IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-00752-WJM-SKC

MATTHEW HALE, J.D.,

Plaintiff,

v.

RUDY MARQUES,
AMY KELLEY,
DEBORAH PAYNE,
JAMES WIENCEK,
SUSAN PROSE,
ANDRE MATEVOUSIAN,
JAMES FOX,
PAUL KLEIN,
CHRISTOPHER SYNSVOLL,
C. PORCO,
J. OSLAND,
M. WYCHE,
L. ROBINSON,
D. HUMPHRIES,
S. HANSEN,
FEDERAL BUREAU OF PRISONS,

Defendants.

MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), defendants Rudy Marques, Amy Kelley, Deborah Payne, James Wiencek, Susan Prose, Andre Matevousian, James Fox, Paul Klein, Christopher

Synsvoll, C. Porco, M. Wyche, L. Robinson, and the Federal Bureau of Prisons ("BOP") (collectively, "Defendants")[1] move to dismiss the complaint, ECF No. 1.

INTRODUCTION

Plaintiff is an inmate at United States Penitentiary – Administrative Maximum ("ADX") in Florence, Colorado. He initially asserted 22 claims against various employees of the Federal Bureau of Prisons ("BOP") and of the Department of Justice ("DOJ"), and against the BOP itself, but after screening, only seven claims remain. All seven surviving claims are brought against individuals in their individual capacities pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), seeking damages to redress various alleged violations of the First and Fifth Amendments with regard to Plaintiff's incarceration.

The seven remaining claims should be dismissed. First, pursuant to *Ziglar v. Abbasi*, ___ U.S. ___, 137 S. Ct. 1843 (2017), there is no *Bivens* remedy for alleged violations of the First Amendment, and Plaintiff's Fifth Amendment claim arises in a new context in which the Court should not recognize a *Bivens* remedy. Second, even if there were a *Bivens* remedy for the constitutional violations Plaintiff alleges, qualified immunity would bar suit against the remaining individual defendants. Finally, to the extent any injunctive relief claims remain against the BOP, those should be dismissed for failure to state a claim as well.

[1] The Court has dismissed most of Plaintiff's claims, ECF No. 11, but Plaintiff has not filed an amended pleading. The remaining defendants are only those named as defendants on Plaintiff's remaining claims (Claims 1, 10, 11, 12, 15, 20, and 21). *See id.* at 10.

BACKGROUND

Plaintiff "is serving a forty-year sentence for obstructing justice and soliciting the murder of a federal judge." *Hale v. Fed. Bureau of Prisons*, 759 F. App'x 741, 743 (10th Cir. 2019).[2] Plaintiff holds himself out to be "an ordained minister in the non-Christian Church of the Creator," referred to as the faith of "Creativity." ECF No. 1 ¶ 2, 3. Both the Tenth and Seventh Circuits have recognized Creativity as "a 'white supremacist organization' for which [Plaintiff] was the leader." *Hale*, 759 F. App'x at 743 (quoting *United States v. Hale*, 448 F.3d 971, 975 (7th Cir. 2006)). In 2014, Plaintiff filed a lawsuit against the BOP and several individual defendants arguing, in relevant part, that restrictions placed upon him at ADX violated his religious rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1 to -4 and the First Amendment. *Id.* at 744. In that case, the Tenth Circuit affirmed the district court's dismissal of some claims and summary judgment on the rest, holding, inter alia, that "Creativity is not a religion." *Id.* at 748.

In this action, Plaintiff again challenges several restrictions placed upon his activity. He originally brought 22 claims against 15 individuals and the BOP. ECF No. 1. After screening (*see* ECF Nos. 8, 11), seven claims remain:

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[2] The Court may take judicial notice of the Tenth Circuit's recent opinion in Plaintiff's prior case without converting this motion to dismiss to a motion for summary judgment for two reasons. First, because it is an opinion in a closely-related judicial proceeding, the Court may take judicial notice of it. *See St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979) ("Judicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it."). Second, Plaintiff himself refers to this action in his complaint, *see* ECF No. 1 ¶ 9 (alleging that the district court's decision—which has been affirmed by the Tenth Circuit—was wrong and will be reversed "by judicial or other means"), and as a document "referred to in the complaint" that is "central to the plaintiff's claim," the Court may review it without converting this to a motion for summary judgment. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010).

- Claim 1, against defendants Marques, Wiencek, Prose, Fox, Matevousian, Payne, and Kelley, for alleged violations of the Establishment Clause of the First Amendment. ECF No. 1 ¶¶ 1-14. Plaintiff alleges that his incoming and outgoing mail that pertains to Creativity is intercepted, and that the named defendants have engaged in harassment of Plaintiff due to his "non-Christian faith." *Id.* ¶ 12.
- Claim 10, against defendants Marques, Kelley, and Klein, for alleged violations of the Freedom of Speech Clause of the First Amendment. *Id.* ¶¶ 43-46. Plaintiff alleges that defendants refused to permit Plaintiff to mail out an article he had written seeking help from the outside in commuting his sentence.
- Claim 11, against defendants Marques, Synsvoll, Porco, and Klein, for First Amendment Retaliation. *Id.* ¶¶ 47-53. Plaintiff alleges that defendants banned him from phone calls with his mother for six months in retaliation for his attempt to disseminate the article referred to in Claim 10.
- Claim 12, against defendants Marques, Synsvoll, Porco, and Klein, for violation of the Due Process Clause of the Fifth Amendment. *Id.* ¶¶ 54-56. Plaintiff alleges that he was not afforded a hearing prior to the imposition of the ban on phone calls to his mother referred to in Claim 11.
- Claim 15, against defendant Marques, for violation of the Freedom of Speech Clause of the First Amendment. *Id.* ¶¶ 63-67. Plaintiff alleges that defendant Marques has unlawfully intercepted Plaintiff's incoming and outgoing mail.
- Claim 20, against defendants Marques, Wyche, and Robinson, for First Amendment Retaliation. *Id.* ¶¶ 87-90. Plaintiff alleges that defendants imposed institutional

discipline in response to Plaintiff's request to his mother to sell some of his property to fund his defense.

- Claim 21, against defendant Marques, for violation of the Freedom of Speech Clause of the First Amendment. *Id.* ¶¶ 91-94. Plaintiff alleges that defendant Marques improperly delayed Plaintiff's incoming and outgoing mail.

While Plaintiff includes the BOP as a defendant in the caption and makes one mention of the BOP as a defendant, *see id.* ¶ 1, Plaintiff makes no specific allegations against the BOP in any of the surviving seven claims, and the individual defendants are sued in their individual, and not official, capacities.

ARGUMENT

In adjudicating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must determine whether a complaint states a claim upon which relief may be granted. While a court must accept as true all well-pleaded factual allegations, it need not credit allegations that are merely conclusory. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* This is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 678. Where the well-pleaded facts are "merely consistent with a defendant's liability" or the "mere possibility of misconduct," the complaint fails to state a claim for relief that is plausible on its face, and the complaint must be dismissed. *Id.* 678-79.

I. ALL OF PLAINTIFF'S REMAINING CLAIMS SHOULD BE DISMISSED BECAUSE THERE IS NO *BIVENS* REMEDY FOR THE CONSTITUTIONAL VIOLATIONS HE ALLEGES.

In *Abbasi*, the Supreme Court explained that the *Bivens* remedy is limited to the three scenarios already approved by the Supreme Court, and that purported *Bivens* claims involving a "new context" should be carefully scrutinized and generally rejected. *See* 137 S. Ct. at 1857 ("[E]xpanding the *Bivens* remedy is now a 'disfavored' judicial activity."). Determining whether a *Bivens* remedy exists—or should exist—involves answering two questions: (1) does the claim arise in a "new context"; and, if so, (2) should the court create a new *Bivens* remedy, considering whether (a) alternative remedies exist; and (b) "special factors" counsel hesitation in recognizing a new damages remedy. *Id.* at 1857-58.

A. Plaintiff's Claims Raise a New Context Under *Bivens*.

Each of Plaintiff's claims involve a new context. The "antecedent" question in any *Bivens* case involving a new context is whether to recognize a new remedy. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2006 (2017). The Supreme Court's recent decision in *Abbasi*, 137 S. Ct. 1843, makes clear that each of the claims here is a new context because each is different from the three specific *Bivens* claims approved by the Supreme Court. *Id.* at 1859-60, 1864. Those three Supreme Court approved claims are *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), a Fourth Amendment case against the federal officers who entered and searched plaintiff's house, and detained him, all without probable cause; *Davis v. Passman*, 442 U.S. 228 (1979), a Fifth Amendment equal-protection case by an administrative assistant against her employer, a congressman who fired her because of her sex; and *Carlson v. Green*, 446 U.S. 14 (1980), an Eighth Amendment case by an inmate against his jailors for causing his asthma-induced death. *Abbasi*, 137 S. Ct. at 1843 ("These three cases—*Bivens*,

Davis, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself.").

Whenever a "case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." *Id.* at 1859. The Supreme Court emphasized that the distinction between a party's claims and prior Supreme Court *Bivens* cases need not be substantial to constitute a new context: "even a modest extension is still an extension." *Id.* at 1864. The Court's non-exhaustive list of examples shows that small differences matter. A new context is found, for example:

> [B]ecause of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Id. at 1859-60. Following *Abbasi*, unless a claim matches the situation in *Bivens*, *Davis*, or *Carlson*, in order to determine whether to create a new *Bivens* remedy, a court must first determine whether the claim arises in a new context.

All of Plaintiff's seven surviving claims implicate a new context. Six of the seven claims (claims 1, 10, 11, 15, 20, and 21) assert violations of the First Amendment. None of the *Bivens* trilogy involved a claim brought under that constitutional provision, and so the "context" of any type of First Amendment claim cannot but be new. *Abbasi*, 137 S. Ct. at 1859 (context is "new" where different "constitutional right at issue"). The Supreme Court "ha[s] never held that *Bivens* extends to First Amendment claims." *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012).[3] The

[3] *See also Abrar v. United States*, No. 17-cv-03068-CMA-NYW, 2018 WL 6985003, at *4-5 (D. Colo. Nov. 20, 2018) (no *Bivens* remedy for First Amendment access to court claim); *Ajaj v.*

remaining claim—Claim 12—is brought under the Due Process Clause of the Fifth Amendment. The only Fifth Amendment claim among the *Bivens* trilogy was *Davis*, which involved an equal protection claim for sex discrimination in federal employment. Plaintiff's due process claim—in which he alleges that he should have been afforded a hearing before his ability to phone his mother was temporarily curtailed—could hardly be farther from that factual scenario. Indeed, the Supreme Court has explicitly found that a *Bivens* remedy is not available even for an alleged due process violation in connection with a review of Social Security disability benefits. *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988) (declining to recognize a *Bivens* remedy for alleged due process violations in administration of Social Security disability benefits review program). Unquestionably, all seven of Plaintiff's surviving claims arise in a new context.

B. The Court Should Not Recognize Any of Plaintiff's New *Bivens* Claims.

In the new contexts presented by Plaintiff's claims, the Court should not recognize a new *Bivens* remedy. In determining whether to do so, the reviewing court must be fully cognizant "that expanding the *Bivens* remedy is now a 'disfavored' judicial activity." *Abbasi*, 137 S. Ct. at 1857. The Supreme Court's approach to implied damages remedies, such as *Bivens*, has changed drastically over the past decades. *Abbasi*, 137 S. Ct. at 1856-57. The Court now recognizes, as a matter of separation of powers, that Congress, and not the courts, should generally devise any causes of action for constitutional violations. *Id.* ("[I]t is a significant step under separation-of-

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Fed. Bureau of Prisons, No. 15-cv-00992-RBJ-KLM, 2017 WL 219343, at *3 (D. Colo. Jan. 17, 2017) (no *Bivens* remedy for Free Exercise Clause claims); *Bogard v. Hutchings*, No. 12-cv-01581-KMT, 2014 WL 959496, at *3-4 (D. Colo. Mar. 12, 2014) (no *Bivens* remedy for First Amendment retaliation); *Williams v. Klien*, 20 F. Supp. 3d 1171, 1174-75 (D. Colo. 2014) (same); *Allmon v. Lappin*, No. 11-cv-00549-MSK-CBS, 2013 WL 1149507, at *5-6 (D. Colo. Mar. 19, 2013) (same); *Blackman v. Torres*, No. 11-cv-02066-REB-BNB, 2013 WL 941830, at *2 (D. Colo. Mar. 11, 2013) (same).

powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials."). Indeed, the Court acknowledged in *Abbasi* that under the present state of the law, the outcomes and analyses in the "three *Bivens* cases might have been different if they were decided today." *Id.* at 1856.

The inquiry as to whether to devise a new *Bivens* remedy focuses on "'who should decide' whether to provide for a damages remedy, Congress or the courts," and "[t]he answer most often will be Congress." *Id.* at 1857. This is because "[i]n most instances, the Court's precedents now instruct, the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* (quotation marks omitted). This inquiry contains two components: first, whether there is any alternative remedial process; and second, whether any special factors counsel hesitation before authorizing a new kind of federal litigation. *Id.* at 1857-58; *see also Wilkie v. Robbins*, 551 U.S. 537, 549-550 (2007). The Court has made clear that either step alone may preclude devising a new *Bivens* remedy. *Abbasi*, 137 S. Ct. at 1857-58; *Wilkie*, 551 U.S. at 550. In other words, a plaintiff must demonstrate *both* that there is no alternative remedial process and that there are no special factors counseling hesitation to creating a new cause of action.

1. Alternative Remedies

At the first step of the analysis, there are alternative existing processes for Plaintiff to vindicate his rights, through the BOP's administrative remedy program, through claims in federal court for injunctive relief, and through the Federal Tort Claims Act. *Cf. Abbasi*, 137 S. Ct. at 1865 (recognizing the availability of injunctive relief may preclude a *Bivens* remedy because "the existence of alternative remedies usually precludes a court from authorizing a *Bivens*

action"); *see also Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231-34 (10th Cir. 2005) (discussing availability of injunctive relief and explaining that there "is no reason to rely on a court-created remedy, like *Bivens*, when Congress has created an adequate means for obtaining legal redress"). Notably, the Tenth Circuit has held that these exact remedies precluded implying a *Bivens* remedy in *K.B. v. Perez*, 664 F. App'x 756, 759 (10th Cir. 2016). Those alternatives should foreclose Plaintiff's request that the Court create a *Bivens* remedy.

2. Special Factors

While the Court should deny a *Bivens* remedy based on the availability of alternative remedial processes, the second step of the analysis—determining whether special factors counseling hesitation are present—provides a further basis to refuse to create a new remedy. The special factors inquiry "concentrate[s] on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1857-58. A "special factor" is any factor that "cause[s] a court to hesitate" before answering in the affirmative that it, rather than Congress, should devise a damages remedy. *Id.* at 1858.

In *Abbasi*, the Court indicated that the comprehensive reforms Congress passed with regard to prisoner claims through the Prison Litigation Reform Act of 1995 may "suggest[] that Congress chose not to extend the *Carlson* damages remedy [for deliberate indifference to serious medical needs] to cases involving other types of mistreatment." *Id.* at 1865. Congress's decision not to provide a remedy for circumstances outside of the constitutionally deficient medical care in *Carlson*, when it "had specific occasion to consider the matter," counsels hesitation to courts devising new remedies in Congress's stead. *Id.* Congress, rather than the judiciary, is in a better

position to determine the appropriate remedies for prisoners against BOP officials, and to weigh the benefits and the costs of such claims. Moreover, in the PLRA Congress barred compensatory damages without evidence of physical injury, 42 U.S.C. § 1997e(e), and the Tenth Circuit has accordingly held that this provision bars compensatory damages for First Amendment claims. *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001). Given this, there is strong reason to believe that Congress would refuse to create a new damages remedy for First Amendment or due process violations absent physical injury to the plaintiff.

This special factor applies with added force here when Plaintiff's claims relate to prison security. As the Tenth Circuit recognized, "BOP has designated Creativity a security threat group (STG) because inmates following its tenets have engaged in acts of violence, including murdering other inmates and instigating race riots." *Hale*, 759 F. App'x at 743-44. Plaintiff's own efforts to communicate with the outside world have included "encourag[ing] a neo-Nazi leader to pursue mass activism tactics, and . . . target[ing] a federal magistrate judge." *Id.* at 744. Against this backdrop, the threat of personal liability could impede the proper functioning of BOP facilities by causing officials to alter their behavior and judgment to avoid harassing lawsuits against them personally for damages, at the expense of institutional security. *See Abbasi*, 137 S. Ct. at 1863 (recognizing that the costs and difficulties of litigation "might intrude upon and interfere with the proper exercise of their office"). "[T]he decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide," including "the burdens on Government employees sued personally, as well as the costs and consequences to the Government itself." *Id.* at 1858. Congress is in a far better position to weigh the costs and benefits for allowing prisoners to bring claims like those Plaintiff asserts,

and the Court should defer to Congress and allow it to determine what, if any, damages remedy is appropriate.

In sum, Plaintiff's *Bivens* claims arise in a new context, and both the availability of alternate remedies and special factors counseling hesitation establish that the Court should not recognize those claims here.

II. QUALIFIED IMMUNITY BARS PLAINTIFF'S CLAIMS BECAUSE THERE IS NO CLEARLY-ESTABLISHED LAW BARRING THE CONDUCT PLAINTIFF CHALLENGES.

Even if the Court were to create a *Bivens* remedy in this case, the individual Defendants would be entitled to qualified immunity. Government officials are generally shielded from liability for damages when their conduct does not violate "clearly established" constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This immunity recognizes the "social costs [of litigation against public officials, which] include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.* at 814. It represents a defense from suit, not just from liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Plaintiff bears a heavy two-part burden to overcome qualified immunity and must show that: (1) each defendant's actions violated a constitutional right; and (2) the right allegedly violated was clearly established at the time of the conduct. *Patel v. Hall*, 849 F.3d 970, 980 (10th Cir. 2017). Plaintiff cannot make out either showing here as to any of his claims.

A. Plaintiff Has Not Alleged a Constitutional Violation.

Here, none of Plaintiff's surviving claims successfully state a constitutional violation at all, let alone a violation of clearly-established constitutional right.

1. First Amendment Claims

Plaintiff raises First Amendment claims under the Establishment Clause (Claim 1), the Free Speech Clause (Claims 10, 15, and 21), and for retaliation for protected speech (Claims 11 and 20). None of these claims has merit.

a. Establishment Clause Claim

The Establishment Clause prohibits the government from "confer[ring a] privileged status on any particular religious sect" or "singl[ing] out [a] bona fide faith for disadvantageous treatment." *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005). While the Tenth Circuit has not spoken to the standard applicable to inmate Establishment Clause claims, other courts are divided on whether those claims are evaluated under the test of *Turner v. Safley*, 482 U.S. 78, 89 (1987), in which a regulation is valid if it is "reasonably related to legitimate penological interests," or a stricter standard. *Compare Rauser v. Horn*, 241 F.3d 330, 334 (3d Cir. 2001) (applying *Turner* to claim that prison officials retaliated against inmate for exercising Establishment Clause rights) *with Am. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 426 (8th Cir. 2007) (holding that strict scrutiny, not *Turner*, applies to Establishment Clause challenge). Under any standard, however, Plaintiff's Establishment Clause claim here fails.

In **Claim 1**, Plaintiff asserts that (1) his incoming and outgoing mail that mentions Creativity has been intercepted, ECF No. 1 ¶ 6, (2) he has been charged with "gang activity" for "writing a sermon for his own Church and religious faith," *id.* ¶ 7, and (3) two defendants have refused to allow him to mail out a chapter of the book he is currently writing. *Id.* He claims that these actions have been taken against him "because [he] is not a Christian, because he in fact

opposes the Christian religion, and because the religion he does embrace, Creativity, is resented by the Defendants for its un-Christian and anti-Christian tenets." *Id.* ¶ 8. He claims that the defendants named on this claim "want [him] to abandon his own belief system, Creativity, and adopt that of Christianity whether he wants to or not." *Id.* ¶ 12. This, according to Plaintiff, amounts to the defendants favoring Christianity in violation of the Establishment Clause.

But the Tenth Circuit has held that "Creativity is not a religion." *Hale*, 759 F. App'x at 748.[4] Because the Tenth Circuit has concluded that Creativity is not a "bona fide faith," *Cutter*, 544 U.S. at 724, Plaintiff cannot state an Establishment Clause claim on this basis. Plaintiff therefore cannot state a claim under the "single out [a] bona fide faith for disadvantageous treatment" branch of the Establishment Clause analysis. *See Cutter*, 544 U.S. at 724.

Similarly, Plaintiff's factual allegations do not state a plausible claim that defendants have "confer[red] a privileged status," *id.*, on Christianity by their actions toward Plaintiff. Taking all of Plaintiff's factual pleadings at true, he has alleged, at best, that defendants will not permit him to disseminate texts and teachings regarding Creativity.[5] But he has not alleged any conduct—official or otherwise—that would place Christianity above other religions (a subset that, under Tenth Circuit law, does *not* include Creativity), or privilege religion over non-

[4] The court applied this holding in both the statutory context to Plaintiff's RFRA claims and in the constitutional context to his claims under the Free Exercise Clause. *Hale*, 759 F. App'x at 748-49. Moreover, Plaintiff is collaterally estopped from arguing otherwise in this action. *See United States v. Wittig*, 575 F.3d 1085, 1098 (10th Cir. 2009) ("Collateral estoppel is a principle of finality. It means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." (quotation marks and citation omitted)).

[5] Claim 1 could be viewed simply as a Free Exercise claim disguised as an Establishment Clause claim, but any Free Exercise claim would also fail as a matter of law because "Creativity is not a religion." *Hale*, 759 F. App'x at 748.

religion, in violation of the Establishment Clause. Plaintiff does not allege that, if he were a Christian, he would be permitted to disseminate threat-group-related material without interference. *See Hale*, 759 F. App'x at 743-44 and 744 n.1 (discussing Creativity as an STG, and the BOP's imposition of mail restrictions on correspondence referring to Creativity). As in his prior lawsuit, he "identifies no Christian, Jewish, or Muslim comparator who is permitted to send or receive communications about STGs, or who may possess an STG text." *Id.* at 753. Plaintiff's allegations, read in light of the Tenth Circuit's prior opinion, make clear that the restrictions imposed on Plaintiff are a matter of institutional security, not establishment of religion.

b. Free Speech Clause Claims

While prisoners do enjoy First Amendment rights, "prisoners' 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) (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989)). This is so because prisons are constitutionally permitted to place restrictions on prisoners' liberties where the regulation "is reasonably related to legitimate penological interests." *Id.* (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). A prisoner alleging a First Amendment violation "must include sufficient facts to indicate the plausibility that the actions of which he complains were *not* reasonably related to legitimate penological interests." *Id.* at 1188; *see also Al-Owhali v. Holder*, 687 F.3d 1236, 1239 (10th Cir. 2012) (plaintiff bears the burden to demonstrate, through specific factual allegations, that there is no legitimate, rational basis for the challenged action). This standard requires a prisoner to "recite facts that might well be unnecessary in other contexts to surmount a motion to dismiss." *Al-Owhali*, 687 F.3d at 1240.

And under the *Twombly/Iqbal* standard, the Court must examine the actual facts pleaded, and should not accept as true legal conclusions of the prisoner. *See Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012).

Based on *Turner*, the Supreme Court has repeatedly held that First Amendment rights are appropriately curtailed in prison. *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003). *Turner* is satisfied if officials, in their judgment, believe that the challenged actions would advance the desired goal. *See Johnson v. California*, 543 U.S. 499, 513 (2005) (observing that *Turner* does not require proof a policy advanced the goal, but only that officials "might reasonably have thought" it would); *Sperry v. Werholtz*, 413 F. App'x 31, 40 (10th Cir. 2011) ("[I]t 'does not matter whether we agree with' the defendants or whether the policy 'in fact advances' the jail's legitimate interests. The only question that we must answer is whether the defendants' judgment was 'rational,' that is, whether the defendants might reasonably have thought that the policy would advance its interests."). In conducting this analysis, courts "must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton*, 539 U.S. at 132. The burden is not on the government actors to provide the validity of their actions, "but on the prisoner to disprove it." *Id.*

Claim 10. In this claim, Plaintiff alleges that defendants Marques, Klein, and Kelly refused to permit Plaintiff to mail an article he had written ("Why Do I Want to Be Free?") to his mother, which Plaintiff claims violated the First Amendment. ECF No. 1 ¶¶ 43-46. Plaintiff alleges that BOP had "no legitimate penological interest" in prohibiting him from sending the

article. *Id.* ¶ 45. However, under *Iqbal*, the Court must disregard that legal conclusion, and examine the facts pleaded to determine whether they support the assertion that the BOP had no legitimate interest in blocking the dissemination of the article. *Iqbal*, 556 U.S. at 678 ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.").

Claim 10 does not include a complete accounting of the content of the "Why Do I Want to Be Free" article, other than that it asserted ("among other things," ECF No. 1 ¶ 44) Plaintiff's innocence and the conclusory assertions that the article was "wholly lawful, wholly peaceful, and merely sought to help obtain Hale's rightful freedom by lawful means." ECF No. 1 ¶ 44-45. Plaintiff does not plead that the article was devoid of any discussion of Creativity. *See id.* The Tenth Circuit has recognized the "overwhelming evidence . . . that Creativity poses an institutional security risk and that Mr. Hale has sought to advance the white-supremacist goals of Creativity in ways that pose a danger both inside and outside of ADX," and held that mail restrictions on Plaintiff regarding Creativity did not violate the First Amendment. *Hale*, 759 F. App'x at 750. By failing to disassociate the article from his communications about Creativity, Plaintiff has failed to carry his burden to plausibly plead a lack of legitimate penological interest in the BOP intercepting the article, and Claim 10 should be dismissed.

Claim 15. In this claim, Plaintiff alleges that defendant Marques has wrongfully intercepted "numerous pieces" of his mail, both outgoing and incoming. ECF No. 1 ¶ 64. He claims that Marques has done this in the hopes that Plaintiff's correspondence with the outside world will dry up, and thus that Marques will no longer have to read Plaintiff's mail. *Id.* ¶ 66. As with the article discussed above in Claim 10, Plaintiff includes no factual pleadings regarding

the content of this mail, and does not plead that the intercepted mail had no mention or discussion of Creativity. *See* ECF No. 1 ¶¶ 63-67. Because he has not included factual material showing that the intercepted mail did not discuss Creativity in any way, the facts as pleaded by Plaintiff do not plausibly support the inference that the BOP had no legitimate penological interest in intercepting that mail. The Tenth Circuit has already concluded that the BOP has such an interest with regard to Plaintiff's Creativity-related correspondence, *see Hale*, 759 F. App'x at 749-51, and Plaintiff has not pleaded any facts that would negate the applicability of that interest. *See Gee*, 627 F.3d at 1185-86 (prisoner-plaintiffs bear the burden to plead facts showing the lack of a legitimate penological interest). Claim 15 thus fails on the same basis as Claim 10.

Claim 21 suffers from the same infirmity. In this claim, Plaintiff alleges that defendant Marques has delayed sending Plaintiff's mail out, supposedly to suppress Plaintiff's speech. ECF No. 1 ¶ 92-93. But Plaintiff includes no factual allegations concerning the content of this mail, and thus no basis for this Court to plausibly conclude that lacked Marques a legitimate penological interest in delaying it—namely, enforcing the prohibition on Plaintiff's communication with the outside world regarding Creativity. *See Hale*, 759 F. App'x at 750-51.

c. First Amendment Retaliation Claims

To state a claim for retaliation under the First Amendment, a plaintiff must allege facts establishing three elements: (1) that the plaintiff was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct. *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir.

2007). With respect to the third element, "[a]n inmate claiming retaliation must allege *specific facts* showing retaliation because of the exercise of [his] constitutional rights." *Peterson v. Shanks*, 149 F.3d 1140, 1144 (10th Cir. 1998) (quotation marks omitted; emphasis in original). In particular, the plaintiff must allege facts showing that "but for the retaliatory motive," the complained-of action "would not have taken place." *Id.* In addition, the *Turner* analysis equally applies to prisoner retaliation claims. *Frazier v. Dubois*, 922 F.2d 560, 562 (10th Cir. 1990).

Claim 11. This claim revolves around the alleged First Amendment violation discussed above in Claim 10. Plaintiff asserts that after he was denied the ability to send his "Why Do I Want to Be Free?" article to his mother, he included the article as an attachment to a court filing. ECF No. 1 ¶ 48. He asked his mother to inquire whether a publication, The First Freedom, would publish it. In response, Plaintiff claims that he was charged with prison disciplinary infractions (of which he claims he was ultimately cleared), and defendants Marques, Klein, Synsvoll, and Porco imposed a ban on calls with his mother that lasted six months. *Id.* ¶¶ 49-52. Claim 11 specifically challenges this ban, which Plaintiff asserts was imposed in retaliation for his efforts to exercise his First Amendment right to have his article published.

Claim 11 should be dismissed because Plaintiff has not pleaded sufficient facts to allow the Court to plausibly conclude that retaliation for protected speech was the but-for cause of the ban. As discussed above with regard to Claim 10, Plaintiff has pleaded no facts that would permit the Court to plausibly conclude that BOP had no legitimate penological interest in preventing Plaintiff from disseminating the article.[6] By Plaintiff's own account, the call ban was

[6] Because Plaintiff has no First Amendment right to disseminate the article under *Turner*, as discussed above, his retaliation claim necessarily fails. *Smith v. Maschner*, 899 F.2d 940, 948

imposed incident to disciplinary charges asserted because of Plaintiff's attempt to circumvent the restrictions imposed on the article. *See* ECF No. 1 ¶¶ 48 (Plaintiff converts the article into an exhibit to a court filing); 49 (asks his mother to send the filing to the newsletter); 50 (is charged with violation "to circumvent prison censorship"); 51 (call ban imposed). This sequence of events plausibly shows only that the call ban was imposed because Plaintiff was suspected of violating prison regulations; these facts do not plausibly support the conclusion that "but for the retaliatory motive" on the part of the defendants named on this claim, the ban "would not have taken place." *Peterson*, 149 F.3d at 1144.

Claim 20. In this claim, Plaintiff alleges that, after he asked his mother to sell some of his personal books, defendants Marques, Wyche, and Robinson charged and convicted him with a disciplinary infraction for operating a business. ECF No. 1 ¶¶ 88-90. Plaintiff claims this conviction was in retaliation for his speech to his mother. *Id.* This claim fails for two reasons.

First, "a prisoner has no recognized right to conduct a business while incarcerated." *French v. Butterworth*, 614 F.2d 23, 24 (1st Cir. 1980); *see also Johnson v. Wilkinson*, 42 F.3d 1388, 1994 WL 669857, at *4 (6th Cir. Nov. 30, 1994) ("[An inmate] has no constitutional right to conduct business within a prison."); *Smith v. Umbdenstock*, 962 F.2d 11, 1992 WL 97976, at *2 (7th Cir. May 11, 1992) ("[A]n inmate has no constitutionally protected right to operate a business while incarcerated."); *Stroud v. Swope*, 187 F.2d 850, 851 (9th Cir. 1951) (same). Because he has no constitutional right to operate the business of selling his possessions in the outside world for profit (regardless of how that money would be spent), Plaintiff cannot

(10th Cir. 1990) (only "retaliation for the exercise of a constitutionally-protected right is actionable"); *Hale*, 759 F. App'x at 751.

plausibly claim that he was "was engaged in constitutionally protected activity." *Shero*, 510 F.3d at 1203.

Second, the Tenth Circuit has held that "[a] prisoner cannot maintain a retaliation claim when he is convicted of the actual behavioral violation and there is evidence to sustain the conviction." *Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018) (quoting *O'Bryant v. Finch*, 637 F.3d 1207, 1215 (11th Cir. 2011) (quotation marks omitted). Plaintiff's allegations admit that he was convicted of this disciplinary violation, ECF No. 1 ¶ 89, and he does not plead that there was no evidence to support this conviction—to the contrary, his factual allegations essentially admit that he asked his mother to sell his possessions for profit. *See id.* ¶ 88. He cannot, therefore, maintain a retaliation claim under these circumstances.

As with the First Amendment claims discussed above, Plaintiff's retaliation claims fail to state a claim.

2. Fifth Amendment Claim

In **Claim 12**, Plaintiff alleges that he was deprived of due process under the Fifth Amendment when "he was afforded no hearing whatever before Defendants Marques, Synsvoll, Porco, and Klein banned him from making phone calls to his own mother." ECF No. 1 ¶ 55. Plaintiff alleges that the ban on telephone calls with his mother lasted six months. *Id.* ¶ 52.

A prisoner alleging a procedural due process claim must establish: (1) "whether there exists a liberty or property interest of which [he] has been deprived"; and, if so, (2) "whether the procedures followed by the State were constitutionally sufficient." *Swarthout v. Cooke*, 131 S. Ct. 859, 861 (2011). Plaintiff's allegations do not state a plausible claim on either point.

A liberty interest exists only where an interference with that right would impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995); *see also Hewitt v. Helms*, 459 U.S. 460, 467 (1983) ("[L]awfully incarcerated persons retain only a narrow range of protected liberty interests . . . [O]ur decisions have consistently refused to recognize more than the most basic liberty interests in prisoners."). The Tenth Circuit has observed that an inmate "has no constitutional right to make personal telephone calls." *Martinez v. Mesa Cnty. Sheriff*, 69 F.3d 548, 1995 WL 640302, at *1 (10th Cir. Nov. 1, 1995) (unpublished). And the Tenth Circuit has also held that a two-year confinement in administrative detention, during which time the inmate's "telephone privileges were restricted," was not such an "atypical and significant hardship" that it gave rise to a liberty interest. *Villarreal v. Harrison*, 201 F.3d 449, 1999 WL 1063830, at *2 (10th Cir. Nov. 23, 1999) (unpublished). Here, Plaintiff's claim that he was denied the privilege of telephone calls with his mother for six months does not, as a matter of law, establish a plausible liberty interest. *Cf. Hale*, 759 F. App'x at 751-52 (rejecting Plaintiff's due process challenge to the mail restrictions to which he is subject).

As to the sufficiency of the procedures, when evaluating a due process claim courts examine (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

Plaintiff claims he was given no notice and no hearing before the restriction on calls to his mother was imposed. ECF No. 1 ¶ 55. However, his allegations make clear that this restriction was imposed in connection with charges of disciplinary infractions related to his communications with his mother, *id.* ¶¶ 50-51, and that Plaintiff was given a hearing on these charges and was "found not guilty." *Id.* ¶ 50. Thus Plaintiff's own allegations show that the restriction was tied to specific disciplinary charges on which he received a hearing, thus showing that he received a constitutionally acceptable level of process.

In sum, Plaintiff cannot establish either a liberty interest in personal phone calls to his mother or a deprivation of sufficient process.

B. Plaintiff Has Not Alleged a Violation of a Clearly-Established Constitutional Right.

In addition to failing to state a constitutional violation at all, none of Plaintiff's claims allege a violation of a clearly-established constitutional right. For a right to be clearly established, it must be "sufficiently clear that every reasonable official would have understood that what he is doing violates that right" and "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (quotations marks omitted). "The law is clearly established when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as plaintiff maintains." *Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003). Plaintiff "must identify the authorities that create the clearly established right." *Apodaca v. Raemisch*, 864 F.3d 1071, 1076 n.3 (10th Cir. 2017).

In analyzing qualified immunity, it is critical to focus on the particular facts "in light of the specific context of the case." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *see also*

Plumhoff v. Rickard, 572 U.S. 765, 779 (2014) ("crucial question" focuses on "the particular circumstances that [the official] faced"); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (same). Accordingly, the Supreme Court has repeatedly "'told courts . . . not to define clearly established law at a high level of generality.'" *Mullenix*, 136 S. Ct. at 308; *White v. Pauly*, 137 S. Ct. 548, 552 (2017) ("Today, it is again necessary to reiterate the longstanding principle that clearly established law should not be defined at a high level of generality. As this Court explained decades ago, the clearly established law must be particularized to the facts of the case."); *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (same). Established precedent must "speak clearly to the specific circumstances." *Mullenix*, 136 S. Ct. at 312; *Quinn v. Young*, 780 F.3d 998, 1005 (10th Cir. 2015) ("We must scrupulously adhere to our longstanding duty to ascertain 'clear law (clear answers) that would apply to the situation at hand.'") (citation omitted).

Nowhere in Plaintiff's complaint does he point to a "Supreme Court or Tenth Circuit decision [that] is on point," or to "the clearly established weight of authority from other courts," that would demonstrate that the rights he claims were violated are clearly established. *Roska*, 328 F.3d at 1248. This failure, standing alone, should be sufficient for the Court to conclude that he has not alleged a violation of a clearly-established right. *See Apodaca*, 864 F.3d at 1076 n.3 (plaintiff "must identify the authorities that create the clearly-established right").

Moreover, even if the existence of a constitutional violation were a closer question (which it is not), "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Davis v. Hall*, 375 F.3d 703, 712 (8th Cir. 2004). The *Turner* standard governing whether prison officials may curtail an inmate's rights in service of a

legitimate penological interest is a multi-factor balancing test. *See Frazier v. Dubois*, 922 F.2d 560, 562 (10th Cir. 1990) ("*Turner* erects a balancing test, and it directs lower courts to weigh the following factors."). And the Tenth Circuit has held that "[o]n-point cases are particularly important when the constitutional question involves a balancing test." *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 666 (10th Cir. 2010). The Tenth Circuit has already recognized the security concerns presented by Plaintiff's incarceration. *Hale*, 759 F. App'x at 743-44. Managing those concerns inherently requires the exercise of discretion and judgment, and "[q]ualified immunity protects on-the-spot judgment calls." *Pahls v. Thomas*, 718 F.3d 1210, 1222 n.5 (10th Cir. 2013).

In sum, Plaintiff has not shown a violation of a constitutional right at all, let alone a clearly-established constitutional right. Defendants are entitled to qualified immunity.

III. ANY CLAIMS AGAINST THE BOP SHOULD BE DISMISSED.

It is not clear from Plaintiff's complaint on which claims, if any, he intended to include the BOP as a defendant. First, Plaintiff has named all of the individual defendants in their individual capacities, *not* in their official capacities. *See* ECF No. 1 at 3-4 (checking "individual" and not "official" boxes for first three defendants), 5 ("All fifteen [original individual defendants] are being sued in their individual capacities."). Each claim is introduced by a statement of which defendants allegedly violated Plaintiff's rights on that claim, but none of the surviving claims includes the BOP on that list. *See id.* at 7 (claim 1), 16 (claims 10 and 11), 18 (claim 12), 20 (claim 15), 24 (claim 20), 25 (claim 21).

Plaintiff makes specific allegations against the BOP—as distinct from the individual-capacity defendants—only in claims 1, 10, and 20. In claims 10 and 20, however, the only

allegation he makes against the BOP is that it lacked a legitimate penological interest in whatever conduct Plaintiff has accused the individual defendants of. *See* ECF No. 1 ¶¶ 45, 90. And in claim 1, Plaintiff alleges only that the BOP is "a defendant in this case," *id.* ¶ 1, that one individual defendant would not tell Plaintiff what he had to do for "the BOP to be willing to mail" his book, *id.* ¶ 12, and that defendant Prose is "an attorney for the BOP." *Id.* ¶ 13. These are the only mentions of the BOP specifically in any of Plaintiff's surviving claims.

Based on the almost complete absence of allegations specifically directed at the BOP (as distinct from the individual-capacity defendants), the Court should conclude that Plaintiff has asserted no surviving claims against the BOP. Even if the BOP is included as a defendant on any of Plaintiff's surviving claims, however, those claims fail to state a claim upon which relief may be granted, as argued above, and so any claims against the BOP for injunctive relief should be dismissed under Fed. R. Civ. P. 12(b)(6).

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed.

Dated August 23, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Clay C. Cook, BOP

and I hereby certify that I will mail to the following non-CM/ECF participants in the manner (mail, hand delivery, etc.) indicated by the nonparticipant's name:

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