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.

REPLY IN SUPPORT OF MOTION TO DISMISS [#48]

Plaintiff's response only highlights the deficiencies in his claims. First, the Court should follow the uniform, nationwide trend, post-*Abbasi*, and refuse to recognize a new *Bivens* First Amendment or due process claim in the prison context. Plaintiff's suggestion that a 25-year-old Tenth Circuit cases mandates ignoring *Abbasi* and allowing his claims to proceed is unavailing. Second, even if there were a *Bivens* remedy, the individual Defendants would be entitled to

qualified immunity because Plaintiff is unable to identify any clearly established precedent particularized to the unique circumstances here. Plaintiff's suggestion that the First and Fifth Amendments themselves clearly establish the law, and that he need not identify even analogous cases, is not true and fatal to his claims. Finally, all of the claims should be dismissed against the BOP and the individual Defendants for failure to state a claim.

ARGUMENT

I. THERE IS NO AVAILABLE *BIVENS* REMEDY.

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

Defendants demonstrated in their motion to dismiss that the First Amendment and due process *Bivens* claims raised in Plaintiff's complaint constitute a new context because they differ from the three previous *Bivens* cases recognized by the Supreme Court. ECF No. 48 at 6-8; *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017) (holding that whenever a "case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new" and that "even a modest extension is still an extension"). In particular, the context is new because, *inter alia*, the constitutional right at issue is different from those three cases, *Abbasi*, 137 S. Ct. at 1859 (context is "new" where a different "constitutional right at issue"), and the factual context—concerning grievances related to prison mail and phone calls—is entirely different.

In response, Plaintiff presents no argument applying the *Abbasi* standard. The Court should thus easily conclude that the context is new. Instead, Plaintiff argues that the Court should ignore *Abbasi* and rely on a statement in a 1994 Tenth Circuit case, *National Community & Barter Ass'n v. Archer*, 31 F.3d 1521, 1527 (10th Cir. 1994), and hold that all First Amendment

Bivens claims are allowed.[1] His argument lacks merit.

Abbasi clearly holds that if a case differs from the three *Bivens* cases the Supreme Court has allowed, the context is new and a full special-factors analysis is required. As other courts that previously allowed First Amendment *Bivens* claims have recognized, "[i]t is *Abbasi*, not our own prior precedent, that must guide us now."[2] *Bistrian v. Levi*, 912 F.3d 79, 95–96 (3d Cir. 2018) (holding no First Amendment *Bivens* remedy following *Abbasi* even though Third Circuit previously recognized that right); *Vanderklok v. United States*, 868 F.3d 189, 199-200 (3d Cir. 2017) (concluding, after *Abbasi*, that "[o]ur past pronouncements are thus not controlling" and "[i]t is not enough to argue . . . that First Amendment retaliation claims have been permitted under *Bivens* before"); *Luis Buenrostro v. Fajardo*, 770 F. App'x 807, 808 (9th Cir. 2019) (rejecting First Amendment *Bivens* claim even though Ninth Circuit previously allowed such claim, *see Moss v. U.S. Secret Serv.*, 572 F.3d 962, 967 n.4 (9th Cir. 2009)); *Doe v. Meron*, 929 F.3d 153, 169–70 (4th Cir. 2019) (rejecting First Amendment *Bivens* claim even though Fourth Circuit previously recognized such claim, *see Tobey v. Jones*, 706 F.3d 379, 385-86 (4th Cir. 2013)). Indeed, "[n]ationwide, district courts seem to be in agreement that, post-*Abbasi*, prisoners have no right to bring a *Bivens* action for violation of the First Amendment."[3] *Akande*

[1] Plaintiff offers no precedent suggesting that a *Bivens* remedy is appropriate for his alleged due process violation.

[2] While *Abbasi* overruled prior cases like *Archer*, even pre-*Abbasi*, the Tenth Circuit never ruled that all First Amendment *Bivens* cases are allowed. Instead, as one of the cases that Plaintiff cites explains, "whether a *Bivens* action exists must be decided on a case by case basis." *Beattie v. Boeing Co.*, 43 F.3d 559, 564 n.12 (10th Cir. 1994). In fact, *Beattie* expressly rejected a First Amendment *Bivens* claim following *Archer*. Notably, the Tenth Circuit has never permitted a First Amendment *Bivens* claim in the prison context.

[3] This is consistent with the numerous decisions in this district, pre- and post-*Abbasi*, that have rejected First Amendment *Bivens* claims in the prison context. ECF No. 48 at 7 (listing cases).

v. Philips, No. 1:17-cv-01243, 2018 WL 3425009, at *8 (W.D.N.Y. July 11, 2018).

Simply put, each of Plaintiff's claims arises in a new context, and *Abbasi* requires that a full special-factors analysis be conducted.

B. The Court Should Not Recognize a New *Bivens* Remedy.

This Court should follow the uniform trend of courts around the country and refuse to recognize a new First Amendment or due process *Bivens* remedy in the prison context. Before delving into the analysis, it is important to note that Plaintiff's assertion that there is a presumption in favor of a *Bivens* remedy, ECF No. 57 at 10, is flatly inconsistent with *Abbasi*, which recognized that the Court has refused to expand *Bivens* in any way for more than 30 years and that doing so "is now a 'disfavored' judicial activity." *Abbasi*, 137 S. Ct. at 1857. 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. As detailed below, this Court should follow the uniform trend and refuse to devise a new *Bivens* remedy in the prison context because Plaintiff has alternative remedial mechanisms and numerous special factors counsel hesitation against creating a new remedy.

1. Alternative Remedies

As explained in the motion, ECF No. 48 at 9-10, 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. Indeed, Plaintiff explicitly states that he is exercising one of those remedies here by seeking injunctive relief against the BOP for his claims.

Plaintiff claims that any alternative remedy must be "equally effective" and must be

declared by Congress "to be a substitute for recovery under the Constitution," ECF No. 57 at 10-11, but case law holds the opposite. The Supreme Court has repeatedly denied *Bivens* remedies based on alternatives that failed to provide "complete relief." *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988). The Court's central concern in analyzing alternatives is whether the plaintiff is in a "damages or nothing" situation. *Abbasi*, 137 S. Ct. at 1862. Where, like here, Plaintiff is challenging his ongoing conditions of confinement, the *Abbasi* Court recognized that the prisoner may alternatively bring injunctive relief claims. *Id.* The Tenth Circuit and other courts have recognized that the ability to bring injunctive relief claims to challenge conditions of confinement, as well as to utilize the administrative remedy program, provide alternative processes that negate the availability of a *Bivens* remedy. *See, e.g., K.B. v. Perez,* 664 F. App'x 756, 759 (10th Cir. 2016); *Vega v. United States*, 881 F.3d 1146, 1154 (9th Cir. 2018). Because Plaintiff undoubtedly has remedies to challenge his conditions of confinement—and is exercising one such option in this action—the Court should refuse to devise a new *Bivens* remedy.[4]

2. Special Factors

The Court need not reach the second step of the analysis—whether special factors counseling hesitation are present—because the availability of other remedies alone is sufficient to refuse a new *Bivens* remedy. But if the Court reaches this step, it should hold that special factors counsel against creating a new *Bivens* remedy. ECF No. 48 at 10-12.

[4] Plaintiff does not contest that he can use the administrative remedy program or seek injunctive relief. He suggests that the FTCA is not an alternative because parties cannot bring constitutional claims, but the relevant question is whether an alternative remedy is available, not whether the remedies are completely congruent. For example, in *Schweiker*, the alternative remedy did not allow aggrieved parties to bring constitutional claims or to obtain various damages remedies, but the Court still held that it precluded a *Bivens* remedy. *Schweiker*, 487 U.S. at 425.

First, as recognized in *Abbasi*, the Supreme Court indicated that the Prison Litigation Reform Act of 1995 ("PLRA") 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. This special factor applies with added force here because, in the PLRA, Congress barred compensatory damages without evidence of physical injury, 42 U.S.C. § 1997e(e).[5] *Searles v. Van Bebber*, 251 F.3d 869, 876 (10th Cir. 2001) (holding no compensatory damages for First Amendment violations without evidence of physical injury). Congress' affirmative decision to deny a damages remedy to prisoners in the absence of physical injury is a special factor that strongly counsels against the Court creating a new damages remedy where no physical injury exists. *See, e.g.*, *Buenrostro*, 770 F. App'x at 808 (refusing to create new First Amendment *Bivens* remedy in part because of the PLRA provisions).

Plaintiff does not address the other special factor: prison security needs for security threat groups like Creativity. As Defendants explained, 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 at the expense of prison security. Congress is in a far better position to weigh the costs and benefits for allowing prisoners to bring claims like those Plaintiff asserts, that relate to threat assessments, and the Court should defer to Congress and allow it to determine what, if any, damages remedy is appropriate.

[5] Plaintiff's argument that he is seeking damages for violation of First Amendment rights, not for mental or emotional injury, ECF No. 19, is the exact reasoning that *Searles* rejected. 251 F.3d at 876 ("disagree[ing] with the reasoning" because "[t]he plain language of the statute does not permit alteration of its clear damages restriction on the basis of the underlying rights being asserted"). *Searles* holds that the PLRA prevents the award of compensatory damages, regardless of substantive violation, where there is no physical injury.

In sum, this Court should follow the uniform nationwide trend and refuse to devise a new *Bivens* First Amendment and due process remedy in the prison context because there are alternate remedies and special factors counseling hesitation.

II. QUALIFIED IMMUNITY BARS PLAINTIFF'S CLAIMS.

Even if the Court were to create a *Bivens* remedy in this case, which it should not, the individual Defendants are entitled to qualified immunity.

A. Plaintiff Has Not Alleged a Clearly Established Constitutional Violation.

At the outset, the Court can quickly dismiss all of the claims against the individual Defendants because Plaintiff has failed to identify any precedent, particularized to the specific facts and circumstances, that clearly establishes any constitutional violation by any of the individual Defendants.[6] *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Id.* Established precedent must "speak clearly to the specific circumstances." *Id.* at 312. As explained in the motion, Plaintiff's obligation was to "identify the authorities that create the clearly established right." *Apodaca v. Raemisch*, 864 F.3d 1071, 1076 n.3 (10th Cir. 2017). He fails to do so and, indeed, recognizing his failure, disclaims any obligation to provide any on-point authority or even any "analogous cases." ECF No. 57 at 36. He cites virtually no precedent, let alone precedent that would clearly establish in the unique context here that each Defendant's own actions violated his constitutional rights. Plaintiff instead insists that the First and Fifth Amendments themselves clearly establish the law, *id.*, but it is established *precedent* that must

[6] The Supreme Court has held that, in analyzing qualified immunity, courts may bypass the threshold constitutional question and simply hold that the law was not clearly established at the time of the alleged violation. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

clearly establish the law. And the Supreme Court has placed special emphasis in recent years that this established precedent "must be 'particularized' to the facts of the case," *White v. Pauly*, 137 S. Ct. 548, 551-52 (2017), with a "high degree of specificity." *District of Columbia v. Wesby*, 138 S. Ct. 577, 582 (2018); *see also City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures.").

The necessity of on-point cases is particularly important in this context where prison officials are tasked with making judgment calls regarding threats posed by Plaintiff and the security threat group he seeks to lead. In exercising their important security duties, officials are tasked with exercising their penological judgment in applying the *Turner* balancing test. *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 666 (10th Cir. 2010) ("On-point cases are particularly important when the constitutional question involves a balancing test."). Qualified immunity was developed as an "exacting standard" in order to give these "officials breathing room to make reasonable but mistaken judgments." *Sheehan*, 135 S. Ct. at 1774. Qualified immunity ensures that officials are liable only for "transgressing bright lines." *Austell v. Sprenger*, 690 F.3d 929, 936 (8th Cir. 2012). None of the individual Defendants have transgressed any such bright lines. Accordingly, they are each entitled to qualified immunity.

B. Plaintiff Has Not Alleged a Constitutional Violation.

Plaintiff further fails to allege any constitutional violation with respect to any of his claims, providing an additional basis for granting qualified immunity to the individual Defendants. This defect likewise requires the dismissal of each claim for failure to state a claim.

1. First Amendment Claims

a. Establishment Clause Claim (Claim 1)

As explained in the motion, 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). 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.* Plaintiff claims that this alleged "mistreatment" violates the Establishment Clause. He is wrong.

Plaintiff's factual allegations, as opposed to conclusory assertions, do not state a plausible claim that Defendants have "confer[red] a privileged status," *Cutter*, 544 U.S. at 724, on Christianity.[7] Plaintiff fails to allege any conduct—official or otherwise—that places Christianity above other religions or privileges religion over non-religion, in violation of the Establishment Clause. Plaintiff does not allege that, if he were a Christian, he would be permitted to receive or disseminate threat-group-related material without interference. *See Hale*, 759 F. App'x at 743-44 & 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

[7] As Defendants noted in the motion, this is merely a repackaging of Plaintiff's prior lawsuit in the form of an Establishment Clause claim.

the Tenth Circuit's prior opinion, make clear that the restrictions imposed on Plaintiff are a matter of institutional security, not establishment of religion.

Rather than offering any concrete factual allegations, Plaintiff relies on his conclusory assertion that Defendants were motivated because Plaintiff is not a Christian. But this conclusory assertion is irrelevant; even if Plaintiff personally perceives this to be true, that does not state a claim. This is because the "focus" of the inquiry is whether there is "objectively discernible conduct or communication that is temporally connected to the challenged activity [which] manifests a subjective intent by the defendant to favor religion or a particular religious belief." *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 560, 561 (10th Cir. 1997) (holding that claim "must be supported by allegations of conduct or statements that expressly (without resorting to psychoanalysis) indicate that the defendant believed his [actions] would serve a religious purpose" and rejecting as insufficient the plaintiff's "individual perception"). Plaintiff's complaint fails to allege any such facts. It thus fails to state an Establishment Clause claim.

b. Free Speech Clause Claims (Claims, 10, 15, and 21)

Plaintiff fails to state a claim with respect to any of his free speech claims under the applicable *Turner* standard because he fails to "include sufficient facts to indicate the plausibility that the actions of which he complains were *not* reasonably related to legitimate penological interests." *Gee v. Pacheco*, 627 F.3d 1178, 1187 (10th Cir. 2010). Because *Turner* allows First Amendment rights to be curtailed so long as "reasonably related to legitimate penological interests," *id.*, a prisoner must directly address *Turner*'s core holding in his complaint, *Al-Owhali v. Holder*, 687 F.3d 1236, 1240 (10th Cir. 2012). This requires a prisoner to "recite facts that might well be unnecessary in other contexts to surmount a motion to dismiss." *Id.* at 1239.

Here, Plaintiff failed to meet this standard because he offers only conclusory assertions that Defendants lacked a legitimate penological interest. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) (conclusory assertions not entitled to presumption of truth and disregarded in evaluating well-pleaded facts). Plaintiff's obligation was to "plead facts from which a plausible inference can be drawn that the action was not reasonably related to a legitimate penological interest." *Gee*, 627 F.3d at 1188. He does not attempt to meet this burden. Indeed, he refuses to identify the content of the allegedly protected materials, and he offers no allegations that the challenged writings are unrelated to Creativity. As the Tenth Circuit has already recognized, based on 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," restrictions preventing Plaintiff from all Creativity-based communications do not violate the First Amendment. *Hale*, 759 F. App'x at 749-51.

Claim 10. In this claim, Plaintiff alleges that Defendants Marques, Klein, and Kelly violated the First Amendment by refusing to permit Plaintiff to mail an article he had written ("Why Do I Want to Be Free?"). ECF No. 1 ¶¶ 43-46. Plaintiff concedes that he offers no allegations showing that the article is unrelated to Creativity. ECF No. 57 at 24. He nevertheless insists that by merely alleging the BOP had "no legitimate penological interest," he has stated a claim. Not so. An allegation that merely states that there is "no legitimate penological interest" is a "formulaic recitation of the elements" that is "conclusory and not entitled to be assumed true" on a motion to dismiss. *Iqbal*, 556 U.S. at 680; *see also Doe v. Heil*, 533 F. App'x 831, 840 (10th Cir. 2013) (holding that this "bald and conclusory assertion" is "patently insufficient"). As a result, Plaintiff's conclusory assertion is patently insufficient to state a claim.

Lest there by any doubt, the Court may review the contents of this document, which is incorporated by reference into the complaint. This document shows that Plaintiff addressed the article to his Creativity followers and presented to them a desire to the lead the "White Race" and "our cause" to victory.[8] *Hale v. Fed. Bureau of Prisons*, No. 1:14-cv-00245 (ECF No. 208, pp. 22-24). Plaintiff has already litigated and lost the issue that BOP may legitimately restrict all Creativity-related communications. *Hale*, 759 F. App'x at 749-51. He is collaterally estopped from relitigating that issue. Plainly, this document, where Plaintiff discusses and seeks to lead his security threat group, is a Creativity-related communication. Plaintiff fails to state a claim.

Claim 15. Plaintiff alleges that Defendant Marques wrongfully intercepted "numerous pieces" of his mail, both outgoing and incoming. ECF No. 1 ¶ 64. He alleges that Defendant Marques "systematically reject[s] any and all pieces of his incoming and outgoing mail" related to Creativity and has rejected hundreds of pieces of mail on this basis.[9] *Id.* ¶ 6 (specifically incorporated into Claim 15 by ¶ 63). This claim fails on the same basis as Claim 10: BOP officials have a legitimate penological interest in rejecting Creativity-related communications because "a security/safety risk is inherent in Creativity communications." *Hale*, 759 F. App'x at

[8] As Plaintiff alleges, he filed a copy of this document as an attachment in his prior case. ECF No. 1, ¶ 48; *see Hale v. Fed. Bureau of Prisons*, No. 1:14-cv-00245 (ECF No. 208, pp. 11-33). A court may review documents referenced in the complaint that are central to the claims and whose authenticity is not in dispute. *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002). Likewise, a court may take judicial notice of a document in its own records. *St. Louis Baptist Temple, Inc. v. FDIC*, 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.").

[9] While Plaintiff claims in his response to have no way to know about the content of his incoming rejected mail, his own allegations state otherwise. ECF No. 1 ¶ 6 (alleging that incoming mail has been rejected based on Creativity). BOP regulations specifically provide that when incoming mail is rejected, the Warden will notify the inmate of the rejection along with the reasons for the rejection. 28 C.F.R. § 540.13.

749-51. Plaintiff is collaterally estopped from relitigating this issue and fails to state a claim.

Claim 21. In this claim, Plaintiff alleges that Defendant Marques delayed sending Plaintiff's mail, supposedly to suppress Plaintiff's speech. ECF No. 1 ¶ 92-93. Plaintiff includes no factual allegations concerning the content of this mail, and no non-conclusory allegations demonstrating an improper motive on the part of Defendant Marques. He thus again offers no well-pleaded factual allegations that would allow the Court to infer that Defendant Marques lacked a legitimate penological interest—namely, taking the necessary time to review Plaintiff's communications thoroughly in order to prevent Plaintiff from communicating with the outside world about Creativity. *See Hale*, 759 F. App'x at 750-51.

In response, Plaintiff insists that the content of his mail is irrelevant. Not so. As Plaintiff himself acknowledges in his complaint, he has attempted to send or receive "[h]undreds of pieces of mail" that have been rejected because they pertain to Creativity. ECF No. 1 ¶ 6. The BOP has a legitimate penological interest in effectively monitoring Plaintiff's mail to ensure he does not communicate regarding his security threat group. *Hale*, 759 F. App'x at 750-51. The need for effective monitoring is heightened for Plaintiff because he has serially attempted to send and receive hundreds of pieces of mail relating to Creativity. ECF No. 1 ¶ 6.

Plaintiff's limited allegations are vague and conclusory and fail to rise to the level of a constitutional violation. He identifies only one piece of mail that he specifically claims was delayed by two months and 22 days, but he provides no additional factual context related to this piece of mail. ECF No. 1 ¶ 93. Courts have repeatedly held that such isolated delays, without more, fail to state a claim. *See, e.g.*, *Schroeder v. Drankiewicz*, 519 F. App'x 947, 950 (7th Cir. 2013) (delay of slightly less than two months for mail item not enough); *Watkins v. Curry*, 2011

WL 5079532, at *4 (N.D. Cal. Oct. 25, 2011) (finding that an isolated incident of one-year delay without more fails to establish a First Amendment violation).

Nor is Plaintiff's allegation that "[m]any" unidentified pieces of mail have been delayed for "weeks" sufficient to state a claim. ECF No. 1 ¶ 93. This allegation offers no context as to the content of the mail delayed, when, for how long, or how frequently. Without such necessary factual enhancements, it is impossible for Plaintiff to state a claim based on vague and conclusory assertions. *See, e.g.*, *Huerta v. Oliver*, No. 17-CV-00988-RBJ-KLM, 2019 WL 399229, at *10–11 (D. Colo. Jan. 31, 2019), *report and recommendation adopted*, No. 17-CV-00988-RBJ-KLM, 2019 WL 954771 (D. Colo. Feb. 27, 2019) (concluding allegations that defendants "frequently and typically delay mail for two weeks or longer" was too conclusory and vague to state a claim). Indeed, the Tenth Circuit has recognized that such "brief delays in mailing" are insufficient to violate the First Amendment. *Gee*, 627 F.3d at 1190; *see also Bruscino v. Pugh*, 232 F. App'x 763, 766 (10th Cir. 2007) (three-week delay not First Amendment violation). Other courts are in accord. *Rowe v. Shake*, 196 F.3d 778, 780, 782 (7th Cir. 1999) (allegation that, over the course of three months, eight items delayed more than two weeks insufficient); *Cancel v. Goord*, No. 00 CIV. 2042(LMM), 2002 WL 171698, at *3 (S.D.N.Y. Feb. 4, 2002) (allegation of seven delays, ranging from two to six weeks, over the course of a year insufficient). Simply put, as alleged, the limited allegations do not show that any delays are both purposeful (and not isolated errors) and unrelated to the BOP's legitimate penological interest in monitoring Plaintiff's mail closely, especially given his serial attempts to communicate about Creativity. As a result, Plaintiff fails to state a claim.

c. First Amendment Retaliation Claims (Claims 11 and 20)

Plaintiff's First Amendment retaliation claims fare no better.

Claim 11. In Claim 11, Plaintiff alleges that he was retaliated against for circumventing the BOP's denial of his ability to disseminate the article in Claim 10—"Why Do I Want to Be Free?"—by mailing the article in his legal mail as an attachment to a court filing. ECF No. 1 ¶ 48. Plaintiff claims that he was charged with prison disciplinary infractions and that defendants Marques, Klein, Synsvoll, and Porco banned calls with his mother for six months. *Id.* ¶¶ 49-52. He alleges the ban was retaliation for his efforts to exercise his First Amendment right.

This claim fails for two reasons. First, because Plaintiff has no First Amendment right to disseminate this Creativity-related document, as discussed above, his retaliation claim necessarily fails. *Smith v. Maschner*, 899 F.2d 940, 948 (10th Cir. 1990) (only "retaliation for the exercise of a constitutionally-protected right is actionable"); *Hale*, 759 F. App'x at 751. In other words, this claim cannot go forward if Claim 10 is dismissed. Second, the well-pleaded facts alleged show that the call ban was imposed for circumventing mail restrictions imposed and thus violating prison regulations. The well-pleaded facts do not plausibly support the inference that "but for the retaliatory motive" on the part of the Defendants named on this claim, the ban "would not have taken place." *Peterson v. Shanks*, 149 F.3d 1140, 1144 (10th Cir. 1998).

Claim 20. In this claim, Plaintiff alleges that, after he asked his mother to sell some of his personal books, he was charged and convicted 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, as explained in the motion, Plaintiff had no constitutionally protected right to conduct any business (no matter the size or purpose) while

incarcerated. ECF No. 48 at 20. As a result, Plaintiff cannot plausibly claim that he was "was engaged in constitutionally protected activity," the first element of a retaliation claim. *Shero v. City of Grove, Okl.*, 510 F.3d 1196, 1203 (10th Cir. 2007). 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. Notably, Plaintiff does not even address this second ground in his response. For both of these independent reasons, he fails to state a claim.

2. Fifth Amendment Claim (Claim 12)

In Claim 12, Plaintiff alleges that he was deprived of due process under the Fifth Amendment when he was banned from making phone calls to his mother for six months. ECF No. 1 ¶¶ 52, 55. As explained in the motion, Plaintiff fails to state a claim both because he had no protected liberty interest in making such calls and because he concedes he received a hearing.

The Tenth Circuit has repeatedly held 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 table decision); *see also Coleman v. Long*, 772 F. App'x 647, 649–50 (10th Cir. 2019) (holding one-year suspension of phone and visitation privileges without hearing not constitutional violation because no "liberty interest in visitation and telephone privileges from the Constitution"); *Requena*, 893 F.3d at 1218 ("restrictions on an inmate's telephone use, property possession, visitation and recreation privileges are not different

in such degree and duration as compared with the ordinary incidents of prison life to constitute protected liberty interests under the Due Process Clause" (quotation marks omitted)). Other courts of appeals are in agreement. *See, e.g.*, *Hester v. Mamukuyomi*, 750 F. App'x 275, 277 (5th Cir. 2018); *McDowell v. Litz*, 419 F. App'x 149, 152 (3d Cir. 2011); *Moghaddam v. Seifert*, 135 F. App'x 981, 982 (9th Cir. 2005). Because Plaintiff had no constitutionally protected liberty interest, he cannot state a due process claim.

While the Court should not go further, Plaintiff's own allegations show that the restriction was imposed in connection with charges of disciplinary infractions, *id.* ¶¶ 50-51, and that Plaintiff was given a hearing on these charges (and claims to have been "found not guilty"). *Id.* ¶ 50. While Plaintiff complains that he should have received a pre-deprivation hearing, he points to no law supporting such a requirement in connection with phone restrictions.

In sum, Plaintiff cannot establish either a liberty interest in personal phone calls or a deprivation of constitutionally sufficient process. He fails to state a claim.

III. ANY CLAIMS AGAINST THE BOP SHOULD BE DISMISSED.

In his response, Plaintiff insists that all of his claims are asserted against the BOP, notwithstanding that he failed to list the BOP as a defendant on any of them. The Court need not resolve this issue because, even if the BOP is a defendant on these claims, Plaintiff fails to state a claim upon which relief may be granted for the reasons explained above. As a result, any claims against the BOP should be dismissed pursuant to Rule 12(b)(6).

CONCLUSION

For the foregoing reasons, and those in Defendants' motion to dismiss, the Court should dismiss all of the remaining claims with prejudice.

Dated October 11, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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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