In the

# United States Supreme Court

MATTHEW PAUL BOROWSKI,

Plaintiff-Appellant,

v.

KIMBERLY BECHELLI, THOMAS CRAWFORD, MARK SVENINGSON,

Defendants-Appellees.

## APPENDIX

MATTHEW PAUL BOROWSKI

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NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with Fed. R. App. P. 32.1

# United States Court of Appeals

**For the Seventh Circuit**
**Chicago, Illinois 60604**

Submitted June 20, 2019*
Decided June 20, 2019

**Before**

MICHAEL S. KANNE, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 19-1113

MATTHEW P. BOROWSKI,
*Plaintiff-Appellant,*

*v.*

KIMBERLY BECHELLI, et al.,
*Defendants-Appellees.*

Appeal from the United States District Court for the Southern District of Illinois.

No. 3:16-cv-00848-JPG-GCS

J. Phil Gilbert,
*Judge.*

## ORDER

Matthew Borowski, a federal inmate, sues prison officials under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for First Amendment violations. He contends that the defendants improperly rejected a calendar featuring photographs of scantily clad female models in sexually suggestive poses. The district court granted the defendants' motion to dismiss, concluding that Borowski cannot pursue a First Amendment claim with a *Bivens* action. We affirm the judgment.

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* We have agreed to decide this case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. *See* FED. R. APP. P. 34(a)(2)(C).

Borowski is housed at the federal penitentiary in Marion, Illinois—a facility with a Sexual Offender Management Program designed to rehabilitate sexual offenders, like Borowski, and reduce their risk of recidivism. Borowski twice tried to obtain a risqué calendar, once from an outside vendor and once from his mother. But prison officials returned the publications in accordance with mail screening procedures. Citing Bureau of Prisons Program Statement 5266.11, they explained that the calendar was rejected because it contained "sexually explicit material" and "features nudity." *See* 28 C.F.R. §§ 540.71(b)(7), 540.72(a). Borowski disputed those findings through the prison's internal grievance procedure. He relied on his email communications with the vendor in which the vendor stated that the calendar did not feature nudity and confirmed that other federal prisons had not rejected the publication.

When the grievance procedure proved unsuccessful, Borowski brought a *Bivens* suit, alleging violations of his First Amendment right to receive publications. (He also claimed that the defendants violated his due-process rights, but he does not challenge that claim's dismissal on appeal.) The defendants moved to dismiss the complaint, and the magistrate judge recommended granting their motion. Accepting the recommendation, the district judge concluded that extending *Bivens* to cover Borowski's claim would contravene the Supreme Court's decision in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), which strongly cautioned against creating new *Bivens* claims where an alternative remedial structure already exists to protect the constitutional right.

Borowski acknowledges that the Supreme Court has not declared First Amendment violations actionable under *Bivens*. *See, e.g.*, *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012). Thus, on appeal, he does not meaningfully challenge the district court's reasoning. Instead, he argues that the Supreme Court's holding in *Abbasi* should be overturned because it arbitrarily eliminates judicial remedies for federal prisoners. But this court cannot disregard Supreme Court precedent; we can do no more than acknowledge that Borowski has preserved the argument. *See United States v. Faulkner*, 793 F.3d 752, 756 (7th Cir. 2015).

AFFIRMED

**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF ILLINOIS**

MATTHEW PAUL BOROWSKI,

Plaintiff,

v.

MAUREEN P. BAIRD, *et al.*,

Defendants.

Case No. 3:16-cv-00848-JPG-SCW

**JUDGMENT**

This matter having come before the Court, the issues having been heard, and the Court having rendered a decision,

**IT IS HEREBY ORDERED AND ADJUDGED** that this matter is **DISMISSED WITH PREJUDICE.**

DATED: December 14, 2018

**MARGARET M. ROBERTIE,**
**Clerk of Court**

**BY:** s/Tina Gray
**Deputy Clerk**

**Approved:**
s/ *J. Phil Gilbert*
**J. Phil Gilbert**
**U.S. District Judge**

**UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF ILLINOIS**

MATTHEW PAUL BOROWSKI,

Plaintiff,

v.

MAUREEN P. BAIRD, *et al.*,

Defendants.

Case No. 3:16-cv-00848-JPG-SCW

**MEMORANDUM AND ORDER**

**J. PHIL GILBERT, DISTRICT JUDGE**

This is a First Amendment case against federal officials pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Plaintiff Matthew Paul Borowski—a prisoner at the United States Penitentiary in Marion, Illinois—claims that prison officials violated his First Amendment rights when they confiscated some of his mail: specifically, a risqué "Straight Stuntin' Double Trouble 2016–18" calendar that Borowski ordered from an outside vendor. (ECF No. 47, p. 4.) Prison officials explained that several pages of the calendar had pictures of women with areolas, genitals, and the like visible—so they exercised their discretion pursuant to 28 C.F.R. §§ 540.71 and 540.72 to reject the calendar as sexually explicit material. (*Id.*) Borowski then sued, arguing that the publisher of the magazine informed him that the calendar contained no nudity and that Marion was the first federal facility to reject the calendar—an alleged violation of his First Amendment rights. (*Id.*)

The defendants have now moved to dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction—although the Court more correctly construes it under Rule 12(b)(6) for failure to state a claim, for the Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 since it deals with a federal constitutional question—and

Magistrate Judge Williams advises this Court to grant that motion in his Report and Recommendation. (ECF Nos. 53, 62.) Because of Borowski's objection to Magistrate Judge Williams's Report, this Court has reviewed it *de novo*. FED. R. CIV. P. 72(b)(3); *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999). And as always with a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well-pled allegations in the complaint and centers instead on whether the plaintiff has pled factual content that suggests that he has a plausible claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

It is well established that the First Amendment protects a prisoner's ability to send and receive mail, with certain caveats related to the prison's legitimate penological interests. *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Thornburgh v. Abbott*, 490 U.S. 401 (1989); *Zimmerman v. Tribble*, 226 F.3d 568, 572 (7th Cir. 2000). The problem for Borowski, however, is that he cannot bring this type of claim against *federal* officials pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Even though district courts used to routinely adjudicate these types of matters, the Supreme Court changed the game in *Ziglar v. Abbasi*, — U.S. —, 137 S.Ct. 1843 (2017). In *Ziglar*—a prisoner *Bivens* action dealing with the Fourth and Fifth Amendments—the Supreme Court held that federal courts should not expand *Bivens* actions to reach contexts that the Supreme Court has not officially recognized unless "special factors" counsel otherwise. 137 S.Ct. at 1859-60. The idea is that since *Bivens* is an implied remedy for damages under Constitutional principles rather than a legislatively-created remedy like 42 U.S.C. § 1983, courts should not expand that remedy unless there are special circumstances at hand. *Id.* at 1854–55.

The Supreme Court then explained that they have only officially recognized *Bivens* theories in three scenarios: (1) Fourth Amendment unreasonable searches and seizures; (2) Fifth Amendment gender discrimination; and (3) Eighth Amendment deliberate indifference to medical needs. *Id.* at 1855–56 (citing *Bivens*, 403 U.S. at 397; *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980)). This case—a First Amendment action dealing with a raunchy calendar—is none of those things, and even though federal courts used to adjudicate First Amendment *Bivens* actions all the time, the Court may no longer do so according to *Ziglar*. Especially considering that the Supreme Court said a few years before *Ziglar*: "We have never held that Bivens extends to First Amendment claims"—making it quite clear that the Supreme Court has not yet "officially recognized" a First Amendment *Bivens* claim. *Reichle v. Howards,* 566 U.S. at 663 n. 4 (2012).

There is one exception, however, as previously mentioned: whether there are "special factors" in this case that urge expanding *Bivens* here. These include questions like "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed," and whether "there is an alternative remedial structure present in a certain case." *Id.* at 1858. And here, as Magistrate Judge Williams explains in his Report and Recommendation, Borowski has alternative avenues to obtain relief: he can go through the Bureau of Prison's administrative remedies program; he can file small claims under 31 U.S.C. § 3723 and 3724; he can file complaints with the Inspector General; and more. The Court does not believe it should turn this simple prison administrative issue regarding sexually explicit material into a lawsuit about money damages absent any sort of congressional action. Indeed, "[n]ationwide, district courts seem to be in agreement that, post-Abbasi, prisoners have no right to bring a *Bivens* action for violation of the First Amendment." *Harris v. Dunbar*,

No. 217CV00536WTLDLP, 2018 WL 3574736, at *3 (S.D. Ind. July 25, 2018) (collecting cases). This Court joins those hordes of other district courts in agreement.

## CONCLUSION

Accordingly, the Court:

- **ADOPTS** Magistrate Judge Williams's Report and Recommendation in regards to its analysis on the *Ziglar* issue (ECF No. 62);
- **OVERRULES** Borowski's objection to the Report (ECF No. 63);
- **GRANTS** the defendants' motion to dismiss Borowski's First Amendment claims (ECF No. 53);
- **REMINDS** Borowski that even though he filed a second-amended complaint that attempts to bring a Fifth Amendment due process claim against defendants Powers, Nelson, and Connors, the Court already dismissed that claim **WITH PREJUDICE** (ECF No. 45);
- **DISMISSES** this action **WITH PREJDICE**, and
- **DIRECTS** the Clerk of Court to judgment to enter accordingly.

**IT IS SO ORDERED.**

**DATED: DECEMBER 14, 2018**

***s/ J. Phil Gilbert***
**J. PHIL GILBERT**
**U.S. DISTRICT JUDGE**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

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|---|---|---|
| MATTHEW PAUL BOROWSKI,<br><br>Plaintiff,<br><br>vs.<br><br>KIMBERLY BECHELLI, MARK SVENINGSON, and THOMAS CRAWFORD,<br><br>Defendants. | ) | Case No. 16-cv-848-JPG-SCW |

REPORT AND RECOMMENDATION

WILLIAMS, Magistrate Judge:

INTRODUCTION

Pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), Plaintiff filed his complaint against three BOP officials in the mailroom at USP-Marion for violating his First Amendment rights when they rejected two copies of Plaintiff's Calendar entitled "Straight Stuntin Double Trouble 2016-2018". This matter is before the Court on Defendants' motion to dismiss, or in the alternative, motion for summary judgment (Doc. 53). Plaintiff has filed a response (Doc. 56) in opposition to the motion. Defendants have filed a supplement (Doc. 59) to their motion and Plaintiff has filed a supplement (Doc. 60) to his response.

The matter has now been referred to United States Magistrate Judge Stephen C. Williams by United States District Judge J. Phil Gilbert pursuant to 28 U.S.C. §§ 636(b)(1)(B) and (c), Federal Rule of Civil Procedure 72(b), and Local Rule 72.1(a).

Based on the following, the Court **RECOMMENDS** that Defendants' motion to dismiss and summary judgment motion be **GRANTED**.

## FACTUAL BACKGROUND

Plaintiff is currently incarcerated at USP-Marion. USP-Marion contains a Sex Offender Management Program (SOMP) designed to provide services to sexual offenders in order to minimize their risk of re-offense (Doc. 53-6, p. 2). Plaintiff is currently incarcerated for receipt of child pornography (*Id.* at p. 6). Although Plaintiff was offered to opportunity to participate in SOMP, he has declined on two occasions (*Id.* at p. 7).

The claim in this case arises from Plaintiff's receipt of a copy of the 2016-2018 Straight Stuntin Magazine Double Trouble Calendar, which the mailroom at Marion rejected on January 12, 2016 as sexually explicit. A second issue of the calendar was also rejected by staff on February 18, 2016 (Doc. 1, p. 6). The calendar was rejected because it contained sexually explicit and/or nude material on pages 5, 21, 35, and 39 of the calendar (*Id.* at p. 6, 8). Specifically, the relevant pages contained images of females with breasts, nipples, areolas, and genitalia visible (*Id.* at p. 6). The calendar was rejected pursuant to 28 C.F.R. §§ 540.71 and 540.72, as well as the corresponding BOP Program Statement 5266.11 (*Id.* at p. 10). Plaintiff was informed by the publisher, Black Media Family, that the calendar did not contain nudity and that Marion was the first to reject the calendar as numerous other federal facilities had accepted the calendar (*Id.* at p. 8-9).

Plaintiff filed his complaint against individuals in the mailroom staff, who rejected the calendar, pursuant to *Bivens*, arguing that the rejection of the calendar on two occasions violated Plaintiff's First Amendment rights (Doc. 10, p. 5). Defendants have filed the pending motion to dismiss and/or summary judgment motion, arguing that *Bivens* does not extend to First Amendment violations as alleged by Plaintiff and that the rejection of the calendar did not violate his First Amendment rights.

LEGAL STANDARDS

"A motion under Rule 12(b)(6) challenges the sufficiency of the complaint to state a claim upon which relief may be granted." ***Hallinan v. Fraternal Order of Police of Chi. Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009).** "[A] Rule 12(b)(6) motion must be decided solely on the face of the complaint and any attachments that accompanied its filing." ***Miller v. Herman*, 600 F.3d 726, 733 (7th Cir. 2010) (citing Fed.R.Civ.P. 10(c)).** "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." **Fed. R. Civ. P. 12(d).**

Summary Judgment is proper only "if the admissible evidence considered as a whole shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." ***Dynegy Mktg. & Trade v. Multi Corp.*, 648 F.3d 506, 517 (7th Cir. 2011) (internal quotation marks omitted) (citing FED. R. CIV. P. 56(a)).** ***See also Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 607**

(7th Cir. 2005). A fact is material if it is outcome determinative under applicable law, and a genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The party seeking summary judgment bears the initial burden of demonstrating—based on the pleadings, affidavits, and the other information submitted—the lack of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After a proper motion for summary judgment is made, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250 (*quoting* FED. R. CIV. P. 56(e)(2)). A mere scintilla of evidence in support of the nonmovant's petition is insufficient; a party will be successful in opposing the motion when it presents definite, competent evidence to rebut it. *Szymanski v. Rite-Way Lawn Maintenance Co., Inc.*, 231 F.3d 360, 364 (7th Cir. 2000).

On summary judgment, the Court considers the facts in the light most favorable to the non-movant, and adopts reasonable inferences and resolves doubts in the non-movant's favor. *Srail v. Vill. of Lisle*, 588 F.3d 940, 948 (7th Cir. 2009). Even if the material facts are not in dispute, summary judgment is inappropriate when the information before the Court reveals that "alternate inferences can be drawn from the available evidence." *Spiegla v. Hull*, 371 F.3d 928, 935 (7th Cir. 2004), *abrogated on other grounds by Spiegla II*, 481 F.3d at 966 (7th Cir. 2007).

## ANALYSIS

### A. Extending *Bivens* after *Abbasi*

Defendants first argue that the Court should dismiss Plaintiff's First Amendment claim as the Court lacks jurisdiction. Defendants specifically argue that *Bivens* should not be extended to Plaintiff's claim after the recent Supreme Court decision in *Ziglar v. Abbasi*, -- U.S. --, 137 S.Ct. 1843 (2017).

In *Abbasi*, the Court reviewed the implied cause of action under *Bivens* and the framework for determining whether a *Bivens*-type remedy should be extended to a particular claim. In its opinion, the Court set forth the proper framework for determining whether a case presented a new *Bivens* context. *Abassi*, -- U.S. --, 137 S.Ct. at 1859-60. There are only three types of cases in which a *Bivens* remedy has been recognized: 1) a Fourth Amendment case against federal officers for unreasonable search and seizure when they arrested a man without a warrant, *Bivens*, 403 U.S. 388; 2) a Fifth Amendment gender discrimination claim by a woman whose federal employment was terminated by a congressman, *Davis v. Passman*, 422 U.S. 228, 99 S.Ct. 2264 (1979); and 3) an Eighth Amendment deliberate indifference claim brought by a federal inmate's estate claiming that his asthma was not being treated adequately, *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468 (1980). A court must determine if the case before it "is different in a meaningful way from [these] previous *Bivens* cases decided by [the Supreme Court]." *Id.* Such "meaningful differences" can be

> because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial

> guidance as to how any officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

*Id.*

Should the case presented differ in any meaningful way from the *Bivens* claims previously approved by the Supreme Court, then the case presents a new *Bivens* context. *Abassi* --U.S.--, 137 S.Ct. at 1859-60. Upon such a finding, the Court must go on to consider if there are "special factors counselling hesitation in the absence of affirmative action by Congress" which would make a remedy unavailable under *Bivens*. *Id.* at 1857. An inquiry of the "special factors" requires the Court to determine "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1857-58. A new *Bivens* cause of action may also be prohibited "if there is an alternative remedial structure present in a certain case." *Id.* at 1858.

Plaintiff's First Amendment claim in this case is meaningfully different from the Fourth, Fifth, and Eighth Amendment cases enumerated by the Court. Here, Plaintiff claims that he was denied receipt of a calendar that was mailed to him on two occasions and that prison officials returned the calendar to the sender. Plaintiff's claim that the prison official's refusal to allow him to possess the calendar violated his free speech rights are factually dissimilar from core *Bivens* actions. The claim implicates a different constitutional amendment and such restrictions were allegedly imposed upon Plaintiff

due to the unique circumstances of his conviction. Further, the Supreme Court has "never implied a *Bivens* action under any clause of the First Amendment", although it has assumed, without deciding, "that such an action exists." *Vanderklok v. United States*, 868 F.3d 189, 198 (3rd Cir. 2017). *See Harris v. Dunbar*, Case No. 17-cv-536-WTL-DLP, 2018 WL 3574736, at * 2 (S.D. Ind. July 25, 2018)( "[A]lthough in some cases the Supreme Court assumed without deciding that a *Bivens* remedy was available for a First Amendment claim, it never identified one." (*citing Reichle v. Howards*, 566 U.S. 658, 663 n. 4, 132 S.Ct. 2088 (2012) ("We have never held that *Bivens* extends to First Amendment claims.")). *See also Wood v. Moss*, --U.S.--, 134 S.Ct. 2056, 2066 (2014) (assuming without deciding that *Bivens* extends to First Amendment cases); *Reichle v. Howards*, 566 U.S. at 663 n. 4 (2012) ("We have never held that *Bivens* extends to First Amendment claims); *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 129 S.Ct. 1937 (2009) ("For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment . . . we have not found an *implied* damages remedy under the Free Exercise Clause."); *Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404 (1983) (declining to extend *Bivens* to a First Amendment claim); *but see King v. Federal Bureau of Prisons*, 415 F.3d 634 (7th Cir. 2005) (permitting a similar First Amendment claim, refusal of the prison to provide books, without commenting on *Bivens*) and *White v. Inch*, 2017 WL 5756912, * 3-4 (S.D.Ill. 2017). As Plaintiff's claims in this case are meaningfully different than those identified by the Supreme Court, the Court must consider whether factors counsel

against expanding a *Bivens* remedy to Plaintiff's claim.

*Abassi* stated that expanding *Bivens* remedy is a "disfavored" policy. As set forth above, the Court explained that if a case presents a new *Bivens* context, the Court must next determine "whether any alternative, existing process for protecting the interest amounts to a convincing reasons for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S.Ct. 2588 (2007). Even if there is no alternative, the court also must "'make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.'" *Id.* (quoting *Bush v. Lucas*, 462 U.S. 367, 378, 103 S.Ct. 2404 (1983)).

Defendants argue that Plaintiff has alternative avenues for pursuing his claims. They point to the possibility of injunctive or declaratory relief; BOP's administrative remedies program which Plaintiff must follow in accordance with the **Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)**; and the ability to file complaints with the DOJ's Inspector General. *See Harris*, 2018 WL 3574736, at * 3 (noting other avenues for relief for a federal inmate, including the BOP's administrative grievance process). While none of these alternative remedies allow for money damages and most do not permit Plaintiff to file a lawsuit in order to vindicate his constitutional rights, Plaintiff may also bring a claim for money damages pursuant to the **Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680**, for any injuries that he sustained. Plaintiff is not without some

recourse to address his concerns. Therefore, this Court concludes that he does have alternative remedies to address his free speech claims.

In addition, this Court considers whether judicial intervention is necessary. This Court does not function to administer federal prisons and decisions regarding the safety, security classifications, and communications of federal inmates should be left to the sound discretion of the BOP except in extraordinary circumstances that do not appear present in this case. *See Bell v. Wolfish*, **441 U.S. 520, 532, 99 S.Ct. 1861 (1979).** And, as set forth in *Abbasi*, "legislative action suggests that Congress does not want a damages remedy is itself a factor counseling hesitation." *Abbasi*, **--U.S.--, 137 S.Ct. at 1865.**

> Some 15 years after *Carlson* [*v. Green*, 446 U.S. 14 (1980)] was decided, Congress passed the Prison Litigation Reform Act of 1995, which made comprehensive changes to the way prisoner abuse claims must be brought in federal court. So it seems clear that Congress had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs. This Court has said in dicta that the Act's exhaustion provisions would apply to *Bivens* suits. But the Act itself does not provide for a standalone damages remedy against federal jailers. It could be argued that this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment.

*Id.* **(internal citations omitted).** *See also Harris*, **2018 WL 3574736, at *3 (collecting cases that have found no right to bring a *Bivens* action for First Amendment infringements).**

For these reasons, this undersigned **RECOMMENDS** that special factors dictate hesitation in applying *Bivens* to Plaintiff's First Amendment claims and it is **RECOMMENDED** that the Court **GRANT** Defendants' motion to dismiss as this Court

lacks subject matter jurisdiction over Plaintiff's First Amendment claims.

**B. First Amendment Claim**

Should the Court decline to adopt the undersigned's recommendations regarding the extension of *Bivens* to First Amendment claim, the undersigned also **RECOMMENDS** that the Court **GRANT** summary judgment as to Defendants on Plaintiff's First Amendment claim.

The Seventh Circuit has held that "[t]he free-speech clause of the First Amendment applies to communications between an inmate and an outsider." *Zimmerman v. Tribble,* 226 F.3d 568, 572 (7th Cir. 2000). The freedom of speech protected by the First Amendment is also not merely freedom to speak; it is also freedom to read. *King v. Fed. Bureau of Prisons,* 415 F.3d 634, 648-49 (7th Cir. 2005) (*citing Stanley v. Georgia,* 394 U.S. 557, 564, 89 S.Ct. 1243 (1969); *Lamont v. Postmaster General,* 381 U.S. 301, 306-07, 85 S.Ct. 1493 (1965)). While inmates do not lose their constitutional rights upon being confined in prison, some restrictions on those rights may be imposed by prison authorities. In *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254 (1987), the Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89, 107 S.Ct. 2254. *Turner* outlined four factors which courts must consider in evaluating whether a regulation restricting prisoners' rights is sufficiently reasonably related to legitimate penological interests to withstand constitutional scrutiny: "(1) the validity and rationality of the connection between a

legitimate and neutral government objective and the restriction; (2) whether the prison leaves open 'alternative means of exercising' the restricted right; (3) the restriction's bearing on the guards, other inmates, and the allocation of prison resources; and (4) the existence of alternatives suggesting that the prison exaggerates its concerns." *Munson v. Gaetz*, 673 F.3d 630, 633 (7th Cir. 2012) (*citingT urner*, 482 U.S. at 89-91, 107 S.Ct. 2254)). "The burden...is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S.Ct. 2162 (2003).

Plaintiff does not contend that the existing BOP policy governing Incoming Publications is overly broad. BOP Program Statement 5266.11 states that "the warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." 28 C.F.R. §540.71(b). Such publications which may be rejected include "sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution. 28 C.F.R. § 540.71(b)(7). Commercially published materials which cannot be disseminated to inmates pursuant to the Ensign Act[1] because they are sexually explicit or contain nudity, are to be returned to the publisher. 28 C.F.R. § 540.72(a). Nudity includes "a pictorial depiction where genitalia or female breasts are exposed" while sexually explicit materials are "pictorial depiction[s] of actual or

[1] The Ensign Act states: "no funds may be used to distribute or make available to a prisoner any commercially published information or material that is sexually explicit or features nudity." 28 U.S.C. § 530C(b)(6)(D).

stimulated sexual acts including sexual intercourse, oral sex, or masturbation." 28 C.F.R. § 540.72(b)(2) and (4). Such provisions have been upheld, *see Amatel v. Reno*, 156 F.3d 192, 194-95 (D.C. Cir. 1998)(upholding federal regulations under the Ensign Act which bar commercial materials that are sexually explicit or contain nudity)[2], and Plaintiff does not question the constitutionality of these provisions.

Instead, Plaintiff argues that the images in his calendar were not "nudity" and, thus, should not have been rejected. Plaintiff argues that the warden rejected the calendar for containing nudity (Doc. 53-2, p. 17), stating that the materials contained "females with breasts, nipples, areolas and genitalia visible, which by its nature, poses a threat to orderly operation of the institution." (Doc. 1, p. 6). Plaintiff offers an email from the publishers of the calendar indicating that there was no nudity in their calendar (Doc. 1, p. 8).[3] Defendants have provided the uncensored pictures for the Court's review (Doc. 54) and general descriptions of the pictures (Doc. 53, p. 10). The undersigned finds these descriptions to be accurate. While all of the females are wearing clothing, one female is wearing a lace bra which allows her areola to be seen through the bra. Two other pictures prominently display the image of the model's crotch covered by tight underwear.

While the undersigned agrees that whether these pictures qualify as nudity under the BOP Program Statement as an issue of fact, the undersigned need not reach the

[2] See also *Jones v. Salt Lake Cnty.*, 503 F.3d 1147, 1154-56 (10th Cir. 2007); *Mauro v. Arpaio*, 188 F.3d 1054, 1057-64 (9th Cir. 1999); Waterman v. Farmer, 183 F.3d 208, 209-10 (3rd Cir. 1999).
[3] Stating in an email that "there is no nudity and saying that there are 'breasts, nipples, areolas, and genitalia visible' is a stretch..." (Doc. 1, p. 8).

factual dispute in this case. Instead, Defendants argue that regardless of whether the images contained nudity, they were of a sexual nature and would be disruptive to the inmate population. Defendants note that USP-Marion is a Sex Offender Management Program (SOMP) facility which seeks to "minimize this population's risk for sexual re-offense." **BOP Program Statement 5324.10 §1.1.** As part of the program, materials, including photographs that are sexually explicit or are of suggestive poses, are prohibited. **See § 4.6.1.** Although Plaintiff is not a current participant in the program (Doc. 53-6, p. 7), he is incarcerated for receipt of child pornography and is housed in and around inmates in the SOMP program (Doc. 53-6, p. 6). Dr. Patrick Cook, who previously served as the SOMP Coordinator at USP-Marion, testified that the images in the calendar would be detrimental to Plaintiff's rehabilitation "and the SOMP mission at USP Marion." (Doc. 53-6, p. 7). He cites several studies in support of his opinion that exposure to "sexually explicit materials can elicit both aggressive attitudes and behaviors" (Doc. 53-6, p. 3-5). Dr. Cook notes that Plaintiff was assessed as "moderate-high" risk of sexual recidivism and that his psychological records indicate a "deviant sexual attraction, sexual preoccupation, and history of sexually abusive behavior" (Doc. 53-6, p. 7). Access to images that are "indicative of sexual objectification of women", like those in the calendar, would be detrimental to his rehabilitation (*Id.*). Further, Dr. Cook testified that if Plaintiff were allowed to possess the images he could trade, sell, or circulate the images to other individuals who are also incarcerated for sexual crimes which would be detrimental to their rehabilitation and to

the purpose of the SOMP program (*Id.* at p. 8). According to Dr. Cook, the presence of the calendar at USP-Marion is at odds with the SOMP's goals "and incongruent with creating an institution climate conducive to voluntary participation in treatment" (Doc. 53-6, p. 6).

The undersigned **RECOMMENDS** that the Court **FIND** that Defendants have shown that the restriction on the calendar has a valid, rational connection to a legitimate government interest. Sexually suggestive images, including sexual posing, "are nearly indistinguishable from 'sexually explicit' or 'nude' images with respect to the threats they pose to prisons - all categories contain sexually arousing content." *Roberts v. Apker*, 570 Fed. Appx. 646 (9th Cir. 2014). The Seventh Circuit has upheld regulations prohibiting "sexually explicit material" in general population. *See Payton v. Cannon*, 806 F.3d 1109, 1110 (7th Cir. 2015 (noting that the ex-warden's statements regarding a penological interest, although not supported by academic or scientific literature, were unrebutted). It has also stated that "[p]risons have great latitude in limiting the reading material of prisoners." *Mays v. Springborn*, 575 F.3d 643, 649 (7th Cir. 2009) (upholding ban on article describing prison riots and showing images of gang signs). Further, the Seventh Circuit has stated that reading materials could be censored "in the interest of rehabilitation." *King v. Federal Bureau of Prisons*, 415 F.3d 634, 639 (7th Cir. 2005). *See also Koutnik v. Brown*, 456 F.3d 777, 784 (7th Cir. 2006)(security, order, and rehabilitation of inmates are legitimate interests of penal institutions); *Van de Bosch v. Raemisch*, 658 F.3d 778, 785 (7th Cir. 2011)(legitimate penological interests include

**crime determine, rehabilitation, and safety of guards and other inmates).**

Plaintiff has not provided any evidence that the restrictions on "sexually suggestive poses" is irrational, other than his own belief that allowing sex offenders to view such materials would test their rehabilitation prior to release (Doc. 56, p. 10-11). He provides no supporting evidence for this belief. ***See Tanksley v. Litscher*, 723 Fed. Appx. 370, 371 (7th Cir. 2018) (inmates own belief as to whether images will interfere with his rehabilitation not objective) (*citing Borzych v. Frank*, 439 F.3d 388, 391 (7th Cir. 2006)).** On the other hand, Defendants have provided academic and scientific data, through Dr. Cook's affidavit and citation to numerous studies on inmate access to sexually explicit materials, to support their position (Doc. 53-6, p. 3-4). Dr. Cook testified that, based on his knowledge, experience, and review of Plaintiff's record, there were concerns about the impact of viewing such materials by Plaintiff as it would interfere with his rehabilitation as a sex offender as the materials are "indicative of the sexual objectification of women, sexual preoccupation, and potentially other paraphilic and/or deviant interests" (Doc. 53-6, p.7). Dr. Cook also testified that there was a concern that materials could reach other inmates who are participating in the SOMP program. ***Van den Bosch*, 658 F.3d at 789 (prison officials have legitimate concern of materials reaching other prisoners once they enter the prison system).** Thus, the undersigned finds that Defendants have demonstrated a rational relationship between the rejection of Plaintiff's calendar, containing scantily-clad females in suggestive poses, and a legitimate penological interest for rehabilitation in a sex offender facility.

Having found no evidence that the regulation is irrational, the undersigned need not "run[] through each factor at length." *Mays*, 575 F.3d at 648. Even still, the other three factors are easily met. The second factor, "whether the prison leaves open alternative means of exercising the restricted right", *Munson*, 673 F.3d at 633, is met "if other means of expression...remain[] available." *Thornburgh v. Abbott*, 490 U.S. 401, 417-18, 109 S.Ct. 1874 (1989). The factor is satisfied when the regulation "permit[s] a broad range of publications to be sent, received, and read." *Id.* at 418, 109 S.Ct. 1874. Here, Plaintiff may receive a wide range of publications that do not contain nudity or sexually suggestive poses. Thus, the undersigned finds that the second factor is met.

Turning to the third factor, the undersigned must consider "the restriction's bearing on the guards, other inmates, and the allocation of prison resources." *Munson*, 673 F.3d at 633. The Supreme Court's analysis in *Abbott* is particularly relevant in this case:

> The class of publications to be excluded is limited to those found potentially detrimental to order and security; the likelihood that such material will circulate with the prison raises the prospect of precisely the kind of "ripple effect" with which the Court in Turner was concerned. Where, as here, the right in question "can be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike", the courts should defer to the "informed discretion of corrections officials."

*Thornburgh*, 490 U.S. at 418, 109 S.Ct. 1874 (quoting *Turner*, 482 U.S. at 90-92, 107 S.Ct. 2254). Here, Defendants have pointed out that there is a risk in Plaintiff having these materials as they could be disseminated throughout the prison. USP-Marion is a SOMP

facility and has a particular concern in inmates in that program obtaining materials, like Plaintiff's calendar, as it would be detrimental to their progress in the sex offender program (Doc. 53-6, p. 8). The Court should defer to the discretion of the officials who run this program in determining that such materials would be detrimental to the goals of the SOMP program, even if Plaintiff is not a participant in the program.

Finally, the fourth factor looks at "the existence of alternatives suggesting that the prison exaggerates its concerns." *Munson*, 673 F.3d at 633. "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Turner*, 482 U.S. at 91, 107 S.Ct. 2254. The burden of posing such an alternative is on the plaintiff. *Mauro v. Arpaio*, 188 F.3d 1054, 1062 (9th Cir. 1999) (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350, 107 S.Ct. 2400 (1987)). Plaintiff offers no such alternative, other than to allow all inmates, including those in the sex offender program, to have access to "sexually explicit" materials in order to test their rehabilitation. As such, the undersigned also finds that the fourth factor weighs in favor of Defendants.

Accordingly, the undersigned **RECOMMENDS** that the Court **FIND** that Defendants have shown that the decision to reject such sexually suggestive materials, as found in Plaintiff's requested calendar, are reasonably related to a legitimate penological interest and Plaintiff has failed in his burden to show otherwise.

C. Remaining Issues

Defendants have also sought summary judgment on the grounds that Plaintiff failed to exhaust his administrative remedies as to the February 18, 2016 rejection of Plaintiff's calendar and that Defendants were not personally involved in either rejection of Plaintiff's calendar. However, as the undersigned finds that Plaintiff's claims either fail for lack of subject matter jurisdiction or, in the alternative, that Defendants are entitled to summary judgment on the merits, the undersigned need not further discuss these two additional avenues for summary judgment.

CONCLUSION AND RECOMMENDATION

Accordingly, it is **RECOMMENDED** that the Court **FIND** that *Bivens* should not be extended to First Amendment violations and **DISMISS** Plaintiff's claim for lack of subject matter jurisdiction. Should the Court **REJECT** the undersigned's findings as to the *Bivens* issue, it is **RECOMMENDED** that the Court **GRANT** summary judgment on the merits of Plaintiff's claim for violation of his First Amendment rights.

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 73.1(b), the parties may object to any or all of the proposed dispositive findings in this Recommendation. The failure to file a timely objection may result in the waiver of the right to challenge this Recommendation before either the District Court or the Court of Appeals. *See, e.g.,*

*Snyder v. Nolen*, 380 F.3d 279, 284 (7th Cir. 2004). Accordingly, Objections to this Report and Recommendation must be filed on or before **September 10, 2018.**

**IT IS SO ORDERED.**
DATED: August 24, 2018.

*/s/ Stephen C. Williams*
STEPHEN C. WILLIAMS
United States Magistrate Judge

# UNITED STATES DISTRICT COURT

for the
Southern District of Illinois

## NOTICE

Pursuant to Title 28 U.S.C. §636(b) and Rule 73.1(b) of the Local Rules of Practice in the United States District Court for the Southern District of Illinois, any party may serve and file written OBJECTIONS to this Report and Recommendation/ Proposed Findings of Fact and Conclusions of Law within fourteen (14) days of service.

**Please note: You are not to file an appeal as to the Report and Recommendation/Proposed Findings of Fact and Conclusions of Law.** At this point, it is appropriate to file **OBJECTIONS**, if any, to the Report and Recommendation/ Proposed Findings of Fact and Conclusions of Law. An appeal is inappropriate until after the District Judge issues an Order either affirming or reversing the Report and Recommendation/ Proposed Findings of Fact and Conclusions of Law of the U.S. Magistrate Judge.

Failure to file such OBJECTIONS shall result in a waiver of the right to appeal all issues, both factual and legal, which are addressed in the Report and Recommendation/Proposed Findings of Fact and Conclusions of Law. *Video Views, Inc. v Studio 21, Ltd. and Joseph Sclafani, 797 F.2d 538 (7th Cir. 1986).*

**You should e-file/mail your OBJECTIONS to the Clerk, U.S. District Court, at the address indicated below:**

**301 West Main, Benton, IL 62812**