 4642392 at *9–12 (N.D. Cal. Dec. 2, 2009); *Prentice v. Nev. Dep’t of Corr.*, 2010 WL 4181456 at *4 (D. Nev. Oct. 19, 2010); *Birkes v. Mills*, No. 3:10-CV-0032, 2011 WL 5117859 at *4 (D. Ore. Sept. 28, 2011). The sole decision finding that Creativity *could* constitute a religion arose in the employment-discrimination context, where the inquiry focuses on how the beliefs affect the adherent, not on the religious character of the beliefs themselves. *Peterson v. Wilmur Commc’ns Inc.*, 205 F. Supp. 2d 1014, 1018 (E.D. Wis. 2002).

380 U.S. 163, 184–85 (1965). Indeed, the concept of white supremacy, though secular in the sense that it is a racist idea, could be religious in context. *Wiggins v. Sargent*, 753 F.2d 663, 667 (8th Cir. 1985).

Examples of how the *Meyers* criteria are applied to particular factual scenarios are instructive with regard to application to the facts of this case. As noted below, when the *Meyers* factors are applied, unusual belief systems are not found to be religions for one of two reasons - either belief system is so vague and indeterminate that it fails to prescribe any moral or ethical system (*Africa, Jacques*) or the beliefs are so narrowly focused that they do not address metaphysical or ultimate issues or otherwise comprise a comprehensive set of beliefs. (*Meyers, Quaintance, Versatile*). In both circumstances, the belief system is found to be a secular rather than religious one.

In *Meyers*, the defendant was charged with cannabis possession. As a defense, he testified that he was the founder and reverend of the “Church of Marijuana”, wherein he was religiously commanded to use, possess, grow, and distribute cannabis “for the good of mankind and the planet earth.” 95 F.3d at 1479. Although the court noted that whether a belief structure is established or recognized cannot be the sole determinant of whether it qualifies as a religion, the secular nature of *Meyers*’ beliefs more accurately espoused a philosophy or way of life rather than a religion. *Id.* at 1484.

In *Africa v. Pennsylvania*, upon which *Meyers* was partially based, the defendant was a prisoner who requested a special, raw-food diet as adherent to MOVE, an organization “opposed to all that is wrong.” 662 F.2d 1025, 1026 (3d Cir. 1981). MOVE’s goals were to bring about peace, stop violence, and end corruption. *Id.* MOVE adherents believed in using things but not misusing them. *Id.* Avoiding ceremonies and rituals, every act of life was invested with

religious significance to MOVE adherents. For MOVE adherents, “every day of the year can be considered a religious ‘holiday’” because no single day is more special than another. *Id.* Noting that MOVE did not address any fundamental, ultimate, or overarching principles, the court held that MOVE was concerned with secular matters and lacked a comprehensive, multi-faceted theology. *Id.* at 1033–36.

In *Jacques v. Hilton*, the plaintiffs were founders of the United Church of Saint Dennis, ULC Inc., which was loosely affiliated with the Universal Life Church. 569 F. Supp. 730, 731 (D.N.J. 1983). Saint Dennis was not a reference to any particular individual. The church recognized the “Spirit of Life” as a supernatural force, which each individual possessed. A central tenet of the church was each individual’s right to honor any supreme being in any manner he chose, and to act consistently with his own beliefs. Church adherents celebrated June 21 as the day life began. There were no rituals at meetings, rather they were opportunities for participants to assist each other in reconciling any conflict that they were experiencing. Applying *Africa*, the court determined the church was not a religion because its exhortation to be guided by conscience was entirely a matter of self-determination. Additionally, the court noted that when each individual is the arbiter of his own truth, there can be no common beliefs to unite different adherents.

In *United States v. Quaintance*, one of the defendants was the founder of the Church of Cognizance, which maintained that cannabis was a sacrament and deity, and that its consumption was worship. 471 F. Supp. 2d 1153, 1155 (D.N.M. 2006). The defendant testified that the church adherents sought to live the longest, healthiest life possible, for which the path was narrow. *Id.* at 1157. Applying *Meyers*, the court found that the church addressed only one ultimate idea — longevity — which was insufficiently profound or comprehensive. Though the court found the

evidence for metaphysical beliefs to be ambiguous, the defendants presented no evidence that “good thoughts, good words, good deeds” was anything more than a secular ethical system.

In *Versatile v. Johnson*, the plaintiff, who was a prisoner and adherent of Nation of Gods and Earths (NGE), sought to reverse the prison’s ban on certain texts. No. 3:09-CV-0120, 2011 WL 5119259 at *1 (E.D. Va. Oct. 27, 2011). NGE adherents believe that their god, Allah, stands for “Arm Leg Leg Arm Head”, and refers to “to black men and their physical form.” Adherents refer to their teachings as Islam, but recognize the term to mean “I Self Lord And Master”. The central goal of NGE is to gain knowledge of one’s self and become a lord and master of one’s own judgments. NGE teaches that the white man is the devil and that whites are physically and mentally inferior to blacks. Though white people can join NGE, they can never become “Gods” in the sense that black men can. The court also found that, despite using words that connoted metaphysicality, NGE was focused inward on a god that did not exist outside of adherents themselves. The court further found that, aside from the basic tenets of family and black unity, NGE had no moral component, as adherents were “free to decide their own code of personal morality”. Though the court found that NGE had important texts, maintained gathering places, recognized honorary days, and established dietary restrictions, it also found that NGE lacked other accoutrements of religion and held that factor in equipoise. Ultimately, reasoning that there was no ultimate motivation behind NGE teachings other than a self-interested desire to better self and create a strong, unified black community, that NGE was primarily a social and cultural movement rather than a religion.

Conversely, in *Dettmer v. Landon*, the plaintiff prisoner was a member of the Church of Wicca. 799 F.2d 929, 931–32 (4th Cir. 1986). Wicca adherents practice, for lack of a better word, witchcraft. The district court found that Wicca adherents have a complex set of doctrines

relating to the spiritual aspect of their lives and a broad concern for improving the lives of others.

The court of appeals affirmed, reasoning that Wicca adherents worship, conduct ceremonies, follow spiritual leaders, seek guidance from such leaders, and study doctrine. The court noted witchcraft's long history, dating to ancient pagan faiths. Because these beliefs were parallel to that filled by the orthodox belief in God in other religions, Wicca was a religion.

a. Ultimate Ideas

A "religion must consist of something more than a number of isolated, unconnected ideas." *Africa*, 662 F.2d at 1035. Religious beliefs usually seek to answer human kind's basic questions about life, purpose and death, and other deep and imponderable matters. *Meyers*, 95 F.3d at 1483. "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." *Id.* Ideas about these imponderables address purpose relative the spiritual or intangible world, not merely a simplistic purpose confined to the physical world. *Quaintance*, 471 F. Supp. 2d at 1157. A "'monofaceted concern' with race is not a comprehensive system of beliefs about an ultimate concern." *Versatile*, 2011 WL 5119259 at *14.

Mr. Hale states that Creativity addresses man's purpose — "to perpetrate and advance our own kind," and, more specifically, "to propagate, advance and expand the White Race, to the highest pinnacle reached in the handiwork of Nature." He argues that man's "purpose" need not be spiritual, but can be natural. Mr. Hale asserts that "Nature has chosen our White Race to be the elite species of her realm" in the same way that the Jews were chosen by God "to be a people for Himself." He insists that Creativity addresses man's sense of being, which "is that of a racial being," and man's place in the universe; the "White man's place in the universe is that of the highest of all beings." In this vein, Mr. Hale contends that the whole Creativity religion is

concerned with the existence of the white race and addresses man's place in the universe. He asks if these are not existential matters, what matters are? Mr. Hale maintains that Creativity's beliefs are not secular because they themselves believe that such beliefs are sacred. He states that the evidence overwhelmingly shows that "there is far more to Creativity than the mere will to exalt one race over another," as purportedly characterized by the BOP, and instead characterizes exalting the white race over other races as "an extremely minute part" of his creed. Mr. Hale characterizes "Nature" as Creativity's deity notwithstanding what Mr. Klassen wrote in a letter once. Mr. Hale contends that no other religion deals more with questions of life and death, right and wrong, and good and evil; he says other religions leave individual conduct up to the individuals, but Creators "are constantly instructed that the guiding principle of all their actions shall be: what is best for the White Race?" He argues these beliefs reflect Creativity's obedience to its higher power. Mr. Hale takes umbrage at the BOP's characterization of Creativity as a violent movement, noting that Creativity is the only religion to forbid illegal conduct, though he immediately concedes it is not a full prohibition, as Creators are permitted to use violence in response to government force or assassination attempts by Jewish people.

Mr. Hale's belief that Creativity is a religion does not make it so; it simply establishes that he strongly believes in its precepts. Creativity beliefs arguably touch on life and purpose, as well as existential, teleological, and cosmological matters, but do so only in service of temporal objectives — to *further dominance of the white race*. By definition, dominance of the white race has only temporal meaning — it advocates a hierarchical social structure for human beings during their lifetimes. In that sense, its tenets are purely secular, political, and ideological as compared to spiritual. It is not concerned with the individual adherent's spiritual well-being, nor with any concept of afterlife, particularly for nonwhites. It is true that Creativity attributes its precepts to

Nature, but that is just a solipsistic justification for them. The mere existence of an external referent (Nature, God, Trump, Dr. Atkins) for particular beliefs does not, by itself, make such beliefs religious. Similarly, the borrowing of religious terminology such as “Commandments”, “Golden Rule”, “duty” and “holy” does not imbue a temporal objective with a spiritual quality.

Rather, lurking beneath the surface of Creativity’s credos and commandments is the tacit understanding that, in prosecuting the Creativity worldview, whites will relegate nonwhites to bad lands at best and no lands at worst. # 186-29 at 35–36, Creed & Program No. 11. Contrary to Mr. Hale’s assertion, the evidence overwhelmingly shows that there is little more to Creativity than its overbearing will to exalt white people over all others. 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. *See Versatile*, 2011 WL 5119259 at *14. Like the NGE in *Versatile*, there is no ultimate motivation behind Creativity teachings other than a self-interested desire to establish white dominance. *Id.*

In sum, Creativity lacks an ultimate belief system that addresses philosophical and existential issues such as the nature of man, whether there is life after death, what role man plays in the universe, and the like. These beliefs address only the relative positions of people of different races during their lifetimes. Thus, the Court finds that Creativity fails to address ultimate ideas or metaphysical issues because it lacks any cosmological, teleological and existential focus. The ultimate-ideas factor therefore weighs against Creativity being a religion.

b. Metaphysical Beliefs

Religions usually have some element of the metaphysical or supernatural permeating their belief systems, transcending the world, and data therein, immediately apparent to humans.

Meyers, 95 F.3d at 1483. “Adherents to many religions believe that there is another dimensions, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities.” *Id.* Creation science, for example, is metaphysical because it “depends upon a supernatural intervention which is not guided by natural law.” *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1267 (E.D. Ark. 1982).

Mr. Hale concedes that Creativity has no metaphysical aspects and, indeed, eschews them like secular humanism. # 193 at 50–51 (citing *Torasco v. Watkins*, 367 U.S. 488, 495 n.11 (1961)). He argues it is not necessary for a religion to be metaphysical. While Mr. Hale is correct that a metaphysical aspect is not required, it is important to note that his chosen exemplar, secular humanism, is not without its own controversy when it comes to being considered a religion. Indeed, the Ninth Circuit concluded that the Supreme Court in *Torasco* never held secular humanism was a religion and rejected a challenge on that basis. *See Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (1994). And even though Creativity openly rejects anything metaphysical, it is still an important part of the *Meyers* analysis determining whether a new movement or belief system can be considered a religion under the Constitution. Thus, the metaphysical factor weighs against Creativity being a religion.

c. Moral or Ethical System

Religions often prescribe an express way of living and interacting with other humans that could be described as a moral or ethical code, wherein thoughts and actions are considered on a largely binary spectrum in normative terms like good, evil, right, and wrong. *Meyers*, 95. F.3d at 1483. This moral or ethical belief structure may create duties to a higher power or spirit, the pursuit of which causes adherents to reject what would benefit their own elemental self-interest. *Id.* “The sort of ethical system contemplated by religion has a religious, as opposed to secular or

philosophical, connotation.” *Versatile*, 2011 WL 5119259 at *15.

Mr. Hale notes that Creativity has a golden rule and 16 commandments that comprise a moral and ethical system. # 193 at 53. He argues that these precepts impose duties as *Meyers* contemplates and are the antithesis of seeking elemental self-interest because Creators are to do what is best for their race. # 193 at 53–54. Mr. Hale is “amazed” that the BOP would say that “self-interest is the very crux of Creativity,” a “bizarre and idiotic statement.” # 193 at 54. He argues that Creativity is every bit as moral and ethical as Christianity; it is just that the BOP does not like what Creativity stands for. # 193 at 54–55. Mr. Hale contends that Creativity is “all about” abnegating elemental self-interest because he chose a harder life fighting for his faith with Creativity than he would have had pursuing his musical career as a violinist. # 193 at 55. He asserts that Creators have a duty to sacrifice themselves for the good of their race. # 193 at 56. Mr. Hale says the BOP is wrong to characterize Creativity as unconcerned with neutral matters that do not benefit or harm white people, as “a benefit or harm to our kind can always be discovered.” # 193 at 56. He notes that Creators “care about the welfare of the animal species of the world as their presence enriches our own lives” even though animals are a seemingly neutral moral or ethical case. # 193 at 57.

Creativity does have a moral or ethical system, found mostly in its commandments. These commandments take definitive positions on what constitutes good, evil, right, and wrong in Creativity’s belief system. However, the system is less of a system and more of a single, binary precept as the Court has already discussed. Also at the same time, Creativity creates duties to itself, not to a higher power. There is no religious connotation to Creativity’s moral or ethical system; it is entirely based on the secular concern of white supremacy. *See Versatile, Versatile*, 2011 WL 5119259 at *15.

No tenet of Creativity causes adherents to reject what would benefit their own elemental self-interest. What Mr. Hale construes as the abandonment of his self-interest — choosing Creativity over the easier path of playing the violin — can indeed constitute the rejection of at least some of what would accrue to his personal benefit. But he does not assert that this career choice was mandated by Creativity’s tenets or even a call to ministry. Rather, 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. 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.⁵ Accordingly, the moral-ethical factor weighs against Mr. Hale because Creativity’s clear system of commandments is not religious in nature and Creativity clearly counsels pursuit of elemental self-interest.

d. Comprehensive Beliefs

Many religions have ideas that are comprehensive in that they espouse an “overarching array of beliefs” that, in their totality, answer most the believer’s problems and concerns regarding the human condition. *Meyers*, 95 F.3d at 1483. Most religious teachings consciously aim to elucidate “the nature both of world and man, the underlying sustaining force of the universe, and the way to unlimited happiness.” *Africa*, 662 F.2d at 1035. “In other words, religious beliefs generally are not confined to one question or a single teaching.” *Meyers*, 95 F.3d at 1483.

Mr. Hale analogizes Creativity’s golden rule to that of Christianity, arguing that

⁵ This pursuit of elemental self-interest is underscored by CREATIVITY’s express disavowal of a higher power, duties to which typically cause religious adherents to move beyond acting in their basic self-interest.

Christianity is not confined to a single teaching like its golden rule, and so, too, Creativity goes beyond its golden rule. # 193 at 44–45. He maintains that Creativity offers an overarching array of beliefs on subjects such as organic farming, medicines, diet, vaccines, and fasting. # 193 at 45–46. According to Mr. Hale, the BOP fails to understand that Creativity is for white people but that does not mean its belief system is limited to the issue of race. # 193 at 46. Rather than a root principle in white supremacy, Mr. Hale says “Creators believe in the Eternal Laws of Nature as revealed through science, history, logic and common sense,” which constitutes the first daily affirmation of Creativity. # 193 at 47. Mr. Hale argues Creativity is much more comprehensive than Christianity because there is no corresponding Christian diet, view of the environment, teaching on personal health, take on politics, take on economics, take on science, or take on medicines. # 193 at 49.

As the Court has already noted, Creativity does not attempt to answer human kind’s basic questions; it either avoids questions or to the extent it has an answer, that answer is reduced to the single-dimensional idea of white dominance. Of Creativity’s five fundamental beliefs, 16 commandments, and 20 creeds (41 total dogmatic points), nine are statements of fact about Creativity (“Your first loyalty belongs to the White Race”), three cover environmental purity (“we plan to put into operation a program of restoring the fertility of the soil”), and 27 can be boiled down to *all things in furtherance of the white race*.⁶ In putting forth Creativity’s beliefs on diet, environment, personal health, politics, economics, science, and medicines, Mr. Hale misunderstands the array of beliefs *Meyers* seeks to articulate. The inquiry is not searching for dogmatic views on this collection of issues; it seeks a cohesive belief system offering answers to

⁶ The 27 are: fundamental beliefs IV and V; commandments 1–5, 7–13, and 16; and creeds 1, 4–5, 7–12, and 18–20, all reproduced *supra*.

the suite of foundational questions about the human condition: *Who am I?*, *Why am I here?*, *Where do I come from?*, *How does life work?*, *What happens when I die?*, *What is my purpose?*, and *How should I act?*. While it is true that some religions eventually arrive at *What should I eat?*, these foundational questions define a religion's worldview to the point that it may not even proceed to *Who should I vote for?*, as Mr. Hale notes of Christianity. Indeed, Creativity does not answer any of these foundational questions unless they can be answered by *all things in furtherance of the white race*. Creativity thus openly confines its theology to a single teaching just as the Republic focused on a single objective — to shrug off the government and live unfettered — in *Hutson*. 2018 WL 345316 at *4.

Creativity attempts to compensate for this dearth of comprehensive worldview by repetitive use of words that have a religious connotation. For example, it touts itself as “the only salvation for the White Race.” # 186-10 at 2, Fundamental Belief V. And though *salvation* has a real meaning (being saved from harm), it has a religious connotation that has nothing to do with Creativity's belief structure (deliverance from sin). Along the same lines, Creativity's golden rule references “ultimate sin,” # 186-10 at 2, Fundamental Belief IV, but this usage is untethered from religious *sin* (transgression against deity) and is instead generic (reprehensible action). A sin against Creativity is a sin against its single-dimensional precept. Creativity also refers to itself as a “faith.” # 186-19 at 12, Commandment No. 14. Obviously, *faith* can be defined as a system of religious belief, but doing so as Creativity begs the question *faith in what?*. Reference to the Christian and Jewish faiths is a derivation of these religions' adherents themselves placing their belief in a deity without proof of the deity's existence. Creativity adherents place belief in nothing without proof, as the only thing they believe in is themselves and their collective power as a unit of white people — things not unseen. *Faith*, therefore, along with *salvation* and *sin*, are

words that mean something different in Creativity than in the world's religions.

Creativity also attempts to compensate for dearth of comprehensiveness by proliferation of dogma. One of its three main religious texts is a how-to guide for natural living (*Salubrious Living*), loosely connected to the beliefs it espouses so stridently in *Nature's Eternal Religion* and *The White Man's Bible*. To borrow from Mr. Hale's analogy to Christianity, where Christianity provides a canvas upon which to paint a rich collection of views on the more mundane questions in human kind, Creativity offers a paint-by-number kit rigid in its dogmatic views on current events. Mr. Hale argues that Creativity is unrelated to the white-supremacist political party that Mr. Klassen created a few years before Creativity, but the conclusion is hard to escape in light of these views on current events. The creeds in Creativity's Creed and Program (to say nothing of the Articles for Defense of the White Race) 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 historic 'Winning of the West'". # 186-29 at 35-36, Creed & Program No. 11. 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. See *Conner*, 2009 WL 4642392 at *11. The comprehensiveness factor therefore weighs against Creativity being a religion.

e. Accoutrements of Religion

Though a secular belief system does not become religious through the use of religious terminology and paraphernalia, many religions have external signs and elements that are indicative of a set of beliefs being religious:

- a. *Founder, Prophet, or Teacher*: Many religions have been wholly founded or significantly influenced by a deity, teacher, seer, or prophet who is considered to be divine, enlightened, gifted, or blessed.

- b. *Important Writings*: Most religions embrace seminal, elemental, fundamental, or sacred writings. These writing often include creeds, tenets, precepts, parables, commandments, prayers, scriptures, catechisms, chants, rites, or mantras.
- c. *Gathering Places*: Many religions designate particular structures or places as sacred, holy, or significant. These sites often serve as gathering places for believers. They include physical structures, such as churches, mosques, temples, pyramids, synagogues, or shrines; and natural places, such as springs, rivers, forests, plains, or mountains.
- d. *Keepers of Knowledge*: Most religions have clergy, ministers, priests, reverends, monks, shamans, teachers, or sages. By virtue of their enlightenment, experience, education, or training, these people are keepers and purveyors of religious knowledge.
- e. *Ceremonies and Rituals*: Most religions include some form of ceremony, ritual, liturgy, sacrament, or protocol. These acts, statements, and movements are prescribed by the religion and are imbued with transcendent significance.
- f. *Structure or Organization*: Many religions have a congregation or group of believers who are led, supervised, or counseled by a hierarchy of teachers, clergy, sages, priests, etc.
- g. *Holidays*: As is etymologically evident, many religions celebrate, observe, or mark “holy,” sacred, or important days, weeks, or months.
- h. *Diet or Fasting*: Religions often prescribe or prohibit the eating of certain foods and the drinking of certain liquids on particular days or during particular times.
- i. *Appearance and Clothing*: Some religions prescribe the manner in which believers should maintain their physical appearance, and other religions prescribe the type of clothing that believers should wear.
- j. *Propagation*: Most religious groups, thinking that they have something worthwhile or essential to offer non-believers, attempt to propagate their views and persuade others of their correctness. This is sometimes called “mission work,” “witnessing,” “converting,” or proselytizing.

Meyers, 95 F.3d at 1483–84.

Mr. Hale argues that Creativity overwhelmingly demonstrates accoutrements of religion: a

founder considered to be a prophet; three important writings; gathering places in its churches around the world; ordained keepers of knowledge; ceremonies and rituals such as weddings, child pledgings, and confirmations of loyalty; a leadership structure with its greatest priest at the top, holidays such as Klassen Day, Founding Day, and Martyrs' Day; a diet and fasting as outlined in *Salubrious Living*; and a drive to convert people. #193 at 61–64. Mr. Hale notes that Creativity has no prescribed appearance or dress.

Creativity has a great many accoutrements of religion. Indeed, it appears to have gone to great lengths to establish as many accoutrements of religion as possible. Accordingly, the accoutrements factor weighs in favor of Creativity being a religion.

f. Conclusion

To the minimal extent Creativity is religious, its beliefs are derived entirely from secular concerns. See *Quaintance*, 471 F. Supp. 2d at 1171. Therefore, synthesizing the *Meyers* factors as applied to Creativity, and viewing all factual disputes in the light most favorable to Mr. Hale, the Court finds that Creativity is not a religion for purposes of the Free Exercise Clause of the Constitution and RFRA.

3. Justification for the Mail Restrictions

Even if Creativity *was* a valid religion, the Court would nevertheless grant summary judgment to the BOP on Mr. Hale's RFRA claim (and, by extension, his free-exercise claim) on the grounds that the restrictions on Mr. Hale's correspondence were justified by a compelling governmental interest and were narrowly tailored to meet that interest. It is beyond dispute that the BOP's need to maintain security and order within BOP facilities is a compelling governmental interest, *Kikumura*, 242 F.3d at 962, and Mr. Hale concedes that the BOP also has a compelling interest in preventing its prisoners from using their correspondence to foment criminal activity

through associates in broader society outside of prison. # 193 at 81–82 (“the Defendant has the right to prevent crime”).

The BOP contends that the mail restrictions on Mr. Hale were necessary because of Mr. Hale’s affiliation with Creativity, which the BOP has identified as a Security Threat Group (STG) since 1993. Although the BOP does not prohibit inmates from affiliating themselves with STGs while in prison, it does prohibit them from holding leadership roles in an STG and from conducting STG business or providing guidance to the STG.

It is undisputed that, prior to his incarceration, Mr. Hale previously served as the ostensible worldwide leader of Creativity — the “Pontifex Maximus”. It is also undisputed that the BOP’s reason for imposing the 2010 mail restriction on Mr. Hale was because he had designated himself as “Pontifex Maximus *Pro Tempore*”⁷ in correspondence to other Creativity affiliates, appearing to again assume a leadership role. The 2013 mail restriction was imposed for different reasons. In December 2012, Mr. Hale wrote to the leader of the National Socialist Movement, a Neo-Nazi organization, encouraging it to pursue “mass activism tactics” — namely, “street demonstrations, rallies in parks, and meetings in public libraries” —to “reach people who don’t necessarily wish to be reached” with “the Holy Swastika.” The ADX Warden perceived Mr. Hale’s correspondence to “bridge or merge” Creativity with the National Socialist Movement, and to “urge . . . a white supremacist group to pursue specific means to fight for their perceived common cause” with Creativity.

Both mail restrictions are supported by colorable interpretations of Mr. Hale’s words and

⁷ Since Mr. Hale’s incarceration, a schism has broken out over the true leadership of Creativity. Mr. Hale’s 2010 correspondence was an attempt to (re)-install himself as temporary leader until an approved leader could be named.

actions. In 2010, Mr. Hale was using his prison correspondence to attempt to reassert a leadership role for himself in a BOP-designated STG, an act for which a mail restriction is clearly an appropriate response. The situation is slightly more ambiguous with regard to the 2013 correspondence, but the BOP's interpretation that Mr. Hale, long an influential figure in Creativity regardless of his leadership status, was attempting to guide or advise the National Socialist Movement is a reasonable reading of Mr. Hale's intentions. Thus, the Court finds that the BOP has articulated a legitimate factual basis to believe that, in 2010 and 2013, Mr. Hale was using his correspondence privileges to further the leadership or guidance of Creativity, an STG. This constitutes a compelling reason for the BOP to temporarily restrict Mr. Hale's ability to correspond with such groups.

Mr. Hale's response primarily attacks the BOP's characterization of Creativity as a STG in the first place. He argues that, because Creativity is a religion — a point the Court concedes for purposes of this thread of the argument (but otherwise rejects for the reasons stated above) — “it would be unlawful for the Defendant to classify a religion as an STG and treat all of its adherents as a ‘group’ in a negative way accordingly.” Mr. Hale cites no authority for this proposition, and the Court finds it legally unsound. Although the Constitution grants broad protections to religions and their adherents, in the prison context, even religious protections will yield to sufficiently important penological interests. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). Thus, in a case like *In Re Long Term Administrative Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 468 (4th Cir. 1999), the court affirmed the state's classification of an entire religious group as an STG, despite the inmates' argument that doing so infringed their rights under the Free Exercise Clause. The court found that “there is ample evidence in the record supporting the reasonableness of [the state's] conclusion that the Five Percenters as a group posed

a threat to prison safety,” pointing to members having been involved in three serious acts of violence in the state prison system over a four-month span, plus evidence that other jurisdictions had identified the group as racist, violent, and an organized threat to prison security.

Because there is no legal impediment to BOP identifying Creativity as a STG if the evidence otherwise warrants it, the Court turns to the question of whether the BOP has come forward with adequate evidentiary support to justify that determination. The Court notes several pertinent incidents that bear on the question:

- In 1999, apparently in response to the Illinois bar refusing to grant a law license to Mr. Hale, a Creativity adherent named Benjamin Smith when on a shooting rampage, targeting black, Asian, and Jewish victims, killing two and injuring nine before turning the gun on himself. Mr. Hale eulogized Mr. Smith, praising his willingness to “take action for his people . . . and spread our sacred message.” Mr. Hale later gave an ambiguous statement on behalf of Creativity, refusing to condemn Mr. Smith’s actions. Mr. Hale stated that “it’s not the policy of the church to commit crimes, but [due to racial grievances] do not be surprised when a white man of the character and honor of Ben Smith stands up and fights back in the way that he did.” Suggesting that “the future will see more, more Ben Smiths,” Mr. Hale announced that “we cannot condemn a man for doing what he feels in his heart is right, whether it’s outside the tactics of the church or not.” See *United States v. Hale*, 448 F.3d 971, 975 (7th Cir. 2006)⁸ (emphasis added).
- In 2000, when the Supreme Court refused to hear Mr. Hale’s challenge to Illinois’ denial of his law license, Mr. Hale left a message to Creativity followers, stating that he “can no longer in good faith and good conscience urge, recommend, or instruct my adherents and supporters in general to obey the laws of this land.” He encouraged his followers to “take whatever actions we deem necessary to resist this tyranny” and stated that “whatever blood is spilled will be on the hands of those who so severely wronged us today.” 448 F.3d at 976-77.
- In 2002, in retribution for a loss in a trademark lawsuit involving Creativity, Mr. Hale encouraged members of Creativity to take “any action of any kind” against the presiding judge and the attorneys for the opposing side (all of whom he had labeled “JEWS” or “TRAITOR WHITES”). A Creativity member specifically discussed with

⁸ The cited reference is the decision by the Seventh Circuit Court of Appeals affirming Mr. Hale’s criminal convictions, discussed below. The Court cites to this document both for purposes of convenience and because the facts therein have been deemed conclusively proven. The same facts are also supported by competent evidence in the record of this case.

Mr. Hale the idea of “exterminating the rat” – a reference to murdering the presiding judge – to which Mr. Hale responded “my position’s always been that . . . I’m gonna fight within the law [but i]f you wish to do anything yourself, you can, you know?” In further discussions with the member, Mr. Hale repeatedly professed, on one hand, an intention to avoid involvement with the plan while simultaneously giving indirect advice and encouragement to the member to carry out the plan. Mr. Hale was ultimately charged with and convicted of soliciting a crime of violence against a federal officer and was sentenced to 480 months in prison, the sentence he is currently serving. 448 F.3d at 977–79.

- Creativity’s written principles similarly intimate that violence in furtherance of Creativity’s goals is sometimes acceptable. Article 7 of the Articles for Defense of the White Race, which is incorporated by reference into Creativity’s statement of creed, states that “the crux of our position [is]: Should the [] government use force to violate our Constitutional rights to freely practice our religion . . . then we have every right to declare them as open criminals violating the Constitution and the highest law of the land. They then obviously are the criminals, and we can treat them like the criminal dogs they are and take the law into our own hands. . . . We must then meet the force with force and open warfare exists. It will then be open season on all Jews.” Mr. Hale contends that this refers to a “doomsday scenario” that “ha[s] never been applied in the course of [Creativity’s] 44 year history.”
- Between 2005 and 2008, at least two individuals, William White and Hal Turner, were convicted of soliciting the murder of jurors and others connected with Mr. Hale’s criminal trial. *United States v. White*, 698 F.3d 1005 (7th Cir. 2012); *United States v. Turner*, 720 F.3d 411 (2d Cir. 2013). It is important to acknowledge that there are no allegations that Mr. Hale knew of Mr. White or Mr. Turner, or that Mr. Hale was aware of or condoned their actions. Indeed, it is not entirely clear whether Mr. White or Mr. Turner were formally adherents of Creativity, or whether they simply shared similar political views. However, it is fair to recognize that both men’s actions were directly inspired by Mr. Hale, his trial, and his prominent public image.
- According to the affidavit of Blake Davis, a former ADX Warden, in 2008, an inmate associated with Creativity used the occasion of Hitler’s birthday to trigger a planned, racially-motivated riot at a BOP facility in Florence, Colorado.
- In 2016, Mr. Hale received an e-mail from a Creativity member who proposed to “take out any of the judges or prosecutors” from Mr. Hale’s criminal trial, if Mr. Hale desired. Approximately one month later, Mr. Hale learned that one of the prosecutors from his criminal trial had been nominated as a federal judge. Mr. Hale issued a press release that, among other things, identified the judge as a “Jewish crypto-homosexual communist,” accused him of “caus[ing] enormous grief to me, my family, and my church,” and suggested that it is my hope that he will one day receive his comeuppance.” Mr. Hale later amended the press release to substitute the phrase “legal comeuppance,” and indicated that he intended to file a misconduct complaint

against the judge.

The Court acknowledges that Mr. Hale strenuously disputes the facts of, or the conclusions to be drawn from, the various events discussed above. He insists that the actions of Mr. Smith (and arguably, Mr. White and Mr. Turner) are the individual, unsanctioned acts of deranged individuals who disregard Creativity's directives to refrain from illegal conduct. Further, he suggests that these few rogue actors are "no different than what occurs with Christians, Muslims, Jews, and others on a daily basis." Mr. Hale insists that the provisions of Article 7 authorize resort to violence only in self-defense and that Creativity does not contend that such time is near. He has numerous disagreements with the circumstances that led to his own conviction, noting that there was no evidence that he did anything other than innocently advise the fellow Creativity member to do what he believed was right.

The Court finds that Mr. Hale's arguments and factual denials do not prevent the BOP from legitimately declaring Creativity to be an STG. As noted in *Five Percenters*, prison officials enjoy broad latitude in deciding how to effectuate its compelling interests of promoting safety both inside and outside of prisons. Here, as in that case, there is evidence that Creativity members have engaged in violent rhetoric, inducements to violence, and actual violent acts on multiple occasions. Mr. Hale professes that Creativity is inherently a peaceful and law-abiding religion, but there is adequate evidence to suggest that those principles are frequently disregarded by its members, including Mr. Hale himself. Although Mr. Hale strenuously protests his innocence, he himself has been convicted of soliciting the murder of a federal judge and, unless and until that conviction is vacated, the Court must accept Mr. Hale's guilt on that offense as having been conclusively proven. Mr. Hale's suggestion that Creativity may be beset by a handful of bad actors who commit crimes, just as Christian and Muslim adherents commit crimes without

tarnishing the reputations of other adherents, fails for that same reason: even if the actions of those Creativity adherents listed above would not justify mail restrictions imposed on an ordinary Creativity member in the BOP, they *do* justify restrictions imposed on Mr. Hale himself, as Mr. Hale has used his leadership in Creativity to inspire and induce others to violence. Accordingly, the Court is satisfied that, even if Creativity were treated as a religion, the BOP has shown that it had a compelling justification for the mail restrictions imposed on Mr. Hale in 2010 and 2013.

The BOP has further shown that the mail restrictions were the least restrictive means that the BOP had to advance its compelling interest in protecting society from harm at the hands of Creativity adherents who might be induced by Mr. Hale. Mr. Davis, the ADX Warden who imposed the 2010 restriction, explained that between August 2009 (prior to which Mr. Hale was again on a mail restriction) and June 2010, the BOP “attempted to manage [Mr. Hale’s] communications on a letter-by-letter basis,” but found that such individualized review of Mr. Hale’s correspondence was insufficient to prevent inappropriate communication with Creativity followers. As Mr. Davis explains, the BOP eventually learned that “it was clear from [Mr. Hale’s] correspondence that he *wanted* to exert the influence that being Pontifex Maximus gave him.” Thus, Mr. Davis’ explanation reveals that something less than a full ban on correspondence with Creativity adherents was insufficient to prevent Mr. Hale from attempting to exert leadership or control over Creativity. In such circumstances, the BOP has carried its burden of showing that no less-restrictive alternative to the mail restrictions would have sufficed to achieve its compelling interest.

Accordingly, the Court finds that there is no genuine dispute of material fact requiring trial. Mr. Hale’s free-exercise and RFRA claims fail because: (1) the Court finds that Creativity does not constitute a religion, and (2) to the extent it does, the BOP has carried its burden of showing that

the 2010 and 2013 mail restrictions were justified by a compelling governmental interest that was narrowly-tailored.

B. First Amendment Retaliation

Mr. Hale alleges that the 2010 and 2013 mail restrictions were also imposed against him as retaliation for his exercise of his First Amendment rights to correspond with other adherents of Creativity. To establish a claim for retaliation for the exercise of First Amendment rights, Mr. Hale must show: (1) that he engaged in a Constitutionally-protected activity, (2) that the BOP subjected him to an action that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) that the adverse action was substantially motivated by the constitutionally-protected conduct. *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007). It is essentially undisputed that Mr. Hale can establish each of these elements: he clearly engaged in First Amendment activity by corresponding peacefully with Creativity members and the National Socialist Movement. The BOP does not materially dispute that the 2010 and 2013 mail restrictions are adverse actions that might chill the First Amendment inclinations of persons of ordinary firmness. And it is undisputed that the mail restrictions were specifically imposed *because of* the contents of Mr. Hale's correspondence.

However, even if Mr. Hale establishes retaliation, the BOP remains authorized to engage in such retaliation if it is reasonably related to legitimate penological interests under *Turner*. See *Allmon v. Wiley*, 483 F. App'x 430, 432 (10th Cir. 2012); *Frazier v. Dubois*, 922 F.2d 560, 562 (10th Cir. 1990). The Court need not conduct the full *Turner* analysis, as the discussion above establishes that the BOP had a compelling justification for imposing the mail restrictions when Mr. Hale began engaging in correspondence that concerned exercising control or guidance over a validly-designated STG. Thus, even if the BOP's impositions of mail restrictions were retaliation

for Mr. Hale's exercise of his First Amendment rights, those restrictions were justified by legitimate penological interests and thus, the BOP is entitled to summary judgment on Mr. Hale's retaliation claim.

B. Diet Claims

Mr. Hale alleges that the BOP has violated his free-exercise rights and RFRA by refusing to provide him with the diet encouraged by Creativity, which is essentially a diet consisting solely of raw and unprocessed foods (including no canned foods). Once again, consideration of these claims is governed by the more restrictive RFRA analysis that requires Mr. Hale to make a preliminary showing that not be provided his requested diet constitutes a substantial burden on a religious exercise, at which point the burden shifts to the BOP to show that the restriction is justified by a compelling governmental interest and is narrowly-tailored.

Mr. Hale's first difficulty with these claims is that, for the reasons stated above, the Court has found that Creativity does not constitute a religion; as such, its demands that adherents consume a raw-food diet is not a religious observance protected by the First Amendment or RFRA.⁹

⁹ If the Court were to conclude that Creativity is religious in nature, the Court would likely allow Mr. Hale's RFRA diet claim to proceed to trial. The BOP has offered a bewildering array of justifications for refusing to provide Mr. Hale a raw-food diet, including concerns about kitchen efficiency, cost, pilferage of food by kitchen staff, hoarding by Mr. Hale, fermentation of fruits into alcohol, security concerns relating to the passing of note or poisoning of identifiable food trays, the fear that fellow inmates will become jealous of Mr. Hale's diet and join Creativity for the same benefit, and many others. The few courts that have considered some of these concerns have generally found them to not be sufficiently compelling. *See Koger v. Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) (questioning whether "orderly administration of a prison dietary system" and concerns of efficiency are sufficiently compelling); *United States v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1341, 1346-47 (11th Cir. 2016) (rejecting cost containment and inmate jealousy as compelling reasons). *But see Vega v. Lantz*, No. 3:04-CV-1215, 2009 WL 3157586 (D. Conn. Sept. 25, 2009) (finding inmate jealousy and cost containment to be compelling justifications).

C. Denial of Literature

Mr. Hale claims that his free-exercise rights were violated by the BOP's prohibition against him having a copy of *Nature's Eternal Religion*, Creativity's "Bible," in his cell. It is undisputed that the BOP has relented on this point, and that Mr. Hale is allowed to possess a copy of the book so long as he is housed at ADX. The BOP argues that, therefore, this claim is moot; Mr. Hale argues that the claim is not moot because, without a ruling on the merits, the BOP could take the book away at any point in the future without consequence.

As courts of limited jurisdiction, federal courts are constitutionally required to decide only actual cases or controversies. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). The existence of a case or controversy is predicated on the existence of a live case that is not moot. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010). A live suit can become moot when the plaintiff "no longer suffers actual injury that can be redressed by a favorable judicial decision." *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015).

The BOP represents that so long as Mr. Hale is incarcerated at ADX,¹⁰ he is free to have his literature in his cell. The Court has no reason to question the sincerity of this representation, and indeed, to some extent, the Court's adoption of that representation in this Order would likely prevent the BOP from taking the position in the future that *Nature's Eternal Religion* could be declared contraband at ADX. Mr. Hale offers nothing more than speculation that the BOP might change its mind later. In such circumstances, the Court is satisfied that Mr. Hale's claim seeking

¹⁰ Mr. Hale does not offer any argument about the effect that a transfer to another, less-restrictive prison would have on his right to possess the book, and thus, the Court does not entertain that possibility.

a copy of *Nature's Eternal Religion* is moot.

In any event, were the Court to reach the merits, it would find that the BOP has the authority to restrict Mr. Hale's possession of the book outside of the highly-restrictive context of ADX. An inmate's entitlement to possess a given publication is evaluated under the *Turner* standard, which examines: (1) the existence of a rational connection between the prohibition and the governmental interest justifying it; (2) whether there are alternative means of exercising the right claimed by the inmate; (3) the effect that accommodation would have on prison staff and other inmates; and (4) whether obvious, easy alternatives to the prohibition exist at *de minimis* cost. *Jones v. Salt Lake Cty.*, 503 F.3d 1147, 1153 (10th Cir. 2007). As the BOP notes, *Nature's Eternal Religion* contains extensive racially-inflammatory language and ideas, the dissemination of which in a multi-racial prison environment is highly likely to lead to violent conflict among inmates. It is no surprise that numerous courts reaching this exact question have found it permissible for prisons to ban the possession of *Nature's Eternal Religion* and other Creativity texts under *Turner*. *Birkes*, 2011 WL 5117859 at *6 (citing *Byrnes v. Biser*, No. 06-249, 2007 WL 3120296 at *1-2 (W.D. Pa. Oct. 23, 2007)). Thus, to the extent that the Court were to conclude that Mr. Hale's claim is not moot, the Court would find that it is within the discretion of the BOP to prevent him from possessing *Nature's Eternal Religion* or other Creativity texts outside the context of ADX.

D. Remaining Motions

Mr. Hale moves to strike a "fact exhibit" included with the BOP's reply brief (# 199-1). Because the Court did not consider the exhibit, the motion is denied as moot. Mr. Hale also moves to submit declarations from nonparties in support of his summary-judgment response. Mr. Hale had an opportunity in preparing his response to submit any and all evidence he wished. As a

lawyer, Mr. Hale was familiar with what evidentiary exhibits he could have attached. The Court therefore finds his request untimely, but even if it were timely, the Court is satisfied that Creativity's texts and Mr. Hale's arguments thereon create a sufficient evidentiary record.

Though not styled as motions, Mr. Hale continues to submit filings that allege the BOP has again imposed mail restrictions at various points since this lawsuit was filed. The Prison Litigation Reform Act requires prisoners to exhaust administrative remedies for claims brought under federal law with respect to prison conditions. 42 U.S.C. § 1997e(a). Consequently, Mr. Hale may not freely add an unexhausted mail restriction to his exhausted claims. In any event, Mr. Hale has not even invoked the proper procedure to amend his complaint to add allegations that arose after filing suit. See Fed. R. Civ. P. 15(d) (describing supplemental pleadings). The Court therefore did not consider any mail restrictions outside July 2010 to January 2011 and January to August 2013. As a result, the BOP's motion to strike these filings is denied as moot.

V. CONCLUSION

For the foregoing reasons, the Defendant's Motion for Summary Judgment (# 186) is **GRANTED**. The Plaintiff's Motion to Strike (# 202) is **DENIED AS MOOT**, the Plaintiff's Motion to Allow Declarations by Nonparties (# 206) is **DENIED**, and the Defendant's Motion to Strike (# 210) is **DENIED AS MOOT**. Judgment shall issue in favor of the Defendant.

Dated this 28th day of March, 2018.

BY THE COURT:



Marcia S. Krieger
Chief United States District Judge