IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-03374-CNS-STV

MAMDOUH SALIM,

Plaintiff,

v.

ADX WARDEN, and
AUSA_SDNY OFFICE,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Scott T. Varholak

This matter is before the Court on Defendant's Motion to Dismiss Amended Complaint (the "Motion"). [#38] The Motion has been referred to this Court. [#39] The Court has carefully considered the Motion and related briefing, the entire case file, and the applicable case law, and has determined that oral argument would not materially assist in the disposition of the Motion. For the following reasons, the Court respectfully **RECOMMENDS** that the Motion be **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND[1]

Plaintiff, Mamdouh Salim, is currently incarcerated at the United States Penitentiary – Administrative Maximum Facility ("ADX") in Florence, Colorado. [#12 at 2]

[1] The facts are largely drawn from the allegations in Plaintiff's Amended Complaint (the "Complaint") [#12], which the Court accepts as true at this stage of the proceedings. *Wilson v. Montano*, 715 F.3d 847, 850 n.1 (10th Cir. 2013) (citing *Brown v. Montoya*, 662 F.3d 1152, 1162 (10th Cir. 2011)). The Court also finds it appropriate to take judicial notice of facts from the record of Plaintiff's earlier criminal and civil cases, as they bear directly

"In January 1999, [Mr. Salim] and others were indicted on numerous charges alleging a global terrorist conspiracy to murder United States citizens, including charges relating to the August 7, 1998, bombings of United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania." *United States v. Salim*, 287 F. Supp. 2d 250, 259 (S.D.N.Y. 2003). During these proceedings, Mr. Salim was housed in the maximum-security wing of the Metropolitan Correctional Center in New York. *Id.* "On November 1, 2000, [Mr. Salim] stabbed corrections officer Louis Pepe in the left eye with a sharpened comb." *Id.* "[Mr.] Salim testified that . . . he attacked [Mr.] Pepe to get his keys, unlock a visitation room . . . and attack his attorneys so that they would withdraw from representing him and [the presiding judge] would have to grant substitute counsel." *United States v. Salim*, 549 F.3d 67, 70 (2d Cir. 2008) (*Salim I*). "The weapon penetrated the corrections officer's eye and entered his brain." *Id*. at 71. The charges arising from this attack were ultimately severed from the underlying terrorism case. *Salim*, 287 F. Supp. 2d at 259. On April 3, 2002, Mr. Salim pled guilty to a charge of conspiracy to murder and attempted murder of a federal corrections officer. *Salim I*, 549 F.3d at 70; [#12 at ¶ 1]. Ultimately, Mr. Salim was sentenced to life imprisonment, a sentence that he is currently serving. *United States v. Salim*, 690 F.3d 115, 121 (2d Cir. 2012) (*Salim II*); [#12 at ¶ 1].

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upon the disposition of the case at hand. *Hodgson v. Farmington City*, 675 F. App'x 838, 841 (10th Cir. 2017) (finding the court may take judicial notice of another court's publicly filed records concerning "matters that bear directly upon the disposition of the case at hand" (quotation omitted)); *Tal v. Hogan,* 453 F.3d 1244, 1264 n.24 (10th Cir. 2006) ("facts subject to judicial notice may be considered in a Rule 12(b)(6) motion . . .[;] [t]his allows the court to take judicial notice of its own files and records, as well as facts which are a matter of public record" (quotation omitted)).

Mr. Salim has been subject to Special Administrative Measures ("SAMs") since at least 2013.[2] [#12 at ¶ 4] Since at least 2014, the SAMs prohibited Mr. Salim from all forms of communication with his son. [*Id*. at ¶¶ 4, 7] Since 2014, every iteration of the SAMs imposed on Mr. Salim has included this prohibition on communication. [#12 at ¶ 8]

Mr. Salim, proceeding pro se, initiated the instant action on December 19, 2022. [#1] He filed the operative Amended Complaint (the "Complaint") on March 30, 2023. [#12] The Complaint asserts claims against the Defendants in their official capacities for violations of the Religious Freedom Restoration Act ("RFRA") and the Administrative Procedure Act ("APA").[3] [#12 at 2-3] The Complaint seeks various forms of injunctive

[2] Pursuant to federal regulation, the Attorney General of the United States may direct the Bureau of Prisons to "implement special administrative measures ["SAMs"] that are reasonably necessary to protect persons against the risk of death or serious bodily injury." 28 C.F.R. § 501.3(a). These SAMs may include limiting certain privileges, "including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism." *Id.* With approval, each SAM may be imposed for up to one year, but they may be extended in one-year increments. 28 C.F.R. § 501.3(c). The inmate must be provided with written notification of the restrictions imposed and the basis for these restrictions. 28 C.F.R § 501.3(b).

[3] The Complaint asserts these claims are brought pursuant to *Bivens v. Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 U.S. 388 (1971) and 42 U.S.C. § 1983 ("Section 1983"). [#12 at 3] However, *Bivens* creates a cause of action only against federal officials in their individual capacities for money damages. *Nicholson v. Brennan*, No. 15-CV-01999-KLM, 2017 WL 4337896, at *2 (D. Colo. Sept. 28, 2017). And Section 1983 creates a cause of action only against state officials. *Watson v. City of Kansas City*, Kan., 857 F.2d 690, 694 (10th Cir. 1988) ("To establish a cause of action under section 1983, a plaintiff must allege (1) deprivation of a federal right by (2) a person acting under color of state law."). Here, Plaintiff asserts claims against federal Defendants in their official capacities and does not seek money damages. [#12 at 19] Construing the Complaint liberally, Plaintiff may still maintain an action seeking injunctive relief based upon violations of his constitutional rights, and such claims are not barred by the doctrine of sovereign immunity. *Nicholson*, 2017 WL 4337896, at *2 (citing *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1232-33 (10th Cir. 2005)).

relief which aim at lifting the SAMs prohibiting Mr. Salim from communicating with his son. [#12 at 19]

On August 7, 2023, Defendants filed the instant Motion, seeking dismissal of all of Plaintiff's claims. [#38] Plaintiff has responded to the Motion [#80] and Defendants have filed a reply [#92].

II. STANDARD OF REVIEW

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

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." In deciding a motion under Rule 12(b)(6), a court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Cassanova v. Ulibarri*, 595 F.3d 1120, 1124 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). Nonetheless, a plaintiff may not rely on mere labels or conclusions, "and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Plausibility refers "to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'" *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). "The burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she

is entitled to relief." *Id*. (quoting *Twombly*, 550 U.S. at 556). The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

B. Pro Se Litigants

"A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972)). "The *Haines* rule applies to all proceedings involving a pro se litigant." *Id.* at 1110 n.3. The Court, however, cannot be a pro se litigant's advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008). Moreover, pro se parties must "follow the same rules of procedure that govern other litigants." *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (quoting *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992)).

III. ANALYSIS

The Motion alleges that Plaintiff fails to state a claim under the RFRA and the APA. [#38 at 8-15] In the Response, Plaintiff requests the Court take judicial notice of six facts in evaluating the Motion. [#80 at 25-29] Plaintiff then asserts: (1) the Motion is procedurally improper because Defendants attached a copy of the 2023 Notification of Extension of SAMs (the "2023 Extension") [*id.* at 6-24]; and (2) the prohibition on communications with Plaintiff's son violates the RFRA and APA [*id.* at 56-84]. The Court first addresses Plaintiff's request that the Court take judicial notice of certain facts, then addresses each of Plaintiff's arguments challenging the Motion.

A. Judicial Notice

In the Response, Plaintiff asks the Court to take judicial notice of six facts in evaluating the Motion. [#80 at 25-29] Defendants argue the facts are "irrelevant or inappropriate for judicial notice." [#92 at 8-10] The Court will address each fact in turn.

Federal Rule of Evidence 201 "allows a court at any stage of the proceeding, to take notice of 'adjudicative' facts that fall into one of two categories: (1) facts that are 'generally known within the territorial jurisdiction of the trial court;' or (2) facts that are 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Salim v. Sessions*, No. 13-CV-03175-RM-CBS, 2017 WL 11487131, at *3 (D. Colo. May 2, 2017) (quoting Fed. R. Evid. 201 (b) and (f)). "Adjudicative facts are simply the facts of the particular case." *Id.* (quoting *United States v. Wolny*, 133 F.3d 758, 764 (10th Cir. 1998)).

First, Plaintiff asks the Court to take judicial notice that his criminal charges in connection with the global terrorist conspiracy were dismissed, and Plaintiff has no pending criminal charges. [#80 at 26] In May 2019, the government entered a notice of *nolle prosequi*, dismissing its criminal charges against Plaintiff in Case No. 1:98-cr-01023-LAK. [#80 at 92-94 (copy of nolle prosequi in the conspiracy case)]. The Court will take judicial notice of the dismissal as a matter of public record. *Tal v. Hogan*, 453 F.3d 1244, 1265 (10th Cir. 2006) ("facts subject to judicial notice may be considered in a Rule 12(b)(6) motion . . .[;] [t]his allows the court to take judicial notice of its own files and records, as well as facts which are a matter of public record" (quotation omitted)). The Court declines to take judicial notice that Plaintiff has no pending criminal charges because it is unnecessary in evaluating the Motion. Plaintiff alleges this in the Complaint

[#12 at ¶¶ 9, 10], and the Court must "accept as true all well-pleaded factual allegations." *Cassanova*, 595 F.3d at 1124.

Second and third, Plaintiff asks the Court to take judicial notice that: (1) an indictment is not evidence of any kind against a defendant and (2) the dismissed indictment in the terrorism case is not evidence of any kind against Plaintiff. [#80 at 26-27] The Court declines to take judicial notice of these items because these statements are an interpretation of law, which is not an appropriate application of judicial notice. *United States v. Jimenez*, No. 16-cr-00370-PAB, 2018 WL 3083744, at *3 (D. Colo. June 22, 2018) ("As a general rule, legal conclusions are not the proper subject of judicial notice." (quotation omitted)); *Donaldson v. United States Dep't of Treasury*, No. 17-1213-EFM-GEB, 2018 WL 1116675, at *2 (D. Kan. Mar. 1, 2018) ("interpretations of law and citations to law . . . are not an appropriate application of judicial notice").

Fourth, Plaintiff asks the Court to take judicial notice that Plaintiff's name and nick name were not on an "Al Qaeda membership list," which was introduced during a criminal trial. [#80 at 27] The Court declines to take judicial notice for two reasons. First, arguably, application of the appended membership list to the facts presented here is subject to reasonable dispute. *See* Fed. R. Evid. 201 advisory committee's notes to 1972 proposed rules ("A high degree of indisputability is the essential prerequisite"). Second, whether Plaintiff was on the membership list has no bearing on this Motion. *United States v. Murry*, 31 F.4th 1274, 1296 (10th Cir. 2022) (finding district court did not abuse its discretion in declining to take judicial notice of collateral matters that had no bearing on the case).

Fifth, Plaintiff asks the Court to take judicial notice that the compelling interests furthered by the SAMs are "prevention of acts of violence and terrorism to protect persons

against the risk of death or serious bodily injury." [#80 at 29] "Whether something qualifies as a compelling interest is a question of law." *U.S. v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002). Thus, the fifth item is not an adjudicative fact that is appropriate for judicial notice, *Jimenez*, 2018 WL 3083744, at *3, and the Court declines to take judicial notice of it.

Sixth, Plaintiff asks the Court to take judicial notice that "SAM is a document having many provisions controlling [Plaintiff's] communication and limiting certain privileges, including, but not limited to housing, correspondence, visiting, using of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism." [#80 at 29] The Court declines to take judicial notice, because Plaintiff develops the same allegations in the Complaint [#12 at ¶¶ 16-17], and the Court must "accept as true all well-pleaded factual allegations." *Cassanova*, 595 F.3d at 1124.

B. The 2023 Extension

Plaintiff argues that the Motion is procedurally improper because Defendants attached a copy of the 2023 Extension to the Motion [#38-1], and therefore the Court should either: (1) not consider the 2023 Extension in evaluating the Motion or (2) convert the Motion into one for Summary Judgment. [#80 at 6-21, 32-50] The Court disagrees.

A court may consider documents or evidence outside the four corners of the complaint, without converting a motion to dismiss into one for summary judgment, when those documents are "referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Applied here, the precise harm described in Plaintiff's Complaint is the enforcement of the SAMs [*see generally* #12], and the 2023

Extension sets forth the operative version of the SAMs imposed on Plaintiff [##38-1 at 1; #92 at 2]. In the Response, Plaintiff appears to argue the action challenges only the SAMs imposed on or before 2022. [#80 at 10] But the Court finds this argument to be at odds with the allegations and relief sought in the Complaint. In the Complaint, Plaintiff alleges the restriction prohibiting Plaintiff from communicating with his son has been a renewed provision in each iteration of the SAMs since at least 2013. [#12 at ¶ 8 ("'The contact ban' became a repeated provision in SAM since 2014 until today 2023 – i.e. it has been renewed . . . every year"); *see also* [#80 at 32] ("[Defendants] had deprived [Plaintiff] from all contacts with his son Dr. Mu'ath since 2013 until now, and counting.") Further, Plaintiff requests injunctive relief, which if granted, affects the operative version of the SAMs, rather than prior versions. [#12 at 19 ("To proclaim that the total ban on contacts between [Plaintiff] and his son . . . was and **is still** unconstitutional . . . [and] [t]o issue a 'prohibitory injunction' against the [Plaintiff's] total contact bans.") (emphasis added)]. Construing the Complaint liberally, the Court finds the 2023 Extension is indeed central to Plaintiff's claim.

While Plaintiff disputes the factual content in the 2023 Extension [#80 at 16-17 (arguing the statements are false, inadmissible hearsay, and inadmissible under Fed. R. Evid. 403)], Plaintiff does not appear to dispute that the copy of the SAMs provided by Defendants is authentic. *See, e.g., Abdulmutallab v. Barr*, No. 17-cv-02493-RM-KMT, 2019 WL 4463284, at *3 (D. Colo. Sept. 18, 2019) (copy of SAMs was properly considered on motion to dismiss). In fact, this Court has already held that it may consider the 2023 Extension without converting the Motion into one for summary judgment. [#82 at 6]

Plaintiff also argues the Court should not consider the 2023 Extension because it did not exist when Plaintiff filed the Complaint. [#80 at 8] Upon review of the documents, the Court finds the 2023 Extension was in effect at the time Plaintiff filed the Complaint. [*Compare* #12 at 19 (signature block on Complaint is dated March 19, 2023) *with* #38-1 at 1 (2023 Extension reads that the previous version of the SAMs was set to "expire on March 14, 2023, unless renewed")]. Accordingly, the Court may properly consider the 2023 Extension in evaluating the Motion without converting this motion to one for summary judgment.

C. The RFRA Claim

Plaintiff's RFRA claim asserts that the prohibition on contact with his son substantially burdens his sincerely held religious beliefs. [#12 at ¶¶ 20-33] Defendants argue that Plaintiff does not plausibly plead a RFRA claim because the prohibition on contact with Plaintiff's son: (1) is in furtherance of compelling governmental interests and (2) is the least restrictive means of furthering those interests. [#38 at 8-12] The Court will address Defendants' arguments in turn.

To establish a RFRA claim, Plaintiff "must demonstrate he wishes to engage in (1) a religious exercise (2) motivated by a sincerely held belief, which (3) is subject to a substantial burden imposed by the government." *Hale v. Fed. Bureau of Prisons*, No. 14-CV-0245-MSK-MJW, 2018 WL 1535508, at *4 (D. Colo. Mar. 28, 2018). For purposes of the Motion, Defendants concede that Plaintiff has sufficiently alleged these elements. [#38 at 8]

Once the plaintiff establishes that the challenged rule substantially burdens his free exercise of religion, "the burden shifts to the government to justify that burden." *Newland*

v. Sebelius, 881 F. Supp. 2d 1287, 1296 (D. Colo. 2012). The government may justify a substantial burden on the free exercise of religion: "if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb–1(b).

Defendants argue the SAMs further the governmental interests of national and institutional security. [#38 at 9] "Whether something qualifies as a compelling interest is a question of law." *Hardman*, 297 F.3d at 1127 (citations omitted). And there is substantial authority holding that national security is generally a compelling government interest. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010) ("Everyone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order."); *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation." (quotation omitted)); *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury,* 686 F.3d 965, 980 (9th Cir. 2012) ("the government's interest in national security cannot be understated"); *Tabbaa v. Chertoff*, 509 F.3d 89, 103 (2d Cir. 2007) ("It is undisputed that the government's interest in protecting the nation from terrorism constitutes a compelling state interest."). Under the RFRA, however, the government cannot rely on generalized interests alone; the government must demonstrate a compelling interest in applying its challenged rule to "the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006). The Court must therefore determine whether the government has established a compelling interest in applying the SAMs to Plaintiff.

The Court concludes that the government has demonstrated such a compelling interest. Plaintiff was indicted for *inter alia*:

> engag[ing] in financial and business transactions on behalf of al Qaeda, including but not limited to: purchasing land for training camps; purchasing warehouses for storage of items, including explosives; purchasing communications equipment; transferring funds between corporate accounts; and transporting currency and weapons to members of al Qaeda and its associated terrorist organizations in various countries [including Sudan] throughout the world.

Salim, 2017 WL 11487131, at *5 (citing *U.S. v. Bin Laden*, 92 F. Supp. 2d 225, 237 (S.D.N.Y. 2000)). "While incarcerated and awaiting trial on those charges, Plaintiff pleaded guilty to attempted murder of a correctional officer; a crime characterized as a crime of terrorism under 18 U.S.C. § 2332b(g)(5)(A), because the attack was 'calculated to influence or affect the conduct of the government by intimidation or coercion.'" *Id*. In imposing the 2023 Extension, the Attorney General found "there is a substantial risk that [Plaintiff's] communications or contacts with persons could result in death or serious bodily injury to others" [#38-1 at 2], based on a recommendation by the U.S. Attorney for the Southern District of New York and the Federal Bureau of Investigation ("FBI"), which cited:

> (1) [Plaintiff's] role as an early participant in al Qaeda, which positions him to inspire, motivate, and radicalize others who share his violent ideology supporting jihad against the U.S. and others deemed infidels; (2) his vicious and premeditated attack on Officer Pepe; and (3) [Plaintiff's] conduct under the SAM.

[*Id.* at 3] Finally, the Court finds persuasive that in Plaintiff's previous challenge to the communication ban between him and his son, this Court found that "Plaintiff's SAMs relate to the unique federal penological interests that address national security risks by

segregating inmates with alleged ties to terrorist organizations." *Salim*, 2017 WL 11487131, at *8 (citations omitted).[4]

Although the government's national and institutional security concerns are clearly compelling interests, and arguably undisputed [#80 at 29 (requesting the Court take judicial notice of the government's compelling interest)], whether Defendants' actions are the least restrictive means to achieve those purposes cannot be decided at this stage. The Complaint makes plausible assertions that there are feasible, less-restrictive alternatives, and that those alternatives would advance the government's compelling interests. [#12 at ¶¶ 18-21] And this question is fact dependent. *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) ("Thus the government's burden is two-fold: it must support its choice of regulation, and it must refute the alternative schemes offered by the challenger, but it must do both **through the evidence presented in the record**." (emphasis omitted)). Thus, it is inappropriate for complete resolution at this stage. *Chesser v. Dir. Fed. Bureau of Prisons*, No. 15-CV-01939-NYW, 2017 WL 698794, at *10 (D. Colo. Feb. 22, 2017) (declining to address the least restrictive means inquiry, because "[w]hether [the plaintiff's] RFRA claims can ultimately survive judgment on the merits, is a question better suited for dispositive motions, after the Parties have engaged in meaningful discovery"); *El Ali v. Barr*, 473 F. Supp. 3d 479, 525 (D. Md. 2020) (the least restrictive means inquiry "is best left for exploration at discovery").

[4] In Plaintiff's previous challenge to the communication ban, this Court also found that Plaintiff's assertions that his ties to Al-Qaeda have not been proven in a court of law do not rebut the government's proffered justifications or the reasons clearly stated in the SAMs Extension. *Salim*, 2017 WL 11487131, at *5; *see also Rosenberg v. Meese*, 622 F. Supp. 1451, 1471 (S.D.N.Y. 1985) (for the Bureau of Prisons to consider dismissed criminal charges in classifying a federal prisoner for legitimate penological objectives of maintaining security within prison walls was entirely lawful).

Accordingly, the Court respectfully RECOMMENDS that Defendants' Motion be DENIED to the extent it seeks dismissal of Plaintiff's RFRA claim.

D. The APA Claim

Under the APA, a court may hold unlawful and set aside agency action if it finds the agency's action to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law[,]" or "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(A)-(B). "An APA review is 'very deferential to the agency,' presuming that the agency's action is valid and permissible." *Mohammed v. Holder*, 47 F. Supp. 3d 1236, 1241 (D. Colo. 2014). "This places the burden on [Plaintiff] to defeat that presumption." *Id*. Defendants argue that Plaintiff does not plausibly plead an APA claim because Plaintiff's allegations: (1) fail to support that the agency's decision to restrict Plaintiff's communication is somehow arbitrary or capricious, (2) fail to support a constitutional violation, and (3) Plaintiff's remaining arguments are improperly alleged for the first time in the Response to the Motion. [##38 at 13-15, 92 at 20] The Court will address these arguments in turn.

1. Arbitrary and Capricious

"To establish that a decision is arbitrary and capricious, [Plaintiff] must show that the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, ordered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Mohammed*, 47 F. Supp. 3d at 1241 (internal quotation marks omitted). "Furthermore, [b]ecause the arbitrary and capricious standard focuses on the rationality of an agency's

decisionmaking process rather than on the rationality of the actual decision, it is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Zzyym v. Kerry*, 220 F. Supp. 3d 1106, 1110 (D. Colo. 2016) (internal quotation marks omitted).

In the 2023 Extension, the government presents its beliefs and rationale for the issuance of the SAMs. [*See generally* #38-1] The FBI and the United States Attorney's Office for the Southern District of New York reasoned there is a substantial risk that Plaintiff's communications or contacts with persons could result in death or serious bodily injury due to:

> (1) [Plaintiff's] role as an early participant in al Qaeda, which positions him to inspire, motivate, and radicalize others who share his violent ideology supporting jihad against the U.S. and others deemed infidels; (2) his vicious and premediated attack on [the correctional officer]; and (3) [Plaintiff's] conduct under the SAM.

[*Id*. at 3] With respect to Plaintiff's conduct, the 2023 Extension describes his repeated attempts to circumvent the SAMs dating back to 2009. [*See id*. at 4-6]

Plaintiff first alleges that the restriction on Plaintiff's communication is arbitrary because it contravenes a BOP Policy "to encourage incarcerated parents to keep [a] close relationship with all of their children." [#12 at ¶¶ 35-37] To support this assertion, Plaintiff attaches to the Complaint part of a memo issued to inmates in 2013 that "reaffirm[s] the [BOP's] commitment to helping [inmates] prepare to reenter society," including "building parenting skills." [*Id.* at 25] In the Response to the Motion, Plaintiff also attaches a prison psychologist's answers in response to questions Plaintiff asked about the benefits of encouraging inmates to maintain relationship with their family members. [#80 at 80-81, 118-119] But neither the memo nor the questionnaire purport to override or invalidate

the regulations that direct the BOP to implement SAMs "that are reasonably necessary to protect persons against the risk of death or serious bodily injury." 28 C.F.R. § 501.3. Nor do these documents demonstrate that the reasons articulated in the 2023 Extension are arbitrary or capricious. Simply put, the BOP may generally encourage inmates to maintain relationship with family members yet still conclude that it needed to restrict Plaintiff's communications with his son in order to protect persons against the risk of death or serious bodily injury.

Second, Plaintiff asserts the communication restriction is arbitrary because it was imposed "without any pre-deprivation procedure" [##12 at ¶¶ 6, 35-37; 80 at 32, 72-75];[5] specifically, Plaintiff was denied a (1) list of charges, (2) evidence from a factfinder, and (3) a "meaningful hearing." [##12 at ¶¶ 6, 35-37; 80 at 75] When SAMs are authorized, the inmate must be provided with written notification of the restrictions imposed and the basis for these restrictions. 28 C.F.R. § 501.3(b). However, "[t]he notice's statement as to the basis may be limited in the interest of prison security or safety or to protect against acts of violence or terrorism." *Id*. And in the prison context, the "requirements of due process are flexible and call for such procedural protections as the particular situation demands." *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (citation and internal quotation marks omitted). Thus, where "the inquiry draws more on the experience of prison administrators, and where the [government's] interest implicates the safety of other

[5] To the extent Plaintiff attempts to reassert a due process claim, [*see* #80 at 32 ("[t]his deprivation was done without any due process")], the Court notes that Plaintiff already asserted that claim in his previous challenge to the SAMs and it was dismissed with prejudice. *See Salim*, 2017 WL 11487131, at *7-9 (dismissing with prejudice Plaintiff's Fifth Amendment claims that the SAMs are renewed annually without due process).

inmates and prison personnel," informal, non-adversary procedures are sufficient. *Id.* at 228–29.[6]

Here, Plaintiff was provided with written notification regarding renewal of his SAMs and detailed reasons for the BOP's decision to continue the restrictions.[7] [#80 at 11 (discussing when Plaintiff received the 2023 Extension)]. Given this written notification, the Court finds Plaintiff's allegations that the government denied him "pre-deprivation procedure" [#12 at ¶ 8, 37] are insufficient to establish that the government's decision to impose SAMs was arbitrary and capricious.

2. Constitutional Violation

Plaintiff also alleges that the restriction on Plaintiff's communication is unconstitutional because it violates his fundamental liberty interest in maintaining familial relationships. [*Id.* at ¶ 41] The Constitution protects "certain kinds of highly personal relationships." *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (quotation omitted). "And

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[6] Plaintiff cites *United States v. Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 757 (1972) and *Pac. Coast Eur. Conf. v. United States*, 350 F.2d 197, 205 (9th Cir. 1965) for the proposition that the APA requires a hearing. [#80 at 75] However, neither of these cases involves a prison regulation—a unique context in which the "requirements of due process are flexible." *Wilkinson*, 545 U.S. at 224 (2005).

[7] In *Mohammed v. Holder*, the Court provided supplemental background on the imposition of SAMs at ADX and how inmates are notified:

> Three months before SAMs expire, the inmate is contacted and given the opportunity to provide comments and suggestions concerning renewal or modification of the SAMs. At ADX, an in-person meeting occurs with the inmate to discuss his comments. These comments are then provided to ADX personnel and combined with other relevant information about the inmate, including other requests, disciplinary information, correspondence to or from the inmate, telephone conversations, types of education and leisure materials requested, and participation in the various programming offered by the institution.

Mohammed, 2011 WL 4501959, at *2.

outside the prison context, there is some discussion . . . of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents." *Id.* However, "[t]he very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration." *Id*.; *see Wirsching v. Colorado*, 360 F.3d 1191, 1201 (10th Cir. 2004) (holding ban on visitations with a prisoner's minor child did not violate constitutional right of familial association).

In all cases in which a prisoner asserts that a prison regulation violates the Constitution, the principle that inmates retain at least some constitutional rights must be weighed against the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration. *Washington v. Harper,* 494 U.S. 210, 223-24 (1990). Accordingly, only a rational connection must exist between a prison policy and a legitimate penological interest to justify it. *Turner v. Safley*, 482 U.S. 78, 89 (1987). And in *Turner*, the Court held that four factors are relevant to the inquiry:

> (1) whether the regulation has a "valid, rational connection" to a legitimate governmental interest;
> (2) whether alternative means are open to inmates to exercise the asserted right;
> (3) what impact an accommodation of the right would have on guards and inmates and prison resources; and
> (4) whether there are "ready alternatives" to the regulation.

Overton, 539 U.S. at 132 (quoting *Turner*, 482 U.S. at 89–91) (numbers and spaces added). In weighing these factors, courts must "accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for

defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Id.*

"[I]n ruling on a motion to dismiss, a court need only assess, as a general matter, whether a prison regulation is reasonably related to a legitimate penological interest." *Al-Owhali v. Holder,* 687 F.3d 1236, 1240 (10th Cir. 2012) (quotation omitted). "Taken together, *Iqbal* and *Turner* require an inmate to plead facts from which a plausible inference can be drawn that the action was not reasonably related to a legitimate penological interest." *Id.* (quotation omitted). "This is not to say that [Mr. Salim] must identify every potential legitimate interest and plead against it." *Id*. "However, he is required to recite[ ] facts that might well be unnecessary in other contexts to surmount a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Id.* (quotation omitted).

Plaintiff challenges the rational basis for the SAMs by alleging: (1) the communication restriction imposed is "outside . . . criminal prosecutorial duties," because Plaintiff's final appeal, for the underlying conviction, was resolved ten years ago [#12 at ¶¶1-2]; (2) "there were no criminal charges brought against [Plaintiff] with regard to contact with [his son]" [*id.* at ¶¶ 9-10]; and (3) other inmates who committed very dangerous crimes do not have SAMs imposed [#80 at 82-83].

First, the Court disagrees with Plaintiff that the SAMs lack a rational basis because they were imposed outside of Plaintiff's criminal prosecution or because Plaintiff's last criminal prosecution was resolved ten years ago. The "passage of time and [Plaintiff's] relatively clean record in prison do not diminish the weight of the nature of his crime in establishing the SAMs." *Salim v. Holder*, No. 13-CV-03175-RM-CBS, 2015 WL 13849468, at *5 (D. Colo. Mar. 4, 2015) (quotations omitted), *report and recommendation*

adopted sub nom., *Salim v. Sessions*, No. 13-CV-03175-RM-CBS, 2017 WL 11487131 (D. Colo. May 2, 2017). And the "penological interest need not be related only to post-incarceration conduct. Prison officials are permitted to consider the nature of the underlying crime for which a prisoner was convicted." *Sattar v. Holder*, No. 07-CV-02698-PAB-KLM, 2012 WL 882401, at *8 (D. Colo. Mar. 15, 2012). Here, it "is a matter of public record that Mr. Salim has been indicted for conduct that includes providing money and weapons to members of Al Qaeda and associated terrorist organizations." *Salim*, 2015 WL 13849468, at *5. While awaiting trial on those charges, "Plaintiff pleaded guilty to attempted murder of a correctional officer; a crime characterized as a crime of terrorism under 18 U.S.C. § 2332b(g)(5)(A), because the attack was 'calculated to influence or affect the conduct of the government by intimidation or coercion.'" *Salim,* 2017 WL 11487131, at *5. Indeed, in Plaintiff's previous challenge to the SAMs, the Court found that, in light of Plaintiff's significant history of criminal conduct and conduct even while incarcerated, the prohibition on communication with Plaintiff's son relates to "the unique federal penological interests that address national security risks by segregating inmates with alleged ties to terrorist organizations." *Salim,* 2017 WL 11487131, at *8. Thus, Plaintiff's first challenge fails.

Second, the Court disagrees with Plaintiff that the SAMs lack a rational basis because the government has never brought criminal charges against Plaintiff related to his communications with his son. The 2023 Extension explicitly addresses Mr. Salim's current restrictions and "is a coherent explanation of the government's policy." *Al–Owhali*, 687 F.3d 1241 (citation omitted). The 2023 Extension explains that Plaintiff remains relevant across a global audience and has the potential to negatively influence others.

[#38-1 at 6] News articles and YouTube videos continue to reference Plaintiff and the terrorist acts he was allegedly involved in. [*Id*.] The government also identifies the basis for limiting communications with the particular family member. [#38-1 at 4] For instance, In 2013, the FBI concluded that Plaintiff had been communicating with his son in code, "designed to conceal the identity of third parties." [*Id*.] FBI analysis also revealed that Plaintiff had managed to write at least four books under an assumed name during his incarceration. [*Id.*] Thus, in May 2013, the Attorney General modified Plaintiff's SAMs to remove his son as an approved contact. [*Id*.] In violation of the SAMs, on August 20 and August 27, 2013, during a telephone call with his family, Plaintiff attempted to speak with his son. [*Id*.] On October 6, 2022, Plaintiff had a telephone call with his wife, who said that his son was visiting her and sends his greetings. [*Id*.] Thus, even assuming Plaintiff's contention is true—that "there were no criminal charges brought against [him]" [#12 at ¶¶ 9-10]—this assertion still fails to address whether the restriction was supported by a rational penal interest in the first place. *See Nicholson v. Brennan*, No. 15-CV-01999-KLM, 2017 WL 4337896, at *6 (D. Colo. Sept. 28, 2017) (dismissing Plaintiff's claim challenging the restrictions imposed on Plaintiff's communications with his fiancée where Plaintiff has not alleged that the communication ban does not serve the legitimate purpose of preventing him from ***potentially*** divulging classified information) (emphasis added).

Finally, Plaintiff argues that other inmates who committed very dangerous crimes do not have SAMs imposed on them. [#80 at 82-83] These mere conclusory allegations that other inmates were treated differently from him is insufficient to overcome the strong presumption of government rationality, particularly where the Executive's judgments about national and institutional security are entitled to deference. See *Holder v.*

Humanitarian L. Project, 561 U.S. 1, 35 (2010) ("The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions."). Mr. Salim does not allege that the inmates he identifies have attempted to murder prison staff or circumvented their SAMs. And SAMs are individualized to the risks posed by a particular inmate. *See* 28 C.F.R. § 501.3(a) (requiring a determination "that there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons"). That SAMs were not imposed on other inmates has no bearing on the individualized analysis supporting the specific restrictions to which Plaintiff is subject. Therefore, Plaintiff's allegations do not plausibly support a finding that his SAMs are not reasonably related to the government's assessment of the threat he poses and its determination that the measures protect legitimate penological interests.

Plaintiff further argues that Defendants failed to explain why they chose to prohibit communications with his son rather than select from "multiple choices" short of a complete prohibition. [#80 at 74, 77] But "*Turner* does not impose a least-restrictive-alternative test."[8] *Overton*, 539 U.S. at 136. In *Turner*, the Court clarified "prison officials do not

[8] Thus, this standards differs from the standard applied to Plaintiff's RFRA claim. In his opposition, Plaintiff cites to two cases to argue that the government must explain why the prohibition involves "no greater deprivation of liberty than is reasonably necessary to achieve [the government's] goal." [#80 at 54]. Neither case is applicable here because they involve the standards for imposing conditions of supervised release, which come from different legal authorities that include requirements not found in the regulation authorizing SAMs. *See United States v. Geddes*, 71 F.4th 1206, 1212-13 (10th Cir. 2023) (discretionary conditions of supervised release may only be imposed if they "involve no greater deprivation of liberty than is reasonably necessary," among other requirements);

have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint."[9] *Turner*, 482 U.S. at 90–91. "But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, [then] a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id*. at 91. Here, Plaintiff suggests as alternatives "threatening, limited time sanction, limiting number of pages per letter, [and] limiting number of minutes on phone call." [#80 at 77] However, Plaintiff does not suggest how these alternatives would achieve the government's legitimate interest in preventing acts of violence and terrorism at de minimis cost. To the contrary, the 2023 Extension demonstrates that despite the FBI's continued monitoring of Plaintiff's communication with his son, Plaintiff, for years, managed to communicate in code, and wrote and disseminated four books. [#38-1 at 4] Even after the SAMs were modified to prohibit contact with his son, Plaintiff repeatedly attempted to circumvent the SAMs. [*Id*.] The fact that Plaintiff was able to transmit these messages while subject to less restrictive SAMs supports the assessment that SAMs are warranted to prevent such communications.

United States v. Bryant, 976 F.3d 165, 183 (2d Cir. 2020) (sentencing conditions that implicate fundamental liberty interests may not represent a "greater deprivation of liberty than is necessary to achieve" the sentencing goal at issue). These cases, assessing the conditions of supervision that may be imposed upon an individual after their release from prison thus say nothing about the SAMs conditions that may be imposed while the inmate remains incarcerated. While the individual remains incarcerated, the Court must give proper deference to prison officials. *Turner*, 482 U.S. 84-85.

[9] The Court recognizes that the Tenth Circuit has held that the four *Turner* factors need not be part of the analysis at the pleading stage. *Al-Owhali*, 687 F.3d at 1240. Nonetheless, the *Turner* analysis is instructive as "it is critical that a complaint address *Turner*'s core holding." *Id.*

Plaintiff has therefore not sufficiently alleged that the communication ban does not serve the legitimate penological purpose expressed in the 2023 Extension, and therefore he has not plausibly pleaded that the prohibition on contact violates his constitutional rights. *Cf. Mohammed*, 2011 WL 4501959 at *5, 10 (concluding that an inmate had set forth a plausible First Amendment challenge to his SAMs where the warden recommended that the inmate's privileges be expanded). Accordingly, the Court finds that Plaintiff has not plausibly alleged that the SAMs violate Plaintiff's constitutional rights.

3. Argument Raised in Response

Although not pled in the Complaint, Plaintiff argues in his Response that he has not been allowed to communicate with one of his granddaughters. [#80 at 83] But, "[i]t is inappropriate to use a response to a motion to dismiss to essentially raise a new claim for the first time." *Boyer v. Bd. of Cnty. Comm'rs of Cnty. of Johnson Cnty.,* 922 F. Supp. 476, 482 (D. Kan. 1996). Accordingly, the Court will not consider issues related to Plaintiff's granddaughter as those were not raised in the Complaint.

4. Conclusion

Accordingly, the Court respectfully RECOMMENDS that Defendants' Motion be GRANTED to the extent it seeks dismissal of Plaintiff's APA claim.

IV. CONCLUSION

For the reasons articulated above, the Court respectfully **RECOMMENDS** that the Motion be **GRANTED** to the extent it seeks to dismiss the APA claim, but **DENIED** to the extent it seeks to dismiss the RFRA claim.[10]

[10] Within fourteen days after service of a copy of this Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings of fact, legal conclusions, and recommendations with the Clerk of the United States District Court for

DATED: January 25, 2024

BY THE COURT:

s/Scott T. Varholak
United States Magistrate Judge

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the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *Griego v. Padilla (In re Griego)*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review. "[A] party's objections to the magistrate judge's report and 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. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the district judge of the magistrate judge's proposed findings of fact, legal conclusions, and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings of fact, legal conclusions, and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (holding that the district court's decision to review magistrate judge's recommendation *de novo* despite lack of an objection does not preclude application of "firm waiver rule"); *Int'l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (finding that cross-claimant waived right to appeal certain portions of magistrate judge's order by failing to object to those portions); *Ayala v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (finding that plaintiffs waived their right to appeal the magistrate judge's ruling by failing to file objections). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (holding that firm waiver rule does not apply when the interests of justice require review).