IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MATTHEW HALE,

Plaintiff,

v. Civil Action No. 21-1469 (JEB)

MICHAEL COLLIS, et al.

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS (Doc. 12)

Now comes Plaintiff Matthew Hale (hereafter "Hale"), pro se, in opposition to the Defendants' Motion to Dismiss and memorandum of law filed in support of same (hereafter "Defense Brief"), stating as follows:

SUMMARY

Because the Defendants are wrong on the pertinent law governing this case in each and every respect, their motion should be denied entirely. Hale's Complaint easily demonstrates the jurisdiction of the Court to hear this case, that the District of Columbia is indeed the proper venue for it, and that relief may be granted for each and every one of the claims which he has brought. This Court has personal jurisdiction over Defendant Collis (hereafter "Collis") because he has established "minimum contact" with Washington, D.C. being that he is an "Intelligence Analyst" for the Federal Bureau of Prisons (hereafter "BOP") in that locale. Likewise, venue lies in this district because a substantial part of the events or omissions giving rise to Hale's claims occurred here. As for Hale's purported failure to serve Collis with process, any such failure on the part of the Marshal Service constitutes "good cause" under Rule 4(m) of the

Federal Rules of Civil Procedure for simply extending the date by which to serve him; dismissal of the case against Collis altogether is thus an improper remedy under the law.

As for Hale's First Amendment free exercise and RFRA claims, they are not barred by issue preclusion doctrine since there can be no confidence whatever that the free exercise right of Hale to profess Creativity was decided correctly by the prior judgment in the other court, nor does the doctrine of issue preclusion apply to the exercise of an inalienable right which has been oppressed by virtue of government power. Simply put, Creativity is a religion under clearly established Supreme Court case law and it would violate Hale's constitutional right to practice his chosen religious faith in the Seventh Circuit where he currently resides were this Court to ignore that fact in favor of a mere judge-made doctrine whose application here is already doubtful, to say the least.

As for Bivens, a Bivens remedy is indeed available for Hale's claims, the reason being that, even after Ziglar v. Abbasi, there are no "special factors counseling hesitation" in the admittedly "new context" of a prisoner being mistreated--and blatantly so--purely on account of the defendants' disdain for his "false and unrecognied religion" as they amazingly and forthrightly--though no less odiously--put it (Defense Brief at 23), and because they wish to suppress the expression of his opinions otherwise. A Bivens remedy is manifestly necessary to deter government actors such as Collis from persecuting the powerless prisoners in their care over matters of religious conscience and other ideological

persuasion, Hale having no other means of recompense--other than for his RFRA claim four as discussed below--for that violation of his basic rights which has already occurred by virtue of Collis' discriminatory conduct.

Finally, as for qualified immunity, there can be no qualified immunity for Collis' actions in regards to Hale's Claims One, Two, and Five on account of the fact that he both acted in violation of clearly established law and did so knowingly. As for Claims Three and Four, the Defendants failed to provide any argument at all that Collis is entitled to qualified immunity and have therefore waived any such defense on his part for those claims. Thus qualified immunity is inapplicable to any of the claims which Hale has brought in this case.

STANDARD OF REVIEW FOR MOTIONS TO DISMISS PURSUANT TO RULE 12(b)(6)

"A motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) tests the legal sufficiency of a complaint. In evaluating a Rule 12(b)(6) motion, the Court must first take note of the elements a plaintiff must plead to state the claim to relief, and then determine whether the plaintiff has pleaded those elements with adequate factual support to state a claim to relief that is plausible on its face. The complaint, however, need not include detailed factual allegations to withstand a Rule 12(b)(6) motion. A plaintiff may survive a Rule 12(b)(6) motion even if recovery is unlikely, so long as the facts alleged in the complaint are enough to raise a right to relief above the speculative level. In assessing a Rule 12(b)(6) motion, a court may consider only the facts contained within the four corners of the complaint, along with any documents attached to or incorporated into the complaint, matters of which the court may take judicial notice, and matters of public record."

Hamilton v. United States, 502 F. Supp. 3d 266, 272-273 (D.D.C. 2020)(internal citations and quotation marks omitted, emphasis added).

Accordingly, the Court must disregard exhibits 2 and 3 which

the Defendants inexplicably attached to their brief, as well as their discussion of same (Defense Brief at 4). For that matter, the Court must likewise disregard the Defendants' discussion of CTU and "intelligence analysts" (Id). None of this material appears within Hale's Complaint, nor does it constitute public record or something of which this Court may take judicial notice. It is therefore irrelevant to the case at this juncture, the juncture of a 12(b)(6) motion to dismiss on the basis of a supposed complaint insufficiency. The Court should therefore disregard it.

ARGUMENT

I. Since Hale has only sued Defendant Collis for money damages and not the CTU or BOP, Defendants' arguments about sovereign immunity are inapposite (Response to Defense Brief at 8-9).

The Defendants apparently do not understand that Hale only sued Collis for money damages (Doc. 1 at 12). Therefore their entire argument here about sovereign immunity is misplaced. That said, it is simply untrue that Hale may only recover money damages against Collis under a Bivens theory of liability (Defense Brief at 9 and 16-17). Rather, the Supreme Court has held that money damages are independently permitted under the Religious Freedom Restoration Act (hereafter "RFRA") against government officials in their individual capacities. See Tanzin v. Tanvir, 208 L.Ed. 2d 295, 304, 592 U.S. -- (2020). So, regardless of whatever the Court may decide regarding Bivens in this case, Hale's case against Collis for money damages under RFRA must be allowed to go forward (Claim Four). Collis has failed to make any sort of argument that he is not subject to RFRA liability for the $5

million dollars in damages which Hale has sought. He has therefore waived any such argument.

II. Since the Court granted Hale's motion to serve the Defendants with process, dismissal of the case against Collis is not an appropriate remedy here (Response to Defense Brief at 10-11).

As the Court is aware, Hale moved it--pursuant to Rule 4 (c)(3) of the Federal Rules of Civil Procedure--to order the United States Marshal or deputy marshal to serve the Defendants with the Complaint in this case (see Doc. 2 at 2), providing the clerk with a filled out summons form for Collis specifically in order to accomplish that objective (Id at 1). That motion not being acted upon for over two months, he then renewed it "out of an abundance of caution" (see Doc. 4), the Court granting said motion three days later (Doc. 5). It seems though that the U.S. Marshal failed to serve Collis personally, at least according to the Defendants (Defense Brief at 10-11), and they now assert that the case against Collis should be dismissed as a result. Since he is a prisoner though, Hale is not actually in a position to know whether Collis was served or not and this is somewhat the point: he obviously acted in good faith and with due diligence when he sought the service of the Defendants according to the rules and should not be penalized here in the event that the marshal service really did fail to serve Collis as the Court ordered.

The Defendants totally ignore the second sentence of Rule 4(m) of the Federal Rules of Civil Procedure, which dooms their argument:

> "But if the plaintiff shows good cause for the failure [to serve process], the court must extend the time for an appropriate remedy."

(emphasis added).

Surely, Hale has shown good cause here: he was obviously warranted in relying upon the Marshal Service pursuant to the Court's order. "The Marshals Service's failure to complete service, once furnished with the necessary identifying information, is automatically 'good cause' requiring an extension of time under Rule 4(m). Antonelli v. Sheehan, 81 F.3d 1422, 1426 (7th Cir. 1996), citing Sellers v. United States, 902 F.2d 598, 602 (7th Cir. 1990). See also Dumaguin v. Sec'y of Health & Human Services, 28 F.3d 1218, 1221 (D.C. Cir. 1994), Coulibaly v. Kerry, 130 F. Supp. 3d 140, 150 (D.D.C. 2015), and Scott v. Conley, 937 F.2d 60, 69 note 3 (D.D.C. 2013) (same). "Generally, pro se plaintiffs who depend on Court officers for executing service should not be penalized for a Court officer's failure to effect service of process." Cheatham v. Wolf, 2020 U.S. Dist. LEXIS 37268 (D.D.C. March 4, 2020), citing Mondy v. Sec'y of the Army, 845 F.2d 1051, 1060 (D.C. Cir. 1988)(MacKinnon, J. concurring).

Indeed, once Hale filed his motion to effectuate service, the matter was out of his hands. Not only did he show good faith in trying to serve Collis, he has shown "good cause" why any failure to do so should be remedied simply by extending the time for service as occurred in the cases above, with the Court ordering the Marshal to cure whatever deficiency has occurred here. Whatever "failure" Hale committed here (Defense Brief at 11) is thus explained on its face: despite his mindful best efforts,

corroborated by the record, the Marshal Service somehow (allegedly) missed Collis. It is difficult to conceive how outright dismissal of his claims against Collis could be appropriate accordingly. Indeed, dismissal is barred by the clear terms of Rule 4(m).

For all of these reasons then, the Defendants' service of process argument fails.

III. Since Collis works for the CTU and that unit is located in Washington, D.C. (hereafter "D.C."), venue is obviously proper in D.C. (Response to Defense Brief at 11-13).

It is altogether irrelevant whether Collis resides in West Virginia (Id at 12). Venue lies in D.C. because "a substantial part of the events or omissions giving rise to [Hale's] claim[s]" occurred here. See 28 U.S.C. sec. 1391(b)(2). Collis' argument is downright bizarre: in essence, he is implying that he doesn't do anything in D.C. even though he is employed by the CTU operating out of D.C. (see his Declaration at Doc. 12-2). It is a ridiculous argument, quite frankly, and one which should be rejected by this Court. The CTU is located in D.C. and he is an employee of that unit. Venue is obviously appropriate in D.C. as far as the CTU, BOP, and Collis is concerned. Hale sued in D.C. because that is where all of his troubles are coming from. Venue isn't proper in southern Illinois where he himself resides (Defense Brief at 12) because the actions which he is complaining of have not arisen in Illinois. It would have been nonsensical for Hale to have sued in West Virginia where the CTU is not even based, nor does Collis dare deny under oath that at least some of the actions which he has taken in Hale's regard have occurred in D.C. It would have been silly for Hale to have sued in both West

Virginia and D.C. when all three defendants are based out of D.C. and are at the very same address at that (see Complaint at 1). Collis cannot deny that he is a member of the CTU, that the CTU is located in D.C., and that he has acted against Hale's legal interests in that locale. Therefore his arguments against venue lying in D.C. must fail.

Had Hale sued in West Virginia--the only other place where venue could even theoretically lie--the BOP and the CTU would no doubt have argued that venue would be improper there. This is all the more reason why venue must be proper in this district: Hale cannot possibly have been required to sue in two different districts when all three defendants in the case are based at the same address. (Notably, the idea that D.C. would be an unfair or inconvenient place for the trial of this case--see Defense Brief at 11-12--is ridiculous. On the contrary, there is no place where it would be more fair and convenient for the Defendants, at least collectively so.) Clearly this Court has personal jurisdiction over Collis since he has more than "minimum contacts" with D.C. See Urquhart-Bradley v. Mobley, 964 F.3d 36, 44 (D.C. Cir. 2020). It is hard to see then why he would seek to avoid venue on the basis of a flimsy declaration which does not even deny that the acts which Hale complains of occurred in D.C.

Notably, the location of Collis' "physical office" is not the ultimate issue in this case. The issue rather is whether his acts against Hale have been ratified by his D.C. employer which they clearly have. If nothing else, the fact that the CTU has not stopped Collis from mistreating Hale is sufficient to confer

venue upon this district, for that constitutes an "omission" under 28 U.S.C. sec. 1391(b)(2). The deeds of Collis are not separable from the CTU for whom he works and, beyond any doubt, the venue for the CTU is D.C.

For all of these reasons then, the Defendants' venue argument fails.

IV. The doctrine of issue preclusion does not bar Hale's Claims Three and Four (Response to Defense Brief at 13-16).

As stated within paragraph 7 of Hale's Complaint, issue preclusion does not bar his religious-based claims for several reasons. First, the free exercise of religion is an inalienable right possessed by every person; it is, therefore, unamenable to "issue preclusion" considerations. In other words, a person has the constitutional right to profess the religious faith of his choosing in this country regardless of whether he has lost a court case or not. Second, the Tenth Circuit is actually in clear and provable violation of Supreme Court precedent with the religious "test" it has concocted, and Creativity--Hale's chosen religion--is in fact a religion under that precedent. Third, Hale is entitled to the protection of this precedent--as applied both by the District of Columbia circuit and the Seventh Circuit where he now resides--since he has a constitutional right to the protection of the law where he lives and not that of some other place. Fourth, several exceptions to the general rule of issue preclusion found within the Restatement of Judgments, 2d apply to this case even if the doctrine of issue preclusion could be applied to the exercise of an inalienable right. So, for all of these reasons, amplified by the case law which follows, the Defendants' argument

must fail.

A. The right to profess the religious doctrine of one's own choosing is inalienable and thus not subject to issue preclusion doctrine.

In perhaps the most clear and concise remarks on the subject of religion that the Supreme Court has ever made, it has stated the following:

> "The Free Exercise Clause of the First Amendment...provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...'. The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all governmental regulation of religious beliefs as such. The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma..."

Employment Division v. Smith, 494 U.S. 872, 876-877 (1990) (numerous internal case citations omitted, emphasis added).

On the other hand, nowhere in the law does it say that a person can lose his right to believe and profess his religious faith. In other words, the free exercise of religion is inalienable and if it is inalienable, a decision in a court case somewhere cannot alienate it. Thus, assuming for a moment that Creativity is indeed a religion as Hale will show below, a decision to the contrary by the Tenth Circuit cannot be enforced by virtue of issue preclusion doctrine. No one loses his right to believe and profess his religious faith in this country, whether by judicial fiat or otherwise; the federal government does not have the lawful power to strip a person of the profession of his religious faith. The case law quoted above makes that clear. And so did Congress in passing RFRA for that matter ("The Congress finds that...the

framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution."). See 42 U.S.C. sec. 2000bb(a). That is the whole point of why there exists a Bill of Rights in the first place: there are some things which the federal government is simply not allowed to do.

If a right is inalienable--as the free exercise of religion certainly is--it follows that it cannot be alienated by the application of issue preclusion doctrine. That doctrine is for the resolution of disputes between parties, not for the "resolution" of whether American citizens have the right to profess the religions of their choice. That issue has already been decided. It was decided in 1791 when the Bill of Rights was ratified and it was decided at that time in Hale's favor and the favor of all other Americans. On the other hand, issue preclusion is merely a "judically created doctrine." Baker v. General Motors Corp., 522 U.S. 222, 250 (1998)(Kennedy, J. concurring)(emphasis added). The application of such a doctrine cannot take precedence over the enforcement of the rights of the Constitution of the United States itself. "The judicial power [of the United States] must be understood in light of the Constitution's status as the supreme legal document over lesser sources of law. This status necessarily limits the power of a court to give legal effect to prior judicial decisions that articulate demonstrably erroneous interpretations of the Constitution because those prior decisions cannot take precedence over the Constitution itself." Gamble v. United States, 587 U.S. --, 204 L.Ed.2d 322, 349-350 (2019) (Thomas, J. concurring)(internal citation and quotation marks

omitted). Therefore, if the Tenth Circuit's "test" for a religion demonstrates an erroneous interpretation of the free exercise clause as adjudicated by Supreme Court precedent, Creativity's religiosity should not and cannot be "precluded." The federal courts have a legal duty to uphold the constitutional rights of those who appear before them, not acquiesce in the violation of those rights.

None of the cases cited by the Defendants address this fundamental point: that the (true) issue here is whether the federal government has the lawful power to alienate, through the application of a mere judicially created doctrine, an inalienable right. The fact that an inalienable right is at issue here makes this case different from all of the cases which the Defendants cite. It is important to keep in mind that the Defendants in this case constitute the federal government and it is precisely the federal government--whether the Defendants or this Court--which is barred from alienating Hale's right to profess his religious faith, if it be a religious faith. Furthermore, unlike with the cases which the Defendants cite, there is a strong public interest here in ensuring that the free exercise of American citizens is upheld by the courts. See e.g. Tyndale House Publishers, Inc. v. Sebelius, 904 F.Supp. 2d 106, 130 (D.D.C. 2012)("[T]here is undoubtedly also a public interest in ensuring that the rights secured under the First Amendment and, by extension, the RFRA, are protected."). On the other hand, "there is no justification for applying collateral estoppel, which is a flexible, judge-made doctrine, in situations where the policy concerns underlying it are absent." United States v. Stauffer Chemical Co., 464 U.S.

165, 176 (1984)(White, J. concurring). Simply put, there are no "policy concerns" supporting the preclusion of the right of the people to profess their religious beliefs, a right bestowed upon them by Nature or God. The policy concerns of this case are entirely rather on the other side of the ledger in Hale's favor.

So, if Creativity really is a religion under Supreme Court precedent, Hale's right to profess it must be vindicated by this Court, not turned away at the courthouse door. "The very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." Marbury v. Madison, 5 U.S. 137, 2 L.Ed. 60 (1803)(emphasis added), quoted by National Treasury Employees Union v. Nixon, 492 F.2d 587, 590 (D.C. Cir. 1974). Hale therefore always has the right to go to court when his inalienable right to profess his religion has been violated by the federal government. After all, while issue preclusion is merely a "judicially created doctrine," Baker, 522 U.S. at 250, and one which is subject to "countervailing considerations," Stauffer Chemical Co., 464 U.S. at 177, the right to profess one's own religious faith is an inalienable constitutional right which the courts must enforce. Hale always has the right to profess his religion according to the law, and notably that is all he has asked for with his Complaint. "Issue preclusion" cannot be applied where the violation of inalienable rights is concerned. The very concept makes no sense.

"The federal Constitution is the supreme law of the land..." Hernandez v. Foster, 657 F.3d 463, 480 (7th Cir. 2011). The

doctrine of "issue preclusion" most certainly is not. Therefore, in a conflict between the two, the former must prevail.

B. Since the "test" which the Tenth Circuit has concocted to determine what is religious is in violation of Supreme Court precedent, and Creativity is, in fact, a religion under that precedent, redetermination of the issue is warranted here under the general exception to issue preclusion doctrine itself.

The D.C. Circuit, honoring Supreme Court precedent, has plainly held the following:

"It is well established that [a] court may not inquire into the worthiness of [plaintiffs'] religious beliefs to ascertain whether they merit First Amendment protection. United States v. Ballard, 322 U.S. 78, 86-88, 88 L.Ed. 1148, 64 S.Ct. 882 (1944). The District Court need only consider whether [their] beliefs are 'religious' in their 'own scheme of things' and whether their beliefs are sincere. United States v. Seeger, 380 U.S. 163, 185, 13 L.Ed. 2d 733, 85 S.Ct. 850 (1965)[.]"

Kaplan v. Hess, 694 F.2d 847, 851 (D.C. Cir. 1982)(emphasis added). See also Gartrell v. Ashcroft, 191 F.Supp.2d 23, 39 (D.D.C. 2002)(Seeger understanding of religion specifically applied to prisoner free exercise claims); Kaufman v. McCaughtry, 419 F.3d 678, 681-682 (7th Cir. 2005)(Seeger applied to prisoner free exercise claims in the Seventh Circuit where Hale is domiciled); and Peterson v. Wilmur Communications, Inc., 205 F.Supp.2d 1014, 1018-1019 and 1022 (E.D. Wisc. 2002)(Judge Lynn Adelman, presiding) (Creativity specifically held to be a religion under Seeger standard).

The only issue then under this precedent is whether Creativity is a religion to Hale and whether he is sincere in his beliefs. A court can go no further. Nevetheless, in United States v. Meyers, 95 F.3d 1475, 1481-1484 (1996), a divided panel of the Tenth Circuit came up with a factor-driven test for determining what is and what is not a "religion," which is against both the letter and

the spirit of what the Supreme Court held and sought to do in the Seeger and Ballard cases. It was this (unconstitutional) test which was later applied against Creativity and Hale in Hale v. Fed. Bureau of Prisons, 759 F.App'x 741, 754 (10th Cir. 2019), thus fulfilling Judge Brorby's sad prediction in Meyers that "[t]he ability to define religion is the power to deny freedom of religion." See Meyers, at 1489-1492 (emphasis added).

The above is reason in itself why issue preclusion should not be applied in this case. After all, "[r]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in [the] prior litigation." Montana v. United States, 440 U.S. 147, 164 note 11 (1979). Here, the Tenth Circuit fabricated a test for religion which is totally at odds with Supreme Court precedent, that precedent asking only whether the beliefs in question are religious within a person's own (sincere) scheme of things, which is obviously an extremely deferential standard supportive of maximum religious freedom. Thus this Court can readily doubt the quality of the application of the Tenth Circuit test to Creativity being that the test never should have been adopted in the first place. Such a test violates, inherently, the admonition of courts not to "inquire into the worthiness of religious beliefs to ascertain whether they merit First Amendment protection." See again Kaplan, 694 F.2d at 851. Similarly, it is manifestly unfair for the religious rights of Creativity believers in prison to be destroyed throughout the country by virtue of an unconstitutional test.

The application of issue preclusion "usually depends on an

underlying confidence that the result achieved in the initial litigation was substantially correct." Currier v. Virginia, 585 U.S. --, 201 L.Ed.2d 650, 662 (2018)(internal quotation marks and citation omitted). Here, there can be no confidence at all since Creativity is a religion under Seeger and Ballard (Creativity is religious within Hale's own scheme of things). The allegations stated in paragraph 20 and elsewhere of Hale's Complaint clearly demonstrate his sincere belief in Creativity and that it is a religion to him and that is all that is necessary for his right to profess Creativity to be protected by the law.

There is an exception to issue preclusion "if the prior proceedings were seriously defective." Canonsburg Gen. Hosp. v. Burwell, 807 F.3d 295, 306 (D.C. Cir. 2015). The application of a factor-driven test upon Creativity must be "seriously defective" where the Supreme Court has ruled that no such test is necessary for the free exercise rights of the religious believer to be upheld. It is what the religious believer holds dear to his own heart which matters, not the viewpoints of non-believing judges or anybody else.

For these reasons then, the general exception to issue preclusion applies here. There can be no confidence whatever that the Tenth Circuit got Creativity's religiosity right considering that it failed to ask the only legitimate question which the courts are allowed to ask: whether Creativity is religious in Hale's own sincere scheme of things.

C. Since Hale is entitled to the protection of the substantive law where he currently lives and not that of some other place, the doctrine of issue preclusion cannot bar him from the protection of that law.

As Hale has shown, Creativity is a religion both within this circuit (D.C.) and the Seventh Circuit where he resides. It is, furthermore, a religion of course as far as the Supreme Court is concerned. Hale is therefore entitled to the protection of this law; it cannot be the case that this Court is obliged to defer to a Tenth Circuit test which is at odds with the law of Hale's own domicile and that of the Supreme Court for that matter. Rather, it is axiomatic that every person "is entitled to the protection of the laws of the state or territory in which he abides...". Lehmer v. Hardy, 294 F. 407, 411 (D.C. Cir. 1923)(emphasis added).

Hale's right to the protection of the law where he lives must therefore trump the "flexible, judge-made doctrine" of issue preclusion. Stauffer Chemical Co., 464 U.S. at 176. It cannot be that, thanks to the Tenth Circuit's unconstitutional decision in his regard, he is no longer able to profess his religious faith anywhere within the federal prisons of the United States due to "issue preclusion" doctrine. After all, the law outside of the Tenth Circuit is different and in his favor. Although the Tenth Circuit might be able to impose its unconstitutional religious test on Creativity-believers within that circuit, it should not be allowed to do so elsewhere in violation of other precedents; it cannot be that this Court is obliged to throw those precedents --including its own precedents--overboard in obeisance to issue preclusion doctrine. If the contrary were the case, the Tenth Circuit would be the true Supreme Court in this country where the rights of religious adherents are concerned, every other circuit being bound to honor its judgments even when those judgments

violate their own substantive law.

By means of analogy, if the Tenth Circuit had upheld a BOP policy requiring that every Jewish prisoner in its custody wear a yellow star, there is no way that this Court would deem that issue "precluded" from redetermination within this district. That is because the law does not allow such a disability to be imposed on the basis of religious status, McDaniel v. Paty, 435 U.S. 618 (1978), just as the law does not allow the BOP to ban Hale from professing Creativity within his correspondence here. Plus, the issue of Creativity being a religion cannot possibly be precluded when it is the case that courts within the Seventh Circuit, where Hale is domiciled, have specifically ruled the other way. See again Peterson v. Wilmur Communications, Inc., 205 F.Supp.2d 1014, 1018-1019 and 1022 (E.D. Wisc. 2002).

For all of these reasons then, issue preclusion does not apply here. Hale is entitled to the protection of the law where he lives, not that of some other place, and that law supports his profession of Creativity as his chosen religious faith.

D. Several exceptions to the general rule of issue preclusion found within the Restatement of Judgments, 2d are present in this case.

Of the five exceptions to issue preclusion found within Section 28, no less than four apply to this case in pertinent part:

> (2) The issue is one of law and (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect

> to the issue in the initial action than in the subsequent action or:
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action.

Numbers 2 and 3 have already been thoroughly discussed and so Hale will not repeat that discussion here. As for #4, Hale obviously had a "significantly heavier burden of persuasion with respect to [the religiosity of Creativity] in the initial action" than he does here: whereas he was compelled to overcome a factor-driven test for Creativity in the Tenth Circuit, all he has to do here is show that Creativity is religious within his own scheme of things and that his beliefs are sincerely held. It is difficult to imagine then how the difference in the respective burdens presented by the two cases could be more substantial than it is here.

As for #5, not only does the public have an interest--and a strong one at that--in seeing the free exercise rights of religious adherents upheld but the interests of Creativity believers in particular have been adversely impacted by the Tenth Circuit decision. (They are unable to write Hale about their love for their Creativity religious faith either.) Those believers deserve a more accurate, just, and lawful resolution of the matter, one which meets the standards of the United States Supreme Court. Notably, we are not talking about any "risks" posed by Hale's mail (Defense Brief at 15); we are talking rather about his mere profession of Creativity belief within his correspondence which is constitutionally protected. The Tenth Circuit's upholding of the

blanket ban on "Creativity" is constitutionally overbroad, just as it would be constitutionally overbroad to force all Jewish prisoners to wear a yellow star. A religion in itself does not pose a danger to anybody; it is individuals who may or may not pose a danger, not those religious creeds which those individuals find compelling as a matter of conscience. Sadly, the Tenth Circuit panel deciding his case succumbed to the same bigotry regarding a minority religion which compelled Hale to sue the BOP in the first place. That bigotry should not be carried on by this Court.

Lastly, it is worthy of note that the Defendants are simply wrong when they state that "any claims that relate to texts concerning Plaintiff's 'philosophy, politics, and social commentary that share a Creativity belief in white supremacy' are also precluded," citing the Hale v. Marques case (Defense Brief at 15). Presumably they are referring to Claims One and Two. In any event, the fact of the matter is that Hale voluntarily dismissed that case as the Defendants admit (Id at 3), which "leaves the parties as if the action had never been brought." Guttenberg v. Emery, 68 F.Supp.3d 184, 191 (D.D.C. 2014). The case was dismissed without prejudice (see Hale v. Marques, 19-cv-752, Doc. 106 and 107, D. Colo. 2020), and "[a] voluntary dismissal without prejudice is the 'opposite' of an adjudication upon the merits." Guttenberg, 68 F.Supp.3d at 191, quoting Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 505 (2001) (emphasis added). It was therefore improper for the Defendants to cite Hale v. Marques for their issue preclusion argument at all. The case in fact cannot be considered by this Court in any respect.

Thus we are left with only the Tenth Circuit decision and that decision is actually much narrower in scope, upholding BOP restrictions on "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 of or code [sic] for these group names." (Defense Brief at 15-16)(emphasis added). Clearly, the Tenth Circuit was talking therefore about references to Creativity and names of groups, not the personal philosophy, politics, and social commentary of Hale which he cares to put into print. Thus his Claims One and Two in the present case--and Claim Five for that matter--are totally unaffected by the Defendants' arguments as a matter of law and must (likewise) stand accordingly.

V. A Bivens Remedy is available for at least some First Amendment claims, including the claims which Hale has brought in this case against Collis (Response to Defense Brief at 16-17).

A. A Bivens remedy is available for Hale's Claim Three.

It is undeniable that Hale can recover money damages against Collis in his individual capacity under RFRA, as mentioned earlier (see supra at 4). Thus the Defendants' arguments only conceivably affect Hale's Claims One, Two, Three, and Five, not his RFRA Claim Four. The question here then is whether Congress' intent to provide money damages to plaintiffs under RFRA somehow evinces an intent not to provide money damages to plaintiffs under the free exercise clause of the First Amendment (Hale's Claim Three). Because there is no reason whatever to believe that Congress had meant to elevate RFRA free exercise claims over First Amendment free exercise claims as far as the availability of money damages

is concerned, the Defendants' arguments must fail. There is no reason to believe that Congress would favor money damages being available under RFRA but disfavor them from being available under the Constitution of the United States; especially where, as here, the clear intent of Congress in enacting RFRA was to give teeth to the First Amendment. See 42 U.S.C. sections 2000bb(b)(1 and 2) and 2000bb-1(c). In other words, Congress specifically intended to allow for money damages for violations of the right to freely exercise one's religious faith; it would be irrational then to suppose that it would want to rule out money damages for their violation under the First Amendment itself having specifically allowed for them under the RFRA statute. After all, whether under RFRA or under the First Amendment, we are talking about the same denial of free exercise of religion which Congress found so objectionable. On the other hand, there is zero reason why Congress would want to give a constitutional violation a monetary free pass but a statutory violation for the same conduct a monetary remedy. For this reason therefore, a Bivens remedy must be available for Hale's Claim Three.

B. A Bivens remedy is likewise available for Hale's Claims One, Two, and Five.

As for Hale's Claims One, Two, and Five, it is a closer question whether a Bivens remedy is available since they are not religion-based claims where Congress has evinced already a specific intent to make money damages available to successful plaintiffs. However, while the Defendants imply that the Supreme Court has specifically declined to extend Bivens to First Amendment claims, the very case they cite--Ashcroft v. Iqbal, 556 U.S. 662 (2009)--assumed, without deciding, that a Bivens remedy is

available for First Amendment claims. See Iqbal at 675. (See also Reichle v. Howards, 566 U.S. 658, 663 note 4 (2012) reiterating this point.) Thus the law is by no means as settled in the Defendant's favor as they pretend; had the Supreme Court meant to foreclose a Bivens remedy for First Amendment claims, it would have done so in Iqbal. In any event, the absence of a case where the Supreme Court has specifically upheld a Bivens remedy for a First Amendment claim does not preclude such a remedy being available, quite simply, since the Supreme Court hears few cases in general and can only decide those cases and issues which it does. It remains the task of the lower courts to apply those principles of law which the Supreme Court has already articulated.

Thus, while Hale admits that his claims one, two, and five present a "new context" for a Bivens remedy which the Supreme Court has not yet heard (Defense Brief at 17), the ultimate question for this Court to resolve is whether there are "special factors [which] counsel hesitation" in this particular case (Id at 16) and the answer to that question, Hale submits, is a resounding "no" as far as prior Supreme Court opinions are concerned. Decisively, the Supreme Court has already explicitly stated that there are no special factors counseling hesitation in a (non-corporate) prison setting which is what we have here of course. See McCarthy v. Madigan, 503 U.S. 140, 151-152 (1992) (Congress has not enacted any remedial mechanism which counsels hesitation in a prison setting) and Carlson v. Green, 446 U.S. 14, 19 (1980)("Petitioners [prison officials] do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappro-

priate."). That, of course, was the concern of Ziglar v. Abbasi which the Defendants cite (Defense Brief at 17), and yet the Supreme Court has already held, specifically, that that concern is invalid where Bivens lawsuits against non-corporate prison officials are concerned. Abbasi in no way changed the law on that particular score and Hale therefore wins on the law as it stands.

In fact, the Supreme Court in McCarthy, citing Carlson, explicitly observed that prison officials are not "likely to be unduly inhibited in the performance of their duties by the assertion of a Bivens claim," 503 U.S. at 151. Thus it is the case that the Supreme Court has already considered--and rejected--the idea that a Bivens remedy is unavailable to prisoners out of concern that prison officials may be inhibited from performing their necessary duties thereby. Thus, while it is true that expanding the Bivens remedy is indeed generally disfavored now after Abbasi as the Defendants claim (Defense Brief at 17), it is not disfavored in that prison context which the Supreme Court has specifically already approved of in the McCarthy and Carlson cases. Abbasi did not overrule those cases and they remain good law, Carlson being one of those three cases of course where the Supreme Court did extend a Bivens remedy (Defense Brief at 17). The fact that Hale is a prisoner then supports the extension of a Bivens remedy here since a Bivens remedy was extended to the prisoner in Carlson. Ignoring the fact that the Supreme Court has previously extended a Bivens remedy to prisoners does not help the Defendants' case at all.

Notably, the reason why a Bivens remedy is not extended in suits against privately-owned corporate prisons is because such suits would not deter individual officers working for them from committing constitutional violations. See Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 70-71 (2001). This is the key reason why the prisoner in that case lost his bid for a Bivens remedy and yet the Defendants remarkably fail to mention that salient fact (Defense Brief at 16). It is the fact that Hale is not suing a private corporation but rather an individual prison official which brings his case under Carlson, not Malesko.

When these three cases are considered together then--Carlson, McCarthy, and Malesko--the conclusion becomes inescapable that a Bivens remedy is indeed available for Hale's Claims One, Two, and Five against Collis. Hale is not suing a private prison as in Malesko, and the very "purpose of Bivens is to deter individual federal officers from committing constitutional violations," Malesko, 534 U.S. at 70 (emphasis added), which is exactly what Hale needs and seeks to do here. "The Bivens remedy is a powerful tool against [] governmental abuse, and must be available in appropriate cases." Western Center for Journalism v. Cederquist, 235 F.3d 1153, 1159 (9th Cir. 2000)(concurring opinion)("I agree with the Tenth Circuit that a Bivens remedy is available in First Amendment cases involving the type of [] harassment alleged here.") See also Morrison v. Board of Education, 507 F.3d 494, 502 (6th Cir. 2007)(the logic of Bivens applies likewise to First Amendment claims). On the other hand, without a Bivens remedy being available to Hale, there is no deterence whatever of the conduct alleged:

the suppression of Hale's completely lawful and unobjectionable literary work (Claim One), the suppression of Hale's completely lawful and unobjectionable articles about current affairs and other topics (Claim Two), and the rejection of his completely lawful and unobjectionable non-Creativity correspondence otherwise merely in an effort to cause him psychological and other grief (Claim Five). Defendant Collis, and those federal prison officials like him, need to be deterred from engaging in the sort of illegal conduct alleged here. Mere injunctive relief, for its part, provides no deterrent at all.

It is difficult to conceive in fact where a Bivens remedy for First Amendment freedom of speech claims would be more justified than in a prison setting where a prisoner is totally at the mercy of his captors and unable therefore to evade the oppression of his constitutional rights. Without a Bivens remedy being available, there is nothing whatever to deter Collis--or other prison officials in the future--from violating Hale's constitutional rights in the same vein after the present case has been concluded. Without a Bivens remedy for constitutional deprivations, there is no deterrence of federal officials from committing them. United States v. Stanley, 483 U.S. 669, 692 footnote 8 (1987)(separate opinion). Thus, were this Court to deny Hale a Bivens remedy, it would be essentially saying that it is A okay for federal prison officials to violate his constitutional rights in the future since there is no negative legal consequence for their doing so. That cannot possibly be the law, nor is it in fact the law. Congress has not even remotely "provided an equally effective alternative remedy [to

prisoners] and declared it to be a substitute for recovery under the Constitution" thus precluding a Bivens remedy (McCarthy, 503 U.S. at 151-152), nor are there, once again, "special factors" which "counsel hesitation" in a non-corporate prison setting. Id, and Carlson, 446 U.S. at 19 ("[W]e have here no explicit congressional declaration that persons injured by federal officers' violations...may not recover money damages from the agents but must be remitted to another remedy...")(emphasis added). On the other hand, "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief...". Bell v. Hood, 327 U.S. 678, 684 (1946). We want federal officials to think twice about destroying freedom of speech rights through the assessment of money damages against them instead of merely telling them not to do so after the fact. Plus, mere injunctive relief cannot possibly recompense Hale for the harm he has already suffered. It is not "compensation" under any sensible meaning of the term. Constitutional rights are themselves valuable and recompense for their violation--indeed destruction--must be provided accordingly.

As for Hale's supposed "access to alternative and more appropriate mechanisms to remedy his claims" (Defense Brief at 17), the non-injunctive "mechanisms" which the Defendants list are downright laughable. Obviously the BOP's "Administrative Remedy Program" gave him nothing or he would not have had to bring this suit, and as for the Federal Tort Claims Act, it is not even available for constitutional claims. See Abbasi, 137 S.Ct. at 1856 (the remedies of the FTCA do not apply to any claim against

a federal employee "which is brought for a violation of the Constitution"). See also Meshal v. Higgenbotham, 804 F.3d 417, 428 (D.C. Cir. 2020)("Congress expressly granted an exemption from the FTCA for Bivens suits"). Furthermore, the Supreme Court explicitly rejected the FTCA for Bivens analysis purposes 42 years ago in Carlson, 446 U.S. at 19-20. So, money damages under Bivens is it. That is the only recompense which Hale can possibly receive for his Claims One, Two, and Five.

* * *

For all of these reasons, the Defendants' arguments fail. A Bivens remedy is available under the applicable law and warranted by the particular facts of Hale's case. RFRA provides a monetary remedy for Claim Four and Bivens provides a monetary remedy for Claims One, Two, Three, and Five. There is no reason to deny Hale such a remedy just because he is a prisoner, nor has Congress even remotely evinced an intent to preclude such relief. A Bivens remedy is in fact more justified in a prison setting than anyplace else.

VI. Qualified immunity is unavailable to Collis in this case (Response to Defense Brief at 17-21).

First, due to the Defendants' failure to appreciate that Creativity is indeed a religion under Supreme Court, D.C. Circuit, and Seventh Circuit precedent, they failed to make any argument at all that Collis is entitled to qualified immunity on Claims Three and Four. They have therefore waived the issue for those claims.

Second, as for Claims One, Two, and Five--which the Defendants do address--they are wrong for multiple reasons as explained below.

A. Claim One.

The Defendants do not seem to appreciate (or care) that the censorship of outgoing prisoner mail, based entirely upon a desire to suppress the expression of particular opinions, has been illegal in the United States for nearly fifty years now--see Procunier v. Martinez, 416 U.S. 396, 413-417 (1974)--and yet that is exactly what Hale has alleged happened here in his Claim One. (The Court struck down a ban on the expression of "inflammatory political, racial, religious or other views." Id at 415). There are no "legal conclusions" alleged by Hale in his Claim One (Defense Brief at 20). Rather, Hale, under the very Harlow pleading requirement which the Defendants cite (Id at 18), alleges quite rightly all of the facts which bring this case squarely within the clearly established law of Martinez, law which has been cited by lower courts all over the country for decades. See e.g. Amatel v. Reno, 156 F.3d 192, 197 (D.C. Cir. 1998). So, it is the fact that Collis has violated that clearly established law which disentitles him to qualified immunity.

What's more is that Collis knew that he was breaking the law through his actions, and Hale explained in paragraph 12 of his Complaint exactly how he knew that. Therefore, not only did Collis violate clearly established law but he "knowingly violate[d] the law." Malley v. Briggs, 475 U.S. 335, 341 (1986)(emphasis added). He had the chance to quit violating the law when Hale apprised him as to what the law was but he opted instead to keep violating it. Thus qualified immunity is doubly unavailable to Collis in this case. There is no "legitimate question" as to whether Hale has the right to express his views on race. Harlow,

at 818. The matter was decided decades ago and is understood by everybody. The idea that Hale has failed to state a constitutional violation at all is laughable, and yet the Defendants say it anyway (Defense Brief at 19).

Lastly, Hale obviously had no legal obligation to include "a complete accounting of the content of [his] book" (Defense Brief at 20) within his Complaint, whatever the Defendants mean by that exactly. Furthermore, he did not need to "plead that the book [is] devoid of any mention or discussion of Creativity" (Id) when that is obviously understood under the liberal pleading rules by paragraph 9 of his Complaint ("Hale's book...is a work of naturalist racialist philosophy...")(emphasis in original); Creativity is obviously a religion as far as Hale is concerned and so he is drawing a distinction between the two fields. In any event, the Defendants' argument is irrelevant in light of the fact that the religiosity of Creativity is not barred by issue preclusion doctrine. As for the lack of a penological interest in suppressing Hale's book, that is pled, overwhelmingly, by paragraph 10. Hale in fact went out of his way to plead sufficient facts by which this Court could plausibly conclude that Collis was not furthering the legitimate penological interests of the BOP through his actions. The pleading requirements of Rule 8 of the Federal Rules of Civil Procedure do not require that he do any more than that.

In sum, a case which outlawed bans on the expression of "inflammatory political, racial, religious or other views" of prisoners provided plain notice to Collis that his censorship of Hale's book of "naturalist racialist philosophy" was likewise against the law. In fact, Collis had even less legal basis to ban

a work of racial philosophy than he would the expression of "inflammatory" racial views. He should have looked at Martinez, realized that the censorship of Hale's book was legally problematic, and taken a different course.

B. Claim Two.

True, Hale could have provided more facts concerning the articles in question (Defense Brief at 20). Is that required though under the pleading rules? Martinez already makes clear that prisoners can express their opinions on matters that are of concern to them, and that alone should have alerted Collis to the illegality of his acts. Hale did address the content of his articles ("current affairs and other topics")(paragraph 14); he did not have to "account for the names and number of articles in question" (Id), particularly since the violation of his rights is ongoing. (For instance, the Defendants have recently taken away Hale's email access too on account of the expression of his opinions and banned yet another of the books he has written from going out.) The fact of the matter, in any event, is that all expression of opinion found in prisoners' outgoing mail is protected by Martinez. There is no such thing as a lawful picking and choosing of what opinions Hale is allowed to express from prison, for it is that very picking and choosing which the Supreme Court found so problematic in that case. An actual legitimate concern that a prisoner is trying to commit a crime with his mail is one thing; simply trying to bar prisoners from expressing what they think is quite another and it is the latter which Hale has (properly) alleged occurred in this case.

As with Claim One, Collis not only violated the clearly

established law of Martinez here but did so deliberately, Hale informing him as to illegality of his actions as to Claim Two just as he had with Claim One (see Complaint paragraphs 12, 13, and 17). His Complaint in fact tracks the holding of Martinez quite intentionally and he was legally required to do no more than that.

C. Claim Five.

Like all of Hale's allegations, his allegations in Claim Five really speak for themselves. They present, overwhelmingly, a prima facie case that the Defendants have violated his First Amendment rights. The Defendants' arguments are, for their part, downright bizarre and frivolous (Defense Brief at 20-21). It is as if they are attacking a complaint they did not read. It is not Hale's burden to provide "evidence" for his claims at this juncture of the case (Id at 21); that said, he did "demonstrate" the illegality of Collis' actions (see Complaint paragraph 32). Hale in fact cites three cases there which put Collis on notice that his actions were unlawful. Therefore, the Defendants' arguments fail with respect to Claim Five just as they fail with respect to Claims One and Two.

VII. Since Hale did not ask for a preliminary injunction in his Complaint, he need not respond at this juncture to the Defendants' arguments against same (Response to Defense Brief at 21-23).

The Defendants apparently did not understand that the "injunction" Hale seeks (Complaint at 12) is a permanent injunction which would take place at the conclusion of the case. He did not ask for a preliminary injunction within his Complaint; hence the Defendants' arguments are inapposite. Should Hale move

for a preliminary injunction as this case progresses, the Defendants can respond to that motion at that time.

CONCLUSION

For the foregoing reasons, the Defendants' motion to dismiss is without merit and should be denied in its entirety. Hale's Complaint went far and beyond what is required under the pleading rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss was placed into the inmate mailing system on March ~~22~~ 23, 2022 via 1st class mail prepaid, addressed to the following attorney who represents the Defendants in this case:

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