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Brief of Appellant

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No. 15-15338

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY MERRICK,

Plaintiff-Appellant,

v.

INMATE LEGAL SERVICES, et al.

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona, 2:13-CV-01094-SPL-BSB

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331, following its removal to federal court pursuant to 28 U.S.C. § 1441. The District Court had supplemental jurisdiction over Plaintiff Merrick's state law claims pursuant to 28 U.S.C. § 1367. This Court has jurisdiction under 28 U.S.C. § 1291. The final judgment in this case was entered on February 9, 2015, when the District Court terminated the action with prejudice,[1] ER 1, and Merrick timely filed a notice of appeal on February 24, 2015. ER 22.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in granting summary judgment to Inmate Legal Services supervisor Carol Lillie on Merrick's court access claim based on its conclusions that: 1) Merrick could have made additional efforts to overcome

[1] The District Court's December 27, 2013, opinion dismissed Merrick's religious freedom claims without prejudice. ER 20. While dismissals without prejudice are not necessarily final appealable orders, "earlier rulings . . . can be reviewed on appeal from final judgment." *Harmston v. City & Cnty. of San Francisco*, 627 F.3d 1273, 1277 (9th Cir. 2010) (quotation marks omitted; alteration in original) (quoting 15 A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3905.1 (2d ed. 2002)); *Ciralsky v. CIA*, 355 F.3d 661, 668 (D.C. Cir. 2004) (court of appeals had jurisdiction over dismissal of entire action, and "jurisdiction over that final decision extends as well to the interlocutory rulings that preceded it"). Thus, this Court has jurisdiction over the District Court's December 27, 2013, order based on the District Court's final order dismissing the entire case with prejudice. And, even as to district court orders that only dismiss a complaint without prejudice, a plaintiff may nonetheless appeal if he or she "elects to stand on the dismissed complaint." *Lopez v. City of Needles*, 95 F.3d 20, 22 (9th Cir. 1996) (internal quotation marks and citation omitted).

Lillie's refusal to file his Motion for Reconsideration of the Arizona Court of Appeals' decision affirming his criminal conviction; and 2) the contents of the Motion for Reconsideration were repetitive? ER 11.

2. Whether the District Court erred in dismissing at the screening stage Merrick's *pro se* claim that Defendants' refusal to permit Merrick unmonitored, unrecorded confessional phone calls with his clergy violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 *et seq*. and Arizona's Free Exercise of Religion Act, Ariz. Rev. Stat. § 41-1493 *et seq.*, based on its conclusions that: 1) Merrick did not adequately plead that his practice of religion was substantially burdened; 2) Merrick did not plead that Defendants lacked a legitimate penological purpose in refusing him private phone calls; and 3) Merrick was insincere in his beliefs? ER 20.

A statutory addendum containing RLUIPA and Arizona's FERA follows at the conclusion of this brief.

STATEMENT OF THE CASE

This case involves two main claims. First, Merrick alleges that Maricopa County Jail (the "jail") personnel violated his First and Fourteenth Amendment rights of court access when Carol Lillie, the supervisor responsible for the Jail's Inmate Legal Services ("ILS") program, refused to file Merrick's Motion for Reconsideration of the Arizona Court of Appeals decision affirming his criminal

conviction, and then repeatedly denied his grievance arising out of that failure. ER 265-266. Second, Merrick alleges that, by refusing him unmonitored and unrecorded calls with his clergy for purposes of "confession, spiritual guidance and counseling," and instead suggesting Merrick receive counseling from clergy of another faith, jail personnel violated the United States and Arizona Constitutions, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 et seq., and Arizona's Free Exercise of Religion Act (FERA), Ariz. Rev. Stat. § 41-1493 *et seq*. ER 263-264.

I. MERRICK'S COURT ACCESS CLAIM

A jury convicted Merrick of tampering with a witness, conspiracy to commit perjury, and obstructing criminal investigations or prosecutions. ER 171. Merrick appealed his conviction to the Arizona Court of Appeals, where his court-appointed appellate attorney filed a brief under *Anders v. California*, 386 U.S. 738 (1967), and Merrick filed a supplemental brief in *propria persona* ("*pro per*"). ER 170. Merrick's own brief was copied and served by jail personnel working at ILS, which is responsible for "provid[ing] the inmates with legitimate access to court," ER 34, by "[f]il[ing] motions in State and Federal Courts," ER 37.

On October 30, 2012, the Arizona Court of Appeals affirmed Merrick's criminal conviction, released his appellate counsel from further obligation to Merrick beyond informing him of the outcome of the appeal, and stated that

"[d]efendant may, if desired, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure." ER 194. Pursuant to the Arizona Rules of Criminal Procedure, the Motion for Reconsideration had to be filed within fifteen days of the court's decision, Ariz. R. Crim. Proc. 31.18(b), which would have been November 14, 2012.

On November 7, 2012, Merrick sent his *pro per* Motion for Reconsideration to ILS. ER 228. He submitted the document according to ILS requirements and included both an "Inmate Legal Request" form and a cover letter. ER 228; ER 207 These documents indicated no fewer than eight times that Merrick was unrepresented by counsel, and requested that ILS file his motion with the Arizona Court of Appeals. ER 207; ER 208; ER 228. However, on November 8, 2012, ILS employee Meyer returned the motion to Merrick, stating that ILS would not file it because Merrick was represented by counsel. ER 228. Later that day, Merrick filed a formal grievance with the prison asserting that he was *pro per* and that he was denied access to the courts. ER 230. He explained: "ILS returned my pro-per motion stating they wouldn't process it because I had an attorney. I HAVE NO ATTORNEY!!! This is filed pro-per." ER 230. Merrick also stated that he wrote letters to his former appellate counsel and to the court informing them that ILS would not allow him to file the motion, ER 108, and he also attempted to phone his former counsel, ER 110. While Merrick did not attempt to resubmit the Motion for

Reconsideration or attempt to submit a motion for extension of time with the court, ER 113-114, he later stated that this was because, once ILS refused to file the Motion for Reconsideration, he did not believe that ILS would file any other documents related to that motion, ER 114. Separately from his Motion for Reconsideration, Merrick also drafted a Petition for Review with the Arizona Supreme Court, which was filed by ILS and received by the Supreme Court on November 16, 2012. ER 232.

On November 14, 2012, ILS Supervisor Lillie responded to Merrick's grievance, informing Merrick that ILS timely filed his Petition for Review with the Arizona Supreme Court. ER 230. Merrick appealed the denial of his grievance, explaining that the Petition for Review and the Motion for Reconsideration were different documents, and therefore his grievance "has not been addressed." ER 231. On December 6, 2012, the prison denied that appeal, stating "[y]ou are wrong. The records prove that ILS filed the petition and it was recorded as such by the court on November 16, 2012—no further action." ER 232. Merrick then appealed the denial of his grievance to an external reviewer, stating: "The grievance was and is about: A MOTION FOR RECONSIDERATION . . . NOT a petition for review with the Arizona Supreme Court." ER 233. On January 3, 2013, external referee Rick Wilson completed an investigation into Merrick's grievance. ER 234. Wilson concluded that "[t]here is sufficient evidence to justify a reasonable conclusion of

the grievance's validity." ER 234. Wilson's investigation was the first time anyone associated with the jail acknowledged that ILS wrongly failed to file Merrick's *pro per* Motion for Reconsideration.

II. MERRICK'S RELIGIOUS FREEDOM CLAIMS[2]

Merrick has been incarcerated in the Maricopa County Jail since August 8, 2012. ER 245. On August 15 and August 23, 2012, Merrick requested unmonitored, unrecorded telephone calls with his clergy for the purposes of confession, spiritual guidance, and counseling. ER 263. Merrick sought telephone calls rather than in-person visits because his clergy lives in Oklahoma.[3] ER 263. Prison officials did not initially respond to Merrick's request. ER 263. Prison officials denied this request and informed Merrick that per prison policy, he could only speak with his clergy on the monitored, recorded jail telephone. ER 263.

On September 17, 2012, Merrick filed a formal grievance with the prison asserting that prison officials violated his constitutional and statutory rights by denying the requested telephone calls with his clergy. ER 263. Merrick asserted

[2] Because this claim was dismissed at the screening stage, all allegations in the plaintiff's complaint are taken as true. *See Resnick v. Hayes,* 213 F.3d 443, 447 (9th Cir. 2000) (in reviewing a district court's decision to dismiss for failure to state a claim, courts take as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor).

[3] During discovery on his court access claim, Merrick explained that he belongs to the Fundamental American Christian Temple. ER 117. He also explained that he previously belonged to a different church, alternately referred to as the American Christian Temple and the Christian Temple Church. ER 117-118.

that his religious practices and beliefs included confession and obtaining spiritual guidance and counseling from his church clergy, and that these practices would not be possible with clergy of another faith. ER 268. Moreover, Merrick stated that telephone calls with clergy should be treated the same as telephone calls with legal counsel, which prison officials allow to remain unmonitored and unrecorded. ER 263. Merrick exhausted his prison remedies when prison officials denied his grievance at each level, informing Merrick that he could "find local clergy to visit him at the jail," give confession to a priest of a different faith, practice his religion in other ways, or contact his church to request religious literature. ER 263. In addition, on September 29, 2012, Merrick wrote the prison's chaplain, Chaplain Paul, and requested permission to make the unmonitored and unrecorded calls to his clergy for the purposes of confession, spiritual guidance, and counseling. ER 264. Paul denied the request. ER 264. Paul stated he could provide Merrick with clergy of another faith, but not Merrick's own faith. ER 264.

III. PROCEDURAL HISTORY

Merrick initially filed his complaint in Arizona state court, and the Defendants removed to the United States District Court for the District of Arizona. ER 270. The District Court then dismissed Merrick's complaint, ordering that he re-file it using a court-provided form. ECF No. 7 at 4-5. Merrick did so, and that document, styled First Amended Complaint, ER 259, is the operative complaint in

this case. The Complaint names as defendants Sheriff Joseph Arpaio and ten employees of the Maricopa County Jail, in their individual and official capacities. ER 259-260. As to his court access claim, Merrick alleged that Defendants Meyer and Lillie were the ILS employees who were responsible for refusing to file his Motion for Reconsideration, and that Defendants Rogers and Baumann denied Merrick's grievance arising from that refusal. ER 265. As to his religious exercise claims, Merrick alleged that Defendants Baumann, Harmon, O'Neal, Garcia, Wade, Paul, and Garitson refused Merrick unmonitored and unrecorded phone calls with his clergy, and that Wade Garcia, Baumann, Harmon, and Paul suggested that Merrick could confess to clergy of a different faith. ER 263-64; ER 267-68. Finally, Merrick alleged that each of his claims arose out of Defendant Arpaio's "policies, procedures, [and] customs," or "fail[ure] to train his employees." ER 264, 266, 268.

On December 30, 2013, the District Court screened Merrick's complaint pursuant to 28 U.S.C. § 1915A(a) and dismissed his religious freedom claims without requiring the Defendants to file an answer. ER 20. The court stated that although Merrick "expressed a personal preference for his personal clergy," he had "not demonstrated interference with his sincerely held religious beliefs." ER 17. In addition, the court concluded that Merrick had "not alleged facts demonstrating that the Jail's phone policies were enforced without a legitimate penological

purpose." ER 17. Finally, the court commented that Merrick's credibility as well as the sincerity of his beliefs were "cast into severe doubt" because of the nature and facts of his underlying conviction, citing the Arizona Court of Appeals decision affirming Merrick's conviction.[4] ER 17-18 (stating that "[k]ey to Plaintiff's conviction were written and recorded telephone conversations between Plaintiff and Vicki McFarland, a person Plaintiff claims was his pastor, in which Plaintiff directed McFarland to contact other witnesses for the purpose of securing testimony favorable to Plaintiff"). The court did not address Merrick's Establishment Clause claim, though it was also dismissed.

In addition, the District Court dismissed all of the Defendants except for Lillie at the screening stage. ER 20. The court dismissed Defendant Arpaio based on its conclusion that "Plaintiff has not alleged that Defendant Arpaio personally participated" in the events giving rise to his claims, and "Plaintiff has offered no facts in support of" the "conclusory allegations" in the complaint regarding the

[4] In its later order granting summary judgment to Defendant Lillie on Merrick's court access claim, the District Court again commented on Merrick's religious freedom claims, stating that "Plaintiff's RLUIPA claim was dismissed because he 'failed to allege facts demonstrating that the practice of religion was substantially burdened by Defendants' policies or that he was prevented from engaging in a sincerely held religious belief.'" ER 11 (quoting screening order, at ER 17). The District Court then added that its discussion of Merrick's sincerity "was not the only basis for determining that Plaintiff had failed to state a RLUIPA claim." Finally, the District Court commented that "Plaintiff never sought to amend his complaint [to state a RLUIPA claim] and never sought reconsideration of the Court's screening order."

training, policies, or procedures that may have led to the events underlying the complaint. ER 16. The court dismissed all but one of the remaining defendants—Baumann, Harmon, Rogers, Wade, Garcia, O'Neal, Garitson, and Paul—based on its conclusion that those employees' participation in the events giving rise to Merrick's complaint were limited to denying prison grievances. ER 16.

As to the remaining court access claim against Lillie, the parties engaged in discovery and filed cross-motions for summary judgment. Merrick's motion for summary judgment was initially denied as premature, ECF No. 30, and he filed a Second Motion for Summary Judgment on August 11, 2014. ER 244. Lillie filed her Response to Plaintiff's Motion for Summary Judgment and her Cross-Motion for Summary Judgment on August 19, 2014. ECF No. 35.

On February 9, 2015, the District Court denied Merrick's motion for summary judgment and granted Lillie's cross-motion based on its conclusion that ILS's failure to file Merrick's Motion for Reconsideration did not result in an actual injury that was proximately caused by ILS's conduct. ER 9. The District Court first concluded that Merrick "has not shown that he was prevented from filing his Motion for Reconsideration as a result of Defendant[] [Lillie's] conduct," ER 9, because Merrick had not resubmitted the Motion for Reconsideration or moved for an extension of time to file. ER 18-26; ER 10. The District Court further concluded that Merrick did not "show that the [underlying Motion for

Reconsideration] is nonfrivolous" because he did not show that he raised arguments that "were different from those previously raised" in his Supplemental Opening Brief, ER 10. Finally, the court stated that "the evidence shows that Defendant did not intend to interfere with Plaintiff's right to access the courts and that Defendant's failure to allow Plaintiff to file his Motion for Reconsideration was, at most, the result of negligence." ER 7. The court did not decide whether negligence was sufficient to support the active interference requirement of an access to courts claim. ER 7.

SUMMARY OF ARGUMENT

I. MERRICK'S COURT ACCESS CLAIM

Prison inmates have a First and Fourteenth Amendment right of court access. "Backward-looking" court-access claims, like the one in this case, require the plaintiff to show three elements: (1) the loss of a nonfrivolous or arguable underlying claim; (2) official acts that frustrated the litigation; and (3) a remedy that may be awarded as recompense but that is not otherwise available in a future suit. First, the District Court erred by holding that Lillie was not responsible for frustrating Merrick's ability to file his Motion for Reconsideration. Second, the District Court erred by holding that Merrick raised no nonfrivolous claims in his Motion for Reconsideration. At minimum, the court should have permitted the case to go to trial. However, the record also supports a conclusion that no reasonable

factfinder could fail to conclude that Lillie violated Merrick's right of court access, and grant summary judgment to him.

1. It is undisputed that Merrick properly submitted his Motion for Reconsideration to Inmate Legal Services for mailing, as he was required to do. That alone, coupled with Lillie's refusal to mail the Motion, should be enough to show that Lillie hindered Merrick's efforts to pursue a legal claim. In particular, neither the Supreme Court nor the courts of appeals have required plaintiffs to show that the relevant official acts interfering with their court access erected an insurmountable barrier. Rather, courts have held that delay alone that results in harm is sufficient to state a viable claim of denial of court access.

Moreover, Lillie's response to Merrick's grievance arising out of her refusal to file the Motion for Reconsideration reveals that none of the steps that the District Court determined Merrick should have taken would have made any difference in the outcome. The key fact is that it was not until an outside reviewer considered Merrick's grievance—months after his Motion for Reconsideration would have been due—that anyone associated with the jail acknowledged that ILS had been wrong in failing to file the Motion.

The District Court concluded that Lillie was at most negligent in failing to file Merrick's Motion for Reconsideration, but did not decide whether negligence could support a court access claim. First, the District Court erred because the facts

support the conclusion—or at minimum show a genuine dispute of fact—that Lillie intentionally failed to file Merrick's motion. In submitting his Motion for Reconsideration to Lillie, Merrick made it abundantly clear that he was not represented by counsel; further, he had filed a *pro per* brief in his direct appeal, resulting in the order affirming his conviction as to which he sought reconsideration. But in any event, this Court should hold that negligent conduct can support a court access claim, considering the importance of the underlying right. Finally, even if this Court holds that simple negligence is insufficient to support a court access claim, it should hold that gross negligence or reckless indifference can support such a claim.

2. In addition, the District Court erred in concluding that Merrick's Motion for Reconsideration included no nonfrivolous claims, and that therefore he was not prejudiced by Lillie's conduct. First, courts have emphasized that very little needs to be shown to satisfy this element, and the Sixth Circuit has appropriately adopted a presumption of prejudice. Second, the District Court focused on whether Merrick's Motion raised new arguments, whereas the Arizona Rules of Criminal Procedure instead direct that a Motion for Reconsideration discuss errors of fact or law in the underlying decision. And, Merrick did argue in his Motion that the Arizona Court of Appeals made errors of fact or law, including that that Court

overlooked controlling precedent supporting his argument that Arizona's Free Exercise of Religion Act can be raised as a defense in a criminal proceeding.

II. MERRICK'S RELIGIOUS FREEDOM CLAIMS

The District Court also erred in dismissing Merrick's Free Exercise claims under RLUIPA and the Arizona Free Exercise of Religion Act at the screening stage. First, contrary to the District Court's conclusion, Merrick adequately pleaded that the Jail substantially burdened his religious exercise by refusing him private confessional phone calls. That the Jail offered Merrick alternative ways to engage in religious worship did nothing to undo that substantial burden, as the Supreme Court recently recognized in *Holt v. Hobbs*, 135 S. Ct. 835 (2015). Second, the District Court improperly concluded that Merrick was insincere in his beliefs, contrary to the mandate that courts accept allegations in a complaint as true at the screening stage. Third, the District Court erred in holding that Merrick was required to plead that the Jail lacked a legitimate penological purpose in denying unmonitored and unrecorded confessional phone calls; in fact, a prima facie RLUIPA claim need only allege that a prison has imposed a substantial burden on a sincere religious belief. Fourth, the District Court failed to address Merrick's Establishment Clause claim, which should be remanded for that court to address in the first instance.

STANDARD OF REVIEW

I. COURT ACCESS CLAIM

A district court's decision on summary judgment is reviewed *de novo*. *Arakaki v. Hawaii*, 314 F.3d 1091, 1094 (9th Cir. 2002). Summary judgment is appropriate only where "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). In reviewing a grant of summary judgment, this Court must determine, viewing the evidence and inferences therefrom in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the District Court correctly applied the relevant substantive law. Fed. R. Civ. P. 56 (c); *Suzuki Motor Corp.*, 330 F.3d at 1131; *Allen v. A.H. Robins Co., Inc.*, 752 F.2d 1365, 1368 (9th Cir. 1985).

II. RELIGIOUS FREEDOM CLAIMS

This Court reviews *de novo* a district court's dismissal of a case pursuant to 28 U.S.C. § 1915A for failure to state a claim upon which relief may be granted. *Silva v. Di Vittorio*, 658 F.3d 1090, 1101 (9th Cir. 2011) (citing *Weilburg v. Shapiro*, 488 F.3d 1202, 1205 (9th Cir. 2007)). In reviewing a district court's decision to dismiss for failure to state a claim, courts take as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *Id.* (citing *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)).

Courts are to liberally construe *pro se* filings, and may dismiss a *pro se* complaint only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Silva*, 658 F.3d at 1101 (quotes and citations omitted); *see also Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir. 2003) (noting that *pro se* pleadings must be construed liberally). "[A] *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *see also Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) ("*Iqbal* incorporated the *Twombly* pleading standard and *Twombly* did not alter courts' treatment of *pro se* filings; accordingly, we continue to construe *pro se* filings liberally…our 'obligation' remains, 'where a petitioner is *pro se*, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt." (quoting *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc)). Likewise, "courts should construe liberally motion papers and pleadings filed by *pro se* inmates and should avoid applying summary judgment rules strictly." *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010). Liberal construction is "particularly important in civil rights cases." *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987).

ARGUMENT

I. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT TO DEFENDANTS ON MERRICK'S COURT ACCESS CLAIM.

Prison inmates have a First and Fourteenth Amendment right of access to the courts. *Lewis v. Casey*, 518 U.S. 343, 346 (1996). The Supreme Court has distinguished between two types of court access claims: forward-looking and backward-looking. *Christopher v. Harbury*, 536 U.S. 403, 412-15 (2002); *see also Silva*, 658 F.3d at 1102 (differentiating "between two types of access to court claims: those involving prisoners' right to affirmative assistance and those involving prisoners' rights to litigate without active interference").

This case involves a backward-looking claim because it alleges that official acts caused the loss or inadequate settlement of a case. *Christopher*, 536 U.S. at 413-14. To establish a backward-looking access to courts claim, the plaintiff must show: (1) the loss of a nonfrivolous or arguable underlying claim; (2) official acts that frustrated the litigation; and (3) a remedy that may be awarded as recompense but that is not otherwise available in a future suit. *Phillips v. Hust*, 477 F.3d 1070, 1076 (9th Cir. 2007), *overruled on other grounds*, *Hust v. Phillips*, ___U.S.___ (2009)).

The first two elements of Merrick's court access claim are discussed below, beginning with the official acts that frustrated his litigation and then turning to the

loss of his nonfrivolous underlying claim.[5] Liberally construing his filings, Merrick established, or at minimum raised a triable issue of fact as to, each of these elements. Accordingly, the District Court erred in granting summary judgment to Lillie. Indeed, to the extent summary judgment was appropriate, it should have been granted in favor of Merrick.

A. Defendant Lillie's Refusal to File Merrick's Motion for Reconsideration Frustrated His Ability to Litigate His Case.

The District Court concluded that Merrick did not show that "he was prevented from filing his Motion for Reconsideration as a result of Defendant's conduct" because Merrick still had "several days to attempt to get his Motion for Reconsideration filed" after Lillie refused to file the document, ER 9, and that in any event he "could have sought an extension of time." ER 10. This was wrong for two reasons. First, controlling law requires only that a plaintiff show that defendants "interfered" with court access, and Merrick has met that standard; court access claims do not hinge on whether it is conceivably possible that an unrepresented plaintiff, acting with the benefit of hindsight, could have done more to vindicate his right. Second, it is apparent from the Defendants' response to Merrick's grievance that the additional steps suggested by the District Court would

[5] Lillie did not contest that Merrick has satisfied the third aspect of his court access claim, and the District Court did not address it. Accordingly, Merrick does not discuss this aspect of his claim in this brief. However, Merrick seeks a declaratory judgment, damages, and attorney fees.

have been futile. Thus, the District Court should have concluded that Merrick established that his injury was caused by ILS's refusal to send his Motion for Reconsideration. At minimum, however, the District Court erred by resolving factual disputes in ILS's favor in reaching the opposite conclusion.

1. The District Court Held Merrick to an Overly Demanding Standard that Is Contrary to Existing Law.

The District Court concluded that "Defendant's conduct did not prevent Plaintiff from filing his Motion for Reconsideration" because Merrick did not try to file a Motion for Extension of Time, nor did he try to resubmit his Motion for Reconsideration after ILS denied his initial request. ER 10. Even if it were true that either of those actions was likely to have worked (it is not), it was inappropriate to grant summary judgment to ILS based on that conclusion. To the contrary, Merrick was required to show only that he properly submitted his motion for mailing, and that ILS's subsequent actions impeded his opportunity to litigate his case. He was not required to additionally show that, even with the benefit of hindsight, there was nothing more that he could have done to overcome ILS's failure.

The Supreme Court has held that inmates are denied constitutionally required court access when prison officials "hinder[]" their "efforts to pursue a legal claim." *Lewis*, 518 U.S. at 351. "Hinder" is defined as "to make slow or difficult the progress of," "to hold back," and "to delay, impede, or prevent action." Merriam Webster, http://www.merriam-webster.com/dictionary/hinder

(last visited Nov. 17, 2015). That definition does not require plaintiffs to show that there was nothing more that they might have conceivably done to overcome defendants' intransigence; if the Supreme Court intended to require that showing, it would have limited court access claims to those in which defendants have made court access impossible, or erected insurmountable barriers.

Illustratively, the Court wrote in *Bounds v. Smith* that "[i]t is indisputable that indigent inmates must be provided at state expense . . . with stamps to mail" legal documents, without first directing an inquiry into whether an individual indigent prisoner might have been able to get money for legal supplies in another way, such as through a prison job, or by asking friends or family for a loan to pay for legal supplies. 430 U.S. 817, 824-25 (1977); *see also Myers v. Hundley*, 101 F.3d 542, 544 (8th Cir. 1996) (actual injury may occur when inmate has enough money to pay for stamps or personal necessities but not both). Likewise, the *Bounds* Court required prisons to make available adequate law libraries, even when prisoners had access to "jailhouse lawyers," and notwithstanding the fact that "a habeas corpus petition or civil rights complaint need only set forth facts giving rise to the cause of action," and not citation to caselaw. 430 U.S. at 825. In both of these examples, the Court rejected counterfactuals regarding what more a plaintiff could have done to overcome barriers to court access, and instead focused on the requirement that prisons take reasonable steps to facilitate prisoners' litigation.

Accordingly, prison officials violate the right of access to courts when they refuse to send court filings through the mail, as happened in this case. *See, e.g.*, *Cohen v. Longshore*, 621 F.3d 1311, 1317-18 (10th Cir. 2010) (actual injury may be found when prison mail clerk refused to send inmate's legal mail). And, this and other circuit courts have found viable access to courts claims without inquiring into whether plaintiffs could have pursued additional self-help strategies in order to litigate their claims. *See, e.g.*, *Gluth v. Kangas*, 951 F.2d 1504, 1508 (9th Cir. 1991) (holding that "[i]t is the state's burden to provide meaningful access and to demonstrate that its chosen method is adequate" after inmates challenged the prison law library access policy); *Goff v. Nix*, 113 F.3d 887, 891 (8th Cir. 1997) (inability of codefendants to work together to recruit witnesses impeded access to the courts).

Moreover, even if Merrick could have eventually convinced ILS to file his motion, courts have held that a delay in access to courts that results in harm is itself enough to show interference. "Any deliberate impediment to access, even a delay of access, may constitute a constitutional deprivation." *Jackson v. Procunier*, 789 F.2d 307, 311 (5th Cir. 1986); *see also Chriceol v. Phillips*, 169 F.3d 313, 317 (5th Cir. 1999) (interference causing a delay in accessing the courts may result in a constitutional violation); *Gramegna v. Johnson*, 846 F.2d 675, 677 (11th Cir. 1988) ("[i]t cannot be gainsaid that . . . allowing mail to accumulate before

forwarding it to prisoners unconstitutionally infringes on their right of access to the courts"); *cf. Johnson v. Barczak*, 338 F.3d 771, 773 (7th Cir. 2003) (prison's delay in filing did not constitute an actual injury when plaintiff's claims proceeded without impact after the delay). "[I]f substantive constitutional rights are violated, the constitutionally recognized deprivation is complete at the time of the action, irrespective of the procedures available before or after the deprivation." *Toney-El v. Franzen*, 777 F.2d 1224, 1226-27 (7th Cir. 1985) (quoting *Hicks v. Feeney*, 596 F. Supp. 1504, 1512 (D. Del. 1984)).

Thus, in *Snyder v. Nolen*, two Seventh Circuit judges agreed that the plaintiff stated a claim that a court clerk violated his right of court access by refusing to file documents related to a divorce proceeding, even though the plaintiff could have sought a writ of mandamus ordering the clerk to process the filing. 380 F.3d 279, 293, 297-98 (7th Cir. 2004) (opinions of Kane, J., concurring, and Ripple, J., dissenting). To be sure, this does not mean that Merrick is excused from showing that his attempt at litigation was "hindered" by ILS's actions, rather than his own. *Snyder*, 380 F.3d at 301 (Ripple, J., dissenting) ("Snyder will have to demonstrate at some point . . . that the alleged harm was caused by the alleged action of Mr. Nolen rather than as a result of his own failure to seek immediate redress . . . through a petition for writ of mandamus to the state trial court). Nonetheless, it illustrates that the "official acts" prong is not a license to impose unofficial (and

unwritten) additional procedures on plaintiffs attempting to access the courts, as could occur if this Court agrees with the District Court that plaintiffs cannot make out a successful court access claim unless they have not only complied with a prison's reasonable court access requirements, but also taken additional steps. *See Dorn v. Lafler*, 601 F.3d 439, 444 (6th Cir. 2010) ("[P]risons have an obligation to timely mail court documents when prisoners have been diligent and punctual in submitting them to prison officials.").

Accordingly, the District Court erred in granting summary judgment to Lillie based on its conclusion that Merrick should have taken extraordinary steps to attempt to overcome her refusal to file his Motion for Reconsideration. Instead, the District Court should have focused on whether Lillie unreasonably failed to carry out her and ILS's affirmative duty to facilitate Merrick's access to the courts.

2. ILS's Response to Merrick's Grievance Shows that the Additional Steps Required by the District Court Would Have Been Futile.

Even if it was appropriate to inquire as to what more Merrick could have done after ILS rejected his properly submitted Motion for Reconsideration, the District Court should still have found that Merrick acted with a sufficient level of diligence. Nothing in the record indicates that any of the steps the District Court suggested Merrick should have taken would have resulted in a different outcome; rather, the record shows that ILS persisted in its erroneous belief that Merrick was

ineligible to file his *pro per* Motion for Reconsideration long after the deadline lapsed. ER 232. At minimum, the District Court's contrary conclusion reflects its reading of the record in the light most favorable to ILS, rather than Merrick, and reversal is proper on that basis. But beyond that, a fair reading of the record suggests that no reasonable fact finder could conclude that any steps Merrick could have taken would have caused ILS to reverse its refusal to file his motion.

The District Court concluded that Merrick could have taken three steps to convince ILS to file his Motion for Reconsideration: (1) he could have "inform[ed] ILS that he no longer had counsel" when ILS returned his motion on November 8, ER 9; (2) he could have attempted to resubmit the motion on November 14, after ILS filed his separate Petition for Review, ER 9; and (3) he could have sought an extension of time from the Arizona Court of Appeals, ER 10. For the reasons that follow, there is no reason to believe that any of these tactics would have been successful.[6]

1. Given that Merrick emphasized he was "*pro per*" at least eight separate times when he first submitted his Motion for Reconsideration to ILS, informing ILS of that fact for a ninth time would have been futile. Merrick's Motion for Reconsideration was accompanied by an "Inmate Legal Request" form and a cover

[6] As a *pro per* inmate, Merrick had no other option but to go through ILS to file his motion. ER 223 ("Pro Per inmates are allowed free legal mail to the courts….This will be handled through *Inmate Legal Services*.").

letter. ER 228; ER 207. On the Inmate Legal Request Form, Merrick checked a box indicating that he was *pro per*, writing "since Oct. 30, 2012" next to it. ER 228. Below that, he indicated that his "Advisory counsel is/was" Tyrone Mitchell.[7] ER 228. And below that, he asked ILS to file "my pro-per motion for reconsideration." ER 228. Then, on his cover letter, he wrote that his submission was a "PRO-PER MOTION FOR RECONSIDERATION OF APPEAL." ER 207. He requested that one copy of the motion be mailed to his "Advisory Counsel," and he wrote "FROM: ANTHONY MERRICK, Pro-Per" at the bottom of the page. ER 207. Finally, the motion itself stated that Merrick was *pro per* on the first and last pages.[8] ER 208; ER 218. Despite all of these explicit statements that Merrick was filing *pro per*, however, ILS refused to file the motion and returned it to Merrick, inexplicably asserting: "inmate has an attorney." ER 228.

[7] The District Court concluded that Defendant Lillie's incorrect belief that Merrick was represented by counsel was somehow supported by this notation. ER 9 at n.7. That conclusion is belied by two facts: first, that Merrick underlined "was," indicating that whatever his relationship to Tyrone Mitchell was previously, that relationship was concluded; and second, that he referred to Mitchell as his "advisory counsel," suggesting that there was no attorney-client relationship. ER 228.

[8] ILS has acknowledged that it was aware that Merrick had permission to file his supplemental brief on appeal *pro per*. ER 52. There was no basis on which ILS could have reasonably concluded that Merrick somehow had permission to file a *pro per* supplemental brief, yet could only file a counseled brief in support of reconsideration of the resulting order. If anything, the reverse would have been far more likely—that a litigant would have counsel in his direct appeal, but not in filing a discretionary Motion for Reconsideration of the resulting order.

Moreover, after receiving ILS's response, Merrick filed a grievance with the prison on the same day.[9] ER 230. In that grievance, he stated he had no attorney and that he was filing *pro per*. ER 230. He asserted: "I.L.S. returned my pro-per motion stating they wouldn't process it because I had an attorney. I HAVE NO ATTORNEY!!! This is filed pro-per. I am being denied access to the court and my right to Appeal my case."[10] ER 230. A prison officer received the grievance the next day and apparently forwarded it to Lillie, who responded on November 14—the day Merrick's Motion for Reconsideration was due. ER 230. Defendant Lillie's response indicated that the "Petition for Review"—a different document, filed with the Arizona Supreme Court—had been filed. ER 230. On November 20, Merrick appealed the grievance, once again stating that he "was not allowed to file a Pro-Per Motion for Reconsideration of my appeal with the Arizona Court of Appeals . . . This grievance is about the Motion for Reconsideration. This matter has not been

[9] Merrick testified during his deposition that he attempted to write to the court and contact his former counsel to inform them that ILS would not allow him to file the motion, but his letter to the court was not mailed, and his former counsel did not respond. ER 107-08. In particular, he stated that his letter to the court "sat in a box in the hallway for about two weeks, and then I [saw] it when I was going to court. But then when it did, it came right back to me saying that they wouldn't send that out, that it had to go to my attorney." ER 108.

[10] In his grievance, Merrick indicated that he wanted the prison to "correct [its] policy to prevent any further injuries" as a remedy. ER 230. He later explained that the reason he sought that remedy instead of asking that his Motion be filed was that his experience with grievances was that they "took about a week" to resolve. ER 27. Thus, Merrick believed that by the time his grievance was resolved, his motion for reconsideration would be out of time. As it happened, it took significantly longer than a week for Merrick's grievance to be resolved. ER 234-35.

addressed." ER 231. On December 6, Captain Baumann responded to Merrick's latest grievance, stating: "You are wrong. The records prove that ILS filed the petition…" ER 232. Yet again, Merrick appealed the grievance stating: "The grievance was and is about: A MOTION FOR RECONSIDERATION with the Arizona Court of Appeals! NOT a petition for review with the Arizona Supreme Court." ER 233. Despite his efforts, it was not until January 3, 2013—approximately one and a half months after the filing deadline passed—that prison officials acknowledged, through an external referee, that ILS had wrongly failed to file Merrick's Motion for Reconsideration. ER 234-35.

Contrary to the District Court's conclusion, Merrick not only informed ILS that he was no longer represented by counsel, but he did so numerous times. Lillie's response to Merrick's grievance indicates that it would have been futile for him to have informed ILS of his *pro per* status an additional time, instead of filing a grievance. *See Fraley v. U.S. Bureau of Prisons*, 1 F.3d 924, 925 (9th Cir. 1993) ("Exhaustion is not required if pursuing those remedies would be futile.").

2. The same record evidence reveals that ILS would not have mailed Merrick's Motion for Reconsideration had he resubmitted it after ILS filed his *pro per* Petition for Review on November 14. First, on November 14, Lillie maintained that Merrick's documents were properly filed. ER 230. Second, even if Lillie would have somehow realized that the Motion for Reconsideration had not yet

been filed on November 14, there is no reason to believe that she would have concluded that Merrick's *pro per* status in connection with seeking discretionary review in the Arizona Supreme Court also meant that he was *pro per* in seeking direct review of his conviction in the Arizona Court of Appeals. *See Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (indigent defendants do not have a right to counsel on "discretionary appeal to the State Supreme Court").

3. There is even less reason to believe that ILS would have mailed a motion for extension of time on November 14. First, as discussed previously, there is no basis to conclude that Lillie would have reversed her position that Merrick had counsel in connection with his Motion for Reconsideration. Second, on that same day, Lillie maintained that Merrick had no outstanding documents requiring filing. ER 230. Thus, there was no likelihood that Lillie would have filed a motion for extension of time in connection with a motion that she was maintaining had already been filed.

Merrick stated multiple times in his initial request to ILS that he was acting *pro per*. ER 228. He also stated it repeatedly when he submitted and appealed his grievance concerning ILS's refusal to file his motion. ER 230; ER 231; ER 233. Nevertheless, ILS responded to his requests by stating that it would not file his motion because "you are not pro-per." ER 228. Further, ILS later refused even to acknowledge that the Motion for Reconsideration had never been filed. ER 232.

Based on these facts, it would be unreasonable to conclude that ILS would have filed Merrick's Motion for Reconsideration had he resubmitted it on November 8 or November 14, or had he submitted a motion for extension of time.

B. Lillie Intentionally Violated Merrick's Right of Court Access, but in Any Event, This Court Should Hold That Prison Officials May Be Held Liable For Negligent Infringement of the Right of Court Access.

Lillie argued, and the District Court held, that she was at most negligent in failing to file Merrick's Motion for Reconsideration. ER 7 at 21-24. However, considering that her refusal to file Merrick's Motion for Reconsideration came after he indicated multiple times and with abundant clarity that he was *pro per*, a fact finder should instead conclude that her actions were intentional. And in any event, this Court should conclude that negligent actions that result in a denial of access to courts also violate the Constitution.[11]

1. Defendant Lillie Acted Intentionally When She Refused to Mail Merrick's Motion for Reconsideration.

Courts have held that deliberate actions by a prison official satisfy the intent requirement, even where the prison official lacked a malicious motive. *Simkins v. Bruce*, 406 F.3d 1239, 1242 (10th Cir. 2005) (An access to courts claim "requires [plaintiff] to allege intentional conduct interfering with his legal mail, and does not

[11] The District Court did not make a determination as to whether negligence was sufficient to constitute "active interference" in an access to courts claim. ER 8. It noted, however, that courts are divided as to the requisite state of mind. ER 7.

require an additional showing of malicious motive."); *Simmons v. Dickhaut*, 804 F.2d 182, 184 (1st Cir. 1986) (prisoner "alleged facts adequate to show an intentional deprivation of his right of access" when he requested his legal materials three times before he was told he could pick them up, at which point the material was missing). Similarly, the Fifth Circuit has distinguished between legal mail that was inadvertently lost and mail that was "deliberately withheld," even if the withholding did not entail the specific intent to interfere with a plaintiff's access to courts.[12] *Compare Richardson v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988) (prison officials did not violate inmate's access to courts when they lost two pieces of his mail) *with Jackson*, 789 F.2d at 311 ("the mail officers deliberately held up [plaintiff's] mail when they should reasonably have known that the delay would deprive him of his right of access to the courts"). Or, as the Sixth Circuit explained, a constitutional violation occurs when a defendant "intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it." *Lawler v. Marshall*, 898 F.2d 1196,

[12] In the context of Eighth Amendment prison conditions claims, courts have similarly held that deliberate acts satisfy the intent element, even absent an intent to harm. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) ("the cases are…clear that it [deliberate indifference] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result."); *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir.1988) (prisoner may show deliberate indifference to serious medical needs by actions that delay or deny medical treatment, as well as by intentional interference with medical treatment) (citing *Estelle*, 429 U.S. at 104-05).

1199 (6th Cir. 1990) (quoting *Nishiyama v. Dickson Cnty., Tenn.*, 814 F.2d 277, 282 (6th Cir. 1984)).

For the same reason, courts have held that policies that have the foreseeable effect of impeding prisoners' access to courts violate the Constitution, even if they were not adopted in order to impede litigation. *See*, *e.g.*, *Myers v. Hundley*, 101 F.3d 542, 545 (8th Cir. 1996) (general prison policy affording inmates only $7.70 per month was sufficient to show prejudice after inmate missed court deadlines because he could not afford stamps); *Gramegna*, 846 F.2d at 677 ("practice of allowing mail to accumulate before forwarding it to the prisoners unconstitutionally infringes on their right of access to the courts"); *Ripp v. Nickel*, 838 F. Supp. 2d 861, 864-65 (W.D. Wis. 2012) (Defendant violated inmate's access to courts by refusing to provide him with postage; defendant's refusal was not based on malicious intent, but rather a state statute that placed a monetary limit on inmate legal loans); *Bovarie v. Tilton*, No. 06CV687JLS (NLS) 2008 WL 761853 at *1 n.2, *5 (S.D. Cal. Mar. 19, 2008) (prison officials acted with gross negligence and deliberate indifference when they implemented policies that limited inmate access to the prison law library).

Accordingly, Lillie possessed the requisite mindset when she intentionally refused to file Merrick's Motion for Reconsideration. Merrick explicitly and repeatedly stated that he was *pro per* in his initial request to ILS, as well as in all

three formal grievances that he filed after his initial request was denied. ER 228, 230-31, 233. Likewise, Merrick repeatedly stated in his grievances that the Motion for Reconsideration was a separate document from his Petition for Review. ER 233. ILS responded to these statements and requests with assertions including "you are not pro-per" and "you are wrong." ER 228; ER 232. Thus, although Lillie may not have acted with malicious intent, she acted intentionally in refusing to mail Merrick's Motion for Reconsideration despite his clear and repeated indications that he was not represented by counsel. At minimum, the evidence, construed in the light most favorable to Merrick, does not permit the holding that no reasonable fact finder could conclude that Lillie acted intentionally.

2. This Court Should Conclude that Negligent Actions May Still Violate Prisoners' Right of Court Access.

In any event, this Court should hold that prison employees' negligent actions may unconstitutionally burden prisoners' access to courts. This is so because states have "affirmative obligations to assure all prisoners meaningful access to the courts." *Bounds*, 430 U.S. at 824. Thus, it is immaterial whether a prison official desires to prevent an inmate from pursuing his appeal if the effect of the official's actions precludes that inmate from accessing the courts. *See Dorn v. Lafler*, 601 F.3d 439, 444 (6th Cir. 2010) (finding it "irrelevant" that prison officials did not intentionally suppress plaintiff's legal papers). Accordingly, "[r]egardless of the *mens rea* or motive of the state official, any deprivation of meaningful access to

the courts violates the Constitution—provided an actual injury results. This right of access is fundamental." *Ruiz v. Laguna*, No. 05CV1871WQH 2007 WL 1120350 at *26 (S.D. Cal. Mar. 28, 2007).

Although the Ninth Circuit has held negligence to be insufficient in establishing constitutional rights violations in other contexts, access to courts claims warrant a different standard. *Stevenson v. Koskey*, 877 F.2d 1435, 1441 (9th Cir. 1989) (probation officer permitting a guard to "thumb through" legal documents in an envelope did not rise to the level of intent constitutionally required for section 1983 liability). First, the right of court access is based at least in part in the First Amendment, and not solely in the Due Process Clause. *Lewis*, 518 U.S. at 404-05 ("Within the residuum of liberty retained by prisoners are freedoms identified in the First Amendment to the Constitution: . . . freedom to petition their government for a redress of grievances."). Thus, *Daniels v. Williams*, which held that more than negligence was required to state a Due Process violation for injury to life, liberty, or property—and on which the *Stevenson* court relied—does not apply in the context of the right of court access. 474 U.S. 327 (1986). Second, the importance of an inmate's preservation of his access to courts cannot be overstated, because it is "his most fundamental political right, because [it is] preservative of all rights." *Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring in the judgment); *see also Chambers v. Baltimore & Ohio Ry. Co.*,

207 U.S. 142, 148 (1907) ("right to sue…is the right conservative of all other rights, and lies at the foundation of orderly government"). The importance of providing meaningful access to courts is reflected in the Supreme Court's holding that prison officials have affirmative obligations to ensure this right. *Bounds*, 430 U.S. at 828. In view of the importance of this right, which prisons affirmatively owe to inmates, a negligence standard is appropriate.

Finally, even if this Court concludes both that, construing the evidence in the light most favorable to Merrick, Lillie did not act intentionally, and that more than negligence is required to state a court access claim, it should nonetheless permit liability because the record supports the conclusion that Lillie acted with gross negligence or reckless indifference. Even those courts that have held that negligence is insufficient to support a court access claim have left open the possibility of claims based on gross negligence or other standards short of intentionality. *E.g.*, *Scheeler v. City of St. Cloud*, 402 F.3d 826, 831 (8th Cir. 2005) (requiring plaintiffs to show "deliberate indifference to their right to access the courts"); *Snyder*, 380 F.3d at 291 n.11 ("an allegation of simple negligence" will not sustain a court access claim, but proceeding to analyze complaint because it "cannot be characterized fairly as alleging mere negligence"); *Crawford-El v. Britton*, 951 F.2d 1314, 1318 (D.C. Cir. 1991) (at minimum, showing of "deliberate indifference" to right of court access would overcome qualified

immunity); *see also Daniels*, 474 U.S. at 334 n.3 (declining to decide whether "recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause").

Thus, this Court should hold that Lillie's official acts hindered Merrick's ability to litigate his case, and that she acted with the requisite state of mind.

C. The District Court Erred in Determining that Merrick's Motion For Reconsideration Contained No Nonfrivolous Claims.

The District Court erred in concluding that Merrick failed to show that his Motion for Reconsideration was not frivolous. The District Court concluded that Merrick "present[ed] no evidence demonstrating that the Court of Appeals would have considered issues that [he] had previously raised," ER 10, apparently relying on Lillie's argument that Merrick's motion "simply asked the Arizona Court of Appeals to reconsider the arguments that [he] already made in his Supplemental Opening Brief." ER 10.

1. Courts Have Established a Low Threshold for Demonstrating a Claim Is Nonfrivolous.

To begin, the District Court erred in requiring Merrick to show that "the Court of Appeals would have considered" the issues he raised in his motion.[13] Instead, very little is required to show loss of a nonfrivolous underlying claim; a

[13] Presumably, the District Court was referring to the likelihood that the Arizona Court of Appeals would grant reconsideration, rather than the likelihood it would rule on Merrick's motion one way or the other.

plaintiff "need not show, ex post, that he would have been successful on the merits had his claim been considered." *Allen v. Sakai*, 48 F.3d 1082, 1085 (9th Cir. 1994). A plaintiff need show only that the "nature of the underlying claim is more than hope." *Harbury*, 536 U.S. at 416. As this Court explained in *Allen*, to hold otherwise "would permit prison officials to substitute their judgment for the courts' and to interfere with a prisoner's right to court access on the chance that the prisoner's claim would eventually be deemed frivolous." 48 F.3d at 1091; *see also Lewis*, 518 U.S. at 353 n. 3 ("Depriving someone of an arguable (though not yet established) claim inflicts actual injury because it deprives him of something of value—arguable claims are settled, bought, and sold."); *Walters v. Edgar*, 163 F.3d 430, 434 (7th Cir. 1998) (plaintiffs need not prove they would have won underlying case to establish injury arising from denial of access to courts because "even if the claim, had it been pressed to judgment, would have failed, there is always a chance, provided the claim is not frivolous, that it would have been settled before then"); *Smith v. Shawnee Library Sys.*, 60 F.3d 317, 322 (7th Cir. 1995) ("The right of access allows prisoners to raise their voices in the courts; otherwise they would be at the whim of prison officials."). Thus, the Sixth Circuit has appropriately held that plaintiffs are entitled to a presumption of prejudice when prison officials deny them access to the courts. *Dorn*, 601 F.3d at 445

(discussing analogous presumption in context of denial of effective assistance to counsel, and citing *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000)).

Where a plaintiff seeks to invoke a court's discretionary jurisdiction, the plaintiff need not establish any particular quantitative likelihood that the court would have chosen to exercise its jurisdiction by accepting the case. Thus, in *Gentry v. Duckworth*, the court held that the defendant prison official was not entitled to summary judgment on a prisoner's court access claim where the fact that the Indiana Court of Appeals could waive the inmate's procedural defaults meant that court "would not necessarily have refused to hear the merits of Gentry's petition for post-conviction relief." 65 F.3d 555, 559 (7th Cir. 1995) ("[p]rejudice to the right of access to the courts occurs whenever the actions of a prison official causes court doors to be actually shut on a complaint"); *see also Hamilton v. McDaniel*, 408 Fed. Appx. 86, 88 (9th Cir. 2011) (finding attorney's failure to consult with defendant regarding his appeal "causes prejudice when it is reasonably probable that the defendant would have appealed but for his counsel's failure to consult with him"). Here, Merrick's Motion for Reconsideration requested the court to exercise its discretion and revisit its decision based on alleged errors of fact and law. And, as discussed below, the motion contained nonfrivolous arguments. Accordingly, as in *Gentry*, summary judgment was

improper because Lillie precluded the Court of Appeals from determining whether there was any basis to reconsider its opinion.

2. The District Court Failed to Substantively Consider Merrick's Nonfrivolous Arguments that the Arizona Court of Appeals Erred in Determinations of Law and Fact Because It Misapprehended the Arizona Rule Governing Motions for Reconsideration.

Lillie, as the moving party, was required to highlight the issues of material fact over which there was no dispute. Fed. R. Civ. P. 56(c); *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986) (the moving party bears the responsibility of informing the district court of the basis for its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact). However, Lillie's motion for summary judgment dedicated just over one page to arguing the many errors of law and fact that Merrick alleged were frivolous, and addressed none of the arguments on a substantive basis. ECF No. 41. Instead, Lillie argued only that Merrick's motion was repetitive of his supplemental opening brief. *Id.* For support, Lillie generated a chart that purported to show that Merrick's Motion for Reconsideration contained no nonfrivolous arguments because it presented no new law or facts. ER 197-99. The District Court appeared to have been persuaded by the chart, stating "Defendant offers a chart demonstrating that Plaintiff presented no new law or facts that would have justified reconsideration of the Court of Appeals' order," ER 10, and then concluding in a

single sentence that "Plaintiff presents no evidence demonstrating that the Court of Appeals would have considered issues that Plaintiff had previously raised." ER 10.

The District Court erred by focusing primarily on whether or not Merrick's arguments were repetitive, when that was not the relevant question under Arizona law. Motions for reconsideration are governed by Rule 31.18 of the Arizona Rules of Criminal Procedure, which requires only that "[a] motion for reconsideration shall be directed solely to discussion of those specific points or matters in which it is claimed the appellate court has erred in determination of facts or law." Significantly, Rule 31.18(d) does not require *new* law or facts but instead requires articulation of *alleged errors* of law or fact. And, consistent with the text of Rule 31.18(d), Merrick argued that the Court of Appeals decision contained twenty-one errors of facts or law.[14]

Perhaps because of the District Court's attention to Lillie's chart rather than the language of the rule, that court failed to analyze—much less liberally construe—the many errors of fact and law Merrick alleged. *Bretz v. Kelman,* 773

[14] The Committee Comment to the 1997 amendments to Rule 31.18 states "[m]otions for reconsideration should not simply reargue issues already fully briefed by the parties and addressed by the decision." However, that same comment also explains that parties may "inform the court of factual errors in its decision, order, or opinion or identify court decisions, statutes, or regulations that the party believes the court has overlooked…[s]uch motions can also be used to address an issue that was raised by the court in its decision without the parties having fully briefed that issue previously." Ariz. R. Crim. P. 31.18, cmt. (1997).

F.2d 1026, 1027 (9th Cir. 1985) ("Where a plaintiff is proceeding *pro se*, particularly when pleading a civil rights claim, the Court 'has an obligation to construe the pleading liberally and to afford the petitioner the benefit of any doubt.'") (citing *Jones v. Cmty. Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984)).

Had the District Court employed the correct standard under Rule 31.18 and substantively analyzed the errors of law and fact Merrick alleged in his Motion for Reconsideration, rather than relying on Lillie's characterization of them, it would have concluded summary judgment was improper. These flaws in the District Court's analysis, standing on their own, merit remand for application of the correct standard. However, for the reasons discussed below, this Court could also find that, on its face, Merrick's Motion for Reconsideration included at least one nonfrivolous argument.[15] In addition, Merrick argued numerous factual errors, and neither Lillie nor the District Court suggested there was any basis for concluding that those arguments were frivolous.

[15] This is not to imply that the other arguments in Merrick's Motion for Reconsideration were frivolous. To the contrary, many of those arguments rely on trial evidence or motions that were not before the District Court. Because the District Court therefore could not have concluded that those arguments were frivolous on the record before it at summary judgment, this provides another reason to reverse the District Court's grant of summary judgment to Lillie.

i. Merrick Alleged a Nonfrivolous Error of Law Regarding the Court of Appeals' Application of Ariz. Rev. Stat. § 41-1493.01.

Merrick raised a nonfrivolous claim in his Motion for Reconsideration when he argued that the Arizona Court of Appeals erred in determining that Ariz. Rev. Stat. ("A.R.S.") § 41-1493.01, Arizona's Free Exercise of Religion Act ("FERA"), was available only to government employees and could not be invoked as a defense to a criminal charge. Merrick asserted that "the Court erred in stating that A.R.S. § 41-1493.01 [only] applies to an employee of State Government and is not a defense to criminal conduct." ER 212 (brackets in original).

The plain language of A.R.S. § 41-1493.01 makes no mention of limiting its application to persons employed by the state or other governmental entities, nor does it provide that it may not be used as a defense to criminal conduct. The statute explicitly permits any person to assert a violation of free exercise as a claim or defense: "A person whose religious exercise is burdened in violation of this section may assert that violation as a claim *or defense* in a judicial proceeding and obtain appropriate relief against a government." A.R.S. § 41-1493.01(d) (emphasis added).[16] Furthermore, the Court of Appeals overlooked a controlling opinion by the Arizona Supreme Court which stated "religious exercise may provide a valid

[16] "Person" is defined in the statute as including "a religious assembly or institution." A.R.S. § 41-1493(5). If religious institutions are covered under the statute, it follows that all individuals, not just employees of the government, are covered under the statute.

defense under A.R.S. § 41-1493.01."[17] *State v. Hardesty*, 214 P.3d 1004, 1010 (2009); ER 178-79.

Because A.R.S. § 41-1493.01 unambiguously states that any person may assert the burdening of religious exercise in violation of the statute as a claim or defense, Merrick presented a nonfrivolous argument that the Court of Appeals erred in interpreting A.R.S. § 41-1493.01.

ii. Merrick's Motion For Reconsideration Presented a Nonfrivolous Argument that the Court of Appeals Made Factual Errors.

Merrick also moved to reconsider based on a number of alleged factual errors. For example, Merrick argued that the Court of Appeals erred by conflating the Fundamental Christian Temple with the Christian Temple Church. ER 211. This was relevant because the Court of Appeals rejected Merrick's argument that certain evidence should have been excluded based on clergy-penitent privilege, ER 176, based in part on its conclusion that the "Fundamental Christian Temple" "did not exist" at the relevant time, and that therefore "McFarland was not then an ordained member of the church." ER 176. Construed liberally, Merrick argued in

[17] A party that asserts a religious exercise defense under A.R.S. § 41-1493.01 must establish three elements: 1) that an action or refusal to act is motivated by a religious belief, 2) that the religious belief is sincerely held, and 3) that the governmental action substantially burdens the exercise of religious beliefs. *Hardesty*, 214 P.3d at 1007. However, analysis of the three elements is not necessary at this stage because Merrick is only required to put forth a colorable argument that the Court of Appeals erred in determination of the law.

his Motion for Reconsideration that this premise was incorrect because the Christian Temple Church—as opposed to the Fundamental Christian Temple—in fact did predate the events giving rise to his underlying conviction. ER 211. Thus, Merrick pointed to specific facts that the Court of Appeals may have misapprehended, provided citations to the record, and argued this alleged factual error led the Court of Appeals to an erroneous conclusion regarding the applicability of the clergy-penitent privilege to communications between Merrick and McFarland.[18] ER 210-11. In addition, Merrick argued several related errors, including that the Court of Appeals improperly determined the "truth" of Merrick's religious beliefs, rather than limiting itself to assessing his sincerity. ER 210-11; *see also United States v. Ballard*, 322 U.S. 78, 87 (1944) (fact finder may not assess "truth or falsity" of religious beliefs).

Thus, Lillie did not—and could not—establish that Merrick's Motion for Reconsideration included only frivolous arguments, and the District Court erred in drawing the contrary conclusion.

[18] The Court of Appeals held the trial court did not abuse its discretion when it admitted telephone recordings with McFarland and letters addressed in legal mail to McFarland, despite Merrick's claim that they were privileged communications between clergy and penitent. ER 177.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S RELIGIOUS FREEDOM CLAIMS BECAUSE PLAINTIFF PLEADED FACTS SUFFICIENT TO SHOW THAT HIS SINCERE RELIGIOUS PRACTICE WAS SUBSTANTIALLY BURDENED.

The District Court held that Merrick's complaint failed to state a claim under either RLUIPA or FERA (Arizona's Free Exercise of Religion Act) for three reasons: first, that he did not "allege facts demonstrating that the practice of his religion was substantially burdened by Defendants' policies or that he was prevented from engaging in a sincerely held religious belief," ER 17; second, that he "has not alleged facts demonstrating that the Jail's phone policies were enforced without a legitimate penological purpose," ER 17; and third, that his "credibility as well as the sincerity of his beliefs are cast into severe doubt" by his underlying conviction. ER 17. The District Court's conclusion that Merrick's complaint did not allege a substantial burden on sincere religious exercise reflects its failure to liberally construe the complaint at the screening stage and draw all inferences in favor of Merrick. And the District Court's remaining two conclusions misstated the relevant burden, and inappropriately drew a factual conclusion at the complaint stage. Finally, the District Court did not address Merrick's Establishment Clause claim, and so that claim should be remanded for the District Court to address in the first instance.

A. Merrick Pleaded Sufficient Facts Showing that Denial of Unmonitored, Unrecorded Phone Calls With His Clergy Substantially Burdened His Religious Practices.

To state a claim under RLUIPA, a plaintiff need only allege that the Government substantially burdened the practice of the plaintiff's sincerely held religious belief. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (RLUIPA plaintiff bears the "initial burden of proving" that prison policy "implicates his religious exercise" and that the policy "substantially burdened that exercise of religion."); *Warsoldier v. Woodford*, 418 F.3d 989, 994-95 (9th Cir. 2005) (RLUIPA prima facie claim requires plaintiff to show "substantial burden on the exercise of his religious beliefs"); *Lindell v. McCallum*, 352 F.3d 1107, 1110 (7th Cir. 2003); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014).[19] If the plaintiff satisfies this burden, then the government must show that its policies further "a compelling governmental interest" using the "least restrictive means" possible. *Warsoldier*, 418 F.3d at 995. Courts must broadly construe RLUIPA in favor of protecting an inmate's right to exercise his religious beliefs. *Holt*, 135

[19] *Burwell* involved a claim under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb, the predecessor to RLUIPA. RFRA prohibited the "Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government "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(a), (b). RLUIPA amended RFRA's definition of the "exercise of religion" and imposes the same general test as RFRA but on a more limited category of governmental actions. *See Cutter v. Wilkinson,* 544 U.S. 709, 715-16 (2005).

S.Ct. at 860 ("[s]everal provisions of RLUIPA underscore its expansive protection for religious liberty . . . Congress mandated that this concept 'shall be construed in favor of a broad protection of religious exercise'") (citing 42 U.S.C. § 2000cc-3(g)). Similarly, to state a claim under FERA, A.R.S. § 41-1493.01(c), a plaintiff must establish "(1) that an action or refusal to act is motivated by a religious belief, (2) that the religious belief is sincerely held, and (3) that the governmental action substantially burdens the exercise of religious beliefs." *Hardesty*, 214 P.3d at 1007.[20]

The District Court's conclusion seemed to rest primarily on Merrick's representations that, in response to his request for private confessional phone calls, prison employees instead offered alternatives—in-person visits from Merrick's clergy, the opportunity to write to his clergy, or private confession with clergy of other faiths who visited the jail. Thus, the district court concluded that Merrick "expressed a personal preference for his personal clergy but has not demonstrated interference with his sincerely held religious beliefs." ER 17.

The District Court's conclusion was flatly inconsistent with Merrick's complaint. Merrick alleged that, in suggesting that he consult with a clergyperson

[20] FERA is substantially identical to RFRA and follows the same analysis. *See Hardesty*, 214 P.3d at 1007. The Supreme Court's interpretation of RFRA, although technically not binding regarding Arizona Supreme Court's interpretation of FERA, provided persuasive authority when Arizona Supreme Court interpreted FERA in *Hardesty*.

of a different religion, the Defendants "sponsor[ed] and enforce[d] what they felt were acceptable religious practices in the jail and denied plaintiff his beliefs and practices." ER 268. In addition, Merrick alleged that "it was his religious practice and beliefs to confess, seek spiritual advice and obtain counseling from his clergy only. He could not do this with persons of another faith." ER 268. Finally, even if in-person confession with his own clergy would satisfy Merrick's religious obligations, Merrick alleged that his clergy was in Oklahoma, ER 263, making in-person visits impractical. There is no plausible way to read these statements except as alleging that Merrick's religious beliefs required—rather than entailed a mere preference for—confession and spiritual advice only from Merrick's own clergy.

Moreover, even if the District Court's reading of Merrick's complaint were not factually foreclosed, the Supreme Court recently held that the availability of some ways of practicing a religion does not excuse the imposition of substantial burdens on others: "RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise . . . not whether the RLUIPA claimant is able to engage in other forms of religious exercise." *Holt*, 135 S. Ct. at 862. Thus, even in a scenario where a religious adherent could participate in confessions with a clergy of a different faith, a RLUIPA claim alleging a substantial burden associated with the denial of opportunities to confess to one's own clergy would not be foreclosed.

Finally, there is no alternative argument that would support the District Court's conclusion that Merrick did not adequately plead that his religious exercise was substantially burdened. Although RLUIPA does not define "substantial burden," the Supreme Court in *Holt* stated that a plaintiff sufficiently pleaded such a burden by alleging that prison policy required him "to 'engage in conduct that seriously violates [his] religious beliefs.'" *Id.* (alteration in original) (quoting *Hobby Lobby*, 134 S. Ct. at 2775). Similarly, this Court has stated that a substantial burden exists when "the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008); *see also Warsoldier*, 418 F.3d at 995 (a prison policy requiring all male inmates to maintain hair no longer than three inches substantially burdened American Indian inmate's exercise of religion because it coerced him to violate his religious beliefs under threat of punishment). That principle applies no less in cases like this one, where Merrick alleged that jail policies resulted in defendants' refusal to accommodate his religious exercise. *See, e.g.*, *Shakur v. Schriro*, 514 F.3d 878, 879 (9th Cir. 2008) (RLUIPA imposes an affirmative duty on prison officials to provide religious accommodations where the failure to do so harms the inmate's religious experience, so Muslim inmate was entitled to a Halal meat diet, rather than a

vegetarian diet that gave inmate indigestion); *see also Holt*, 135 S. Ct. at 860 (RLUIPA "allows prisoners 'to seek religious accommodations'" and "'may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.'" (quoting *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) and 42 U.S.C. § 2000cc-4(c))); *LaPlante v. Mass. Dep't of Corr*, 89 F. Supp. 3d 235, 244 (D. Mass. 2015) (policy of scheduling prayer during two-hour block on Sundays, rather than around phases of the moon, as mandated by Wiccan faith, substantially burdened Wiccan inmate's religious exercise); *Hudson v. Dennehy*, 538 F. Supp. 2d 400, 412 (D. Mass. 2008) (ban on Muslim inmates' participation in obligatory weekly group prayer services while in separate confined housing unit substantially burdened inmates' practice of core tenet of their faith).

Here, Merrick asserted that private confessional calls were a "requirement of his religious practices (confession, spiritual guidance, and counseling)." ER 263. He also alleged that these actions resulted in injury because he "believes GOD has punished him and will do so later," including in connection with his criminal case,[21] ER 263, that he suffered "alienation from his friends, family and church members," ER 264, and that he "felt pressured to change his beliefs and practices

[21] Merrick wrote that "Plaintiff[']s court case had a negative ending and Plaintiff wasn't able to get spiritual guidance and counseling on witnesses and evidence that he was not able to use in the criminal case." ER 263.

to ones that the jail would allow." ER 267. Finally, he alleged that prison employees "compelled, coerced, encouraged, influenced and pressured [Merrick] to modify his behavior and to abandon his religious beliefs, conscience and practices and to accept the religious practices and faith defendants offered." ER 268. Thus, Merrick's complaint alleges (1) that prison employees refused to consider accommodating his religious exercise by permitting him to engage in unmonitored and unrecorded confessional phone calls, (2) that these phone calls were a component of his religious exercise, and (3) that he believes that serious religious consequences will follow. These allegations should have been sufficient to survive the screening stage; indeed, the complaint in *Holt* was not substantially more detailed. Complaint, Holt v. Hobbs, 5:11-cv-00164 (June 28, 2011) (alleging, in relevant part, that plaintiff "is a devout, fundamentalist Muslim who follows the Salaf and the Sunnah of the Prophet Muhammad (saws), in which it is stated that . . . one clip the mustaches short and leave the beard as it is.") (emphasis in original).[22] Accordingly, the District Court erred in dismissing plaintiff's claims related to religious exercise at the screening stage, and should have required

[22] In his complaint, Holt also cross-referenced a motion for a preliminary injunction, filed on the same day. However, that document did not add to Holt's description of how his religious exercise was burdened by the prison's facial hair policy, stating only that "Plaintiff is a devout, fundamentalist Muslim . . . One of Plaintiff's beliefs is that he is required to grow his beard as laid out in the hadith and the Sunnah of the Prophet Muhammad (saws)." Motion for Preliminary Injunction, Holt v. Hobbs, 5:11-cv-00164 (June 28, 2011).

Defendants to answer Plaintiff's complaint.

B. The District Court Erred By Concluding at the Screening Stage that Merrick Was Insincere in His Religious Beliefs.

Once the District Court concluded that Merrick had not pleaded sufficient facts to establish a substantial burden, it compounded the error by concluding that "Plaintiff's credibility as well as the sincerity of his beliefs are cast into severe doubt by his conviction in Maricopa County Superior Court." ER 17.

The sincerity element of a RLUIPA claim is a question of fact. *Mosler v. Maynard*, 937 F.2d 1521, 1526 (10th Cir. 1991) ("Whether religious beliefs are sincerely held is a question of fact."); *see also United States v. Seeger*, 380 U.S. 163, 185 (1965) ("question of sincerity" of conscientious objector's religious beliefs "is, of course, a question of fact"). And it is axiomatic that at the pleading stage, the court must take as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *Silva*, 658 F.3d at 1101; *Wilhelm v. Rotman*, 680 F.3d 1113, 1116 n.1 (9th Cir. 2012) (at the screening stage, the court "accept[s] . . . as true" "the stated facts . . . from [plaintiff's] complaint"). Accordingly, the District Court erred in weighing evidence and determining Merrick's credibility at the pleading stage.

Moreover, in reaching this conclusion, the District Court relied on a portion of the Arizona Court of Appeals decision affirming Merrick's conviction. ER 18

(quoting the Arizona Court of Appeals' conclusion that Merrick's communications "did not evince a 'human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return"). But, as discussed above, Merrick alleged that the Court of Appeals decision contained many errors in fact and law related to the role that his religious exercise played before the trial court. Accordingly, if this Court reverses the District Court's grant of summary judgment on Merrick's court access claim, that provides an additional, independent reason to reject the district court's premature factual finding as to Merrick's sincerity.

C. The District Court Erred By Requiring Merrick to Disprove at the Complaint Stage that Prison Policies Burdening His Religious Practices Served a Legitimate Penological Purpose.

Finally, the District Court erred in dismissing Merrick's religious freedom claims based on its conclusion that he had "not alleged facts demonstrating that the Jail's phone policies were enforced without a legitimate penological purpose," ER 17, because a prima facie case under RLUIPA does not require such an allegation. As discussed in Section II.A, a plaintiff can make out a prima facie RLUIPA claim by showing only a substantial burden on a sincere religious belief. Thus, as to a RLUIPA claim in a similar posture to this case, the Seventh Circuit held that dismissal of RLUIPA complaint at screening stage was improper where the plaintiff alleged a substantial burden on a sincere religious belief, observing that

"Wisconsin prison authorities may be able to demonstrate a compelling interest . . . [but] they have made no attempt to do this, the case having been dismissed without any submission by the defendants." *Lindell*, 352 F.3d at 1110. This case is no different; it is Defendants, not Merrick, who must advance a compelling government interest justifying the substantial burden on Merrick's sincere religious beliefs.

D. This Court Should Remand Merrick's Establishment Clause Claim so that the District Court Can Address It in the First Instance.

In addition to his free exercise claims, Merrick also pleaded that the Defendants violated the Establishment Clause by telling him that, in lieu of private confessional calls with his own clergy, he could or should practice his religion in another way or with clergy of another faith. ER 267-68 (indicating that Count III of his Complaint concerned "Establishment of Religion," and alleging that Defendant Wade "told plaintiff confessions are done anonymously and he doesn't have to have one of his faith"; that Defendant Garcia "told Plaintiff . . . Plaintiff could use MCSO clergy"; that Defendant Chaplain Paul "said the Diocese doesn't allow confessions over the phone, but Plaintiff could . . . get counseling from the two priests of another faith"). Further, Merrick alleged that "Defendants compelled, coerced, encouraged, influences and pressured plaintiff to modify his behavior and to abandon his religious beliefs, conscience and practices and to accept the

religious practices and faith defendants offered." ER 268; *see also Lee v. Weisman*, 505 U.S. 577, 591-92 (1992) ("in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce"); *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (one "principal way[]" in which government can "run afoul" of Establishment clause is "government endorsement or disapproval of religion").

The District Court dismissed Merrick's Establishment Clause claim in its screening order. ER 20 (dismissing Count III). Yet, in contrast to the other claims and defendants that the Court dismissed, it did not discuss its reasons for doing so, ER 16-18, raising the possibility that the Court may have overlooked Merrick's Establishment Clause claim. Accordingly, this Court should remand so that the District Court can consider the sufficiency of Merrick's claim in the first instance, and consider permitting him to amend his complaint if necessary.

CONCLUSION

For the foregoing reasons, the decisions of the District Court should be reversed and this case should be remanded. This Court should direct entry of summary judgment for Merrick on the court access claim, or in the alternative should instruct the District Court to proceed with trial. In addition, this Court should remand Merrick's religious freedom claims for further proceedings.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Merrick states that there are no cases pending in this Court that satisfy the definition of "related case" under Ninth Circuit Rule 28–2.6.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,724 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface, using 14 point Times New Roman and Microsoft Word.

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CERTIFICATE OF SERVICE

When All Case Participants Are Registered for the Appellate CM/ECF System

U.S. Court of Appeals Docket Number: 15-15338

I hereby certify that on November 20, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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STATUTORY ADDENDUM

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42 U.S.C.A. § 2000cc-1

§ 2000cc-1. Protection of religious exercise of institutionalized persons

Effective: September 22, 2000

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal

42 U.S.C.A. § 2000cc-2

§ 2000cc-2. Judicial relief

Effective: September 22, 2000

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would

not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C.A. § 2000cc-3

§ 2000cc-3. Rules of construction

Effective: September 22, 2000

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall--

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

42 U.S.C.A. § 2000cc-4

§ 2000cc-4. Establishment Clause unaffected

Effective: September 22, 2000

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

42 U.S.C.A. § 2000cc-5

§ 2000cc-5. Definitions

Effective: September 22, 2000

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the

authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

A.R.S. § 41-1493

§ 41-1493. Definitions

Effective: July 29, 2010

In this article, unless the context otherwise requires:

1. "Demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

2. "Exercise of religion" means the ability to act or refusal to act in a manner substantially motivated by a religious belief, whether or not the exercise is compulsory or central to a larger system of religious belief.

3. "Government" includes this state and any agency or political subdivision of this state.

4. "Nonreligious assembly or institution" includes all membership organizations, theaters, cultural centers, dance halls, fraternal orders, amphitheaters and places of public assembly regardless of size that a government or political subdivision allows to meet in a zoning district by code or ordinance or by practice.

5. "Person" includes a religious assembly or institution.

6. "Political subdivision" includes any county, city, including a charter city, town, school district, municipal corporation or special district, any board, commission or agency of a county, city, including a charter city, town, school district, municipal corporation or special district or any other local public agency.

7. "Religion-neutral zoning standards":

(a) Means numerically definable standards such as maximum occupancy codes, height restrictions, setbacks, fire codes, parking space requirements, sewer capacity limitations and traffic congestion limitations.

(b) Does not include:

(i) Synergy with uses that a government holds as more desirable.

(ii) The ability to raise tax revenues.

8. “Suitable alternate property” means a financially feasible property considering the person’s revenue sources and other financial obligations with respect to the person’s exercise of religion and with relation to spending that is in the same zoning district or in a contiguous area that the person finds acceptable for conducting the person’s religious mission and that is large enough to fully accommodate the current and projected seating capacity requirements of the person in a manner that the person deems suitable for the person’s religious mission.

9. “Unreasonable burden” means that a person is prevented from using the person’s property in a manner that the person finds satisfactory to fulfill the person’s religious mission.

A.R.S. § 41-1493.01

§ 41-1493.01. Free exercise of religion protected

A. Free exercise of religion is a fundamental right that applies in this state even if laws, rules or other government actions are facially neutral.

B. Except as provided in subsection C, government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.

C. Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person is both:

1. In furtherance of a compelling governmental interest.

2. The least restrictive means of furthering that compelling governmental interest.

D. A person whose religious exercise is burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. A party who prevails in any action to enforce this article against a government shall recover attorney fees and costs.

E. In this section, the term substantially burden is intended solely to ensure that this article is not triggered by trivial, technical or de minimis infractions.

A.R.S. § 41-1493.02

§ 41-1493.02. Applicability

A. This article applies to all state and local laws and ordinances and the implementation of those laws and ordinances, whether statutory or otherwise, and whether adopted before or after the effective date of this article.

B. State laws that are adopted after the effective date of this article are subject to this article unless the law explicitly excludes application by reference to this article.

C. This article shall not be construed to authorize any government to burden any religious belief.

A.R.S. § 41-1493.03

§ 41-1493.03. Free exercise of religion; land use regulation

Effective: July 29, 2010

A. Government shall not impose or implement a land use regulation in a manner that imposes an unreasonable burden on a person's exercise of religion, regardless of a compelling governmental interest, unless the government demonstrates one of the following:

1. That the person's exercise of religion at a particular location violates religion-neutral zoning standards enacted into the government's laws at the time of the person's application for a permit.

2. That the person's exercise of religion at a particular location would be hazardous due to toxic uses in adjacent properties.

3. The existence of a suitable alternate property the person could use for the exercise of religion.

B. Government shall not impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a

nonreligious assembly or institution, regardless of a compelling governmental interest.

C. Government shall not impose or implement a land use regulation in a manner that discriminates against an assembly or institution on the basis of religion, regardless of a compelling governmental interest.

D. Government shall not impose or implement a land use regulation in a manner that completely excludes a religious assembly or institution from a jurisdiction or unreasonably limits religious assemblies, institutions or structures within a jurisdiction, regardless of a compelling governmental interest.

A.R.S. § 41-1493.04

§ 41-1493.04. Free exercise of religion; professional or occupational license; certificate or registration; appointments to governmental offices; definition

Effective: August 2, 2012

A. Government shall not deny, revoke or suspend a person's professional or occupational license, certificate or registration for any of the following and the following are not unprofessional conduct:

1. Declining to provide or participate in providing any service that violates the person's sincerely held religious beliefs except performing the duties of a peace officer.

2. Refusing to affirm a statement or oath that is contrary to the person's sincerely held religious beliefs.

3. Expressing sincerely held religious beliefs in any context, including a professional context as long as the services provided otherwise meet the current standard of care or practice for the profession.

4. Providing faith-based services that otherwise meet the current standard of care or practice for the profession.

5. Making business related decisions in accordance with sincerely held religious

beliefs such as:

(a) Employment decisions, unless otherwise prohibited by state or federal law.

(b) Client selection decisions.

(c) Financial decisions.

B. Government shall not deny a person an appointment to public office or a position on a board, commission or committee based on the person's exercise of religion.

C. This section is not a defense to and does not authorize any person to engage in sexual misconduct or any criminal conduct.

D. This section does not authorize any person to engage in conduct that is prohibited under the Constitution of the United States or of this state or § 15-535.

E. This section does not authorize any person to engage in conduct that violates the emergency medical treatment and active labor act (P.L. 99-272; 100 Stat. 164; 42 United States Code section 1395dd) or the religious land use and institutionalized persons act (P.L. 106-274; 114 Stat. 803; 42 United States Code section 2000CC-1) as of the effective date of this section.

F. For the purposes of this section, "government" includes all courts and administrative bodies or entities under the jurisdiction of the Arizona supreme court.