IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:19-cv-00752-WJM-SKC

MATTHEW HALE, J.D.,

Plaintiff,

v.

RUDY MARQUES, *et al.*,

Defendants.

RECOMMENDATION RE:
MOTION TO ALTER OR AMEND JUDGMENT [#23], MOTION TO DISMISS [#48], AND MOTIONS TO INTERVENE [#17, #26, #28, #31, #37, #39, #53, #78]

This Recommendation addresses several pending motions, to include: (1) Plaintiff Matthew Hale's ("Hale") "Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. Pro. Rule 59(e)" ("Motion to Alter Judgment") [#23];[1] (2) Defendants' Motion to Dismiss [#48]; and (3) eight Motions to Intervene filed by non-parties[2] [#17, #26, #28, #31, #37, #39, #53, #78]. These motions were referred to the magistrate judge for a recommendation. [#25, #27, #29, #33, #38, #40, #48, #54, #79.] The Court has carefully considered each motion, the related briefing, and the applicable law. No hearing is necessary on any of the motions. For the following reasons, the Court RECOMMENDS

[1] The Court uses "[#__]" to refer to specific docket entries in CM/ECF.

[2] These motions are titled variously as "request to be a movant," "motion to join suit," "motion to join necessary party," and "motion to intervene." Their titles and cited rules of procedure notwithstanding, the Court understands that each movant seeks the same relief, to intervene and become a party-plaintiff to this action.

that Hale's Motion to Alter Judgment be DENIED, the Motion to Dismiss be GRANTED, and the Motions to Intervene be DENIED.

BACKGROUND

Hale is an inmate in the custody of the Federal Bureau of Prisons ("BOP") at the United States Penitentiary – Administrative Maximum ("ADX") in Florence, Colorado. In 2014, he filed a lawsuit similar to the present action against the BOP and several individuals. *See Hale v. Fed. Bureau of Prisons*, No. 14-cv-00245-MSK-MJW, 2018 WL 1535508 (D. Colo. Mar. 28, 2018). There, he alleged he was a minister in "The Church of the Creator," which considers "Creativity" to be a religion. *Id.* "[A] central tenet of Creativity is the premise of the superiority of the white race and the need for racial purity and segregation." *Id.* Hale argued that the various restrictions placed on him at ADX violated his religious rights under the Religious Freedom Restoration Act and the First Amendment. *See Hale v. Fed. Bureau of Prisons*, 759 F. App'x 741, 744 n.1 (10th Cir. 2019) ("Mr. Hale is currently prevented from sending or receiving correspondence that contains any reference to Creativity, the Creativity Movement, the Worldwide Church of the Creator, the Creativity Alliance, or any permutation or code for these groups.").

Senior District Judge Krieger dismissed some of Hale's claims and entered summary judgment in favor of the defendants on the remaining claims. *Id.* Hale appealed. On appeal, the Tenth Circuit held that "Creativity is not a religion," and affirmed the district court's orders. *Id.* at 748. Hale then appealed the Tenth Circuit's decision; however, the Supreme Court recently denied his petition for certiorari. *Hale v. Fed. Bureau of Prisons*, 140 S.Ct. 196 (2019); [*see also* #77].

Hale filed this case on March 13, 2019. He originally asserted 22 claims pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Religious Freedom Restoration Act ("RFRA"), 42. U.S.C. § 2000bb-1 to -4. [#1 at p.4.] In this action, he again alleges that he is an "ordained minister in the non-Christian Church of the Creator," also referred to as "Creativity religious faith." [*Id.* at ¶¶2-3.] And he again challenges the restrictions on his communications placed on him by the BOP. [*See generally id.*]

Pursuant to 28 U.S.C. § 1915A and D.C.Colo.LCivR 8.1(b), Magistrate Judge Gallagher screened the Complaint to determine if any of Hale's claims were appropriate for summary dismissal. He recommended that most of the claims be dismissed based on issue preclusion and the Tenth Circuit's holdings in *Hale v. Fed. Bureau of Prisons*, 759 F. App'x 741 (10th Cir. 2019). [#8.] Senior District Judge Babcock adopted this recommendation over Hale's objections. [#11.] On July 1, 2019, Hale filed the Motion to Alter Judgment, which the Court construes as a motion for reconsideration of Judge Babcock's order. [#23.] Defendants did not file any response to the motion; however, the Court concludes that it does not need additional briefing to address the merits of that motion.

On August 23, 2019, the Defendants filed the Motion to Dismiss arguing, among other things, that Hale's remaining seven claims should be dismissed for failure to state a claim. [#48.] The Motion to Dismiss is fully-briefed. [#57 (Response); #76 (Reply)]. In addition, several non-parties seek to intervene in this case. They allege they are adherents of Creativity, and they generally contend that their First Amendment rights are being violated by the BOP's restrictions on Hale's communications. [#17, #26, #28, #31,

#37, #39, #53, #78]. Defendants filed responses to these requests [#51, #80] and most of the movants filed replies [#52, #62, #63, #64, #65, #71, #81, #83].

DISCUSSION

A. Motion to Alter Judgment [#23]

Hale seeks reconsideration of Judge Babcock's order partially dismissing his claims. A motion under Rule 59(e) is the appropriate vehicle "to correct manifest errors of law or to present newly discovered evidence" bearing on a judgment or other court order. *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997). In the Tenth Circuit, grounds for a motion to reconsider pursuant to Rule 59(e) can include: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citing *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948 (10th Cir. 1995)). Thus, a motion to reconsider is "appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.* These motions are not to be used as a vehicle for "revisit[ing] issues already addressed or advanc[ing] arguments that could have been raised in prior briefing." *Id.* (citing *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991)). Furthermore, a motion for reconsideration "is an extreme remedy to be granted in rare circumstances." *Brumark*, 57 F.3d at 944.

Here, Hale does not argue that there have been any intervening changes in the controlling law. Rather, he contends that the court misapprehended Claims 2, 13, and 19 because, according to Hale, these claims have "nothing to do with Creativity," and therefore, the claims are not subject to issue preclusion. [#23 at p.3.] But this is the same argument Hale made in his objections [#10] to Judge Gallagher's recommendation to

dismiss those claims, and which Judge Babcock already considered and addressed. [#11 at p.3.] In his Order, Judge Babcock cited specific allegations in the Complaint regarding these dismissed claims to conclude that the speech at issue relied on Creativity and Hale's related "philosophy." [*Id.* at pp.3-4.] Consequently, Judge Babcock found that Hale's claims were precluded by the Tenth Circuit's holding that "any reference to Creativity, the Creativity Movement, the Worldwide Church of the Creator, the Creativity Alliance, or any permutation or code for these groups" were correctly subject to restriction. [*Id.*]. *See Hale v. Fed. Bureau of Prisons*, 759 F. App'x at 744 n.1, 751 (emphasis added). Hale argues that this conclusion was erroneous. However, he argued the same when objecting to Judge Gallgher's dismissal recommendation; thus, he is now rearguing points previously considered by Judge Babcock. *See Does*, 204 F.3d at 1012 (reconsideration "is not appropriate to revisit issues already addressed"). The argument does not demonstrate appropriate grounds, such as an intervening change in the controlling law, new evidence previously unavailable, or a need to correct clear error or prevent manifest injustice, to warrant reconsideration. *Servants of the Paraclete*, 204 F.3d at 1012.

The Court further notes that each of these claims incorporates by reference allegations that refer to "Creativity." [#1 at ¶¶15, 57, 80.] For example, the claims incorporate paragraph two of the Complaint, which alleges that Hale "is an ordained minister in the non-Christian Church of the Creator… .;" and paragraph three of the Complaint, which alleges that "[a]s part of Hale's duties as an ordained minister, he remains knowledgeable about his Creativity religious faith, practices that faith in his daily life, foreswears all other religions, and issues sermons to his congregation of like

believers in the free world." Claims 2 and 13 also incorporate, respectively, paragraphs eight and nine, which allege, in relevant part:

> 8. All of said actions by the Defendants against Hale have been taken because Hale 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. ...
>
> 9. Creativity is indeed Hale's RELIGION under the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1 (hereafter "RFRA"), and that is the case regardless of whether this Court has thus far ruled to the contrary (see Case No. 14-CV-00245, Judge Krieger presiding). That decision is under appeal at the Tenth Circuit (Case No. 18-1141), is erroneous, and will be reversed, by judicial or other means.

[#1, at ¶¶8, 9 (emphasis in original).] Accordingly, the allegations in the Complaint belie any argument that these dismissed claims are unrelated to Creativity. Thus, the Court recommends that the Motion to Alter Judgment be denied.

Hale also argues that Claim 22 should be reinstated. [#23 at pp.12-14.] Claim 22 alleges that Defendant Matevousian defamed Hale by stating in a letter to a United States Senator that Creativity "advocates for violence motivated by racial discrimination," which implies "that Hale does likewise [advocate for violence] since he is an adherent of that religion." [#1 at ¶97.] Hale points out that the Complaint specifically alleges that "Creativity, as a matter of religious doctrine, forbids the usage of violence and/or other criminal or illegal activity in the fulfillment of its beliefs." [#23 (citing #1 at ¶22).] He argues that the Court must take this allegation as true and notes that no court has ruled that Creativity advocates violence. He argues, therefore, that he can prove the falsity of Matevousian's statements. The Court is not persuaded by these arguments for two primary reasons.

First, Hale made these same arguments when objecting to Judge Gallagher's recommendation; Judge Babcock already considered and overruled these objections. [*See* #9 at pp.4-6.] As previously discussed, revisiting arguments already made is not an appropriate use of Rule 59(e). *See Does*, 204 F.3d at 1012.

Second, and more fundamentally, even if this Court accepts Hale's allegations regarding Creativity as true, it is beside the point. The crux of Claim 22 is not that Matevousian defamed Creativity, it is that he defamed Hale by suggesting that Hale advocates for violence motivated by race. Although it may be true that no court has ruled that Creativity advocates violence, with regard to Hale, the Tenth Circuit has noted that Hale "is serving a forty-year sentence for . . . soliciting the murder of a federal judge who entered a judgment against the church's predecessor." The Seventh Circuit affirmed Hale's conviction and specifically held that the evidence was sufficient to support his conviction for soliciting a crime of violence. *United States v. Hale*, 448 F.3d 971, 975 (7th Cir. 2006), *cert denied* 549 U.S. 1158 (2007). Moreover, the Tenth Circuit found that "there is overwhelming evidence that . . . Mr. Hale has sought to advance white-supremacist goals of Creativity in ways that pose a danger both inside and outside of ADX." *Hale v. Fed. Bureau of Prisons*, 759 F. App'x at 744, 750. Thus, neither Judge Gallagher nor Judge Babcock erred in determining that Hale would be unable to demonstrate the falsity of Matevousian's alleged statements. For these reasons, the Court recommends that the Motion to Alter Judgment be denied.

The remainder of the motion relies on the argument that the issues in his previous case were not final for purposes of issue preclusion because the Supreme Court had yet to rule on Hale's appeal. [#23 at pp.5-12.] Hale also contends that dismissal with prejudice

was improvident based on the possibility that the Supreme Court could reverse the Tenth Circuit's decision. [*Id.*] The Supreme Court, however, has since denied Hale's petition for certiorari, and therefore, the Tenth Circuit's decision in *Hale v. Fed. Bureau of Prisons*, 759 F. App'x 741 (10th Cir. 2019), is now unquestionably final and Hale's arguments in this regard are now moot. 140 S.Ct. 196 (2019). Thus, his request to alter the judgment on that basis should be denied.

B. Motion to Dismiss [#48]

1. Standard of Review

In deciding a motion under Fed. R. Civ. P. 12(b)(6), the Court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124-25 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). The Court is not, however, "bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *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." *Ashcroft*, 556 U.S. at 678 (internal quotation marks omitted). A claim is plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard requires more than the sheer possibility that a defendant has acted unlawfully. *Id.* Facts that are "merely consistent" with a defendant's liability are insufficient. *Id.* "[T]o state a claim in federal court, 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*, 492 F.3d 1158, 1163 (10th Cir. 2007).

The Court's ultimate duty is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007). "Nevertheless, the standard remains a liberal one, and 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely.'" *Morgan v. Clements*, No. 12-cv-00936-REB-KMT, 2013 WL 1130624, at *1 (D. Colo. Mar. 18, 2013) (quoting *Dias v. City & County of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009)).

2. *Pro Se* Parties

The Court acknowledges that Hale is not an attorney.[3] Consequently, his pleadings and other papers are construed liberally and held to a less stringent standard than formal

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[3] Though he is not an attorney, Senior Judge Krieger noted the following:

> 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.

Hale, 2018 WL 1535508, at *17 n.2.

pleadings drafted by a lawyer. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). "[I]f the court can reasonably read the pleadings to state a claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper authority, his confusion of legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Id.* But this Court cannot act as a *pro se* litigant's advocate. *Id.* It is the responsibility of the *pro se* plaintiff to provide a simple and concise statement of each claim and the specific conduct that gives rise to them. *See Willis v. MCI Telecomms.*, 3 F. Supp. 2d 673, 675 (E.D.N.C. 1998). The Court may not "supply additional factual allegations to round out a plaintiff's complaint." *Whitney v. State of New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997). Nor may a plaintiff defeat a motion to dismiss by alluding to facts that have not been alleged, or by suggesting violations that were never pleaded. *Associated Gen. Contractors of Cal. Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). *Pro se* plaintiffs must "follow the same rules of procedure that govern other litigants." *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

3. Failure to State a Claim

a. Claim One – Establishment Clause

In his first claim, Hale alleges that as a minister in the "non-Christian Church of the Creator," his duties include preparing and issuing sermons to his congregation. [#1 at ¶¶2-3.] He states that in April 2017, the Defendants began to reject incoming and outgoing mail that referred to "his Church, the name of his religion, or the fact that he is an ordained minister in that Church[,]" and any "and all mail which pertained to his Church, religion, or ministerial status or responsibilities . . . ." [*Id.* at ¶6.] He further alleges that the Defendants

charged him with gang activity for writing his sermons and prohibited him from mailing a chapter of a book he is writing. [*Id.* at ¶7.] He contends that Defendants have taken these actions against him because he is not Christian and in an effort by Defendants to impose Christianity upon him, all in violation of the Establishment Clause.

"It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). The Tenth Circuit has explained that governmental action does not offend the Establishment Clause if:

> (1) it has a secular purpose; (2) its principal or primary effect is one that neither advances nor inhibits religion; and (3) it does not foster an excessive government entanglement with religion. We interpret the first and second prongs of the *Lemon* test in light of Justice O'Connor's endorsement test. That is, we ask whether government's actual purpose is to endorse or disapprove of religion, and whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.

Medina v. Catholic Health Initiatives, 877 F.3d 1213, 1230 (10th Cir. 2017) (quoting *Fields v. City of Tulsa*, 753 F.3d 1000, 1010 (10th Cir. 2014)). "To survive a motion to dismiss [a plaintiff] must allege facts which, accepted as true, suggest a violation of any part of the analysis." *Bauchman for Bauchman v. W. High Sch.*, 132 F.3d 542, 552 (10th Cir. 1997).

i. Secular Purpose

The first prong of the *Lemon* test asks "whether the government conduct was motivated by an intent to endorse religion." *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1118 (10th Cir. 2010) (quoting *Weinbaum v. City of Las Cruces*, 541 F.3d 1017,

1030 (10th Cir. 2008)). "In deciding whether the government's purpose was improper, a court must view the conduct through the eyes of an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act." *Medina*, 877 F.3d at 1230 (citing *Weinbaum*, 541 F.3d at 1030 (quotations omitted)). In the Tenth Circuit, the objective observer "is kin to the fictitious reasonably prudent person of tort law." *Am. Atheists,* 616 F.3d at 1158 (internal quotation marks and citation omitted). The objective observer's knowledge is "not limited to the information gleaned simply from viewing the challenged [conduct]," and the observer "is presumed to know far more than most actual members of a given community." *Id.* at 1158–59 (internal quotation marks and citations omitted). Further, courts "will not lightly attribute unconstitutional motives to the government, particularly where [they] can discern a plausible secular purpose." *Medina*, 877 F.3d at 1230.

Since courts evaluate government action from the perspective of an objective observer who is aware of the "history, purpose, and context of" the acts in question, a more complete consideration of Hale's prior lawsuit is in order. *Medina*, 877 F.3d at 1230. In 2014, Hale brought a similar action against the Federal Bureau of Prisons (and others) in which he lost on summary judgment. *Hale v. Federal Bureau of Prisons*, Civil Action No. 14-cv-00245-MSK-MJW, 2018 WL 1535508 (D. Colo. March 28, 2018), *aff'd*, 759 F. App'x 741 (10th Cir. 2019), *cert. denied* 104 S.Ct. 196 (2019) ("*Hale I*").

Hale I involved similar challenges by Hale to the restrictions placed on his outgoing and incoming communications that involved Creativity. *See generally id. Hale I*. The BOP imposed the restrictions from July 2010 to January 2011, from January to August 2013,

and from an ongoing period beginning in 2014. From May 2016 to April 2017, Hale was incarcerated at the United States Penitentiary in Terra Haute, Indiana. The restrictions were reinstated when Hale returned to ADX after sending out a press release that was determined to be designed to incite his followers and other white supremacist groups. *Hale I*, 759 F. App'x at 744 n.1. Although Hale attempts to cast the restrictions in the present case as new [#1 at ¶6], they are the same restrictions involved in *Hale I*. Both the District Court and Tenth Circuit in *Hale I* considered past and present mail restrictions (including those reinstated upon Hale's April 2017 return to ADX) in the aggregate as an ongoing restriction on Hale's ability to send and receive communications about Creativity. *Hale I*, 759 Fed. App'x at 754 n.5.

The District Court in *Hale I* found that the BOP appropriately declared Creativity a security threat group ("STG"), which afforded the BOP wide latitude in deciding how best to effectuate its compelling interests of promoting safety both inside and outside the prison. *Hale I*, 2018 WL 1535508, at *14. Several additional findings by the District Court are pertinent to this Recommendation. The District Court determined that the restrictions on Hale's correspondence were "justified by a compelling governmental interest and were narrowly tailored to meet that interest" of promoting safety in and out of the prison. *Id.* at *11. It further found that 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." *Id.* In observing that the BOP prohibits inmates from "holding leadership roles in an STG and from conducting STG business or providing guidance to the STG," the court found:

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

Id. at *12 (emphases added).

The Tenth Circuit affirmed the District Court and held that Creativity is not a religion. *See generally Hale I*, 759 Fed. App'x 741. Regarding mail restrictions, the Tenth Circuit concluded,

> the mail restrictions on Mr. Hale are rationally connected to the BOP's security interests. There is overwhelming evidence in the record 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.

Id. at 750.

Consequently, as it is relevant to this inquiry, the government's secular purpose for restricting Hale's Creativity-based communications and classifying his writings as gang activity was already established in *Hale I—to wit*, mitigating internal and external safety risks. *See Hale*, 759 F. App'x at 749-51. In his Complaint, Hale does not allege that Defendants lacked a secular purpose for restricting his mail. Rather, his allegations focus on establishing Defendants' actual purpose for the mail restrictions. He alleges the purpose of the limitations is to endorse Christianity and punish him "because he in fact

opposes the Christian religion" and "expresses anti-Christian sentiment." [#1 at ¶¶7, 8, 11, 14.] But these allegations are merely conclusory and devoid of further factual enhancement to support his contention that Defendants were motivated by an intent to endorse or disapprove of some religion, particularly in light of the findings in *Hale I*.

Hale also alleges that in May 2018, Defendant Marques was sent to Hale's cell by the other Defendants to inform him that they would not mail a chapter of Hale's book "that is critical of the Christian religion and its values." [#1 at ¶12.] Hale alleges that during the visit, Marques was "wearing a huge Christian cross on his chest" in contravention of ADX policy. [*Id.*] Based on this, Hale argues that the Defendants "wanted to convey to Hale, without admitting it in words which could be legally damaging, that their actions in his (sic) regard are rooted in Christian bigotry and animus and that desire to impose that religion and its values upon him." [*Id.*] The Complaint further alleges that in April 2017, August 2017, May 2018, and September 2018, the named Defendants had conversations "to the effect that Hale should and must be mistreated because he refuses to acknowledge the alleged truths of the Christian religion;" and, "Prose has in fact urged, instructed, and ordered all of the other Defendants in this Claim One to harass Hale's mail, to punish him for 'gang activity,' and to stop his book chapter from going out, all on the basis that her personal Christian beliefs were likewise offended by the content of Hale's speech." [*Id.* at ¶¶13, 14.]

Against the "history, purpose, and context" of the restrictions on Hale's communications, and given their obvious secular purpose, even these allegations are insufficient to support Hale's Establishment Clause claim. First, the Complaint acknowledges that during his visit, Marques made no statements to Hale concerning

Creativity or Christianity, thus demonstrating the conclusory nature of the allegation that Marques' actions were "rooted in Christian bigotry and animus." [*Id.* at ¶12.] Additionally, there is a "critical difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (italics and internal quotation marks omitted). The United States Supreme Court "has long recognized that the government may accommodate religious practices without violating the Establishment Clause." *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005) (ellipses omitted). *Cf. Draper v. Logan Cty. Pub. Library*, 403 F. Supp. 2d 608, 620-621 (W.D. Ky. 2005) (permitting a library employee to wear a cross pendant at work did not violate the Establishment Clause so as to justify a dress code prohibiting religious ornaments); *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp. 2d 536, 554 (W.D. Pa. 2003) (allowing the plaintiff to wear a small cross necklace at work did not violate the Establishment Clause). Without any further factual support, the Court is not persuaded that an objective observer would conclude that wearing a cross on a single occasion conveyed a message that the government favored or preferred a specific religion or belief.

With respect to Defendants' alleged conversations and statements that Hale "must be mistreated because he refuses to acknowledge the alleged truths of the Christian religion," the Court concludes that these allegations are too bare in the absence of other factual allegations. For example, the Complaint does not allege the faith or religion of the various Defendants to suggest a basis for the "Christian bigotry" alleged throughout the Complaint; instead, the allegations in the Complaint assume, without additional factual

support, that all Defendants are Christian and all of them are motivated by unspecified faith-based bigotry. Similarly, the Complaint does not allege that any Defendant made comments to Hale about Christianity, that Hale was present at the alleged meetings where Defendants discussed mistreating him for not acknowledging Christianity, or that someone else with knowledge of those alleged meetings told Hale the gist of what was said during those meetings; the Complaint, in conclusory fashion, simply alleges these meetings occurred. Although these allegations may be consistent with a constitutional violation, they lack the necessary detail to nudge the claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

Furthermore, even if this Court were to credit these allegations, it would nevertheless conclude that they are insufficient to state a claim. The restrictions on Hale's mail have been in place (in some form) since 2010 and the courts in *Hale I* considered them all in the aggregate. The conduct alleged in Hale's present claim took place, at a minimum, three years after restrictions on his communications were reimplemented. Considering the "history, purpose, and context of" the events in question—*i.e.*, *Hale I*—, *Medina*, 877 F.3d at 1230, it is implausible that an objective observer would, based on these allegations, conclude that the Creativity-restrictions on Hale's communications were reimplemented with the purpose of endorsing a religion. *Iqbal*, 556 U.S. at 678. Accordingly, the Court recommends finding that Hale fails to state an Establishment Clause claim under the secular purpose component of the endorsement test.

ii. Primary Effect

The Court next considers whether the government action has the principal or primary effect of advancing religion. *Lemon*, 403 U.S. at 612.[4] In the Tenth Circuit, courts "ask more specifically whether the challenged conduct has 'the effect of conveying a message that religion or a particular religious belief is favored or preferred.'" *Medina*, 877 F.3d at 1231 (quoting *Weinbaum*, 541 F.3d at 1030). Here, Hale contends that he has been "persecuted" by Defendants "on the basis that the contents of his mail, and his feelings in general, are un-Christian and anti-Christian." [#1 at ¶8, ¶10 (emphasis in original).] However, the inquiry here is an objective one, "not an inquiry into whether particular individuals might be offended" by the conduct. *Bauchman*, 132 F.3d at 555.

The Court concludes that an objective observer aware of the "history, purpose, and context" of the BOP's Creativity restrictions, including the Tenth Circuit's conclusions in *Hale I*, would perceive that Defendants' restrictions are designed to advance security inside and outside the prison and mitigate internal and external safety risks. *Hale*, 759 Fed. App'x at 750-51. As Defendants correctly point out, Hale has not alleged that if he were a Christian he would be permitted to receive or disseminate STG-related materials without BOP interference. Nor has he identified any "Christian, Jewish, or Muslim comparator who is permitted to send or receive communications about STGs." *Id.* at 753. Thus, the natural consequences of the Defendants' Creativity-based restrictions, viewed in context and in their entirety by an objective observer, would not be the advancement or endorsement of religion.

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[4] The *Lemon* test also asks whether the action inhibits religion. The Tenth Circuit has determined that Creativity is not a *bona fide* religion. Thus, the Court only looks to whether Defendants' alleged actions advanced a religion.

To the extent Hale relies on Marques' cross or the Defendants' alleged conversations about mistreating him to establish that the primary effect of the restrictions is to advance religion, the Court is not persuaded. As discussed above, these allegations lack the requisite specificity to establish a plausible connection between those alleged acts and the reimplementation of the BOP's Creativity-based communication restrictions. Therefore, the Court further recommends finding that Hale has failed to state a claim as to this element.

iii. Excessive Entanglement

"The entanglement analysis typically is applied to circumstances in which the state is involving itself with a recognized religious activity or institution." *Bauchman*, 132 F.3d at 556 (citing *Florey v. Sioux Falls Sch. Dist. 49–5*, 619 F.2d 1311, 1318 (8th Cir. 1980)). It is conduct that infringes on religious organizations' "independence from secular control or manipulation—[their] power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Medina,* 877 F.3d at 1234 (citation omitted). "'[T]o assess entanglement, [courts] have looked to the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" *Rocky Mountain Christian Church v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, 612 F. Supp. 2d 1163, 1181 (D. Colo. 2009) (quoting *Agostini v. Felton*, 521 U.S. 203, 232–233 (1997)).

For the reasons stated above, the Court has rejected the notion that Defendants' restrictions on Hale's Creativity-based communications support finding that their conduct endorses religion. Instead, the Court is persuaded that an objective observer would

conclude that the restrictions were religiously neutral and related to the prison's internal and external security concerns. Moreover, Hale has failed to allege any interference in the internal organization of a religious institution; this is in part because the Tenth Circuit has concluded that Creativity is not a religion, and further because the Complaint alleges insufficient facts to plausibly infer that Defendants' actions involved advancing Christianity. Accordingly, the Court recommends finding there are insufficient facts from which to plausibly infer Defendants' involvement, let alone excessive entanglement, with recognized religious activity.[5]

Based on the foregoing, the Court finds that Hale has failed to plausibly allege a violation of the Establishment Clause and recommends that this claim be dismissed.

b. Claims Ten and Eleven – Freedom of Speech and Retaliation

Claim 10 alleges a violation of the First Amendment Free Speech Clause. Hale alleges that he tried to mail a copy of his article entitled "Why do I want to be free?" to his mother. [#1 at ¶44.] However, Defendants Marques and Kelley allegedly refused to mail the article. [*Id.* at ¶45.] Hale argues this refusal violates his First Amendment right to freedom of speech. [*Id.*] The Court recommends finding that this claim is barred by issue preclusion based on *Hale I*.

The Tenth Circuit decided that Hale's Creativity-based speech and related "philosophy" are properly subject to the BOP's restrictions. The Tenth Circuit explained that "[t]he overriding mission of the Church and the Creativity religion is the permanent

[5] Even assuming *arguendo* that Marques' Christian cross could be considered entanglement, the allegation would still be insufficient. "Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). Hale has alleged only one instance where Marques wore the cross.

prevention of the cultural, genetic, and biological genocide of the White Race worldwide and thus the achievement of White racial immortality." *Hale I*, 759 F. App'x at 743. "One of the central tenets of Creativity is that 'Good is personified by the White Race . . . while evil is personified by its antithesis . . . ." *Id.* It further found that "Hale has sought to advance the white-supremacist goals of Creativity in ways that pose a danger both inside and outside of ADX," and that "[b]y limiting Hale's ability to send and receive mail communicating Creativity's message, the BOP mitigates internal and external safety risks." *Id.* at 750-51.

Claim 10 specifically incorporates by reference those allegations that refer to Hale's role and duties as an ordained minister in the "non-Christian Church of the Creator," and additional allegations which refer to the BOP's Creativity-based restrictions. [#1 at ¶¶43, 2, and 3.] The incorporation of these paragraphs alone undercuts the contention that Hale's article was unrelated to Creativity or its "philosophy." [#1 at ¶43.]

Moreover, the Complaint alleges that in *Hale I*, Hale filed the complete text of the article he tried mailing to his mother, as an exhibit in that case, and the Complaint provides a citation to that exhibit. [*Id.* at ¶48.] The Court has reviewed that document and taken judicial notice of its content.[6] Generally, the article discusses Hale's past contributions to

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[6] The Court may take judicial notice of this document without converting the motion to dismiss to one for summary judgment. *See Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 (10th Cir. 2013) (agreeing that in ruling on a 12(b)(6) motion, courts may consider "documents incorporated by reference in the complaint; documents referred to in and central to the complaint, when no party disputes its authenticity; and matters of which a court may take judicial notice" (citations and internal quotations omitted)); *see also Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006) (internal citations and quotation marks omitted ("[F]acts subject to judicial notice may be considered in a Rule 12(b)(6) motion without converting the motion to dismiss into a motion for summary judgment. This allows the court to take judicial notice of its own files and records, as well as facts which are a matter of public record.").

the white supremacy movement and his desire to continue to lead the movement. It references the titles of two books he has written, which he describes as "two of the greatest books for the future of our White people… ." He refers to both the "Racial Loyalist cause" and the "Racial Loyalist movement," and describes the formation of a "mass movement" for his release from prison. He is repeatedly derogatory regarding other races and further writes that those who care about the white race should "fight" for his release so he can lead the movement outside of prison.

Notably, in this case, Judge Babcock previously dismissed Claim 13. Claim 13 was premised on a refusal to mail an article to Hale's mother that Hale wrote about "those who care about the future of their White Race;" Judge Babcock also dismissed Claim 19 which was premised on the withholding of mail that mentioned the titles of books authored by Hale. [#11.] Judge Babcock dismissed these claims finding that the speech at issue "is based on Creativity and Plaintiff's related 'philosophy,'" which were precluded by the Tenth Circuit decision in *Hale I* because the Tenth Circuit "decided this speech correctly is subject to the BOP's restrictions." [*Id.* at p.4.]. Similarly, the District Court in *Hale I,* found that restrictions on one of Hale's mailings which sought "mass activism tactics" around white supremacy and which sought to leverage a leadership role by Hale in the movement was properly restricted by the BOP. *Hale I*, 2018 WL 1535508, at *12.

The article which is the subject of Claim 10 bears no material difference with the prior articles and communications already considered by Judge Babcock and the Tenth Circuit to be properly restricted by the BOP. The Tenth Circuit has already decided that

this speech is subject to the BOP's restrictions, and therefore, the Court recommends finding that Claim 10 is barred by issue preclusion.[7]

Relatedly, in Claim 11, Hale alleges that the BOP Defendants retaliated against him by imposing a six-month ban on his phone calls with his mother. The BOP did so after Hale spoke to his mother and asked her to get a newspaper to publish the "court exhibit" he filed in *Hale I*. [#1 at ¶¶51-53.] The "court exhibit" referred to in the Complaint is the article, described above.[8]

To state a claim of retaliation, a plaintiff must first allege facts establishing that he was engaged in constitutionally protected activity. *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007). In his Response, Hale argues that his article was "wholly lawful" and that "a reasonable official would have fair notice that punishing Hale for trying to get a newspaper to publish it was unlawful as well and that it specifically violated Hale's right to be free from First Amendment retaliation." [#57 at pp.37-38 (emphasis in original).] However, the Court has already concluded that Hale's First Amendment claim based on the dissemination of the article is barred by issue preclusion; thus, there can be no retaliation claim here.

Even if Hale contends his constitutionally-protected activity is the conversation he had with his mother about the article, the Court nevertheless concludes that he has failed

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[7] As stated by Judge Gallagher, the 2014 Case has been finally adjudicated. Hale was the plaintiff in that action and these issues were fully and fairly litigated over nearly five years. Thus, issue preclusion applies. *Park Lake Res. Ltd. Liab. v. U.S. Dep't of Agr.*, 378 F.3d 1132, 1136 (10th Cir. 2004) (discussing the elements of issue preclusion).

[8] Hale apparently attached the article to a Court filing as an exhibit and placed it in an envelope labeled "special mail," which is not subject to BOP inspection. Once it was docketed with the court, he asked his mother to disseminate the article. [*See* #1 at ¶¶48-49.]

to state a claim for retaliation. In *Hale I*, the Tenth Circuit observed that "[r]estrictions on STG communications are imposed for security reasons inside and outside the prison." *Hale I*, 759 F. App'x at 749. The Circuit Court further noted that the need for a complete bar on Hale's Creativity communications was comprehensively explained by the BOP:

> [Mr. Hale's] danger lies primarily in his communications. His criminal conviction was based on his communications, not his personal involvement in violent conduct. Other people have been inspired to engage in violence (Ben Smith) and have threatened violence against others (William White) because of [Mr. Hale] and the force of his personality and his communications to advance the interests of the Creativity Movement. [Mr. Hale's] communications demonstrate that he wants to keep his memory alive among his followers, who continue to seek to communicate with him about the Creativity Movement. . . .
>
> If [Mr. Hale] receives communications about the Creativity Movement and gains knowledge about the group's activities outside the prison, he may make decisions based on that information or attempt to disseminate those communications to others, both within the prison and by means of telephone calls.

Id. at 749-50 (emphasis added).

Although the speech alleged here occurred by phone rather than mail, it is a distinction without a difference in the context of the BOP's communication restrictions involving Creativity and Hale. The Tenth Circuit concluded that restrictions on Creativity-based communications are reasonably related to legitimate penological interests. In this case, Hale allegedly attempted to communicate with his mother regarding Creativity based on the content of the article he asked her to disseminate to the press; thus, any First Amendment claim based on this conduct is precluded by the Tenth Circuit decision. Without an allegation of constitutionally protected activity, Hale cannot state a claim for retaliation on this basis. *Shero*, 510 F.3d at 1203. The Court recommends that Hale's retaliation claim be dismissed.

c. Claims Fifteen and Twenty-One – First Amendment Re: Withholding and Delaying Mail

In Claim 15, Hale alleges that—in violation of the First Amendment—"various" pieces of his incoming and outgoing mail have never reached their intended recipients. [#1 at ¶64.] Claim 21 alleges similarly that Defendant Marques has delayed mailing Hale's correspondence for lengthy periods of time without just cause. [*Id.* at ¶92.]

Inmates have a First Amendment right to receive information while in prison to the extent that right is not inconsistent with prisoner status or legitimate penological objectives of the prison. *Jacklovich v. Simmons*, 392 F.3d 420, 426 (10th Cir. 2004) (citing *Pell v. Procunier*, 417 U.S. 817 (1974)). The Supreme Court has held that a prison regulation that impinges on an inmate's First Amendment rights is valid only if it is "reasonably related to legitimate penological interests." *Searles v. Dechant*, 393 F.3d 1126, 1131 (10th Cir. 2004) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). This reasonableness standard requires the court to "balance the guarantees of the Constitution with the legitimate concerns of prison administrators." *Beerheide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002).

In *Hale I*, the Tenth Circuit noted that, under the mail restrictions, "Hale may correspond with anyone outside the prison, even other Creativity adherents, but he may not communicate about Creativity. Further, no ADX inmate may send or receive communications about STGs, including Creativity." *Hale I*, 759 F. App'x at 746 (emphasis in original; footnote omitted). The Complaint does not describe the content of the mailings at issue. However, it incorporates by reference those allegations discussing the BOP's censorship of mail related to Creativity or its philosophy. [#1 at ¶¶63, 91 (incorporating ¶6).] The Tenth Circuit has already concluded that the BOP has a legitimate penological

interest in preventing Hale from sending or receiving correspondence that contains these references, or permutations of them. *Id.*, 759 F. App'x at 749-51, n.1. Thus, to the extent the Complaint seeks relief based on mail related to Creativity or its philosophy, those claims should be dismissed based on issue preclusion for the same reasons Hale's previous First Amendment claims were dismissed.

If, however, Hale challenges the censorship or delay of mail unrelated to Creativity, the allegations are too vague and conclusory to establish that the BOP lacked a legitimate penological interest in intercepting, delaying, or rejecting that mail. *Gee v. Pacheco*, 627 F.3d 1178, 1188 (10th Cir. 2010) (plaintiff "must include sufficient facts to indicate the plausibility that the actions of which he complains were not reasonably related to legitimate penological interests") (emphasis in original). This is particularly true where the Complaint itself (and Claim 21) raises allegations pertaining to Hale's status as an "ordained minister in the non-Christian Church of the Creator," and the Defendants' alleged "systematic[ ] reject[ion] [of] any and all pieces of his incoming and outgoing mail that happened to mention the name of his Church, the name of his religion, or the fact that he is an ordained minister in that Church." [#1 at ¶6, incorporated into ¶91 of Claim 21.] Indeed, Claim 21 goes on to allege that "[a]ny and all mail which pertained to his Church, religion, or ministerial status or responsibilities was likewise rejected and continues to be rejected to this day. Hundreds of pieces of Hale's mail - personally handled by Marques - have thus far been rejected on this basis." [*Id.* (emphasis added.)] As a result, because this claim only makes vague and conclusory allegations concerning the content of any rejected or delayed mail, it fails to meet the *Twombly* standard and should likewise be dismissed on that basis. *Twombly*, 550 U.S. at 570.

The Court, therefore, recommends that Claims 15 and 21 be dismissed.

d. Claim Twenty – First Amendment Retaliation (Selling of Personal Items)

According to the Complaint, Hale wrote to his mother and asked her to auction off some of his possessions to cover legal costs from his prior case. [#1 at ¶88.] Defendant Marques issued Hale an incident report for "conducting a business." [*Id.* at ¶89.] Hale was found guilty of the offense "at a supposed 'hearing'" and the infraction was added to his prison disciplinary record. The Complaint alleges the BOP had no legitimate penological interest in preventing him from selling his property "in the free world" to cover his legal costs, and that ultimately this was an act of retaliation in violation of his First Amendment right to effectuate the lawful disposition of his property.[9] [*Id.* at ¶90.]

The Court recommends dismissal of this claim as well. Hale cannot assert a constitutional retaliation claim unless he was engaged in constitutionally protected activity. As the Court understands his claim, Hale contends that the disciplinary action was imposed to deter his "constitutionally protected speech...to effectuate the lawful disposition of his own lawfully acquired property."[10] [#1 at ¶90.]

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[9] In their Motion, Defendants correctly observe that there can be no claim for retaliation where a prisoner is convicted of the actual violation and there is evidence to sustain the conviction. [#76 at p.16.] *See Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018) (quoting *O'Bryant v. Finch*, 637 F.3d 1207, 1215 (11th Cir. 2011)). Defendants note that the Complaint does not allege the absence of a factual or evidentiary record to support the finding of an infraction. [*Id.*] While this may technically be true, the Complaint does allege that Hale was not allowed to present witnesses or evidence on his behalf. [#1 at ¶89.] Regardless, the claim is subject to dismissal for the reasons stated above.

[10] Defendants argue that Hale has no First Amendment right to conduct a business. While that proposition is not in and of itself controversial, the Court questions whether asking his mother to sell his belongings constitutes conducting a business. *Compare French v. Butterworth*, 614 F.2d 23 (1st Cir. 1980) (plaintiff wished to sell health food to other prisoners at a profit to himself), *Johnson v. Wilkinson*, 42 F.3d 1388 (6th Cir. 1994) (Table) (prisoner wrote a book which he intended to advertise and sell for profit), *Smith v.*

"[A]n order to sell, like a threat intended to intimidate. . . is not the kind of verbal act that the First Amendment protects." *King v. Federal Bureau of Prisons*, 415 F.3d 634, 637 (7th Cir. 2005) (Posner, J.) (internal citations omitted); *see also* See *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 455–56 (1978); *Nat'l Org. for Women v. Operation Rescue,* 37 F.3d 646, 655–56 (D.C. Cir. 1994); *United States v. Rowlee,* 899 F.2d 1275, 1278 (2d Cir. 1990); *cf. Int'l Bhd. of Elect. Workers, Local 501 v. NLRB,* 181 F.2d 34, 40 (2d Cir. 1950) (L. Hand, J.). "It has no connection to the marketplace of ideas and opinions, whether political, scientific, aesthetic, or even commercial." *King*, 415 F.3d at 637; *see also Capp v. Nordstrom*, No. 2:13-cv-00660-MCE-AC, 2013 WL 5739102, *10 (E.D. Cal. Oct. 22, 2013) ("Defendant's First Amendment argument is without merit, because the First Amendment protects expressive speech, not conduct, and requesting a customer's email address is not the kind of verbal act that the First Amendment protects. It has no connection to the marketplace of ideas and opinions".).

Thus, the Court concludes that in asking his mother to auction his property, Hale has not alleged speech protected by the First Amendment, and therefore, his retaliation claim should be dismissed. *See King*, 415 F.3d at 637 ("He argues that not letting him talk to his broker on the phone infringes freedom of speech, but that is absurd . . . .").

Umbdenstock, 962 F.2d 11 (7th Cir. 1992) (Table) (prisoner placed an ad offering his services as a jailhouse lawyer for profit) *with King*, 415 F.3d at 636-37 ("ordering one's broker to sell stock . . . is no more the conduct of a business than asking a real estate broker to sell one's house is. Securities are owned by millions of people who are not engaged in the securities business."). But the Court need not resolve this issue.

e. Claim Twelve – Fifth Amendment Due Process

Claim 12 challenges Defendants' failure to provide Hale a hearing before restricting calls with his mother as a violation of due process. [#1 at ¶¶54-56.] Hale alleges a "liberty interest in being able to talk to his family." [*Id.* at #56.]

A "person alleging that he has been deprived of his right to procedural due process must prove two elements: that he possessed a constitutionally protected liberty or property interest such that the due process protections were applicable, and that he was not afforded an appropriate level of process." *Hale*, 759 F. App'x at 751-52 (*citing Zwygart v. Bd. of Cty. Comm'rs*, 483 F.3d 1086, 1093 (10th Cir. 2007) (internal quotation marks omitted)). "T]he[ ] due process rights of prisoners ... are not absolute; they are subject to reasonable limitation or retraction in light of the legitimate security concerns of the institution." *Bell v. Wolfish*, 441 U.S. 520, 554 (1979). "A deprivation occasioned by prison conditions or a prison regulation does not reach protected liberty interest status and require procedural due process protection unless it imposes an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Reinhardt v. Kopcow*, 66 F. Supp. 3d 1348, 1355 (D. Colo. 2014) (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). The Complaint contains no such allegations.

Hale alleges that he was not afforded a hearing before the Defendants banned him from making calls to his mother. [#1 at ¶55.] He was ultimately prevented from speaking with his mother for six months. [*Id.* at ¶52.] The Court agrees with Defendants that Hale has failed to allege a liberty interest such that he was entitled to any due process. The Tenth Circuit has consistently found that a prisoner "does not derive a liberty interest in visitation and telephone privileges from the Constitution." *Coleman v. Long*, 772 F. App'x

647, 649 (10th Cir. 2019); *see also Villarreal v. Harrison*, 201 F.3d 499, at *2 n.1 (10th Cir. Nov. 23, 1999) (observing that a two-year restriction on the plaintiff's phone calls did "not establish that the conditions of [plaintiff's] administrative detention were so different as compared with normal incidents of prison life as to give rise to a protected liberty interest"); *Martinez v. Mesa Cnty. Sheriff*, 69 F.3d 548, 1995 WL 640302, at *1 (10th Cir. Nov. 1, 1995) (Table) (an inmate "has no constitutional right to make a personal telephone call). The Court, therefore, recommends that this claim be dismissed.

4. Qualified Immunity

The individual defendants have raised the qualified immunity defense as to the various claims asserted against them. Qualified immunity shields "government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotation omitted). Qualified immunity is "immunity from suit rather than a mere defense to liability [and] it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Whether defendants are entitled to qualified immunity is a legal question. *Wilder v. Turner*, 490 F.3d 810, 813 (10th Cir. 2007).

When the qualified immunity defense is raised, the plaintiff bears the burden of showing, with particularity, facts and law establishing the inference that the defendant violated a clearly established federal constitutional or statutory right. *Walter v. Morton*, 33 F.3d 1240, 1242 (10th Cir. 1994) (emphasis added). If the plaintiff fails to satisfy either prong, the defendant is entitled to qualified immunity. *Pearson*, 555 U.S. at 236. "This is a heavy burden. If the plaintiff fails to satisfy either part of the inquiry, the court must grant

qualified immunity." *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1208 (10th Cir. 2017). The court has the discretion to consider these prongs in any order it chooses. *Leverington v. City of Colorado Springs*, 643 F.3d 719, 732 (10th Cir. 2011).

Under the first prong, "[i]f no constitutional right would have been violated were the allegations established," the inquiry is at an end. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Here, the Court has concluded that, even accepting all the allegations as true, Hale has failed to state any claims for relief because the Complaint fails to plausibly allege violations of any constitutional rights. Thus, the Court recommends finding that the individual Defendants are entitled to qualified immunity, and the Court need not address the second prong of the inquiry.[11]

C. Motions to Intervene [#17, #26, #28, #31, #37, #39, #53, #78]

If the presiding judge adopts the foregoing recommendation to grant Defendants' Motion and dismiss the claims, the Motions to Intervene will be rendered moot, and this Court recommends denial of the Motions to Intervene on that basis. Nevertheless, in the event the presiding judge rejects some or all of the recommendation, the Court addresses the merits of these requests and recommends that intervention be denied.

In their motions, the movants variously cite Federal Rules of Civil Procedure 19, 20, and 24 in support of their requests to join the litigation.[12] Because the movants are not parties to the case, only Rule 24 may serve as the basis for the relief they seek. *Viesti Assoc., Inc. v. McGraw-Hill Global Educ. Holding, LLC*, No. 12-cv-00668-WYD-DW, 2014

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[11] Defendants also argue that this Court should not create *Bivens* remedies for Hale's claims. In light of its conclusions pursuant to Rule 12(b)(6), the Court also does not reach that argument.

[12] The Court separately addresses Adrian Krieg's motion to submit an amicus brief.

WL 3766185, *3 (D. Colo. July 30, 2014) (noting that Rule 24 governs intervention by nonparties in a pending litigation); *Foods of Bruton, Inc. v. City of Orlando*, 192 F.R.D. 310, 312 (M.D. Fla. 2000) ("A nonparty cannot on its own motion join as a party under Rule 19 or 20.").

1. Intervention as Matter of Right

Rule 24(a)(2)[13] provides for intervention as a matter of right to anyone who:

> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). The movant bears the burden of establishing his right to intervene. *See United States v. Tex. E. Transmission Corp.*, 923 F.2d 410, 414 (5th Cir. 1991). Thus, to intervene as a matter of right under Rule 24(a)(2), the movant must show that: (1) the motion is timely; (2) the movant asserts an interest relating to the property or transaction which is the subject of the action; (3) the movant's interest relating to the property may be impaired or impeded; and (4) existing parties do not adequately represent the movant's interest. *United States v. Albert Inv. Co., Inc.*, 585 F.3d 1386, 1391 (10th Cir. 2009) (citing *Utah Ass'n of Counties v. Clinton,* 255 F.3d 1246, 1249 (10th Cir. 2001)) (internal quotations omitted); *see also WildEarth Guardians v. United States Forest Serv.*, 573 F.3d 992, 995 (10th Cir. 2009).

The Tenth Circuit requires that the claimed interest in the transaction that is the subject of the action be "'direct, substantial, and legally protectable.'" *Forest Guardians v. U.S. Dep't of Interior,* No. CIV 02–1003, 2004 WL 3426413, at *5 (D.N.M. Jan. 12, 2004)

[13] No party has asserted that Rule 24(a)(1) is applicable to these intervention requests.

(Browning, J.) (quoting *Utah Ass'n of Cntys.*, 255 F.3d at 1250). The inquiry is "highly fact-specific;" "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Utah Ass'n of Cntys.*, 255 F.3d at 1251–52.

"To satisfy [the impairment] element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *WildEarth Guardians,* 573 F.3d at 995 ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene."). "Although the intervenor cannot rely on an interest that is wholly remote and speculative, the intervention may be based on an interest that is contingent upon the outcome of the litigation." *San Juan Cnty. v. United States*, 503 F.3d 1163, 1203 (10th Cir. 2007). A third party's interest may be impaired "when the resolution of the legal questions in the case effectively foreclose[s] the rights of the intervenor in later proceedings, whether through res judicata, collateral estoppel, or stare decisis." *Ute Distrib. Corp. v. Norton,* 43 F. App'x 272, 279 (10th Cir. 2002).

An applicant for intervention also bears the burden of showing inadequate representation. *Forest Guardians,* 2004 WL 3426413, at *6. "[A] presumption of adequate representation arises when an applicant for intervention and an existing party have the same ultimate objective in the litigation." *Utah Ass'n of Cntys.*, 255 F.3d at 1255.

At the outset, the Court notes that the motions submitted by Mark Quitta [#31], Ranier C. De Intinis [#37], John Crookston [#39], and Branden Hall [#53] are identical and consist of a single paragraph asserting simply that they are correspondents of Hale's and that they wish to vindicate their First Amendment right to engage in continued

correspondence. [#31, #37, #39, #53.] These movants, however, have not provided any facts regarding their attempts to correspond with Hale, the nature of those communications, or any information regarding specific instances where they have been prevented from doing so. [*Id.*] They have not addressed any of the factors necessary to establish intervention, nor have they included a pleading setting out their claims as required by Rule 24(c).[14] It is a movant's burden to establish the right to intervene. Because these motions are facially insufficient to establish that burden, the Court recommends that they be denied.

The Court also recommends that the motions filed by Gregory Morris [#17], Stephanie Slater [#26], and Evelyn Hutcheson [#28] be denied. These movants seek to intervene on Claim 1 and Claim 10. They each state that they are adherents of the Creativity religion and, due to the restrictions placed on Hale's correspondence, are being prevented from exercising their chosen religion. In addition, these movants seem to contend that their right of association was violated when the BOP prevented Hale from circulating his article. For several reasons, however, the Court concludes that these movants have not established grounds for intervention.

First, like the previous four motions, these motions lack specific facts regarding the purported violations. Second, the Court concludes that the claims asserted by the movants do not share a common question of law with Hale's claims. In Claim 1, Hale asserts violations of the Establishment Clause, whereas the core of the movants' claims

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[14] None of the movants have complied with Rule 24(c), which is reason alone to deny their requests. *Shell v. Henderson*, No. 09-cv-00309-MSK-KMT, 2010 WL 2802651, *1 (D. Colo. July 15, 2010) (citing *Miami County Nat'l Bank v. Bancroft*, 121 F.2d 921, 926 (10th Cir.1941); *Hobson v. Hansen*, 44 F.R.D. 18, 25 n. 6 (D.D.C.1968)).

is the free exercise of religion.[15] In Claim 10, Hale asserts that his freedom of speech has been impinged, whereas the movants seek to vindicate their freedom of association. Rule 24(a) "is not intended to allow for the creation of whole new suits by intervenors." *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) ("Intervenors must take the pleadings in a case as they find them."). Hale's Complaint defines the general scope of this action and the movants cannot now, by intervention, alter that scope to create a different suit based on different claims. *See Ute Distrib. Corp.*, 43 F. App'x at 279 ("Litigation impairs a third party's interests when the resolution of the legal questions in the case effectively foreclose the rights of the proposed intervenor in later proceedings") (emphasis added).

Furthermore, even assuming *arguendo* that the movants had articulated direct, substantial, and legally protectable interests, the Court, nevertheless, concludes that these interests are adequately represented by Hale. Indeed, Hale and the movants have the same ultimate objective with respect to their interests: the removal of any restrictions on Hale's correspondence whatsoever. Consequently, these motions for intervention should also be denied.

2. Permissive Intervention

The Court also recommends that the movants be denied permissive intervention pursuant to Rule 24(b)(1)(B). Rule 24(b) provides that, upon a timely motion, the Court may permit anyone to intervene who has a claim or defense that shares a common

[15] Given the Tenth Circuit's conclusions regarding Creativity's lack of viability as a religion, it is not clear that any of these movants have articulated any right to relief with respect to their free exercise claims. Furthermore, the BOP exerts no control over any of these movants; thus, it is unclear how the Defendants' actions could prevent the movants from continuing to "practice" Creativity.

question of law or fact with the main action. Fed. R. Civ. P. 24(b)(1)(B). When this threshold requirement is met, the decision to allow or deny permissive intervention lies within the discretion of the district court. *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990). In exercising this discretion, the Court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights. Fed. R. Civ. P. 24(b)(3); *see also Wilderness Soc'y, Ctr. for Native Ecosystems v. Wisely*, 524 F. Supp. 2d 1285, 1294 (D. Colo. 2007). In addition, the Court may consider such factors as: "(1) whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights; (2) whether the would-be intervenor's input adds value to the existing litigation; (3) whether the petitioner's interests are adequately represented by the existing parties; and (4) the availability of an adequate remedy in another action." *United States v. N. Colo. Water Conservancy Dist.*, 251 F.R.D. 590, 598 (D. Colo. 2008).

As previously discussed, the Court concludes that the movants have not set forth a sufficient statement of facts, and further, that they assert constitutional violations different from those asserted by Hale. Thus, their claims do not share a common question with this lawsuit, their participation would alter the scope of this action, and their claims could be brought in separate proceedings. In addition, the movants have not indicated any input that would add value to this case. Moreover, the Court has already determined that Hale will adequately represent the movants' ultimate interests. Because the factors weigh against it, the Court recommends that permissive intervention also be denied.

3. Request to be a Movant [#78]

Finally, the Court recommends that Adrian Krieg's "Request to be a Movant" be denied. It is not entirely clear what relief Krieg seeks from the Court. On its face, the motion seems to request permission to file an Amicus Brief. [#78.] However, Krieg does not attach any proposed brief to the motion; rather, he has included his curriculum vitae and several letters he previously sent to the Clerk of Court. [*Id.*] In his motion, Krieg alleges that the BOP has blocked correspondence between him and Hale. [*Id.*]

"[A]n *amicus curiae*'s purpose is to submit briefing that will assist the court, but not duplicate or advocate for a party in the suit." *Ctr. for Biological Diversity v. Jewell*, No. 16-cv-01932-MSK-STV, 2017 WL 4334071, at *1 (D. Colo. May 16, 2017) (citing *Newark Branch, N.A.A.C.P. v. Town of Harrison*, 940 F.2d 792, 808 (3d Cir. 1991)). District courts have the discretion to authorize participation by *amici curiae*. *Id.* In determining how to exercise that discretion, "district courts often look to Federal Rule of Appellate Procedure 29 ('Rule 29'), which governs amicus curiae participation in appeals, for guidance. Under Rule 29, a person or entity may participate as *amicus curiae* if it has an interest in the case, the matters it seeks to address are relevant, and its participation is desirable." *Id.* Here, the Court limits its analysis to the third factor.

"The participation of *amicus curiae* is desirable if a party does not have an attorney or is not adequately represented, the resolution of the case will affect the *amicus curiae*'s interests in a different lawsuit, or the *amicus curiae* can provide information or perspective that the parties are unable to provide. *Id.* (citing *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)). In this case, Defendants are represented by counsel and although Hale is not represented, he has a law degree and has

demonstrated that he is more than capable of representing his own interests. Moreover, Krieg is not an attorney and has only a basic understanding of the legal process. [*See* #78, #81, #83.] Thus, it is difficult to conceive what assistance Krieg's "brief" could provide to this Court.

In addition, Krieg has not argued that the resolution of this case will affect his interests in a different lawsuit or that he can provide a perspective that Hale or the Defendants could not provide. Indeed, as with the other movants, Krieg's interests in removing the restrictions on Hale's correspondence are already adequately represented by Hale.[16] Accordingly, the Court concludes that Krieg's participation as *amicus curiae* is not desirable and recommends that his request be denied.

CONCLUSION

For the foregoing reasons, the Court RECOMMENDS that Hale's "Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. Pro. Rule 59(e)" [#23] be DENIED.

IT IS FURTHER RECOMMENDED that the Defendants' Motion to Dismiss [#48] be GRANTED.

IT IS FURTHER RECOMMENDED that all Motions to Intervene [#17, #26, #28, #31, #37, #39, #53, #78] be DENIED.

DATED: February 3, 2020.

BY THE COURT:

S. Kato Crews
United States Magistrate Judge

[16] To the extent Krieg seeks to intervene in this action, intervention should be denied for the same reasons it should be denied as to the other movants.

Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).