2021 WL 1248387
Only the Westlaw citation is currently available.
United States District Court, D. New Mexico.

Monte WHITEHEAD, Plaintiff,

v.

MANAGEMENT AND TRAINING CORPORATION et al., Defendants.

Civ. No. 17-275 MV/KK
|
Filed 03/01/2021

Attorneys and Law Firms

Monte Whitehead, Santa Fe, NM, Pro Se.

Christina Muscarella Gooch, Sutin, Thayer & Browne, Jacqueline K. Kafka, Adams+Crow Law Firm, Albuquerque, NM, for Defendants Management and Training Corporation, James Frawner, Richard Martinez.

Christina Muscarella Gooch, Sutin, Thayer & Browne, Jacqueline K. Kafka, Adams+Crow Law Firm, Kurt Wihl, Keleher & McLeod PA, Albuquerque, NM, for Defendant FNU Moreno.

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

MARTHA VÁZQUEZ, UNITED STATES DISTRICT JUDGE

***1** 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, 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.)

***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.)

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.)

***3** 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").

***4** 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, 106 S.Ct. 2548, 91 L.Ed.2d 265 (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, 106 S.Ct. 2548; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (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, 106 S.Ct. 2505. 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, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999). Finally, the Court cannot decide issues of credibility. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505. "[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, 106 S.Ct. 2505.

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

1. *Legal Standards*

***5** 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, 109 S.Ct. 1874, 104 L.Ed.2d 459 (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, 109 S.Ct. 1874) (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, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). Consequently, in considering the constitutionality of prison regulations, courts should "accord deference to the appropriate prison authorities." *Id.* at 85, 107 S.Ct. 2254.

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, 107 S.Ct. 2254 (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, 107 S.Ct. 2254; *see Whitehead v. Marcantel*, 766 F. App'x 691, 696 (10th Cir.), *cert. denied*, —— U.S. ——, 140 S. Ct. 384, 205 L.Ed.2d 227 (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, 107 S.Ct. 2254 (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, 109 S.Ct. 1874. 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, 107 S.Ct. 2254. 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, 107 S.Ct. 2254. "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, 107 S.Ct. 2254). 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, 126 S.Ct. 2572, 165 L.Ed.2d 697 (2006) (quotation marks and alterations omitted).

***6** 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, 107 S.Ct. 2254; *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, 107 S.Ct. 2254; *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, 109 S.Ct. 1874) (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, 107 S.Ct. 2254. "[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, 107 S.Ct. 2254 (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, 107 S.Ct. 2254 (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, 126 S.Ct. 2572, 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, 123 S.Ct. 2162, 156 L.Ed.2d 162 (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 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).)

***7** 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, 99 S.Ct. 1861, 60 L.Ed.2d 447 (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, 99 S.Ct. 1861. 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, 99 S.Ct. 1861. 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, 99 S.Ct. 1861.

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 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.*

***8** 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 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,

> [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.)

> ***9** [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 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, 99 S.Ct. 1861.

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, 109 S.Ct. 1874.

***10** 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, 107 S.Ct. 2254, 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, 107 S.Ct. 2254).) 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.").

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.

***11** 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, 107 S.Ct. 2254, 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, 126 S.Ct. 2572 (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]

***12** 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.)

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, 107 S.Ct. 2254, 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.)

***13** 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.)

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.)

***14** 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.)

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, 109 S.Ct. 1874. (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, 109 S.Ct. 1874; (*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, 109 S.Ct. 1874. 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, 109 S.Ct. 1874. 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, 107 S.Ct. 2254. 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.").

***15** 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, 109 S.Ct. 1874 (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, 109 S.Ct. 1874. (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, 109 S.Ct. 1874. 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, 107 S.Ct. 2254, 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.

***16** 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, 109 S.Ct. 1874. 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.)

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, 107 S.Ct. 2254, 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*, —— U.S. ——, 140 S. Ct. 2568, 206 L.Ed.2d 498 (2020), *reh'g denied*, —— U.S. ——, 140 S. Ct. 2821, 207 L.Ed.2d 152 (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.)

***17** 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, 107 S.Ct. 2254, 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, 107 S.Ct. 2254 (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, 107 S.Ct. 2254 (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, 107 S.Ct. 2400, 96 L.Ed.2d 282 (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 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).

***18** 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]

***19** 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).)

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, 107 S.Ct. 2254, 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 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.)

***20** 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. 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 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]

***21** 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 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,

> ***22** [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.

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, 126 S.Ct. 2572; *Turner*, 482 U.S. at 84–85, 107 S.Ct. 2254. 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, 109 S.Ct. 1874 ("[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, 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, 109 S.Ct. 1874. 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.

***23** 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, 107 S.Ct. 2254, 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, 109 S.Ct. 1874. 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, 109 S.Ct. 1874.

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, 107 S.Ct. 2254. 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.

***24** 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, 107 S.Ct. 2254. 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.").

***25** 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 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]

(*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,

> ***26** 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 [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.*)

***27** 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, 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.*)

***28** 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, 107 S.Ct. 2254. 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.

***29** 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' 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.

All Citations

--- F.Supp.3d ----, 2021 WL 1248387

Footnotes

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.)

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.)

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).

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.

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.

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.

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.

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.)

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 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, 109 S.Ct. 1874. "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).

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 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.

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.

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 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, 109 S.Ct. 1874 (prison regulations "permit[ting] a broad range of publications to be sent, received, and read" by inmates satisfy the second *Turner* factor).

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.)

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.)

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.)

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

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.").

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.

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.

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.)

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.)

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).

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.)

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.

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.

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.)

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), 2015 WL 13667235, 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.

End of Document