

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

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 NUDDLESTON, in his official and individual capacity, and
OFFICER D. PARRY, in his official and individual capacity

Defendants.

ORDER

This matter is before the Court on defendant United States' Motion to Dismiss [ECF No. 63], the Motion to Dismiss Official-Capacity Claims filed by all defendants except for the United States [ECF No. 64], the Motion to Dismiss Individual-Capacity Claims also filed by all defendants except for the United States [ECF No. 65], and the recommendation of Magistrate Judge Kristen L. Mix [ECF No. 97]. Judge Mix recommends that this Court grant the United

States' motion, and grant in part and deny in part the other two motions. ECF No. 97 at 2. Her recommendation is incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). After a *de novo* review of the portions of the recommendation to which the parties object, see *id.*, the Court ADOPTS in full Judge Mix's recommendation. Accordingly, the Court GRANTS the United States' Motion to Dismiss [ECF No. 63], and GRANTS IN PART and DENIES IN PART defendants' other two motions [ECF No. 64 and 65]. The Court likewise DENIES plaintiff's request for oral argument. *See* ECF No. 101.

I. FACTS

On May 11, 2015 plaintiff Ahmad Ajaj, a Muslim prisoner in solitary confinement at the U.S. Penitentiary Administrative Maximum Security prison ("ADX") in Florence, Colorado, filed suit against the Federal Bureau of Prisons ("BOP") and Warden John Oliver. ECF No. 1 (Complaint). Plaintiff alleged that these defendants violated (1) his First Amendment right to free exercise of religion and (2) the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb, by refusing to distribute his medications to him before dawn and after sunset so that he could maintain his religious fast during the Islamic holy month of Ramadan in 2013 and 2014. *Id.* at ¶¶8–53. Alleging that those defendants violated his rights in the past, plaintiff sought an injunction to prevent them from doing the same during the coming month of Ramadan in 2015. *See id.* In addition, plaintiff sought declaratory relief. *Id.*

Several months later on October 9, 2015 plaintiff amended his Complaint to add a number of additional defendants, including the United States and several individual employees of the BOP. *See* ECF No. 29 (Amended Complaint). Plaintiff also added several new allegations that the BOP and its employees: (1) refused to provide plaintiff his medication and

meals before dawn and after sunset during the Islamic Sunnah fast;¹ (2) failed to provide plaintiff with Halal-certified meals with Halal meat; (3) prevented plaintiff from having access to an imam; and (4) refused to allow plaintiff to participate in group prayer with other Muslim inmates. ECF No. 97 at 3–9.

Based on those allegations and plaintiff’s original allegations, plaintiff added a number of additional claims in his Amended Complaint. These included: (1) additional First Amendment violations by the BOP and various individual defendants (Claims One); (2) additional RFRA violations by the BOP and various individual defendants (Claims Two); (3) a claim for an alleged violation of the Federal Tort Claims Act (“FTCA”) by the United States (Claim Three); (4) and claims for alleged Fifth Amendment equal protection violations by the BOP and various individual defendants (Claim Four).² *See* ECF No. 29 at ¶¶317–414.

II. STANDARD OF REVIEW

A. Magistrate Judge Recommendation.

When a magistrate judge makes a recommendation on a dispositive motion, the district court “must determine de novo any part of the magistrate judge’s disposition that has been properly objected to.” Fed. R. Civ. P. 72(b)(3). “In the absence of timely objection, the district court may review a magistrate [judge’s] report under any standard it deems appropriate.”

¹ Sunnah refers to additional fasts that many Muslims adhere to if they cannot participate in the religiously-mandated pilgrimage to Mecca. ECF No. 29 at ¶¶69–74. These fasts take place on Mondays and Thursdays, as well as a few other holy days throughout the year. *See id.* at ¶74.

² Claim One names the BOP and the individual defendants Berkebile, Oliver, True, Hall, Lamb, Camacho, Morrow, Huddleston, Castle, Henderson, Knox, and Crank. Claim Two names the BOP and individual defendants Berkebile, Oliver, True, Hall, Lamb, Camacho, Morrow, McCoic, Huddleston, Castle, Crank, Henderson, Knox, and Parry. Claim Three only names defendant United States. Claim Four names the BOP and individual defendants Berkebile, Oliver, True, Hall, Parry, and Knox. ECF No. 29 at ¶¶317–414.

Summers v. Utah, 927 F.2d 1165, 1167 (10th Cir. 1991) (citing *Thomas v. Arn*, 474 U.S. 140, 150 (1985)).

B. Rule 12(b)(6).

To survive a 12(b)(6) motion to dismiss, the complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While the Court must accept the well-pleaded allegations of the complaint as true and construe them in the light most favorable to the plaintiff, *Robbins v. Wilkie*, 300 F.3d 1208, 1210 (10th Cir. 2002), purely conclusory allegations are not entitled to be presumed true. *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009). However, so long as the plaintiff offers sufficient factual allegations such that the right to relief is raised above the speculative level, he has met the threshold pleading standard. *See, e.g., Twombly*, 550 U.S. at 556; *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008).

Importantly, “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556 (internal quotation marks omitted); *accord Robbins v. Okla. ex. rel. Dep’t of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir. 2008). “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) (internal citation omitted).

III. ANALYSIS

For ease of analysis, I review Judge Mix’s recommendations and the parties’ objections as they pertain to each of plaintiff’s four claims contained within plaintiff’s Amended Complaint.

A. Plaintiff’s Claim One (First Amendment).

Plaintiff’s Claim One raises three allegations of violations of plaintiff’s First Amendment right to free exercise of religion: (1) defendants’ failure to distribute plaintiff’s medication before dawn and after sunset during Ramadan and Sunnah fasts; (2) defendants’ failure to provide plaintiff with a Halal diet; and (3) defendants’ failure to provide plaintiff with meaningful access to an imam on a weekly basis.³ ECF No. 29 at ¶¶317–333; ECF No. 97 at 17. Plaintiff maintains two sets of claims based on those three allegations: (i) against various individual defendants in their individual capacities for monetary relief; and (ii) against the BOP for injunctive relief.⁴ *See id.* Defendants seek dismissal of both claims. I address each in turn.

1. First Amendment Individual Capacity Claims for Damages Against Individual Defendants.

Defendants first argue for dismissal of the First Amendment individual capacity claims because: (1) there is no *Bivens* remedy under the First Amendment, and (2) even if there was, defendants are entitled to qualified immunity because plaintiff failed to state a claim. ECF No. 65 at 8–18. Agreeing with defendants’ first argument that courts do not recognize a *Bivens*

³ As Judge Mix points out, plaintiff’s First Amendment claim against defendants regarding the timing of his medication also briefly mentions the timing of his meal delivery. ECF No. 97 at 20. However, the Court agrees with Judge Mix that the “thrust of this claim is clearly the timing of [plaintiff’s] medication intake[,]” meaning that there is no separate claim regarding meal timing and that plaintiff’s arguments on that issue are inapplicable. *Id.*; ECF No. 29 at 58–59 (Prayer for Relief mentioning only medication timing).

⁴ As Judge Mix’s recommendation acknowledges, plaintiff has voluntarily dismissed all of its official capacity claims against individual defendants that are contained in Claim One, Claim Two, and Claim Four. ECF No. 97 at 16. Accordingly, the Court dismisses those claims. The Court also dismisses defendant Warden Bill True from the lawsuit because plaintiff only asserted official capacity claims against him. *See id.* at 17.

claim for alleged First Amendment violations, Judge Mix recommends that defendants' motion to dismiss the individual capacity claims be granted on plaintiff's First Amendment claims. ECF No. 97 at 44–50 (citing *Iqbal*, 556 U.S. at 675 wherein the Court explicitly refused to find that a prisoner can bring a First Amendment claim for damages). After *de novo* review, I agree with Judge Mix's reasoning and adopt this recommendation.

Plaintiff nevertheless objects, arguing that: (1) the Court should find a *Bivens* remedy because any alternative remedies are purely prospective and inadequate since they do not provide for damages; and (2) that deference to prison officials does not qualify as a special factor justifying a refusal to create a *Bivens* remedy. ECF No. 101 at 8–11.

Disagreeing with both points, I first note that plaintiff does not need a *Bivens* claim to obtain the “unique” remedy of monetary damages because, as Judge Mix acknowledges, plaintiff can obtain monetary damages for his claims alleging violations of the Fifth Amendment. *See* ECF No. 97 at 47. Furthermore, plaintiff's second argument is unavailing because the “threshold” for “a factor counseling hesitation” to creating a *Bivens* remedy is “remarkably low[,]” and I conclude that deference to prison officials surely meets that exceedingly low threshold. *See Arar v. Ashcroft*, 585 F.3d 559, 574 (2d Cir. 2009). Accordingly, I adopt Judge Mix's recommendation and DISMISS plaintiff's First Amendment individual capacity claims with prejudice.

2. First Amendment Claims Against the BOP for Injunctive Relief.

Defendants next argue for dismissal of plaintiff's First Amendment claims against the BOP.⁵ They contend: (1) that plaintiff's claim dealing with medication administration during Ramadan and Sunnah are moot; and (2) that plaintiff has not otherwise stated a claim with his

⁵ All of defendants' arguments for dismissal of plaintiff's claims against the BOP are contained within their motion to dismiss the official capacity claims. *See* ECF No. 64.

remaining allegations. ECF No. 64 at 9–19. Agreeing in part with defendants’ first argument, Judge Mix recommends that plaintiff’s First Amendment claim against the BOP based on the government’s administration of medication during Ramadan be dismissed as moot because ADX’s revised pill line procedures comply with plaintiff’s requests.⁶ ECF No. 97 at 21. Nevertheless, she concludes that plaintiff has stated a claim and recommends that defendants’ motion be denied with respect to the remaining allegations: (i) the BOP’s failure to provide medications at certain times during Sunnah fasts; (ii) a lack of access to a Halal diet with Halal meat; and (iii) a lack of access to an imam. After a *de novo* review, I agree with Judge Mix’s recommendations.

Plaintiff nevertheless objects to Judge Mix’s conclusion about the mootness of the Ramadan claim. ECF No. 101 at 5. He argues that the Court can still provide relief because the BOP might transfer him to another prison that does not have ADX’s revised procedures, and that even if the claim is moot, the “voluntary cessation” exception to the mootness doctrine applies. *Id.* at 5–7. I disagree with both arguments.

First, I find plaintiff’s argument about potential transfer unconvincing because it is purely speculative. *See Hall v. Beals*, 396 U.S. 45, 49 (1969) (rejecting “speculative contingencies” as a basis for continuing an otherwise moot controversy). Furthermore, I find that the “voluntary cessation” exception does not apply here because I determine that there are no “clear showings” of a “desire” by the BOP “to return to the old ways.” *See Brown v. Buhman*, 822 F.3d 1151, 1167 (10th Cir. 2016).

⁶ As Judge Mix correctly points out, the Court can examine evidence outside the Complaint on a motion to dismiss when the issue is subject matter jurisdiction (mootness). ECF No. 97 at 21 n.7 (citing *Pringle v. United States*, 208 F.3d 1220, 1222 (10th Cir. 2000)). Thus, the Court can examine the Declaration of Clay C. Cook, see ECF No. 26-1, that defendants cite as part of their argument about ADX’s new pill line procedures. *See id.*

Defendants also object to Judge Mix’s recommendation to deny defendants’ motion with respect to plaintiff’s other First Amendment allegations against the BOP. ECF No. 106 at 5. They contend that plaintiff has failed to state a claim because he neither adequately alleges facts showing a “substantial burden” on his sincerely held religious beliefs nor alleges facts showing that the BOP’s alleged restrictions are not “reasonably related to legitimate penological objectives.” *Id.* at 5–10; *Kay v. Bemis*, 500 F.3d 1214, 1218–19 (10th Cir. 2007) (describing this “two-step inquiry”).

However, like Judge Mix I find that based on the following allegations within his Amended Complaint, plaintiff has in fact sufficiently pled “substantial burdens” on his religious beliefs: (1) that the BOP consistently denied his request for a fully Halal diet, and that ADX’s other meals do not suffice, see, e.g., ECF No. 29 at ¶¶190–91, 194; (2) that he has routinely made requests to visit with an imam that the BOP, with one exception, has denied, see, e.g., *id.* at ¶¶247–48, 253, 272, 280–89; 345–54; and (3) that the BOP’s refusal to provide him meals and medication before dawn and after sunset during Sunnah fasts forces him to choose between practicing his religion and suffering the ill effects of not eating or taking medication, see, e.g., *id.* at ¶¶176–78.

Furthermore, I agree with Judge Mix that plaintiff has adequately alleged that the BOP’s restrictions may not be “reasonably related to legitimate penological objectives.” *See Al-Owhali v. Holder*, 687 F.3d 1236, 1241 (10th Cir. 2012). For instance, plaintiff alleges: (1) that despite his many inquiries, the BOP has not provided him *any* reason why it cannot provide a Halal diet, ECF No. 29 at ¶¶201–03, 223–24; (2) that the BOP has routinely denied him visits with the Imam for *no reason* and that they have placed certain restrictions on his meetings with the Imam that do not appear to be placed on other inmates’ visits, *id.* at ¶¶ 265–66, 268; and (3) that the

BOP is willing and able to accommodate his fast during Ramadan but not during Sunnah, see *id.* at ¶181. I therefore find that plaintiff has stated First Amendment claims with these allegations.

The Court therefore ADOPTS Judge Mix's recommendation in its entirety with respect to Claim One. Defendants' motion to dismiss the individual capacity claims [ECF No. 65] is therefore GRANTED and those claims are dismissed with prejudice. In addition, defendants' motion to dismiss the claims against the BOP [ECF No. 64] is GRANTED IN PART and DENIED IN PART. Accordingly, plaintiff's claim regarding medication distribution during Ramadan is dismissed without prejudice. See *Brown*, 822 F.3d at 1179 (dismissal based on mootness must be without prejudice).

B. Plaintiff's Claim Two (RFRA).

Plaintiff's second claim in his Amended Complaint raises four allegations of behavior by defendants allegedly in violation of RFRA: (1) defendants' failure to distribute plaintiff's medication before dawn and after sunset during Sunnah fasts; (2) defendants' failure to provide plaintiff with a Halal diet; (3) defendants' failure to provide plaintiff with meaningful access to an imam on a weekly basis; and (4) defendants' failure to allow plaintiff to pray five times daily with at least one other Muslim inmate. ECF No. 97 at 17. Once again, plaintiff maintains two sets of claims based on those four allegations: (i) against certain individual defendants in their individual capacities for monetary relief; and (ii) against the BOP for injunctive relief. Defendants seek dismissal of both. I address each in turn.

1. **RFRA Individual Capacity Claims Against Individual Defendants for Damages.**

Defendants argue for dismissal of the individual capacity claims contained within Claim Two because they assert that there are no damages available for RFRA violations. ECF No. 65 at 18–22. Judge Mix agrees, reasoning that the “appropriate relief” clause within RFRA that spells out remedies under that law should be interpreted to permit only those remedies that exist at law for violations of the Free Exercise Clause. ECF No. 97 at 51–58 (citing cases interpreting RFRA as well as interpretations of the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), which Congress passed after RFRA to address some of the issues RFRA created). Having already found that no *Bivens* claim exists for damages for alleged violations of First Amendment rights, Judge Mix recommends that defendants’ motion to dismiss the individual capacity RFRA claims likewise be granted and those claims dismissed with prejudice. *Id.* at 58. After *de novo* review, I agree with Judge Mix and adopt her recommendation.

Plaintiff nevertheless objects, arguing that Judge Mix: (1) wrongly interpreted RFRA’s “appropriate relief” clause; (2) failed to consider substantial authority against her position; and (3) failed to consider Congressional intent behind RFRA.⁷ ECF No. 101 at 11–14. However, plaintiff’s arguments do not persuade me to his side. First, I find Judge Mix’s narrower interpretation of RFRA’s “appropriate relief” clause correct and in line with several other district courts. See ECF No. 97 at 55–58 (citing, for example, *Tanvir v. Lynch*, 128 F. Supp. 3d 756, 774–81 (S.D.N.Y. 2015)).

⁷ In addition to the arguments he makes in his Objection, plaintiff has also filed a Notice of Filings of Supplemental Authority, see ECF No. 110, which directs the Court’s attention to a Third Circuit case decided on October 11, 2016 that recognized damages against individual capacity defendants under RFRA, see *Mack v. Warden Loretto FCI*, 2016 WL 5899173, at *10 (3d Cir. 2016). Judge Mix’s well-reasoned recommendation, however, addresses the argument in favor of finding a damages remedy under RFRA that the Third Circuit makes in that case, see ECF No. 97 at 54–58, and, in my opinion, Judge Mix persuasively rejects it in favor of a narrower reading of the “appropriate relief” clause.

Second, Judge Mix does in fact consider cases that come out the other way, quoting and analyzing them at length in her recommendation. *See, e.g.*, ECF No. 97 at 54. Finally, Judge Mix does consider Congressional intent extensively, *see id.* at 51, but finds that it cuts against plaintiff’s arguments, not in their favor, *id.* at 53, 58. Finding her reasoning persuasive, the Court adopts Judge Mix’s recommendation with respect to the individual capacity RFRA claims and DISMISSES them with prejudice.

2. RFRA Claims Against the BOP for Injunctive Relief.

Defendants also argue for dismissal of the claims against the BOP contained within Claim Two because they assert that: (1) plaintiff fails to state a claim under RFRA based on his contention that ADX must hire an imam; (2) plaintiff’s other allegations do not plausibly allege a “substantial burden;” (3) plaintiff has not plausibly alleged the absence of a “compelling interest;” and (4) plaintiff has not sufficiently alleged there are “less-restrictive means” regarding his group prayer claim. ECF No. 64 at 10–14.

Judge Mix finds, however, that three allegations within plaintiff’s RFRA claim—that (1) the BOP failed to provide medication at certain times during Sunnah, (2) failed to provide a Halal diet with Halal meat, and (3) prevented plaintiff from having access to an imam—all meet the “substantial burden” requirement because they meet that standard under the First Amendment. ECF No. 97 at 35. She also finds that the final aspect of plaintiff’s claim (i.e. that the BOP prevents plaintiff from engaging in daily group prayer) likewise qualifies as a “substantial burden” under the Tenth Circuit’s recent analysis of that standard in *Williams v. Wilkinson*. *Id.* at 34–35 (citing 645 F. App’x 692, 701–03 (10th Cir. 2016)). Furthermore, Judge Mix finds that plaintiff has plausibly pled both the absence of a compelling interest and that there are less-restrictive means because he sufficiently demonstrates that the BOP’s actions with

respect to that final allegation may not be reasonably related to legitimate penological interests. *Id.* at 36–38. She therefore recommends that defendants’ motion be denied with respect to the claims against the BOP contained within Claim Two. *Id.* at 38. After *de novo* review, I agree with Judge Mix’s reasoning and adopt her recommendation.

Defendants nevertheless object and argue that: (1) Judge Mix’s recommendation with respect to the RFRA claims against the BOP does not address the Tenth Circuit’s decision in *Abdulhasseb v. Calbone*, 600 F.3d 1301, 1320 (10th Cir. 2010), which held that the RLUIPA does not affirmatively subsidize religion; (2) plaintiff has not plausibly alleged a “substantial burden” for his fasting or diet claims; (3) plaintiff has not plausibly alleged the absence of compelling interests; and (4) plaintiff has not plausibly alleged less-restrictive means with respect to his group prayer claim. ECF No. 106 at 10–14. The Court finds all of these arguments unconvincing.

First, I find defendants’ argument about the Tenth Circuit’s decision in *Abdulhasseb* beside the point. The plaintiff in that case argued that the government’s policy of spending money for secular needs rather than religious needs itself violates RLUIPA. *Abdulhasseb*, 600 F.3d at 1230. By contrast, much of what constitutes plaintiff’s allegation here is that the government violated RFRA by preventing him from seeing the imam *the government already provided to inmates at the prison*, or that the government put undue restrictions on his ability to communicate with that religious official. *See, e.g.*, ECF No. 29 at ¶¶261–66. I also agree with Judge Mix that plaintiff has alleged a “substantial burden” for his fasting and diet claims, see *supra* Part III.A.2, the absence of compelling interests behind the government’s policies, see *id.*, and that the government’s policy regarding group prayer may not be the least-restrictive means

of furthering a compelling security interest, see ECF No. 29 at ¶313 (alleging that the BOP allows prisoners of other religions to engage in group prayer).

Accordingly, I ADOPT in full Judge Mix's recommendation on Claim Two. The Court therefore GRANTS defendants' motion to dismiss the individual capacity claims contained within Claim Two [ECF No. 65] and DISMISSES those claims with prejudice. Furthermore, the Court DENIES defendants' motion to dismiss the RFRA claims against the BOP [ECF No. 64].

C. Plaintiff's Claim Three For Damages (FTCA).

In Claim Three, plaintiff alleges a violation of the FTCA by the United States. ECF No. 29 at ¶¶391–99. Plaintiff argues that the United States violated the FTCA when the BOP and its employees allegedly failed to provide plaintiff with his medication at certain times during Ramadan in 2014, which caused plaintiff physical injury. *Id.* Defendant United States, however, argues that dismissal of that claim is appropriate for three reasons: (1) plaintiff failed to file a certificate of review as required by C.R.S. § 13-20-602; (2) to the extent plaintiff's FTCA claim alleges medical malpractice, the Court lacks jurisdiction; and (3) that plaintiff failed to exhaust his administrative remedies. ECF No. 63 at 5–13. Reasoning that plaintiff's claim relates back to his initial Complaint, which plaintiff filed *before* the BOP affirmed its denial of plaintiff's administrative FTCA claim, Judge Mix agrees with the United States' third argument that plaintiff has failed to exhaust administrative remedies. ECF No. 97 at 12–16. She therefore recommends that the United States' motion to dismiss [ECF No. 63] be granted. *Id.* at 16. After *de novo* review, I once again adopt Judge Mix's recommendation.

Plaintiff nevertheless objects that Judge Mix's recommendation makes two errors. First, plaintiff argues that Judge Mix improperly applied the Rule 15(c)(1)(B) standard for when a claim relates back because that standard only applies for the "offensive" purpose of defeating a

statute of limitations. ECF No. 101 at 2–3. Second, he argues that even if that standard applies, a tort claim based on new facts against a new defendant does not relate back. *Id.* at 2.

However, I find that plaintiff is the one who errs in two respects. First, I note that the relation back standard of Rule 15(c)(1)(B) can apply “defensively” for purposes of administrative exhaustion as I previously held in a case involving plaintiff. *See, e.g., Ajaj v. Fed. Bureau of Prisons*, No. 08-CV-02006-RBJ-MJW, 2012 WL 1020487, at *6 (D. Colo. Mar. 27, 2012), *aff’d*, 561 F. App’x 657 (10th Cir. 2014). Second, I find that the factual bases underlying both plaintiff’s FTCA claim and his initial Complaint—i.e. the government’s alleged failure to provide plaintiff’s medication at the times he requested during Ramadan 2014—are “virtually identical.” *See id.* I therefore adopt Judge Mix’s recommendation and GRANT defendant United States’ motion to dismiss Claim Three. Accordingly, that claim is DISMISSED without prejudice.

D. Plaintiff’s Claim Four (Fifth Amendment).

Finally, plaintiff asserts Fifth Amendment Equal Protection causes of action based on defendants’ alleged failures to: (1) provide access to an imam; (2) provide a Halal diet; and (3) allow Muslims to participate in group prayer. ECF No. 29 at ¶¶400–414. Plaintiff maintains a claim against individual defendants based on allegations (1) and (3), and against the BOP based on all three allegations.⁸ *See id.* Defendants seek to dismiss both. Once again, I address each in turn.

⁸ Plaintiff also maintains all three allegations against defendant True in his official capacity. ECF No. 29 at ¶¶400–414. As mentioned before, however, plaintiff has voluntarily dismissed all of his official capacity claims. *See supra* n.4.

1. Fifth Amendment Individual Capacity Claims.

Defendants argue for dismissal of plaintiff's Fifth Amendment individual capacity claims because they argue that the individual defendants named within each claim are entitled to qualified immunity. ECF No. 65 at 22–25. Specifically, they argue for qualified immunity because: (1) plaintiff fails to state a claim; (2) plaintiff fails to allege a violation of a Constitutional right or a clearly established right; and (3) plaintiff has failed to allege facts showing that certain individual defendants had personal participation. *Id.*

Regarding plaintiff's claim against defendants Berkebile and Hall for a failure to provide access to an imam, Judge Mix reasons that that allegation is premised on events that necessarily occurred within the first four months of 2013 and as such, is barred by the statute of limitations. ECF No. 97 at 60–61 (citing ECF No. 29 at ¶406); ECF No. 65 at 7–8, 8 n.3; ECF No. 72 at 8. She therefore recommends that defendants' motion to dismiss [ECF No. 65] be granted with respect to that claim. ECF No. 97 at 60–61. Moving on to plaintiff's cause of action against defendants Berkebile, Oliver, Hall, Knox, and Parry for failing to allow Muslims group prayer, Judge Mix concludes that plaintiff has pled sufficient facts to overcome qualified immunity. *See id.* at 61–63. She thus recommends that defendants' motion be denied with respect to that claim. *See id.* After *de novo* review, I agree with both of Judge Mix's recommendations and adopt them.

First, I agree with Judge Mix's conclusion that the events underlying plaintiff's access to an imam allegation against defendants Berkebile and Hall necessarily occurred in early 2013 and are barred by the statute of limitations. ECF No. 29 at ¶406. After all, despite plaintiff's objection that Judge Mix's recommendation ignores plaintiff's accusations that he was denied access to an imam in 2014 and 2015, see ECF No. 101 at 14, plaintiff's Amended Complaint

only alleges that defendants Berkebile and Hall personally participated in such discriminatory conduct in early 2013, see ECF No. 29 at ¶406. I therefore adopt Judge Mix's recommendation on that allegation and grant the individual defendants' motion to dismiss it [ECF No. 65].

Furthermore, regarding plaintiff's Claim Four group prayer allegation, I agree with Judge Mix that plaintiff has adequately stated a claim. *See* ECF No. 61–62 (finding that plaintiff has alleged personal participation and the violation of a “clearly established” constitutional right). Thus, I deny defendants' motion to dismiss with respect to that claim.

Defendants object to the latter recommendation, arguing that the Court should refrain from implying a *Bivens* remedy for plaintiff's Fifth Amendment equal protection claim. ECF No. 105 at 13–15. However, as plaintiff points out, defendants raise this issue for the first time in their Objection. ECF No. 108 at 13. Accordingly, I find that under Tenth Circuit precedent, defendants have waived it. *See United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001) (“Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived.”). The Court therefore adopts in full Judge Mix's recommendations with respect to plaintiff's Fifth Amendment individual capacity claims. Plaintiff's claim against defendants Berkebile and Hall for allegedly failing to provide access to an imam is therefore DISMISSED with prejudice.

2. Fifth Amendment Claims Against the BOP.

Lastly, defendants argue for dismissal of all three of plaintiff's Fifth Amendment claims against the BOP because they contend he fails to allege that: (1) he was similarly situated to other inmates; (2) that other inmates received different treatment; and (3) any difference in treatment was not reasonably related to legitimate penological goals. ECF No. 64 at 24–25. Reasoning that plaintiff sufficiently alleged (1) and (2), and was not obligated to make allegation

(3), Judge Mix concludes that plaintiff has met the standard for plausibly stating an equal protection claim. ECF No. 97 at 38–41. She therefore recommends that defendants’ motion to dismiss be denied with respect to the Equal Protection cause of action against the BOP. *Id.* After *de novo* review, I agree with Judge Mix’s reasoning and adopt her recommendation.

Defendants nevertheless object that: (1) Judge Mix’s recommendation erroneously concluded, based on the Tenth Circuit’s decision in *Tennyson v. Carpenter*, 558 F. App’x 813, 819–20 (10th Cir. 2014), that plaintiff need not allege facts to show that the government treated “similarly situated” individuals differently; (2) that plaintiff’s vague and conclusory allegations do not establish that plaintiff is similarly situated “in all relevant respects” to others; (3) that plaintiff’s group prayer allegation fails in light of ADX’s religious-neutral ban on all congregate prayer; and (4) that there are no allegations that the BOP’s offering of four diets, inability to recruit an imam, and its group prayer restriction evidence an intent to discriminate against plaintiff. ECF No. 106 at 14–15. I find all these arguments wanting.

First, defendants err in construing what Judge Mix held. She did not conclude that under *Tennyson* plaintiff need not allege *any* facts to show he was “similarly situated.” *See* ECF No. 106 at 15. Rather, she correctly points out that plaintiff has pled sufficient facts on that element because *Tennyson* does not require that plaintiff identify these individuals with more specificity than what he alleges. ECF No. 97 at 40; *Tennyson*, 558 F. App’x at 820. Furthermore, I find defendants’ second argument unavailing because I agree with Judge Mix that plaintiff sufficiently alleged that he was treated differently than others in the K-unit at ADX. ECF No. 97 at 40 (citing ECF No. 29 at ¶¶192, 257, 259, 313–14). Third, I find defendants’ argument regarding ADX’s neutral ban on congregate prayer misplaced because that ban, as plaintiff points out, specifically refers to formal congregate *services*, not what plaintiff alleges defendants

prevented him from doing: informal group prayer. ECF No. 26-4 at 2–4 (distinguishing between religious “services, activities, and group meetings[,]” while only stating that “[n]o congregational services will be conducted at ADX”). Finally, I agree with plaintiff that defendants’ sweeping contention that plaintiff fails to allege discriminatory purpose is both erroneous in light of plaintiff’s Amended Complaint and unpersuasive given that defendants make no new arguments for why this is the case. *See, e.g.* ECF No. 29 at ¶¶59, 192, 257, 413; ECF No. 109 at 14.

ORDER

For the reasons above, the Court ADOPTS Magistrate Judge Mix’s recommendation [ECF No. 97]. Accordingly, defendant United States’ motion to dismiss [ECF No. 63] is GRANTED, and both defendants’ motion to dismiss individual claims [ECF No. 65] and defendants’ motion to dismiss official capacity claims [ECF No. 64] are GRANTED IN PART and DENIED IN PART. With no claims left against either of defendant United States or defendant Warden Bill True, those defendants are hereby dismissed from this action. Furthermore, in light of my decision, plaintiff’s request for oral argument is DENIED.

DATED this 25th day of October, 2016.

BY THE COURT:



R. Brooke Jackson
United States District Judge