No. 21-2029

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MONTE WHITEHEAD,
Appellant-Plaintiff,
v.

MANAGEMENT AND TRAINING CORPORATION, et al.,
Appellees-Defendants.

On Appeal from the United States District Court
For the District of New Mexico
The Honorable Martha Vasquez District Judge
No. 2:17-CV-17-00275 MV/KK

RESPONSE BRIEF OF APPELLEES

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APPELLEES DO NOT REQUEST ORAL ARGUMENT

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GLOSSARY

Abbreviation	Definition
OCPF	Otero County Prison Facility

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F. R. App. P. 26.1(a), Defendant-Appellee Management & Training Corporation ("MTC") states that it has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock.

PRIOR OR RELATED APPEALS

This is the second appeal to the Tenth Circuit Court of Appeals arising out of this lawsuit. The District Court dismissed Mr. Whitehead's federal claims in September 2017, denied Mr. Whitehead's motion to amend his complaint, and remanded the case to state court for consideration of Mr. Whitehead's state law claims. Mr. Whitehead appealed the decision regarding the federal claims, but not remand of the state law claims, to the Tenth Circuit, which affirmed in part and reversed in part, remanding the case "for further proceedings consistent with [its] order and judgment." App. 504-512. The Tenth Circuit determined the district court had not specifically addressed certain claims and they were remanded "for consideration in the first instance, which may include allowing the prison-official defendants to proffer a legitimate penological reason for the restrictions." *Id.* 512. In addition, this Court reversed the district court's denial of Mr. Whitehead's motion for leave to amend his complaint. *Id.* 525-527.

STATEMENT OF JURISDICTION

On November 14, 2016, Appellant Whitehead filed suit in the Twelfth Judicial

District Court of the State of New Mexico. *See generally* App. 27-317.[1] In his lawsuit, Mr. Whitehead asserted violations of his civil and constitutional rights under the Federal Constitution and the New Mexico Constitution. On March 1, 2017, Otero County removed the case to the United States District Court for the District of New Mexico on the grounds that the case involved federal questions under 42 USC §§ 1983 and 1988. *Id.* 25. On September 27, 2017, the District Court dismissed all of Mr. Whitehead's federal civil rights claims for failure to state a claim upon which relief can be granted, remanding Mr. Whitehead's state law claims. *See generally id.* 477-500. As noted above, Mr. Whitehead appealed to the Tenth Circuit, which affirmed in part and reversed in part, remanding some of the First Amendment claims and reversing the District Court's denial of Mr. Whitehead's motion for leave to file an amended complaint. *See generally id.* 505-527. Mr. Whitehead filed an amended complaint. *See generally* App. 534-897. The parties filed motions for summary judgment and the District Court granted summary judgment in favor of Defendants on all of Mr. Whitehead's claims by Order filed on March 1, 2021. Mr. Whitehead timely appealed from that Order. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court properly granted summary judgment, pursuant to Fed. R. Civ. P. 56, to Defendants on Mr. Whitehead's First Amendment access-to-

[1] The OCPF Appellees' citations conform with 10th Cir. R. 28.1(A).

information claims?

2. Whether the District Court properly granted summary judgment, pursuant to Fed. R. Civ. P 56, to OCPF Defendants on Mr. Whitehead's claim of retaliation against Warden Ricardo Martinez?

STATEMENT OF THE CASE

Following this Court's decision in the prior appeal, the district court permitted Mr. Whitehead to file an amended complaint. *See, generally,* App. 534-897. The Amended Complaint alleged that Mr. Whitehead's First Amendment rights were violated (i) when internet articles and newspaper articles received in the mail were rejected; (ii) when he was denied access to hardback books received in the mail; (iii) when he was only permitted to receive literature from an approved vendor list; and (iv) when Mr. Whitehead was transferred from OCPF out of "retaliation." (*See generally id*.) After determining that Mr. Whitehead's Amended Complaint exceeded the scope of the Court's order granting Mr. Whitehead leave to amend, the Court struck portions of the Amended Complaint including retaliation claims based on acts other than the Mr. Whitehead's alleged retaliatory transfer from OCPF as stated in Claims Six, Seven, Eight, and Nine; claims for declaratory and injunctive relief, as stated in Mr. Whitehead's Prayer for Relief; and claims based on the First Amendment's religion clauses and the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.*, as stated in Claim Ten. *See* App. 1034-1040. Four claims

remained and are at issue in this appeal: (1) Mr. Whitehead's First Amendment claims against Defendants MTC, Frawner, Martinez, and Azuna challenging their restrictions on Mr. Whitehead's possession and receipt of hardbound books; (2) First Amendment claims against Defendants MTC, Frawner, Martinez, Azuna, Moreno, and Barba, challenging their requirement that Mr. Whitehead purchase publications from approved vendors; (3) First Amendment claims challenging Defendants' restrictions on Mr. Whitehead's receipt of internet printouts and newspaper articles; and (4) First Amendment retaliatory transfer claim against Defendant Martinez. *See* App. 1527-1528. This is an appeal from the District Court's grant of summary judgment in favor of Defendants on all remaining claims asserted in Mr. Whitehead's amended complaint.

SUMMARY OF THE ARGUMENT

The District Court properly granted summary judgment in favor of the OCPF Defendants on all of Mr. Whitehead's claims. OCPF Defendants have legitimate penological reasons for restricting inmate access to internet material, newspaper articles, and hardback books, and for requiring Mr. Whitehead to order reading materials directly from preapproved publishers and vendors. *See generally* App. 1062-70. These restrictions help prevent contraband—such as weapons, drugs, and money—from entering OCPF. *Id.*, ¶¶ 22, 25, 45. These limitations are necessary to maintain the safety of both OCPF inmates and staff, as well as the public in general. *See generally*

id. ¶ 19. Mr. Whitehead's brief arguing otherwise relies, in significant part, on facts unsupported by the record and general arguments related to materials he did not try to access.

Further, Mr. Whitehead's transfer from OCPF was not retaliatory. *Id.*, ¶ 66. OCPF Defendants had legitimate disciplinary reasons for seeking Mr. Whitehead's transfer and thus, did not violate his First Amendment rights. *Id.*, ¶¶ 65-66. The district court did a thorough and thoughtful analysis of the issues raised by the parties, including the evidence that Mr. Whitehead submitted in a belated effort to relitigate disciplinary action against him for violation of prison policy, and which he claims creates a genuine issue of material fact precluding summary judgment. The district court properly concluded there is no genuine issue of material fact and the OCPF Defendants were entitled to judgment as a matter of law. Therefore, summary judgment dismissing Mr. Whitehead's claims against the OCPF Defendants was necessary and proper and the district court's decision should be affirmed in its entirety.

ARGUMENT

I. The District Court Properly Granted Summary Judgment to OCPF Defendants on Mr. Whitehead's First Amendment Access-to-Information Claims

Standard of Review: The Tenth Circuit reviews a district court's decision on a summary judgment motion de novo, applying the standard set out in Rule 56(a) of the Federal Rules of Civil Procedure." *Reorganized FLI, Inc. v. The Williams Companies*

Inc., et al., 1 F.4th 1214, 1218 (10th Cir. 2021) (citing *Doe v. Univ. of Denver*, 952 F.3d 1182, 1189 (10th Cir. 2020)).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) Although the burden of showing the absence of a genuine issue of material fact is upon the moving party, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The nonmoving party makes this showing only by presenting "facts such that a reasonable jury could find in [its] favor." *Garrison v. Gambro, Inc.*, 428 F.3d 933, 935 (10th Cir. 2005). Moreover, in cases whereby an inmate challenges the validity of a prison regulation, the burden is not on the prison to prove the validity of prison regulations, but on the prisoner to disprove it. *Overton v. Bazzetta*, 539 U.S. 126, 132, (2003)

A. OCPF's Policies and Procedures Regarding First Amendment Access for Inmates Satisfy The Turner Test

As this Court noted in the first appeal in this case,

> Inmates have a First Amendment right to receive information while in prison to the extent the right is not inconsistent with prisoner status or the legitimate penological objectives of the prison." *Jacklovich v. Simmons*, 392 F.3d 420, 426 (10th Cir. 2004). We generally apply the four-factor test from *Turner v. Safley*, 482 U.S. 78, 89 (1987), to evaluate whether a prison regulation that "impinges on inmates' constitutional rights . . . is reasonably related to legitimate penological interests." *Al-Owhali v. Holder*, 687 F.3d 1236, 1240 (10th Cir. 2012) (quoting *Turner*, 482 U.S. at 89).

App. 509-510.

The *Turner* factors apply to each of the categories of Mr. Whitehead's First Amendment access-to-information claims. To avoid repetition of the governing law, the OCPF Defendants will discuss each of the four factors and then apply those factors to each category of access-to-information claims, in the same order set forth in Mr. Whitehead's brief-in-chief.

B. The Four *Turner* Factors

Limitations on an inmate's right to receive information are permissible "if they are reasonably related to a legitimate penological interest." *Wardell v. Duncan*, 470 F.3d 954, 959-60 (10th Cir. 2006) (citing *Turner*, 482 U.S. 78). In *Turner*, the Supreme Court established "that restrictive prison regulations [including restrictions on First Amendment rights] are permissible if they are reasonably related to legitimate

penological interests and are not an exaggerated response to those concerns." *Wardell*, 470 F.3d at 959-60 (alteration in original) (internal citation and citing authority omitted).

To make a prima facie showing of entitlement to summary judgment, the OCPF Defendants have the burden of presenting sufficient evidence demonstrating that the refusal to provide Mr. Whitehead printed internet material, newspaper articles, and hardback books, and for requiring Mr. Whitehead to order material only from vendors was rationally related to a legitimate penological interest. *Turner*, 482 U.S. at 89 ("when a prison regulation impinges on [an] inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests" (*quoting Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 128 (1977)). *Turner* set out four factors for assessing reasonableness. To uphold a regulation as reasonable, the Court must: 1) determine that the regulation is rationally connected with the legitimate governmental interest used to justify it; 2) evaluate whether alternative means of exercising the burdened right remain available to prisoners; 3) consider the impact an accommodation of the constitutional right will have on guards, other inmates, and prison resources; and 4) determine if there are ready alternatives to the regulation. *Turner*, 482 U.S. at 89-91.

An analysis of the *Turner* factors should recognize that, while "prison walls do not form a barrier separating prison inmates from the protections of the [First Amendment] . . . these rights must be exercised with due regard for the inordinately

difficult undertaking that is modern prison administration." *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (internal quotation marks and citations omitted). Indeed, it is well-settled that "the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management[.]" *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 404-405 (1974)); *see also Turner*, 482 U.S. at 84 (noting that "courts are ill equipped to deal with the increasingly urgent problems of prison administration"). As such, "substantial deference" is given to prison authorities in the administration and management of prisons. *Frazier v. Ortiz*, 417 Fed.Appx. 768, 774 (10th Cir. 2011) (quoting *Frazier v. Dubois*, 922 F.2d 560, 562 (10th Cir. 1990) (noting that "the Supreme Court advises repeatedly that substantial deference is to be accorded to . . . prison authorities" in analyzing a prison's regulation which impinges on an inmate's constitutional rights)); *see also Hughes v. Rowe*, 449 U.S. 5, 20 (1980) (noting that the Supreme Court "has . . . repeatedly recognized that the judiciary, ill-equipped to deal with complex and difficult problems of running a prison, must accord the decisions of prison officials great deference" (internal quotation marks and citations omitted)).

1. Whether the restriction is rationally related to a legitimate and neutral governmental objective

The first *Turner* factor requires that a restriction on an inmate's First Amendment rights be rationally related to a legitimate and neutral governmental interest. *Turner*, 482 U.S. at 90. This first factor "is the most important." *Lewis v.*

Clark, 663 Fed.Appx. 697, 701 (10th Cir. 2016) (quoting *Al-Owhali v. Holder*, 687 F.3d 1236, 1240 (10th Cir. 2012)). Indeed, this factor is "not simply a consideration to be weighed but rather an essential requirement." *Al-Owhali*, 687 F.3d at 1240 (quoting *Boles v. Neet*, 486 F.3d 1177, 1181 (10th Cir. 2007) (quotation omitted)).

To satisfy the first *Turner* factor, the governmental objective underlying a restriction must be "legitimate and neutral" and "rationally related to that objective." *Sperry v. Werholtz*, 413 Fed.Appx. 31, 40 (10th Cir. 2011). "[P]rison officials need not prove the banned materials actually caused problems in the past, or that the materials are likely to cause problems in the future." *Id.* (internal quotation marks and citation omitted). Moreover, "it does not matter whether [the Court] agree[s] with the [prison officials] or whether the policy in fact advances the jail's legitimate interests[;]" the question is merely "whether the [prison officials'] judgment was rational, that is, whether the [prison officials] might reasonably have thought that the policy would advance its interests." *Id.* (internal quotation marks and citations omitted).

2. Whether there are alternative avenues that remain open to the inmates to exercise the right

The second *Turner* factor asks whether there are alternative means of exercising the right that remain open to inmates. *Turner*, 482 U.S. at 90. This factor, however, does not require prison officials to provide alternative means for inmates to engage in a prohibited activity that present safety and security risks. *See Thornburgh*,

490 U.S. at 417-18 (holding that "the right" in question must be viewed sensibly and expansively, and noting that "[t]he Court in *Turner* did not require that prisoners be afforded other means of communicating with inmates at other institutions . . . Rather, it held in *Turner* that it was sufficient if other means of expression (not necessarily other means of communicating with inmates in other prisons) remained available. . . . ."). Indeed, "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 correctional officials in gauging the validity of the [restriction]." *Turner*, 482 U.S. at 89 (internal quotation marks and citations omitted).

3. The impact that accommodating the asserted right will have on guards and other prisoners, and on the allocation of prison resources

The third *Turner* factor asks what "impact [an] accommodation of the asserted right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. Notably, "[w]hen 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." *Id.* Indeed, "substantial deference" is given to prison authorities in the administration and management of prisons. *Frazier*, 417 Fed.Appx. at 774 "While the degree of [such] impact may be open to debate" courts generally "cannot gainsay [prison officials'] basic judgment [of the burdens of accommodating a prisoner's right] would

pose a burden on staff and resources." *Wardell*, 470 F.3d at 962; *see also Thornburgh*, 490 U.S. at 407-08 (holding that "prison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison" and "considerable deference [must be afforded] to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world").

4. Whether the existence of easy and obvious alternatives indicates that the restriction is an exaggerated response by prison officials

The fourth *Turner* factor which asks whether there exist "obvious, easy alternatives" to the restriction of a prisoner's exercise of his asserted First Amendment right such that the restriction is an "exaggerated response" by prison officials. *Turner*, 482 U.S. at 90-91. This inquiry is "not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable method of accommodating the claimant's constitutional complaint." *Wardell*, 470 F.3d at 962 (quoting *Turner*, 482 U.S. at 90-91). Only if the inmate can point to "an alternative that fully accommodates [his] asserted rights *at a de minimis cost to valid penological interests*" will this *Turner* factor weigh against prison officials' restriction on their exercise of such rights. *Id.*

C. OCPF's Vendor Restrictions are Constitutional

1. The approved vendor policies reasonably relate to and further a legitimate penological interest

Mr. Whitehead's key arguments in support of his position that the OCPF use of an approved vendor list does not meet the first *Turner* factor involves an overly narrow analysis of the law and misapplication of a "fact" not supported by the record. Mr. Whitehead contends that "[r]ather than choose the approved vendors based on their security protocols, the prison chooses them based on their popularity among the prison population." Brief for Appellant ("Aplt. Brief) at 25-26. *Turner* does not require that vendors be approved based on the prison's security protocols, but that use of an approved vendor list "was rational, that is, whether the [prison officials] might reasonably have thought that the policy would advance its interests." *Sperry v. Werholtz*, 413 Fed.Appx. 31, 40 (10th Cir. 2011).

The facts referenced by Mr. Whitehead make it clear that the OCPF officials reasonably believed that the approved vendor list would advance the prison's interests--and not just its security interests--but also its interests in efficient use of prison resources. In the affidavit cited by Mr. Whitehead throughout his discussion of this issue, *see* Aplt. Brief at 25-27, Warden Martinez described the policy requiring inmates to order books, publications, and newspapers from approved vendors and explained the review process that all items ordered by inmates go through, *see* App. 1068, ¶¶ 44-46. He then noted that the policies and procedures requiring use of approved vendors "help 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 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. OCPF's approval of vendors is content neutral and OCPF does not 'censor' (apart from security concerns) potential publishers or book orders. App. 1068-69 ¶¶ 47-48. Warden Martinez's testimony is uncontradicted and demonstrates that the policies regarding the approved vendor list meet the first, and most important, *Turner* factor—that the policies serve a legitimate penological interest. The policies help conserve prison resources necessary to conduct the security reviews of incoming books and other publications to assure that contraband is not introduced into the facility.

Mr. Whitehead's position that the use of an approved vendor list does not pass muster under *Turner* is based, in large part, on a misapplication of a "fact" in Warden Martinez's affidavit. The warden testified 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." App. 1069 ¶ 49. Rather than acknowledging that the inmates' ability to request additions to the approved vendor list presents the type of alternative *Turner* favors in the second factor, Mr. Whitehead argues that the warden's statement means that the prison allows "access to popular speech but not unpopular speech." Aplt. Brief at 27. The strained interpretation of Warden Martinez's

testimony regarding allowing inmates to request additions to the approved vendor list does not make the existence of a reasonable alternative way for inmates to obtain books and other publications a policy that violates the inmates' First Amendment rights.

Mr. Whitehead's reliance on *Shakur v. Selsky*, 391 F.3d 106, 116 (2nd Cir. 2004) is misplaced, because the quoted portion of that opinion, addressing a total ban on all literature from organizations not approved by prison officials, is not applicable here. The OCPF inmates' ability to request that vendors be added to the approved list make it clear that OCPF does not have a total ban on materials from unapproved vendors, as well as establishing a way for each inmate to have an individual determination of his request for materials from vendors not already approved. Thus, Mr. Whitehead's reliance on *Thornburgh v. Abbott*, 490 U.S. 401, 416 (1989), as evidence that the OCPF approved vendor policy fails the *Turner* test, is also misplaced, because the cited portion of *Thornburgh* suggests that having individualized determinations, which already occur at OCPF, is acceptable. The approved vendor policy satisfies the first *Turner* factor.

2. Defendants Provided Alternative Means for Mr. Whitehead to exercise his First Amendment rights

As noted in the previous section, OCPF allows inmates to request additions to the approved vendor list. "During the period of time [Mr. Whitehead's] time at OCPF,

OCPF authorized additional publishers, either because of inmate or publisher requests." App. 1069 ¶ 50. Allowing inmates to request additions to the approved vendor list, and granting such requests when appropriate, is the epitome of providing a reasonable alternative to the approved vendor policy. In addition, Mr. Whitehead had access to a broad range of publications that need not be ordered through an approved vendor. OCPF has a library with thousands of books and has an inter-library loan program that allowed inmates to request a book from another prison library at no cost. App. 1065-66, ¶¶ 29-33. The Tenth Circuit upheld a prison policy permitting only paperback books, in part, because the inmates had access to "a broad range" of publications. *Jones v. Salt Lake City*, 503 F.3d 1147, 1156 (10th Cir. 2007). The jail library contained thousands of books, and inmates could also obtain books from a bookstore through a public donation procedure. *Id.* at 1155-59.

Mr. Whitehead's assertion that OCPF "Defendants ultimately fall back on the argument that the prison library and interlibrary loan program provided an accessible alternative to the approved vendor list,"[2] Aplt. Brief at 29, ignores the portion of the OCPF Defendants' argument, in its summary judgment reply brief, that Mr. Whitehead

[2] Mr. Whitehead also takes issue with "the district court's observation that [he] was once (in 2015) able to order two 'academic' books from Amazon," Aplt. Brief at 30, noting that he was not allowed to keep the books. He failed to acknowledge that he was given a choice to keep the books if he tore off the hard covers. He elected not to do so. *See* App. 1412 (Mr. Whitehead acknowledge in his summary judgment response that he was offered an opportunity to tear the hard covers off the books

"was advised that he could request new vendors to be added to the approved vendor list and failed to do so. He never made any such request and now claims in his [summary judgment] Response that such request would be futile." App. 1465 (internal citations and footnote omitted). He has presented no evidence to support his position that any request would be futile. He was offered an alternative and chose not to try it.

The OCPF offers alternatives, covering a broad range of materials, to the approved vendor list through an expansive library at OCPF, a free inter-library loan program, and the ability to request that publishers be added to the approved vendor list. Thus, the OCPF policies satisfy the second *Turner* factor.

3. Allowing publications from any vendor would impose undue burden on OCPF

"When accommodation of an asserted right will have 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.

> 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 minimus* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Id. at 90-91 (citations and quotation marks omitted); *Jones*, 503 F.3d at 1154.

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instead of sending them home.)

Mr. Whitehead relies on a single fact to argue that there would be no additional burden on the prison if inmates could receive publications from unapproved vendors: "that the prison already inspects all incoming mail—including from approved vendors—to ensure there is no contraband or banned content." *See* Aplt. Brief at 31. Although Warden Martinez acknowledged that all incoming mail is inspected, he also discussed in his affidavit why having an approved vendor policy eases the burden on prison staff. "Although books from approved publishers are also reviewed for contraband and content, having approved publishers helps to alleviate the security concerns that the alleged 'publisher' is a phony being used as a front to send contraband and/or illicit content." App. 1068 ¶ 45. "While not all books from an approved publisher will pass the illicit content review, approved vendors offer a robust variety of books that would pass such review." *Id*. The approved vendor "policies and procedures help OCPF to focus its resources needed to review books that are mailed to inmates . . . . [and] help to protect against 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." *Id*. 1068-69 ¶ 47. The warden's affidavit testimony makes it clear that additional effort would be required to review incoming mail if there were not an approved vendor list. Mr. Whitehead's argument to the contrary is no more than unsupported speculation that should be summarily rejected.

4. There are no reasonable, easily available alternatives to the approved vendor policy, other than those that already exist

Alternatives to the vendor restrictions already exist at OCPF, as discussed under the analysis of the second *Turner* factor in section I.B.2 above. Inmates may request that vendors be added to the approved vendor list, may access publications in the prison library, or may take advantage of a no-cost inter-library loan program to request books from other prison libraries. Mr. Whitehead has offered no evidence of other alternatives that would be readily available with *de minimus* impact on the facility. Use of drug dogs and metal detectors and having prison staff verify publishers via the internet, *see* App. 1373-74, 1416, involves the very use of prison staff time that the policy is designed to avoid. The district court properly found that no reasonable alternatives exist and that the fourth *Turner* factor weighs in favor of granting summary judgment in favor of Defendants. App. 1730.

D. OCPF's Restrictions on Internet Articles and Newspaper Clippings are Constitutional

"Prisons have great latitude in limiting the reading material of prisoners." *Mays v. Springborn*, 575 F.3d 643, 649 (7th Cir. 2009) (citing *Thornburgh*, 490 U.S. at 413). As discussed below, application of the *Turner* factors confirms that OCPF's restrictions on internet articles and newspaper clippings are constitutional. Each of the cases on which Mr. Whitehead relies to support the opposite conclusion can be

distinguished.[3] Most importantly, one of the reasons for the OCPF policies on internet articles and newspaper clippings is to avoid running afoul of copyright law. App. 1069, ¶ 54. None of the cases cited by Mr. Whitehead address the copyright issue at all. In addition, most of the cases are also distinguishable on other grounds.

> *Jacklovich v. Simmons* considered regulations and policies in a Kansas prison
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> > that (1) provide a $30 per month limit on outgoing inmate funds for books, newspapers and periodicals, subject to exceeding the limit once every three months for a newspaper subscription, (2) require that all inmate purchases of books, newspapers and periodicals be made by special purchase order through the institution, thereby prohibiting gift subscriptions, and (3) provide that books, newspapers and periodicals otherwise received be censored, with notice only to the inmate, but not the sender.

392 F.3d 420, 422 (10th Cir. 2004). The policies and regulations were unlike, and far more restrictive than, the OCPF policies in effect here. Of note, *Jacklovich* does not even mention internet articles or publications and addresses newspapers only as part of the overall policies and regulations at issue. A key factor in the *Jacklovich* decision was that "[t]he district court erred" in not considering any *Turner* factor other than the

[3] Mr. Whitehead cites four cases for the proposition that "[t]he district court's analysis of the validity of these restrictions was fundamentally flawed and directly contrary to *Jacklovich v. Simmons*, as well as numerous decisions in the courts of appeals invalidating similar restrictions." Aplt. Brief at 32-33. Other than *Jacklovich*, Mr. Whitehead does not discuss any of the cases or describe how the district court's analysis in this case is directly contrary to the holdings in those cases. While the courts in all four cases held that summary judgment in favor of a prison on a policy related to newspaper clippings or internet material was improper on the record before the court, such holdings do not automatically invalidate an

first. *Id.* at 427. The same is not true here. The district court did a thorough analysis of all four *Turner* factors before determining that summary judgment was appropriate. *See generally* App. 1557-66, 1734-47. Moreover, the *Jacklovich* court reversed the district court based on its finding that genuine issues of material fact existed. *See* 392 F.3d at 428. In the instant case, the district court analyzed and properly concluded that the material facts related to this issue are undisputed. *See* App. 1735-37.[4]

The court in *Allen v. Coughlin*, 64 F.3d 77 (2d Cir. 1995) reversed summary judgment in favor of a prison regarding whether its policy on newspaper clippings was unconstitutional. It did so based on its finding that the record at the time did not support judgment as a matter of law. The prison maintained that the clipping policy was intended to "prevent[] the dissemination of inflammatory material that might threaten the order and security of the prison" and the Court determined that this justification did not pass the first *Turner* factor, also in part because the affidavits "f[e]ll short of establishing the claimed danger from newspaper clippings." *Id.* at 80. There was no issue regarding compliance with copyright laws before the *Allen* court and the policy at issue in that case was based on the potential content of clippings, whereas the OCPF policy is content neutral. App. 1069, ¶ 48.

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analysis by another court that reaches a different conclusion.

[4] To the extent that the district court found a difference between the parties' positions on one fact, the court construed the apparent inconsistency in favor of Mr. Whitehead. App. 1746 n.23.

Lindell v. Frank, 377 F.3d 655 (7th Cir. 2004) involved the validity of a prison's limited application of a policy requiring that inmates receive published materials only from the publisher or another commercial source. The prison considered clippings or copies of articles to fall within the policy and did not allow the inmate to keep an article his father had sent him from the magazine *Farm and Ranch Living*. *Id.* at 659. The appellate court found that the interpretation met the first *Turner* factor, but not the others, in part because the inmate was in the most restrictive housing level and did not have alternative ways to exercise his First Amendment rights, such as access to the prison's library, which the court noted had a limited number of publications. *Id*. In addition, the court noted that there were alternative remedies to address the valid penological interest. *Id.* at 659-660. The court held that the policy, as applied to this inmate, was unconstitutional, but acknowledged it was "a close call." *Id.* at 660. *Lindell* did not address internet materials at all and is distinguishable because Mr. Whitehead does have access to the OCPF prison library, as well as a no-cost inter-library loan program, and publications from approved vendors. *See generally* App. 1065-67, ¶¶ 28-37.

Clement v. Cal. Dep't of Corr., 364 F.3d 1148 (9th Cir. 2004) addressed a prohibition on mail that included material downloaded from the internet and found that the policy did not meet the *Turner* factors, because the prison "failed to articulate a rational or logical connection between its policy and" the penological interests it

sought to protect. *Id.* at 1152. The prison sought to prohibit a drastic increase in the volume of mail and to address security concerns related to the ease with which coded messages could be inserted into internet materials and the difficulty in tracing the origin of internet materials. *Id. Clement* is distinguishable, both because it did not address the copyright interest that is part of the reason behind OCPF's policy and because, as the district court properly concluded, the OCPF Defendants articulated a rational and logical connection between its policy and the legitimate penological interests the policy is designed to address. *See* App. 1737 (agreeing with magistrate judge's conclusion "that each [*Turner*] factor supports the constitutional validity of the challenged restrictions" on newspaper clippings and internet articles and discussing first *Turner* factor),

In sum, although the cases on which Mr. Whitehead rely address some of the same materials as those at issue before the Court, the guidance to be gleaned from those cases is that a court must analyze all four *Turner* factors prior to determining whether summary judgment is appropriate. The district court did so in this case and properly concluded that summary judgment is appropriate. Therefore, this Court should affirm the district court's decision.

1. The restrictions on internet articles and newspaper clippings reasonably relate to, and further, a legitimate penological interest

Mr. Whitehead's argument as to the first *Turner* factor relies, in part, on

asserted facts either not cited to the record or unsupported by the cited portions of the record. For example, he cites to eight pages of the record in support of his statement that "[t]he 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." Aplt. Brief at 33. Not one of the cited pages—App. 176, 179, 182, 549, 50, 1069, 1486, 1626—references OCPF's position as to what is (or is not) "available exclusively online." In the same paragraph, Mr. Whitehead lists news sources purportedly no longer available in print form, but provides no citation to the record to indicate that these sources were at issue before the district court,[5] no information about when the listed sources became exclusively online, no indication that he ever sought to access any of the publications on the list, and no discussion regarding why this information should be considered in analyzing the first *Turner* factor in this case. Aplt. Brief at 34.

A review of facts that are in the record demonstrates that the OCPF policies relate to legitimate penological interests. OCPF allows inmates to have some internet printouts after the printouts are cleared for security concerns. App. 1069 ¶ 54. OCPF, however, prohibits internet newspaper printouts due to copyright issues. *Id.* Still,

[5] An appellate court will not consider "matters of facts not in the record before the district court." *DeRito v. United States*, 851 F.App'x 860, 864 (10th Cir. 2021) (citing *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 n.10). (10th Cir. 2010).

inmates are allowed to order newspaper subscriptions directly from a vendor, and such newspapers are allowed at OCPF. *Id.* Mailed newspaper articles such as print-outs or clippings from third parties are not permitted; however, inmates may purchase articles through approved vendors, such as the publisher itself. App. 1070 ¶ 55. Copies 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. *Id.* ¶ 56.

Ensuring security at the prison and compliance with copyright law are legitimate penological interests. In *Waterman v. Commandant, U.S. Disciplinary Barracks,* 337 F.Supp.2d 1237 (D. Kansas 2004), the court considered a military prison policy prohibiting prisoners from receiving in the mail copies of publications or materials not coming from the original publisher or a commercial vendor. *Id.* at 1239. The prison asserted two reasons for the policy: security and as "a way of deterring inmates from violating copyright laws." *Id.* The court found "that the policy disallowing non-original source material is rationally related to legitimate penal objectives." *Id.* Inmates may not receive newspaper clippings or articles printed from the internet that pose a security risk, but may obtain newspapers or articles from the publishers or commercial vendors. A policy requiring newspapers and articles to come from the publisher or approved commercial vendor ensures that the incoming material does not violate federal copyright laws, so there is a rational relationship between the policy and deterring violations of those laws.

The OCPF policy is also rationally related to this legitimate security concern, as demonstrated by Warden Martinez' supplemental affidavit. "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 articles to send coded messages." App. 1485 ¶ 23. "For example, these papers can be soaked in drugs, and once they enter OCPF, they are cut into pieces and sold to inmates." *Id.* ¶ 24. "Inmate[s] then dissolve the paper and use the drugs." *Id.* Contraband, such a[s] drugs and weapons can be also be hidden in the newspapers." *Id.* ¶ 25. Warden Martinez also understands "that newspapers and internet printouts from non-publishers can be used to send coded messages." *Id.* ¶ 26.

"The legitimacy of promoting prison security is beyond question." *Waterman*, 337 F.Supp.2d at 1241 (citing *Thornburgh*, 490 U.S. at 412.) The OCPF policies on newspaper clippings and internet articles are content neutral and requiring inmates to obtain such items from the publisher or an approved commercial vendor is a reasonable way to prevent third-parties from using such materials to introduce contraband into the facility. *See Waterman*, 337 F.Supp.2d at 1241 (noting that a policy prohibiting non-original source material via mail "appears to operate in a neutral fashion, banning all non-original source generated regular mail without regard to content" and finding the policy rationally related to the legitimate penological interests of security and

copyright.

Mr. Whitehead cites no authority for his position that ensuring copyright compliance is not a legitimate penological interest.

2. OCPF Defendants Provided Alternative Means for Mr. Whitehead to exercise his First Amendment rights

The OCPF Defendants incorporate their discussion in Section I.B.2 of this brief here, because it sets out multiple alternatives for inmates to receive publications that are applicable to this discussion of newspaper clippings and internet articles. In addition to providing the broad range of materials to which inmates have access as set forth in Section I.B.2., OCPF allows inmates to receive newspapers, including clippings, and other publications from the publisher or a commercial vendor, as well as articles from the internet that do not compromise facility security. App. 1069-70 ¶¶ 54-56. Mr. Whitehead had ample alternatives and the second *Turner* factor is satisfied.

3. Allowing newspaper clippings and articles from the internet would impose undue burden on OCPF

"When accommodation of an asserted right will have 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.

> 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 minimus* cost to valid penological interests, a court

> may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Id. at 90-91 (citations and quotation marks omitted); *Jones*, 503 F.3d at 1154.

Mr. Whitehead does not point to any evidence contradicting the burden on the prison established in Warden Martinez' affidavits. Instead his position as to the third *Turner* factor is stated in a single sentence generally asserting that disputed material facts exist. *See* Aplt. Brief at 40. The district court's detailed analysis of the parties' positions on the facts belies Mr. Whitehead's characterization and amply demonstrates that the policies at issue satisfy the third *Turner* factor.

4. There are no reasonable, easily available alternatives to the restrictions on newspaper clippings and internet articles, other than those that already exist

Alternatives to the vendor restrictions already exist at OCPF, as discussed under the analysis of the second *Turner* factor in section B.2 above. Inmates may request that vendors be added to the approved vendor list, may access publications, including newspapers, in the prison library, or may obtain copies of newspapers from the publisher or a commercial vendor and may have internet materials that do not compromise prison security. Mr. Whitehead, without citation to the record and in a single sentence of his brief, addressed the fourth *Turner* factor by claiming to have "provided a number of suggestions, including giving prisoners access to tablets, or simply allowing mailed newspaper clipping or internet articles." Aplt. Brief at 41.

Presumably, the alternative of giving prisoners access to tablets is intended to mean giving prisoners access to electronic devices that would allow them to connect to the internet. It is unclear how that is a reasonable alternative that would be a *de minimus* impact on the prison. The district court correctly concluded that providing tablets, even with firewalls installed to prevent access to disruptive content, would involve "considerably more than *de minimus* costs to the prison." App. 1740-41. The second proffered alternative--"simply allowing mailed newspaper clippings or articles"--is not a reasonable alternative. In essence, Mr. Whitehead proposes dropping the restrictions. The OCPF Defendants have already established that the restrictions exist, in part, to avoid imposing an undue burden on prison staff. Thus, Mr. Whitehead's proposed alternative would result in imposing an undue burden on prison staff. The district court properly concluded that the policy on newspaper clippings and internet materials, when considered with available alternatives, satisfied the fourth *Turner* factor. *See* App. At 1746.

E. OCPF's Restrictions on Hardcover Books are Constitutional

Much of the argument on this issue mirrors that on the issues already discussed. Thus, for the sake of brevity, the OCPF Defendants incorporate their arguments in sections B and C above, and will restrict the discussion in this section to the additional considerations applicable to hardback books.

1. The restrictions on hardcover books reasonably relate to and further a legitimate penological interest

Prohibiting hardback books to be mailed to inmates serves a legitimate penological purpose of promoting security. *Bell v. Wolfish*, 441 U.S. 520, 550-51, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). "Where the regulations at issue concern the entry of materials into the prison…a regulation which gives prison authorities broad discretion is appropriate." *Thornburgh*, 490 U.S. at 416; *see also Al-Owhali v. Holder*, 687 F.3d 1236, 1242 (10th Cir. 2012) (acknowledging that a prison warden has "broad discretion to limit incoming information.").

This Court has considered a policy similar to that in *Jones*, 503 F.3d at 1156. Although the *Jones* plaintiff did not challenge the prison's ban on hardback books, the Court considered the prison's prohibition on softback books. *Jones*, 503 F.3d at 1156. There, inmates could obtain paperback books through the jail library, which contained thousands of books. *Id.* The Court held that, limiting books from "the outside" was rationally related to the legitimate objective of prison security in that it prevented contraband from being smuggled into the jail. *Id.* at 1158. Notably, in *Heard v. Marcantel*, the Court held that the same hardbound book policy as at issue in this case was rationally related to the prison's penological interests. No. 15-CV-0516 MCA/SMV, 2016 WL 9818340, at *7 (D.N.M. Nov. 14, 2016) (rejecting the plaintiff's attempt to "question[] the professional wisdom of distinguishing between

hardbound books from outside sources (even if those sources are merely book publishers and vendors) and those from sources with facility oversight, like the library").

The OCFP prohibition of inmates receiving hardback books in the mail prevents contraband from being introduced at OCPF. Hardback 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. App. 1065-66 ¶ 22. 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. *Id*. 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. *Id*. Hardback books are generally not allowed to be received through the mail due to security concerns involving the use of the hardback books to hide contraband such as needles within the binding material. App. 1065 ¶ 24; App. 1079-80. It is undisputed that, if inmates were allowed 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. App. 1065 ¶ 25. Thus, much like the Court found in

Heard, the first *Turner* factor weighs in favor of OCPF Defendants.

Mr. Whitehead incorrectly contends that, because the prison permits college textbooks in hardcover format, there is no meaningful security risk posed by hardback books. Aplt. Brief at 42-43. It is undisputed that there is a limited exception for college textbooks because of the way they enter the facility. The textbooks are not mailed to the inmates by third parties. They are provided by the college to OCPF, which distributes them to the inmates. App. 1484 ¶ 16. The books are the property of the college and must be returned when the course is completed or the inmate leaves OCPF. The covers of the textbooks cannot be removed because they belong to the college. *Id.* ¶ 17. The manner of distribution minimizes the security concerns associated with hardback books coming through the mail, i.e., smuggling of contraband from the outside. *Id.* 1484-85 ¶ 18; *see also id.* 1717 (district court noting that Mr. Whitehead'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. 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."). The district court's analysis is correct and it should be affirmed.

2. OCPF Defendants Provided Alternative Means for Mr. Whitehead

to exercise his First Amendment rights

The second *Turner* factor is satisfied by regulations that provide inmates with access to a "broad range of publications." *Thornburgh*, 490 U.S. at 418. Contrary to Mr. Whitehead's claims, Mr. Whitehead has access to many publications from the OCPF library, including what Warden Martinez estimates to be 19,000 books.[6] App. 1065-66 ¶¶ 29-33; *see also Bell*, 441 U.S. at 552, (considering as support that the facility had a "relatively large" library for use by inmates).[7] Additionally, if the OCPF library does not have a book an inmate wants, inmates can use the inter-library loan program to request the book from another prison library. App. 1067, ¶ 37.[8]

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[6] Mr. Whitehead contended in his summary judgment response that Warden Martinez' estimation of books available at the OCPF library is wrong. App. 1411 ¶ 12; *id.* 1412 ¶ 14. Even assuming Mr. Whitehead's estimated number of 5,000 is accurate, it is *still* undisputed that the OCPF library provides inmates with a thousands of books and magazines.

[7] To the extent Mr. Whitehead challenges OCPF's selection of books based on his disliking of the available titles, this misses the point. The second *Turner* factor contemplates inmate access to "broad range of publications", not a broad range of publications that a particular inmate likes.

[8] Mr. Whitehead, in his summary judgment response, challenges this broad range of publications, claiming that the inter-library loan program has not worked for him. App. 1412 ¶ 18. Mr. Whitehead provides no admissible evidence to support this claim. *See In re Wickens*, 416 B.R. 775, 776 (Bankr. D.N.M. 2009) ("Hearsay evidence cannot be considered on a motion for summary judgment."); *Johnson v. Weld Cty., Colo.*, 594 F.3d 1202, 1209 (10th Cir. 2010) ("[i]t is well settled in this circuit that we can consider only admissible evidence in reviewing an order granting summary judgment."). Even if this inadmissible evidence is considered, whether Mr. Whitehead actually had issues with the inter-library loan program does not impact the undisputed evidence that OCPF inmates have access to broad ranges of publications and the program is available to inmates.

Perhaps more importantly, Mr. Whitehead himself was provided with an alternative. When he received hardback books in the mail, he was told that he had the choice to either send the books home, or tear off the covers. When he did not agree to tear off the covers, these books were returned. App. 1069, ¶ 40; *id.*, 1271-72. Although Mr. Whitehead noted in his grievance regarding the issue that he "did not want to destroy them so he had them sent," App. 1271, he now contends that removing the covers of the books would violate another policy. Aplt. Brief at 44. His concerns were unfounded. Mr. Whitehead conflates two New Mexico Corrections Department policies to get to this incorrect conclusion. While under NMCD 150201(E)(6)(b), inmates cannot alter property, Mr. Whitehead was offered the opportunity by prison administration to remove the covers to avoid this dilemma and remain protected from NMCD 150201(E)(6)(b). *See* App. 1271-72; *see also id.* 1190, 1210, 1230, and 1248 (portions of inmate handbooks from relevant years stating "Currently, hard-back books can be received only if the covers are removed."). The district court properly determined that Mr. Whitehead's fears of discipline for altering property were "wholly speculative," App. 1719-20,[9] and the district court properly determined that the second *Turner* factor is satisfied and this Court should do the same.

3. Allowing hardback books would impose undue burden on OCPF

[9] Mr. Whitehead cited to the Magistrate's Recommended Findings and Proposed Resolution, App. 1545-46, which did not use the words "wholly speculative." Aplt. Brief at 45.

Mr. Whitehead does not point to any evidence that the burden on the prison established in Warden Martinez' affidavits is contradicted. *See* Aplt. Brief at 46. Instead, he contends that an unpublished opinion from this Court "makes clear that accommodating Whitehead's First Amendment rights would not unduly burden the prison system." *Id*. The district court's analysis of relevant authority and the unpublished opinion is thorough and reaches a more appropriate conclusion.

> Reading *Bell*, *Turner*, *Jones*, and *Khan* together, and not withstanding [Mr. Whitehead'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 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.

App. 1714-15.

4. There are no reasonable, easily available alternatives to the prohibition on hardback books, other than those that already exist

Mr. Whitehead and other inmates at OCPF already have a simple alternative to the prohibition on hardback books: removing the cover. This alternative has *de minimus* impact on the prison. Mr. Whitehead's proposal that the prison search "hard[back] books received in the mail (like by using drug dog or metal detector, which the prison already had and used)," Aplt. Brief at 46-47, is not *de minimus*. It is undisputed that, if inmates were allowed 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. App. 1065 ¶ 25. Neither OCPF nor the district court is required to consider every possible alternative and then shoot it down in order to support a determination that there is no reasonable alternative. *See Turner*, 482 U.S. at 90-91. The district court's analysis and conclusions are proper and should be upheld.

F. Summary as to First Amendment Claims

The detailed memorandum opinion issued by the district court makes it clear that the district court delved into the evidence and the law to thoroughly and thoughtfully analyze Mr. Whitehead's allegations. There is no genuine issue of material fact and the OCPF Defendants were entitled to judgment in their favor as a matter of law. This Court should affirm the district court on all of Mr. Whitehead's First Amendment access-to-information claims.

II. The District Court Properly Granted Summary Judgment in Favor of the Defendants on Mr. Whitehead's Retaliation Claim Against Warden Martinez.

A prison official may violate a prisoner's First Amendment rights when they transfer the prisoner because the prisoner exercised those rights. *Frazier v. Dubois*, 922 F.2d 560, 561–62 (10th Cir. 1990) ("[W]hile 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." (internal quotation marks omitted)). Still, "a prisoner cannot maintain a

retaliation claim when he is convicted of the actual behavioral violation underlying the alleged retaliatory false disciplinary report and there is evidence to sustain the conviction." *O'Bryant v. Finch*, 637 F.3d 1207, 1215 (11th Cir. 2011) (per curiam).

"[A]n inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State". *Olim v. Wakinekona,* 461 U.S. 238, 245 (1983). Indeed, it is well settled that the Due Process Clause does not "protect a duly convicted prisoner against transfer from one institution to another within the state prison system." *Meachum v. Fano,* 427 U.S. 215, 225 (1976). "Transfers between institutions, for example, are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate." *Id,* the Supreme Court noted that the inmate "had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct." 427 U.S. 236, 243 (1976) (where, similar to New Mexico, under New York law individuals sentenced to imprisonment are not sentenced to a particular institution but are instead committed to the custody of the Commissioner of Corrections). Courts should not become involved in "the day-to-day functions of state prisons". *Meachum*, 427 U.S. at 228-229

"An inmate claiming retaliation must allege *specific facts* showing retaliation because of the exercise of [his] constitutional rights." *Peterson v. Shanks,* 149 F.3d 1140, 1144 (10th Cir. 1998) (quotation omitted) (also noting that retaliation claim is

governed by strict "but for" standard for causation). "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." *Frazier*, 922 F.2d at 562.

The process after an inmate is recommended for transfer is set out in CD-080102. App. 1070-71 ¶ 64. While OCPF can request a transfer, it has no authority to actually approve any such transfer requests. *Id*. 1070 ¶ 63.

On February 23, 2017, it was discovered that Mr. Whitehead was using a church volunteer, Pastor Koehne, to violate NMCD policies by passing correspondences outside the proper channels for such communications. *Id*. ¶ 58. This practice circumvented NMCD policies and threatened OCPF's safety and security as well as that of the general public. *Id*. ¶ 61. Mr. Whitehead was transferred because he circumvented NMCD policies through using a religious volunteer to pass mail, which threatened the safety and security of OCPF as well as the public. *Id*. ¶ 62. The decision to seek Mr. Whitehead's transfer was unrelated to his history of filing grievances in OCPF or filing this lawsuit. *Id*. 1071 ¶ 66.

Mr. Whitehead is a duly convicted inmate, and, as such, is a NMCD ward, that is not permitted to dictate where he is housed. In fact, as the Supreme Court recognized in both *Olim* and *Haymes,* Mr. Whitehead does not have a justifiable expectation to be housed at any particular facility. *Olim*, 461 U.S. at 245. Since Mr. Whitehead was

convicted of the disciplinary charges, Mr. Whitehead's retaliation claim fails as a matter of law. *Allmon v. Wiley*, No. 08-CV-01183-MSK-CBS, 2011 WL 4501941, at *8 (D. Colo. Aug. 25, 2011) (unpublished), *aff'd,* 483 F. App'x 430 (10th Cir. 2012) ("Because he was found guilty of the disciplinary charges resulting in the disciplinary harm at issue, [the plaintiff's] retaliation claim fails."). This transfer request had nothing to do with Mr. Whitehead's grievances. App. 1071 ¶ 66. This transfer request had nothing to with Mr. Whitehead filing this lawsuit. *Id*. In sort, Mr. Whitehead's retaliatory transfer claim fails because OCPF had a legitimate reason for requesting Mr. Whitehead's transfer that was unrelated to his history of filing grievances or the initiation of this lawsuit.

Mr. Whitehead provides no legal argument to dispute this claim, but only attempts to dispute the factual allegations that led to Mr. Whitehead being convicted of a disciplinary charge. *See generally* Aplt. Brief at 50-56. There is no dispute that he was convicted, but he seeks now to re-litigate that conviction by arguing that the facts on which the conviction was based are disputed. This is insufficient under Fed. R. Civ. P. 56 to create a factual dispute. It does not matter if Mr. Whitehead disputes the facts used to convict him but not the fact that he was convicted. Warden Martinez has testified to this disciplinary charge, including his continuing good faith belief that Mr. Whitehead violated prison policy by using a volunteer pastor to mail letters that should have gone through prison processing. S*ee* App. 1070-71 ¶¶ 57-66; *see also* 1583-84.

Mr. Whitehead has presented *no* admissible evidence to refute it. Mr. Whitehead has presented no evidence to satisfy his burden that Warden Martinez' transfer was pretextual. *See Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007) ("Because defendants can show legitimate reasons for [the plaintiff's] dismissal, the burden shifts back to [the plaintiff] to demonstrate why the stated reasons are pretextual."). Accordingly, as the district court found, there are no genuine issues of disputed facts and OCPF Defendants are entitled to judgment as a matter of law. This Court should reach the same conclusion and affirm the district court's decision in its entirety.

CONCLUSION

The District Court correctly concluded, after thorough analysis, that there is no genuine issue of material fact and that OCPF Defendants are entitled to judgment as a matter of law on all of Mr. Whitehead's claims. This Court should affirm the district court's summary judgment in favor of OCPF Defendants.

STATEMENT REGARDING ORAL ARGUMENT

OCPF Appellees do not request oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellees' Answer Brief complies with the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The word count feature of the word processing system used to prepare the brief indicates a word count of 10,417 words, excluding the cover page, corporate disclosure statement, table of contents, table of authorities, statement regarding oral argument, certificate of service, certificate of digital submission, and this certificate of compliance.

By: *s/ Christina Muscarella Gooch*
Christina Muscarella Gooch

Date: December 10, 2021

CERTIFICATE OF DIGITAL SUBMISSION

I HEREBY CERTIFY that:

(1) No privacy redactions were required to be made in this document;

(2) The hard copies of the brief that are required to be filed with the 10th Circuit Court of Appeal are identical in substance and form to this electronically filed version; and

(3) This submission has been scanned for viruses with Sophos AntiVirus, Version 10.8.11.3, updated December 10, 2021, and according to the program, is free from viruses.

By: *s/ Christina Muscarella Gooch*
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Date: December 10, 2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 10, 2021, a copy of the foregoing OCPF Appellees' Answer Brief was served via electronic mail to the following counsel and filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit via the court's ECM/ECF system pursuant to F. R. App. P. 25(c):

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