No. 21-2029

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MONTE WHITEHEAD,

Plaintiff-Appellant,

v.

MANAGEMENT AND TRAINING CORPORATION, JAMES FRAWNER; RICHARD MARTINEZ; FNU MORENO; FNU BARBA; FNU AZUNA,

Defendants-Appellees.

On Appeal from the United States District Court for the
District of New Mexico, No. 2:17-cv-00275-MV-KK
Judge Martha Vazquez

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ORAL ARGUMENT REQUESTED

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STATEMENT OF PRIOR OR RELATED APPEALS

This is the second appeal to this Court arising out of Monte Whitehead's lawsuit regarding unconstitutional prison conditions at, and retaliatory transfer from, the Otero County Prison Facility in New Mexico. After the district court dismissed Whitehead's case, this Court "vacate[d] the district court's dismissal of [Whitehead's] First Amendment claims relating to hardback books, internet access, mailed-in newspaper articles, and materials limited to approved vendors and reverse[d] the district court's denial of the motions to amend the complaint and to supplement the pleadings." *Whitehead v. Marcantel*, 766 F.App'x 691, 705 (10th Cir. 2019).

GLOSSARY

Abbreviation	Definition
OCPF	Otero County Prison Facility
NMCD	New Mexico Corrections Department

INTRODUCTION

Plaintiff-Appellant Monte Whitehead's requests for veterinary, religious, and political books and articles were stymied at every turn by the policies of the New Mexico Corrections Department ("NMCD"), the Otero County Prison Facility ("OCPF" or the "prison"), and their employees. Those policies, and the actions of defendants, which barred Whitehead from exercising his First Amendment right to access information, run headfirst into the well-established mandate that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). "[P]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989). And "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

Despite those constitutional protections, the district court deferred to prison officials at every turn, ignored thorny factual issues, and instead credited the testimony of defendants above that of Whitehead and the supporting evidence he provided. But that sort of factual

weighing is entirely inappropriate at the summary judgment stage. Whitehead presented viable constitutional claims that deserve to be tried.

JURISDICTIONAL STATEMENT

Whitehead timely appealed from the district court's March 1, 2021 order granting summary judgment to defendants. The district court had jurisdiction under 28 U.S.C. § 1331, and this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in granting summary judgment to defendants on Whitehead's First Amendment access-to-information claims?

2. Whether the district court erred in granting summary judgment to defendants because there are genuine issues of material fact as to whether Warden Ricardo Martinez transferred Whitehead in retaliation for filing this lawsuit?

STATEMENT OF THE CASE AND THE FACTS

This case concerns the overlapping regulations and restrictions the prison imposed on its prisoners that deprived them of their constitutional right to access information. Whitehead was incarcerated at the prison

while these policies were in place and, as a result, was denied access to veterinary, religious, and political materials. He brought this lawsuit to vindicate his constitutional rights. But rather than reversing course, and working with Whitehead to help him access the information he sought, the warden instead retaliated against him by transferring him to a new prison where he faced serious risk of harassment and assault. App.578–79. The district court nevertheless granted summary judgment to defendants, holding both that Whitehead's rights had not been infringed and that (contrary to the recommendation of the magistrate judge) Whitehead's transfer was not retaliatory. This appeal followed.

I. The Prison Had Extensive Regulations Restricting Access To Information.

During the relevant time period, numerous restrictions and regulations prohibited prisoners at OCPF from reading all manner of information that they have a constitutional right to access.

Vendor restrictions. One of the most restrictive policies at the prison was the requirement that prisoners purchase newspapers, books, and magazines only from a very narrow set of approved vendors—even if prisoners were seeking publications that those approved vendors did not carry. App.1485, 1501–02; NMCD Policy CD151201(J)(1). The prison and

its employees selected the approved vendors based on the popularity of the items they sold. App.1068–69, 1372; *see also* App.1728 ("The undisputed record evidence shows that Defendants selected the approved vendors at issue based on their legitimacy and relative popularity with inmates."). So, by definition, the policy restricted access to less popular publications and books. While from October 2016 to at least April 2017 the prison claims that prisoners could purchase certain publications directly from *publishers*, even if they were not approved vendors, the prisoners' experience showed that requests to purchase books from publishers were denied or wholly ignored. App.1068–70, 1485, 1501–02, 1514.

The precise metes and bounds of the approved vendor list is unclear. App.1048–61; *see* App.1551. By some accounts, at times only two publishers were approved vendors (Hamilton Booksellers and Christian Book Distributors), App.1687, while at other times the prison approved a handful of vendors.[1] App.1390, 1409, 1415, 1425; *see also* App.205, 1390, 1409, 1608, 1618 n.13 (citing App.682). But it is undisputed that no more

[1] *Cf. Heard v. Marcantel*, 2017 WL 3412094, at *4, 9 n.15 (D.N.M. Mar. 16, 2017) (discussing assertion that "that prisoners at OCPF could order paperback books from two (and only two) pre-approved vendors").

than a dozen vendors were ever approved at one time. App.682, 1190, 1210, 1230, 1248. Many of the approved vendors were not booksellers at all, instead offering clothing, music, and other items. App.1414. And the quality of the available booksellers is telling. Hamilton Booksellers, for example, currently sells no books written by Franz Kafka, William Faulkner, John Steinbeck or Toni Morrison—but many by Nicholas Sparks and Nora Roberts. *See* https://www.hamiltonbook.com/ (last accessed October 13, 2021). Of current paperback books for sale, Hamilton Booksellers counts 1,376 as "Mysteries and Detectives" and 1,012 as "Romance and Women's Stories"—but only 94 as "Classics & Literary Fiction." *Id.*

Despite severely restraining prisoners' options for purchasing books and other publications by limiting them only to approved vendors, the prison still separately inspected all books and publications to ensure that they did not contain contraband or raise any security concerns before issuing the purchases to the inmate. NMCD Policy CD151201(D)(3); App.1078.

Online publications and newspaper clippings. The prison also severely restricted prisoners' access to online publications, including the news, and banned receipt of newspaper clippings.

Prisoners could receive news articles only by purchasing them directly from the publisher. App.1069–70, 1485–86, 1651–52. And they were absolutely prohibited from printing (or receiving printed or photocopied versions of) any publications, including news stories, from the internet. Although the prison claims that some internet printouts were permissible, App.1417, the prison's policy clearly and unequivocally prohibited "[a]ny publications, copied or printed from the Internet." App. 649–55, 1069, 1165, 1168, 1486. Prisoners did not otherwise have regular internet access, so their only available avenue for obtaining news was to purchase news articles directly from publishers, to the extent the prisoners could even know that the articles existed.

The upshot of these restrictions was that prisoners were prohibited from accessing online-only publications. Numerous publications exist only in electronic form—including publications like *US News & World Report*—and those publications *could not* be purchased or otherwise acquired without violating prison policy. Simply put, prisoners "lacked

access to newspaper articles not available from the publisher and articles published only on the internet." App.1744–45.

Hardcover books. On top of the vendor and online-publication and newspaper clippings restrictions, prisoners also "were not permitted to possess hardback books or receive hardback books in [the] mail." App.669, 671, 1062–74. Under prison policy, mail including hardcover books was rejected. NMCD Policy CD151201(E)(6)(e); App.1065, 1079–80. The prison, however, made an exception for hardcover books for certain college courses, which prisoners were able to keep with their property and broadly access. App.565–66, 1067, 1412, 1522.

The prison purported to allow hardcover books "if the covers [we]re removed," *see* App.1067; *see also* App. 673, 1190, 1210, 1230, 1248, 1263, but that allowance was illusory in light of other prison policies. Specifically, New Mexico Corrections Department Policy CD150201(E)(6)(b) provided that "[i]nmates found in possession of property that has been altered … will receive a disciplinary report and said property will be confiscated." App.1601; *see* App.1097, 1355, 1364, 1368, 1392, 1409, 1412–13. The prisoners understood this policy to prohibit them from removing the covers of purchased books. App.574.

II. While At The Prison, Whitehead Was Deprived Of Access To Information.

Whitehead is a prisoner in the custody of the State of New Mexico who was incarcerated at the prison from March 2013 until he was transferred out in April 2017. App.29, 1062–63. The conditions Whitehead experienced at the prison and the circumstances of his transfer to a different facility form the basis for this case. *See* App.27, 534.

After Whitehead arrived at the prison in March 2013, the overlapping regulations and restrictions prevented him from accessing books and articles he desired. He wanted to write an article about the impact of the private prison industry in New Mexico, but was denied underlying source materials. App.547. He wanted to purchase and read veterinary books to stay up-to-date on his pre-confinement profession, but was unable to do so given the prison's restrictions. App.563–65. He was similarly denied access to religious materials, and other veterinary materials (like textbooks and journals). App.570–71.

Each of the prison's restrictive policies contributed to Whitehead's inability to access information.

First, the approved vendor restrictions consistently frustrated Whitehead's efforts to obtain reading materials. App.200–01, 203–04. Whitehead could not purchase multiple books during his incarceration at the prison because they were not available from an approved vendor. *See, e.g.*, App.150–52, 571, 1409–10, 1421, 1610, 1613. For example, Whitehead's request for three paperback books from Prison Legal News was rejected in May 2016. App.71, 453, 469–71, 535–36, 541, 554, 683–84. The approved vendor restrictions also prevented Whitehead from purchasing magazines he wished to read—like Equus, Journal of the American Veterinary Medical Association, and Biblical Archaeology review, App.1428, and from purchasing newspaper articles when the publisher did not sell articles individually. App.661–67.

Second, when his family and friends tried to send him online articles and newspaper clippings about private prisons, veterinary materials, and more, Whitehead's mail would be rejected. App.1281, 1283, 1292, 1299.

Third, Whitehead was regularly frustrated in his attempt to purchase or receive hardcover books. App.205, 564, 668, 670, 672, 686–88, 672, 912, 1409, 1415. And veterinary texts are often only published

in hardcover form. App.571. Whitehead explained that, although the prison might "allow" prisoners to keep hardcover books with the covers torn off, he might be subject to disciplinary proceedings for owning damaged items—and also that those books quickly disintegrated, making them unreadable. App.563–66, 1365, 1412–13, 1601–02.

The prison's restrictions, as well as a substandard library and dysfunctional interlibrary loan system, *see, e.g.*, App.1674–76, meant that Whitehead could not access the information he desired in any form.

III. Whitehead Sued To Vindicate His First Amendment Rights And The Prison Warden Retaliated.

Whitehead, proceeding pro se, sued five defendants responsible for the policies and acts underlying his claims in November 2016.[2] Management and Training Corp. is a private company that operates the prison and employed the individual defendants. App.537–42, 1062. The individual defendants are the former and present wardens at the prison, the librarian, the mail room supervisor, and a mail room staffer, all of whom were involved in enforcing policies that restricted Whitehead's access to information. App.536–38, 541–42, 1062. The present warden

[2] Whitehead's complaint and amended complaint name additional defendants no longer party to this proceeding. *See* App.27, 534.

(Ricardo Martinez) was also involved in the retaliatory transfer of Whitehead from the prison after Whitehead filed this suit. App.538.

Warden Martinez was served with the complaint on February 3, 2017, and began retaliating against Whitehead within weeks. App.286–87.[3] Three weeks after service, on February 23, Warden Martinez shut down the protestant church of which Whitehead was a member and pastor. App.577–78. The next day, Whitehead was moved out of his housing section (the "honor pod") and moved into a pod that correctional officers called the "shit stick pod," which came with substantially less freedom. App.577–78, 1658–59. Although Warden Martinez reinstated the church a few days after that, he banned Whitehead from accessing many privileges of the church, including participating in preaching or teaching at the prison. App.1658–59. And then within weeks, Whitehead was told that he was going to be transferred to another prison. App.824–29, 1486, 1658–59.

[3] Warden Martinez attested that he "became aware of the Plaintiff's original Complaint … on December 21, 2016." App.1071. No record evidence suggests that he knew about the contents of the lawsuit at that point. *Id.*

In the midst of these actions, on February 24, 2017, Whitehead submitted an "inmate informal complaint" alleging that he was moved within the prison and asking for the prison's basis for doing so. App.824. Two weeks later, on March 6, 2017, he was told he was "moved for security reasons by the Warden." App.825. After he was told he was being moved from OCPF to another prison, Whitehead filed an appeal form, protesting his noticed transfer. App.829. But his efforts were unavailing. Only ten weeks after the warden had been served with this lawsuit, Whitehead was transferred to another New Mexico prison. App.577–78. Formal disciplinary proceedings regarding Whitehead's alleged transfer-inducing rule violations never took place. App.1658–62.

The transfer out of the prison came at significant costs to Whitehead. In addition to being abruptly transferred from his community and church, he faced a distinct fear of abuse and violence. Because OCPF houses primarily sex offenders, prisoners transferred from OCPF to other facilities are presumed to be sex offenders and are often assaulted or forced to go into administrative segregation for their safety. App.577–79.

To be sure, Warden Martinez tells a different version of events, claiming that Whitehead collaborated with volunteer church pastors to smuggle out letters in violation of prison policies. App.1070–71, 1583–84.

IV. The District Court Rulings And This Court's Prior Decision.

The district court has now twice entered judgment in favor of defendants on all of Whitehead's federal claims. *See* App.477, 1701.

The first time around, the district court dismissed Whitehead's claims for failure to state a claim, but this Court, as relevant here, reversed in part and vacated in part. *Whitehead v. Marcantel*, 766 F.App'x. 691, 705 (10th Cir. 2019).

First, the Court concluded that defendants did not "articulate any legitimate penological interests for" their restrictions prohibiting receipt of reading material from non-approved vendors, prohibiting hardcover books, prohibiting the receipt of newspaper articles through the mail, and prohibiting access to the internet or internet articles. *Id.* at 697. And holding that the district court had failed to address Whitehead's allegations properly, this Court "vacate[d] the dismissal of those claims and remand[ed] them to the district court for consideration in the first instance." *Id.* at 698.

Second, this Court reversed the denial of Whitehead's motions to amend the complaint and to supplement the pleadings, explaining that "the district court denied both motions without an 'apparent or declared reason'" and that "[s]uch a refusal constitutes an abuse of discretion." *Id.* at 704–05.

On remand, after being granted leave to amend, Whitehead alleged that: (1) defendants violated his First Amendment rights by barring his purchase of publications from non-approved vendors, App.569–71; (2) defendants' restrictions on receipt of internet printouts and newspaper articles violated his First Amendment rights, App.547–52; (3) defendants violated his First Amendment rights by restricting his possession and receipt of hardcover books, App.562–66; and, (4) Warden Martinez violated Whitehead's rights by transferring him in retaliation for filing this lawsuit, App.576–583.[4]

Soon after, Whitehead filed a motion for partial summary judgment on his First Amendment claims, which defendants opposed. *See* App.935–90, 991–999, 1002–23. The magistrate judge then ordered that

[4] Whitehead's amended complaint included additional claims which the magistrate judge struck on March 6, 2020. App.1036–37, 1039-40.

defendants provide a "*Martinez*" Report "address[ing] all of Plaintiff's allegations against the OCPF Defendants, as well as any defenses raised in the OCPF Defendants' answers that they wish to pursue,"[5] App.1027–33, and then issued an order staying discovery, App.1041–47.

Defendants filed their *Martinez* Report on April 2, 2020, including certain exhibits and an affidavit from Warden Martinez. App.1048–61. The next day defendants filed a cross motion for summary judgment on all claims. App.1327–51.

After conducting a *sua sponte* review of the record, the magistrate judge determined that defendants' *Martinez* report was insufficient and asked them to provide additional information. Most relevant for present purposes, the magistrate judge requested additional information about defendants' policies regarding vendors and hardcover books and the timing of Whitehead's transfer, and asked defendants to "identify and describe the 'security concerns'" regarding newspaper or internet articles mailed from unapproved third parties. App.1470–72 (citing App.1452).

[5] The magistrate judge directed that defendants need not address the claims that they struck from the case two days later. App.1027–33.

On September 22, 2020, the magistrate judge issued proposed findings recommending that Whitehead's motion for partial summary judgment be denied and that defendants' motion for summary judgment be granted in part and denied in part: granted as to Whitehead's access-to-information claims but denied as to the retaliatory-transfer claim. App.1574–75. According to the magistrate judge, there was a live dispute over "Defendant Martinez's proffered reason for requesting Plaintiff's transfer"—namely, whether the volunteer pastor of Whitehead's church in fact mailed letters for Whitehead, or whether that basis for transfer was pretext. App.1570. The magistrate judge also emphasized the "close temporal proximity" between the date Warden Martinez had been served and the date on which he may have requested a transfer.[6] App.1571. Thus, according to the magistrate judge, there was "evidence that … could support an inference of pretext." *Id.* Because all of the key facts regarding retaliatory transfer were disputed—including the who, what, when, and where—the magistrate judge recommended

[6] Defendants and Whitehead dispute the exact timeline here. Whitehead attests that retaliation began on February 23, 2017—while defendants will not commit to a specific timeline regarding the transfer request. App.1486, 1510–11.

that the district court deny summary judgment to the prison on the retaliatory-transfer claim, so that a jury of Whitehead's peers could resolve the factual disputes.

In a number of places, the magistrate recognized that Whitehead had presented disputed facts in his response to defendants' supplemental *Martinez* report, *see* App.1494, but concluded that had not done so "under penalty of perjury" and so declined to consider them.[7] App.1549 n.19, App.1573 n.41.

The parties objected to the parts of the magistrate judge's recommendations that had ruled against them. App.1576–82, 1585–1636, 1641–50, 1656–1700; *see also* App.1638. The district court ultimately sided with defendants across the board: On March 1, 2021, the district court denied Whitehead's motion for summary judgment and

[7] Knowing that Whitehead was pro se, and that, if offered under penalty of perjury, Whitehead's assertions would raise disputed facts, the magistrate judge should have offered Whitehead the ability to resolve the issue. *See Gordon v. Watson*, 622 F.2d 120, 123 (5th Cir. 1980) (concluding that "district court should have required the parties to correct the deficiencies in their various pleadings and supporting papers if it intended to rely on them for its grant of summary judgment"). Notably, he had signed his filing, but had failed to do so with the requisite formality. The magistrate judge's failure is particularly striking in light of their *sua sponte* request for defendants to file a supplemental *Martinez* report to cure deficiencies in their original filing.

granted defendants' motion for summary judgment on all counts. App.1754–55. The district court held that the prison's restrictions on prisoners' ability to access information were constitutionally valid and that there were no genuine issues of material fact. App.1747. And the district court overrode the judgment of the magistrate judge on the retaliatory-transfer claim, holding that the record established that the transfer was made "in good faith because [Martinez] had well-founded reasons to and did in fact believe" that Whitehead had violated prison policy by using the volunteer pastor from Whitehead's church to pass mail out of the prison. [8] App.1754. This timely appeal followed.

STANDARD OF REVIEW

This Court reviews the district court's summary judgment ruling *de novo*, drawing all reasonable inferences and resolving all factual disputes in favor of the nonmoving party. *Cerveny v. Aventis, Inc.*, 855 F.3d 1091, 1095 (10th Cir. 2017). When some contradictory evidence exists, the basic summary judgment question is whether a reasonable jury could find for the nonmovant on the disputed issue. *See Anderson v. Liberty Lobby, Inc.*,

[8] The district court, similar to the magistrate judge, declined to consider certain facts on the basis of how they were proffered. App.1724 n.15.

477 U.S. 242, 248 (1986). "[T]o survive the ... motion, [the nonmovant] need only present evidence from which a jury might return a verdict in his favor." *Id.* at 257; *Fowler v. United States*, 647 F.3d 1232, 1237 (10th Cir. 2011). At this stage, the court may not "weigh the evidence and determine the truth of the matter" according to its own views; instead, its role is only to "determine whether there is a genuine issue for trial." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam).

For purposes of summary judgment, courts treat a prisoner's pleadings as evidence if they allege specific facts based on the prisoner's personal knowledge and have been subscribed under penalty of perjury. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Id.* And "[a] bona fide factual dispute exists even when the plaintiff's factual allegations … are less specific or well-documented than those" proffered by defendants. *Id.* at 1109.

SUMMARY OF ARGUMENT

The Supreme Court has cautioned that judicial review of restrictions on prisoners' constitutional rights "is not toothless."

Thornburgh, 490 U.S. at 414. The district court's unbridled deference to the prison-official defendants violated this cardinal command and is thus at odds with well-settled precedent from the Supreme Court and this Court. This Court should reverse.

I. The prison made it impossible for Whitehead to read categories of veterinary, religious, and political texts. Those restrictions clash with Whitehead's First Amendment right to information while in prison. Both because defendants violated Whitehead's rights, and because Whitehead presented disputed material facts, the district court erred in granting summary judgment to defendants.

A. The prison's vendor restriction is neither rationally connected to its claimed security interests, nor is it content neutral. Instead, the prison selects allowed vendors by popularity (not adherence to security standards). Because "popularity" is not content-neutral, and because Whitehead supported his allegations with ample evidence to establish genuine issues of material fact on this claim, the district court erred in granting summary judgment to defendants.

B. The prison's restrictions on online articles and newspaper clippings are similarly faulty. The complete ban on the receipt of

online-only publications, as well as the severe restrictions on printed materials and newspaper articles, imposed a considerable limit on prisoners' access to information. Defendants purported countervailing interests (the specter of copyright law and concerns about smuggling and coded messages) cannot support those dramatic restrictions. Summary judgment to defendants was, again, error.

C. The prison's near-complete ban on hardcover books is also constitutionally invalid. The prison's own actions—creating an exception to its rule for certain college course books—demonstrates that allowing at least some hardcover books is consistent with sound prison administration. And the district court inappropriately brushed aside the gravity of the harm (to Whitehead, a complete inability to access academic texts that are not available in paperback). In light of applicable precedent, and the existence of disputed material facts, the district court's decision cannot be sustained.

II. Whitehead presented genuine issues of disputed fact that precluded judgment on his retaliatory-transfer claim. Everyone agrees that, within a matter of weeks of being served with this lawsuit, the prison warden initiated Whitehead's transfer to a different prison.

Whitehead and defendants disagree about *why* the warden did so, but Whitehead presented ample evidence, including affidavits from third parties, supporting his version of events (unconstitutional retaliation against his exercise of First Amendment rights). The district court erred in ignoring that evidence and favoring defendants' narrative.

ARGUMENT

I. The District Court Erred In Granting Summary Judgment To Defendants On Whitehead's First Amendment Access-To-Information Claims.

It is well settled that a prison may not impinge on an inmate's constitutional rights unless the restriction at issue is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). To assess whether a restriction is reasonable, courts consider four factors.

First, courts consider "whether a rational connection exists between the prison policy regulation and a legitimate governmental interest advanced as its justification." *Khan v. Barela*, 808 F.App'x 602, 606–607 n.4 (10th Cir. 2020) (quoting *Beerheide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002)). This factor has two prongs: that the governmental objective motivating the regulation be legitimate and neutral and that the regulation be rationally related to that objective. *Thornburgh*, 490

U.S. at 414. The prison must show "more than a formalistic logical connection between a regulation and a penological objective." *Beard v. Banks*, 548 U.S. 521, 535 (2006). Without a rational connection between the regulation and a legitimate penological interest, the regulation fails. *See Jacklovich v. Simmons*, 392 F.3d 420, 427 (10th Cir. 2004) (explaining that without a rational connection, there was theoretically no need to consider the remaining factors)

Second, courts consider "whether alternative means of exercising the right are available notwithstanding the policy or regulation." *Beerheide*, 286 F.3d at 1185. "The absence of any alternative … provides 'some evidence that the regulations are unreasonable.'" *Beard*, 548 U.S. at 532 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003)).

Third, courts consider "what effect accommodating the exercise of the right would have on guards, other prisoners, and prison resources generally." *Beerheide*, 286 F.3d at 1185. Under this factor, courts consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90; *see Jones v. Salt Lake Cnty.*, 503 F.3d 1147, 1153 (10th Cir. 2007).

Last, courts consider "whether ready, easy-to-implement alternatives exist that would accommodate the prisoner's rights." *Khan*, 808 F.App'x at 606–07 n.4 (quoting *Beerheides*, 286 F.3d at 1185). "[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns." *Turner*, 482 U.S. at 90 (quotation marks omitted); *see Jones*, 503 F.3d at 1154.

The *Turner* analysis is conducted on a case-by-case basis. *Wardell v. Duncan*, 470 F.3d 954, 961 (10th Cir. 2006). And each factor can give rise to genuine issues of material fact. *Jacklovich*, 392 F.3d at 427 (reversing district court's grant of summary judgment). As set forth below, the prison's restrictions on vendors, online publications and newspaper clippings, and hardback books all fail the *Turner* test.

A. The Prison's Vendor Restrictions Are Unconstitutional.

The prison's requirement that prisoners purchase books only from the small number of approved vendors cannot survive scrutiny under *Turner*. In light of the severity of the restriction and other measures the prison takes to keep prisoners safe, that restriction on liberty is not reasonably related to any legitimate penological interest.

1. Defendants' asserted security interests do not support the restrictive vendor requirement.

The prison's restrictive vendor list is not rationally connected to its claimed security interests, nor are the restrictions content neutral. Defendants do not dispute that the prison treats books from approved and unapproved vendors similarly from a security perspective—"[a]ll vendor acquired books and publications are inspected for contraband and security concerns before being issued to an inmate." App.1068–69, 1076. And defendants have made no showing about the comparative security advantages of approved vendors. *See, e.g.*, App.1370, 1414. So defendants have no basis to claim that the restrictions helped the prison "focus its resources needed to review books that are mailed to inmates." App.1068–69. Regardless of the shipper's inclusion on the approved vendor list, the prison undertakes the same security screenings to ensure the safety of guards and prisoners. The approved vendor list does nothing to advance the prison's security goals.

It is not surprising that the prison was unable to make any legitimate showing that the vendor restrictions enhance security not just in theory but in fact. Rather than choose the approved vendors based on their security protocols, the prison chooses them based on their

popularity among the prison population. Warden Martinez himself describes how vendors can be added to the approved vendors list, which includes the suggestion of prisoners. App.1068. New vendors do not have to complete any additional security screenings or make any special showing about their security protocols. And precisely because the approved vendors do not need to make any special security-related showing, defendants were able to point to *no* evidence that a more expansive list (including reputable vendors) would *actually* increase security risks. In the absence of those showings, it was error for the district court to conclude that the vendor restrictions bear a "logical connection" to the prison's proffered interest in security. To the contrary, the restriction serves only to limit the prisoners' access to information, in violation of their First Amendment rights.

Moreover, and for many of the same reasons, the restrictions are not content-neutral. The First Amendment requires prison regulations that burden a prisoner's fundamental right to receive publications to "operat[e] in a neutral fashion, without regard to the content of the expression." *Turner*, 482 U.S. at 90. But prison officials acknowledge that they select vendors based on their relative popularity among prisoners.

App.1068–69. Allowing access to popular speech but not unpopular speech is a quintessential content-based restriction, and it is hard to think of a criterion that is more offensive to the First Amendment, which exists precisely to protect unpopular speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (explaining that the purpose behind the First Amendment is "to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society"). And this distinction carries the perverse consequence for prisoners of not only restricting access to unpopular information, but also excluding many "academic/specialty types of publications"—such as the veterinary publications Whitehead seeks to access—which are the very materials that are most productive for prisoners to access as they seek to keep up their skills and education. App.1610–12.

The Second Circuit's decision in *Shakur v. Selsky*, 391 F.3d 106, 116 (2d Cir. 2004), is instructive. There, the restriction at issue "appear[ed] to ban all literature from outside organizations, unless those organizations have been approved by the deputy commissioner." *Id.* at 115. The court determined that the plaintiff stated a claim, explaining that the regulation at issue "greatly circumscribe[d] the universe of

reading materials accessible to inmates" and was thus "not sufficiently related to any legitimate and neutral penological objective." *Id.* at 116. So too here. The prison's one-size-fits-all policy is an impermissible "shortcut[]" that "lead[s] to needless exclusions" that bear no rational relationship to the prison's proffered interest in security. *Thornburgh*, 490 U.S. at 416 (upholding prison policy while emphasizing the "individualized nature of the determinations"). That is enough to reverse the district court's grant of summary judgment in favor of defendants.

2. Defendants provided no alternative means for Whitehead to exercise his First Amendment rights.

The district court's errors did not stop with the first *Turner* factor. The district court's holding that alternative channels exist for prisoners to access information that is not available through approved vendors cannot be sustained. According to the district court's reasoning, the fact that prisoners have access to a large *number* of books is sufficient to satisfy the alternative-means factor. But access to *many* books is not sufficient to justify a restriction on *every other* book. It is unfathomable that a prison could justify restricting access to the Koran on the ground that the prison provides access to the more popular Bible. Or that a

prison could justify restricting access to conservative publications on the ground it provides access to numerous liberal ones. In defendants' view, there is no right to have a specific book. But that argument attacks a strawman. Whitehead is not seeking access to only a *particular* book. The vendor restrictions have made inaccessible to him entire *categories* of books, and that bars him from accessing information he desires for his personal and professional development. It simply is not enough for First Amendment purposes to have access to "a broad range of publications," when the very categories of publications someone wants to access are not among them. App.1744–45.

Defendants ultimately fall back on the argument that the prison library and interlibrary loan program provided an accessible alternative to the approved vendor list. But that argument misses the point. The limited selection of books at the prison library does not include the religious, political, and scientific sources Whitehead has alleged he wants to access. App.564, 568, 1352–1407, 1411–12. And even assuming other prisons have the relevant books (and there is no indication that they do), the prison's restrictions and regulations have made meaningful access to the interlibrary loan program impossible. App.564–65.

The district court did not find credible some of Whitehead's sworn written testimony about his inability to access certain categories of publications. *See* App.1718. But weighing his sworn testimony against the prison's assertions is impermissible at the summary-judgment stage. *See, e.g.*, *Hall*, 935 F.2d at 1109; *Collins v. Hladky*, 603 F.2d 824, 825 (10th Cir. 1979). Nor was the district court's observation that Whitehead was once (in 2015) able to order two "academic" books from Amazon—books he was not allowed to keep—enough to warrant summary judgment in favor of defendants. The fact that over the four-year span at issue he was able to procure two books that he was not even allowed to keep hardly "confirms that Plaintiff had access to its very broad range of literature, including books for veterinary and religious study." App.1616–17, App.1730. The district court's holding on the second *Turner* factor was erroneous and cannot stand.

3. There is no substantial burden on the prison.

The third and fourth *Turner* factors focus on the burden on the prison to accommodate the inmate's First Amendment interests (including the impact an accommodation would have on guards, other

prisoners, and prison resources) and the existence of available alternatives. Both of those factors weigh in favor of Whitehead.

As for administrative burden, the undisputed facts establish that the prison already inspects all incoming mail—including from approved vendors—to ensure there is no contraband or banned content. It would thus cause no additional burden or result in any delay in mail delivery for the prison to inspect mail from unapproved vendors. App.1374.

As for available alternatives to the vendor restrictions, there are many. The district court did not explain why an expanded approved vendor list would not be a readily available option to the prison. And the court completely dismissed a policy it already knew the prison could adopt: allowing prisoners to purchase books and articles directly from the publisher. The court knew that was a feasible and available alternative because the prison adopted that policy (if in an incomplete way). The district court's blind deference to the prison officials as to the burden of expanding the vendor list or pursuing other alternative channels for Whitehead to obtain the information he seeks cannot be squared with *Turner*.

Finally, the district court was wrong to suggest that considering these alternatives would convert the fourth *Turner* factor into a "least restrictive alternative" test. App.1732. To the contrary, *Turner* requires that courts consider alternatives in context and weigh them against the other factors. That is not a "least restrictive alternative" test by any measure, but it does mean that the court must at least consider and weigh the availability of alternatives—something the district court refused to do.

B. The Prison's Restrictions On Internet Articles And Newspaper Clippings Are Unconstitutional.

As if it were not bad enough that the prison restricts access to books to only a few preferred vendors, the prison also prohibits prisoners from received newspaper clippings and printed internet articles, notwithstanding that many valuable information sources are available only online. The district court's analysis of the validity of these restrictions was fundamentally flawed and directly contrary to *Jacklovich v. Simmons*, 392 F.3d 420, 426 (10th Cir. 2004), as well as numerous decisions in the courts of appeals invalidating similar restrictions. *See, e.g.*, *Allen v. Coughlin*, 64 F.3d 77, 81 (2d Cir. 1995) (reversing district court's summary judgment grant on publishers-only

restriction for newspaper clippings); *Lindell v. Frank*, 377 F.3d 655, 660–61 (7th Cir. 2004) (affirming injunction blocking publishers' only rule as to newspaper clippings and photocopies of same); *Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148, 1152 (9th Cir. 2004) (affirming district court's decision that prison's "internet-generated mail policy" violated the plaintiff's First Amendment rights).

1. Defendants' asserted security interests do not support the absolute ban on receiving internet articles and newspaper clippings.

As with the vendor restrictions, the prison's ban on receiving internet articles and newspaper clippings is not rationally connected to any legitimate security interests and is not content neutral. Deference to prison authorities does "not mean that every prison regulation is insulated from review no matter what the facts may be." *Jacklovich*, 392 F.3d at 426.

The prison does not dispute that myriad sources of news, ideas, and information are available exclusively online, yet the prison bars prisoners from accessing those sources. App.176, 179, 182, 549, 560, 1069, 1486, 1626. The prison tries to suggest that this burden is not much of a burden at all, because prisoners may obtain hard copies of online articles directly

from publishers. But that defies reality. Some of the most iconic news sources of our day are no longer available in print: *US News & World Report*, extensive online content from the *New York Times*, Wikipedia, and more. These publications, and countless more, are completely off-limits to those incarcerated at the prison.

The prison's newspaper-clippings restrictions also meaningfully curtailed prisoners' access to information. The prison and its employees rejected mailed newspaper clippings, and prisoners could receive news articles only by purchasing them directly from the publisher. App.1069–70, 1281, 1283, 1292, 1299, 1485–86, 1651–52. But publications generally do not sell singular articles, and prisoners cannot afford to purchase every publication on a routine basis, even if they could know in advance which papers would have the articles they wanted to read. App.1744–45 ("Plaintiff lacked access to newspaper articles not available from the publisher.").

Nor do defendants' purported rationales—preventing copyright violations and the introduction of contraband—justify such a draconian restriction. App.1068–69, 1485.

First, purely speculative, unsubstantiated concerns about copyright compliance cannot be the sole support for banning prisoners from accessing vast quantities of information. For starters, copyright concerns are generally only triggered by commercial acts—not the "fair use" exception for "scholarship" or "research" as Whitehead sought here. 17 U.S.C. § 107. Defendants also produced absolutely no evidence that most of, or even many of, the internet articles or newspaper clippings prisoners received would cause copyright problems. One obvious example: Whitehead wanted to access Wikipedia, which is open source, and plainly not a copyright issue.

Nor do defendants explain why "copyright issues," App.1001, 1069, are a legitimate penological concern, let alone one that justifies such a gargantuan burden on speech. The district court (repeating the magistrate judge) concluded without further analysis that "[e]nsuring compliance with federal copyright law is unquestionably a legitimate, neutral penological purpose." App.1560. But whatever deference is accorded to prison officials based on "professional judgment[]," App.1564, cannot apply to a concern entirely unmoored from prison security or management. Defendants are not charged with enforcing copyright law,

nor are they the copyright holders—the asserted interest is purely abstract. And as Whitehead explained below, App.1620–22, 1626, defendants never told him that potential copyright violation fueled their confiscation of his mail. Nor do defendants now point to contemporaneous documents detailing that concern as a rationale for the prison's policies. Instead, the agita over preventing copyright violations appeared mid-litigation. *See* App.1001, 1069.

The speculative concern about copyright materials is insufficient under controlling law. In ensuring that *Turner* balancing does not devolve into blind deference, the Supreme Court has emphasized that judgments must be "experience-based," *Beard*, 548 U.S. at 533, and not rely on speculation or involve "exaggerated response[s]," *Thornburgh*, 490 U.S. at 418 (citing *Turner*, 482 U.S. at 90–91). The Supreme Court has most recently emphasized that this framework ensures that the deck is not inexorably stacked against free speech rights within prison walls. *See Beard*, 548 U.S. at 535. Under that directive, courts routinely require that prison officials come forth with concrete, experience-based evidence

to support infringements on protected speech.[9] Defendants provided no support for their copyright concern at all.[10]

Second, defendants' purported security concerns are at best disputed and at worst wholly unfounded. *Jacklovich*, 392 F.3d at 430. Once again, the prison provides no evidence that allowing access to online sources or newspaper clippings would increase the amount of contraband or coded messages through prisoner mail. And the singling out of newspaper clippings and internet articles is arbitrary. *See Jackson v. Pollard*, 208 F.App'x 457, 461 (7th Cir. 2006); *see also Khan*, 808 F.App'x at 608. As Whitehead attested, "written correspondence, word processed correspondence and printed e-mails" could also be used to smuggle contraband or send coded messages but were not prohibited. App.1506–

[9] *See, e.g.*, *Turner v. Cain*, 647 F.App'x 357, 367–68 (5th Cir. 2016) (holding that a warden's failure to "produce[] evidence of any legitimate penological interest" in restricting parts of the plaintiff's speech was enough for the plaintiff to prevail on the first element of his claim); *Wolf v. Ashcroft*, 297 F.3d 305, 308 (3d Cir. 2002) (holding that a prison must "'demonstrate' that the policy's drafters 'could rationally have seen a connection' between the policy and the interests" through "more than a conclusory assertion" to succeed).

[10] That prior decisions in similar issues have not dealt with a proffered copyright justification, as the district court notes, supports rather than detracts from Whitehead's argument (because it undercuts the seriousness of the alleged problem defendants seek to solve). *See* App.1741.

10, 1629–30. And as this Court has explained regarding newspaper clippings from non-publishers, "the justification in preventing contraband from such sources seems inapplicable" because the documents "likely comprising only part of one or two newspaper pages at most, may not be much different than a letter from a relative." *Khan*, 808 F.App'x at 608.

Further, defendants' inconsistent enforcement of these restrictions creates issues of fact regarding the governmental interest at play. The district court's conclusion that evidence of inconsistent *enforcement* was irrelevant to the *promulgation* of the restrictions is contrary to controlling law. App.1741–42. In *Turner* the Supreme Court explained that a prisoner can prevail by showing that a prison policy is "an exaggerated response to [stated] security objectives," 482 U.S. at 97–98, and concluded that where prison officials have not thought it necessary to impose the challenged restriction consistently, the validity of the prison's rationale is called into question. Similarly, in *Thornburgh*, the Court stated that inconsistency in application of a rule bears on "the adequacy of the regulations as applied, and [should be] considered on remand." 490 U.S. at 417 n.15,

Here, Whitehead raised disputed material facts regarding the enforcement of the policy—specifically that the mailroom supervisor and mailroom staff told him that if his family removed the web addresses from the internet articles mailed to him, so that it was "not obvious" they were from the internet, they would "probably be allowed." App.1375, 1623, 1628–29; *see also* App.1376. Where, as here, the factual record shows that prison officials thought so little of the need for the rule that they neglected to enforce it, and indeed gave prisoners tips on how to evade it, their actions are relevant to the issue of whether there was enough need to justify the rule's incursion on Whitehead's First Amendment rights.

2. Whitehead did not have alternative means to exercise his First Amendment rights.

Defendants cannot make any serious argument that Whitehead had an alternative means of accessing online-only publications and news clippings in light of prison policy. The record is overwhelmingly clear that receipt of internet-only publications was completely verboten under the prison's policies. Prisoners were not allowed to access the internet, and so the simplest option to read online news sources was barred. App.817 ("Offenders … are **not** permitted access to the Internet, nor are they

permitted to obtain access to the Internet through third parties."). And the prison barred receipt of internet articles, making the ban on online information complete. And Whitehead presented substantial evidence that the same is true for certain newspapers (because prisoners cannot always access all the information they want through subscriptions, for financial and logistical reasons). In light of that, defendants needed to show that, nevertheless, Whitehead could access the information he sought through other sources. The district court, again, relied on the contested conclusion that Whitehead "had access to a broad range of publications." App.1744–45. For the same reasons that justification does not answer the restrictions on vendors at the prison, it also provides no legitimate alternative answer to the flat ban on online publications and newspaper clippings. *See supra* at section I.A.

3. Accommodating Whitehead's First Amendment rights would not unduly harm prison administration.

Disputed material facts exist as to the remaining *Turner* factors—the risk of harm to prison administration and defendants' assertions regarding the need to screen incoming mail for potential copyright violations. Those issues are for the trier of fact. The same is true

regarding alternative approaches—Whitehead provided a number of suggestions, including giving prisoners access to tablets, or simply allowing mailed newspaper clippings or internet articles. The district court erred in taking those questions away from the jury and deciding as a matter of law that a flat ban on internet articles and newspaper clippings can be justified in light of the prison's asserted interests.

C. The Prison's Restrictions on Hardcover Books Are Unconstitutional.

The prison's restrictions on prisoners' ability to possess hardcover books—even those received directly from publishers or vendors—are constitutionally invalid under Supreme Court and this Court's precedents. This Court recently held that "a complete ban on hardcover books" would "likely violate the First Amendment" because "limiting contraband" is "not reasonably related to a restriction on hardcover books" that are sent "by publishers" directly. *Khan*, 808 F.App'x at 608. For many of the same reasons this Court found persuasive in *Khan*, the prison's hardcover book ban cannot be sustained.

1. Defendants' asserted security interests do not support the ban on hardcover books.

As this Court's decision in *Khan* made clear, the prison's interest in preventing contraband is not sufficient to justify a complete ban on

hardcover books, even those received directly from the publisher. *See id.* That is manifestly correct.

Both the Supreme Court's decision in *Bell v. Wolfish* and this Court's decision in *Jones v. Salt Lake County* approved of schemes limiting prisoners' purchases of books to those shipped directly from the publisher. *Jones*, 503 F.3d at 1158; *Wolfish*, 441 U.S. at 549. Here, by contrast, Whitehead cannot receive hardcover books *even if* they are shipped directly from the publisher. As this Court explained, "one of the usual justifications, for a ban on hardcover books or newspapers—limiting contraband—is not reasonably related to a restriction on hardcover books or newspapers sent by publishers." *Khan*, 808 F.App'x at 608 (citation omitted).

Indeed, the Court need look no further than defendants' exception to its policy for college textbooks to see that the prison does not really think that hardcover books pose an insurmountable security risk. Defendants actually pass those books out and allow prisoners to keep them in their possession for as long as they were in classes. App.565–66, 1484–85. Defendants' own policy therefore establishes that, at least for some vendors or publishers, hardcover books do not pose a meaningful

security risk. That dents the district court's determination that "technological advances" have made it possible for criminals to impersonate publishers as a "front to send contraband and/or illicit content." App.1543. The district court never explained why the same would not be true with respect to hardcover college textbooks, or with respect to soft-cover books. And in all events, to support summary judgment, evidence "must be based on more than mere speculation, conjecture, or surmise." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).

In short, speculative concerns about contraband cannot justify a ban on hardcover books under *Turner*. That is enough to enter summary judgment in favor of *plaintiff*, but at a minimum creates a fact question sufficient to preclude summary judgment in favor of defendants.

2. Whitehead did not have alternative means to exercise his First Amendment right to information.

Although the prison's utter failure to connect its near-flat ban on hardcover books to its purported security interests is enough for this Court to reverse the district court, the remaining *Turner* factors also point in favor of invalidating the prison's hardcover book policy. The

principal argument defendants make in defense of the ban on hardcover books is that prisoners can obtain the information in hardcover books by simply removing the cover. But just because defendants claim that an alternative exists does not mean that it does. *See Beerheide*, 286 F.3d at 1187. That is exactly the case here.

Setting aside that removing the cover of hardcopy books renders them practically unusable, prisoners are not permitted to take the covers off their books under New Mexico Corrections Department Policy CD150201(E)(6)(b). That policy plainly provides that "inmates found in possession of property that has been altered … will receive a disciplinary report and said property will be confiscated." App.1601; *see* App.1093–97, 1355, 1364, 1368, 1392, 1409, 1412–13.

That policy renders the prison's purported alternative completely illusory. An "alternative" with a penalty is no alternative at all. *See, e.g.*, *Beerheide*, 286 F.3d at 1187. That could not be truer in the prison context, where violation of any regulations (big or small) is a serious matter. The rule on its face contemplates at least a disciplinary report, which can lead to loss of privileges. App.1097, 1355, 1364, 1368, 1392, 1409, 1412–13,

1601. And the policy also calls for the confiscation of the property—a consequence that completely nullifies the supposed alternative.

Unable to reconcile that policy with defendants' arguments, the district court ultimately retreated to the position that it was unlikely that the policy would have been enforced against Whitehead. Accordingly, the court dismissed Whitehead's fears as "wholly speculative." App.1545–46. But the district court was able to reach that conclusion only by crediting defendants' statements that *they* did not consider hardcover books with covers removed to be altered property and discrediting Whitehead's fears. But judges may not make credibility determinations at summary judgment. *See Hansen v. PT Bank Negara Indon. (Persero)*, 706 F.3d 1244, 1251 (10th Cir. 2013). Viewed in the light most favorable to the non-moving party, there is at a minimum a genuine dispute as to whether petitioner had alternative means of accessing the information he sought in the hardcover books, and the district court erred in finding this dispute "immaterial." App.1545.

3. Accommodating Whitehead's First Amendment rights would not unduly harm prison administration.

This Court's precedent makes clear that accommodating Whitehead's First Amendment rights would not unduly burden the prison system. *See Khan*, 808 F.App'x at 608. Indeed, numerous other prisons have allowed hardcover books from publishers, or been admonished for failing to do so. *See, e.g.*, *Jackson v. Elrod*, 881 F.2d 441, 444–46 (7th Cir. 1989) (affirming denial of qualified immunity to jailers because they were on notice "under clearly-established case law" that ban on hardcover books without regard for alternative means of access was unconstitutional); *Kincaid v. Rusk*, 670 F.2d 737, 744 (7th Cir. 1982) (holding that "[m]aintenance of security and discipline do not justify the wholesale prohibition of … hardbound books"). That limited concession to the First Amendment would not create substantial administrative burdens on the prison.

That is especially so in light of security measures the prison already takes on incoming mail, and the availability of greater security measures should the prison desire. Whitehead attested to the availability of other alternatives—searching the hardcover books received in the mail (like by

drug dog or metal detector, which the prison already had and used). App.1361–63, 1368–69, 1373, 1388, 1410–11, 1413–14, 1426, 1431, 1498, 1603. But the district court simply ignored them, holding that it "must defer to Defendant Martinez's professional judgment." App.1721. Not so. The Supreme Court has cautioned that "the deference owed prison authorities" does not "make[] it impossible for prisoners or others attacking a prison policy …. ever to succeed." *Beard*, 548 U.S. at 535. The district court erred in blindly deferring to prison officials and failing to consider available alternatives, all of which support reversal.

* * *

Each of the aforementioned restrictions is invalid on its own terms, but the combination makes the First Amendment violation undeniable. Prisons cannot, through piecemeal regulation, do what they cannot do outright——create "a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. And the district court was obligated to consider the cumulative impact of regulations on the information Whitehead and other prisoners could access. *See Thornburgh*, 490 U.S. at 414 (addressing cumulative impact of regulations on incoming information).

Here, Whitehead presented overwhelming evidence that the cumulative, real-world impact of defendants' policies and procedures was to deny him the ability to access important information he needed to better himself spiritually and intellectually, to remain current on his veterinary training so he can be gainfully employed when he exits prison, and to write articles about prison conditions and issues. As he explained in his amended Complaint, "[d]enying [him] access to hardback books, Internet information, newspaper articles, and restricting him to an extremely limited vendor list prevents him from receiving a wide array of material that would allow Plaintiff to better himself; and formulate his own ideas and the world around him." App.572–73; *see also, e.g.*, *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 639 (7th Cir. 2005) (concluding that post-incarceration employment prospects are a "proper goal"). The district court's complete failure to consider the cumulative impact of the prison's severe restrictions cannot be sustained, and this Court should reverse the grant of summary judgment to defendants on all of Whitehead's First Amendment access-to-information claims.

II. There Are Genuine Issues Of Material Fact As To Whether Warden Martinez Transferred Whitehead In Retaliation For His Exercise of His First Amendment Rights.

Finally, the district court erred in overriding the magistrate judge's recommendation and granting summary judgment to Martinez on Whitehead's retaliatory-transfer claim. It is well-settled that "prison officials may not retaliate against or harass an inmate because of the inmate's exercise of his right of access to the courts." *Gee v. Pacheco*, 627 F.3d 1178, 1189 (10th Cir. 2010). "This principle applies even where the action taken in retaliation would be otherwise permissible." *Smith v. Maschner*, 899 F.2d 940, 948 (10th Cir. 1990). "While a prisoner enjoys no constitutional right to remain in a particular institution and generally is not entitled to due process protections prior to such a transfer, prison officials do not have the discretion to punish an inmate for exercising his first amendment rights by transferring him to a different institution." *Frazier v. Dubois*, 922 F.2d 560, 561–62 (10th Cir. 1990).

To state a First Amendment retaliation claim, a plaintiff must allege three elements: (1) that the plaintiff was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary

firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct. *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007).

Under this Court's precedent, an inference that the defendant's response was "substantially motivated" by protected conduct arises where (1) the defendants were aware of the protected activity; (2) the plaintiff directed his complaint to the defendants' actions; and (3) the alleged retaliatory act "was in close temporal proximity to the protected activity." *Gee*, 627 F.3d at 1189. A prisoner may also show retaliatory motive via "specific, objective facts from which it could plausibly be inferred" that the reason given for the adverse act "was pretextual." *Banks v. Katzenmeyer*, 645 F.App'x 770, 773 (10th Cir. 2016).

To start, the temporal proximity of the retaliatory actions following service of Whitehead's lawsuit on Martinez is stunning. Martinez was served on February 3, 2017, (Doc 142-1 at 10), and initiated a transfer within two months—"sometime between" February 23, 2017 and March

21, 2017.[11] App.1486, App.1569, App.1749. Whitehead attested that retaliatory acts (including shutdown of the church, and his transfer out of the honor pod) began on February 23, 2017, culminating in the transfer request on March 21. App.578, 1659. That temporal proximity alone supports a strong inference supporting Whitehead's assertion that Martinez retaliated against him for filing this lawsuit. *Gee*, 627 F.3d at 1189; *Stetzel v. Holubek*, 661 F.App'x 920, 922 (10th Cir. 2016) ("Stetzel therefore has provided sufficient evidence of retaliatory motive through the temporal proximity of the grievances to the incident report."); *Proctor v. UPS*, 502 F.3d 1200, 1209 (10th Cir. 2007) (similar).

But on top of the timing, substantial evidence confirms that Warden Martinez's purported rationale for the transfer—that Whitehead used a pastor to sneak mail out of the prison—was pretextual.

First, Whitehead presented corroborating evidence that he did not sneak mail out of the prison. App.847–49. This evidence is not

[11] As the magistrate judge correctly concluded, "Although Defendant Martinez attested that he 'became aware of' Plaintiff's state court complaint on December 21, 2016, there is presently no record evidence that he knew anything about its contents—such as the fact that it included claims against him and the allegations supporting those claims—before February 3, 2017." App.1071.

insubstantial—Whitehead presented evidence from Pastor Perry Koehne (who Warden Martinez claims helped Whitehead break prison rules) and his senior pastor, Timothy Brock. These declarations highlight two disputed material facts: (1) whether or not Whitehead broke prison rules by giving letters to Pastor Koehne; and (2) what date Warden Martinez could have learned about the alleged rule violation.

Each presents a question for the finder of fact, rendering summary judgment inappropriate. *See Ortiz v. Torgenson*, 2021 WL 1327795, at *9 (10th Cir. Apr. 9, 2021) (reversing district court's grant of summary judgment in light of disputed material facts regarding retaliatory transfer); *Allen v. Avance*, 491 F.App'x 1, 6 (10th Cir. 2012) (same); *Penrod v. Zavaras*, 94 F.3d 1399, 1405 (10th Cir. 1996) (same). Critically, Whitehead attested that retaliation began in February 2017, App.578, but Pastors Koehne and Brock attested that the meeting with Martinez (where he allegedly learned of the rule breaking) was much later, on March 22, 2017.

Timeline matters here—if Martinez did not meet with the pastors until *after* the retaliatory acts began, then it cannot possibly serve as the rationale for those acts. That is why the magistrate judge concluded that

"[t]here is no indication in the record that [the pastors] met with Defendant Martinez more than once to discuss whether Plaintiff used Mr. Koehne to pass mail out of the [prison]; thus, they appear to be referring to the same meeting"—*i.e.*, the meeting on March 22, 2017. App.1570 n.37. Assessing the credibility and memories of those witnesses is reserved for the finder of fact, and makes summary judgment inappropriate.

As the magistrate judge explained: "there is evidence that, on the current record, could support an inference of pretext. Specifically, on the current record, "Mr. Koehne's and Mr. Brock's declarations permit the inference that Mr. Koehne denied allowing Plaintiff to use him to pass mail and thus that Defendant Martinez did not request Plaintiff's transfer in good faith on the belief that Plaintiff used Mr. Koehne in this fashion." App.1571.

Second, Whitehead himself attested that he did not conspire with the pastors to break prison policy. App.692–93, 1357, 1418. Whitehead's attestations at the very least create triable issues of fact for a jury: "In resolving a motion for summary judgment [the Court] ordinarily must accept sufficiently specific assertions in an affidavit as true." *Stetzel*, 661

F.App'x at 922 (reversing grant of summary judgment on retaliatory-transfer claim).

In rejecting the magistrate judge's decision, the district court engaged in impermissible fact-finding, relying on Warden Martinez's October 5, 2020 affidavit in which he contradicted the testimony of Pastors Koehne and Brock, and claimed that "Pastor Koehne admitted to passing mail for Plaintiff" and therefore he had "a good faith belief that Plaintiff violated OCPF and NMCD policies." App.1583–84, App.1751.

"Material factual disputes cannot be resolved at summary judgment based on conflicting affidavits." *Hall*, 935 F.2d at 1111. As this Court has explained: "[A]n official's retaliatory intent rarely will be supported by direct evidence of such intent." *Mimics, Inc. v. Vill. of Angel Fire*, 394 F.3d 836, 848 (10th Cir. 2005). A defendant accused of illegal retaliation has little incentive to admit to it. *See Allen*, 491 F.App'x at 6 ("Avance claims he was responding to Allen's disruptive behavior and not to Allen's protected activities. But the district court found, and we agree, Allen alleged sufficient facts, with support in the record, to create a genuine question of material fact about Avance's motivation."). Instead, Warden Martinez's declaration emphasizes the presence of disputed

material facts—who said what in that conversation and whether it motivated what happened next is for the finder of fact, not summary judgment.[12]

Nor can the district court's reasoning find safe harbor in the legal standard here—whether Warden Martinez believed his reasons to be true and acted in good faith upon those beliefs. *Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007). This good-faith standard does not transform Warden Martinez's statement about his state of mind into gospel. Under the district court's reasoning, and counter to this Court's precedent, a defendant's statement of mental state could render "immaterial" evidence of facts to the contrary. App.1750 n.34 (finding Whitehead's "evidence that he in fact never gave Mr. Koehne letters to take out of the OCPF" was "immaterial"). Instead, Whitehead could (and did) provide contradictory evidence suggesting Warden Martinez's purported

[12] The district court's conclusion that Warden Martinez's affidavit controlled is particularly concerning in light of the discovery posture of this case. Whitehead was unable to conduct discovery. App.1041–47. The only evidence at issue, therefore, was that provided directly by Whitehead, including his written testimony, and that provided by defendants. And, regardless, "a court … cannot resolve material disputed factual issues by accepting the [*Martinez*] report's factual findings when they are in conflict with pleadings or affidavits." *Hall*, 935 F.2d at 1109.

rationale for the transfer was pretextual. *See Ortiz*, 2021 WL 1327795, at *6. That is enough to overcome summary judgment.

To the extent defendants attempt to revive their argument that Warden Martinez is entitled to summary judgment because, although he requested Whitehead's transfer, he lacked the authority to approve it, App.1580–81, that argument can be swiftly rejected. *See* App.1755 n.38. To sustain a retaliation claim, a plaintiff must show "responsive action that would chill a person of ordinary firmness from continuing to engage in" constitutionally protected activity. *Gee*, 627 F.3d at 1189 (internal quotation marks omitted). This Court routinely finds that transferring a prisoner can constitute unconstitutional retaliation. *See, e.g.*, *id.*; *Fogle v. Pierson*, 435 F.3d 1252, 1263 (10th Cir. 2006); *Dubois*, 922 F.2d at 561. Any daylight between actual transfer, and a prison warden instituting proceedings likely to result in that transfer, is minimal.

CONCLUSION

For the reasons outline above, this Court should reverse the district court's grant of summary judgment to defendants, and remand with instructions to grant summary judgment to Whitehead on his First Amendment access-to-information claims, and proceed to trial on his retaliatory-transfer claim. In the alternative, the Court should vacate the judgment below in its entirety and remand the whole of this case for trial.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the important issues presented, counsel respectfully requests oral argument. Oral argument may assist the Court in fully considering the issues presented in this case, which involve detailed record analysis, as well as complex questions of constitutional law that are of paramount importance not only to Whitehead, but also to other prisoners throughout the Tenth Circuit who are denied access to information under color of state law.

Respectfully submitted,

/s/Kate H. Epstein

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October 13, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,758 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

3. Under Tenth Circuit Rule 28A(h), I also hereby certify that electronic files of this brief and accompanying addendum have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

October 13, 2021

/s/Kate H. Epstein
Kate H. Epstein

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

a. all required privacy redactions have been made;

b. the hard copies submitted to the clerk are exact copies of the ECF submission;

c. The digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Word 2016, and according to the program is free of viruses.

October 13, 2021

/s/Kate H. Epstein
Kate H. Epstein

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/Kate H. Epstein
Kate H. Epstein

ATTACHMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MONTE WHITEHEAD,

Plaintiff,

v. Civ. No. 17-275 MV/KK

MANAGEMENT AND TRAINING CORPORATION *et al.*,

Defendants.

MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER is before the Court on: (a) Plaintiff's Motion for Partial Summary Judgment against MTC Defendants (Doc. 124) ("Plaintiff's Motion"), filed November 21, 2019; and, (b) OCPF Defendants' Motion for Summary Judgment (Doc. 143) ("Defendants' Motion"), filed April 3, 2020. By an Order of Reference (Doc. 148), filed May 11, 2020, this matter was referred to the undersigned to conduct hearings if warranted, and to perform any legal analysis required to recommend an ultimate disposition of the case. The Court, having reviewed the parties' submissions, the record, and the relevant law, and being otherwise fully advised, proposes to find that Plaintiff's Motion is not well taken and recommends that it be DENIED. The Court further proposes to find that Defendants' Motion is well taken in part and recommends that it be GRANTED IN PART and DENIED IN PART as set forth herein.

I. Introduction

This case arises out of Plaintiff's incarceration at the Otero County Prison Facility ("OCPF") from March 2013 to April 2017. (Doc. 119 at 3; Doc. 142-1 at 2.) While many of Plaintiff's claims have been dismissed or stricken, the following claims remain: (1) Plaintiff's First Amendment claims against Defendants Management and Training Corporation ("MTC"),

James Frawner, Richard Martinez, and FNU Azuna challenging these Defendants' restrictions on Plaintiff's possession and receipt of hardbound books, (Doc. 119 at 29-33); (2) Plaintiff's First Amendment claims against Defendants MTC, Frawner, Martinez, Azuna, FNU Moreno, and FNU Barba (collectively, "Defendants") challenging Defendants' requirement that Plaintiff purchase publications from approved vendors, (*id.* at 36-38); (3) Plaintiff's First Amendment claims challenging Defendants' restrictions on Plaintiff's receipt of internet printouts and newspaper articles, (*id.* at 14-19); and, (4) Plaintiff's First Amendment retaliatory transfer claim against Defendant Martinez. (*Id.* at 43-50; *see also* Doc. 135.) In the cross-motions presently before the Court, Plaintiff seeks summary judgment on the first three claims and Defendants seek summary judgment on all of them.[1] (Docs. 124, 143.)

II. Procedural History

Plaintiff, a *pro se* prisoner, commenced this action by filing a Complaint for Damages for Violations of Civil and Constitutional Rights and for Declaratory and Injunctive Relief in state court on November 14, 2016. (Doc. 1-1.) At the time, Plaintiff was housed at the OCPF.[2] (*Id.* at 3.) On March 1, 2017, a former defendant removed the case to this Court. (Doc. 1.) In a Memorandum Opinion and Order dated September 27, 2017, United States District Judge Robert Junell dismissed Plaintiff's federal claims under Federal Rule of Civil Procedure 12(b)(6), denied Plaintiff's motions to amend his complaint and supplement the pleadings, declined to exercise supplemental jurisdiction over his state law claims, and remanded the state law claims to state

[1] Plaintiff also sought summary judgment on his claims based on the First Amendment's religion clauses and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.* (Doc. 124; *see* Doc. 119 at 64-75.) However, these claims have been stricken because Plaintiff included them in his amended complaint without the Court's leave or the opposing parties' written consent. (Doc. 135 at 5-7.) The portion of Plaintiff's Motion seeking summary judgment on these claims should therefore be denied as moot.

[2] Plaintiff was transferred to the Guadalupe County Correctional Facility ("GCCF") on April 17, 2017, (Doc. 22 at 1; Doc. 119 at 44-45), and to the Penitentiary of New Mexico on January 7, 2020. (Doc. 131 at 1.)

court. (Doc. 91.) On February 12, 2018, Plaintiff appealed the Court's decision as to his federal claims but did not challenge the remand of his state law claims. (Doc. 99; Doc. 110-1 at 2.)

In an Order and Judgment entered on April 2, 2019, the Tenth Circuit affirmed this Court's decision in part and reversed it in part, remanding the case "for further proceedings consistent with [its] order and judgment." (Doc. 110-1 at 23.) In many respects, the Tenth Circuit affirmed this Court's dismissal of Plaintiff's federal claims. (*See generally id.*) However, the Tenth Circuit vacated the dismissal of Plaintiff's claims that "certain defendants violated his First Amendment rights by preventing him from receiving hardback books, books from non-approved vendors, information from the internet, and newspaper articles sent by mail," and remanded these claims "to the district court for consideration in the first instance." (*Id.* at 5, 8.) The appellate court noted that this Court's consideration on remand could "include allowing the prison-official defendants to proffer a legitimate penological reason for the restrictions." (*Id.* at 8.)

The Tenth Circuit also held that this Court improperly denied Plaintiff's Motion for Leave to Amend the Complaint (Doc. 23) and Motion to Supplement the Pleadings (Doc. 60). (Doc. 110-1 at 22-23.) Specifically, the Tenth Circuit found that Plaintiff's retaliatory transfer claim "may be a proper claim for relief," noting that "prison officials may violate a prisoner's First Amendment rights when they transfer the prisoner because the prisoner exercised those rights."[3] (*Id.* at 22 & n.15.) Accordingly, the Tenth Circuit reversed and remanded the "denial of [Plaintiff's] motion to amend the complaint and his motion to supplement the pleadings to the district court for evaluation consistent with this order and judgment." (*Id.* at 22-23.)

[3] However, the Tenth Circuit found "that the district court did not err in denying [Plaintiff] leave to expand on his equal-protection claim or to add unspecified exhibits." (*Id.* at 22 n.16.)

On remand, the Court granted Plaintiff's motions to amend and supplement, permitting Plaintiff to "file an amended complaint reasserting his First Amendment claims and asserting a First Amendment retaliatory transfer claim." (Doc. 112 at 6.) Plaintiff timely filed an Amended and Supplemental Complaint for Damages of Civil and Constitutional Rights and for Declaratory and Injunctive Relief on October 10, 2019. (Doc. 119.) Plaintiff's amended complaint exceeded the scope of the amendments the Court gave him leave to file in several respects. (Doc. 135 at 3-4.) As such, on March 6, 2020, the Court entered an order striking the unauthorized portions of the amended complaint. (*Id.* at 6-7.)

On November 21, 2019, Plaintiff moved for partial summary judgment. (Doc. 124.) Defendants responded in opposition to Plaintiff's Motion on December 3, 2019, and Plaintiff filed a reply in support of it on December 19, 2019. (Docs. 127, 128.)

On March 4, 2020, the Court ordered Defendants to file a *Martinez* Report addressing, with limited exceptions, "all of Plaintiff's allegations against the OCPF Defendants, as well as any defenses raised in the OCPF Defendants' answers that they wish to pursue." (Doc. 134 at 4.) In its Order, the Court notified the parties that

> the Court may use the *Martinez* Report in deciding whether to grant summary judgment for or against any party, whether by motion or *sua sponte*. As such, the parties (including Plaintiff in his response or objections to the *Martinez* Report) are urged to submit whatever proof or other materials they consider relevant to Plaintiff's claims against the OCPF Defendants and the OCPF Defendants' defenses in the pleadings they file pursuant to this Order.

(*Id.* at 6-7.)

Defendants filed their *Martinez* Report on April 2, 2020. (Doc. 142.) Plaintiff filed a response in opposition to the report on May 26, 2020, and Defendants filed a reply in support of it on June 15, 2020. (Docs. 149, 151.) At the Court's direction, Defendants also filed a Supplemental

Martinez Report on August 14, 2020, to which Plaintiff responded on September 2, 2020. (Docs. 156, 159.)

Defendants moved for summary judgment in conjunction with their original *Martinez* Report on April 2, 2020. (Doc. 143.) Plaintiff responded in opposition to Defendants' Motion on June 1, 2020, and Defendants replied in support of it on June 15, 2020. (Docs. 150, 152.) The parties' cross-motions for summary judgment are thus fully briefed and ready for resolution.

III. Analysis

A. Legal Standards Governing Summary Judgment

Under Federal Rule of Civil Procedure 56, this Court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of showing that "there is an absence of evidence to support the nonmoving party's case." *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once the movant meets this burden, Rule 56(c) requires the non-moving party to designate specific facts showing that there is a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993).

"An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citation omitted). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute,

or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). For purposes of summary judgment, a prisoner's complaint is treated as evidence if it alleges specific facts based on the prisoner's personal knowledge and has been subscribed under penalty of perjury. 28 U.S.C. § 1746; *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991). "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Id.* However, "it is not the proper function of the district court to assume the role of advocate for the *pro se* litigant." *Id.* at 1110.

When reviewing a motion for summary judgment, the Court must keep in mind three principles. First, the Court's role is not to weigh the evidence, but to assess the threshold issue of whether a genuine issue of material fact exists, requiring a trial. *Anderson*, 477 U.S. at 249. Second, the Court must draw all reasonable inferences in favor of, and construe all evidence in the light most favorable to, the non-moving party. *Hunt v. Cromartie*, 526 U.S. 541, 552-53 (1999). Finally, the Court cannot decide issues of credibility. *Anderson*, 477 U.S. at 255. "[T]o survive the . . . motion, [the nonmovant] need only present evidence from which a jury might return a verdict in his favor." *Id*. at 257.

B. Plaintiff's First Amendment Claims Regarding Access to Information

1. *Legal Standards*

Prisoners have a First Amendment right "to receive information." *Jacklovich v. Simmons*, 392 F.3d 420, 426 (10th Cir. 2004). However, prison officials may curtail this right to further legitimate penological interests. *Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989). Indeed, "prisoners' rights may be restricted in ways that would raise grave First Amendment concerns outside the prison context." *Gee v. Pacheco*, 627 F.3d 1178, 1187 (10th Cir. 2010) (quoting *Thornburgh*, 490 U.S. at 407) (quotation marks omitted). "Running a prison is an inordinately

difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 84–85 (1987). Consequently, in considering the constitutional validity of prison regulations, courts should "accord deference to the appropriate prison authorities." *Id.* at 85.

To effectuate the principle that "prison administrators, and not the courts, are to make the difficult judgments concerning institutional operations," the Supreme Court has held that, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89 (alterations omitted). The *Turner* Court delineated four factors courts must consider in determining whether a prison regulation satisfies this requirement.[4] *Id.* at 89-91.

First, "there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89 (quotation marks omitted); *Jones v. Salt Lake Cty.*, 503 F.3d 1147, 1153 (10th Cir. 2007). This factor "is the most important; . . . it is not simply a consideration to be weighed but rather an essential requirement." *Al-Owhali v. Holder*, 687 F.3d 1236, 1240 (10th Cir. 2012) (quotation marks omitted); *see also Parkhurst v. Lampert*, 339 F. App'x 855, 860 (10th Cir. 2009) ("The first consideration is mandatory."). This factor is also "multifold," requiring both that the regulation be rationally related to a governmental objective, and that the governmental objective be "legitimate and neutral." *Thornburgh*, 490 U.S. at 414. The rational relationship test is met "where the logical connection between the regulation and the asserted goal" is not "so remote as to render the policy arbitrary or irrational." *Turner*,

[4] The Tenth Circuit applies the four-factor *Turner* analysis to both written and unwritten restrictions, and in the context of both jails and prisons. *Jones v. Salt Lake Cty.*, 503 F.3d 1147, 1155 n.7, 1158 n.13 (10th Cir. 2007).

482 U.S. at 89-90. The neutrality requirement, in turn, is met "[w]here a regulation furthers an important or substantial government interest unrelated to the suppression of expression." *Jones*, 503 F.3d at 1153.

The second *Turner* factor "is whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. "Where other avenues remain available for the exercise of the asserted right, courts should be particularly conscious of the measure of judicial deference owed to corrections officials in gauging the validity of the regulation." *Jones*, 503 F.3d at 1153 (quoting *Turner*, 482 U.S. at 90). The alternative means "need not be ideal; they need only be available." *Id.* (alterations omitted). "[E]ven if not the best method from the inmate's point of view, if another means of exercising the right exists, the second *Turner* factor does not undercut the challenged restriction." *Wardell v. Duncan*, 470 F.3d 954, 961–62 (10th Cir. 2006) (quotation marks omitted). Moreover, "'the right' in question must be viewed sensibly and expansively." *Thornburgh*, 490 U.S. at 417. Also, though "[t]he absence of any alternative . . . provides some evidence that the regulations are unreasonable," it "is not conclusive." *Beard v. Banks*, 548 U.S. 521, 532 (2006) (quotation marks and alterations omitted).

The third *Turner* factor requires courts to consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90; *Jones*, 503 F.3d at 1153. "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90; *see also Jones*, 503 F.3d at 1153-54 ("[W]here the right in question can only be exercised at the cost of significantly less liberty and safety for everyone else, guards and other

prisoners alike, the courts should defer to the informed discretion of corrections officials[.]") (quoting *Thornburgh*, 490 U.S. at 418) (quotation marks omitted).

Finally, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation," whereas "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns." *Turner*, 482 U.S. at 90 (quotation marks omitted); *Jones*, 503 F.3d at 1154. The Supreme Court has emphasized that

> [t]his is not a least restrictive alternative test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Turner, 482 U.S. at 90–91 (citation and quotation marks omitted); *Jones*, 503 F.3d at 1154.

The *Turner* analysis "requires courts, on a case-by-case basis, to look closely at the facts of a particular case and the specific regulations and interests of the prison system in determining whether prisoner's constitutional rights may be curtailed." *Wardell*, 470 F.3d at 961; *see also Boles v. Neet*, 486 F.3d 1177, 1181 (10th Cir. 2007) (*Turner* analysis "requires close examination of the facts of each case"); *Beerheide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002) (*Turner* analysis must be considered "on a case-by-case basis"). While prison officials must "show more than a formalistic logical connection between a regulation and a penological objective," *Beard*, 548 U.S. at 535, ultimately "[t]he burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *Jones*, 503 F.3d at 1159. The Court will consider the parties' cross-motions for summary judgment

on Plaintiff's First Amendment claims challenging Defendants' restrictions on his access to information in light of the foregoing standards.[5]

2. *Analysis*[6]

a. Hardbound Books

The Court will first consider Plaintiff's claims that Defendants violated his First Amendment rights by restricting his possession and receipt of hardbound books during his incarceration at the OCPF. (Doc. 119 at 29-33.) When Plaintiff arrived at the OCPF in March 2013, he was ordered to remove the hard covers from six hardbound books he brought with him from Northeastern New Mexico Correctional Facility ("NENMCF") or send the books home. (Doc. 119 at 31; Doc. 123 at 15.) Plaintiff "ruined" four books trying to tear off the covers and sent the remaining two home. (Doc. 119 at 31.)

There is no record evidence that Plaintiff filed an informal complaint, formal grievance, or grievance appeal about these six books.[7] (*See generally* Docs. 1-1, 119, 142-11.) However, in November and December 2014, Plaintiff did file an informal complaint, formal grievance, and grievance appeal contending that the New Mexico Corrections Department ("NMCD") policy banning inmates' receipt of hardbound books through the mail was "not right" and unconstitutional. (Doc. 119 at 135, 137, 139.) In response, OCPF personnel informed Plaintiff

[5] In their Motion, Defendants do not argue that any individual Defendant is entitled to summary judgment because he or she had no personal involvement in restricting Plaintiff's access to information in the manner alleged. (*See generally* Doc. 143.) Thus, the Court will consider Plaintiff's First Amendment access-to-information claims against Defendants collectively.

[6] The facts recited in this section are undisputed except as otherwise noted. Further, the Court resolves all genuine, material factual disputes, construes all cognizable evidence, and draws all reasonable inferences in Plaintiff's favor.

[7] Plaintiff did file an informal complaint and formal grievance alleging that one of these books went missing during his transfer to OCPF; upon investigation, the book was found in his mother's possession. (Doc. 142-11 at 53, 55.) In their Motion, Defendants do not argue that Plaintiff failed to exhaust his administrative remedies with respect to his First Amendment access-to-information claims based on the six hardbound books he brought with him from the NENMCF. (*See generally* Doc. 143.)

that hard book covers were a prohibited item, and hardbound books were not allowed in accordance with NMCD Policy 151201. (*Id.* at 136, 138.)

On December 8, 2015, Plaintiff received two hardbound books from either Barnes & Noble or Amazon and was again told to remove the hard covers if he wanted to keep them. (Doc. 1-1 at 179; Doc. 119 at 31; Doc. 150 at 2, 8.) He elected to send the books home. (Doc. 119 at 31.) Plaintiff filed a "Form I-60" and an informal complaint regarding these books in December 2015. (*Id.* at 153-54.) In response, OCPF personnel again cited to NMCD Policy 151201 to explain why Plaintiff was told to remove the books' hard covers. (*Id.* at 155.) The record does not reflect that Plaintiff filed a formal grievance or grievance appeal about these books.[8]

Under NMCD Policy 151201(E)(6)(e) in effect at the relevant times, hardbound books were cause for rejection of incoming mail. (Doc. 142-1 at 4; Doc. 142-3 at 6-7.) From March 2013 to October 2016, the OCPF Inmate Handbook provided that "hard-back books can be received only if the covers are removed," (Doc. 142-10 at 11, 31, 51, 69); and, from October 2016 to April 2017, it provided that "[n]o hardbound books are permitted."[9] (*Id.* at 84.) A memorandum from "D. Simmons thru Warden Frawner" stated that, "[e]ffective October 3, 2013 inmates will no longer be able to accept 'HARD COVER BOOKS' from outside vendors or family members. Any Hard Cover Books delivered will need to be sent home at inmates [sic] expense." (Doc. 119 at 140.) In short, "inmates [were] not permitted to possess hardback books or receive hardback

[8] Again, in their Motion, Defendants do not contend that Plaintiff failed to exhaust his administrative remedies with respect to his First Amendment access-to-information claims based on the two hardbound books he ordered from Barnes & Noble or Amazon. (*See generally* Doc. 143.)

[9] The OCPF Inmate Handbook in effect from October 2016 to April 2017 also provided that "[i]nter-library loans are . . . available only in paperback books." (Doc. 142-10 at 87.) It is unclear whether inmates were permitted to receive hardbound books through the interlibrary loan process before October 2016. Plaintiff declared that, when the books he requested through inter-library loan were hardbound, Defendant Azuna rejected them; however, in an affidavit attached to Plaintiff's response to Defendants' Supplemental *Martinez* Report, inmate James Martin attested that, on unspecified dates, the OCPF allowed him to receive two hardbound books via interlibrary loan. (Doc. 119 at 32; Doc. 159 at 29.)

books in mail" during Plaintiff's incarceration at the OCPF, unless the hard covers were removed. (Doc. 142-1 at 6.)

There was, however, an exception to the OCPF's hardbound book ban. Specifically,

> [d]uring the period of Plaintiff's incarceration at OCPF, books provided for certain college courses, including an automotive class, were only available in hardback. Therefore, OCPF allowed limited access to hardback books for these classes. Still, none of these books were delivered to State inmate[s] through the mail. OCPF provided them to those inmates enrolled in these classes.

(*Id.*) As an inmate college facilitator/tutor at the OCPF, Plaintiff handed out hardbound college textbooks to inmates, including himself, taking courses at Mesalands Community College. (Doc. 119 at 32.) Also, the OCPF ordered hardbound books for an automotive class from Amazon. (*Id.* at 33; Doc. 159 at 29.) Inmates kept these hardbound college textbooks with their property and had broad access to them. (Doc. 150 at 5.)

For the reasons explained below, the Court proposes to find that there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law with respect to Plaintiff's First Amendment claims challenging the foregoing restrictions on his access to hardbound books during his incarceration at the OCPF. Addressing the first *Turner* factor, *i.e.*, whether the restrictions are rationally related to a legitimate, neutral penological purpose, *Turner*, 482 U.S. at 89, Defendants proffered that

> [h]ardback books received through the mail present a security risk for the smuggling of contraband such as drugs and weapons, and otherwise require a more involved security review for content given the length of information at issue. Hardback books are difficult to search effectively, yet they are particularly good for smuggling contraband such as, money, drugs, and weapons that can easily be secreted in the bindings. The contents of mailed books must also be reviewed for sexually explicit content and material that may support/induce violence, as well as information that could assist an inmate with escape, provide information about banned substance manufacturing and trafficking, and/or provide information about other activities which may threaten security and safety at OCPF.

(Doc. 142-1 at 3-4.)

"[P]rotecting prison security [is] a purpose . . . central to all other corrections goals." *Thornburgh*, 490 U.S. at 415 (quotation marks omitted). Thus, there is no question that the proffered purpose of Defendants' prohibition of hardbound books received through the mail—*i.e.*, to prevent the introduction of contraband and disruptive content into the OCPF—is legitimate and neutral.

Whether there is a rational relationship between this purpose and the restriction at issue is a more nuanced question. In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Supreme Court held that "a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores" was "a rational response by prison officials to an obvious security problem." *Id.* at 550. In so holding, the *Bell* Court observed that "hardback books are especially serviceable for smuggling contraband into an institution[. M]oney, drugs, and weapons easily may be secreted in the bindings," yet they are "difficult to search effectively." *Id.* at 551. However, the *Bell* Court also appeared to accept the defendant warden's testimony that "there is relatively little risk that material received directly from a publisher or book club would contain contraband, and therefore, the security problems are significantly reduced without a drastic drain on staff resources." *Id.* at 549.

In *Jones*, in turn, the institution at issue "prohibit[ed] inmates from possessing hardback books," and "allow[ed] inmates to obtain paperback books from the jail library and, with permission, the publisher," as well as, for a time, from a local Barnes & Noble store via public donation. 503 F.3d at 1156-58. The plaintiff in that case did not contest the institution's hardbound book ban but did "challenge the paperback book policy." *Id.* at 1156. The Tenth Circuit found that the facility's paperback book policy was rationally related to the legitimate, neutral penological purpose of promoting prison security. *Id.* at 1158. In so holding, the court observed

that "[a]llowing inmates to purchase paperback books only from the publisher prevents contraband from being smuggled into the jail and lessens the administrative burden on jail personnel who must inspect each book." *Id.*

In an unpublished opinion, the Tenth Circuit recently stated that "[t]he implication of [*Bell*] and *Jones* is that a complete ban on hardcover books . . . would likely violate the First Amendment." *Khan v. Barela*, 808 F. App'x 602, 608 (10th Cir. 2020). The *Khan* court explained that, according to *Bell* and *Jones*, "one of the usual justifications . . . for a ban on hardcover books . . . —limiting contraband—is not reasonably related to a restriction on hardcover books . . . sent by publishers." *Id.* (citation and quotation marks omitted). Implicitly recognizing the case-by-case, fact-intensive nature of the *Turner* analysis, however, the *Khan* court observed that the "defendants may be able to support this or other justifications for prohibiting [the plaintiff] from receiving" hardbound books. *Id.* The *Khan* defendants had not yet had the opportunity to justify their hardbound book restrictions, because the decision on appeal was the district court's *sua sponte* dismissal of the plaintiff's claims on a preliminary review of the pleadings. *Id.* at 604.

In this case, Defendants have presented Defendant Martinez's undisputed testimony that restrictions on hardbound books received directly from publishers, vendors, and book clubs is necessary to further the penological purpose of limiting contraband and disruptive content because an alleged publisher, vendor, or book club could be "a phony being used as a front to send contraband and/or illicit content."[10] (Doc. 142-1 at 7-8.) Since 1979, when the Supreme Court

[10] By "illicit content," Defendant Martinez referred to "sexually explicit content and material that may support/induce violence, as well as information that could assist an inmate with escape, provide information about banned substance manufacturing and trafficking, and/or provide information about other activities which may threaten security and safety at OCPF." (Doc. 142-1 at 4.) Regulations designed to prevent the introduction of such material into a prison are considered "neutral" under *Turner* because they "further[] an important or substantial government interest unrelated to the suppression of expression." *Jones*, 503 F.3d at 1153; *Thornburgh*, 490 U.S. at 415. "In other words, where prison officials draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are neutral." *Jones*, 503 F.3d at 1153 (quotation marks omitted). At any rate, none of the policies at issue here restricted publications based on their content; on the contrary, all of the challenged restrictions

issued its decision in *Bell*, the advent of the internet and other technological advances have made it vastly easier and cheaper for an average individual to publish or sell a book or successfully pose as a book publisher, vendor, or club. In this millennium, "publishers only" rules may indeed provide considerably less protection from contraband smuggling than they used to. Thus, and in light of *Bell*, *Jones*, and *Khan*, Defendant Martinez's undisputed testimony persuades the Court that Defendants' restrictions on hardbound books—including books received directly from publishers, vendors, and book clubs—are rationally related to their legitimate, neutral penological purpose of limiting contraband and disruptive content.

Although Plaintiff asserts that Defendants "have not pointed to a single incidence" where contraband was smuggled into the OCPF through a counterfeit publisher, vendor, or book club, (Doc. 150 at 7), they are not required to do so to show a rational relationship between their restrictions and the penological purpose they have proffered.

> To show a rational relationship between a regulation and a legitimate penological interest, prison officials need not prove that the banned materials actually caused problems in the past, or that the materials are likely to cause problems in the future. In other words, empirical evidence is not necessarily required. Moreover, it does not matter whether we agree with the defendants or whether the policy in fact advances the jail's legitimate interests. The only question that we must answer is whether the defendants' judgment was rational, that is, whether the defendants might reasonably have thought that the policy would advance its interests.

Sperry v. Werholtz, 413 F. App'x 31, 40 (10th Cir. 2011) (citations and quotation marks omitted). Here, Defendants reasonably believed that prohibiting inmates' receipt of hardbound books—even those purportedly sent from a publisher, vendor, or book club—would significantly reduce the introduction of contraband and disruptive content into the OCPF.

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were factually as well as technically content neutral. Thus, the *Thornburgh* Court's suggestion that prison officials should make "individualized" determinations about whether to restrict particular *content* simply does not apply here, where Defendants restricted particular *formats* and *sources*. *See Thornburgh*, 490 U.S. at 416.

Plaintiff also argues that the OCPF's hardbound book restrictions are not rationally related to the proffered purpose of smuggling prevention because inmates were more likely to smuggle prohibited material into the prison in other ways. (Doc. 149 at 12, 18; Doc. 150 at 4, 6-7, 24; Doc. 159 at 4.) However, even assuming that these assertions are true and Plaintiff has personal knowledge of them,[11] there is no First Amendment rule that prison regulations must only address the most pressing security risks facing an institution. Such a rule would contravene the Supreme Court's instruction that "prison administrators, and not the courts, are to make the difficult judgments concerning institutional operations." *Turner*, 482 U.S. at 89 (alterations omitted). Rather, the test is simply whether "defendants might reasonably have thought that the policy would advance [the prison's] interests." *Sperry*, 413 F. App'x at 40.

Plaintiff next contends that Defendants' selective restriction of hardbound books "shows the security concern is irrational or fabricated." (Doc. 150 at 25-26; Doc. 159 at 6-8.) However, Defendants proffered a rational explanation for treating hardbound college textbooks differently from other hardbound books.

> [T]extbooks come directly from the college to OCPF. They are not mailed to inmates or provided directly to inmates.[12] These college textbooks . . . are not OCPF property and must be returned to the college at the completion of the semester or when an inmate is transferred . . . . Therefore, neither OCPF nor the inmate can[] alter the book. Since OCPF's security concern largely stems from concerns about the smuggling of contraband from the outside, . . . the controlled manner in which college textbooks are admitted into OCPF and distributed to the inmates satisfies OCPF's security concerns.

(Doc. 156 at 12-13.)

[11] Plaintiff has not, for obvious reasons, tried to demonstrate personal knowledge of the relative difficulty of various methods of smuggling prohibited items into the OCPF.

[12] Likewise, the automotive textbooks that the OCPF ordered from Amazon were not mailed or provided directly to inmates, but rather were received and distributed by the institution. (*See* Doc. 119 at 33; Doc. 159 at 29.)

Interestingly, Plaintiff suggests that he could have smuggled contraband into the OCPF using textbooks from Mesalands Community College because he knows people who work or are students there. (Doc. 159 at 6-7.) But Plaintiff does not explain how he or any other inmate could have ensured that the OCPF would distribute a particular textbook containing contraband *to him*. In this regard, Plaintiff's argument actually highlights why "the controlled manner in which college textbooks are admitted into OCPF and distributed to the inmates satisfies OCPF's security concerns" in a way that hardbound books inmates received directly through the mail would not. (Doc. 156 at 12-13.)

Defendants' restriction on hardbound books in an inmate's possession upon arrival at the OCPF is also rationally related to the legitimate, neutral penological purpose of smuggling prevention. In their Supplemental *Martinez* Report, Defendants proffered a rational explanation for treating these books in the same manner as books inmates received through the mail. "The intake process at OCPF is the same for all inmates[,] whether transferred from another facility or not. Upon arrival at OCPF, inmates and their belongings must be thoroughly searched." (Doc. 156 at 10-11.) Defendants "[could not] rely on prior searches" to keep inmates, staff, and the public safe, because contraband sometimes came from other institutions as well as the outside world. (*Id.* at 11.) Indeed, Plaintiff admits as much. (*See* Doc. 159 at 3, 13.) One pertinent example is that "some inmates," including Plaintiff, "would arrive to OCPF from other facilities with prohibited hardback books," which, per NMCD policy, they "should [not] have had . . . in their possession in the first place."[13] (Doc. 156 at 11.)

In sum,

[13] Plaintiff argues that other institutions were justified in permitting inmates to receive hardbound books in violation of NMCD Policy 151201 because that policy is unconstitutional. (Doc. 159 at 3.) However, for the reasons explained herein, the Court disagrees.

> [a]n inmate bringing a hardbound book into OCPF from either an intake or a transfer poses the same security risks as receiving hardbound books from the mail. Hardbound books, mailed or in inmate's possession, present a security risk for the smuggling of contraband such as drugs and weapons, and otherwise require a more involved security review for content given the length of information at issue.

(*Id.*) For the foregoing reasons, the logical connection between Defendants' hardbound book restrictions and their legitimate, neutral penological purpose is not "so remote as to render the policy arbitrary or irrational," *Turner*, 482 U.S. at 89-90, and the restrictions therefore satisfy the first *Turner* factor.

The parties vigorously dispute a number of factual questions related to the second *Turner* factor, *i.e.*, whether Plaintiff had alternative means of exercising the constitutional right at issue. *Turner*, 482 U.S. at 90. Thus, for example, Defendant Martinez attested that the OCPF library contained about 19,000 books, while Plaintiff presented his own and other inmates' declarations estimating that the library contained from 3,000 to 10,000 books.[14] (*Compare* Doc. 142-1 at 5 with Doc. 149 at 15, 40, 47, 49, 53, 54; Doc. 150 at 4-5.) Likewise, Defendant Martinez attested that, "[u]sing the interlibrary loan system, inmates can request a book if OCPF does not have it available and the book will arrive at OCPF from another library." (Doc. 142-1 at 6.) However, Plaintiff declared that it took him about ten requests to obtain one book through the interlibrary loan process, and other inmates attested to similar response rates. (Doc. 149 at 7, 16, 50, 54; Doc. 150 at 17.) Finally, Defendant Martinez attested that, during Plaintiff's incarceration at the OCPF, there were five approved vendors from whom Plaintiff could order paperback books, including Barnes & Noble, which offered more than a million titles. (Doc. 142-1 at 7.) Plaintiff, in contrast,

[14] Pursuant to Federal Rule of Civil Procedure 56(d), Plaintiff declared that he needs additional discovery in the form of OCPF "[l]ibrary book inventories from 2013-2017 . . . to show [the] actual number of books [the] library contained." (Doc. 150 at 32.) However, for the reasons discussed in this section and in Section III.B.2.b., *infra*, even if these inventories were to show that the OCPF library contained only 3,000 books—the lowest of the estimates offered and below Plaintiff's own estimates of 5,000 to 10,000 books, (Doc. 149 at 15, 40; Doc. 150 at 4-5)—this would not create a genuine issue of material fact preventing the entry of summary judgment in Defendants' favor on Plaintiff's First Amendment access-to-information claims. The Court therefore denies Plaintiff's request for this information.

declared that, "[f]or the majority of the time . . . there were only two book distributors," *i.e.*, Edward R. Hamilton Booksellers ("Hamilton Booksellers") and Christian Book Distributors ("Christian Book"), and that Barnes & Noble was added "shortly" before he was transferred from the OCPF to another facility. (Doc. 149 at 39; Doc. 150 at 17.)

All of these factual disputes, however, are rendered immaterial by a fact that the parties do *not* dispute, *i.e.*, that Plaintiff could have kept his hardbound books—both those with which he arrived and those he later received in the mail—had he removed the books' hard covers. (*See, e.g.*, Doc. 1-1 at 179; Doc. 119 at 31; Doc. 142-1 at 6; Doc. 150 at 2, 8); *cf. Jackson v. Elrod*, 881 F.2d 441, 446 (7th Cir. 1989) ("The legitimate state interests here could have been satisfied . . . by simply removing the covers of the hard-bound books."). Although Plaintiff declared that removing the covers from four of his hardbound books "ruined" them, (Doc. 119 at 31), he did not declare—and it would have been highly implausible for him to do so—that removing the covers made them illegible. The Court can certainly understand why this option was not appealing to Plaintiff; however, to satisfy *Turner*, alternative means to exercise a constitutional right need not be "ideal," *Jones*, 503 F.3d at 1153, or "the best method from the inmate's point of view," *Wardell*, 470 F.3d at 961–62 (quotation marks omitted); rather, they simply need to be available. Here, there is no dispute that Defendants offered Plaintiff alternative means to access the information he claims was only available in hardbound books. (*See* Doc. 150 at 6; Doc. 159 at 6.)

Plaintiff argues that these alternative means were nevertheless unavailable to him because OCPF Policy 3-305 defines "nuisance contraband" to include "[a]ny authorized property that has been altered or damaged," and NMCD Policy CD150201(E)(6)(b) provides that "[i]nmates found in possession of property that has been altered . . . will receive a disciplinary report and said property will be confiscated." (Doc. 142-4 at 8; Doc. 142-7 at 1; *see* Doc. 149 at 4, 13, 17, 41 *and*

Doc. 150 at 2, 5-6.) According to Plaintiff, he could not have removed the covers from his hardbound books without violating these policies. (*Id.*) However, both the OCPF Inmate Handbooks and the grievance responses Plaintiff attached to his amended complaint show that the OCPF did not consider hardbound books with the covers removed to be nuisance contraband or altered property. In short, Plaintiff's argument fails to create a genuine issue of material fact regarding whether he could have removed the covers from hardbound books he wished to keep or receive during his incarceration at the OCPF. Thus, Defendants' restrictions on Plaintiff's access to hardbound books also satisfy the second *Turner* factor.

Addressing the third *Turner* factor, *i.e.*, the impact on the OCPF of accommodating Plaintiff's First Amendment rights as he requested, *Turner*, 482 U.S. at 90, Defendants presented evidence that,

> [i]f inmates were permitted to receive hardback books in the mail, there would be an increased administrative burden involved in checking each hardback book for contraband, such as needles and illicit substances. This increased administrative burden could result in the need to hire additional staff or purchase screening equipment such as metal/drug detectors to accomplish these additional security checks.

(Doc. 142-1 at 4.) Defendants further note that the increased administrative burden could have delayed other inmates' receipt of mail, which per NMCD policy must be delivered in a timely manner. (Doc. 151 at 6.)

Attempting to refute Defendants' evidence of a significant ripple effect if the OCPF had accommodated his First Amendment rights as requested, Plaintiff first argues that permitting inmates to receive hardbound books directly from publishers, vendors, and book clubs would not have increased the administrative burden on the OCPF to inspect incoming mail for contraband and disruptive content, because Defendants already had a policy of inspecting "all vendor acquired

books and publications."[15] (Doc. 149 at 18.) However, in so arguing, Plaintiff fails to acknowledge or dispute Defendants' evidence that hardbound books are more difficult to inspect than other types of publications, due to the ease with which items may be concealed in their bindings and, often, their greater length. (Doc. 142-1 at 3-4.)

Plaintiff also maintains that Defendants could have searched hardbound books received in the mail quickly and easily using drug dogs and metal detector wands, and that "the validity of a book can be checked in a matter of minutes by checking the ISBN on a web site that sells books or with the Library of Congress."[16] (Doc. 149 at 10-12, 17-18, 22, 37; Doc. 150 at 3-4, 6-7, 19, 24; Doc. 159 at 5.) However, though courts must draw all reasonable factual inferences in favor of prisoners opposing summary judgment, they must also

> distinguish between evidence of disputed facts and disputed matters of professional judgment. In respect to the latter, [the Court's] inferences must accord deference to the views of prison authorities. Unless a prisoner can point to sufficient evidence regarding such issues of judgment to allow him to prevail on the merits, he cannot prevail at the summary judgment stage.

Beard, 548 U.S. at 529–30 (citation omitted).

In addition, Plaintiff's assertions run afoul of the rule that testimonial evidence must be based on personal knowledge. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602. Because the Court must defer to Defendants' professional judgment regarding the ease and speed with which they could have adequately searched and checked the validity of incoming hardbound books using drug

[15] Plaintiff also hypothesizes that permitting inmates to receive hardbound books directly from publishers, vendors, and book clubs would not have increased the OCPF's administrative burden because inmates would have brought in and ordered only a "small" number of hardbound books. (Doc. 159 at 5.) However, he offers no evidence to support this hypothesis, which is speculative and regarding which he has shown no personal knowledge. *See Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1201 (10th Cir. 2015) ("Information presented in [an] affidavit [on summary judgment] must be based on personal knowledge.") (quotation marks omitted).

[16] The Court notes that such a "check" would not allow prison officials to verify the identity of the person or entity who purportedly sent the book.

dogs, metal detectors, and the internet, and because Plaintiff has demonstrated no personal knowledge on these points, his declarations fail to create a genuine issue of material fact.[17] In short, the third *Turner* factor also supports the constitutional validity of Defendants' restrictions on Plaintiff's access to hardbound books.

Finally, with respect to the fourth *Turner* factor, *i.e.*, whether there was a ready alternative that would have fully accommodated Plaintiff's rights at *de minimis* cost to the OCPF, *Turner*, 482 U.S. at 90-91, Plaintiff again suggests either using drug dogs and metal detectors to inspect hardbound books, or allowing inmates to receive hardbound books directly from publishers, vendors, and book clubs. (Doc. 150 at 3-4, 6, 24.) However, for the reasons already discussed, Defendants have shown that these alternatives would have imposed significant costs on the OCPF, and Plaintiff has failed to demonstrate a genuine factual dispute on this point. Therefore, the fourth *Turner* factor also weighs in Defendants' favor with respect to their restrictions on Plaintiff's access to hardbound books.

In sum, viewing the record evidence in the light most favorable to Plaintiff and drawing all reasonable inferences in his favor, each *Turner* factor supports the constitutional validity of the challenged restrictions on Plaintiff's possession and receipt of hardbound books. Because there is no genuine issue of material fact, Defendants are entitled to summary judgment on Plaintiff's claims that Defendants violated his First Amendment rights by restricting his access to hardbound books during his incarceration at the OCPF. For the same reasons, Plaintiff is not entitled to summary judgment on these claims.

b. Approved Vendor List

[17] Plaintiff's declaration that he has seen prison guards use drug dogs to quickly and easily search the OCPF library, (Doc. 150 at 24), does not show personal knowledge of how long it would take and how difficult it would be to adequately search hardbound books received through the mail, if only for the obvious reason that books arriving from the outside would require a more thorough review and search than books already in the prison library.

Plaintiff next claims that Defendants violated his First Amendment rights by requiring him to purchase publications from approved vendors. (Doc. 119 at 36-38.) From before March 2013 to October 2016, the OCPF used an approved vendor list and only permitted inmates to purchase newspapers, books, and magazines from approved vendors. (Doc. 156 at 13; Doc. 159 at 8-9.) From October 2016 to after April 2017, the OCPF "maintained its approved vendor list" but also allowed inmates to purchase publications from publishers.[18, 19] (*Id.*)

On November 14, 2014, Plaintiff filed an informal complaint asserting that the OCPF's use of an approved vendor list was "not right." (Doc. 1-1 at 174.) On November 18, 2014, G. Valle responded that the warden had approved the list but it was "subject to change." (*Id.* at 175.) On November 19, 2014, Plaintiff filed a formal grievance regarding this issue, (*id.* at 176), and on November 28, 2014, L. Eason responded by citing to an NMCD policy requiring inmate personal property to be purchased through the prison canteen or an approved vendor. (*Id.* at 177.) L. Eason added that a committee to determine approved vendors was "held each year," "inmates are allowed to request new vendors," and the next such committee "should be held around January or February." (*Id.*) L. Eason suggested that if Plaintiff "would like to submit requests to have a

[18] In his April 2, 2020 affidavit, Defendant Martinez used the terms "vendor" and "publisher" interchangeably and did not indicate whether the OCPF's policies with respect to vendors and publishers were different and, if so, for what time periods. (Doc. 142-1 at 7-9.) However, in his August 13, 2020 affidavit, Defendant Martinez clarified his testimony on these points. (Doc. 156 at 13.) The Court notes that, according to the latter affidavit, the OCPF stopped using an approved vendor list in July 2017, and now simply requires inmates to receive publications directly from a vendor or the publisher. (*Id.*)

[19] In his response to Defendants' Supplemental *Martinez* Report, Plaintiff alleges that Defendants did not respond to his "numerous requests" for leave to purchase publications directly from publishers—presumably after the October 2016 policy change, though he does not specify the dates of his requests—and that the policy change was illusory. (Doc. 159 at 8-9, 21.) However, Plaintiff did not make these factual allegations under penalty of perjury and thus, the Court cannot consider them as evidence in ruling on the parties' summary judgment motions. 28 U.S.C. § 1746; *Hall*, 935 F.2d at 1111. Moreover, even if the Court were to accept these allegations as true, they would not change the Court's recommended disposition, because Defendants' approved vendor restrictions both before and after October 2016 satisfy the *Turner* standard, as further discussed herein.

vendor authorized," he should do so at that time. (*Id.*) On December 2, 2014, Plaintiff filed a grievance appeal regarding this issue. (*Id.* at 178.)

In May 2016, Plaintiff ordered three paperback books from Prison Legal News ("PLN"), which Defendants rejected because PLN was not an approved vendor.[20] (Doc. 1-1 at 45; Doc. 76 at 2, 18-20; Doc. 119 at 150-52; *see* Doc. 150 at 2-3, 8, 21.) There is no record evidence that Plaintiff filed an informal complaint, formal grievance, or grievance appeal regarding these books.[21] The OCPF's approved vendor restrictions also prevented Plaintiff from purchasing certain magazines he wished to read. (Doc. 150 at 21.)

The parties dispute whether Plaintiff could have effectively requested that a new vendor be added to the approved vendor list or sought the warden's exceptional approval of particular purchases from non-approved vendors. Defendant Martinez attested that

> [a]ny inmate can request that a certain publisher be added to the approved publisher's list. Moreover, specific books, publications, and/or orders are considered and approved even if the publisher does not appear on the approved publishers list.

(Doc. 142-1 at 8.) However, Plaintiff declared that Defendants did not respond to his requests to add approved vendors or for exceptional approval of specific purchases. (Doc. 149 at 22; Doc. 150 at 8.) Plaintiff also declared that, in his last year at the OCPF, a memorandum informed

[20] Although Plaintiff declared that Defendants rejected the books he ordered from PLN "*only* because PLN was not an approved vendor," (Doc. 150 at 3 (emphasis added)), he later declared that Defendants rejected these books because they contained "legal information specifically aimed to help prisoners." (*Id.* at 8.) Plaintiff has presented no evidence demonstrating personal knowledge that Defendants rejected the books he ordered from PLN because of their contents, nor has he presented any evidence that the OCPF had a policy or practice of rejecting legal information designed to help prisoners. As such, his conclusory declaration fails to create a genuine factual dispute on this point. *See Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1201 (10th Cir. 2015) (courts "do not consider conclusory and self-serving affidavits" on summary judgment).

[21] Again, in their Motion, Defendants do not contend that Plaintiff failed to exhaust his administrative remedies with respect to his First Amendment claims based on Defendants' rejection of the three books he ordered from PLN. (*See generally* Doc. 143.)

inmates that the approved vendor process would be competitive, *i.e.*, the addition of a new vendor would require the removal of an old one. (Doc. 149 at 21.)

The parties also dispute—and incidentally display some confusion regarding—who was on the approved vendor list from March 2013 to April 2017. Defendant Martinez attested that, from 2013 to 2016, the following book vendors were approved: (a) Troll and Toad; (b) Christian Book; (c) Barnes & Noble; (d) Al Anwar; and, (e) Islamic Bookstore.[22] (Doc. 142-1 at 7.) According to Defendant Martinez, Christian Book had a 500,000-book catalog and Barnes & Noble offered over a million titles. (*Id.*) The OCPF Inmate Handbooks from January 2013 through September 2016 also listed Troll and Toad, Christian Book, Barnes & Noble, Al Anwar, and Islamic Bookstore as approved vendors. (Doc. 142-10 at 11, 31, 51, 69.) However, the October 2016 handbook listed the OCPF's approved book vendors as Hamilton Booksellers, Wisdom Publications, Wyrd's Way Publications, Islamic Bookstore, Asatru, Christian Book, and Triarco. (*Id.* at 84.)

Plaintiff, in turn, declared that, during most of his incarceration at the OCPF, there were only two approved book vendors, *i.e.*, Hamilton Booksellers and Christian Book, and that Barnes & Noble was added "shortly" before his departure.[23] (Doc. 149 at 39.) However, Plaintiff also

[22] Plaintiff declared that, under Rule 56(d), he should be allowed to discover the catalogs of other approved vendors listed in Defendant Martinez's affidavit to show that these other vendors do not sell publications. (Doc. 149 at 19; Doc. 150 at 32.) However, Defendant Martinez's affidavit is unambiguous on this point; *e.g.*, he expressly indicated that "Noc Bay" sells "Native American arts & crafts" and "Union Supply" sells "care packages for inmates." (Doc. 142-1 at 7.) There is thus no need for Plaintiff to obtain these vendors' catalogs, and the Court denies Plaintiff's request.

[23] It is unclear whether Plaintiff made this declaration based on personal knowledge, or rather based on *Heard v. Marcantel*, in which the parties did not dispute for summary judgment purposes that Hamilton Booksellers and Christian Book were the only approved book vendors at the OCPF at some point between July 2013 and March 2017. *See Heard v. Marcantel*, Civ. No. 15-516 MCA/SMV, 2017 WL 3412094, at *1, *4 (D.N.M. Mar. 16, 2017). In so finding, the *Heard* court relied on a June 2016 memorandum the plaintiff submitted, in which A. Waters stated that the OCPF was then using only Hamilton Booksellers and Christian Book "for ordering books for inmate population" but was "in the process of adding more vendors." *Heard v. Marcantel*, Civ. No. 15-516 MCA/SMV, Doc. 63 at 17 (D.N.M. filed Jul. 13, 2016). In *Heard*, the defendants elected not to present any evidence to clarify or contradict this memorandum, likely because the plaintiff in that case was not challenging the OCPF's use of an approved vendor list. *Id.*, Doc. 67 at 4-5 (D.N.M. filed Jul. 27, 2016). Here, however, Defendants have made a different choice, and have thereby created a very different record with respect to the approved vendors and publishers from whom inmates could order publications between March 2013 and April 2017. The Court therefore declines to rely on the *Heard* decision

declared that the two hardbound books he received in the mail in December 2015 were either from Amazon or Barnes & Noble and that they came from an approved vendor. (Doc. 1-1 at 179; Doc. 119 at 31; Doc. 150 at 2, 8, 18.) Thus, Plaintiff has necessarily admitted that one of these mass market booksellers was an approved vendor by December 2015. Plaintiff also attached to his amended complaint an undated memorandum listing Barnes & Noble, Christian Book, Scroll Publishing, Hamilton Booksellers, Hastings, Al Anwar, and Islamic Bookstore as approved book vendors. (Doc. 119 at 149.) In addition, he declared that the OCPF maintained a list of forty approved magazines.[24] (Doc. 150 at 2, 17.)

On the foregoing record, there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law on Plaintiff's First Amendment claims challenging Defendants' approved vendor restrictions. Addressing the first *Turner* factor, Defendants proffered that these restrictions

> help[ed] OCPF to focus its resources needed to review books that are mailed to inmates. Anyone who prints a book could potentially be a "publisher." As such, these policies help[ed] to protect against the situation whereby any number of "publishers" can send any number of books to inmates at OCPF, overtaxing OCPF's resources and jeopardizing the effectiveness of OCPF's security reviews.

(Doc. 142-1 at 7-8.) He further clarified that,

> [a]lthough books from approved publishers [were] also reviewed for contraband and content, having approved publishers help[ed] to alleviate the security concern that the alleged "publisher" is a phony being used as a front to send contraband and/or illicit content.

(*Id.* at 7.)

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in determining whether there are genuine issues of material fact regarding Plaintiff's constitutional challenge to Defendants' approved vendor restrictions. *See generally Wardell*, 470 F.3d at 961 (*Turner* analysis must be done on "case-by-case basis"). However, as is required on summary judgment, the Court will resolve its doubts regarding whether Plaintiff's declaration is based on personal knowledge in Plaintiff's favor in deciding Defendants' Motion.

[24] Plaintiff attached to his amended complaint a purported copy of a November 2016 memorandum listing the OCPF's approved magazines. (Doc. 119 at 148.) However, this document is inauthentic on its face and the Court will not rely on it.

Again, "protecting prison security [is] a purpose . . . central to all other corrections goals." *Thornburgh*, 490 U.S. at 415 (quotation marks omitted). Thus, there is no question that the proffered purpose of Defendants' approved vendor restrictions—*i.e.*, to limit the introduction of contraband and disruptive content into the OCPF—is legitimate and neutral.

Plaintiff again argues that the challenged restrictions are not rationally related to Defendants' proffered objective because inmates were more likely to use other methods to smuggle contraband or disruptive content into the OCPF. (*See, e.g.*, Doc. 149 at 19; Doc. 150 at 7.) Again, however, even assuming that Plaintiff's assertions are true and based on personal knowledge, there is no First Amendment rule that a prison policy is only proper if it addresses the most acute security risks. Rather, again, the test is simply whether "defendants might reasonably have thought that the policy would advance [the prison's] interests." *Sperry*, 413 F. App'x at 40. Here, Defendants reasonably believed that their approved vendor restrictions would limit the introduction of contraband and disruptive content into the OCPF via books, magazines, and newspapers. Therefore, the challenged restrictions are rationally related to the legitimate, neutral penological objective of smuggling prevention and satisfy the first *Turner* factor. *See also Payne v. Friel*, No. 2:04-CV-844-DAK, 2007 WL 1100420, at *8 (D. Utah Apr. 10, 2007), *aff'd in relevant part*, 266 F. App'x 724 (10th Cir. 2008) ("[T]here is an obvious connection between the prison's approved vendor policy and the governmental interest in preventing contraband from entering the prison.").

Regarding the second *Turner* factor, *i.e.*, whether Plaintiff had alternative means of exercising the right at issue, *Turner*, 482 U.S. at 90, and construing genuinely disputed facts in Plaintiff's favor, Plaintiff had access to newspapers, "numerous recreational magazine subscriptions," and 3,000 books through the OCPF library, as well as roughly one-tenth of the books he requested through the interlibrary loan process. (Doc. 142-1 at 4-6; Doc. 149 at 2, 16,

47, 49-50, 53-54; Doc. 150 at 5.) He could also purchase books, magazines, and newspapers from Hamilton Booksellers and Christian Book from March 2013 to November 2015, and from Hamilton Booksellers, Christian Book, and Barnes & Noble or Amazon from December 2015 to April 2017. (Doc. 1-1 at 179; Doc. 149 at 39; Doc. 150 at 2, 8, 18.) Christian Book had a 500,000-book catalog and Barnes & Noble offered over a million titles. (Doc. 142-1 at 7.)

Plaintiff disputes that all of Christian Book's and Barnes & Noble's titles were available to him, because some were hardbound, some contained prohibited content, and some did not interest him. (Doc. 149 at 19-20; Doc. 150 at 7, 17.) However, as discussed above, there is no dispute that Plaintiff could have kept the hardbound books he ordered had he been willing to remove the covers. And, even assuming that some books sold by Christian Book and Barnes & Noble included prohibited content, there is no evidence tending to show that the subtraction of these books would reduce the 1.5 million titles otherwise available from these vendors to any material degree. And, of course, the fact that some or indeed many of the publications sold by Christian Book and Barnes & Noble did not interest Plaintiff is both irrelevant and inevitable given the vast number of titles they offered.

Plaintiff also argues that he did not have alternative means of exercising the right at issue because he could not access specific publications he wanted to read, *e.g.*, publications from PLN, legal reference books, and religious and veterinary publications. (*See, e.g.*, Doc. 150 at 21.) In so arguing, however, Plaintiff forgets that "the right" in question must be construed sensibly and expansively. *Thornburgh*, 490 U.S. at 417. In other words, "the right" at issue here is not Plaintiff's right to read a specific book. Rather, it is to have access to "a broad range of publications," which Plaintiff indisputably did. *Id.* at 418. For these reasons, Defendants' approved vendor restrictions from March 2013 to April 2017 also satisfy the second *Turner* factor.

Addressing the third *Turner* factor, *i.e.*, "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," *Turner*, 482 U.S. at 90, Defendants presented evidence that

> [t]o require OCPF staff to process and thoroughly inspect mail from non-approved vendors would burden the administration, make it difficult if not impossible to comply with . . . time constraints [for delivering mail to inmates], and potentially disadvantage other inmates whose mail would be delayed.

(Doc. 142-1 at 8.)

Attempting to refute this evidence, Plaintiff argues that inspecting publications from non-approved sources would not have added to the OCPF's administrative burden or impeded its timely delivery of mail to other inmates, because the OCPF already inspected all incoming mail for contraband and disruptive content. (Doc. 149 at 23.) In so arguing, however, Plaintiff overlooks Defendants' undisputed evidence that the approved vendor policies allowed the OCPF to "focus" its resources, in the patently logical sense that publications from unknown sources would have required more thorough and time-consuming inspections than publications from known, vetted, and trusted sources because they would have been more likely to contain contraband or disruptive content. (Doc. 142-1 at 7-8.) Thus, the third *Turner* factor also supports the constitutional validity of the approved vendor restrictions in effect at the OCPF during Plaintiff's incarceration there.

Finally, with respect to the fourth *Turner* factor, *i.e.*, whether there was an easy, obvious way for the OCPF to fully accommodate Plaintiff's rights at *de minimis* cost, *Turner*, 482 U.S. at 90–91, Defendants presented evidence that "[t]here is not an obvious or easy alternative that would allow inmates to obtain books from unapproved vendors without significantly and adversely affecting the interests previously identified." (Doc. 142-1 at 8.)

Attempting to refute this evidence, Plaintiff purports to identify three such alternatives, *i.e.*: (1) using drug dogs and metal detectors to search publications from non-approved sources; (2)

having property officers check the validity of the publisher of each such publication on the internet; and, (3) allowing pre-approval of purchases from non-approved vendors on a case-by-case basis. (*See, e.g.*, Doc. 149 at 22-23; Doc. 150 at 9.) However, none of these alternatives involve *de minimis* costs to the OCPF. As previously discussed, Defendants have established that allowing inmates to receive publications from non-approved sources would have increased the administrative burden of inspecting inmate mail and delayed its delivery. And, though Plaintiff argues that it would take mere "minutes" for prison officials to check a publisher's validity or pre-approve a purchase from a non-approved vendor, (*see, e.g.*, Doc. 149 at 18-19, 22, 37), even minutes would have consumed considerable prison resources when multiplied by all of the publications inmates could have ordered from non-approved sources. Therefore, the fourth *Turner* factor also weighs in Defendants' favor with respect to their approved vendor restrictions.

More generally, Plaintiff argues that the Court should reject Defendants' use of an approved vendor list because other courts have done so. (Doc. 149 at 20, 32; Doc. 150 at 9, 20; Doc. 159 at 12.) However, none of the cases Plaintiff cites expressly address prison officials' use of approved vendor lists. For example, *Krug v. Lutz*, 329 F.3d 692 (9th Cir. 2003), does not include the passage Plaintiff purports to quote from it, and concerns a due process claim. *Murphy v. Missouri Department of Corrections*, 372 F.3d 979, 986 (8th Cir. 2004), *Williams v. Brimeyer*, 116 F.3d 351, 354 (8th Cir. 1997), and *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1031 (2d Cir. 1985), *overruled by O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 n.2 (1987), in turn, address content-based restrictions not at issue here.

The Second Circuit's decision in *Shakur v. Selsky*, 391 F.3d 106 (2d Cir. 2004), comes closest to supporting Plaintiff's argument. In *Shakur*, the court held that the plaintiff stated a legally sufficient First Amendment claim based on the defendants' confiscation of political

literature from an "unauthorized organization." *Id.* at 115. However, even that case is plainly distinguishable because, in *Shakur*, the appellate court was reviewing the district court's *sua sponte* dismissal of the plaintiff's claim on the pleadings, rather than a grant of summary judgment. *Id.* And, as the Second Circuit noted, "[a]t the point of summary judgment"—as here—the plaintiff will have "assemble[d] evidence to attempt to meet his burden of proof," the defendants will have "articulate[d] rationales for [their] policy," and the court "could thus find the government's explanation valid and rational, and hold that the plaintiff could not meet his burden of proof." *Id.* (citation, ellipses, and quotation marks omitted).

For all of the foregoing reasons, there is no genuine issue of material fact and Defendants are entitled to summary judgment on Plaintiff's First Amendment claims challenging Defendants' approved vendor restrictions during his incarceration at the OCPF. For the same reasons, Plaintiff is not entitled to summary judgment on these claims.

c. Newspaper Articles and Internet Printouts

Finally, Plaintiff claims that Defendants violated his First Amendment rights by restricting his access to newspaper articles and internet printouts during his incarceration at the OCPF. (Doc. 119 at 14-19.) Defendants rejected Plaintiff's mail as a result of these restrictions on two occasions.[25] First, on July 2, 2014, Defendants rejected mail from Plaintiff's mother because it contained printouts of internet articles. (Doc. 1-1 at 150-59.) The Mail Rejection Form, which Defendant Moreno signed, gave as the reason for the rejection that "Internet articles [are] not allowed." (*Id.* at 150.) Plaintiff submitted an informal complaint regarding this rejection, in

[25] In their *Martinez* Report, Defendants cite to a portion of Plaintiff's amended complaint listing eight types of mail that Plaintiff claims were rejected because they included internet printouts. (Doc. 142 at 9-10.) However, the cited portion of the amended complaint concerns mail that the GCCF rejected and is therefore irrelevant to the Court's analysis here. (*See* Doc. 119 at 19.)

response to which F. Muniz stated, "[t]he articles sent to you by mail must come from the publisher." (*Id.* at 153.) Plaintiff then submitted a formal grievance, in response to which Defendant Moreno stated that publications will be delivered to an inmate "if they are received directly from the publisher or [vendor] upon approval." (*Id.* at 156.) In a subsequent memo, K. Boyd added that, "[a]fter further review . . . [n]either NMCD policy nor MTC policy specifically state that you are or not allowed information downloaded from the internet. The issue would need approval from the Warden concerning the information that you are requesting." (*Id.* at 157.) There is no record evidence indicating whether Plaintiff subsequently requested the warden's approval for the internet articles rejected on July 2, 2014.

Second, on September 8 or 18, 2014,[26] Defendants rejected mail from Plaintiff's mother because it contained photocopies of newspaper articles. (*Id.* at 162-68.) The Mail Rejection Form regarding this mail, which Defendant Moreno signed, gave as the reason for the rejection that "[n]ewspaper articles [are] not allowed." (*Id.* at 162.) Plaintiff submitted an informal complaint regarding this rejection, to which G. Valle responded by stating that "no newspaper articles will be allowed through the mail. You may purchase articles through an approved vendor." (*Id.* at 163-64.) Plaintiff also submitted a formal grievance, to which L. Eason responded by citing to NMCD policies stating that "[b]ooks and magazines will be accepted and delivered to inmates if they are received directly from the publisher or vendor," and "inmates may acquire books, magazines, and newspapers from the publisher." (*Id.* at 165-67.) L. Eason added that Plaintiff's grievance was being dismissed "on the basis of the newspaper not being received from the publisher." (*Id.* at 168.)

[26] The pertinent Mail Rejection Form indicates that the mail in question was rejected on September 8, 2014; however, Plaintiff's informal complaint and portions of his formal grievance indicate that the mail was rejected on September 18, 2014. (Doc. 1-1 at 162-63, 165.)

As previously noted, from March 2013 to October 2016, the OCPF only allowed inmates to receive publications, including newspapers, from approved vendors; and, from October 2016 to April 2017, the OCPF only allowed inmates to receive publications, including newspapers, from approved vendors or the publisher. (Doc. 156 at 13.)

Discerning the OCPF's policy regarding internet printouts requires a closer examination of the record evidence. On April 2, 2020, Defendant Martinez attested that the "OCPF allow[ed] inmates to have some internet printouts after the printouts [were] cleared for security concerns. OCPF, however, prohibit[ed] internet *newspaper printouts* due to copyright issues."[27] (Doc. 142-1 at 8 (emphasis added).) Similarly, on August 13, 2020, he attested that the OCPF did not allow "*articles* printed from the internet." (Doc. 156 at 14 (emphasis added).)

The Mail Rejection Form regarding Plaintiff's July 2, 2014 mail indicates that this mail was rejected because "Internet *articles* [are] not allowed." (Doc. 1-1 at 150 (emphasis added).) Likewise, F. Muniz's response to Plaintiff's informal complaint stated, "[t]he *articles* sent to you by mail must come from the publisher." (Doc. 1-1 at 153 (emphasis added).) And, Defendant Moreno's response to Plaintiff's formal grievance indicated that the mail in question contained an "internet *newspaper article*" and stated that "*[p]ublications* . . . will be accepted and delivered to inmates if they are received directly from the publisher or vendor upon approval." (*Id.* at 156 (emphasis added).) Also, OCPF Policy 7-707 was amended on November 13, 2015 to prohibit "[a]ny *publications*, copied or printed from the Internet." (Doc. 142-9 at 19, 22 (emphasis added).)

[27] In the same affidavit, however, Defendant Martinez attested that "[c]opies of articles downloaded from the internet are permitted if they do not pose a serious threat to OCPF's security or otherwise violate NMCD policies and procedures." (Doc. 142-1 at 9.) In considering Defendants' Motion, the Court must construe this potential inconsistency in Plaintiff's favor. The Court will therefore base its proposed findings and recommended disposition on the more restrictive internet printout policy, *i.e.*, that the OCPF prohibited all articles printed from the internet.

Read carefully, this evidence consistently indicates that the OCPF prohibited inmates from receiving printouts of internet *publications*, including articles, rather than all internet printouts categorically.[28] The Court is aware of Plaintiff's declaration that Defendants "denied all of Plaintiff's Internet printouts if it was apparent it was printed from the Internet." (Doc. 150 at 10.) However, the Court will disregard this declaration because it is conclusory; the only specific internet materials Plaintiff claims Defendants rejected were those he received in July 2014, which were undisputedly printouts of articles. *See Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1201 (10th Cir. 2015) (courts "do not consider conclusory and self-serving affidavits" on summary judgment). Thus, on the present record, the internet policy Plaintiff challenges is a ban on printouts of publications, including newspaper articles, from the internet.

Addressing the first *Turner* factor, *i.e.*, whether the restrictions at issue are rationally related to a legitimate penological purpose, *Turner*, 482 U.S. at 89, Defendants proffer two penological purposes for the OCPF's restrictions on newspaper articles and printouts of internet publications. First, Defendants state that the OCPF imposed these restrictions "to comply with copyright laws." (Doc. 142 at 10; Doc. 142-1 at 8.) And second, they assert that the OCPF "cannot allow newspaper or internet articles mailed from unapproved third parties because of security concerns," *i.e.*, "to prevent the introduction of contraband" and "illicit content" into the OCPF. (Doc. 142 at 10; Doc. 142-1 at 7; Doc. 151 at 7.)

Ensuring compliance with federal copyright law is unquestionably a legitimate, neutral penological purpose. Moreover, prohibiting publications not received directly from an approved vendor (or from an approved vendor or the publisher) is rationally related to that purpose. *See Waterman v. Commandant, U.S. Disciplinary Barracks*, 337 F. Supp. 2d 1237, 1241 (D. Kan.

[28] For example, this policy would not prohibit inmates from receiving printouts of personal e-mail messages.

2004) ("[T]he policy disallowing non-original source material is rationally related to legitimate penal objectives," *inter alia*, as "a way of deterring inmates from violating copyright laws."). Like other publications, newspaper articles and internet publications are likely to be protected by copyright.

> Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. § 102(a). "[O]riginal works of authorship" include "literary works," *i.e.*,

> works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, *periodicals*, manuscripts, phonorecords, film, tapes, *disks*, or *cards*, in which they are embodied.

17 U.S.C. § 101 (emphases added); *see also generally* 17 U.S.C. § 512 (setting forth "[l]imitations on liability relating to material online" for service providers).

Notwithstanding Plaintiff's protestations to the contrary, (Doc. 149 at 6-7, 24-25), copyrighted works can generally only be reproduced or distributed with the copyright owner's authorization, regardless of attribution. 17 U.S.C. § 106. There are specific statutory limitations on the owner's exclusive rights; however, none of these are broadly applicable to inmates' receipt of photocopies or internet printouts of publications from sources other than an approved vendor or the publisher. *See* 17 U.S.C. §§ 107-112 (listing limitations to copyright owner's exclusive rights in copyrighted works). Thus, requiring inmates to obtain material likely to be copyrighted—such as a newspaper article—from a source that would almost certainly own the material's copyright or have purchased the right to distribute it—such as an approved vendor or a publisher—is rationally related to the prevention of copyright law violations.[29] Likewise, banning the receipt of internet

[29] It gives the Court pause that, from March 2013 to October 2016, the OCPF did not permit inmates to obtain newspaper articles from publishers, even though *bona fide* publishers would either own the copyright to a work or

publication printouts is rationally related to this purpose, because it is unlikely that an inmate would ever receive such printouts from a source possessing the right to distribute them.

Plaintiff argues that the Second Circuit would not have found a prison ban on newspaper clippings unconstitutional, and the Ninth Circuit would not have found a prison ban on internet material unconstitutional, if such bans were rationally related to the prevention of copyright violations. (Doc. 149 at 34-35; Doc. 150 at 27); *see Clement v. Calif. Dep't of Corr.*, 364 F.3d 1148, 1152 (9th Cir. 2004) (affirming district court's decision that prison's "internet-generated mail policy" violated the plaintiff's First Amendment rights); *Allen v. Coughlin*, 64 F.3d 77, 80-81 (2d Cir. 1995) (reversing district court's decision granting the defendants summary judgment on the plaintiff's First Amendment claims challenging the application of a publishers-only rule to newspaper clippings). However, the prison officials in *Clement* and *Allen* did not assert the prevention of copyright violations as a purpose for the challenged restrictions, and the *Clement* and *Allen* courts thus did not consider or address this purpose. *Clement*, 364 F.3d at 1152; *Allen*, 64 F.3d at 80-81. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *United Food & Commercial Workers Union, Local 1564 of N.M. v. Albertson's, Inc.*, 207 F.3d 1193, 1199 (10th Cir. 2000).

Plaintiff also argues that Defendants' restrictions on newspaper articles and printouts of internet publications could not have been intended to prevent copyright violations because Defendants themselves suggested or allowed copyright violations. Most prominently, Plaintiff

have purchased the right to distribute it. Nevertheless, in light of Defendant Martinez's reasonable observation that "[a]nyone" could pose as a publisher, and the fact that a counterfeit publisher would not have the right to distribute a copyrighted work, the Court finds OCPF's pre-October 2016 policy is rationally related to the prevention of copyright violations. (Doc. 142-1 at 7.) Moreover, that Defendants decided to tolerate the risk of counterfeit publishers after October 2016 does not render their prior decision to try to mitigate this risk irrational.

declared that Defendants Barba and Moreno told him that if his family removed the web addresses from the internet articles they mailed him, so that it was "not obvious" they were from the internet, they would "probably be allowed."[30] (Doc. 149 at 24.) However, there is no record evidence that Defendants Barba and Moreno, as OCPF mailroom employees, played a role in enacting the OCPF's policies restricting newspaper articles and internet printouts. As such, their alleged willingness to overlook non-obvious violations of these policies has no bearing on the policies' purpose and fails to create a genuine issue of material fact.[31]

Turning to Defendants' second proffered purpose for the challenged restrictions, again, smuggling prevention is also a legitimate, neutral penological purpose. *See Thornburgh*, 490 U.S. at 415 ("[P]rotecting prison security" is "central to all other corrections goals."). In this regard, Defendants presented evidence that the

> OCPF cannot allow newspaper or internet articles mailed from unapproved third parties because of security concerns including lacing the papers with drugs like ketamine and suboxone, hiding contraband in the folded pages, as well as using such newspapers and internet articles to send coded messages. For example, these papers can be soaked in drugs, and once they enter OCPF, they are cut into pieces and sold to inmates. Inmate[s] then dissolve the paper and use the drugs. . . . I also understand that newspapers and internet printouts from non-publishers can be used to send coded messages.

(Doc. 156 at 13.)

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[30] Plaintiff also declared that Defendant Martinez permitted guards to bring in pirated movies for inmates to watch. (Doc. 149 at 25.) However, Plaintiff has not demonstrated personal knowledge both that the movies were in fact "pirated" and that Defendant Martinez had reason to know it. Thus, the Court declines to consider this declaration in recommending a disposition of the parties' cross-motions for summary judgment. *Ellis*, 779 F.3d at 1201 ("Information presented in [an] affidavit [on summary judgment] must be based on personal knowledge.") (quotation marks omitted).

[31] Plaintiff also argues that distributing photocopies and internet printouts of articles does not violate copyright law because acts such as giving books as gifts and checking them out of the library do not violate copyright law. (Doc. 149 at 24-25.) Without delving too deeply into the intricacies of copyright provisions that have no application in this case, the Court notes that a person who has purchased her own "particular copy" of a copyrighted work may generally dispose of that copy as she pleases. 17 U.S.C. § 109. However, photocopies and printouts, by their very nature, will almost certainly be duplicates of a person's "particular copy," which cannot be distributed without the copyright owner's authorization. 17 U.S.C. § 106.

OCPF's restrictions requiring inmates to obtain newspaper articles from an approved vendor (or from an approved vendor or the publisher), and prohibiting the receipt of internet publication printouts, are also rationally related to limiting contraband and disruptive content. Defendants' evidence establishes that these materials can be used to smuggle contraband and disruptive content into a prison. Attempting to challenge this evidence, Plaintiff asserts that, in his fifteen years of incarceration, he has never seen or heard of inmates using ketamine in prison, and has only seen or heard of suboxone being smuggled into prison through visits and transfers, and never through newspaper articles or internet printouts. (Doc. 159 at 13.) However, these assertions fail to create a genuine factual dispute for the simple reason that, notwithstanding his lengthy incarceration, Plaintiff lacks personal knowledge of every substance other inmates have used or might use while incarcerated and every way in which inmates have smuggled or could smuggle these substances into a prison.

Plaintiff also argues that Defendants' restrictions on newspaper articles and internet printouts are not rationally related to smuggling prevention because "[r]egular written correspondence and typed correspondence can be used in the very same ways Defendants suggest printed Internet articles and newspaper articles may be used." (Doc. 159 at 13-17 (citing *Clement*, 364 F.3d at 1152 and *Allen*, 64 F.3d at 79-82).) However, again, the Court declines to second-guess Defendants' rational professional judgments regarding which security risks to tolerate and which to mitigate, in light of the Supreme Court's clear directive that these judgments are entitled to deference. *Beard*, 548 U.S. at 529–30; *Turner*, 482 U.S. at 84–85. To the extent that the *Clement* and *Allen* decisions relied on this kind of second-guessing, the Court recommends declining to follow them.

In short, Defendants reasonably believed that the challenged restrictions would significantly reduce the likelihood that inmates' receipt of newspaper articles and internet publication printouts would violate copyright laws or that these materials would be used to introduce contraband and disruptive content into the OCPF, by ensuring that these materials came only from secure and legitimate sources. *Sperry*, 413 F. App'x at 40. For these reasons, Defendants' restrictions on Plaintiff's receipt of photocopies of newspaper articles and printouts of internet publications satisfy the first *Turner* factor.

With respect to the second *Turner* factor, *i.e.*, "whether there are alternative means of exercising the right that remain open to prison inmates," *Turner*, 482 U.S. at 90, again, "'the right' in question must be viewed sensibly and expansively." *Thornburgh*, 490 U.S. at 417. Thus, the Supreme Court has found that prison regulations "permit[ting] a broad range of publications to be sent, received, and read" by inmates "clearly satisf[y]" this factor. *Id.* at 418. Here, as previously discussed, it is undisputed that Plaintiff could access thousands of publications—including books, magazines, and newspapers—from the OCPF library, the interlibrary loan program, approved vendors, and, after October 2016, publishers.

Admittedly, as Plaintiff argues, many newspapers do not sell articles individually, and "[s]ubscriptions are not entirely substitutable for clippings because subscribing requires inmates to anticipate which papers might have articles that they like to read and to subscribe to all such papers," and also requires "the expenditure of personal wealth." *Allen*, 64 F.3d at 80. Thus, the Court understands that the alternatives available to Plaintiff were not "ideal," *Jones*, 503 F.3d at 1153, or "the best method from the inmate's point of view." *Wardell*, 470 F.3d at 961–62. Nevertheless, because Plaintiff could access a "broad range" of publications, Defendants'

restrictions on newspaper articles and internet printouts also satisfy the second *Turner* factor. *Thornburgh*, 490 U.S. at 418.

As previously noted, the third *Turner* factor requires the Court to consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. In this regard, as the *Waterman* court observed,

> if inmates were allowed to receive photocopies or Internet-generated materials from non-original sources, [prison] staff would undoubtedly have to expend much greater personnel resources to screen the material for . . . copyright violations, thereby increasing the workload on staff.

Waterman, 337 F. Supp. 2d at 1241–42. Given the complexity of copyright law, such screening would have imposed a near-impossible administrative burden on the OCPF. In addition, as Defendant Martinez attested, requiring the OCPF to process and thoroughly inspect newspaper articles and printouts of internet publications "from non-approved vendors would burden the administration, make it difficult if not impossible to comply with . . . time constraints, and potentially disadvantage other inmates whose mail would be delayed." (Doc. 142-1 at 8.) Plaintiff has not asserted any argument to contradict these points that the Court has not already addressed and rejected in this section and Section III.B.2.b., *supra*. For all of the reasons discussed, the third *Turner* factor also supports the constitutional validity of Defendants' restrictions on newspaper articles and printouts of internet publications.

Finally, with respect to the fourth *Turner* factor, Plaintiff has pointed to no easy, obvious alternative that would fully accommodate his right to access newspaper articles and internet publications at *de minimis* cost to the OCPF. *Turner*, 482 U.S. at 90–91. Plaintiff suggests that the OCPF could have allowed inmates to access publications via the internet by distributing tablets and installing firewalls on them to prevent inmates from accessing disruptive content. (Doc. 159

at 14.) However, on its face, this suggested alternative involves considerably more than *de minimis* costs to the prison. Thus, the fourth *Turner* factor also weighs in Defendants' favor with respect to the challenged restrictions on newspaper articles and internet printouts.

In sum, viewing the record evidence in the light most favorable to Plaintiff and drawing all reasonable inferences in his favor, each *Turner* factor supports the constitutional validity of the challenged restrictions on newspaper articles and internet publication printouts. There being no genuine issue of material fact, Defendants are also entitled to judgment as a matter of law on Plaintiff's claims that Defendants violated his First Amendment rights by restricting his access to these materials. For the same reasons, Plaintiff is not entitled to summary judgment on these claims.

C. Plaintiff's First Amendment Retaliatory Transfer Claim

Finally, in their Motion, Defendants seek summary judgment on Plaintiff's First Amendment retaliatory transfer claim against Defendant Martinez. (Doc. 143 at 22-25.) In this claim, Plaintiff alleges that Defendant Martinez requested his transfer from the OCPF to another facility because he exercised his First Amendment rights by filing and serving the present lawsuit. (Doc. 119 at 43-50.) "It is well-settled that prison officials may not retaliate against or harass an inmate because of the inmate's exercise of his right of access to the courts." *Gee*, 627 F.3d at 1189 (quotation mark and alterations omitted).

> While a prisoner enjoys no constitutional right to remain in a particular institution and generally is not entitled to due process protections prior to such a transfer, prison officials do not have the discretion to punish an inmate for exercising his first amendment rights by transferring him to a different institution.

Frazier v. Dubois, 922 F.2d 560, 561–62 (10th Cir. 1990).

However,

> it is not the role of the federal judiciary to scrutinize and interfere with the daily operations of a state prison, and our retaliation jurisprudence does not change this

> role. Obviously, an inmate is not inoculated from the normal conditions of confinement experienced by convicted felons serving time in prison merely because he has engaged in protected activity. Accordingly, a plaintiff must prove that but for the retaliatory motive, the incidents to which he refers . . . would not have taken place. An inmate claiming retaliation must allege *specific facts* showing retaliation because of the exercise of the prisoner's constitutional rights.

Peterson v. Shanks, 149 F.3d 1140, 1144 (10th Cir. 1998) (emphasis in original) (citation and quotation marks omitted); *see Frazier*, 922 F.2d at 562 n.1 ("Mere allegations of constitutional retaliation will not suffice; plaintiffs must rather allege specific facts showing retaliation because of the exercise of the prisoner's constitutional rights.").

For example, the Tenth Circuit found that a prisoner sufficiently alleged specific facts showing unconstitutional retaliation where he alleged "that Defendants were aware of his protected activity, that his protected activity complained of Defendants' actions, and that the transfer was in close temporal proximity to the protected activity."[32] *Gee*, 627 F.3d at 1189; *see also Allen v. Avance*, 491 F. App'x 1, 6 (10th Cir. 2012) ("Our cases allow an inference of whether the defendant[s'] response was substantially motivated by protected conduct where evidence showed (1) the defendants were aware of the protected activity; (2) the plaintiff directed his complaint to the defendants' actions; and (3) the alleged retaliatory act was in close temporal proximity to the protected activity.") (quotation marks omitted); *cf. Trant v. Oklahoma*, 754 F.3d 1158, 1170 (10th Cir. 2014) ("[T]emporal proximity between the protected speech and the alleged retaliatory conduct, without more, does not allow for an inference of a retaliatory motive.").

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[32] In the employment context, the Tenth Circuit explained the concept of "close temporal proximity" as follows:

> [i]t appears clear that, if the adverse action occurs in a brief period up to one and a half months after the protected activity, temporal proximity alone will be sufficient to establish the requisite causal inference; but it is equally patent that if the adverse action occurs three months out and beyond from the protected activity, then the action's timing alone will not be sufficient to establish the causation element.

Conroy v. Vilsack, 707 F.3d 1163, 1181–82 (10th Cir. 2013).

A prisoner may also show retaliatory motive via "specific, objective facts from which it could plausibly be inferred" that the reason given for the adverse act "was pretextual." *Banks v. Katzenmeyer*, 645 F. App'x 770, 773 (10th Cir. 2016).

Here, Plaintiff filed his original complaint in state court on November 14, 2016. (Doc. 1-1 at 1.) Defendant Martinez attested that he "became aware of the Plaintiff's original Complaint . . . on December 21, 2016 and . . . was served with this lawsuit on February 3, 2017."[33] (Doc. 142-1 at 10.) He further attested that, while he does not recall the exact date on which he requested Plaintiff's transfer from the OCPF, he estimates that it was "sometime between" February 23, 2017 and March 21, 2017. (Doc. 156 at 14.)

According to Defendant Martinez, "[t]he decision to request Plaintiff's transfer was unrelated to his history of filing grievances in OCPF or the initiation of this lawsuit." (Doc. 142-1 at 10; Doc. 156 at 14.) Rather, Defendant Martinez attested that he requested Plaintiff's transfer because Plaintiff "violated OCPF and NMCD policy." (Doc. 142-1 at 10.) Specifically, Defendant Martinez attested that

> Pastor Koehne was a church volunteer at OCPF. On February 23, 2017, Pastor Koehne admitted to accepting letters from Plaintiff during Pastor Koehne's religious visits to OCPF, and then mailing these letters for inmate Whitehead after leaving OCPF premises. Plaintiff's actions violated both OCPF and NMCD mail policies and procedures that limit the means and methods of how inmates communicate outside of OCPF. . . . Because Plaintiff circumvented NMCD policies through using a religious volunteer to pass mail, which threatened the safety and security of OCPF as well as the public, I requested that NMCD transfer Plaintiff from OCPF.[34]

[33] Plaintiff insists that Defendant Martinez committed perjury by attesting that he was served with process on February 3, 2017, and that he was actually served on February 17, 2017. (Doc. 149 at 6, 30; Doc. 159 at 17.) However, Plaintiff appears to have misread the year as the day on the return of service, which in fact reflects that Defendant Martinez was served on February 3, 2017. (Doc. 1-1 at 260-61.) Plaintiff is admonished to exercise greater care to avoid falsely accusing an opposing party of perjury in future pleadings.

[34] The NMCD policy in question provides that "[a]ll inmates' mail or packages, both incoming and outgoing, shall be opened and inspected for contraband and to intercept cash, checks or money orders. Mail is read and accepted or rejected based on legitimate institutional interests of order and security." (Doc. 142-3 at 3.)

(Doc. 142-1 at 9.)

However, Plaintiff disputes Defendant Martinez's proffered reason for requesting Plaintiff's transfer and submitted evidence that Mr. Koehne did *not* admit to accepting letters from Plaintiff during religious visits and mailing the letters after leaving the prison.[35] Specifically, Plaintiff submitted the declarations of Mr. Koehne and his senior pastor, Timothy Brock.[36] In his declaration, Mr. Koehne stated that, when he and Mr. Brock met with Defendant Martinez and other OCPF officials,[37]

> they asked me if I received anything from the inmates and I replied, "Yes they give me letters all the time. I've even requested some and I still have all of them!" WELL, as soon as words came out of my mouth the atmosphere in the room changed and I could tell something was wrong. *Even after clarifying that these were mailed letters*, they made it clear that the meeting was over.

(Doc. 119 at 314 (capitalization in original) (italics added).) Mr. Brock, in turn, declared that Mr. Koehne "said that he had taken letters from an inmate in the past, and that he still probably had

[35] Plaintiff also submitted evidence that he in fact never gave Mr. Koehne anything to sneak out of the OCPF. (Doc. 119 at 314; Doc. 149 at 6; Doc 150 at 11.) However, this evidence is immaterial. As further discussed below, at issue is not whether Plaintiff in fact used Mr. Koehne to pass mail out of the OCPF, but rather whether Defendant Martinez believed he did and acted in good faith on that belief. *See Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007) ("The relevant inquiry is not whether [the defendants'] proffered reasons were wise, fair or correct, but rather . . . whether they believed those reasons to be true and acted in good faith upon those beliefs.") (quotation marks omitted).

[36] These declarations are undated. (Doc. 119 at 314-15.) Generally, to have the same force and effect as an affidavit, a declaration must be "subscribed . . . as true under penalty of perjury, *and dated*." 28 U.S.C. § 1746 (emphasis added). However, "the absence of a date does not render a declaration invalid if extrinsic evidence demonstrates . . . the period in which the declaration is signed." *Richardson v. Gallagher*, 553 F. App'x 816, 827–28 (10th Cir. 2014). Here, Plaintiff's Motion for Hearing and/or Decision on Plaintiff[']s Request for a Preliminary Injunction (Doc. 44), which included letters from Mr. Koehne and Mr. Brock substantively identical to their declarations, was filed on May 30, 2017, (*see id.* at 6-7); and, Plaintiff's Motion to Allow Plaintiff to Cure Deficiency in Affidavits by Perry Koehne and Timothy Brock (Doc. 86), in which Plaintiff first submitted the declarations in their current form, was filed on September 20, 2017. (*See id.* at 3-4.) These documents demonstrate that Mr. Koehne and Mr. Brock signed their declarations between May 30, 2017 and September 20, 2017, and the Court will therefore excuse the lack of a date on the declarations.

[37] Mr. Koehne and Mr. Brock declared that this meeting occurred on March 22, 2017, whereas Defendant Martinez attested that it occurred on February 23, 2017. (*Compare* Doc. 19-1 at 3 *and* Doc. 142-1 at 9 *with* Doc. 119 at 314-15.) There is no indication in the record that Mr. Koehne and Mr. Brock met with Defendant Martinez more than once to discuss whether Plaintiff used Mr. Koehne to pass mail out of the OCPF; thus, they appear to be referring to the same meeting.

them. *Later [Mr. Koehne] clarified that he did not take them from the prison, but those letters were mailed to him*." (*Id.* at 315 (emphasis added).)

Based on the record currently before the Court, Defendants have not met their summary judgment burden with respect to Plaintiff's First Amendment retaliatory transfer claim. Initially, on the present record, there is evidence "that Defendant[Martinez was] aware of [Plaintiff's] protected activity, that [Plaintiff's] protected activity complained of Defendant[Martinez's] actions, and that the transfer [request] was in close temporal proximity to the protected activity." *Gee*, 627 F.3d at 1189. Specifically, there is close temporal proximity between February 3, 2017, the date on which Defendant Martinez was served with Plaintiff's original complaint, and February 23, 2017, the earliest date on which Defendant Martinez may have requested Plaintiff's transfer.[38]

In addition, there is evidence that, on the current record, could support an inference of pretext. Specifically, on the current record, Mr. Koehne's and Mr. Brock's declarations permit the inference that Mr. Koehne denied allowing Plaintiff to use him to pass mail and thus that Defendant Martinez did not request Plaintiff's transfer in good faith on the belief that Plaintiff used Mr. Koehne in this fashion.[39] *See Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007) ("The relevant inquiry is . . . whether [the defendants] believed [their proffered] reasons to be true and acted in good faith upon those beliefs.") (quotation marks omitted). As such, the Court cannot say that there are no genuine issues of material fact with respect to Plaintiff's First Amendment retaliatory transfer claim at this time.[40]

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[38] Although Defendant Martinez attested that he "became aware of" Plaintiff's state court complaint on December 21, 2016, there is presently no record evidence that he knew anything about its contents—such as the fact that it included claims against him and the allegations supporting those claims—before February 3, 2017. (*See* Doc. 142-1 at 10.)

[39] The Court notes that, to date, none of Defendant Martinez's affidavits have addressed whether Mr. Koehne denied allowing Plaintiff to use him to pass mail and, if so, whether Defendant Martinez discredited that denial in good faith.

[40] Plaintiff also declared that other OCPF inmates who engaged in misconduct were treated differently, and that GCCF Warden Vincent Horton told Plaintiff that Defendant Martinez told Warden Horton to deny Plaintiff access to

Defendant Martinez argues that he is nevertheless entitled to summary judgment on Plaintiff's First Amendment retaliatory transfer claim because "Plaintiff was convicted of the disciplinary charges" at issue. (Doc. 143 at 24.) In so arguing, however, Defendant Martinez oversimplifies the rule on which he relies and ignores the dearth of evidence supporting this defense. It is true that

> an inmate cannot state a claim of retaliation for a disciplinary charge involving a prison rule infraction when a hearing officer finds that the inmate committed the actual behavior underlying that charge and affords the inmate adequate due process.

Chapman v. Lampert, 711 F. App'x 455, 458 (10th Cir. 2017) (quotation marks omitted); *see also, e.g.*, *O'Bryant v. Finch*, 637 F.3d 1207, 1215 (11th Cir. 2011) ("If a prisoner is found guilty of an actual disciplinary infraction after being afforded due process *and* there was evidence to support the disciplinary panel's fact finding, the prisoner cannot later state a retaliation claim against the prison employee who reported the infraction in a disciplinary report.") (emphasis in original); *Allmon v. Wiley*, No. 08-CV-01183-MSK-CBS, 2011 WL 4501941, at *8 (D. Colo. Aug. 25, 2011), *report and recommendation adopted*, No. 08-CV-01183-MSK-CBS, 2011 WL 4501937 (D. Colo. Sept. 27, 2011), *aff'd*, 483 F. App'x 430 (10th Cir. 2012) (same).

Here, however, there is very little record evidence regarding what process Plaintiff received before he was transferred, and none to show that a hearing officer afforded him adequate due

information regarding his lawsuit. (*See, e.g.*, Doc. 119 at 53; Doc. 149 at 28-29; Doc. 159 at 20, 26-33.) However, the Court will disregard this evidence because the former is irrelevant absent some indication that the other inmates were similarly situated to Plaintiff, and the latter is inadmissible hearsay. *See Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1120 (10th Cir. 2007) (plaintiff may show retaliatory motive via evidence that he was treated differently from other "similarly-situated" persons who violated "rules of comparable seriousness"); Fed. R. Evid. 801(c), (d) (non-party's out-of-court statement offered to prove the truth of the matter asserted is hearsay); Fed. R. Evid. 802 (hearsay is generally inadmissible). Moreover, the Court denies Plaintiff's request for "[a] list of men who received disciplinary reports and had disciplinary action taken against them from 2013-2017" to determine whether his transfer was "in line with actions taken against other inmates." (Doc. 150 at 32.) Plaintiff has pointed to no other OCPF inmate accused of an infraction similar to the one with which he was charged who received a lighter punishment, and the requested information is thus neither relevant nor proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1).

process and found that he committed the actual behavior underlying the charge against him. The record reflects that, in general, the OCPF's inmate transfer process is as follows:

> [i]nmates are served a 48-hour hearing notice, advising the inmate they are being scheduled for committee. . . . They have a right to appear or waive the committee. . . . Inmates then will go to committee on scheduled dated [sic]. During the committee the inmates are advised they are being recommended for transfer. The inmates will then sign the transfer committee chronology and are advised they have 15 days to appeal the committee. . . . Committee action is then entered into Criminal Management Information System for NMCD to review and approve or deny.

(Doc. 142-1 at 10.) The record does not indicate what process, if any, inmates are afforded if they elect to appear at a transfer committee, including whether they are notified of the reasons for the proposed transfer or given an opportunity to respond to any allegations of misconduct underlying the transfer request.

With respect to Plaintiff's transfer in particular, it is undisputed that: (a) Plaintiff received a 48-hour hearing notice and "appear[ed]" before a transfer committee[41]; (b) "the committee determined that Plaintiff should be transferred to an alternate Level 3 facility because [he] 'meets criteria for transfer'"; and, (c) Plaintiff submitted a written appeal of this determination.[42] (Doc. 119 at 296-99; Doc. 156 at 14, 20-21.) However, there is no evidence regarding what happened at the transfer committee hearing, no evidence of why the committee determined that he "m[et] criteria for transfer," and no evidence that he received notice of the charge against him and an opportunity to challenge it before the hearing occurred and his deadline to appeal expired. On the contrary, with respect to the allegation that he used Mr. Koehne to pass mail, Plaintiff declared,

[41] In his response to Defendants' Supplemental *Martinez* Report, Plaintiff alleged that the "committee hearing" consisted of him meeting with a single caseworker who, when asked about the reason for the transfer, told him only that the warden had requested it. (Doc. 159 at 18.) However, again, Plaintiff did not make these allegations under penalty of perjury and, as such, the Court cannot consider them as evidence in ruling on the parties' summary judgment motions. 28 U.S.C. § 1746; *Hall*, 935 F.2d at 1111.

[42] Plaintiff's transfer appeal does not refer to any proffered reason for his transfer. (Doc. 119 at 296-99.)

and at this time Defendants have presented no evidence to dispute, that Plaintiff "never received a disciplinary report nor did he go through any disciplinary hearing where he could see the charges and call or confront witnesses and see the evidence against him." (Doc. 150 at 11.)

On the foregoing record, there is at least a genuine issue of material fact regarding whether a hearing officer afforded Plaintiff adequate due process and found him guilty of an actual disciplinary infraction in connection with the transfer at issue. Thus, Defendant Martinez is not presently entitled to summary judgment on Plaintiff's First Amendment retaliatory transfer claim based on the process Plaintiff received.[43] For all of these reasons, the Court recommends that Defendants' motion for summary judgment on Plaintiff's First Amendment retaliatory transfer claim be denied at this time.

IV. Conclusion

The Court recommends that Plaintiff's Motion for Partial Summary Judgment against MTC Defendants (Doc. 124) be DENIED because, viewing the evidence in the light most favorable to Defendants and drawing all reasonable inferences in their favor, Plaintiff has failed to show the absence of a genuine issue of material fact and that he is entitled to judgment as a matter of law on his First Amendment claims based on Defendants' policies restricting his access to information while he was incarcerated at the OCPF. The Court further recommends that OCPF Defendants' Motion for Summary Judgment (Doc. 143) be GRANTED as to Plaintiff's First Amendment access-to-information claims against Defendants because, viewing the record

[43] Defendant Martinez also hints that he should be granted summary judgment on Plaintiff's retaliatory transfer claim by observing that, though he was the person who *requested* Plaintiff's transfer, "[o]nly NMCD has the authority to grant or deny . . . transfer requests." (Doc. 143 at 24; Doc. 156 at 14.) However, Defendant Martinez does nothing to develop this argument and cites no authority to support it, and the Court therefore declines to consider it at this time. *See Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 800 n.10 (10th Cir. 2001) ("A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point. The court will not do his research for him.") (brackets omitted).

evidence in the light most favorable to Plaintiff and drawing all reasonable inferences in his favor, there is no genuine issue as to any material fact and Defendants are entitled to judgment as a matter of law on these claims. However, the Court recommends that Defendants' Motion be DENIED as to Plaintiff's First Amendment retaliatory transfer claim against Defendant Martinez because Defendants have failed to meet their summary judgment burden with respect to this claim.

THE PARTIES ARE NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1). **A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.**

Kirtan Khalsa

KIRTAN KHALSA
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

MONTE WHITEHEAD,

Plaintiff,

v. Civ. No. 17-275 MV/KK

MANAGEMENT AND TRAINING CORPORATION *et al.*,

Defendants.

ORDER ADOPTING IN PART MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION

THIS MATTER is before the Court on: (1) Plaintiff's Motion for Partial Summary Judgment against MTC Defendants (Doc. 124) ("Plaintiff's Motion"), filed November 21, 2019; (2) OCPF Defendants' Motion for Summary Judgment (Doc. 143) ("Defendants' Motion"), filed April 3, 2020; (3) Magistrate Judge's Proposed Findings and Recommended Disposition (Doc. 160) ("PFRD"), filed September 22, 2020; (4) OCPF Defendants' Objection to Magistrate Judge's Proposed Findings and Recommended Disposition (Doc. 161) ("Defendants' Objection"), filed October 5, 2020; and, (5) Plaintiff's Objections to Magistrate Judge's Proposed Findings and Recommended Disposition (Doc. 162) ("Plaintiff's Objections"), filed October 9, 2020. The Court, having considered the parties' submissions, the record, and the relevant law, and for the reasons described below, will overrule Plaintiff's Objections, sustain Defendants' Objection, adopt in part and modify in part the Magistrate Judge's PFRD, deny Plaintiff's Motion, and grant Defendants' Motion.

I. Introduction

This case arises out of Plaintiff's incarceration at the Otero County Prison Facility ("OCPF") from March 2013 to April 2017. (Doc. 119 at 3; Doc. 142-1 at 2.) Many of Plaintiff's

claims have been dismissed or stricken; however, the following claims remain: (1) Plaintiff's First Amendment claims against Defendants Management and Training Corporation ("MTC"), James Frawner, Richard Martinez, and FNU Azuna challenging these Defendants' restrictions on Plaintiff's access to hardbound books, (Doc. 119 at 29-33); (2) Plaintiff's First Amendment claims against Defendants MTC, Frawner, Martinez, Azuna, FNU Moreno, and FNU Barba (collectively, "Defendants") challenging Defendants' restrictions on Plaintiff's access to publications from non-approved vendors, (*id.* at 36-38); (3) Plaintiff's First Amendment claims challenging Defendants' restrictions on Plaintiff's access to newspaper and internet articles, (*id.* at 14-19); and (4) Plaintiff's First Amendment retaliatory transfer claim against Defendant Martinez. (*Id.* at 43-50; *see also* Doc. 135.) In the Motions presently before the Court, Plaintiff seeks summary judgment on the first three claims and Defendants seek summary judgment on all of them.[1] (Docs. 124, 143.)

II. Procedural History

Plaintiff, a *pro se* prisoner, filed this action in state court on November 14, 2016. (Doc. 1-1.) At the time, Plaintiff was incarcerated at the OCPF.[2] (*Id.* at 3.) The case was removed to federal court on March 1, 2017. (Doc. 1.) In a Memorandum Opinion and Order dated September 27, 2017, United States District Judge Robert Junell dismissed Plaintiff's federal claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure, denied Plaintiff's motions to amend his complaint and supplement the pleadings, declined to exercise supplemental jurisdiction over his state law claims, and remanded the state law claims to state court. (Doc. 91.) On February 12,

[1] Plaintiff also sought summary judgment on his claims based on the First Amendment's religion clauses and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq*. (Doc. 124; *see* Doc. 119 at 64-75.) However, these claims have been stricken because Plaintiff included them in his amended complaint without the Court's leave or Defendants' written consent. (Doc. 135 at 5-7.) As such, the portion of Plaintiff's Motion seeking summary judgment on these claims is denied as moot.

[2] Plaintiff was transferred to the Guadalupe County Correctional Facility on April 17, 2017, (Doc. 22 at 1; Doc. 119 at 44-45), and to the Penitentiary of New Mexico on January 7, 2020. (Doc. 131 at 1.)

2018, Plaintiff appealed the Court's decision as to his federal claims but did not challenge the remand of his state law claims. (Doc. 99; Doc. 110-1 at 2.)

In an Order and Judgment entered on April 2, 2019, the Tenth Circuit affirmed this Court's decision in part and reversed it in part, remanding the case "for further proceedings consistent with [its] order and judgment." (Doc. 110-1 at 23.) In many respects, the Tenth Circuit affirmed the dismissal of Plaintiff's federal claims. (*See generally id.*) However, it vacated the dismissal of Plaintiff's claims that "certain defendants violated his First Amendment rights by preventing him from receiving hardback books, books from non-approved vendors, information from the internet, and newspaper articles sent by mail," and remanded these claims "to the district court for consideration in the first instance." (*Id.* at 5, 8.) The Tenth Circuit noted that, on remand, this Court could "allow[] the prison-official defendants to proffer a legitimate penological reason for the restrictions." (*Id.* at 8.)

In addition, the Tenth Circuit held that this Court improperly denied Plaintiff's Motion for Leave to Amend the Complaint (Doc. 23) and Motion to Supplement the Pleadings (Doc. 60). (Doc. 110-1 at 22-23.) Specifically, the appellate court found that Plaintiff's retaliatory transfer claim "may be a proper claim for relief," noting that "prison officials may violate a prisoner's First Amendment rights when they transfer the prisoner because the prisoner exercised those rights."[3] (*Id.* at 22 & n.15.) Accordingly, it reversed and remanded the "denial of [Plaintiff's] motion to amend the complaint and his motion to supplement the pleadings to the district court for evaluation consistent with this order and judgment." (*Id.* at 22-23.)

[3] However, the Tenth Circuit found "that the district court did not err in denying [Plaintiff] leave to expand on his equal-protection claim or to add unspecified exhibits." (Doc. 110-1 at 22 n.16.)

On remand, the Court granted Plaintiff's motions to amend and supplement and permitted Plaintiff to "file an amended complaint reasserting his First Amendment claims and asserting a First Amendment retaliatory transfer claim." (Doc. 112 at 6.) Plaintiff timely filed an Amended and Supplemental Complaint for Damages of Civil and Constitutional Rights and for Declaratory and Injunctive Relief ("Amended Complaint") on October 10, 2019. (Doc. 119.) However, Plaintiff's Amended Complaint exceeded the scope of the amendments the Court gave him leave to file. (Doc. 135 at 3-4.) As such, on March 6, 2020, the Court entered an order striking the unauthorized portions of the Amended Complaint. (*Id.* at 6-7.)

Meanwhile, on November 21, 2019, Plaintiff moved for partial summary judgment. (Doc. 124.) Defendants filed a response in opposition to Plaintiff's Motion on December 3, 2019, and Plaintiff filed a reply in support of it on December 19, 2019. (Docs. 127, 128.)

On March 4, 2020, the Court ordered Defendants to file a *Martinez* Report addressing, with the exception of claims to be stricken, "all of Plaintiff's allegations against the OCPF Defendants, as well as any defenses raised in the OCPF Defendants' answers that they wish to pursue." (Doc. 134 at 4.) In its Order, the Court informed the parties that

> the Court may use the *Martinez* Report in deciding whether to grant summary judgment for or against any party, whether by motion or *sua sponte*. As such, the parties (including Plaintiff in his response or objections to the *Martinez* Report) are urged to submit whatever proof or other materials they consider relevant to Plaintiff's claims against the OCPF Defendants and the OCPF Defendants' defenses in the pleadings they file pursuant to this Order.

(*Id.* at 6-7.)

Defendants filed their *Martinez* Report on April 2, 2020 and moved for summary judgment the following day. (Docs. 142-43.) Plaintiff responded to Defendants' *Martinez* Report on May 26, 2020 and to their Motion on June 1, 2020. (Docs. 149-50.) Defendants, in turn, replied in support of the report and their Motion on June 15, 2020. (Docs. 151-52.) At the Court's direction,

Defendants also filed a Supplemental *Martinez* Report on August 14, 2020, to which Plaintiff responded on September 2, 2020. (Docs. 155-56, 159.)

On September 22, 2020, United States Magistrate Judge Kirtan Khalsa issued her PFRD recommending that the Court deny Plaintiff's Motion, grant Defendants' Motion as to Plaintiff's First Amendment access-to-information claims, and deny Defendants' Motion as to Plaintiff's First Amendment retaliatory transfer claim. (Doc. 160 at 48-49.) On October 5, 2020, Defendants objected to the portion of the PFRD recommending that the Court deny Defendants' Motion as to the retaliatory transfer claim. (Doc. 161 at 1.) Plaintiff responded in opposition to Defendants' Objection on November 5, 2020, and Defendants replied in support of it on November 16, 2020. (Docs. 167, 169.) On October 9, 2020, Plaintiff objected to the portions of the PFRD recommending that the Court grant Defendants summary judgment on Plaintiff's access-to-information claims. (Doc. 162 at 1.) Defendants responded in opposition to Plaintiff's Objections on October 23, 2020, and Plaintiff replied in support of them on November 5, 2020. (Docs. 164, 168.)

In their Objections, both Plaintiff and Defendants presented evidence that was not before Judge Khalsa when she issued her PFRD. (Doc. 161-1; Doc. 162 at 32.) Thus, on October 15, 2020, the Court ordered the parties to address in their responses to the opposing side's Objections whether it should consider this additional evidence. (Doc. 163 at 2.) The Court also permitted each side to present rebuttal evidence and to file a reply to the opposing side's response. (*Id.* at 3.)

III. Analysis

A. Standards Governing Objections to Magistrate Judge's PFRD

When a party files timely written objections to a magistrate judge's recommendation on a dispositive matter, the district judge must conduct a *de novo* review, and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). *De novo* review requires the district judge to consider relevant evidence in the record and not merely to review the magistrate judge's recommendation. *In re Griego*, 64 F.3d 580, 584 (10th Cir. 1995). "[A] party's objections to the magistrate judge's [PFRD] must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review." *United States v. One Parcel of Real Prop., With Buildings, Appurtenances, Improvements, & Contents*, 73 F.3d 1057, 1060 (10th Cir. 1996).

B. Consideration of Additional Evidence in Resolving Objections to PFRD

In resolving objections to a magistrate judge's PFRD, the district judge "may . . . receive further evidence." Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1). "The decision whether to accept further evidence after the magistrate judge's recommendation is . . . within the district court judge's discretion." *Gonzales v. Qwest Commc'ns Corp.*, 160 F. App'x 688, 690 (10th Cir. 2005); *see also Henderson v. Echostar Commc'ns Corp.*, 172 F. App'x 892, 895 (10th Cir. 2006) (Rule 72(b) "commits the decision of whether to receive additional evidence to the sound discretion of the district court.") (quotation marks omitted). The United States Court of Appeals for the Fifth Circuit has

> suggested several factors that a court should consider in deciding whether to accept additional evidence after a magistrate judge's recommendation has been issued, including: (1) the [proponent's] reasons for not originally submitting the evidence; (2) the importance of the omitted evidence to the [proponent's] case; (3) whether the evidence was previously available to the [opposing] party . . . ; and (4) the likelihood of unfair prejudice to the [opposing] party if the evidence is accepted.

Performance Autoplex II Ltd. v. Mid-Continent Cas. Co., 322 F.3d 847, 862 (5th Cir. 2003); *cf. Gonzales*, 160 F. App'x at 690 (district court did not abuse its discretion in refusing to receive additional evidence where proponent failed to show "that the additional material attached to [his] objections could not have been discovered, with due diligence, and presented to the magistrate judge").

Here, for the first time in their respective Objections, Defendants presented Defendant Martinez's October 5, 2020 affidavit (Doc. 161-1) and Plaintiff presented his declaration that the OCPF "had no approved newspaper publishers" during his incarceration there. (Doc. 162 at 32.) Both sides contend that they did not know of the need to present this evidence until Judge Khalsa issued her PFRD. (Doc. 168 at 11; Doc. 169 at 2.) Notably, neither side discusses whether, in the exercise of due diligence, it could have discovered the need to do so. *See Gonzales*, 160 F. App'x at 690. However, several factors may have obscured this need, including the case's extensive procedural history, the complex issues presented, Plaintiff's *pro se* status, and the lengthy and copious pleadings that have been filed.

As for the remaining *Performance Autoplex II* factors, the additional evidence at issue is potentially material to the parties' Objections, and though it does not appear to have been previously available to the opposing side, both sides have now had a full and fair opportunity to address and rebut it. 322 F.3d at 862. Thus, there is no likelihood of unfair prejudice to any party should the Court decide to accept it. *Id.* For these reasons, the Court in its discretion will consider both sides' additional evidence in resolving their Objections to the Magistrate Judge's PFRD.

C. Standards Governing Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, this Court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the

movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of showing that "there is an absence of evidence to support the nonmoving party's case." *Bacchus Indus., Inc. v. Arvin Indus., Inc*., 939 F.2d 887, 891 (10th Cir. 1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once the movant meets this burden, Rule 56(c) requires the non-moving party to designate specific facts showing that there is a genuine issue for trial. *See Celotex Corp*., 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 256 (1986); *Vitkus v. Beatrice Co*., 11 F.3d 1535, 1539 (10th Cir. 1993).

"An issue is 'genuine' if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way. An issue of fact is 'material' if under the substantive law it is essential to the proper disposition of the claim." *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citation omitted). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). For purposes of summary judgment, a prisoner's pleadings are treated as evidence if they allege specific facts based on the prisoner's personal knowledge and have been subscribed under penalty of perjury. 28 U.S.C. § 1746; *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991). "A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall*, 935 F.2d at 1110. However, "it is not the proper function of the district court to assume the role of advocate for the *pro se* litigant." *Id.*

When reviewing a motion for summary judgment, the Court must keep in mind three principles. First, the Court's role is not to weigh the evidence, but to assess the threshold issue of whether a genuine issue of material fact exists, requiring a trial. *Anderson*, 477 U.S. at 249.

Second, the Court must draw all reasonable inferences in favor of and construe all evidence in the light most favorable to the non-moving party. *Hunt v. Cromartie*, 526 U.S. 541, 552-53 (1999). Finally, the Court cannot decide issues of credibility. *Anderson*, 477 U.S. at 255. "[T]o survive the . . . motion, [the nonmovant] need only present evidence from which a jury might return a verdict in his favor." *Id*. at 257.

D. Plaintiff's First Amendment Access-to-Information Claims

1. *Legal Standards*

Prisoners have a First Amendment right to access information. *Jacklovich v. Simmons*, 392 F.3d 420, 426 (10th Cir. 2004). However, prison officials may curtail this right to further legitimate penological interests. *Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989). Indeed, "prisoners' rights may be restricted in ways that would raise grave First Amendment concerns outside the prison context." *Gee v. Pacheco*, 627 F.3d 1178, 1187 (10th Cir. 2010) (quoting *Thornburgh*, 490 U.S. at 407) (quotation marks omitted). "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 84–85 (1987). Consequently, in considering the constitutionality of prison regulations, courts should "accord deference to the appropriate prison authorities." *Id.* at 85.

To effectuate the principle that "prison administrators, and not the courts, are to make the difficult judgments concerning institutional operations," the Supreme Court has held that, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89 (alterations omitted). The *Turner* Court identified four factors that courts must consider in determining whether a prison regulation

satisfies this requirement.[4] *Id.* at 89-91; *see Whitehead v. Marcantel*, 766 F. App'x 691, 696 (10th Cir.), *cert. denied*, 140 S. Ct. 384 (2019) ("We generally apply the four-factor test from *Turner v. Safley* . . . to evaluate whether a prison regulation that impinges on inmates' constitutional rights is reasonably related to legitimate penological interests.") (quotation marks and ellipses omitted).

First, "there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (quotation marks omitted); *Jones v. Salt Lake Cty.*, 503 F.3d 1147, 1153 (10th Cir. 2007). This factor "is the most important; . . . it is not simply a consideration to be weighed but rather an essential requirement." *Al-Owhali v. Holder*, 687 F.3d 1236, 1240 (10th Cir. 2012) (quotation marks omitted); *see also Parkhurst v. Lampert*, 339 F. App'x 855, 860 (10th Cir. 2009) ("The first consideration is mandatory."). The requirement has two prongs: first, the regulation must be rationally related to a governmental objective; and second, the governmental objective must be "legitimate and neutral." *Thornburgh*, 490 U.S. at 414. The rational relationship prong is met "where the logical connection between the regulation and the asserted goal" is not "so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. The legitimacy and neutrality prong, in turn, is met "[w]here [the] regulation furthers an important or substantial government interest unrelated to the suppression of expression." *Jones*, 503 F.3d at 1153.

The second *Turner* factor "is whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. "Where other avenues remain available for the exercise of the asserted right, courts should be particularly conscious of the measure of judicial deference owed to corrections officials in gauging the validity of the

[4] The Tenth Circuit applies the four-factor *Turner* analysis to both written and unwritten restrictions, and in the context of both jails and prisons. *Jones v. Salt Lake Cty.*, 503 F.3d 1147, 1155 n.7, 1158 n.13 (10th Cir. 2007).

regulation." *Jones*, 503 F.3d at 1153 (quoting *Turner,* 482 U.S. at 90). The alternative means "need not be ideal; they need only be available." *Id.* (alterations omitted). "[E]ven if not the best method from the inmate's point of view, if another means of exercising the right exists, the second *Turner* factor does not undercut the challenged restriction." *Wardell v. Duncan*, 470 F.3d 954, 961–62 (10th Cir. 2006) (quotation marks omitted). Moreover, though "[t]he absence of any alternative . . . provides some evidence that the regulations are unreasonable," it "is not conclusive." *Beard v. Banks*, 548 U.S. 521, 532 (2006) (quotation marks and alterations omitted).

Pursuant to the third *Turner* factor, courts must consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90; *Jones*, 503 F.3d at 1153. "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90; *see also Jones*, 503 F.3d at 1153-54 ("[W]here the right in question can only be exercised at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike, the courts should defer to the informed discretion of corrections officials[.]") (quoting *Thornburgh,* 490 U.S. at 418) (quotation marks omitted).

Finally, the fourth *Turner* factor requires courts to consider whether there is an obvious, easy alternative to the challenged regulation that fully accommodates the prisoner's rights. *Turner*, 482 U.S. at 90-91. "[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation," whereas "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns." *Id.* at 90 (quotation marks omitted); *Jones*, 503 F.3d at 1154.

> This is not a least restrictive alternative test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the

> claimant's constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Turner, 482 U.S. at 90–91 (citation and quotation marks omitted); *Jones*, 503 F.3d at 1154.

The *Turner* analysis "requires courts, on a case-by-case basis, to look closely at the facts of a particular case and the specific regulations and interests of the prison system in determining whether prisoner[s'] constitutional rights may be curtailed." *Wardell*, 470 F.3d at 961; *see also Boles v. Neet*, 486 F.3d 1177, 1181 (10th Cir. 2007) (*Turner* analysis "requires close examination of the facts of each case"); *Beerheide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002) (*Turner* analysis must be considered "on a case-by-case basis"). While prison officials must "show more than a formalistic logical connection between a regulation and a penological objective," *Beard*, 548 U.S. at 535, ultimately "[t]he burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *Jones*, 503 F.3d at 1159. The Court considers the parties' cross-motions for summary judgment on Plaintiff's First Amendment access-to-information claims in light of the foregoing standards.

2. *Analysis*[5]

a. Hardbound Books

In her PFRD, Judge Khalsa first recommended that the Court grant summary judgment in Defendants' favor on Plaintiff's First Amendment claims challenging Defendants' restrictions on his access to hardbound books during his incarceration at the OCPF. (Doc. 160 at 12, 22.) Pursuant to these restrictions, inmates at the OCPF "were not permitted to possess hardback books or receive hardback books in [the] mail . . . unless the hard covers were removed," with the

[5] The facts described herein are undisputed except as otherwise noted. Further, in considering Defendants' Motion, the Court construes all cognizable evidence and draws all reasonable inferences in Plaintiff's favor.

exception of hardbound textbooks that OCPF distributed to inmates for college classes. (*Id.* at 11-12 (quoting Doc. 142-1 at 6) (quotation marks and brackets omitted).)

In a detailed analysis that the Court hereby adopts, Judge Khalsa carefully considered each of the *Turner* factors with respect to these restrictions. (*Id.* at 12-22.) Applying the first *Turner* factor, Judge Khalsa determined that the restrictions were rationally related to the legitimate, neutral penological purpose of preventing the introduction of contraband and disruptive content into the OCPF. (*Id.* at 12-18.) Plaintiff objects to this determination on several grounds. First, Plaintiff contends that *Bell v. Wolfish*, 441 U.S. 520 (1979) displaces *Turner* and holds that hardbound books received directly from a vendor or publisher can never pose a security risk to prisons. (Doc. 162 at 2-4, 8, 11, 14, 21.) Relatedly, Plaintiff objects that hardbound books from "approved vendors" can never pose such a risk.[6] (*Id.* at 3, 8-9.)

In *Bell*, the Supreme Court held that "a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores" was "a rational response by prison officials to an obvious security problem." 441 U.S. at 550. In so holding, the *Bell* Court observed that "hardback books are especially serviceable for smuggling contraband into an institution[. M]oney, drugs, and weapons easily may be secreted in the bindings," yet they are "difficult to search effectively." *Id.* at 551. However, the *Bell* Court also appeared to accept the defendant warden's testimony that "there is relatively little risk that material received directly from a publisher or book club would contain contraband, and therefore, the security problems are significantly reduced without a drastic drain on staff resources." *Id.* at 549.

The Tenth Circuit applied *Bell* and *Turner* in *Jones*, 503 F.3d at 1147. In *Jones*, the institution at issue "prohibit[ed] inmates from possessing hardback books," and "allow[ed] inmates

[6] As used in this Order, the term "approved vendor" refers to a vendor that prison officials have approved to sell publications directly to inmates.

to obtain paperback books from the jail library and, with permission, the publisher," and also, for a time, from a local Barnes & Noble store via public donation. 503 F.3d at 1156-58. The *Jones* plaintiff did not contest the institution's hardbound book ban but did "challenge the paperback book policy," which the Tenth Circuit found was rationally related to the legitimate, neutral purpose of promoting prison security. *Id.* at 1156, 1158. In so holding, the court observed that "[a]llowing inmates to purchase paperback books only from the publisher prevents contraband from being smuggled into the jail and lessens the administrative burden on jail personnel who must inspect each book." *Id.* at 1158.

In an unpublished opinion, the Tenth Circuit recently stated that "[t]he implication of [*Bell*] and *Jones* is that a complete ban on hardcover books . . . would likely violate the First Amendment." *Khan v. Barela*, 808 F. App'x 602, 608 (10th Cir. 2020). The *Khan* court postulated that, in *Bell* and *Jones*, "one of the usual justifications . . . for a ban on hardcover books . . . — limiting contraband" was "not reasonably related to a restriction on hardcover books . . . sent by publishers." *Id.* (citation and quotation marks omitted). Nevertheless, implicitly recognizing the case-by-case, fact-intensive nature of the *Turner* analysis, the *Khan* court acknowledged the possibility that the defendants could "support this or other justifications for prohibiting [the plaintiff] from receiving" hardbound books once they had an opportunity to defend against the plaintiff's claims.[7] *Id.*

Reading *Bell*, *Turner*, *Jones,* and *Khan* together, and notwithstanding Plaintiff's objections to the contrary, the Court concludes that there is no bright-line constitutional rule prohibiting prison officials from restricting inmates' receipt of hardbound books from publishers or vendors

[7] The *Khan* defendants had not yet had an opportunity to defend against the plaintiff's claims because the decision on appeal was the district court's *sua sponte* dismissal of those claims on a preliminary review of the pleadings. 808 F. App'x at 604.

based on security concerns. Rather, like any other restriction on prisoners' First Amendment rights, the question must be considered on a case-by-case basis, applying the *Turner* analysis and the specific reasons and evidentiary support prison officials offer to justify the restriction. *See Khan*, 808 F. App'x at 608.

In this case, Defendant Martinez attested that Defendants' restrictions on hardbound books received directly from publishers and vendors were necessary to limit the introduction of contraband and disruptive content into the OCPF, because an alleged publisher or vendor may be "a phony being used as a front to send contraband and/or illicit content" to inmates. (Doc. 142-1 at 7-8.) In this regard, the Court notes that, since *Bell* was decided in 1979, the explosive growth of the internet and other technological advances have made it far easier and less costly for an ordinary person to publish or sell a book or successfully pose as a book publisher, vendor, approved vendor, or club.[8] Thus, "publishers only" rules may provide much less protection from contraband smuggling than they did in the past. Defendant Martinez's undisputed attestations on this point persuade the Court, as they did Judge Khalsa, that Defendants' restrictions on hardbound books—including books received directly from publishers and vendors—were rationally related to the legitimate, neutral penological purpose of excluding contraband and disruptive content from the OCPF. (*See* Doc. 160 at 15.)

Relying on the first prong of the first *Turner* factor, Plaintiff objects that Defendants' hardbound book restrictions were not rationally related to their stated purpose because he personally has never seen contraband hidden in books and Defendants have submitted no evidence of contraband smuggling in hardbound books from approved vendors. (Doc. 162 at 15, 21.) However,

[8] Plaintiff has failed to explain why approved vendors would be immune from such impersonation. (*See generally* Doc. 162.) The logos and addresses of virtually any vendor can be found on the internet.

> [t]o show a rational relationship between a regulation and a legitimate penological interest, prison officials need not prove that the banned materials actually caused problems in the past, or that the materials are likely to cause problems in the future. In other words, empirical evidence is not necessarily required. Moreover, it does not matter whether we agree with the defendants or whether the policy in fact advances the jail's legitimate interests. The only question that we must answer is whether the defendants' judgment was rational, that is, whether the defendants might reasonably have thought that the policy would advance its interests.

Sperry v. Werholtz, 413 F. App'x 31, 40 (10th Cir. 2011) (citations and quotation marks omitted). Here, Defendants reasonably believed that prohibiting inmates' receipt of hardbound books—including those purportedly sent from a publisher or vendor—would significantly reduce the introduction of contraband and disruptive content into the OCPF.

According to Plaintiff, the fact that Defendants permitted inmates to possess hardbound college textbooks demonstrates that hardbound books did not actually pose a security risk. (Doc. 162 at 4-8.) However, as Judge Khalsa noted, Defendant Martinez attested to a rational reason for treating hardbound college textbooks differently from other hardbound books. (Doc. 160 at 16.)

> [T]extbooks come directly from the college to OCPF. They are not mailed to inmates or provided directly to inmates.[9] These college textbooks . . . are not OCPF property and must be returned to the college at the completion of the semester or when an inmate is transferred . . . . Therefore, neither OCPF nor the inmate can[] alter the book. Since OCPF's security concern largely stems from concerns about the smuggling of contraband from the outside, . . . the controlled manner in which college textbooks are admitted into OCPF and distributed to the inmates satisfies OCPF's security concerns.

(Doc. 156 at 12-13.)

Plaintiff objects that hardbound college textbooks could have been used for smuggling if an inmate arranged for someone at the college (or Amazon, in the case of certain automotive textbooks) to hide contraband in a specific copy of a specific book *and also* arranged for OCPF

[9] Likewise, certain automotive textbooks that the OCPF ordered from Amazon were not mailed or provided directly to inmates, but rather were sent directly from Amazon to the OCPF for distribution. (*See* Doc. 119 at 33; Doc. 159 at 29.)

personnel to distribute that specific copy to that inmate. (Doc. 162 at 6-7.) However, Plaintiff's argument actually highlights why "the controlled manner in which college textbooks [were] admitted into OCPF and distributed to the inmates satisfie[d] OCPF's security concerns" in a way that hardbound books inmates received directly through the mail did not. (Doc. 156 at 12-13.) Compared to an inmate's direct receipt of books in the mail, the process of distributing college textbooks included an additional layer of security that would have to be subverted, *i.e.*, the prison personnel responsible for distributing the books to inmates.

Plaintiff also objects that hardbound books are no lengthier and therefore no more difficult to search for disruptive content than softbound books. (Doc. 162 at 9.) Even accepting this objection as true, however, it does not address Defendants' undisputed evidence that hardbound books are more difficult to search for contraband. As the *Bell* Court observed, "hardback books are especially serviceable for smuggling contraband into an institution[. M]oney, drugs, and weapons easily may be secreted in the bindings," yet they are "difficult to search effectively." 441 U.S. at 551.

Finally, with respect to the second prong of the first *Turner* factor, Plaintiff objects that Defendants' hardbound book restrictions were not "neutral" because they were "selective against academic type[s] of books," such as veterinary textbooks and biographies. (Doc. 162 at 11.) Yet, Plaintiff fails to point to any evidence that would demonstrate a genuine issue of material fact on this point. Initially, all of the restrictions that Plaintiff has challenged regulated the format and sources of publications without regard to their content and were therefore facially content neutral.[10] *See Thornburgh*, 490 U.S. at 415-16.

[10] True, the restrictions at issue were intended to prevent the introduction not only of contraband, but also of

> sexually explicit content and material that may support/induce violence, as well as information that could assist an inmate with escape, provide information about banned substance manufacturing and

Further, though Plaintiff has declared that he was unable to obtain certain veterinary textbooks and biographies in softbound form, he has not shown—and it seems unlikely that he could show—that most or all "academic" books were only available hardbound. Also, the undisputed fact that Plaintiff could have kept the "academic" hardbound books he wanted had he been willing to remove the covers, as discussed below, alleviates the Court's concern about any disparate impact that Defendants' hardbound book restrictions otherwise might have had. For these reasons, and as further explained in Judge Khalsa's PFRD, (Doc. 160 at 12-18), the Court finds that the logical connection between Defendants' hardbound book restrictions and their legitimate, neutral penological purpose is not "so remote as to render the policy arbitrary or irrational," *Turner*, 482 U.S. at 89-90, and the restrictions therefore satisfy the first *Turner* factor.

As Judge Khalsa noted, the parties have vigorously disputed a number of factual questions related to the second *Turner* factor, *i.e.*, whether Plaintiff had alternative means of exercising the constitutional right at issue. (Doc. 160 at 18 (citing *Turner*, 482 U.S. at 90).) However, she concluded, and the Court agrees, that these factual disputes are immaterial because there is no genuine factual dispute that Plaintiff could have kept his hardbound books—both those with which he arrived and those that he later received in the mail—had he removed the books' hard covers. (*Id.* at 19; *see, e.g.*, Doc. 119 at 31; Doc. 142-1 at 6; Doc. 150 at 2, 8); *cf. Jackson v. Elrod*, 881 F.2d 441, 446 (7th Cir. 1989) ("The legitimate state interests here could have been satisfied . . . by simply removing the covers of the hard-bound books.").

> trafficking, and/or provide information about other activities which may threaten security and safety at OCPF.

(Doc. 142-1 at 4.) However, regulations restricting access to such materials are considered "neutral" under *Turner* because they "further[] an important or substantial government interest unrelated to the suppression of expression." *Jones*, 503 F.3d at 1153; *Thornburgh*, 490 U.S. at 415. "In other words, where prison officials draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are neutral." *Jones*, 503 F.3d at 1153 (quotation marks omitted).

Plaintiff did declare that removing the covers from four of his hardbound books "ruined" them. (Doc. 119 at 31.) However, he did not and could not plausibly declare that removing the covers made the books illegible. (*See id.*) Understandably, this option did not appeal to Plaintiff, but to satisfy *Turner*, alternative means to exercise a constitutional right need not be "ideal," *Jones*, 503 F.3d at 1153, or "the best method from the inmate's point of view." *Wardell*, 470 F.3d at 961–62 (quotation marks omitted). Rather, they simply need to be available. *Jones*, 503 F.3d at 1153. Here, there is no dispute that Defendants offered Plaintiff alternative means to access information that he claims he could find only in hardbound books. (*See* Doc. 150 at 6; Doc. 159 at 6.)

Plaintiff objects that these means were nevertheless unavailable to him because, if he had possessed hardbound books with the covers removed, he could have been disciplined upon transfer to another facility for violating New Mexico Corrections Department ("NMCD") Policy CD150201(E)(6)(b), which provides that "[i]nmates found in possession of property that has been altered . . . will receive a disciplinary report and said property will be confiscated." (Doc. 162 at 17; *see* Doc. 142-4 at 8; Doc. 149 at 4, 13, 17, 41; Doc. 150 at 2, 5-6.) This objection suffers from two flaws. First, it is wholly speculative. Second, Defendants cannot be held accountable for the policies or actions of other facilities, absent evidence that they exerted any influence or control over these policies or actions. The undisputed evidence, including OCPF Inmate Handbooks and a grievance response that Plaintiff attached to his Amended Complaint, shows that *Defendants* did not consider hardbound books with the covers removed to be altered property. (Doc. 119 at 155; Doc. 142-10 at 11, 31, 51, 69.) Thus, notwithstanding NMCD Policy CD150201(E)(6)(b), Plaintiff had a viable alternative way to access information found only in hardbound books while subject to Defendants' restrictions on them.

Similar considerations defeat Plaintiff's objection that he could not have removed the covers from his hardbound books because, if he had, he might have been disciplined by an OCPF guard who did not know that other OCPF personnel had instructed him to remove the covers. (Doc. 162 at 17.) This objection, too, is wholly speculative. Again, the undisputed evidence shows that OCPF did not consider hardbound books with the covers removed to be altered property. (Doc. 119 at 155; Doc. 142-10 at 11, 31, 51, 69.) Thus, if an OCPF guard ignorant of OCPF policy were to have reported Plaintiff for possessing hardbound books with the covers removed, no evidence suggests that Defendants would have failed to correct the guard's mistake. In short, there is no genuine issue of material fact that, while he was at the OCPF and subject to Defendants' restrictions on hardbound books, Plaintiff had viable alternative means to access information found only in hardbound form. Defendants' restrictions on Plaintiff's access to hardbound books therefore satisfy the second *Turner* factor.

With respect to the third *Turner* factor, *i.e.*, the impact on OCPF of accommodating Plaintiff's First Amendment rights as requested, 482 U.S. at 90, Defendant Martinez attested that,

> [i]f [OCPF] inmates were permitted to receive hardback books in the mail, there would be an increased administrative burden involved in checking each hardback book for contraband, such as needles and illicit substances. This increased administrative burden could result in the need to hire additional staff or purchase screening equipment such as metal/drug detectors to accomplish these additional security checks.

(Doc. 142-1 at 4.)

Plaintiff has repeatedly declared that it would have been quick and easy for Defendants to search hardbound books received in the mail with drug dogs and metal detector wands that OCPF already had, and to confirm books' validity "by checking the ISBN on a web site that sells books

or with the Library of Congress."[11] (Doc. 149 at 10-12, 17-18, 22, 37; Doc. 150 at 3-4, 6-7, 19, 24; Doc. 159 at 5; Doc. 162 at 19.) However, as Judge Khalsa observed, (Doc. 160 at 21), though courts must draw all reasonable factual inferences in favor of prisoners opposing summary judgment, they must also

> distinguish between evidence of disputed *facts* and disputed *matters of professional judgment*. In respect to the latter, [the Court's] inferences must accord deference to the views of prison authorities. Unless a prisoner can point to sufficient evidence regarding such issues of judgment to allow him to prevail on the merits, he cannot prevail at the summary judgment stage.

Beard, 548 U.S. at 529–30 (emphases added) (citation omitted).

Relatedly, testimonial evidence must be based on personal knowledge. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602; *see also* Fed. R. Evid. 701 (lay witness' opinion testimony must be "rationally based on the witness's perception . . . and . . . not based on scientific, technical, or other specialized knowledge"). Because the Court must defer to Defendant Martinez's professional judgment regarding the relative difficulty of adequately searching and assessing the source and validity of incoming hardbound books using drug dogs, metal detectors, and the internet, and because Plaintiff has demonstrated no personal knowledge on these points, Plaintiff's declarations fail to create a genuine issue of material fact.[12, 13]

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[11] Such a "check" would not, however, have allowed prison officials to verify the identity of the person or entity who purportedly sent the book.

[12] Plaintiff objects that his opinions regarding contraband smuggling and prison searches are valid because he is an expert on these topics due to his lengthy imprisonment. (Doc. 162 at 14-15.) However, the proffered basis of Plaintiff's claimed expertise is patently inadequate to support his opinions under Federal Rule of Evidence 702. *See, e.g., United States v. Goxcon-Chagal*, 886 F. Supp. 2d 1222, 1246 (D.N.M. 2012), *aff'd sub nom. United States v. Medina-Copete*, 757 F.3d 1092 (10th Cir. 2014) (If a purported expert relies solely or primarily on his or her experience, "then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."). Though Plaintiff has almost certainly witnessed some smuggling and been the subject of many searches while incarcerated, there is no evidence in the record that his experience is of sufficient type, depth, and breadth to allow him to plausibly dispute Defendant Martinez's professional judgment on these topics.

[13] Plaintiff's declaration that he has seen guards use dogs to search the OCPF library quickly and easily, (Doc. 150 at 24), does not show personal knowledge of how long it would take, how difficult it would be, and what personnel and

In his Objections, Plaintiff characterizes Defendant Martinez's sworn statements regarding the impact of permitting OCPF inmates to receive hardbound books through the mail as "unsubstantiated" and "conclusory." (Doc. 162 at 18-19.) In the Court's view, however, not only does Defendant Martinez have personal knowledge about this issue as OCPF's Warden, but also his testimony flows ineluctably from the undisputed fact that hardbound books are "particularly good for smuggling contraband such as[] money, drugs, and weapons" and "difficult to search effectively." (Doc. 142-1 at 3.) This being so, if OCPF were to allow inmates to receive hardbound books through the mail when it had not done so before, then the burden of searching the mail for contraband would necessarily increase, even if overall mail volume remained the same. And thus, depending on the quantity of hardbound books received, the "increased administrative burden could result in the need to hire additional staff or purchase [additional] screening equipment." (*Id.* at 4.) In short, Defendants have sufficiently supported this straightforward observation.

Plaintiff also objects to Defendant Martinez's sworn statements on the basis of *Allen v. Coughlin*, 64 F.3d 77 (2d Cir. 1995), in which the Second Circuit held that "[t]he degree to which the cost of" inspecting newspaper clippings was "burdensome is an issue of fact not resolved by the conclusory affidavits submitted." *Id.* at 81; (*see* Doc. 162 at 18-19.) This citation fails to prove Plaintiff's point, however, both because it relates to newspaper clippings rather than hardbound books, and because the affidavits before this Court are, of course, distinct from the affidavits before the Second Circuit. Thus, notwithstanding Plaintiff's Objections, the Court agrees with Judge Khalsa that the third *Turner* factor supports the constitutional validity of Defendants' restrictions on Plaintiff's access to hardbound books. (Doc. 160 at 22.)

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equipment would be needed to adequately search hardbound books received through the mail. Beyond any other differences, it seems plain that books arriving from the outside would require a more thorough search than books already in the prison library.

Finally, with respect to the fourth *Turner* factor, *i.e.*, whether there was a ready alternative that would have fully accommodated Plaintiff's rights at *de minimis* cost to OCPF's interests, 482 U.S. at 90-91, Plaintiff in his Objections again proposes either using drug dogs and metal detectors to inspect hardbound books, or allowing inmates to receive hardbound books directly from publishers and vendors. (Doc. 162 at 15-16; *see also* Doc. 150 at 3-4, 6, 24.) However, for the reasons already discussed, Defendants have shown that these alternatives would have imposed significant costs to the facility's valid penological interests, and Plaintiff has failed to demonstrate a genuine factual dispute on this point. Therefore, the fourth *Turner* factor also weighs in Defendants' favor with respect to their restrictions on Plaintiff's access to hardbound books.

In sum, viewing the record evidence in the light most favorable to Plaintiff, drawing all reasonable inferences in his favor, and notwithstanding his Objections, the Court agrees with and adopts Judge Khalsa's proposed finding that each *Turner* factor supports the constitutional validity of the challenged restrictions on Plaintiff's access to hardbound books. (Doc. 160 at 12-22.) Because there is no genuine issue of material fact, Defendants are entitled to summary judgment on Plaintiff's claims that Defendants violated his First Amendment rights by restricting his access to hardbound books during his incarceration at OCPF. For the same reasons, Plaintiff is not entitled to summary judgment on these claims.

b. Publications from Non-Approved Vendors

In her PFRD, Judge Khalsa next recommended that the Court grant summary judgment in Defendants' favor on Plaintiff's claims that Defendants violated his First Amendment rights by restricting his access to publications from non-approved vendors. (Doc. 160 at 26-31.) Construing the record evidence in Plaintiff's favor, from before March 2013 to October 2016, OCPF only permitted inmates to purchase books and magazines from an approved vendor and newspapers

from the publisher.[14] (Doc. 156 at 13; Doc. 159 at 8-9; Doc. 164-1 at 1-2.) From October 2016 to Plaintiff's transfer, OCPF "maintained its approved vendor list" but also allowed inmates to purchase books, magazines, and newspapers from publishers.[15] (Doc. 156 at 13; *see also* Doc. 142-10 at 84.)

The parties dispute who was on the approved vendor list from March 2013 to April 2017. Defendant Martinez attested that inmates could purchase books and magazines from several approved vendors, including Christian Book Distributors ("Christian Book") and Barnes & Noble, throughout Plaintiff's incarceration at OCPF. (Doc. 142-1 at 7.) Christian Book had a 500,000-book catalog and Barnes & Noble offered over a million titles. (*Id.*) The OCPF Inmate Handbooks from January 2013 through September 2016 also listed several approved vendors, including Christian Book and Barnes & Noble. (Doc. 142-10 at 11, 31, 51, 69.) The October 2016 handbook listed several approved vendors including Christian Book but did not include Barnes & Noble. (*Id.* at 84.) Additionally, Defendant Martinez attested that "specific books, publications, and/or orders [were] considered and approved even if the publisher [did] not appear on the approved publishers list." (Doc. 142-1 at 8.)

[14] In his April 2, 2020 affidavit, Defendant Martinez used the terms "vendor" and "publisher" interchangeably and did not indicate whether or how OCPF's policies distinguished between the two. (Doc. 142-1 at 7-9.) However, in his August 13, 2020 and October 22, 2020 affidavits, Defendant Martinez clarified his earlier affidavit on these points. (Doc. 156 at 13; Doc. 164-1 at 1-2.) The Court notes that, according to his August 13, 2020 affidavit, OCPF stopped using approved vendor lists completely in July 2017, and from that date forward has simply required inmates to purchase publications directly from a vendor or publisher. (Doc. 156 at 13.)

[15] In his response to Defendants' Supplemental *Martinez* Report, Plaintiff alleged that Defendants ignored his "numerous requests" for leave to purchase publications from publishers—presumably after the October 2016 policy change, though he did not specify the dates of his requests—and that the policy change was illusory. (Doc. 159 at 8-9, 21.) However, Plaintiff did not make these factual allegations under penalty of perjury and thus, the Court cannot consider them as evidence in ruling on the parties' summary judgment motions. 28 U.S.C. § 1746; *Hall*, 935 F.2d at 1111. Moreover, even if the Court were to accept these allegations as true, they would not change the Court's decision, because Defendants' approved vendor restrictions that were in place both before and after October 2016 satisfy the *Turner* standard as further discussed in this section.

Plaintiff, in turn, declared that during most of his incarceration at OCPF, there were only two approved book vendors, *i.e.*, Christian Book and Edward R. Hamilton Booksellers ("Hamilton Booksellers"),[16] and that Barnes & Noble, Scroll Publishing, Hastings, Al Anwar, Crazy Crow, Azure Green, Autom, Islamic Bookstore, and Halalco were added "shortly" before his April 2017 transfer. (Doc. 149 at 39; Doc. 162 at 34 n.13 (citing Doc. 119 at 149).) However, Plaintiff also declared that, in December 2015, he received two hardbound books in the mail from either Amazon or Barnes & Noble and that these books came from an approved vendor. (Doc. 119 at 31; Doc. 150 at 2, 8, 18.) Conversely, in his Objections, Plaintiff declares that he purchased these two books from Amazon by special request and that Amazon was *not* an approved vendor.[17] (Doc. 162 at 32.) Yet, Plaintiff has also declared that Defendants did not respond to his requests to approve specific book purchases from non-approved vendors. (Doc. 149 at 22; Doc. 150 at 8, 18.) Regarding magazines, Plaintiff declared that OCPF maintained a list of 40 approved magazines.[18] (Doc. 150 at 2, 17.)

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[16] It is unclear whether Plaintiff made this declaration based on personal knowledge, or rather based on *Heard v. Marcantel*, in which the parties did not dispute for summary judgment purposes that Christian Book and Hamilton Booksellers were the only approved book vendors at OCPF at some point between July 2013 and March 2017. *See Heard v. Marcantel*, Civ. No. 15-516 MCA/SMV, 2017 WL 3412094, at *1, *4 (D.N.M. Mar. 16, 2017). In so finding, the *Heard* court relied on a June 2016 memorandum that the plaintiff submitted, in which A. Waters stated that OCPF was then using only Christian Book and Hamilton Booksellers "for ordering books for inmate population" but was "in the process of adding more vendors." *Heard v. Marcantel*, Civ. No. 15-516 MCA/SMV, Doc. 63 at 17 (D.N.M. filed Jul. 13, 2016). In *Heard*, the defendants elected not to present any evidence to clarify or contradict this memorandum, likely because the plaintiff in that case was not challenging OCPF's approved vendor restrictions. *Id.*, Doc. 67 at 4-5 (D.N.M. filed Jul. 27, 2016). Here, however, Defendants have made a different choice, and have thereby created a different record with respect to the approved vendors and publishers from whom inmates could order publications between March 2013 and April 2017. The Court therefore declines to rely on the *Heard* decision in determining whether there are genuine issues of material fact regarding Plaintiff's constitutional challenge to Defendants' approved vendor restrictions. *See generally Wardell*, 470 F.3d at 961 (*Turner* analysis must be done on "case-by-case basis"). However, as is required on summary judgment, the Court will resolve its doubts regarding whether Plaintiff's declaration is based on personal knowledge in Plaintiff's favor in deciding Defendants' Motion.

[17] Plaintiff objects that Judge Khalsa "assumed" that these books came from an approved vendor. (Doc. 162 at 32.) In fact, Judge Khalsa relied on Plaintiff's declaration that they did so. (Doc. 160 at 26 (citing Doc. 150 at 18).)

[18] Plaintiff submitted a handwritten copy of a November 2016 memorandum listing the 40 approved magazines at issue. (Doc. 119 at 148.) In his Objections, Plaintiff declares that this is a true and accurate copy of a memorandum that Defendants posted at OCPF. (Doc. 162 at 24.) The Court questions whether the copy is wholly accurate; for

In his pleadings, Plaintiff identified various publications that he declared he was unable to purchase during his incarceration at OCPF because they were not available from an approved vendor. These include three paperback books from Prison Legal News ("PLN") that Plaintiff ordered in May 2016, as well as certain specialty books and magazines. (*See, e.g.*, Doc. 119 at 38, 150-52; Doc. 150 at 2-3, 21; Doc. 162 at 26, 29.) Defendants' approved vendor restrictions also prevented Plaintiff from purchasing newspaper articles when the publisher did not sell articles individually. (*See* Doc. 119 at 128-34.)

In her PFRD, Judge Khalsa applied the four *Turner* factors to the foregoing record and concluded that there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law on Plaintiff's First Amendment claims challenging Defendants' approved vendor restrictions. (Doc. 160 at 26-31.) The Court agrees with and adopts Judge Khalsa's analysis. Regarding the first *Turner* factor, Defendant Martinez attested that the challenged restrictions

> help[ed] OCPF to focus its resources needed to review books that [were] mailed to inmates. Anyone who prints a book could potentially be a "publisher." As such, these policies help[ed] to protect against the situation whereby any number of "publishers" c[ould] send any number of books to inmates at OCPF, overtaxing OCPF's resources and jeopardizing the effectiveness of OCPF's security reviews.

(Doc. 142-1 at 7-8.) He added that,

> [a]lthough books from approved publishers [were] also reviewed for contraband and content, having approved publishers help[ed] to alleviate the security concern that the alleged "publisher" [was] a phony being used as a front to send contraband and/or illicit content.

(*Id.* at 7.)

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example, it seems doubtful that the original memorandum would have included a distinctive spelling error characteristic of some of Plaintiff's pleadings, *i.e.*, "contraban." (Doc. 119 at 148; *see, e.g.*, Doc. 150 at 3-4.) However, even if the Court were to accept this evidence in considering the parties' Motions, it would only reinforce the Court's decision, because the 40 listed magazines consist of a variety of popular periodicals on a broad range of topics. *See Thornburgh*, 490 U.S. at 418 (prison regulations "permit[ting] a broad range of publications to be sent, received, and read" by inmates satisfy the second *Turner* factor).

Plaintiff objects that Defendants' approved vendor restrictions do not satisfy the first prong of the first *Turner* factor, *i.e.*, the rational relationship prong, because they resulted in "needless exclusions," citing *Thornburgh*, 490 U.S. at 417. (Doc. 162 at 30-33.) Indeed, Plaintiff seeks to wholly replace the *Turner* analysis with a "needless exclusions" test that he has derived from the *Thornburgh* Court's observation that the regulations at issue in that case "expressly reject[ed] certain shortcuts that would lead to needless exclusions." 490 U.S. at 417; (*see* Doc. 162 at 30-33.) In so arguing, however, Plaintiff overlooks three critical points. First, the *Thornburgh* Court, far from rejecting the *Turner* analysis, applied that very analysis. 490 U.S. at 414-19. Second, the *Thornburgh* Court did not, as Plaintiff claims, consider and ban content-neutral approved vendor restrictions like the ones at issue here. (*See* Doc. 162 at 30-33.) Rather, it considered and found facially valid certain federal regulations "authoriz[ing] prison officials to reject incoming publications found to be detrimental to institutional security" based on their contents. 490 U.S. at 403. And finally, nowhere did the *Thornburgh* Court hold that a prison regulation cannot be rationally related to a legitimate, neutral penological purpose if it risks any needless exclusions. *See generally id.*

To adopt the test that Plaintiff derives from *Thornburgh* would be contrary to the extensive, uniform body of federal law applying *Turner* to restrictions on prisoners' access to information and holding that such restrictions comply with the First Amendment if they are reasonably related to legitimate penological interests. *Turner*, 482 U.S. at 89. This the Court declines to do. Instead, applying the first prong of the first *Turner* factor, the Court will continue to ask whether "[D]efendants might reasonably have thought that the policy would advance [the prison's] interests." *Sperry*, 413 F. App'x at 40. As to Defendants' approved vendor restrictions, the answer to that question is yes. *See Payne v. Friel*, No. 2:04-CV-844-DAK, 2007 WL 1100420, at *8 (D.

Utah Apr. 10, 2007), *aff'd in relevant part,* 266 F. App'x 724 (10th Cir. 2008) ("[T]here is an obvious connection between the prison's approved vendor policy and the governmental interest in preventing contraband from entering the prison.").

Turning to the second prong of the first *Turner* factor, "protecting prison security [is] a purpose . . . central to all other corrections goals." *Thornburgh*, 490 U.S. at 415 (quotation marks omitted). Thus, the proffered purpose of Defendants' approved vendor restrictions—*i.e.*, to limit the introduction of contraband and disruptive content into OCPF—is plainly legitimate and neutral. Plaintiff objects that the challenged restrictions and their purpose were *not* neutral in three respects. First, he objects that Defendants relied on these restrictions to reject three books from PLN based on their content. (Doc. 162 at 23-24; *see also* Doc. 150 at 8.) However, Plaintiff offers mere conjecture to support this objection and has elsewhere admitted that Defendants rejected these books "*only* because PLN was not an approved vendor." (*Id.*; Doc. 150 at 3 (emphasis added).) As such, his conclusory declarations fail to create a genuine factual dispute on this point. *See Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1201 (10th Cir. 2015) (courts "do not consider conclusory and self-serving affidavits" on summary judgment).

Second, Plaintiff objects that Defendants' approved vendor restrictions were not neutral because they functioned as a content-based ban of publications from "unauthorized organizations," contrary to *Thornburgh*, 490 U.S. at 401. (Doc. 162 at 26, 28-31.) The Court disagrees. The undisputed record evidence shows that Defendants selected the approved vendors at issue based on their legitimacy and relative popularity with inmates, not their catalogs' expressive content. (*See, e.g.,* Doc. 142-1 at 7-8; Doc. 149 at 21.) Thus, the *Thornburgh* Court's suggestion that prison officials should make "individualized" determinations about whether to censor particular content simply does not apply here, where the restrictions at issue were content-neutral. *See Thornburgh*,

490 U.S. at 416. Also, by Plaintiff's own admission, Defendants *did* make individualized determinations by considering special requests for publications from non-approved vendors, such as the two books that Plaintiff declares he received from Amazon in December 2015. (Doc. 142-1 at 8; Doc. 162 at 32.)

Finally, Plaintiff insists that Defendants' approved vendor restrictions, like their hardbound book restrictions, were not neutral because they discriminated against "academic/specialty types of publications." (Doc. 162 at 26-28.) Again, however, though Plaintiff has declared that he was unable to obtain certain specific academic and specialty publications from approved vendors, he has not shown—and it seems unlikely that he could show—that OCPF's approved vendors, with their extensive selections, offered only a narrow range of publications of this kind. Further, the undisputed fact that Defendants permitted Plaintiff to order "academic" books from Amazon in December 2015 alleviates the Court's concern about any disparate impact that Defendants' approved vendor restrictions might otherwise have had. Therefore, and as further explained in Judge Khalsa's PFRD, the Court concludes that the challenged restrictions were rationally related to the legitimate, neutral penological objective of smuggling prevention and thus satisfy both prongs of the first *Turner* factor. (Doc. 160 at 26-27.)

Regarding the second *Turner* factor, *i.e.*, whether Plaintiff had alternative means of exercising the right at issue, 482 U.S. at 90, and construing all facts in Plaintiff's favor, Plaintiff had access to six daily newspapers, "numerous recreational magazine subscriptions," and 3,000 books through the OCPF library, as well as roughly one-tenth of the books that he requested through interlibrary loan. (Doc. 142-1 at 4-6; Doc. 149 at 2, 16, 47, 49-50, 53-54; Doc. 150 at 5; Doc. 164-1 at 1.) He could also purchase books and magazines from Christian Book and Hamilton Booksellers from March 2013 to November 2015, from Amazon or Barnes & Noble as an approved

vendor or by special request in December 2015, and from Barnes & Noble, Scroll Publishing, Hastings, Al Anwar, Crazy Crow, Azure Green, Autom, Islamic Bookstore, and Halalco as approved vendors shortly before his April 2017 transfer. (Doc. 149 at 39; Doc. 150 at 2, 8, 18; *see also* Doc. 162 at 24, 34 n.13 (citing Doc. 119 at 149).) In addition, he could purchase newspapers from publishers throughout his incarceration at OCPF.

The Court finds particularly informative Plaintiff's admission that, while at OCPF, he was able to purchase two biographies from Amazon, which he elected not to keep when they proved to be hardbound books from which he was unwilling to remove the covers. (Doc. 162 at 32-33.) Regardless of Amazon's status at OCPF, this admission confirms that Plaintiff had access to its very broad range of literature, including books for veterinary and religious study.[19] What he characterizes as an inability to obtain such books was in fact a mere unwillingness to remove their covers. Moreover, even assuming that Plaintiff *was* unable to access some of the many publications that he wanted to read, "the right" at issue here was not Plaintiff's right to have access to any book he wanted. Rather, "viewed sensibly and expansively," it was to have access to "a broad range of publications," which Plaintiff indisputably did. *Thornburgh*, 490 U.S. at 417-18. For these reasons, and as further explained in Judge Khalsa's PFRD, the Court finds that Defendants' approved vendor restrictions from March 2013 to April 2017 also satisfy the second *Turner* factor. (Doc. 160 at 28.)

[19] Plaintiff's conclusory assertions that Defendants' approved vendor restrictions prevented him from obtaining books for religious study are particularly incredible in light of the undisputed facts that: (a) Plaintiff follows the Christian religion, and (b) Christian Book was an approved vendor throughout his incarceration at the OCPF. (*See, e.g.*, Doc. 119 at 47-49; Doc. 149 at 39; Doc. 162 at 34 n.13.) Plaintiff clearly could have obtained "concordances, lexicons, commentaries on the Bible [and] Bible dictionaries" from this approved vendor, as well as by special request. (Doc. 162 at 44.)

Addressing the third *Turner* factor, *i.e.*, "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally," 482 U.S. at 90, Defendant Martinez attested in his April 2, 2020 affidavit that

> [t]o require OCPF staff to process and thoroughly inspect mail from non-approved vendors would burden the administration, make it difficult if not impossible to comply with . . . time constraints [for delivering mail to inmates], and potentially disadvantage other inmates whose mail would be delayed.

(Doc. 142-1 at 8.)

Attempting to refute this affidavit, Plaintiff objects that Defendants have "offer[ed] no evidence, only conclusory statements." (Doc. 162 at 34.) In so arguing, Plaintiff fails to appreciate that Defendant Martinez's affidavits are evidence that the Court may properly consider in the summary judgment context. *Vazirabadi v. Denver Health & Hosp. Auth.*, 782 F. App'x 681, 687 (10th Cir. 2019), *cert. denied*, 140 S. Ct. 2568 (2020), *reh'g denied*, 140 S. Ct. 2821 (2020); Fed. R. Civ. P. 56(c). Further, Defendant Martinez based these affidavits on his personal knowledge as the OCPF's Warden from the summer of 2015 to the present and supported them with citations to documents, including the NMCD's policy requiring prisons to deliver packages to inmates within 72 hours of receipt. (Doc. 142-1 at 1, 6-7; Doc. 156 at 10; Doc. 161-1 at 1; Doc. 164-1 at 1.) The Court therefore rejects Plaintiff's mischaracterization of Defendants' evidence as merely conclusory statements.

In his Objections, Plaintiff also reiterates his argument that inspecting publications from non-approved vendors would not have added to OCPF's administrative burden or impeded the timely delivery of mail to inmates, because OCPF already inspected all incoming mail for contraband and disruptive content. (Doc. 162 at 34; *see, e.g.,* Doc. 149 at 23.) In so arguing, however, Plaintiff continues to overlook Defendants' undisputed evidence that the approved vendor restrictions allowed OCPF to "focus" its resources, in the logical sense that publications

from unknown sources would have been more likely to contain contraband or disruptive content and would therefore have required more thorough and time-consuming inspection than publications from known, vetted sources. (Doc. 142-1 at 7-8.) For these reasons, the Court agrees with Judge Khalsa that the third *Turner* factor also supports the constitutional validity of the approved vendor restrictions in effect at OCPF during Plaintiff's incarceration there. (Doc. 160 at 29.)

Finally, with respect to the fourth *Turner* factor, *i.e.*, whether there was an easy, obvious way for OCPF to fully accommodate Plaintiff's rights at *de minimis* cost, 482 U.S. at 90–91, Defendant Martinez attested that "[t]here is not an obvious or easy alternative that would allow inmates to obtain books from unapproved vendors without significantly and adversely affecting the interests previously identified." (Doc. 142-1 at 8.) In his Objections, Plaintiff argues that Defendants' decisions, (a) in October 2016, to permit inmates to order all types of publications from publishers, and (b) in July 2017, to permit inmates to order all types of publications from any vendor or publisher, show that the prior-approved vendor policy was unconstitutional. (Doc. 162 at 23, 35; *see* Doc. 156 at 13.) In other words, Plaintiff objects that because Defendants ultimately adopted less restrictive policies, their initial policy was necessarily invalid.

If the fourth *Turner* factor were a "least restrictive alternative" test, then Plaintiff's argument would make sense. However, it is not. *See Turner*, 482 U.S. at 90 (fourth *Turner* factor "is not a 'least restrictive alternative' test"). Rather, a prison regulation satisfies the fourth *Turner* factor in the absence of a ready alternative that "fully accommodates" the prisoner's rights "at *de minimis* cost to valid penological interests." *Id.* at 90-91 (citation and quotation marks omitted); *Jones*, 503 F.3d at 1154. That Defendants gradually instituted more lenient approved vendor restrictions at the OCPF does not show that these restrictions imposed *de minimis* costs on OCPF

at all, much less that they would have done so under the circumstances prevailing when the original restrictions were in effect.[20]

Plaintiff also objects that, "[i]f Defendants had recognized the known vendors" that they approved by late 2016 "*and* allowed [hardbound books]," presumably with covers intact, "this would have truly provided access to a broad range of literature and would have acted in a neutral fashion." (Doc. 162 at 34-35 (emphasis added).) Even if true, however, Plaintiff's observation does not refute Defendants' undisputed evidence that this alternative would have imposed more than *de minimis* costs to OCPF's valid penological interests. Thus, and as further discussed in Judge Khalsa's PFRD, (Doc. 160 at 29-30), the fourth *Turner* factor also weighs in Defendants' favor with respect to their approved vendor restrictions.

More generally, Plaintiff continues to argue that the Court should reject Defendants' approved vendor restrictions because other courts have done so. (Doc. 149 at 20, 32; Doc. 150 at 9, 20; Doc. 159 at 12; Doc. 162 at 28-29, 32.) However, the cases that Plaintiff cites do not address the use of approved vendor lists in prisons. As Plaintiff admits in his Objections, *Krug v. Lutz*, 329 F.3d 692 (9th Cir. 2003), does not include the passage that he previously purported to quote from it, and concerns a due process claim.[21] (Doc. 162 at 28 n.12.) *Murphy v. Missouri Department of Corrections*, 372 F.3d 979, 986 (8th Cir. 2004), *Williams v. Brimeyer*, 116 F.3d 351, 354 (8th Cir. 1997), and *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1031 (2d Cir. 1985), *overruled by O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 n.2 (1987), in turn, address content-based restrictions not at issue here.

[20] The Court notes that, if it were to treat a prison's decision to relax a restriction as evidence that the original restriction was unconstitutional, this could discourage prisons from modifying their regulations to provide prisoners with greater freedoms.

[21] In his Objections, Plaintiff acknowledges that the quoted passage comes from the *Prisoners' Self-Help Litigation Manual*, which is not an authoritative source of federal constitutional law. (Doc. 162 at 28 n.12.)

The Second Circuit's decision in *Shakur v. Selsky*, 391 F.3d 106 (2d Cir. 2004), comes closest to supporting Plaintiff's argument. In *Shakur*, the court held that the plaintiff sufficiently stated a First Amendment claim based on the defendants' confiscation of political literature from an "unauthorized organization." *Id.* at 115. However, even that case is plainly distinguishable because, in *Shakur*, the appellate court was reviewing the district court's *sua sponte* dismissal of the plaintiff's claim on the pleadings, rather than a grant of summary judgment. *Id.* And, as the Second Circuit noted, "[a]t the point of summary judgment"—as here—the plaintiff will have "assemble[d] evidence to attempt to meet his burden of proof," the defendants will have "articulate[d] rationales for [their] policy," and the court "could thus find the government's explanation valid and rational, and hold that the plaintiff could not meet his burden of proof." *Id.* (citation, ellipses, and quotation marks omitted).

Viewing the record evidence in the light most favorable to Plaintiff, drawing all reasonable inferences in his favor, and notwithstanding his Objections, the Court agrees with and adopts Judge Khalsa's proposed finding that each *Turner* factor supports the constitutional validity of the challenged restrictions on Plaintiff's access to publications from non-approved vendors. (Doc. 160 at 26-31.) Thus, and as further explained in Judge Khalsa's PFRD, the Court finds that there is no genuine issue of material fact and, accordingly, Defendants are entitled to summary judgment on Plaintiff's First Amendment claims challenging Defendants' approved vendor restrictions during his incarceration at OCPF. For the same reasons, Plaintiff is not entitled to summary judgment on these claims.

c. Newspaper and Internet Articles

Judge Khalsa next recommended that the Court grant summary judgment in Defendants' favor on Plaintiff's claims that Defendants violated his First Amendment rights by restricting his

access to newspaper and internet articles. (Doc. 160 at 41; *see* Doc. 119 at 14-19.) With respect to newspaper articles, on April 2, 2020, Defendant Martinez attested that inmates were permitted "to order newspaper subscriptions directly from a vendor, and such newspapers [were] allowed at OCPF" during Plaintiff's incarceration there. (Doc. 142-1 at 8.) He added that inmates were permitted to "purchase [newspaper] articles through *approved vendors, such as the publisher itself*." (*Id.* at 9 (emphasis added).)

Similarly, on August 13, 2020, Defendant Martinez attested that books, magazines, and newspapers could be purchased from "approved vendors" and that newspapers in particular could be purchased "from publishers." (Doc. 156 at 13-14.) And finally, on October 22, 2020, Defendant Martinez attested that

> [f]rom 2013-2017, and as is still the case now, OCPF inmates are allowed to purchase whole newspapers and/or individual newspaper[articles] from any publisher. There were not, and currently are not, approved vendor list(s) for newspapers. . . . OCPF State inmates – including Plaintiff – had access to newspapers through newspaper subscriptions from the publisher. Newspaper subscriptions were not limited to any sort of approved vendor list. So long as the newspaper came directly [from] the publisher, the newspaper [was] allowed.

(Doc. 164-1 at 1-2.) In other words, with respect to newspapers and newspaper articles, Defendants did not maintain an approved vendor list but treated publishers as approved vendors.

Defendant Martinez's affidavits align with communications that Plaintiff received during the grievance process regarding newspaper articles that Defendants rejected. On July 15, 2014, F. Muniz wrote, "[t]he [news] articles sent to you by mail must come from *the publisher*." (Doc. 142-11 at 11 (emphasis added).) On July 30, 2014, Defendant Moreno wrote regarding a newspaper article, "[p]ublications . . . will be accepted and delivered to inmates if they are received directly from *the publisher or vend[o]r* upon approval." (*Id.* at 13 (emphasis added).) On September 25, 2014, G. Valle wrote, "no newspaper articles will be allowed through the mail. You

may purchase articles through *an approved vendor*." (*Id.* at 29 (emphasis added).) And, on November 18, 2014, L. Eason dismissed a grievance "on the basis of the newspaper not being received from *the publisher*." (*Id.* at 22 (emphasis added).) Thus, Plaintiff is technically correct that, as he declared for the first time in his Objections, Defendants did not maintain a list of "approved newspaper publishers." (Doc. 162 at 32.) However, they nevertheless permitted inmates to purchase newspapers and newspaper articles from publishers, whom they treated as approved vendors.[22]

Turning to the OCPF's restrictions on internet material, on April 2, 2020, Defendant Martinez attested that "OCPF allow[ed] inmates to have some internet printouts after the printouts [were] cleared for security concerns. OCPF, however, prohibit[ed] internet *newspaper printouts* due to copyright issues." (Doc. 142-1 at 8 (emphasis added).) Similarly, on August 13, 2020, Defendant Martinez attested that the OCPF did not allow "*articles* printed from the internet."[23] (Doc. 156 at 14 (emphasis added).) These attestations again align with communications Plaintiff received during the grievance process, which indicated that internet "articles" or "publications" were not allowed. (Doc. 119 at 116-22.) Also, OCPF Policy 7-707 was amended on November 13, 2015 to prohibit "[a]ny *publications*, copied or printed from the Internet." (Doc. 142-9 at 19, 22 (emphasis added).)

[22] In his reply in support of his Objections, Plaintiff declares that he "provided exhibits of a news journal," *i.e.*, Prison Legal News, that Defendants rejected even though it came from the publisher bearing the same name. (Doc. 168 at 11.) However, the citations that Plaintiff offers in support of this declaration do not concern publications from PLN; and, the exhibits that *do* concern PLN refer to books, not a news journal. (*See* Doc. 119 at 150-52.)

[23] However, on April 2, 2020, Defendant Martinez attested that "[c]opies of *articles* downloaded from the internet are permitted if they do not pose a serious threat to OCPF's security or otherwise violate NMCD policies and procedures." (Doc. 142-1 at 9 (emphasis added).) In considering Defendants' Motion, the Court must construe this apparent inconsistency in Plaintiff's favor. The Court will therefore analyze the Motion using the more restrictive internet printout policy prohibiting all "articles printed from the internet." (Doc. 156 at 14.)

This evidence indicates that OCPF prohibited inmates from receiving internet articles or publications, as opposed to all internet printouts categorically.[24] The Court is aware of Plaintiff's declaration that Defendants "denied *all* of Plaintiff's Internet printouts if it was apparent it was printed from the Internet." (Doc. 150 at 10 (emphasis added).) However, the Court will disregard this unsupported and conclusory declaration in light of the evidence just discussed and because the only specific internet materials that Plaintiff claims Defendants rejected were those that he received in July 2014, which were undisputedly printouts of articles. *See Ellis*, 779 F.3d at 1201 (courts "do not consider conclusory and self-serving affidavits" on summary judgment).

In her PFRD, Judge Khalsa applied the four *Turner* factors to Defendants' restrictions on newspaper and internet articles and concluded that each factor supports the constitutional validity of the challenged restrictions. (Doc. 160 at 34-41.) As further explained below, the Court agrees with and adopts her analysis. With respect to the first *Turner* factor, *i.e.*, whether the challenged restrictions are rationally related to a legitimate, neutral penological purpose, 482 U.S. at 89, Defendants have proffered two purposes for their restrictions on newspaper and internet articles. First, Defendant Martinez attested that OCPF imposed these restrictions to prevent copyright violations. (Doc. 142-1 at 8.) Second, he attested that OCPF "[could]not allow newspaper or internet articles mailed from unapproved third parties because of security concerns," *i.e.*, "to prevent the introduction of contraband" and "illicit content" into OCPF. (Doc. 142-1 at 7-8; Doc. 156 at 13.)

As a preliminary matter, Plaintiff objects that the Court should bar Defendants from relying on copyright law to justify their restrictions on newspaper and internet articles, because they failed to do so at any time during the grievance process and did not do so in this litigation until April

[24] Thus, for example, this policy would not prohibit inmates from receiving printouts of e-mail messages.

2020. (Doc. 162 at 36-38, 42.) Plaintiff claims that this delay deprived him of the opportunity to rebut the proffered purpose. (*Id.*) In particular, Plaintiff argues that he cannot research copyright law at the Penitentiary of New Mexico ("PNM"), where he is currently housed, and the two weeks he had to prepare his Objections were inadequate to allow his family to research it for him. (*Id.* at 37.)

The Court will overrule this objection for two reasons. First, Plaintiff has pointed to, and the Court is aware of, no authority requiring prison employees to proffer the prison's reasons for a regulation during the grievance process to preserve the prison's ability to rely on those reasons in a subsequent lawsuit challenging the regulation on constitutional grounds. Moreover, to impose such a requirement would be unworkable, forcing prison employees to anticipate constitutional litigation in responding to virtually every inmate grievance. Thus, the Court rejects Plaintiff's argument that Defendants should have proffered copyright law—or indeed any purpose at all—during the grievance process to justify their restrictions on newspaper and internet articles.

Second, in this litigation, Defendants proffered copyright law as a reason for their restrictions on newspaper and internet articles at a reasonable time. Specifically, Defendants proffered this purpose in the earliest substantive pleading that they filed after Plaintiff filed his October 10, 2019 Amended Complaint, *i.e.*, their December 3, 2019 response to Plaintiff's Motion.[25] (Doc. 119; Doc. 127 at 8.) Thus, Plaintiff's contention that "Defendants did not even raise the copyright concern until April of 2020," (Doc. 162 at 36), is inaccurate; and, far from having only two weeks at PNM to research this issue, he actually had about a month at the Guadalupe County Correctional Facility ("GCCF") and another nine months at PNM to do so.

[25] Defendants did not, nor were they required to, identify the challenged restrictions' purposes in their Answer to Plaintiff's Amended Complaint. (*See generally* Doc. 123); *see also* Fed. R. Civ. P. 8(b)(1) ("In responding to a pleading, a party must . . . state in short and plain terms its defenses to each claim asserted against it.").

This time-period more than satisfies due process. The Court therefore declines to bar Defendants from relying on copyright law to justify the challenged restrictions on newspaper and internet articles.

As Judge Khalsa observed with respect to the first *Turner* factor, ensuring compliance with federal copyright law is unquestionably a legitimate, neutral penological purpose. (Doc. 160 at 34.) Further, prohibiting articles not received directly from the publisher was rationally related to that purpose. *See Waterman v. Commandant, U.S. Disciplinary Barracks*, 337 F. Supp. 2d 1237, 1241 (D. Kan. 2004) ("[T]he policy disallowing non-original source material is rationally related to legitimate penal objectives," *inter alia*, as "a way of deterring inmates from violating copyright laws.").[26] Newspaper and internet articles, like other publications, are likely to be protected by copyright.

> Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. § 102(a). "[O]riginal works of authorship" include

> works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, *periodicals*, manuscripts, phonorecords, film, tapes, *disks*, or *cards*, in which they are embodied.

17 U.S.C. § 101 (emphases added).

Copyrighted works can generally be reproduced or distributed only with the copyright owner's authorization, regardless of attribution. 17 U.S.C. § 106. There are specific statutory

[26] Plaintiff objects that he cannot tell what kinds of materials *Waterman* addressed. (Doc. 162 at 41.) In answer to Plaintiff's implied question, the "non-original source material" to which the *Waterman* court referred consisted of caselaw and religious songs printed from the internet, copies of paralegal tests, and copies of state statutes. 377 F. Supp. 2d at 1240.

limitations on the owner's exclusive rights; however, none of these limitations are broadly applicable to Plaintiff's receipt of photocopies or printouts of news articles from sources other than the publisher.[27] *See* 17 U.S.C. §§ 107-112 (listing limitations to copyright owner's exclusive rights in copyrighted works). Thus, requiring Plaintiff to obtain newspaper articles (which were likely to be copyrighted) from the publisher (who likely owned the copyright) was rationally related to ensuring copyright law compliance. Likewise, banning Plaintiff's receipt of internet articles was rationally related to this purpose, because it was highly probable that the articles would have come from a source other than the copyright owner.[28]

In his Objections, Plaintiff continues to argue that the Second Circuit would not have found prison restrictions on newspaper clippings unconstitutional, and the Ninth Circuit would not have found prison restrictions on internet material unconstitutional, if such restrictions were rationally related to copyright law compliance. (Doc. 149 at 34-35; Doc. 150 at 27; Doc. 162 at 41); *see Clement v. Calif. Dep't of Corr.*, 364 F.3d 1148, 1152 (9th Cir. 2004) (affirming district court's decision that prison's "internet-generated mail policy" violated the plaintiff's First Amendment

[27] In this regard, it is significant that Plaintiff has only challenged Defendants' rejection of *photocopies* of newspaper articles. (*See* Doc. 119 at 129-34.) It appears that a non-publisher could generally send an inmate his or her *original copy* of a newspaper or newspaper article without violating copyright law. See 17 U.S.C. § 109(a) ("[T]he owner of a particular copy . . . lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy."). For the first time in his Objections, Plaintiff declares that Defendants also rejected "an actual newspaper clipping" mailed from a family member. (Doc. 162 at 35.) However, even if the Court were inclined to allow Plaintiff to effectively amend his claims for the first time in his Objections, it does not appear that Plaintiff could now pursue constitutional claims based on Defendants' alleged rejection of an original copy of a newspaper article, because he has not declared or demonstrated that he tried to exhaust his administrative remedies with respect to that rejection. *See* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."). Further, to the extent that Defendants' restrictions on original copies of newspapers and newspaper articles were not rationally related to the prevention of copyright violations, they were nevertheless rationally related to the prevention of contraband smuggling, as further discussed in this section.

[28] Without citation to authority, Plaintiff hypothesizes several situations which he claims would involve the lawful use of copyrighted material and suggests that attribution would resolve most copyright concerns. (Doc. 162 at 39-40.) Ironically, by illustrating some of the many and varied circumstances in which copyright violations may arise, Plaintiff's hypotheses lend support to Defendants' position that their restrictions on newspaper and internet articles were needed to prevent such violations.

rights); *Allen*, 64 F.3d at 80-81 (reversing district court's decision granting the defendants summary judgment on the plaintiff's First Amendment claims challenging the application of a publishers-only rule to newspaper clippings). However, the defendants in *Clement* and *Allen* did not proffer copyright law compliance as a purpose of the challenged restrictions, and therefore, the *Clement* and *Allen* courts did not consider this purpose or address its constitutional sufficiency. *Clement*, 364 F.3d at 1152; *Allen,* 64 F.3d at 80-81. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *United Food & Commercial Workers Union, Local 1564 of N.M. v. Albertson's, Inc.*, 207 F.3d 1193, 1199 (10th Cir. 2000).

Plaintiff also maintains that Defendants' restrictions on newspaper and internet articles could not have been intended to prevent copyright violations because Defendants themselves promoted or allowed copyright violations. In particular, Plaintiff declares that Defendants Moreno and Barba told him that if his family removed the web addresses from the internet articles mailed to him, so that it was "not obvious" they were from the internet, they would "probably be allowed." (Doc. 149 at 24; Doc. 162 at 39.) In fact, in his Objections, Plaintiff declares that he actually "receive[d] some relig[i]ous literature from Wikipedia when his sister removed the web address from the page." (Doc. 162 at 44-45.)

However, as Judge Khalsa noted in her PFRD, there is no record evidence that Defendants Moreno and Barba, as OCPF mailroom employees, played any role in enacting OCPF's policies restricting access to newspaper and internet articles. (Doc. 160 at 37; *see* Doc. 119 at 8 (identifying Defendants Moreno and Barba as a "mailroom supervisor" and "mailroom staff," respectively).) Plaintiff points to evidence that Defendants Moreno and Barba participated in *enforcing* the

challenged restrictions, but not that these Defendants participated in *promulgating* them.[29] (Doc. 162 at 38; *see* Doc. 119 at 116-17, 128.) As such, these Defendants' conduct, including their alleged willingness to ignore non-obvious copyright violations, has no bearing on why the restrictions were adopted and fails to create a genuine issue of material fact.

Turning to Defendants' second proffered purpose for the challenged restrictions, *i.e.*, prison security, Defendant Martinez attested that

> OCPF cannot allow newspaper or internet articles mailed from unapproved third parties because of security concerns including lacing the papers with drugs like ketamine and suboxone, hiding contraband in the folded pages, as well as using such newspapers and internet articles to send coded messages. For example, these papers can be soaked in drugs, and once they enter OCPF, they are cut into pieces and sold to inmates. Inmate[s] then dissolve the paper and use the drugs. . . . I also understand that newspapers and internet printouts from non-publishers can be used to send coded messages.

(Doc. 156 at 13.)

With respect to the first prong of the first *Turner* factor, *i.e.*, the rational relationship prong, the Court finds that Defendants' restrictions requiring inmates to obtain newspaper articles from the publisher, and prohibiting the receipt of internet articles, were rationally related to the stated security purpose. Plaintiff objects that Defendants have presented no evidence that paper mailed to OCPF has ever been laced with drugs. (Doc. 162 at 45.) Likewise, Plaintiff contends that Defendant Martinez did not "personally know" about newspaper and internet articles being used to send coded messages. (*Id.* at 46.) However,

> [t]o show a rational relationship between a regulation and a legitimate penological interest, prison officials need not prove that the banned materials actually caused problems in the past, or that the materials are likely to cause problems in the future. In other words, empirical evidence is not necessarily required.

[29] On the contrary, in one document, Defendant Barba specifically stated that Plaintiff was not allowed to have internet articles "as per" the warden. (Doc. 119 at 117.)

Sperry, 413 F. App'x at 40. Rather, "[t]he only question [the Court] must answer is whether the defendants' judgment was rational, that is, whether the defendants might reasonably have thought that the policy would advance [the prison's] interests." *Id.* Here, Defendants reasonably believed that it would.

Plaintiff also objects that Defendants' restrictions on newspaper and internet articles were not rationally related to smuggling prevention because "written correspondence, word processed correspondence and printed e-mails" could also be used to smuggle contraband or send coded messages but were not prohibited.[30] (Doc. 162 at 45-46; *see also* Doc. 159 at 13-17 (citing *Clement*, 364 F.3d at 1152 and *Allen*, 64 F.3d at 79-82).) However, in light of the Supreme Court's clear directive that prison officials' rational professional judgments are entitled to deference, the Court declines to second-guess Defendants' reasonable decisions regarding which security risks to tolerate and which to mitigate. *Beard*, 548 U.S. at 529–30; *Turner*, 482 U.S. at 84–85. To the extent that the *Clement* and *Allen* decisions relied on this kind of second-guessing, the Court declines to follow them. In short, and as further explained in Judge Khalsa's PFRD, Defendants reasonably believed that the challenged restrictions on newspaper and internet articles would reduce the introduction of contraband and disruptive content into the OCPF, by ensuring that these materials came only from secure and legitimate sources. (Doc. 160 at 34-39); *Sperry*, 413 F. App'x at 40.

With respect to the second prong of the first *Turner* factor, the Court again finds that smuggling prevention is a legitimate, neutral penological purpose. *See Thornburgh*, 490 U.S. at 415 ("[P]rotecting prison security" is "central to all other corrections goals."). Plaintiff objects that Defendants' restrictions on newspaper and internet articles were not neutral. (Doc. 162 at 35,

[30] Plaintiff asserts that Judge Khalsa did not "note[]" this "discrepancy," *i.e.*, that authorized forms of mail could also have contained contraband or disruptive content. (Doc. 162 at 40.) In fact, however, she did. (*See* Doc. 160 at 38.)

42.) In support of this objection, Plaintiff first declares that he "feels" that Defendants rejected the newspaper articles mailed to him because they concerned Defendant MTC. (*Id.* at 35.) However, Plaintiff offers no evidence to support this feeling, and the record evidence contradicts it. (*See, e.g.*, Doc. 119 at 116-34.) Plaintiff's unsubstantiated feeling is insufficient to create a genuine issue of material fact. *See Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004) ("To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise.").

Plaintiff further makes the rather circular objection that Defendants' prohibition of internet articles did "not act in a neutral fashion" because it barred access to materials only available on the internet. (Doc. 162 at 42.) However, Plaintiff also concedes that the prohibition was "not based on content of the publications," but rather on their format. (*Id.*) Restrictions that "operate[] in a neutral fashion, without regard to the content of the expression" are neutral under *Turner*. *Thornburgh*, 490 U.S. at 415. For all of the foregoing reasons and as further explained in Judge Khalsa's PFRD, (Doc. 160 at 34-39), the Court finds that the challenged restrictions on newspaper and internet articles were rationally related to the legitimate, neutral penological purposes of copyright compliance and smuggling prevention and therefore satisfy the first *Turner* factor.

With respect to the second *Turner* factor, *i.e.*, "whether there are alternative means of exercising the right that remain open to prison inmates," 482 U.S. at 90, it is important to recall that "'the right' in question must be viewed sensibly and expansively," and prison regulations permitting "a broad range of publications" therefore satisfy this factor. *Thornburgh*, 490 U.S. at 417-18. Here, the undisputed material facts show that, though Plaintiff lacked access to newspaper articles not available from the publisher and articles published only on the internet, he nevertheless had access to a broad range of publications, including six daily newspapers from the OCPF library,

whole newspapers and newspaper articles from publishers, and hundreds of thousands of books and magazines. Thus, viewing his right to access information sensibly and expansively, there were alternative means to exercise the right that remained open to him. *Id.*

Plaintiff objects that Defendants' ban on internet articles "prevent[ed him] from being able to receive . . . caselaw" from family members, and he "does not [have] access to Lexis Nexis computer programs or Westlaw computer programs" *at PNM*, where he is currently housed. (Doc. 162 at 27.) Notably, though, he does not declare that he lacked access to caselaw *at the OCPF*. Plaintiff also objects that the internet "provided the only way for [him] to find information *in a timely and efficient manner*" for an article that he planned to write. (*Id.* at 43 (emphasis added).) However, this objection implicitly recognizes that there were other ways—albeit ways that were not "timely" and "efficient"—for him to find the information that he needed. Again, the alternatives a prison offers need not be "ideal" to satisfy the second *Turner* factor; rather, they must simply be available. *Jones*, 503 F.3d at 1153. In short, and as further explained in Judge Khalsa's PFRD, (Doc. 160 at 39-40), because Plaintiff could access a "broad range" of publications, including newspapers and newspaper articles, during his incarceration at OCPF, Defendants' restrictions on newspaper and internet articles also satisfy the second *Turner* factor. *Thornburgh*, 490 U.S. at 418.

As previously noted, the third *Turner* factor requires the Court to consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." 482 U.S. at 90. In this regard, as the *Waterman* court observed,

> if inmates were allowed to receive photocopies or Internet-generated materials from non-original sources, [prison] staff would undoubtedly have to expend much greater personnel resources to screen the material for . . . copyright violations, thereby increasing the workload on staff.

Waterman, 337 F. Supp. 2d at 1241–42. Given the complexity of copyright law, such screening would have imposed a significant administrative burden on OCPF. In addition, as Defendant Martinez attested, requiring OCPF to process and adequately search newspaper and internet articles from non-publishers for contraband "would burden the administration, make it difficult if not impossible to comply with . . . time constraints, and potentially disadvantage other inmates whose mail would be delayed." (Doc. 142-1 at 8.)

Plaintiff objects that (a) his receipt, from his sister, of "some religious literature from Wikipedia" with the web address removed, and (b) "[o]ther inmates'" receipt of "printed Internet material" with the web addresses removed, prove that inmates could receive internet articles by mail without negatively impacting OCPF. (Doc. 162 at 44-46.) The Court disagrees. That an unspecified number of inmates successfully smuggled an unknown number of internet articles into the facility proves nothing about the impact that the introduction of these articles had on the prison. Nor does it prove anything about the impact that permitting inmates to *openly* receive internet articles by mail would have had. Thus, Plaintiff's declarations fail to create a genuine issue of material fact, and the third *Turner* factor also supports the constitutional validity of Defendants' restrictions on newspaper and internet articles.

Finally, with respect to the fourth *Turner* factor, Plaintiff has pointed to no easy, obvious alternative that would have fully accommodated his right to access newspaper and internet articles at *de minimis* cost to OCPF's penological interests. 482 U.S. at 90–91. In his Objections, Plaintiff suggests that prison employees could have conducted an online search of the web addresses of any internet articles received to check for copyright compliance and legitimacy. (Doc. 162 at 45.) However, on its face, this suggested alternative involves considerably more than *de minimis* costs to legitimate penological interests and fails to adequately address the prison's copyright and

security concerns. The Court therefore finds that the fourth *Turner* factor also weighs in Defendants' favor with respect to the challenged restrictions on newspaper and internet articles.

In sum, viewing the record evidence in the light most favorable to Plaintiff and drawing all reasonable inferences in his favor, and as further explained in Judge Khalsa's PFRD, (Doc. 160 at 34-41), each *Turner* factor supports the constitutional validity of the challenged restrictions on newspaper and internet articles. There being no genuine issue of material fact, Defendants are entitled to judgment as a matter of law on Plaintiff's claims that Defendants violated his First Amendment rights by restricting his access to these materials, and Plaintiff is not entitled to summary judgment on these claims. For the reasons stated in this section, the Court will overrule Plaintiff's Objections and adopt Judge Khalsa's PFRD with respect to all of Plaintiff's First Amendment access-to-information claims (*id.* at 10-41), and will deny Plaintiff's Motion and grant Defendants' Motion with respect to these claims.

E. Plaintiff's First Amendment Retaliatory Transfer Claim

Finally, in her PFRD, Judge Khalsa recommended that the Court deny Defendant Martinez summary judgment on Plaintiff's First Amendment retaliatory transfer claim. (Doc. 160 at 48; *see* Doc. 143 at 22-25.) In this claim, Plaintiff alleges that Defendant Martinez requested his transfer from OCPF to another correctional facility because he exercised his First Amendment rights by filing this lawsuit. (Doc. 119 at 43-50.)

"It is well-settled that prison officials may not retaliate against or harass an inmate because of the inmate's exercise of his right of access to the courts." *Gee*, 627 F.3d at 1189 (quotation mark and alterations omitted).

> While a prisoner enjoys no constitutional right to remain in a particular institution and generally is not entitled to due process protections prior to such a transfer, prison officials do not have the discretion to punish an inmate for exercising his first amendment rights by transferring him to a different institution.

Frazier v. Dubois, 922 F.2d 560, 561–62 (10th Cir. 1990). However,

> it is not the role of the federal judiciary to scrutinize and interfere with the daily operations of a state prison, and our retaliation jurisprudence does not change this role. Obviously, an inmate is not inoculated from the normal conditions of confinement experienced by convicted felons serving time in prison merely because he has engaged in protected activity. Accordingly, a plaintiff must prove that but for the retaliatory motive, the incidents to which he refers . . . would not have taken place. An inmate claiming retaliation must allege *specific facts* showing retaliation because of the exercise of the prisoner's constitutional rights.

Peterson v. Shanks, 149 F.3d 1140, 1144 (10th Cir. 1998) (emphasis in original) (citation and quotation marks omitted); *see Frazier*, 922 F.2d at 562 n.1 ("Mere allegations of constitutional retaliation will not suffice; plaintiffs must rather allege specific facts showing retaliation because of the exercise of the prisoner's constitutional rights.").

The Tenth Circuit has held that a prisoner sufficiently alleged specific facts showing unconstitutional retaliation where he alleged "that Defendants were aware of his protected activity, that his protected activity complained of Defendants' actions, and that the transfer was in close temporal proximity to the protected activity."[31] *Gee*, 627 F.3d at 1189; *see also Allen v. Avance*, 491 F. App'x 1, 6 (10th Cir. 2012) ("Our cases allow an inference of whether the defendant[s'] response was substantially motivated by protected conduct where evidence showed (1) the defendants were aware of the protected activity; (2) the plaintiff directed his complaint to the defendants' actions; and (3) the alleged retaliatory act was in close temporal proximity to the protected activity.") (quotation marks omitted); *cf. Trant v. Oklahoma*, 754 F.3d 1158, 1170 (10th

[31] In the employment context, the Tenth Circuit has explained "close temporal proximity" as follows:

> [i]t appears clear that, if the adverse action occurs in a brief period up to one and a half months after the protected activity, temporal proximity alone will be sufficient to establish the requisite causal inference; but it is equally patent that if the adverse action occurs three months out and beyond from the protected activity, then the action's timing alone will not be sufficient to establish the causation element.

Conroy v. Vilsack, 707 F.3d 1163, 1181–82 (10th Cir. 2013).

Cir. 2014) ("[T]emporal proximity between the protected speech and the alleged retaliatory conduct, without more, does not allow for an inference of a retaliatory motive."). A prisoner may also show retaliatory motive via "specific, objective facts from which it could plausibly be inferred" that the reason given for the adverse act "was pretextual." *Banks v. Katzenmeyer*, 645 F. App'x 770, 773 (10th Cir. 2016).

Here, Plaintiff filed his original complaint in state court on November 14, 2016. (Doc. 1-1 at 1.) Defendant Martinez attested that he "became aware of the Plaintiff's original Complaint . . . on December 21, 2016 and . . . was served with this lawsuit on February 3, 2017." (Doc. 142-1 at 10.) He further attested that he requested Plaintiff's transfer from the OCPF "sometime between" February 23, 2017 and March 21, 2017.[32] (Doc. 156 at 14.)

According to Defendant Martinez, "[t]he decision to request Plaintiff's transfer was unrelated to his history of filing grievances in OCPF or the initiation of this lawsuit." (Doc. 142-1 at 10; Doc. 156 at 14.) Rather, Defendant Martinez attested that he requested Plaintiff's transfer because Plaintiff "violated OCPF and NMCD policy." (Doc. 142-1 at 10.) Specifically, Defendant Martinez attested that

> Pastor Koehne was a church volunteer at OCPF. On February 23, 2017, Pastor Koehne admitted to accepting letters from Plaintiff during Pastor Koehne's religious visits to OCPF, and then mailing these letters for inmate Whitehead after leaving OCPF premises. Plaintiff's actions violated both OCPF and NMCD mail policies and procedures that limit the means and methods of how inmates communicate outside of OCPF. . . . Because Plaintiff circumvented NMCD policies through using a religious volunteer to pass mail, which threatened the safety and security of OCPF as well as the public, I requested that NMCD transfer Plaintiff from OCPF.[33]

[32] Plaintiff declares that Defendant Martinez requested his transfer on March 21, 2017. (Doc. 167 at 4.)

[33] NMCD policy provides that "[a]ll inmates' mail or packages, both incoming and outgoing, shall be opened and inspected for contraband and to intercept cash, checks or money orders. Mail is read and accepted or rejected based on legitimate institutional interests of order and security." (Doc. 142-3 at 3.)

(*Id.* at 9.)

Plaintiff claims that Defendant Martinez's proffered reason for requesting Plaintiff's transfer is pretextual, and submitted evidence that Mr. Koehne denied accepting letters from Plaintiff during religious visits.[34] Specifically, Plaintiff submitted the declarations of Mr. Koehne and his senior pastor, Timothy Brock.[35] In his declaration, Mr. Koehne stated that, when he and Mr. Brock met with Defendant Martinez and other OCPF officials,

> they asked me if I received anything from the inmates and I replied, "Yes they give me letters all the time. I've even requested some and I still have all of them!" WELL, as soon as words came out of my mouth the atmosphere in the room changed and I could tell something was wrong. Even after clarifying that these were mailed letters, they made it clear that the meeting was over.

(Doc. 119 at 314 (capitalization in original).) Mr. Brock, in turn, declared that when Defendant Martinez and other OCPF officials "brought up the[] hypothetical concern of inmates giving Pastors and chaplains and other volunteers letters to bring to their families," Mr. Koehne "said that he had taken letters from an inmate in the past, and that he still probably had them. Later Pastor

[34] Plaintiff also submitted evidence that he in fact never gave Mr. Koehne letters to take out of the OCPF. (Doc. 119 at 314; Doc. 149 at 6; Doc 150 at 11.) However, this evidence is immaterial. As further discussed below, at issue is not whether Plaintiff in fact used Mr. Koehne to pass mail out of the OCPF, but rather whether Defendant Martinez believed he did and acted in good faith on that belief. *See Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007) ("The relevant inquiry is not whether [the defendants'] proffered reasons were wise, fair or correct, but rather . . . whether they believed those reasons to be true and acted in good faith upon those beliefs.") (quotation marks omitted).

[35] These declarations are undated. (Doc. 119 at 314-15.) Generally, to have the same force and effect as an affidavit, a declaration must be "subscribed . . . as true under penalty of perjury, *and dated*." 28 U.S.C. § 1746 (emphasis added). However, "the absence of a date does not render a declaration invalid if extrinsic evidence demonstrates . . . the period in which the declaration is signed." *Richardson v. Gallagher*, 553 F. App'x 816, 827–28 (10th Cir. 2014). Here, Plaintiff's Motion for Hearing and/or Decision on Plaintiff[']s Request for a Preliminary Injunction (Doc. 44), which included letters from Mr. Koehne and Mr. Brock substantively identical to their declarations, was filed on May 30, 2017, (*see id.* at 6-7); and, Plaintiff's Motion to Allow Plaintiff to Cure Deficiency in Affidavits by Perry Koehne and Timothy Brock (Doc. 86), in which Plaintiff first submitted the declarations in their current form, was filed on September 20, 2017. (*See id.* at 3-4.) These documents demonstrate that Mr. Koehne and Mr. Brock signed their declarations between May 30 and September 20, 2017, and the Court will thus excuse the lack of a date on the declarations.

[Koehne] clarified that he did not take them from the prison, but those letters were mailed to him." (*Id.* at 315.)

When Judge Khalsa issued her PFRD, "none of Defendant Martinez's affidavits ha[d] addressed whether Mr. Koehne denied allowing Plaintiff to use him to pass mail and, if so, whether Defendant Martinez discredited that denial in good faith." (Doc. 160 at 45 n.39.) In the absence of evidence that Defendant Martinez had considered and rejected Mr. Koehne's denial, Judge Khalsa concluded that Mr. Koehne's and Mr. Brock's declarations raised a genuine issue of material fact regarding whether Defendant Martinez requested Plaintiff's transfer in good faith on the belief that Plaintiff had used Mr. Koehne to pass mail. (*Id*. at 45.) As such, Judge Khalsa found that Defendant Martinez had not met his summary judgment burden with respect to Plaintiff's First Amendment retaliatory transfer claim. (*Id.*)

After Judge Khalsa issued her PFRD, however, Defendant Martinez submitted his October 5, 2020 affidavit, in which he attested that

> [o]n February 23, 2017, Pastor Koehne admitted to passing mail for Plaintiff. When Pastor Koehne admitted to removing Plaintiff's mail out to the community without authorization, which is in violation of policy, he tried to explain what he meant and undo the confession. I listened to Pastor Koehne, but did not believe his excuse that he did not mean that he "passed mail to outside." I did not find Pastor Koehne's explanation to be credible. I had, and still have, a good faith belief that Plaintiff violated OCPF and NMCD policies.

(Doc. 161-1 at 1-2.) On the basis of this affidavit, Defendants object that there is no genuine issue of material fact and Defendant Martinez is now entitled to judgment as a matter of law on Plaintiff's First Amendment retaliatory transfer claim. (Doc. 161.)

On the expanded record, the Court agrees. At present, the undisputed evidence shows that Defendant Martinez reasonably believed (and still believes) that Plaintiff used Mr. Koehne to pass mail in violation of NMCD policy and requested Plaintiff's transfer in good faith on that belief.

See Piercy v. Maketa, 480 F.3d 1192, 1200 (10th Cir. 2007) ("The relevant inquiry is . . . whether [the defendants] believed [their proffered] reasons to be true and acted in good faith upon those beliefs.") (quotation marks omitted). This legitimate, neutral penological purpose negates any inference of but-for causation that might otherwise arise from the temporal proximity between Plaintiff's filing of this lawsuit and Defendant Martinez's transfer request.[36] *Frazier*, 922 F.2d at 562.

The Court specifically finds that neither Mr. Koehne's nor Mr. Brock's declaration contradicts Defendant Martinez's October 5, 2020 affidavit or supports the inference that his proffered reason for requesting Plaintiff's transfer is pretextual. Initially, neither declaration contradicts Defendant Martinez's attestation that Mr. Koehne "admitted to passing mail for Plaintiff." (Doc. 161-1 at 1.) On the contrary, Mr. Koehne declared that he initially told Defendant Martinez that inmates "g[a]ve" him letters, and Mr. Brock declared that Mr. Koehne told Defendant Martinez that he had "taken" letters from an inmate. (Doc. 119 at 314-15.)

Further, neither Mr. Koehne's nor Mr. Brock's declaration contradicts Defendant Martinez's attestation that, though he "listened to" Mr. Koehne's subsequent explanation that Mr. Koehne received the letters by mail, he did not find the explanation credible. (Doc. 161-1 at 1-2.) Again, if anything, these declarations support Defendant Martinez's affidavit. Mr. Koehne declared that, after he told Defendant inmates gave him letters, "the atmosphere in the room changed and [he] could tell something was wrong." (Doc. 119 at 314.) He further declared that,

[36] As Judge Khalsa noted, "there is close temporal proximity between February 3, 2017, the date on which Defendant Martinez was served with Plaintiff's original complaint, and February 23, 2017, the earliest date on which Defendant Martinez may have requested Plaintiff's transfer." (Doc. 160 at 45.) However, there does *not* appear to be close temporal proximity between December 21, 2016, the date on which Defendant Martinez "became aware of Plaintiff's original Complaint," and February 23, 2017. *Conroy*, 707 F.3d at 1181–82.

even after he "clarif[ied]" that the letters were mailed to him, Defendant Martinez and the other prison officials present "made it clear that the meeting was over." (*Id.*)

Similarly, Mr. Brock declared that, after Mr. Koehne "clarified" that the letters he took from an inmate were mailed,

> it did feel like the tone of the conversation changed. A worried look came over the personnel at the table. Soon the meeting ended, and the Warden told me he would call me soon to let me know what they decided about whether Pastor [Koehne] could continue to volunteer at the Prison.

(*Id.* at 315.) Mr. Brock added that, a few hours later, Defendant Martinez called and told him Mr. Koehne was no longer allowed to volunteer at OCPF. (*Id.*) In short, Mr. Koehne's and Mr. Brock's descriptions of Defendant Martinez's conduct are wholly consistent with Defendant Martinez's attestations that he did not believe Mr. Koehne's explanation.

In response to Defendants' Objection, Plaintiff argues that, if Defendant Martinez had believed Plaintiff used Mr. Koehne to pass mail, he would have instituted disciplinary proceedings against Plaintiff. (Doc. 167 at 3-7.) However, Plaintiff's argument fails to prove his point. Transfer was an obvious way for Defendant Martinez to mitigate the security risk Plaintiff's and Mr. Koehne's relationship appeared to pose by removing Plaintiff from Mr. Koehne's vicinity; Defendant Martinez did not need to initiate disciplinary proceedings to accomplish it. In fact, as Plaintiff notes, disciplinary proceedings would not have accomplished it, because transfer was not a potential punishment for disciplinary infractions. (*Id.* at 6-7.) In these circumstances, Defendant Martinez's decision to request Plaintiff's transfer rather than initiate disciplinary proceedings was "reasonably related" to the "legitimate penological interest[]" of mitigating the security risk that Defendant perceived. *Turner*, 482 U.S. at 89. Under Tenth Circuit law, no more is required. *See Frazier*, 922 F.2d at 562 (*Turner* applies to alleged retaliatory transfers).

Plaintiff also argues that he has demonstrated a genuine issue of material fact regarding Defendant Martinez's motive because he has identified a series of retaliatory actions that culminated in the transfer request. (Doc. 167 at 3-4.) Specifically, Plaintiff claims that, before he requested Plaintiff's transfer on March 21, 2017, Defendant Martinez: (a) "shut down" the inmate church where Plaintiff was a pastor; (b) had Plaintiff removed from the "honor pod"; and (c) reopened the inmate church but barred Plaintiff from preaching or teaching at it.[37] (*Id.*) However, all of these alleged actions occurred after Defendant Martinez's meeting with Mr. Koehne and Mr. Brock and are consistent with Defendant Martinez's well-founded, good faith belief that Plaintiff had used Mr. Koehne, a church volunteer, to pass mail. Thus, they fail to raise an inference of retaliatory motive.

In short, Plaintiff has failed to demonstrate a genuine issue of material fact regarding whether, but for his protected conduct in filing this lawsuit, Defendant Martinez would not have requested his transfer. *Peterson*, 149 F.3d at 1144. On the contrary, the undisputed record evidence shows that Defendant Martinez requested Plaintiff's transfer in good faith because he had well-founded reasons to and did in fact believe that Plaintiff had violated NMCD policy by using Mr. Koehne to pass mail out of OCPF. The Court will therefore sustain Defendants'

[37] In addition, Plaintiff declares that before Defendant Martinez requested his transfer, "correctional officers" confiscated his "personal bath towels" and threw them in the trash. (Doc. 167 at 3.) However, Plaintiff offers no evidence to connect this incident to Defendant Martinez. (*See generally id.*) Plaintiff also declares that GCCF Warden Horton told Plaintiff that Defendant Martinez asked Warden Horton not to give Plaintiff information regarding this lawsuit. (*Id.* at 4.) However, as Judge Khalsa noted, Plaintiff's declaration on this point is inadmissible hearsay. Fed. R. Evid. 801(c), (d) (non-party's out-of-court statement offered to prove the truth of the matter asserted is hearsay); Fed. R. Evid. 802 (hearsay is generally inadmissible). Also inadmissible hearsay is Plaintiff's declaration that inmate Kevin Baush told him that Mr. Baush dropped a lawsuit to persuade Defendant Martinez to let Mr. Baush stay at OCPF. (Doc. 167 at 7-8.)

Objection and grant Defendant Martinez summary judgment on Plaintiff's First Amendment retaliatory transfer claim.[38]

IV. Conclusion

For the above reasons, IT IS HEREBY ORDERED as follows:

1. Plaintiff's Objections to Magistrate Judge's Proposed Findings and Recommended Disposition (Doc. 162) are OVERRULED;

2. The OCPF Defendants' Objection to Magistrate Judge's Proposed Findings and Recommended Disposition (Doc. 161) is SUSTAINED;

3. The Magistrate Judge's Proposed Findings and Recommended Disposition (Doc. 160) are ADOPTED IN PART and MODIFIED IN PART as set forth herein;

4. Plaintiff's Motion for Partial Summary Judgment against MTC Defendants (Doc. 124) is DENIED; and,

5. OCPF Defendants' Motion for Summary Judgment (Doc. 143) is GRANTED.

IT IS SO ORDERED.

THE HONORABLE MARTHA VÁZQUEZ
UNITED STATES DISTRICT JUDGE

[38] Defendants also argue that Defendant Martinez is entitled to summary judgment on Plaintiff's retaliatory transfer claim because, although he *requested* Plaintiff's transfer, he lacked the authority to *approve* it. (Doc. 161 at 5-6.) In support of this argument, Defendants cite to *Newsome v. GEO Group, Inc.*, in which the court held that, "[b]ecause [the defendant] did not make the decision to transfer Plaintiff, Plaintiff's retaliation claim against [the defendant] fails." *Newsome*, Civ. No. 12-733 MCA/GBW, Memorandum Opinion and Order at 34 (Doc. 95), filed Sept. 29, 2015. The Court notes that *Newsome* is distinguishable from the present matter because in that case the defendant did not initiate the plaintiff's transfer, *id.*, whereas here, Defendant Martinez undisputedly did. However, the Court need not decide whether Defendant Martinez is entitled to summary judgment based on *Newsome* because it grants him summary judgment on the grounds already stated.