IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-00992-RBJ-KLM

AHMAD AJAJ,

Plaintiff,

v.

UNITED STATES OF AMERICA;
FEDERAL BUREAU OF PRISONS;
WARDEN BILL TRUE, in his official capacity;
WARDEN JOHN OLIVER, in his individual capacity;
WARDEN DAVID BERKEBILE, in his individual capacity;
ASSOCIATE WARDEN TARA HALL, in her individual capacity;
ASSOCIATE WARDEN CHRIS LAMB, in his official and individual capacity;
PHYSICIAN ASSISTANT RONALD CAMACHO, in his individual capacity;
MEDICAL STAFF SAMANTHA MCCOIC, in her individual capacity;
MEDICAL STAFF K. MORROW, in her official and individual capacity;
CHAPLAIN MICHAEL CASTLE, in his official and individual capacity;
CHAPLAIN JASON HENDERSON, in his official and individual capacity;
RELIGIOUS COUNSELOR GEORGE KNOX, in his individual capacity;
INMATE TRUST FUND SUPERVISOR KENNETH CRANK, in his official and individual capacity;
NURSE ROGER HUDDLESTON, in his official and individual capacity, and
OFFICER D. PARRY, in his official and individual capacity,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on the **Motion to Dismiss** [#63][1] (the "Motion"), filed by Defendant United States; on the **Motion to Dismiss Official-Capacity Claims** [#64],

[1] "[#63]" is an example of the convention the Court uses to identify the docket number assigned to a specific paper by the Court's electronic case filing and management system (CM/ECF). This convention is used throughout this Recommendation.

filed by all Defendants except for Defendant United States; and on the **Motion to Dismiss Individual-Capacity Claims** [#65], also filed by all Defendants except for Defendant United States. Plaintiff filed Responses [#70, #71, #72] in opposition to the Motions, and Defendants filed Replies [#78, #79, #80]. The Motions have been referred to the undersigned for recommendation pursuant to 28 U.S.C. § 636(b) and D.C.COLO.LCivR 72.1(c). *Order Referring Case* [#82]. Oral argument on the Motions was heard on July 7, 2016. *See* [#94]. The Motions are thus ripe for review. Having reviewed the entire case file and being sufficiently advised, the Court respectfully **RECOMMENDS** that the United States' Motion [#63] be **GRANTED**, that the Official Capacity Motion [#64] be **GRANTED in part and DENIED in part**, and that the Individual Capacity Motion [#65] be **GRANTED in part and DENIED in part**.

I. Summary of the Case

At all times relevant to this lawsuit, Plaintiff has been a prisoner in the custody of the United State Bureau of Prisons ("BOP") at the United States Penitentiary - Administrative Maximum in Florence, Colorado ("ADX"). *Am. Compl.* [#29] ¶ 9. Defendants in this matter consist of the United States of America, the BOP, and employees of the BOP. *Id.* ¶¶ 10-26.

Plaintiff is an adherent of Sunni Islam, and, in connection with the following events, he asserts four claims relating to his religious beliefs: (1) First Amendment violation of right to free exercise of religion, asserted against Defendants BOP, Berkebile, Oliver, True, Hall, Lamb, Camacho, Morrow, Huddleston, Castle, Henderson, Knox, and Crank; (2) violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, asserted against Defendants BOP, Berkebile, Oliver, True, Hall, Lamb, Camacho, Morrow, McCoic,

Huddleston, Castle, Crank, Henderson, Knox, and Parry; (3) a Federal Tort Claims Act ("FTCA") claim, asserted against Defendant United States of America; and (4) Fifth Amendment violation of right to equal protection, asserted against Defendants BOP, Berkebile, Oliver, True, Hall, Parry, and Knox. *Id.* ¶¶ 317-414.

A. Plaintiff's Incarceration with the BOP[2]

Plaintiff has been in the custody of Defendant BOP since 1993, and from 1993-2001 Plaintiff was housed in high security prisons. *Id.* ¶ 27. On February 1, 2001, Plaintiff was transferred from a high security facility in Beaumont, Texas, to a medium security prison in Edgefield, South Carolina ("FCI-Edgefield"). *Id.* ¶ 28. On September 11, 2001, Defendant BOP placed Plaintiff in the Special Housing Unit ("SHU") at FCI-Edgefield without notice and in the absence of any disciplinary infractions, where Plaintiff was housed alone. *Id.* ¶¶ 29-30. In September 2002, Plaintiff was transferred to ADX in Florence, Colorado, despite having no violent disciplinary infractions. *Id.* ¶¶ 31, 33. After spending eight years in solitary confinement in ADX, Plaintiff was transferred in January of 2010 to the United States Penitentiary - Marion ("USP-Marion"). *Id.* ¶ 35. In USP-Marion, Plaintiff was housed in the Communications Management Unit with other inmates, where he utilized the administrative remedy process often and helped other prisoners to file grievances. *Id.* ¶¶ 36-39. In May of 2012, Plaintiff was transferred back to ADX, allegedly because of his use of the grievance system, he believes. *Id.* ¶¶ 40-42. Since this transfer, Plaintiff has been housed in solitary confinement, and so ADX staff is responsible for delivering everything to Plaintiff's cell, including daily meals and prescription medications. *Id.* ¶¶ 43-

[2] All well-pled allegations from the complaint are accepted as true and viewed in the light most favorable to the plaintiff. *Barnes v. Harris*, 783 F.3d 1185, 1191-92 (10th Cir. 2015).

44. Given the conditions of his confinement, Plaintiff is at the mercy of ADX officials to observe many tenets of his religion. *Id.* ¶ 45.

B. Plaintiff's Medications

Plaintiff has a history of chronic health problems, including chronic fatigue syndrome, anxiety, severe spinal canal stenosis, fiber peripheral neuropathy, and sciatica, which have caused him to suffer immense back pain and numbness in his extremities. *Id.* ¶ 48. Plaintiff has been prescribed a variety of medications by BOP physicians, including Neurontin, which helps control pain, and Bupropion, which is an antidepressant. *Id.* ¶ 49. If Plaintiff does not take Neurontin daily, he experiences severe pain in his spine and legs, numbness in his hands and feet, cramping, weakness, and stiffness. *Id.* ¶ 51. If Plaintiff does not take Bupropion daily, he suffers from worsened depression, irritability, agitation, dizziness, mood and emotional problems, severe night sweats, and restlessness. *Id.* ¶ 50. Plaintiff can take his prescription medications before dawn and after sunset without suffering adverse health effects. *Id.* ¶ 52. Defendants K. Morrow ("Morrow") (a member of the medical staff at ADX), Samantha McCoic ("McCoic") (a member of the medical staff at ADX in 2013 and 2014), Ronald Camacho ("Camacho") (a physician assistant at ADX in 2013 and part of 2014), and Roger Huddleston ("Huddleston") (a member of the medical staff at ADX) have been responsible for delivering Neurontin and Bupropion to Plaintiff's cell every day, including through 2014. *Id.* ¶¶ 20-23, 53, 57. Plaintiff alleges that Defendants David Berkebile ("Berkebile") (Warden of ADX in 2013 and 2014), Tara Hall ("Hall") (Associate Warden of ADX in 2013 and 2014), and Chris Lamb ("Lamb") (Associate Warden at the Florence Correctional Complex who was responsible for the Health Services Department at ADX) were aware of Plaintiff's medical conditions and need for prescription

medication to relieve his pain and depression. *Id.* ¶¶ 14-16, 55-56.

C. Religious Holidays

The BOP recognizes that Plaintiff is an active participant in the Islamic faith. *Id.* ¶ 61. The Five Pillars of Islam are acts that observant Muslims perform and are the basic foundations of the Islamic religion. *Id.* ¶ 63. Fasting is one of the Five Pillars, and Ramadan is a holy month during which fasting is required. *Id.* ¶¶ 64-65. In order to observe the fast, Muslims must not ingest any medications from dawn until sunset. *Id.* ¶ 66. As an observant Muslim, Plaintiff feels as though he must fast during Ramadan. *Id.* ¶ 67. To observe this fast he must receive his medications outside of fasting hours. *Id.* ¶ 68.

Another Pillar of Islam is Hajj, a religiously mandated pilgrimage to Mecca. *Id.* ¶ 69. Plaintiff is serving a sentence of 114 years and will likely never be able to make this pilgrimage. *Id.* ¶ 70. Plaintiff believes that because he cannot participate in the pilgrimage, he should participate in additional fasts called Sunnah fasts.[3] *Id.* ¶ 71. These fasts take place Mondays and Thursdays and a few other holy days. *Id.* ¶ 74. Plaintiff has made several requests to Defendants BOP, Berkebile, Hall, Lamb, Oliver, Camacho, McCoic, Morrow, and Huddleston to deliver his medications before dawn and after sunset during Ramadan and the Sunnah fasts. *Id.* ¶ 76. Plaintiff also requests that Defendant BOP deliver meals before dawn and after sunset during Sunnah fasts. *Id.* ¶ 77.

D. Claims of Religious Freedom Violations

a. Fasting During Ramadan and Sunnah Fasts

Prisoners who consume medications must do so in the presence of the medical

[3] For purposes of this Recommendation, the Court uses the phrase "Sunnah fasts" to refer to all fasts not occurring as part of Ramadan.

personnel staff member who delivers them. *Id.* ¶ 80. When Plaintiff was first transferred to ADX in 2012, the staff delivered his medications to him before dawn and after sunset during Ramadan. *Id.* ¶ 91. However, in 2013 and 2014, ADX staff refused to deliver Plaintiff's pills as they had during Ramadan in 2012. *Id.* ¶ 92. Plaintiff spent two years pursuing administrative remedies in an attempt to observe Ramadan in accordance with his religious faith. *Id.* ¶ 93. Plaintiff explained to Defendants BOP, Berkebile, Oliver, True, Hall, Lamb, Camacho, Morrow, McCoic, Castle, and Huddleston that their refusal to distribute his medications before dawn and after sunset during Ramadan and the Sunnah Fasts disrespects the Islamic faith and deprives him of his right to partake in these fasts. *Id.* ¶ 96. Plaintiff has also told Defendant BOP in writing that its refusal to deliver meals before dawn and after sunset during Sunnah Fasts deprives him of his right to participate in his religion. *Id.* ¶ 97.

In May 2015, Plaintiff filled this lawsuit in anticipation of the upcoming Ramadan, after Defendants told him they would not accommodate his fasting, again. *Id.* ¶ 158. After filing this lawsuit, Defendants amended their written rules and now require ADX staff to accommodate practicing Muslims during Ramadan with respect to the pill line. *Id.* ¶ 160. Thus, during Ramadan 2015, Defendants BOP, Oliver, Lamb, Morrow, Huddleston, and Castle delivered pills after fasting hours. *Id.* ¶ 167.

Plaintiff also notes that "for years" the Defendants have refused to accommodate Plaintiff's wish to participate in Sunnah Fasts. *Id.* ¶ 176. Defendants BOP and True have refused to provided Halal food before and after sunset. *Id.* ¶ 179.

b. Availability of Halal Food

Islamic principles require observant Muslims to consume only Halal food, *id.* ¶ 183, which means meat that has been slaughtered according to Islamic dietary laws. *Id.* ¶ 186. Halal food must have all Halal ingredients or it is considered contaminated. *Id.* ¶ 187.

The BOP provides Plaintiff with individually wrapped meals from an outside vendor every day, and Plaintiff may supplement that with food from the commissary. *Id.* ¶ 189. ADX offers four meal options: a regular diet, a no-pork diet, a no-meat diet, and a "Common Fare" diet, which is a Kosher diet. *Id.* ¶ 190. None of these diets conforms perfectly with Halal food, but Plaintiff has chosen the no-meat diet because it is the closest. *Id.* ¶¶ 191-95. Plaintiff has repeatedly asked the ADX staff to provide him with Halal foods and has filed several grievances about the issue. *Id.* ¶¶ 198-99. ADX staff told Plaintiff that there is no requirement to provide Halal food, but that if he wanted a Halal diet he would have to buy it from the commissary. *Id.* ¶¶ 201-04. Plaintiff feels as though he must daily make a decision between his religion observance and his need to eat. *Id.* ¶ 205.

The BOP's Trust Fund Department runs the prison commissary, which provides inmates with the opportunity to purchase articles or services not issued or delivered as basic care by the institution. *Id.* ¶ 206. Prisoners may be able to supplement commissary offerings through a Special Purchase Order ("SPO") for certain approved items. *Id.* ¶ 207. The BOP limits how often SPO items can be purchased and in what quantities. *Id.* ¶ 227. Inmates are expected to pay for SPO religious items in addition to paying restitution, purchasing medicine, hygiene products, legal writing and correspondence materials, and paying for phone calls. *Id.* ¶ 228. There are four vegetarian Halal-certified meals available to purchase through SPO. *Id.* ¶ 209. Halal meats are not regularly offered through the commissary. *Id.* ¶ 210. Since 2011, Plaintiff has repeatedly requested that Halal meals

with meat be offered in the commissary and has filed at least thirty grievances and appeals on this issue. *Id.* ¶¶ 211-212. Defendants Hall, Knox, Henderson, and Crank have all had interactions with Plaintiff regarding the lack of Halal meats in the commissary, but each either ignored Plaintiff or told him to talk to someone else about the issue. *Id.* ¶¶ 213-218.

c. Access to an Imam

Islamic law mandates regular consultation with an Imam to ensure compliance with religious values in daily life. *Id.* ¶ 244. All pastoral visits at ADX must be coordinated and approved by ADX officials. *Id.* ¶ 247. More than eighty people at ADX are Muslim and the Imam visits four times a month and must meet with any Muslim who requests him. *Id.* ¶¶ 254-255. At the beginning of 2013, the BOP contracted a part-time Imam who visited Plaintiff no more than once a month. *Id.* ¶ 260. Prayer was not allowed during these visits, and Plaintiff often had less than ten minutes of spiritual guidance with the Imam. *Id.* ¶¶ 261-264. During the visits in 2013, Plaintiff was required to participate through two prison doors, one of which was solid steel. *Id.* ¶ 265. By the end of 2013, Plaintiff had had no interactions with an Imam for eight months. *Id.* ¶ 270. From August 2014 to September 2015, Defendants provided Plaintiff no access to an Imam. *Id.* ¶ 271. Plaintiff also has repeatedly asked for access to an Imam in ways which might be more convenient for the prison, such as through video conferencing or by telephone, but without success. *Id.* ¶ 278.

d. Congregational Prayer

Plaintiff believes that Allah punishes those who fail to participate in congregational prayers and rewards those who do. *Id.* ¶ 296. Every Friday between noon and mid-afternoon prayer, Muslims are obligated to partake in congregational prayer. *Id.* ¶ 298. Each prayer takes approximately five to ten minutes to complete. *Id.* ¶ 297. Plaintiff has

requested to pray with other Muslim prisoners during periods when prisoners may interact with one another. *Id.* ¶ 302. However, Muslims in ADX are not permitted any opportunity to perform congregate prayers. *Id.* ¶ 304. Defendants BOP, Berkebile, Oliver, Hall, Knox, and Parry have threatened Plaintiff and other Muslims with disciplinary action if they perform congregate prayers with other prisoners. *Id.* ¶ 305. Defendant Parry mocks the Islamic ritual of congregate prayer and puts Muslim prisoners in segregation for attempting it. *Id.* ¶¶ 308-309. Defendant Knox told Plaintiff that group prayer was not allowed for security reasons. *Id.* ¶ 312. However, congregational prayers of other religious faiths take place outside of the cells in Plaintiff's living unit. *Id.* ¶ 314. Plaintiff feels as though Defendants' prohibition of congregate prayers constrains his ability to engage in a central tenet of Islam. *Id.* ¶ 316.

As a result of these circumstances, Plaintiff seeks damages against the individual Defendants and an injunction requiring BOP staff at all facilities into which BOP places Plaintiff to (1) distribute Plaintiff's prescribed medication before dawn and after sunset during all religiously required fasting holidays, (2) provide Plaintiff with a Halal diet in accordance with his religious beliefs, (3) provide Plaintiff with meaningful access to an Imam on a weekly basis, and (4) allow Plaintiff to pray five times daily with at least one other Muslim inmate. *Am. Compl.* [#29] at 58-59.

II. Standard of Review

A. Federal Rule of Civil Procedure 12(b)(1)

The purpose of a motion to dismiss pursuant to Rule 12(b)(1) is to test whether the Court has jurisdiction to properly hear the case before it. Because "federal courts are courts of limited jurisdiction," the Court must have a statutory basis to exercise its

jurisdiction. *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002); Fed. R. Civ. P. 12(b)(1). Statutes conferring subject-matter jurisdiction on federal courts are to be strictly construed. *F & S Const. Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). "The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction." *Id.* (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

A motion to dismiss pursuant to Rule 12(b)(1) may take two forms: facial attack or factual attack. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). When reviewing a facial attack on a complaint, the Court accepts the allegations of the complaint as true. *Id.* By contrast, when reviewing a factual attack on a complaint, the Court "may not presume the truthfulness of the complaint's factual allegations." *Id.* at 1003. With a factual attack, the moving party challenges the facts upon which subject-matter jurisdiction depends. *Id.* The Court therefore must make its own findings of fact. *Id.* In order to make its findings regarding disputed jurisdictional facts, the Court "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing." *Id.* (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990); *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987)). The Court's reliance on "evidence outside the pleadings" to make findings concerning purely jurisdictional facts does not convert a motion to dismiss pursuant to Rule 12(b)(1) into a motion for summary judgment pursuant to Rule 56. *Id.*

B. Federal Rule of Civil Procedure 12(b)(6)

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test "the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994); Fed. R. Civ. P. 12(b)(6) (stating that a complaint may be dismissed for "failure to state a claim upon

which relief can be granted"). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton v. Utah State Sch. for the Deaf & Blind,* 173 F.3d 1226, 1236 (10th Cir. 1999) (citation omitted). To withstand a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir. 2007) ("The complaint must plead sufficient facts, taken as true, to provide 'plausible grounds' that discovery will reveal evidence to support the plaintiff's allegations." (quoting *Twombly*, 550 U.S. at 570)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Id.* (brackets in original; internal quotation marks omitted).

To survive a motion to dismiss pursuant to Rule 12(b)(6), the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1191 (10th Cir. 2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," a factual allegation has been stated, "but it has not show[n][ ]that the pleader is entitled to relief," as required by Fed. R. Civ. P. 8(a). *Iqbal*, 552 U.S. at 679 (second

brackets added; citation and internal quotation marks omitted).

III. Analysis

A. The United States' Motion

Plaintiff asserts one claim against the United States, i.e., Claim Three under the Federal Tort Claims Act ("FTCA"). *See Am. Compl.* [#29] ¶¶ 391-99. In this claim, Plaintiff asserts that Defendants Camacho, McCoic, Berkebile, Hall, and Lamb are employees and agents of the BOP and, therefore, of the United States. *Id.* ¶¶ 391-93. Plaintiff states that the United States has a duty of care to provide for the well-being of the prisoners in Defendant BOP custody, including Plaintiff. *Id.* ¶ 392. Plaintiff argues that this duty was breached when Defendants failed to provide Plaintiff with his prescribed medications during Ramadan 2014 "because of the arbitrarily set pill line times at the ADX." *Id.* ¶¶ 393-97. Plaintiff states that the lack of medication caused Plaintiff physical injury, including severe pain, numbness, weakness, stiffness, severe night sweating, restlessness, deep depression, irritability, agitation, dizziness, mood and emotional problems, and other related symptoms, and as a result Plaintiff now seeks damages. *Id.* ¶¶ 398-99.

The United States presents three arguments in support of its request for dismissal of this claim. *See Motion* [#63] at 5-13; *Reply* [#78] at 1-5. However, the Court need only address one, i.e., whether Plaintiff properly exhausted his FTCA claim. The time line of the events underlying the assertion of this claim is crucial to the adjudication of Defendants' argument; thefore, the Court begins with the relevant chronology.

Plaintiff initiated his administrative claim on July 28, 2014, by filing a Form 95 with the BOP "for the alleged negligence that occurred during Ramadan 2014." *Response* [#70] at 11 (citing *Am. Compl.* [#29] ¶ 153). On January 21, 2015, the BOP denied Plaintiff's

claim, and Plaintiff timely requested reconsideration of this denial. *Response* [#70] at 11 (citing *Am. Compl.* [#29] ¶ 155-56). On May 11, 2015, Plaintiff filed the present lawsuit "seeking solely injunctive relief for the fast-approaching Ramadan, which was set to commence on June 17, 2015." *Response* [#70] at 11 (citing *Compl.* [#1]). On July 31, 2015, the BOP affirmed its denial of Plaintiff's administrative claim and informed Plaintiff that he had six months to file suit in district court. *Response* [#70] at 11 (citing *Am. Compl.* [#29] ¶ 157). On October 9, 2015, Plaintiff added the present FTCA claim to this lawsuit. *See Am. Compl.* [#29] ¶¶ 391-99.

The parties agree that a plaintiff may not assert an FTCA claim before exhausting his administrative remedies. *See Motion* [#63] at 11-12 (citing *Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999)); *Response* [#70] at 10 (citing same). They also agree that a plaintiff may not attempt to cure an exhaustion defect by simply filing an amended complaint.[4] *Id.* However, the parties disagree on two issues, which Defendants succinctly state as follows: "(1) whether a plaintiff can, under any circumstances, file an amendment to add an FTCA claim when that claim was not exhausted when the lawsuit was filed, and (2) whether, under the facts here, the FTCA claim 'relates back' to the initial filing." *Reply* [#78] at 4. The Court need not reach the first issue because, assuming that Plaintiff may file an amendment to add an FTCA claim when that claim was not exhausted at the time

[4] The Tenth Circuit Court of Appeals recently discussed this issue in *Estate of Vera Cummings v. United States*, __ F. App'x __, __, 2016 WL 3251897, at *3-4 (10th Cir. June 7, 2016), which stated that *Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999), "affirmed the general rule that new filings in an existing suit cannot correct the failure to exhaust administrative requirements," but noting the narrow exception to the rule where "the court administratively closed the case, the plaintiff filed an amended complaint, and the government agrees to treat it as a new action."

of filing of the lawsuit,[5] the Court finds that Plaintiff's FTCA claim relates back to the initial Complaint [#1], and thus is improperly asserted here. *See, e.g.*, *Ajaj v. Fed. Bureau of Prisons*, No. 08-cv-02006-RBJ-MJW, 2012 WL 1020487, at *4 (D. Colo. Mar. 27, 2012) ("In the present case, the question is whether Mr. Ajaj's Second Amended Complaint constitutes a new action because it is the first time Mr. Ajaj alleged tort claims under the FTCA, thus making his administrative exhaustion timely.").

If Plaintiff's FTCA claim relates back to the original Complaint [#1], it should be dismissed based on a failure to exhaust. *Kennedy v. Finley*, No. 11-cv-00967-REB-KMT, 2012 WL 2564796, at *3 (D. Colo. July 2, 2012), *rev'd in part on other grounds by Kennedy v. Finley*, 552 F. App'x 787 (10th Cir. 2014). If the claim does not relate back and can be viewed as a separate and distinct "new" claim, then Plaintiff properly exhausted his administrative remedies. *See Ajaj*, 2012 WL 1020487, at *4. Pursuant to Fed. R. Civ. P. 15(c)(1)(B), "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading . . . ."

Plaintiff asserts that he filed this lawsuit in May 2015 "seeking solely injunctive relief for the fast-approaching Ramadan, which was set to commence on June 17, 2015." *Response* [#70] at 11. He states that "[t]he relief he was seeking in the original complaint

[5] The Court notes that there is plenty of case law indicating that, under limited circumstances, a plaintiff may file an amendment to add an FTCA claim when that claim was not exhausted when the lawsuit was filed, although Defendants seem to argue that the case law authority is incorrect when compared to the FTCA's statutory language. *See Reply* [#78] at 4-5. However, as noted, the Court need not adjudicate that argument at this time.

was strictly prospective (i.e., related to Ramadan 2015 only), without any mention of past conduct of BOP officials." *Id.* Then, on October 9, 2015, Plaintiff "added an FTCA claim to his pending lawsuit, along with other claims seeking retrospective relief." *Id.* Plaintiff argues that "[b]ecause [he] added a claim to his original complaint, and was not curing a jurisdictional deficiency, his FTCA claim in the amended complaint survives an exhaustion challenge." *Id.*

The Court finds that Plaintiff's understanding of Rule 15(c)(1)(B) is too narrow. The United States Supreme Court has held that "relation back depends on the existence of a common 'core of operative facts' uniting the original and newly asserted claims." *Mayle v. Felix*, 545 U.S. 644, 659 (2005). In other words, the issue is not whether the relief requested is similar, as Plaintiff appears to argue, but rather whether the claims are tied to a common core of operative facts. The entire basis for Plaintiff's lawsuit as stated in the original Complaint is Defendants' conduct in 2013 and 2014 of only giving Plaintiff his medication during Ramadan during the hours when he is required to fast. *See, e.g.*, [#1] ¶¶ 2, 21, 25-26. This core of operative facts are identical to the facts underlying the FTCA claim in the present Amended Complaint. *See, e.g.*, [#29] ¶ 396 (stating that the United States "breached its duty of care when it failed to provide [Plaintiff] with his prescribed medications during Ramadan 2014 because of the arbitrarily set pill line times at the ADX"). Because the original claims in the Complaint [#1] and the newly asserted FTCA claim in the Amended Complaint [#29] are united by a common core of operative facts, the FTCA claim relates back to the original Complaint [#1] pursuant to Rule 15(c)(1)(B). *See Mayle*, 545 U.S. at 659. Because the FTCA claim relates back to the original Complaint [#1], it must

be dismissed based on a failure to exhaust at the time this lawsuit was filed.[6] *See Kennedy*, 2012 WL 2564796, at *3.

Accordingly, the Court finds that Plaintiff did not properly exhaust his administrative remedies prior to bringing suit, and therefore the Court **recommends** that Claim Three asserted pursuant to the FTCA be **dismissed without prejudice**. *See id.* (dismissing unexhausted FTCA claim without prejudice).

B. Motion to Dismiss Official Capacity Claims

In the Amended Complaint, Plaintiff seeks declaratory and injunctive relief against the BOP and various individuals in their official capacities. *Am. Compl.* [#29] at 58-59.

1. Individuals

In the Amended Complaint, Plaintiff seeks only non-monetary relief from the individuals in their official capacities and only monetary relief from the individuals in their individual capacities. [#29] at 58-59. In a Response, however, Plaintiff voluntary dismisses all of the individual Defendants in their official capacities: "Given Defendants' stated position that Defendant BOP is the proper defendant to provide Mr. Ajaj the injunctive relief he seeks, Mr. Ajaj voluntarily dismisses the official capacity claims as asserted against all Defendants except for Defendant BOP." [#71] at 4 n.4.

Unfortunately, despite the fact that this is a fully-lawyered case, it is unclear precisely which Defendants are sued in their official capacities. According to the caption of the Amended Complaint, Defendant True is sued in his official capacity only, and Defendants

[6] When an FTCA claim is procedurally barred from being asserted in the same lawsuit as other claims arising from the same incident, a plaintiff may file a separate lawsuit asserting the FTCA claim once the procedural barriers are removed. *See Kennedy*, 2012 WL 2564796, at *3 n.4.

Lamb, Morrow, Castle, Henderson, Crank, Huddleston, and Parry are sued in both capacities. [#29] at 1. However, under the description of the parties, Defendant True is sued in his official capacity only, Defendant Huddleston is sued in both capacities, Defendant Parry is not designated as being sued in either capacity, and all other Defendants are explicitly sued in only their individual capacities. *Id.* ¶¶ 12-26. Regardless, for purposes of resolving the Motions, and based on Plaintiff's voluntary dismissal of all official capacity claims, the Court construes the Amended Complaint as asserting official capacity claims against Defendants True, Lamb, Morrow, Castle, Henderson, Knox, Crank, Huddleston, and Parry.

Accordingly, the Court **recommends** that Claims One, Two, and Four be **dismissed** to the extent they seek relief against Defendants True, Lamb, Morrow, Castle, Henderson, Knox, Crank, Huddleston, and Parry in their official capacities. Because Defendant True is sued only in his official capacity, *see Am. Compl.* [#29] ¶ 12, the Court further **recommends** that he be **dismissed** from this lawsuit, as no claims remain against him.

2. The BOP

Plaintiff seeks only non-monetary relief against Defendant BOP. *Am. Compl.* [#29] at 58-59. Specifically, he seeks declaratory relief and an injunction requiring BOP staff at all facilities into which BOP places Plaintiff to (1) distribute Plaintiff's prescribed medication before dawn and after sunset during all religiously required fasting holidays, (2) provide Plaintiff with a Halal diet in accordance with his religious beliefs, (3) provide Plaintiff with meaningful access to an Imam on a weekly basis, and (4) allow Plaintiff to pray five times daily with at least one other Muslim inmate. *Am. Compl.* [#29] at 58-59. Plaintiff's First

Amendment claim encompasses only the first three requests for injunctive relief, while the RFRA claim encompasses all four requests. *Id.* ¶¶ 317-90. Plaintiff's Fifth Amendment claim encompasses only the last three requests. *Id.* ¶¶ 403-12.

a. Mootness of Medication Administration Request

Defendant argues that Plaintiff's request for an injunction is moot to the extent he seeks to require BOP staff to distribute Plaintiff's prescribed medication before dawn and after sunset during all religiously required fasting holidays. *Motion* [#64] at 9-11; *Reply* [#80] at 1-2.

An "actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Brown v. Buhman*, 822 F. 3d 1151, 1165 (10th Cir. 2016) (quoting *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013)). "If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Brown*, 822 F. 3d at 1165 (quoting *Campbell–Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016)). Constitutional mootness deprives federal courts of jurisdiction. *Brown*, 822 F. 3d at 1165 (citing *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1336 (2013); *Schell v. OXY USA, Inc.*, 814 F.3d 1107, 1114 (10th Cir. 2016)). *See also Brown*, 822 F. 3d at 1165 n.15 (noting that prudential mootness is discretionary).

A "suit becomes moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Brown*, 822 F. 3d at 1165 (quoting *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013)). "No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit, the case is moot if the dispute is no longer embedded in any actual controversy about the plaintiffs'

particular legal rights." *Brown*, 822 F. 3d at 1165 (quoting *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013)). "The crucial question is whether granting a present determination of the issues offered will have some effect in the real world." *Brown*, 822 F. 3d at 1165-66 (quoting *Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005)). "Put another way, a case becomes moot when a plaintiff no longer suffers actual injury that can be redressed by a favorable judicial decision." *Brown*, 822 F. 3d at 1166 (quoting *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015)).

Plaintiff argues that one of the exceptions to the mootness doctrine applies here, i.e., the exception provided for the "voluntary cessation" of the defendants' conduct. *Response* [#71] at 9-12; *see Already*, 133 S. Ct. at 727. "[V]oluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012). "This rule is designed to prevent gamesmanship." *Brown*, 822 F. 3d at 1166. If voluntary cessation always mooted a case, "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Id.* (quoting *Already*, 133 S. Ct. at 727). The voluntary cessation rule "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *Brown*, 822 F. 3d at 1166 (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). Voluntary cessation must therefore be examined "with a critical eye," so that defendants do not manipulate jurisdiction to insulate their conduct from judicial review. *Brown*, 822 F. 3d at 1166 (quoting *Knox*, 132 S. Ct. at 2287). "A defendant's voluntary cessation may

moot a case, however, if the defendant carries 'the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'" *Brown*, 822 F. 3d at 1166-67 (quoting *Already*, 133 S. Ct. at 727; citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (describing this burden as "heavy"); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (describing this burden as "stringent")).

The Court first notes that Plaintiff's response to Defendants' mootness argument discusses the BOP's alleged failure to deliver both medication and food to him before dawn and after sunset during religiously required fasting days. *See Response* [#71] at 8-9. Defendants argue that "the Court should disregard those assertions [regarding meal delivery] because there is no such claim in the Amended Complaint . . . ." *Reply* [#80] at 2 n.4. The Court agrees with Defendants' statement. First, the RFRA claim exclusively discusses fasting issues in connection with Plaintiff's medication. *See Am. Compl.* [#29] ¶¶ 355-66. Second, while Plaintiff does briefly mention "meals" in connection with his First Amendment claim, *see id.* ¶¶ 328, 330, the thrust of this claim is clearly the timing of his medication intake. *See id.* ¶¶ 317-33. These conclusions are conclusively bolstered, however, by Plaintiff's Prayer for Relief, which only seeks an order requiring the BOP to "distribute [Plaintiff's] prescribed medication before dawn and after sunset during all religiously required fasting holidays." *See id.* at 58. Plaintiff does not seek injunctive relief in connection with the timing of his meals. *See generally id.* at 58-59. Accordingly, any argument by Plaintiff in the Response [#71] regarding the timing of meals is inapplicable to the issues of the case.

Turning to the timing of medication during religiously required fasting holidays,

Plaintiff directs the Court's attention to Ramadan and to the Sunnah Fasts. As discussed below, the Court finds that the relief he requests in connection with Ramadan is moot, while the relief he requests in connection with the Sunnah Fasts is not moot.

Defendant BOP argues that it has already provided the relief Plaintiff seeks in connection with the timing of the pill line during Ramadan, i.e., that it now distributes medication before dawn and after sunset during Ramadan. *Motion* [#64] at 10-11. In support, Defendant provides the Declaration of Clay C. Cook,[7] which first notes that on June 5, 2015, the Warden of ADX signed a memorandum detailing new procedures to be implemented during Ramadan. [#26-1] ¶ 4 (citing *Attach. 1* [#26-2]). This memorandum states:

> During Ramadan (approximately June 18 - July 17, 2015), pill line times will be adjusted to accommodate Ramadan participants at the ADX. For ADX Ramadan participants, pill line will be accommodated before 4:00 a.m. (morning pill line) and after 8:30 p.m. (evening pill line). Ramadan participants may elect to participate in the earlier pill line or continue to participate in normal pill line times (approximately 6 a.m. (morning pill line) and 6 p.m. (evening pill line)). Medical providers may determine that ADX Ramadan participants with medical conditions that may be exacerbated by the above-referenced adjusted pill line schedules will remain on the normal pill line schedule. In the event of an institution emergency, early pill line may be delayed.

Id. Plaintiff elected to participate in the adjusted times and, at the conclusion of Ramadan 2015, wrote a letter to the Warden of ADX expressing his gratitude "for running the holy

[7] Normally, when considering a motion to dismiss, the Court must disregard facts supported by documents other than the complaint unless the Court first converts the motion to dismiss into a motion for summary judgment. *Jackson v. Integra Inc.*, 952 F.2d 1260, 1261 (10th Cir. 1991). However, the Court may consider documents outside of the complaint on a motion to dismiss when an issue of subject matter jurisdiction arises. *Pringle v. United States*, 208 F.3d 1220, 1222 (10th Cir. 2000). Mootness is an issue of subject matter jurisdiction. *See Decker*, 133 S. Ct. at 1336. Therefore, the Court may examine the evidence submitted by the parties in connection with this issue.

month of Ramadan Quranic programs prefect [sic] and in a total respect for our fasting of the month of Ramadan." *Decl. of Cook* [#26-1] ¶¶ 5-6 (citing *Attach. 2* [#26-3]). Shortly thereafter, on August 28, 2015, the Warden issued a revised complex supplement[8] regarding inmate religious beliefs and practices, which memorialized the procedures outlined in the June 5, 2015 ADX Ramadan Pill Line 2015 Memorandum and made them a part of the updated complex supplement for Ramadan each year at ADX.[9] *Decl. of Cook* [#26-1] ¶ 7 (citing *Attach. 3* [#26-4] at 12).

Especially in the context of government enforcement, a defendant's burden of showing that the alleged wrongful behavior is not reasonably expected to recur "is not insurmountable." *Brown*, 822 F. 3d at 1167. "In practice, [this] heavy burden frequently has not prevented governmental officials from discontinuing challenged practices and mooting a case." *Id.* (quoting *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 (10th Cir. 2010)). "Most cases that deny mootness following government officials' voluntary cessation 'rely on clear showings of reluctant submission [by governmental actors] and a desire to return to the old ways.'" *Brown*,822 F. 3d at 1167 (quoting *Rio Grande Silvery Minnow*, 601 F.3d at 1117).

In the context of government enforcement, the Court does not "require some physical or logical impossibility that the challenged policy will be reenacted absent evidence

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[8] "Upon execution, a complex supplement provides further guidance to staff within the institutions of a federal correctional complex regarding implementing Federal Bureau of Prisons regulations and national policy." *Decl. of Cook* [#26-1] ¶ 8.

[9] On July 6, 2016, the BOP filed a Supplement [#92] to its Motion [#64], providing evidence that the BOP "continued to accommodate Plaintiff's request during the 2016 Ramadan [which started June 6, 2016, and ended July 5, 2016] by delivering his morning pills around 3:45 a.m. or 4:00 a.m. and his evening pills at 8:30 p.m. or later." [#92] ¶ 1 (citing *Ex. A* [#92-1]).

that the voluntary cessation is a sham for continuing possibly unlawful conduct." *Brown*, 822 F. 3d at 1167 (quoting *Rio Grande Silvery Minnow*, 601 F.3d at 1117-18 (quoting *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009)). In general, self-correction by the government "provides a secure foundation for mootness so long as it seems genuine." *Brown*, 822 F. 3d at 1167-68 (quoting *Rio Grande Silvery Minnow*, 601 F.3d at 1117).

When a party goes beyond the allegations contained in the complaint and challenges the facts upon which subject matter jurisdiction depends, as the BOP does here by arguing that Plaintiff's claim is moot, the Court may not presume the truthfulness of the complaint's factual allegations but must rely on evidence. *Holt*, 46 F. 3d at 1003. Plaintiff here provided no evidence, and did not seek an evidentiary hearing, to demonstrate "clear showings of reluctant submission [by governmental actors] and a desire to return to the old ways." *Brown*, 822 F. 3d at 1167 (quoting *Rio Grande Silvery Minnow*, 601 F.3d at 1117). Mere allegations in the Amended Complaint are insufficient to oppose the BOP's evidence regarding mootness and subject matter jurisdiction. *See Holt*, 46 F.3d at 1003; *Am. Compl.* [#29] ¶¶ 168-70. Because there is no evidence before the Court suggesting that the BOP's self-correction may not be genuine, the Court finds that the portions of Plaintiff's First Amendment and RFRA claims which seek relief pertaining to the timing of medication during Ramadan are moot.

However, the Court reaches the opposite conclusion with respect to the Sunnah Fasts. *See generally Am. Compl.* [#29] ¶¶ 171-82. First, neither party submits evidence in support of its position regarding whether this aspect of Plaintiff's First Amendment and RFRA claims is moot. *See Holt*, 46 F. 3d at 1003. Second, even if the Court were to rely

on the allegations in the Amended Complaint, the requested relief is not clearly moot. Plaintiff alleges that the Sunnah Fasts are to be observed "on Mondays and Thursdays; six days during the month of Shawwal (the tenth month of the Islamic calendar); the day of Arafa, which is the ninth day of the month of Zul-Hijjah; Ashura, which is the tenth day of the Islamic month of Muharram; and during most of the month of Sha'ban." *Am. Compl.* [#29] ¶ 74. Plaintiff further alleges that "[t]he Sunnah recommends fasting during certain holy days throughout the Islamic calendar year, particularly when Muslims physically cannot go for Hajj," as Plaintiff cannot do as an inmate of ADX.[10] *Id.* ¶ 172. Finally, Plaintiff alleges that after the Sunnah Fasting month of Shawwal concluded in 2015, the BOP began giving Plaintiff his medication around 3:00 a.m., which means that they only began accommodating Plaintiff's request after the required fasting was concluded. *Id.* ¶¶ 177, 181. These allegations simply do not demonstrate that Plaintiff has received, or will continue to receive, the full injunctive relief he seeks in connection with the distribution of medication on all Sunnah Fasting days. Thus, the Court finds that this portion of Plaintiff's First Amendment and RFRA claims is not moot.

Accordingly, the Court **recommends** that the portions of Plaintiff's First Amendment and RFRA claims seeking relief against Defendant BOP in connection with the timing of medication distribution during Ramadan be **dismissed without prejudice**. *See Brown*, 822 F. 3d at 1179 (holding that dismissal on the basis of mootness must be without

[10] To the extent the BOP may be arguing that the issue of medication timing on Sunnah fast days is moot because these fasts are merely "recommend[ed]," this argument is without merit, because a prisoner's genuine and sincere religious belief is protected even if the belief is not doctrinally required by the prisoner's religion. *See Williams v. Wilkinson*, __ F. App'x __, __, No. 15-7022, 2016 WL 1459529, at *10 (10th Cir. Apr. 14, 2016).

prejudice).

b. First Amendment

The remainder of Plaintiff's First Amendment claim concerns the timing of medication distribution during the Sunnah Fasts, his request for a Halal diet which accords with his religious beliefs, and his request for meaningful access to an Imam on a weekly basis. *Am. Compl.* [#29] ¶¶ 317-54.

"Even though they are incarcerated, prisoners retain fundamental constitutional rights. These rights include the reasonable opportunity to pursue one's religion as guaranteed by the free exercise clause of the First Amendment." *Williams v. Wilkinson*, __ F. App'x __, __, No. 15-7022, 2016 WL 1459529, at *9 (10th Cir. Apr. 14, 2016) (quoting *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1209 (10th Cir.1999)). "[I]n order to allege a constitutional violation based on a free exercise claim, a prisoner-plaintiff must survive a two-step inquiry. First, the prisoner-plaintiff must [allege] that a prison regulation substantially burdened sincerely-held religious beliefs." *Williams*, 2016 WL 1459529, at *9 (quoting *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007)). With respect to the second inquiry in a free exercise claim, "prison-official defendants may identify the legitimate penological interests that justified the impinging conduct," and the court must apply a balancing test to determine the reasonableness of the regulation. *Williams*, 2016 WL 1459529, at *9 (quoting *Kay*, 500 F.3d at 1218-19).

The Tenth Circuit Court of Appeals stated in *Williams v. Wilkinson* that "only the first of these inquiries is relevant at the motion-to-dismiss stage." 2016 WL 1459529, at *9 (citing *Kay*, 500 F.3d at 1219). However, the Tenth Circuit did not explicitly state in *Kay v. Bemis*, the published decision cited by *Williams*, that only the first inquiry is relevant at the

motion-to-dismiss stage. *See* 500 F.3d at 1219. Other *published* case law from the Tenth Circuit indicates that the second inquiry is relevant at the motion-to-dismiss stage. *See, e.g.*, *Gee v. Pacheco*, 627 F.3d 1178, 1188 (10th Cir. 2010) (stating that the plaintiff "must include sufficient facts to indicate the plausibility that the actions of which he complains were not reasonably related to legitimate penological interests"); *Al-Owhali v. Holder*, 687 F.3d 1236, 1241 (10th Cir. 2012) ("In order to survive the government's 12(b)(6) motion, [the plaintiff] was not required to substantively rebut the government's justifications for the new restrictions. Rather, he simply needed to plead some plausible facts supporting his claim that the ban on communicating with his nieces and nephews did not serve the purpose of preventing future terrorist activity. Looking to his pleadings, the only supporting fact Al–Owhali offers is that he did not violate any [Special Administrative Measures] before the new restrictions were imposed. This assertion fails to address whether the restriction was supported by a rational penal interest. Accordingly, dismissal of this claim was appropriate." (internal citations omitted)). Thus, the Court relies on the published opinions of *Gee v. Pacheco* and *Al-Owhali v. Holder* to hold that the second inquiry is also relevant at the motion-to-dismiss stage, despite the Tenth Circuit's recent interpretation of *Kay* in the unpublished *Williams* case.

Regardless, the pleading burden on Plaintiff with respect to the second inquiry is not as heavy as Defendants would have the Court believe. To meet the second inquiry at the motion-to-dismiss stage, Plaintiff need only provide allegations plausibly demonstrating that the prison's restrictions may not be supported by a rational penal interest. *See Al-Owhali*, 687 F.3d at 1241. Plaintiff need not "identify every potential legitimate interest and plead against it." *Gee*, 627 F.3d at 1188. The Tenth Circuit has never intended "that pro se

prisoners must plead, exhaustively, in the negative in order to state a claim." *Id.* Rather, "[i]t is sufficient that [a prisoner] plead facts from which a plausible inference can be drawn that the action was not reasonably related to a legitimate penological interest." *Id.*

Returning to the first inquiry, for purposes of evaluating a First Amendment claim pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff has sufficiently stated a violation of his right to free exercise of religion if he alleges that Defendants substantially burdened the exercise of his sincerely-held religious belief. *Williams*, 2016 WL 1459529, at *10 (citing *Kay*, 500 F.3d at 1219). The BOP does not dispute the sincerity of Plaintiff's beliefs for purposes of resolving the Motion. *See Motion* [#64] at 11 n.6. They contend, however, that Plaintiff has not sufficiently alleged that his beliefs are substantially burdened by the prison. *See id.* at 12-16. The Court disagrees.

Regarding Plaintiff's diet, "[t]his circuit recognizes that prisoners have a constitutional right to a diet conforming to their religious beliefs." *Williams*, 2016 WL 1459529, at *9 (quoting *Beerheide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002)). Plaintiff alleges that, as a devout Muslim, he is required to consume only Halal foods that meet the requirements of Islamic dietary law, and that the BOP refuses to provide Plaintiff with a fully Halal diet with meat and fully-compliant Halal foods in the commissary. *Am. Compl.* [#29] ¶¶ 335-36. Defendants argue that Plaintiff has failed to allege a substantial burden because of the availability of a Kosher diet, which they assert meets Halal standards, and because Plaintiff has not alleged that he lacked sufficient food items he may consume without violating his beliefs. *Motion* [#64] at 15-16; *see also Williams*, 2016 WL 1459529, at *10 (similarly arguing that the plaintiff failed to allege a substantial burden because "the availability of a halal diet for Muslim inmates refutes any claim that denial of a kosher diet substantially

burdened [the plaintiff's] free-exercise rights"). However, a First Amendment claim is not dependent on an allegation that a Halal diet including Halal-prepared meats is necessary to the practice of Islam. *See Williams*, 2016 WL 1459529, at *10 (citing *Kay*, 500 F.3d at 1220). "[A] prisoner's belief in religious dietary practices is constitutionally protected if the belief is 'genuine and sincere,' even if such dietary practices are not doctrinally 'required' by the prisoner's religion." *See Williams*, 2016 WL 1459529, at *10 (quoting *Kay*, 500 F.3d at 1220; citing *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991)).

The Amended Complaint adequately alleges Plaintiff's requests to exercise his sincerely held religious belief by eating a Halal diet with Halal-prepared meats, and that the BOP has denied his requested accommodation. *See, e.g.*, [#29] ¶¶ 190-91, 194, 196-97, 204-05, 209-10, 214, 216-17, 223, 235. "This is sufficient to satisfy the first step of a First Amendment free-exercise inquiry and to survive a Rule 12(b)(6) motion." *Williams*, 2016 WL 1459529, at *10; *Kay*, 500 F.3d at 1220 (holding that the complaint contained sufficient allegations "to rationally and plausibly conclude that [the prisoner was] a sincere devotee of the Wiccan faith" and "persistently asked prison administrators for permission to possess tarot cards in order to practice his religion," which requests were denied). The remainder of Defendants' arguments are either premature at this stage or involve inappropriate requests to resolve factual determinations, such as whether the BOP's preparation of Kosher meals meet Halal standards. *See Motion* [#64] at 15.

The Court reaches a similar conclusion with respect to Plaintiff's request to be provided with meaningful access to an Imam. *See, e.g.*, *Am. Compl.* [#29] ¶¶ 247-48, 253, 272, 280-81, 283-84, 286-87, 289, 345-54. Plaintiff alleges that, as a devout Muslim, he is required to "regularly consult with leaders of his religion and develop a more personal

relationship with Allah through prayers and consultation with an Imam." *Id.* ¶ 347. He also alleges that the BOP has denied him any kind of access to an Imam for over a year. *Id.* ¶ 348. These allegations are sufficient at this early stage of the litigation to state a claim. *Williams*, 2016 WL 1459529, at *10. Defendants' citation to *Hartmann v. California Department of Corrections and Rehabilitation*, 707 F.3d 1114, 1123 (9th Cir. 2013), does not disturb this conclusion. In *Hartmann*, the Ninth Circuit Court of Appeals determined that the plaintiffs failed to allege a substantial burden due to the prison's failure to hire a full-time Wiccan chaplain because they had access to services of staff chaplains and a volunteer Wiccan chaplain. Plaintiff's allegations are distinguishable on the basis that he is allegedly being denied virtually all access to an Imam.[11] The remainder of Defendants' arguments are either premature at this stage or involve inappropriate requests to resolve factual determinations, such as whether an Imam (paid or volunteer) is actually available to meet with Plaintiff. *See Reply* [#80] at 3.

Finally, with respect to the Sunnah fasts, Plaintiff alleges that Defendant BOP has refused, for years, to provide Plaintiff with his meals or medication outside of fasting hours. *See Am. Compl.* [#29] ¶ 176. For example, during the Sunnah fast in the month of Shawwal, Defendants refused to accommodate Plaintiff's request to fast. *Id.* ¶¶ 177-78. Defendants cite to *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 450-51 (1988), for the proposition that Plaintiff has not shown a substantial burden on his desire to fast, because he has not alleged that he was forced to break his fast or that

[11] Plaintiff concedes that, after this lawsuit was initiated, he was permitted a single visit from an Imam in September 2015. *Am. Compl.* [#29] ¶ 291. This single visit does not alter the Court's conclusions here, because Plaintiff's allegations of his sincerely-held belief state that he must "*regularly* consult with leaders." *Id.* ¶ 347 (emphasis added).

participating in non-Ramadan fasting days is required, as opposed to recommended, by Plaintiff's faith. *Motion* [#64] at 13-14. Defendants mis-frame the issue, however. *Lyng* distinguished between situations when government action makes it more difficult to practice certain religions and government action which tends to coerce individuals into acting contrary to their religious beliefs. 485 U.S. at 450. Here, in the absence of allowing Plaintiff to eat his meals before dawn or after sunset, Plaintiff would regularly be deprived of any food whatsoever on a significant number of days throughout the year, including "Mondays and Thursdays; six days during the month of Shawwal (the tenth month of the Islamic calendar); the day of Arafa, which is the ninth day of the month of Zul-Hijjah; Ashura, which is the tenth day of the Islamic month of Muharram; and during most of the month of Sha'ban." *Am. Compl.* [#29] ¶ 74. Further, Plaintiff has alleged that, in the absence of taking his medications Neurontin and Bupropion daily, he experiences severe pain in his spine and legs, numbness in his hands and feet, cramping, weakness, stiffness, worsened depression, irritability, agitation, dizziness, mood and emotional problems, severe night sweats, and restlessness. *Id.* ¶¶ 50-51. The Court finds that these allegations demonstrate a substantial burden on Plaintiff, given that he is forced to choose between practicing his religion and suffering from the ill effects of no food and no medication, or else being coerced into acting contrary to his religious beliefs. *See, e.g.*, *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1212-13 (10th Cir. 1999) (holding that a Muslim plaintiff who received meals at regular meal times during the Ramadan fasts demonstrated a substantial burden). To the extent Defendants argue that there is no substantial burden because fasting during the Sunnah fasts is not doctrinally required by Plaintiff's religion, the Court has already rejected that argument above. *See Williams*, 2016 WL 1459529, at *10

(quoting *Kay*, 500 F.3d at 1220; citing *LaFevers*, 936 F.2d at 1119).

Having determined that Plaintiff has alleged a substantial burden with respect to each of the complained-of actions by Defendants, the Court returns to the second inquiry, i.e., whether Plaintiff has provided allegations plausibly demonstrating that the prison's restrictions may not be supported by a rational penal interest. *See Al-Owhali*, 687 F.3d at 1241. Regarding Plaintiff's diet, Plaintiff states that he was not provided with a reason why Halal meals could not be served or a reason why the commissary could not sell Halal-certified meals with Halal meats. *Am. Compl.* [#29] ¶¶ 201-03, 223-24. Defendants provide vague, speculative reasons underlying a penal interest, such as "lessening administrative burdens" or "diverting resources from other penological interests (such as security)." *See Motion* [#64] at 18. However, the Court finds Plaintiff's allegations sufficient to demonstrate that there may not be a rational penal interest underlying this restriction, given that he has been able to discern no reason and has been provided none in response to his inquiries to prison officials. *Am. Compl.* [#29] ¶¶ 201-03, 223-24.

Similarly, with respect to Imam visitations, Plaintiff alleges, for example, that "Christian and Jewish representatives are allowed to perform rituals and prayers with prisoners during visits," which he has been prohibited from doing. *Am. Compl.* [#29] ¶¶ 261-62. Plaintiff also alleges that "[d]uring the few times in 2013 he was permitted visits with the Imam, [Plaintiff] was required to participate in the religious visit through two prison doors, one of which is solid steel" while "[r]eligious visits for Christian and Jewish inmates are not conducted behind the solid steel cell door." *Id.* ¶¶ 265-66. He further alleges that he has been told that "[d]ue to security concerns regarding the space, location, and time restraints of Imam visits, it may not be permissible to conduct prayer during his visits," while

no such security concerns appear to exist for non-Muslim religious visits. *Id.* ¶ 268. At this early stage of the case, the Court finds these allegations sufficient to demonstrate that there may not be a rational penal interest underlying these restrictions.

Finally, with respect to the Sunnah fasts, it has already been demonstrated above that the BOP is able to accommodate fasting during Ramadan. Further, Plaintiff alleges that the BOP has been delivering Plaintiff's medication to him at around 3:00 a.m. at other times of the year during non-fasting days. *Id.* ¶ 181. While the BOP certainly may have an interest "in controlling the times and manner in which medical staff perform duties," *Motion* [#64] at 18, the allegations made by Plaintiff at this early stage of the case certainly call into question whether the BOP's refusal to accommodate the Sunnah fasts is related to a *rational* penological interest, given that BOP appears to be able to serve meals and medication before dawn and after sunset at other times of the year.

Accordingly, based on the foregoing, the Court **recommends** that the Motion [#64] be **denied** to the extent Defendant BOP seeks dismissal of Plaintiff's First Amendment claim regarding a Halal diet, access to an Imam, and the Sunnah fasts.

c. RFRA

Plaintiff's RFRA claim concerns the timing of medication distribution during the Sunnah Fasts, his request for a Halal diet which accords with his religious beliefs, his request for meaningful access to an Imam on a weekly basis, and, unlike his First Amendment claim, his request to be allowed to pray five times daily with at least one other Muslim inmate.[12] *Am. Compl.* [#29] ¶¶ 355-90.

[12] The Court has already found that the portion of Plaintiff's RFRA claim seeking injunctive relief with respect to Ramadan fasting is moot; thus that part of the claim is not further addressed

RFRA provides that the "Government shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb–1(a). "A plaintiff makes a prima facie case under RFRA by showing that the government substantially burdens a sincere religious exercise." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1125-26 (10th Cir. 2013) (citing *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001). The burden then shifts to the government to show that the "compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby Stores, Inc.*, 723 F.3d at 1126 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420 (2006) (quoting 42 U.S.C. § 2000bb–1(b))).

In *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014), the Tenth Circuit Court of Appeals held that a burden on religious exercise is "substantial" under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"):[13]

> . . . when (at the very least) the government (1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief—for example, by presenting an illusory or Hobson's choice where the only realistically possible course of action available to the plaintiff trenches on sincere religious exercise.

See also Williams, 2016 WL 1459529, at *7 (quoting *Yellowbear*; citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)). "For purposes of evaluating whether the

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here. *See supra* § III.B.2.a.

[13] The United States Supreme Court recently noted that RLUIPA permits prisoners "to seek religious accommodations pursuant to the same standard as set forth in RFRA." *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015) (quoting *Gonzales*, 546 U.S. at 436). The Court thus looks to RLUIPA precedent as well as RFRA precedent in its evaluation of Plaintiff's RFRA claim.

prisoner has adequately pleaded a substantial burden, our inquiry is . . . subjective: 'we take religious claimants as we find them, assessing the coercive impact [of] the government's actions on the individual claimant's ability to engage in a religious exercise, as he understands that exercise and the terms of his faith.'" *Williams*, 2016 WL 1459529, at *7 (quoting *Yellowbear*, 741 F.3d at 55). The Supreme Court has clarified in *Holt v. Hobbs* that it is error to conclude under RLUIPA that the government has not substantially burdened a prisoner's right to free exercise of religion simply because of "the availability of alternative means of practicing religion." *Williams*, 2016 WL 1459529, at *7 (quoting *Holt*, 135 S. Ct. at 862). "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise . . . not whether the RLUIPA claimant is able to engage in other forms of religious exercise." *Id.*

In *Williams v. Wilkinson*, 2016 WL 1459529, at *7-9, the Tenth Circuit Court of Appeals discussed how its decision in *Abdulhaseeb v. Calbone*, 600 F.3d at 1312, 1315-17, which reversed a lower court opinion granting summary judgment to defendants on the issue of whether the prisoner's exercise of a sincerely held religious belief had been substantially burdened by denying his request for a halal-certified diet, affects the determination at the motion to dismiss phase of whether a plaintiff has sufficiently alleged that his sincerely-held religious beliefs have been substantially burdened. The *Williams* court stated:

> [T]he denial of Mr. Abdulhaseeb's halal-certified request raised a reasonable inference (and thus a genuine issue of material fact at the summary-judgment stage) that the prison had substantially burdened his religious exercise under either the second or third definitional categories recognized in *Yellowbear*.
>
> Here, Defendants argue the prison denied Mr. Williams's kosher-diet request

> because it already offered a halal diet to Muslim prisoners. In the prison's understanding, denying Mr. Williams's faith-based kosher-diet request does not substantially burden his religious exercise because a halal diet complies with Islam and is available. But as we explained in *Yellowbear*, the subjective inquiry focuses on the coercive impact of the government's actions on Mr. Williams's ability to engage in a religious exercise, as he understands that exercise and the terms of his faith. Under these circumstances, the "reasonable inference" we identified in reversing summary judgment in *Abdulhaseeb* is equally present here. That is, the failure to provide Mr. Williams with a kosher diet will either prevent him from exercising his sincerely held religious belief or force him to make the Hobson's choice of eating a diet contrary to his beliefs or not eating at all. And this inference applies with even more force at the motion-to-dismiss stage than the summary-judgment stage at issue in *Abdulhaseeb*. As the case proceeds, evidence may be discovered that overcomes this inference. But at the pleading stage a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.
>
> Mr. Williams's Complaint has facial plausibility that the government substantially burdened the exercise of his sincerely-held religious belief. The Complaint alleges Mr. Williams made a religiously-motivated request for a kosher diet, and that Defendants denied that request. We used similar facts to illustrate our interpretation of "substantial burden" under RLUIPA in *Yellowbear* . . . . As pleaded, the prison's denial of Mr. Williams's religiously motivated request for a kosher-diet, whether or not shared by other Muslims, falls easily within *Abdulhaseeb*'s second category—flatly prohibiting Mr. Williams from participating in an activity motivated by a sincerely held religious belief.

(internal citations and quotation marks omitted).

Based on this guidance from the Tenth Circuit Court of Appeals, all four aspects of Plaintiff's RFRA claim meet the "substantial burden" requirement. The Court first incorporates here the substantial burden analysis from Section III.2.b. above in connection with Plaintiff's First Amendment claim regarding diet, Imam access, and group prayer, to find that Plaintiff meets this requirement. *See Ajaj v. Federal Bureau of Prisons*, No. 08-cv-02006-MSK-MJW, 2011 WL 902440, at *3 (D. Colo. Mar. 10, 2011) (stating that on a motion to dismiss, the pleading burdens regarding whether sincerely-held religious beliefs

are substantially burdened are the same for claims under the Free Exercise clause, under RLUIPA, and under RFRA); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 (10th Cir. 2013) (addressing substantial burden under RFRA) (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315-16 (10th Cir. 2010)).

Plaintiff did not assert that the BOP's refusal to allow him group prayer violated the First Amendment, but he does argue that this ban violates his rights under RFRA. *See Am. Compl.* [#29] ¶¶ 317-90. Therefore, the Court must here determine whether Plaintiff's belief regarding group prayer is substantially burdened. Plaintiff alleges that Muslims at ADX are not permitted to perform any congregate prayers. *Am. Compl.* [#29] ¶ 304. He also alleges that he and other Muslims are threatened with disciplinary action if they pray with any other prisoners. *Id.* ¶ 305. Because Plaintiff's allegations demonstrate that his belief in the requirement of group prayer is being undermined by Defendant BOP, Plaintiff has met his pleading burden on this step of this RLUIPA claim. *See Williams*, 2016 WL 1459529, at *7 (quoting *Yellowbear*, 741 F.3d at 55).

The BOP further argues that Plaintiff has failed to allege that the imposed burden is not in furtherance of a compelling government interest and is not the least restrictive means of furthering that interest. *Motion* [#64] at 21-23. Plaintiff notes that whether he needs to allege these facts is an unsettled area of law, one which is currently under consideration by the Tenth Circuit Court of Appeals in *Ghailani v. Lynch*, No. 15-1128 (10th Cir. Mar. 10, 2016).[14] In ordering briefing on this issue, the *Ghailani* court directed the

[14] As of the date of this Recommendation, no opinion on the *Ghailani* case has been issued. As stated in a Tenth Circuit order, the precise issue being briefed by the parties is: "[T]o state a plausible claim under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1, is a prisoner required to plead facts tending to show that a substantial burden on his or her exercise of

parties' attention to *Gee v. Pacheco*, 627 F.3d at 1188, which states:

> Mr. Gee must include sufficient facts to indicate the plausibility that the actions of which he complains were not reasonably related to legitimate penological interests. This is not to say that Mr. Gee must identify every potential legitimate interest and plead against it; we do not intend that pro se prisoners must plead, exhaustively, in the negative in order to state a claim. It is sufficient that he plead facts from which a plausible inference can be drawn that the action was not reasonably related to a legitimate penological interest.

While the BOP relies on *Gee* in support of its argument that Plaintiff must allege these facts to state an RFRA claim, it acknowledges that this area of law is unsettled because *Gee*'s holding pertained to a First Amendment claim. *See Motion* [#64] at 23; *Reply* [#80] at 7; *see also Response* [#71] at 21 n.13.

The Court need not here decide the issue pending before the Tenth Circuit in *Ghailani*, because, at this early stage of the case, the Court finds that Plaintiff has plausibly stated that the BOP's actions may not be reasonably related to legitimate penological interests. The Court has already discussed Plaintiff's allegations regarding diet, Imam access, and the Sunnah fasts above in connection with Plaintiff's First Amendment Claim, and incorporates that analysis here to find that Plaintiff has met his pleading burden with respect to those restrictions.

Regarding group prayer, Plaintiff has only asked to pray with other Muslim prisoners at times when prisoners are already permitted to speak with one another. *Am. Compl.* [#29] ¶ 302. He states that each prayer takes five-to-ten minutes to complete. *Id.* ¶ 297. He says that the prayers do not interfere with prison security concerns. *Id.* ¶ 303. He also

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religion is not in furtherance of a compelling governmental interest and is not the least restrictive means of furthering that interest?" *See Order*, No. 15-1128 (10th Cir. Mar. 10, 2016).

states that he and other Muslims are not permitted to pray aloud simultaneously while in their separate isolation cells. *Id.* ¶ 306. He states that Christian, Jewish, and Native American prisoners are permitted to pray with their respective clergypersons; that in the K-unit of ADX where Plaintiff is housed, congregational prayers of other religious faiths take place in the open range area outside of the prisoners' cells; that in the more secure units of ADX, prisoners may pray with clergypersons of other religious faiths within the prisoners' cells; and that in the K-unit, religious groups other than Muslims are permitted "to spend hours singing and praying on the range." *Id.* ¶¶ 313-16. Given these allegations, the Court finds Plaintiff's statements sufficient to demonstrate that there may not be a rational penal interest underlying this restriction against Plaintiff as a Muslim practitioner.

Accordingly, based on the foregoing, the Court **recommends** that the Motion [#64] be **denied** to the extent Defendant BOP seeks dismissal of Plaintiff's RFRA claim regarding a Halal diet, access to an Imam, Sunnah fasting, and group prayer.

d. Fifth Amendment

Plaintiff asserts an equal protection claim, stating that he was deprived of his Fifth Amendment rights by being treated differently from those in other religious groups at ADX. *Am. Compl.* [#29] ¶¶ 400-404. "Equal protection is essentially a direction that all persons similarly situated should be treated alike." *Aldulhaseeb*, 600 F.3d at 1322 n.10 (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). "Religion is a suspect classification." *Aldulhaseeb*, 600 F.3d at 1322 n.10 (citing *United States v. Batchelder*, 442 U.S. 114, 125 n. 9 (1979); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1257 (10th Cir. 2008)). All that

a plaintiff "must allege to properly state an equal protection claim is that he was personally denied equal treatment on the basis of his religion." *Aldulhaseeb*, 600 F.3d at 1322 n.10 (citing *Abdulhaseeb v. Saffle*, 65 F. App'x 667, 673 (10th Cir. 2003)).

Defendants argue that Plaintiff failed to allege that the "difference in treatment was not reasonably related to legitimate penological goals." *Motion* [#64] at 25. They also argue that Plaintiff has "alleged no facts to show that he was similarly situated to other inmates who were treated differently." *Id.* at 24-25. However, under the circumstances of this case, Plaintiff is under no obligation to make such allegations to state an equal protection claim.

First, when a plaintiff alleges that his equal protection rights have been violated on the basis of his membership in a suspect class or due to the defendants' interference with a fundamental right, he is not required to provide allegations that the difference in treatment was not reasonably related to a legitimate penological purpose. *See Tennyson v. Carpenter*, 558 F. App'x 813, 820 (10th Cir. 2014) (stating that because the incarcerated Plaintiff alleged that he was singled out for discipline because he had exercised his fundamental right to use the prison's grievance system under the First Amendment, "it was not necessary for him to allege further that his different treatment was not reasonably related to a legitimate penological purpose"). Here, as discussed above, Plaintiff has sufficiently alleged that his fundamental right to free exercise of religion under the First Amendment has been violated. *See Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (characterizing as "fundamental" the rights and interests protected by the free exercise clause of the First Amendment). Thus Plaintiff need not provide allegations that the difference in treatment was not reasonably related to a legitimate penological purpose in

connection with his equal protection claim.

Second, Defendants are correct to the extent they argue that Plaintiff must make a threshold showing that he was treated differently from others similarly situated to him. *See Brown v. Montoya*, 662 F.3d 1152, 1172-73 (10th Cir. 2011). Plaintiff has sufficiently done this. *See, e.g.*, *Am. Compl.* [#29] ¶¶ 192 ("Jewish prisoners are able to obtain their religiously mandated Kosher diet through the Common Fare diet."), 257, 259 ("The FCC employs full-time Chaplains for other religious groups including Christian, Seventh-day Adventist, Catholic, and Jewish Chaplains," and "[v]olunteers of other faiths have been approved as volunteers for Jewish and Native American prisoners."), 313-14 (". . . Christian, Jewish, and Native American prisoners are able to pray with their respective clergypersons," and "[i]n the K-unit at ADX, where [Plaintiff] is currently housed, congregational prayers of other religious faiths take place in the open range," i.e., outside of the prisoners' cells.); *see also, e.g.*, *Almonte v. Rivas*, No. 13-cv-1132-MJR, 2013 WL 6263285, at *4 (S.D. Ill. Dec. 3, 2013) (holding that the incarcerated plaintiff alleged an equal protection claim by alleging that he was denied the "right to engage in group prayer with other Muslims when non-Muslim inmates are allowed that privilege"). However, Plaintiff need not identify these similarly situated individuals with more specificity in his Amended Complaint. In *Tennyson v. Carpenter*, 558 F. App'x at 819-20, the Tenth Circuit Court of Appeals determined that the district court erred by requiring Plaintiff to allege that he was treated differently from other inmates with similar records, because Plaintiff had sufficiently alleged that a fundamental right under the First Amendment was violated. In so doing, the Tenth Circuit distinguished *Templeman v. Gunter*, 16 F. 3d 367, 371 (10th Cir. 1994), in which the court had affirmed dismissal of an inmate's equal protection claim in

connection with the inmate's transfer to administrative segregation, because this issue did not involve a fundamental right and the inmate had failed to plausibly allege that there were no relevant differences between him and other inmates which might reasonably account for the difference in treatment. *See Tennyson*, 558 F. App'x at 819-20; *see also Reed v. Faulkner*, 842 F.2d 960, 962, 964 (7th Cir. 1988) (stating that a separate equal protection violation could exist if officials treat one religion "differently from" another in a deliberate fashion and "for no reason at all"). Thus, the Court finds that Plaintiff here has met the minimum threshold for plausibly stating an equal protection claim.

Accordingly, based on the foregoing, the Court **recommends** that the Motion [#64] be **denied** to the extent Defendant BOP seeks dismissal of Plaintiff's Fifth Amendment equal protection claim.

C. Motion to Dismiss Individual Capacity Claims

Plaintiff seeks only damages from the individual Defendants in their individual capacities. *Am. Compl.* [#29] at 59.

1. First Amendment: Free Exercise of Religion

Claim One asserts a violation of the First Amendment based on an alleged restriction of Plaintiff's right to free exercise of religion by Defendants Berkebile, Oliver, Hall, Lamb, Camacho, Morrow, McCoic, Huddleston, Castle, Henderson, Knox, and Crank. *Id.* ¶¶ 317-54. Plaintiff asserts this claim pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the United States Supreme Court recognized that a cause of action for money damages may lie under some circumstances against federal officials acting under color of their authority for

violations of an individual's constitutional rights. 403 U.S. at 395-97. *Bivens* only authorizes suit against federal officials in their individual capacities. *Smith v. United States*, 561 F.3d 1090, 1093 (10th Cir. 2009). In the Amended Complaint, Plaintiff forthrightly states:

> Plaintiff acknowledges that this district, relying on dicta in *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) and *Bush v. Lucas*, 462 U.S. 367, 390 (1983), has refused to recognize First Amendment *Bivens* claims. *See, e.g.*, *Shepard v. Rangel*, No. 12-cv-01108-RM-KLM, 2014 WL 7366662, at *15 (D. Colo. Dec. 24, 2014); *Bogard v. Hutchings*, No. 12-cv-01581-KMT, 2014 WL 959496, at *3 (D. Colo. Mar. 12, 2014); *Saleh v. United States*, No. 09-02563, 2011 WL 2682803, at *11 (D. Colo. Mar. 8, 2011), *overruled in part on other grounds*, No. 09-02563, 2011 WL 2682728 (D. Colo. July 8, 2011). In the event this Court believes Plaintiff's prayer for damages under *Bivens* should be precluded by these decisions, Plaintiff notes he is seeking damages pursuant to Federal Rule of Civil Procedure 11(b)(2) ("the claims . . . are warranted by . . . a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.").

Id. ¶ 7 n.1. Defendants seek dismissal of Claim One precisely on these grounds, i.e., that a *Bivens* remedy does not exist for First Amendment claims based on freedom of religion.[15] *Motion* [#65] at 8-11; *Reply* [#79] at 6-8.

As the parties are aware, the undersigned has already carefully considered this legal issue in connection with a previous lawsuit and reached the conclusion that a *Bivens* remedy does not exist for First Amendment claims in at least one non-religious context.[16]

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[15] Defendants note that there is some support in the Tenth Circuit for a *Bivens* remedy under the First Amendment solely in the context of an alleged violation of organizational and associational rights in a non-prison context, i.e., in connection with issues between tax protestor organizations and the Internal Revenue Service. *Motion* [#65] at 10 n.5 (citing *Nat'l Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521, 1530-31 (10th Cir. 1994)). Plaintiff does not argue that this case is applicable to the facts of the present lawsuit.

[16] The Court notes that most circuit courts appear to avoid resolving the issue of whether a *Bivens* claim exists when other grounds for resolving the underlying motion exist, such as a failure to state a claim or qualified immunity. *See, e.g.*, *McGowan v. United States*, 825 F.3d 118, 123 (2d Cir. 2016) (stating in connection with the issue of whether a First Amendment *Bivens* remedy against BOP employee should be recognized: "We need not decide this difficult issue, however, because we conclude that [the plaintiff's] *Bivens* claim fails for the independent reason that [the]

See Shepherd v. Rangel, No. 12-cv-01108-RM-KLM, 2014 WL 7366662, at *6, 15-18 (D. Colo. Dec. 24, 2014) (adopting Recommendation of the undersigned after conducting a de novo review) (cited by *Am. Compl.* [#29] ¶ 7 n.1; *Motion* [#65] at 10 *Response* [#72] at15, 15 n.12; *Reply* [#79] at 8). In *Shepherd v. Rangel*, the Court provided a lengthy discussion of the legal standard for recognizing a *Bivens* claim, which the Court largely incorporates below.

In *Bivens*, the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). The Supreme Court has noted that because implied causes of action are generally disfavored, the Supreme Court has been reluctant to extend *Bivens* liability "to any new context or new category of defendants." *Id.* at 68; *see also Wilkie v. Robbins*, 551 U.S. 537, 549-550 (2007) (summarizing the basic considerations underlying past Supreme Court decisions declining to create *Bivens* claims and applying a two-part analysis to the creation of *Bivens* liability).

The Court recently declined to extend *Bivens* liability to claims against prison officials in their individual capacities for an alleged violation of a prisoner's First Amendment rights. *Saleh v. United States*, No. 09-02563, 2011 WL 2682803, at *10-12 (D. Colo. Mar. 8, 2011), *overruled in part on other grounds*, No. 09-02563, 2011 WL 2682728 (D. Colo. July 8, 2011). In *Saleh*, the Court found no *Bivens* remedy for a prisoner's First Amendment

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defendant . . . is entitled to qualified immunity."). Here, without explicitly deciding the issue at this time, the Court notes that its review of the First Amendment claim indicates that at least part of the claim against some of the individual Defendants would otherwise survive the dismissal motions, and therefore the Court first addresses the overarching issue of whether a *Bivens* remedy against individuals exists under the circumstances of this case.

Claim because (1) the Supreme Court has never explicitly extended *Bivens* to the First Amendment, and (2) other adequate avenues of relief for litigating the injury were available to the plaintiff. *Id.* at *11; *see also Schweiker v. Chilicky*, 487 U.S. 412, 421-23 (1988); *Bush v. Lucas*, 462 U.S. 367, 386-88 (1983) (holding that, even assuming a First Amendment violation had occurred and acknowledging that the administrative "remedies do not provide complete relief for the plaintiff[,]" a *Bivens* action was inappropriate because the congressionally installed administrative system "provide[d] meaningful remedies for employees who may have been unfairly disciplined").

The Supreme Court has never recognized that federal prisoners have a right of action for damages against federal officials pursuant to *Bivens* for First Amendment violations. *Saleh*, 2011 WL 2682803, at *11. In fact, the Supreme Court has explicitly refused to acknowledge that federal prisoners may bring a claim for monetary damages based on an alleged First Amendment violation. *See, e.g.*, *Iqbal*, 556 U.S. at 675 (noting that the Court had "declined to extend *Bivens* to a claim sounding in the First Amendment"); *see also Bush*, 462 U.S. at 390 (citing *United States v. Standard Oil Co.*, 332 U.S. 301, 302 (1947)) (declining "to create a new substantive legal liability without legislative aid" by declining to recognize a right to seek damages for alleged First Amendment violation pursuant to *Bivens*). The Court suggested in *Saleh* that such claims may not have been recognized by the Supreme Court because prisoners may pursue Federal Tort Claims Act claims or claims for injunctive relief, regardless of the availability of a *Bivens* damages claim. 2011 WL 2682803, at *11; *see Wilkie*, 551 U.S. at 550 (noting that adequate, alternative bases for pursuing a particular claim amount "to convincing reason for the Judicial Branch to refrain from providing new and freestanding remedy in damages"); *Bush*,

462 U.S. at 386; *cf.* 42 U.S.C. § 1997e(e) (noting that prisoners are not entitled to claim for money damages where no physical injury is shown).

Since this Court's decision in *Saleh*, the Supreme Court has reaffirmed that it has never held that *Bivens* extends to First Amendment claims. *Reichle v. Howards*, 132 S. Ct. 2088, 2093 n.4 (2012). The Supreme Court noted in *Minneci v. Pollard*, 132 S. Ct. 617, 623 (2012), that *Wilkie* fairly summarizes the basic considerations that underlie past Supreme Court decisions declining to create *Bivens* claims. *See Wilkie*, 551 U.S. at 550. In *Wilkie*, the Supreme Court identified two questions relating to whether to recognize a *Bivens* remedy:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages. [citation omitted] . . . [E]ven in the absence of an alternative, a *Bivens* remedy is a subject of judgment, [and] "the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation."

Id. (quoting *Bush*, 462 U.S. at 378).

Though this two-part analysis is not always delineated explicitly in the Supreme Court's decisions, case law shows that these factors have been frequently cited in decisions to deny *Bivens* liability. *See Bush*, 462 U.S. at 386-388 (denying *Bivens* liability for a federal employee's claim that his federal employer dismissed him in violation of the First Amendment because congressionally created federal civil service procedures provide meaningful redress); *Chappell v. Wallace*, 462 U.S. 296, 298-300 (1983) (finding no implied *Bivens* action for a claim by military personnel that military superiors violated various constitutional provisions because there were special factors related to the military that

weighed against implying a *Bivens* action); *see also United States v. Stanley*, 483 U.S. 669, 683-684 (1987) (similar).

Thus, the Court must address whether there were alternative remedies available to the incarcerated plaintiff. In *Davis v. Passman*, 442 U.S. 228, 242 (1979), the Supreme Court held that persons who have "no [other] effective means" of redress "must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." However, Plaintiff has at least four alternative, existing processes to protect his First Amendment constitutional interests.

First, he may seek injunctive relief, and indeed does so in this case. *See Malesko*, 534 U.S. at 74. Unlike the *Bivens* remedy, which courts "have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Malesko*, 534 U.S. at 74. While injunctive relief remains available, the Court is unconvinced that money damages are necessary to deter unconstitutional conduct. *See, e.g.*, *Williams v. Klien*, 20 F. Supp. 3d 1171, 1175 (D. Colo. 2014) (recognizing that the Courts have not permitted *Bivens* claims for damages raised by prison inmates because prisoners may pursue claims for injunctive relief based on an alleged violation of the First Amendment). In fact, the existence of a monetary remedy is simply not required by applicable precedent or American jurisprudential principles. *See, e.g.*, *K.B. v. Perez*, __ F. Supp. 3d __, __, No. 14-cv-03514-WJ-NYW, 2016 WL 1301040, at *4 (D. Colo. Apr. 1, 2016) (holding that there is no implied damages action in a *Bivens* lawsuit against federal officers in violation of the right to familial association arising either under the First Amendment or the Fifth Amendment) (citing *Schweiker*, 487 U.S. at 421-22 ("The absence of statutory relief for a constitutional violation

. . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation.")).

Second, Plaintiff asserts Fifth Amendment claims that are mostly based on the same deprivations alleged under the First Amendment, to the extent Plaintiff presents argument regarding Halal meals, access to an Imam, and group prayer. *See Am. Compl.* [#29] ¶¶ 403-12. The parties do not dispute that monetary damages pursuant to *Bivens* are available under the equal protection clause of the Fifth Amendment. *See Motion* [#65] at 8 (citing *Davis v. Passman*, 442 U.S. 228 (1979)). Thus, this constitutes an alternative remedy available to Plaintiff. *See, e.g.*, *Custard v. Armijo*, No. 15-cv-00448-GPG, 2015 WL 2407103, at *6 (D. Colo. May 19, 2015) (holding that alternative remedies existed militating against extending *Bivens* damages in part because the plaintiff "assert[ed] Eighth Amendment claims based on the alleged deprivations that constituted his claims for [First Amendment] retaliation").

Third, Plaintiff may seek a remedy under the mandamus statute, 28 U.S.C. § 1361. *See Custard v. Allred*, No. 13-cv-02296-REB-CBS, 2015 WL 328626, at *4 (D. Colo. Jan. 26, 2015) (declining to extend a *Bivens* damages remedy where alternative avenues of relief existed, in part because "Plaintiff could also pursue a remedy through the mandamus statute"). For mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of respondent to do the act in question, and no other adequate remedy available. *Hadley Mem'l Hosp., Inc. v. Schweiker*, 689 F.2d 905, 912 (10th Cir. 1982). Plaintiff must also show that his right to the writ is "clear and indisputable." *See Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989) ("To ensure that mandamus remains an extraordinary remedy, petitioners must

show that they lack adequate alternative means to obtain the relief they seek . . . and carry the burden of showing that [their] right to issuance of the writ is clear and indisputable[.]") (citation omitted); *United States v. Carrigan*, 778 F.2d 1454, 1466 (10th Cir. 1985).

Fourth, Plaintiff may seek remedy for his concerns through the prisoner grievance system. *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1237 (10th Cir. 2005); 28 C.F.R. §§ 542–542.19 (BOP Administrative Remedy Program through which prisoner can seek formal review of any aspect of confinement). Inmates in Plaintiff's position have full access to remedial mechanisms established by the BOP, including grievances filed through the BOP's Administrative Remedy Program ("ARP"). *See* 28 C.F.R. § 542.10 (explaining ARP as providing "a process through which inmates may seek formal review of an issue which relates to any aspect of their confinement"). This program provides yet another means through which allegedly unconstitutional actions may be brought to the attention of the BOP and prevented from recurring. *See, e.g.*, *Custard*, 2015 WL 2407103, at *6 (holding that alternative remedies existed which militated against extending *Bivens* damages, in part because the plaintiff could "also pursue administrative relief through the BOP's administrative remedy program, and apparently has done so"). This method has the added benefit of limiting judicial interference with prison management while maintaining a method of redress for valid constitutional claims. *See, e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 566-67 (1974) ("The operation of a correctional institution is at best an extraordinarily difficult undertaking. . . . [Correctional officers] must have the necessary discretion without being subject to unduly crippling constitutional impediments.").

These alternative remedies foreclose the creation of a *Bivens* remedy for Plaintiff's First Amendment claims. "[T]here is no reason to rely on a court-created remedy, like

Bivens, when Congress has created an adequate means for obtaining legal redress." *Simmat*, 413 F.3d at 1231.

However, the Court must also examine whether any special factors exist to counsel against the creation of a *Bivens* remedy. The Court may create a new *Bivens* remedy only if there are no special factors counseling hesitation against the creation of such a remedy. *Wilkie*, 551 U.S. at 550. Though neither the Supreme Court nor the Tenth Circuit has offered explicit guidance for interpreting this language, the plain meaning of the language suggests that the threshold for finding special factors is quite low.

> The only relevant threshold—that a factor "counsels hesitation"—is remarkably low. It is at the opposite end of the continuum from the unflagging duty to exercise jurisdiction. Hesitation is a pause, not a full stop, or an abstention; and to counsel is not to require. "Hesitation" is "counseled" whenever thoughtful discretion would pause even to consider.

Arar v. Ashcroft, 585 F.3d 559, 574 (2d Cir. 2009).

In the case at hand, the factors counseling hesitation are more than sufficient to meet this low threshold. In the context of prison management, the Supreme Court recognizes the value of balancing inmates' interests against the administrative needs of the prison, noting that a degree of flexibility and accommodation of prison discretion is required. *See, e.g.*, *Wolff*, 418 U.S. at 566-67 (stating that correctional institutions "must have the necessary discretion without being subject to unduly crippling constitutional impediments[.]"). Courts owe substantial deference to the professional judgment of prison administrators, and absent concerns that prison inmates will be otherwise unable to redress their claims, this Court hesitates to create a new cause of action that may be brought against prison officials for monetary damages. *See Beard v. Banks*, 548 U.S. 521 (2006) (Justice Breyer, with two Justices and the Chief Justice concurring, two Justices concurring

in the judgment).

As discussed previously, prisoners already have a variety of ways to pursue First Amendment claims, and denying *Bivens* claims for money damages will not deny prisoners effective relief for their claims. On the other hand, creating a superfluous way for prisoners to gain relief by suing prison employees individually will interfere with prison management and add to the Court's already heavy burden of prisoner litigation. *See K.B.*, 2016 WL 1301040, at *4 ("[E]xtending *Bivens* in this case would potentially permit a huge number of claims from families of offenders seeking to challenge particular conditions of offenders' confinement or particular conditions of offenders' probation/supervised release. The Court finds this potential result to be a special factor that counsels against creation of a new *Bivens* remedy in this case."). These special factors are sufficient to counsel hesitation in creating a new *Bivens* remedy.

A *Bivens* damages remedy "is not an automatic entitlement . . . and in most instances we have found a *Bivens* remedy unjustified." *Wilkie*, 551 U.S. at 550. As both of the above factors weigh against extending *Bivens* to First Amendment claims in the context of federal prisons, the Court agrees with Defendants that here, there is no legal basis to recognize any claim for damages against Defendants in their individual capacities.

Accordingly, the Court finds that there is no *Bivens* remedy under the free exercise clause of the First Amendment under the circumstances of this case, and therefore the Court **recommends** that Claim One be **dismissed with prejudice** to the extent it is asserted against the individual defendants. *Reynoldson v. Shillinger*, 907 F.2d 124, 127 (10th Cir.1990) (stating that prejudice should attach to a dismissal when the plaintiff has not made allegations "which, upon further investigation and development, could raise

substantial issues").

2. RFRA

Defendants next argue that there are no damages available in an RFRA claim, and because Plaintiff sues Defendants in their individual capacities for damages only, this claim should be dismissed against them individually.[17] *See Motion* [#65] at 18-20; *Reply* [#79] at 1-6. Plaintiff argues, in short, that RFRA's "other person acting under color of law" language triggers individual liability, and that RFRA's "appropriate relief" language includes damages. *Response* [#72] at 9-13.

Congress enacted RFRA to permit legal burdens on an individual's religious exercise only if the government can show a compelling need to apply the law to that person and that the law does so in the least restrictive way. *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1174 (10th Cir. 2015) (citing *Employment Division, Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 882-84 (1990)), *rev'd on other grounds by Zubik v. Burwell*, 136 S. Ct. 1557 (2016). "[A] plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion." *Little Sisters*, 794 F.3d at 1174 (quoting *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001); citing 42 U.S.C. § 2000bb–1(a)).

Because the Court's analysis here relies, at least in part, on a statutory interpretation

[17] As with the First Amendment claim, without explicitly deciding the issue at this time, the Court notes that its review of the RFRA claim indicates that at least part of the claim against some of the individual Defendants would survive the dismissal motions, and therefore the Court first addresses the underlying issue of whether a damages remedy against individuals exists under the circumstances of this case.

of RLUIPA, the Court begins with the Tenth Circuit Court of Appeals summary of the history of RFRA and RLUIPA:

> Our story starts with *Smith*. In *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990), the Supreme Court held that the Constitution's Free Exercise Clause does not exempt religious persons from the dictates of neutral laws of general applicability. The devout must obey the law even if doing so violates every article of their faith. When *Smith* was handed down, some worried that it upset existing free exercise doctrine dating back to *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Sherbert* and its progeny the Supreme Court had suggested that no law, not even a neutral law of general applicability, may "substantially burden" the exercise of religion unless that burden amounts to the "least restrictive means" of achieving a "compelling governmental interest." *Smith*, 494 U.S. at 883 (O'Connor, J., concurring in the judgment). What protections *Sherbert* appeared to afford religious observances, *Smith* appeared ready to abandon.
>
> Concerned with just this possibility, worried that *Smith* left insufficient room in civil society for the free exercise of religion, Congress set about the business of "restoring" *Sherbert*, at least as a matter of statute. It opened its efforts with the Religious Freedom Restoration Act of 1993. *See* 42 U.S.C. § 2000bb(b)(1). Passed nearly unanimously, RFRA was (and remains) something of a "super-statute." It instructed that all forms of governmental action—state or federal—had to satisfy *Sherbert*'s test or risk nullification.
>
> But as it turned out, this marked only the opening lines in what proved to be a long dialogue between Congress and the Court. In *City of Boerne v. Flores*, 521 U.S. 507, 117 (1997), the Court held that RFRA stretched the federal hand too far into places reserved for the states and exceeded Congress's Section 5 enforcement authority under the Fourteenth Amendment. As a result, the Court held RFRA unconstitutional as applied to the states, though still fully operational as applied to the federal government. *See id.* at 529-36.
>
> Undaunted, Congress reentered the field soon enough, this time with the Religious Land Use and Institutionalized Persons Act of 2000. In RLUIPA Congress invoked not just its Fourteenth Amendment but also its Spending Clause powers to (re)impose *Sherbert*'s balancing test on state action—though now state action in only two specific arenas, arenas in which Congress found the record of religious discrimination particularly clear and compelling. First, in the land use context, where churches are sometimes disfavored by local zoning boards because (among other things) church members are said to generate "too much" traffic or congestion or noise when they gather for communal expressions of faith. Second, in the prison context,

> where it is so easy for governmental officials with so much power over inmates' lives to deny capriciously one more liberty to those who have already forfeited so many others. This time Congress acted unanimously and this time the Court upheld its effort, at least against a facial challenge under the Establishment Clause. *See Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005).

Yellowbear v. Lampert, 741 F.3d 48, 52-53 (10th Cir. 2014) (some internal citations omitted).

RFRA does not permit suits for damages against the government or individuals in their official capacities. *See, e.g.*, *Chichakli v. Samuels*, No. CIV-15-687-D, 2016 WL 2743542, at *3 (W.D. Okla. May 11, 2016) (citing *Kikimura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001)). It is further well-settled in the Tenth Circuit that RLUIPA does not permit individual capacity claims. *Stewart v. Beach*, 701 F.3d 1322, 1334-35 (10th Cir. 2012). However, neither the United States Supreme Court nor the Tenth Circuit Court of Appeals nor any District Court within the Tenth Circuit has addressed with any relevant particularity the issue of whether RFRA permits claims against defendants in their individual capacities for damages. Further, the Court has been unable to find any other Circuit Court of Appeals which has addressed the issue in any relevant context. *See, e.g.*, *Lebran v. Rumsfeld*, 670 F.3d 540, 557 (4th Cir. 2012) ("[The plaintiff] contends that [RFRA] permits him to recover damages by suing the individual defendants in their personal capacities. . . . [W]e have no occasion to inquire how RFRA applies outside of a military setting. Those questions are not before us, and we have no need to address them."); *Davila v. Gladden*, 777 F.3d 1198, 1210 (11th Cir. 2015) (declining "to address whether RFRA authorizes suit against officers in their individual capacities").

A handful of District Courts outside of the geographic area of the Tenth Circuit of

Court of Appeals have addressed the issue thoroughly, with differing results. For example, in *Jama v. U.S.I.N.S.*, 343 F. Supp. 2d 338. 374-75 (D.N.J. 2004), the court determined that RFRA permits individual capacity suits for damages for three primary reasons:

> First, while § 2000bb–1(c) does not explicitly permit individual capacity suits for money damages, it does not explicitly preclude them, either. . . . Second, a conclusion that RFRA does not allow for suits for money damages would seem to be at odds with the general Congressional purpose that animates the statute. Congress enacted RFRA because it wanted to re-invigorate protection of free exercise rights after the Supreme Court in *Smith* diluted the standard used to evaluate claimed violations of those rights. . . . Third, while no other court has explicitly theorized why money damages are available under RFRA, or held explicitly that they are, courts have considered (thus assuming the availability of) individual capacity claims for damages under the statute. While these courts have not granted damages in any of these cases, their denials of the claims for damages have been based on the merits of the claims or the defendants' entitlement to qualified immunity rather than a finding that damages are unavailable under the statute. . . . Congress has amended RFRA since these cases were decided; that amendment gave Congress an opportunity to change statutory language and clarify that damages were not available under RFRA, but, significantly, Congress did not do this.

(internal footnote omitted). More recently, the court in *Patel v. Bureau of Prisons*, 125 F. Supp. 3d 44, 49-54 (D.D.C. 2015) reached the same conclusion:

> [T]he phrase "other person acting under color of law" . . . contemplates that persons "other" than "officials" may be sued under RFRA, and persons who are not officials may be sued only in their individual capacities. . . . By authorizing suits against "persons" who are not "officials," Congress thus envisioned at least some individual-capacity suits under RFRA. . . .
>
> The distinction between RFRA and RLUIPA is essential to the question raised here. . . . Although "RLUIPA borrows important elements from RFRA," including virtually identical language creating a private right of action for aggrieved individuals, the distinct constitutional bases for the two laws affect their breadth. In particular, because RLUIPA was enacted as an exercise of Congress's spending power, interpreting that statute to allow damages actions against state officials in their individual capacities would raise serious questions regarding whether Congress had exceeded its constitutional authority. . . . RFRA's application to federal action is not based on the Spending Clause. . . . There can be no question, moreover, that Congress

> possesses the power "to establish and maintain an effective regime of criminal law enforcement," including the power to control "the operation of federal correctional facilities." . . . This Article I power carries with it the authority to require religious accommodation of federal inmates pursuant to RFRA. . . . Because Congress can create a right of action against an individual to enforce such statutory requirements, it need not satisfy the "clear notice" requirement that attaches to conditions imposed under the Spending Clause.
>
> It follows from this conclusion that Congress also intended to permit individual capacity suits for damages. . . . The only significant purpose for an individual-capacity claim, then, would be to seek damages—damages that are unavailable in RFRA actions against the sovereign. . . . Faced with the question of what remedies are available under a statute that provides a private right of action, courts presume the availability of all appropriate remedies—including, at least at times, damages—unless Congress has expressly indicated otherwise. RFRA expressly allows plaintiffs to "obtain appropriate relief against a government," and contains no express indication that damages are prohibited.

(internal citations, quotation marks, and footnotes omitted).

Other recent District Court opinions have reached the opposite conclusion, i.e., that RFRA does not permit individual capacity suits for damages. In *Davilla v. Watts*, No. 2:15-cv-171, 2016 WL 1706172, at *5-6 (S.D. Ga. Apr. 28, 2016), the court stated:

> There is no binding precedent which addresses whether the RFRA provides claims against individual defendants for monetary damages. . . . The Eleventh Circuit Court of Appeals has not determined whether the RFRA bars monetary damages claims against individual defendants. . . . In *Smith v. Allen*, the Eleventh Circuit concluded that § 2000cc–2(a) cannot be construed as creating a private cause of action against individual defendants for monetary damages. The "appropriate relief" section contained in the RFRA is identical to that contained in the RLUIPA. . . . The undersigned has no reason to believe that the Eleventh Circuit's reasoning in a case pertaining to the RFRA would be any different than that court's reasoning in *Smith*, which concerned the RLUIPA and which is a statute of very similar construct as the RFRA. Accordingly, . . . Plaintiff's monetary damages claims under the RFRA against Defendants are barred.

(internal citations and quotation marks omitted). The Court finds most persuasive of all, though, to be the reasoning provided in *Tanvir v. Lynch*, 128 F. Supp. 3d 756, 774-81

(S.D.N.Y. 2015), in which the court stated as follows:

> [S]ince [RFRA] says very little about remedies . . . it is unlikely that Congress intended it to displace the existing remedial system for constitutional violations. Indeed, nothing in the Act's Congressional findings or statements of purpose says anything about changing the remedial scheme applicable to free exercise claims. And nothing on the face of the Act's substantive provisions outwardly suggests they do anything other than carry out the law's stated purpose—namely, restoring the compelling interest test as it existed before *Smith*. . . . [A] *Bivens* action would have provided the only potential path for an individual seeking personal capacity damages from a federal official for violation of the Free Exercise Clause at the time of RFRA's enactment. . . [and] the Supreme Court has never recognized a *Bivens* remedy for violations of the Free Exercise Clause. As a consequence, to interpret RFRA's reference to "appropriate relief" as contemplating a remedy then unknown to the law is, at the least, a stretch. Rather, the plain language of the statute read in the light of its stated purpose suggests the law changed the standard applicable to free exercise claims while retaining all remedies that were understood as "appropriate" for claims under the Free Exercise Clause—and nothing more.
>
> The conclusion that RFRA did not displace the existing remedial scheme—whether by adding to or removing from it—is reinforced by the statute's legislative history. Indeed, both House and Senate committee reports, which are regarded as the most authoritative and reliable materials of legislative history, evidence concern about the potential misinterpretation of RFRA's impact on existing law. For example, the Senate Judiciary Committee's report states that "[a]lthough the purpose of this act is only to overturn the Supreme Court's decision in *Smith*, concerns have been raised that the act could have unintended consequences and unsettle other areas of the law." In particular, the legislative history includes discussion of the bill's potential impact on abortion rights, the ability of religious organizations to participate in publicly funded social welfare and educational programs, and the availability of tax exemptions for such organizations. Thus, the Senate Judiciary Committee's report states that: "To be absolutely clear, the act does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Courts's [sic] free exercise jurisprudence under the compelling governmental interest test prior to *Smith*." In view of such an understanding—and against a backdrop where the Supreme Court has never recognized a *Bivens* remedy under the Free Exercise Clause, whether before or after *Smith*—it would seem strange indeed for Congress to have employed a phrase as ambiguous as "appropriate relief" to create such a remedy where one was not previously recognized. . . .

> Nonetheless, Plaintiffs contend that Congress's reference to "appropriate relief" in RFRA's private right of action triggers the "ordinary convention" recognized in *Franklin v. Gwinnett Cnty. Pub. Sch.*, whereby courts presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. But whatever [the] force of that rule in some contexts, it lacks any here. As noted in *Sossamon*, which interpreted this very statutory provision as borrowed in RFRA's companion statute, *Franklin* required the Supreme Court to interpret the scope of an implied statutory right of action. With no statutory text to interpret, the Court presumed the availability of all appropriate remedies unless Congress had expressly indicated otherwise. That is not the case here, however, as Congress has created an express private cause of action that provides for "appropriate relief." The *Franklin* presumption is thus inapplicable, and the meaning of "appropriate relief" must be discerned using the traditional tools of statutory construction. Those tools, as noted above, point to the conclusion that Congress did not intend to create a *Bivens*-type action with the language of "appropriate relief."
>
> Plaintiffs also seek support in *Jama v. U.S.I.N.S.*, 343 F. Supp. 2d 338 (D.N.J. 2004), where the court determined that RFRA provides for personal capacity damages against federal officers. But that decision, and subsequent district court opinions adopting its reasoning, rest on a crucial yet flawed premise—that courts have always recognized § 1983 and *Bivens* claims for money damages against officials for violation of the Free Exercise Clause. Setting aside the § 1983 cases, which have no bearing on whether a claim exists under *Bivens*, there is no question—in light of *Iqbal*, *Reichle*, and, most recently, *Turkmen*—that the Supreme Court has never recognized a *Bivens* remedy for violations of the Free Exercise Clause. Indeed, before RFRA was enacted in 1993, the Supreme Court's only *Bivens* case in the First Amendment context came in the form of its refusal to recognize such an action in *Bush*—decided a full decade before RFRA became law.
>
> In the end, the fundamental task for the judge is to determine what Congress was trying to do in passing the law. As explained, Congress' intent in enacting RFRA could not be clearer: It was to restore Congress' understanding of the compelling interest test as it existed before *Smith*—no more, no less. And because Congress enacted RFRA to return to a pre-*Smith* world, a world in which damages were unavailable against the government, 'appropriate relief' is most naturally read to exclude damages against the government.

(internal quotation marks, citations, and footnotes omitted). The *Tanvir* court noted in conclusion that:

> Plaintiffs argument might carry more weight were the Supreme Court eventually to recognize a *Bivens* remedy in the First Amendment context. The Supreme Court has observed, in a related context, that "[t]he meaning of the word 'appropriate' permits its scope to expand to include . . . remedies that were not appropriate before . . . , but in light of legal change . . . are appropriate now." *West v. Gibson*, 527 U.S. 212, 218 (1999). Thus, were the Supreme Court to recognize a *Bivens* remedy under the Free Exercise Clause, it might well be that "appropriate relief" under RFRA would be held to encompass personal capacity damages.

128 F. Supp. 3d 756, 781 n.26 (internal parenthetical omitted). The Court notes that this suggestion comports with its own conclusion above regarding the non-availability of damages under *Bivens* in connection with the Free Exercise Clause. *See* § III.C.1.

As stated above, the Court finds particularly persuasive the thorough reasoning provided in *Tanvir*. Thus, even if, as Plaintiff argues, RFRA's "other person acting under color of law" language were interpreted to mean that a RFRA claim may be asserted against an individual (an issue which the Court need not reach here), the Court finds that such a claim would be limited to non-monetary relief. Because RFRA's "appropriate relief" language does not include damages, and because damages is the only remedy sought by Plaintiff against the individual Defendants, this claim fails. *See Am. Compl.* [#29] at 59.

Accordingly, the Court finds that there is no damages remedy under RFRA, and therefore the Court **recommends** that Claim Two be **dismissed with prejudice** to the extent it is asserted against the individual defendants. *Reynoldson*, 907 F.2d at 127.

3. Fifth Amendment: Equal Protection Claim

Plaintiff argues that Defendants Berkebile, Oliver, Hall, Parry, and Knox in their individual capacities violated his right to equal protection under the Fifth Amendment.[18]

[18] The Court recommended in Section III.B.1. above that all claims as to Defendant True (who was sued only in his official capacity) be dismissed. Therefore, the Fifth Amendment claim

See Am. Compl. [#29] ¶ 400-14. Plaintiff's allegations regarding the Sunnah Fasts have no connection to this claim. *See id.* Plaintiff's Fifth Amendment claim regarding Halal meals is asserted here only against Defendants BOP and True, and thus has been fully addressed above in Section III.B.2.d. *See id.* ¶¶ 403-04. Plaintiff's Fifth Amendment claim regarding access to an Imam is only asserted as to Defendants Berkebile and Hall.[19] *See id.* ¶¶ 405-08. Plaintiff's Fifth Amendment claim regarding group prayer is only asserted as to Defendants Berkebile, Oliver, Hall, Knox, and Parry.[20] *See id.* ¶¶ 409-11.

These Defendants assert qualified immunity as to this claim. A government official is entitled to qualified immunity from liability for civil damages when his or her allegedly unlawful conduct did not violate any of the plaintiff's statutory or constitutional rights that (1) were "clearly established" at the time of the conduct, and (2) would have been known to a reasonable person in the official's position. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (stating that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"). The Supreme Court has stated that "[f]or executive officials in general . . . our cases make plain that qualified immunity represents the norm." *Id.* at 807. Thus, a government official is entitled to qualified immunity in "[a]ll but the most exceptional cases."

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as to Defendant True is not here addressed in the absence of an individual capacity claim against him. Further this claim was also originally asserted against Defendant Johnson, who was voluntarily dismissed by Plaintiff on December 4, 2015. *See Notice of Voluntary Dismissal* [#45].

[19] To the extent this claim implicates access to an Imam and was asserted against Defendants BOP and True in his official capacity, it has been resolved above in Section III.B.

[20] Similarly, to the extent this claim implicates group prayer and was asserted against Defendants BOP and True in his official capacity, it has been resolved above in Section III.B.

Harris v. Bd. of Educ. of the City of Atlanta, 105 F.3d 591, 595 (11th Cir. 1997).

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [government official] that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or [Court of Appeals for the] Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City & Cty. of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992), *overruled in part on other grounds by Williams v. City & Cty. of Denver*, 99 F.3d 1009, 1014-15 (10th Cir. 1996).

a. Access to an Imam

The basis of the Fifth Amendment claim regarding access to an Imam as to Defendants Berkebile and Hall is that, "[i]n 2013, on the rare occasions [Plaintiff] was afforded the opportunity to meet with an Imam, Defendants Berkebile and Hall mandated that the Imam speak with him outside the double cell doors." *Am. Compl.* [#29] ¶ 406. Plaintiff states that, "[b]y the end of 2013, [Plaintiff] had no interactions with an Imam for eight months," meaning that the events underlying this claim against Defendants Berkebile and Hall must have occurred within about the first four months of 2013. *Id.* ¶ 270. Defendants argue that this portion of Plaintiff's Fifth Amendment claim is barred by the statute of limitations, and Plaintiff concedes in his Response that constitutional claims arising before October 9, 2013, are barred by the statute of limitations. *Motion* [#65] at 7-8, 8 n.3; *Response* [#72] at 8.

Accordingly, the Court **recommends** that this portion of Plaintiff's Fifth Amendment

claim regarding access to an Imam asserted against Defendants Berkebile and Hall in their individual capacities be **dismissed with prejudice**. *Reynoldson*, 907 F.2d at 127.

b. Group Prayer

Plaintiff's Fifth Amendment claim regarding group prayer is asserted as to Defendants Berkebile, Oliver, Hall, Knox, and Parry. *Am. Compl.* [#29] ¶¶ 409-12. The Court has already determined above in Section III.B.2.d. that Plaintiff has adequately alleged an equal protection claim as to Defendant BOP, thus the issues here are (1) whether Plaintiff has adequately alleged the personal participation of these five Defendants in that violation and, if so, (2) whether that constitutional right was clearly established at the time of their participation.

Personal participation is an essential allegation in a civil rights action. *See Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976). To establish personal participation, a plaintiff must show that each defendant caused the deprivation of a federal right. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Defendants argue that the allegations against them are too generalized to allow for a finding of personal participation. *Motion* [#65] at 12-13, 21-22, 25. The Court disagrees. Plaintiff does not simply broadly assert, for example, that all Defendants violated his constitutional rights in unspecified ways. Rather, while the allegations here could have been more specific, Plaintiff alleges that Defendants Berkebile, Oliver, Hall, Knox, and Parry each threatened him, and other Muslim inmates, with disciplinary action if they engaged in prayer with any other prisoners. *Am. Compl.* [#29] ¶¶ 305-08, 311-12. Plaintiff also alleges that these five Defendants each allowed those of other faiths to pray with their respective clergypersons and to pray with

other prisoners in the area outside of the prisoners' cells. *Id.* ¶¶ 313-14. The Court finds these allegations adequate to establish personal participation by these five Defendants.

Regarding whether the constitutional right was clearly established, the Court finds Defendants' statement of the issue to be inaccurate: "As to the sub-claim regarding group prayer, Defendants are entitled to qualified immunity because no law would have put every reasonable officer on notice that it would be unlawful to prohibit inmates from engaging in group activities that are potentially disruptive to both staff, who are tasked with ensuring the safety and security of the institution, and other inmates." *Motion* [#65] at 21. First, although Defendants characterize Plaintiff's proposed group prayer sessions as "disruptive," *id.*, Plaintiff has not provided allegations in the Amended Complaint that could reasonably be construed to assert that the group prayer would be disruptive. *See, e.g.*, *Am. Compl.* [#29] ¶¶ 300-03, 306, 315; *Barnes*, 783 F.3d at 1191-92 (stating that all well-pled allegations from the complaint are accepted as true and viewed in the light most favorable to the plaintiff). Rather, the issue is whether it was clearly established that Defendants were not permitted to deny equal protection to Plaintiff on the basis of his religion, which has long been clearly established. *See, e.g.*, *Aldulhaseeb*, 600 F.3d at 1322 n.10; *Tennyson*, 558 F. App'x at 820. Of course, after discovery, the issue of whether the difference in treatment was reasonably related to a legitimate penological purpose (such as security concerns and/or disruptiveness) will be relevant. *See Tennyson*, 558 F. App'x at 820. However, at this early stage of the case, the Court finds that Plaintiff has alleged sufficient facts to overcome these Defendants' assertion of qualified immunity.[21]

[21] Defendants may, of course, raise this defense again at the summary judgment stage.

Accordingly, the Court **recommends** that Defendants' request to dismiss this portion of Plaintiff's Fifth Amendment claim regarding group prayer asserted against Defendants Berkebile, Oliver, Hall, Knox, and Parry in their individual capacities be **denied**.

IV. Conclusion

For the foregoing reasons,

IT IS HEREBY **RECOMMENDED** that the United States' Motion [#63] be **GRANTED**, that the Official Capacity Motion [#64] be **GRANTED in part and DENIED in part**, and that the Individual Capacity Motion [#65] be **GRANTED in part and DENIED in part**, and that Defendants True, Lamb, Camacho, McCoic, Morrow, Castle, Henderson, Crank, Huddleston, and the United States be **dismissed** from this lawsuit.[22]

IT IS **ORDERED** that pursuant to Fed. R. Civ. P. 72, the parties shall have fourteen (14) days after service of this Recommendation to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. A party's failure to serve and file specific, written objections waives de novo review of the Recommendation by the District Judge, Fed. R. Civ. P. 72(b); *Thomas v. Arn*, 474 U.S. 140, 147-48 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996). A party's objections to this Recommendation 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.*, 73 F.3d 1057, 1060 (10th

[22] If this Recommendation is adopted in full, the following claims will remain: (1) First Amendment against Defendant BOP; (2) RFRA against Defendant BOP; and (3) Fifth Amendment against Defendants BOP, Berkebile, Oliver, Hall, Knox, and Parry.

Cir. 1996).

Dated: August 30, 2016

BY THE COURT:

Kristen L. Mix
United States Magistrate Judge