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Reply 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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

This case raises two primary issues. The first is whether the trial court erred by granting summary judgment to Inmate Legal Services ("ILS") Supervisor Carol Lillie, concluding that she did not violate Merrick's First and Fourteenth Amendment rights of court access when she refused to file his Motion for Reconsideration of the Arizona Court of Appeals decision affirming Merrick's conviction on direct appeal.

Lillie's primary response is an attempt to shift the blame for her own misfeasance onto Merrick. She argues that she reasonably failed to appreciate that Merrick was not represented by counsel, despite the facts that 1) Merrick repeatedly and unambiguously informed first her and then prison employees responsible for processing inmate grievances that he was unrepresented ("*pro per*"); and 2) Lillie knew that Merrick had filed a *pro per* brief in the direct appeal in which he sought reconsideration.

Nonetheless, Lillie presses the argument that Merrick should have known to provide her the court of appeals decision affirming his conviction. But Lillie did not request the document, nor does she point to any other policy that would have required it. First, the question of what Lillie would have done had Merrick submitted the court of appeals decision is not one that can be resolved in her favor on summary judgment. Second, Lillie

admits that she received—one day before Merrick's filing deadline—the very decision she claims would have impelled her to file Merrick's Motion for Reconsideration, because Merrick submitted it with his Petition for Review by the Arizona Supreme Court. Yet Lillie then argues that, despite her decade of experience working at ILS, she failed to appreciate the difference between a petition for review and a motion for reconsideration. This is another factual question, but even if Lillie could prove this "mistake," it does not excuse her willful failure to file Merrick's motion.

Lillie's other arguments are equally fruitless. For example, she argues that Merrick's Motion for Reconsideration was frivolous. But she does not argue that the arguments therein were wrong on the merits; rather, she argues only that they reprised arguments previously rejected by the court of appeals. This ignores that the very purpose of a motion for reconsideration is to permit a court to correct its own errors; in fact, Arizona courts do not generally permit new arguments to be raised in motions for reconsideration.

Finally, Lillie argues that her conduct was merely negligent, an argument belied by the undisputed fact that she made a series of affirmative decisions, with ample time for deliberation, not to file Merrick's motion. Alternatively, Lillie's conduct met an intermediate standard of culpability, which this Court should deem actionable.

The second issue in this case is whether Merrick's allegations that Arizona violated his religious liberties by refusing him unmonitored clergy phone calls were sufficient to survive the screening stage and require a response from the State. The State primarily argues that Merrick failed to allege that unmonitored calls were mandatory aspects of his religious practice. But that argument both misreads Merrick's complaint, and misstates the relevant law, which does not limit religious accommodations to mandatory practices. Likewise, the State's argument in favor of affirming the district court's dismissal of Merrick's Establishment Clause claim both fails to read his complaint liberally, and overstates Merrick's burden at the pleading stage.

ARGUMENT

I. LILLIE VIOLATED MERRICK'S RIGHT OF COURT ACCESS BECAUSE, DESPITE HIS DILIGENT EFFORTS, SHE REFUSED TO FILE HIS NONFRIVOLOUS MOTION FOR RECONSIDERATION WITH THE ARIZONA COURT OF APPEALS.

Although Lillie admits that she refused to file Merrick's Motion for Reconsideration on November 8, she attempts to avoid responsibility for that decision by blaming Merrick himself. She primarily argues that Merrick failed to provide a copy of the court of appeals decision on which his Motion for Reconsideration was based, which she argues would have led her to

credit Merrick's repeated unambiguous assertion that he was unrepresented, and in turn file his motion. Appellee Br. 21. Further, Lillie argues that Merrick's motion was frivolous, that her refusal to file should be deemed merely negligent, and that liability cannot be premised on negligence.

Lillie's arguments fail for several reasons. For one, she demonstrates a persistent failure to view the facts in the light most favorable to Merrick, as required in an appeal from a grant of summary judgment. *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). Moreover, in an attempt to shift the focus away from her own misconduct, Lillie ignores the many efforts Merrick did make to file the motion (and that she was in actual possession of the apparently crucial court of appeals decision by Merrick's filing deadline, ER 53, 74-75), and instead claims that he failed to act with diligence. Lillie's deliberate refusal to file Merrick's motion despite his timely submission and clear communication that he was filing *pro per* also indicate a level of culpability beyond that of mere negligence.

A. Merrick Suffered an Actual Injury When Lillie's Actions Caused Merrick to Miss His Filing Deadline.

Lillie contends that Merrick cannot demonstrate actual injury because her refusal to file his Motion for Reconsideration only delayed his litigation.

Appellee Br. 14.[1] Specifically, Lillie argues it was not her own misconduct that ultimately caused Merrick to miss his filing deadline; rather, she contends that Merrick failed to act diligently to "clear up the confusion or request an extension of time" after she refused his filing. Appellee Br. 15. This assertion mischaracterizes the record and reads the facts in the light least favorable to Merrick, both by ignoring Merrick's unsuccessful efforts to remedy the situation, and by assuming based only on Lillie's say-so that ILS would have filed Merrick's motion if he had resubmitted it accompanied by the court of appeals decision.

After Lillie refused to file Merrick's timely motion on November 8, Merrick immediately filed a grievance with ILS in which he clearly reiterated that he had no attorney and that he was filing *pro per*: "ILS

[1] To support this argument, she points to several dissimilar cases involving short delays that did not result in missed court deadlines. *See, e.g.*, *Vigliotto v. Terry*, 873 F.2d 1201, 1202 (9th Cir. 1989) (finding no violation when officials temporarily confiscated documents from plaintiff's cell and gave him three days to have the documents removed from prison storage before they were destroyed); *Davis v. Goord*, 320 F.3d 346, 352 (2d Cir. 2003) (finding no violation after prison officials opened inmate's letters outside of his presence when inmate failed to demonstrate that these actions resulted in missed deadlines); *Oliver v. Fauver*, 118 F.3d 175, 178 (3d Cir. 1997) (finding plaintiff suffered no injury as a result of prison interference because his legal paperwork still arrived at the court on time); *Hudson v. Robinson*, 678 F.2d 462, 466 (3d Cir. 1982) (plaintiff was not injured when ten-day wait for notary caused him to file a document after he would have liked, but before it was due). If anything, these cases support Merrick, because in contrast to the actions of those defendants, Lillie's actions resulted in Merrick missing the deadline to file his motion.

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 appealed the denial of his initial grievance twice, explaining that ILS made an error: "I was not allowed to file a Pro-Per Motion for Reconsideration of my appeal with the Arizona Court of Appeals . . . This matter has not been addressed." ER 231, 234-35. In addition, Merrick stated in his deposition that he attempted to contact the court and his former counsel to inform them that Lillie would not allow him to file the motion, but his attempts were unsuccessful. ER 107-08. Lillie did not refute this testimony.

Despite these efforts, Lillie argues that Merrick did not act diligently because he did not try and overcome her misconduct in what she, in hindsight, views to have been the "correct" way. She contends that she would have filed Merrick's Motion for Reconsideration had he provided her with the court of appeals decision denying his appeal. Appellee Br. 21-22. Yet Lillie never asked Merrick to provide the decision, nor does she cite any jail policy or rule requiring it. Furthermore, while Lillie states in her affidavit that ILS would have filed Merrick's *pro per* motion had Merrick provided the decision, ER 53, there is no way for the Court to resolve this

issue in Lillie's favor on summary judgment, when the facts must be construed in the light most favorable to Merrick.

Moreover, Lillie admits she was actually in possession of the court of appeals decision on November 13, Appellee Br. 22; ER 53, when ILS received, copied, served, and filed the decision as an attachment to Merrick's Petition for Review by the Arizona Supreme Court. ER 53, 74-75. In addition, Merrick stated in an affidavit that he showed a copy of the decision to a grievance officer on November 8. ER 27. That officer forwarded Merrick's grievance to ILS on November 14, and Lillie denied it that same day on the ground that she had already mailed his Petition for Review. ER 53, 77.[2]

Finally, had Lillie truly believed that Merrick "lacked lawful authority" to file a motion for reconsideration—as she contends, Appellee Br. 16—the appropriate course would have been to request that Merrick provide her with a copy of the decision showing that he was permitted to file *pro per*, rather than simply leaving him to guess what additional actions

[2] Even if Lillie had not seen the Arizona Court of Appeals decision by November 14, and even if Merrick had not repeatedly and unambiguously asserted his *pro per* status, logic dictates that Lillie should have been aware that Merrick was filing *pro per* based on his supplemental brief to his counsel's *Anders* brief, ER 132; it would be nonsensical for a court to permit *pro per* filing of an appellate brief, but require that related motions be counseled.

might convince Lillie to file the motion.[3] *See Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding the "fundamental constitutional rights of access to the courts requires prison authorities to *assist* inmates in the preparation and filing of meaningful legal papers") (emphasis added)). Perhaps in tacit recognition of this obligation, Lillie now claims on appeal that she "advised Merrick that without something from the Court of Appeals he needed to resubmit the document to be filed through counsel," Appellee Br. 21. But this description is inconsistent with Lillie's actual words: "Per the appeals court, you are not pro per in your appeals case and ILS cannot process your

[3] Lillie also asserts that Merrick's failure to submit the court of appeals decision is not excused by the evidence that it would have been futile for him to do so. She argues that resubmission of the motion "resembles the exhaustion of administrative remedies under the Prison Litigation Reform Act, under which there is no futility exception." Appellee Br. 16 n.3.

Even under Lillie's PLRA analogy, however, Merrick was excused from resubmitting his motion with the court of appeals decision because he was never informed of that "requirement," which Lillie asserted only after the fact. Although the PLRA does not have a futility exception, PLRA exhaustion is not required "when circumstances render administrative remedies 'effectively unavailable.'" *Sapp v. Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010) (exhaustion excused when prison officials improperly screened inmate's administrative appeals); *see also Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010) (exhaustion excused when inmate "took reasonable and appropriate steps to exhaust . . . and was precluded from exhausting, not through his own fault but by the [prison official's] mistake); *Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2004) (finding exhaustion not required when prison officials refused to give inmate necessary forms to file a grievance); *Brown v. Croak*, 312 F.3d 109, 111-12 (3d Cir. 2002) (finding exhaustion excused when guards mistakenly informed inmate to wait for an investigation to take place before he could file a grievance).

documents as submitted. As you are represented by counsel and have access to the appellate court through him/her." ER 60. Far from requesting proof of Merrick's *pro per* status, Lillie flatly refused to file his document. Given that refusal, Lillie cannot now argue that she invited Merrick to resubmit his Motion for Reconsideration or fault him for pursuing a grievance rather than resubmitting his motion.

B. Merrick Suffered an Actual Injury Despite the Fact that His Petition for Review Was Filed.

Lillie advances two arguments related to the fact that she filed Merrick's Petition for Review with the Arizona Supreme Court. First, she contends that her subsequent filing of the Petition for Review is evidence that she would not have rejected a future attempt to mail a motion for reconsideration or a motion to extend time to file that document. Appellee Br. 17. Second, she argues that the filing of Merrick's Petition for Review mitigated the harm resulting from her refusal to file his Motion for Reconsideration. Appellee Br. 17 n.4.

First, Lillie has repeatedly asserted that she viewed Merrick's Petition for Review as another reason *not* to file his Motion for Reconsideration. Until she received the Petition for Review, her position was that Merrick was represented, and therefore ineligible to file a motion for reconsideration. Once she received the petition, she took the position that the petition and the

motion were the same document, and refused to file the motion on that basis as well. Lillie asserts as much later in her brief, arguing that she "reasonably concluded the [Motion for Reconsideration] and the Petition for Review were one and the same." Appellee Br. 22. Accordingly, contrary to Lillie's self-serving assertion, any attempt by Merrick to resubmit his Motion for Reconsideration almost certainly would have failed; at a minimum, this Court cannot infer the contrary at summary judgment.

To the extent Lillie's factual assertion—that she confused Merrick's Motion for Reconsideration with his Petition for Review—supports her argument that she was merely negligent, Merrick should be permitted to test it at trial. But this Court should also reject out of hand the proposition that conflating the two documents was "reasonable." Not only was Lillie "in charge" of the unit responsible for providing constitutionally protected legal services to inmates seeking appeals in criminal cases, but she stated in her 2014 affidavit that she had twelve and a half years of experience in ILS. ER 51. Lillie further testified that her responsibilities include "daily supervision and training" and "ensur[ing] efficient and correct procedures are in place." *Id*. That degree of experience and responsibility cannot be reconciled with Lillie's decision not to file Merrick's motion. Perhaps an ILS trainee could reasonably have failed to appreciate the difference between a Motion for

Reconsideration and a Petition for Review—but Lillie, as ILS supervisor, would have been responsible for correcting the error. *See Valentine v. Beyer*, 850 F.2d 951, 957 (3rd Cir. 1988) (finding a violation of court access can occur when inadequately trained legal staff cause an inmate to miss court deadlines).

Second, Lillie argues that "Merrick's ability to pursue his Petition for Review with the Arizona Supreme Court, another form of discretionary appellate review on the same issues . . . also demonstrates the lack of actual injury." Appellee Br. 17 n.4. To begin, this argument implies that an inmate can never assert an access to courts claim based on official interference with a motion for reconsideration, no matter how egregious, if the inmate is able to file a petition for review. But there is good reason that parties may usually opt to file a motion for reconsideration, a petition for review, or both, because they are markedly different avenues for relief. Of particular relevance here, a motion for reconsideration allows a party to address "specific points or matters in which it is claimed the appellate court erred in determination of facts or law." Ariz. R. Crim. P. 31.18(d). The Arizona Supreme Court, however, will not generally accept review in order to correct lower court errors. *See Mast v. Standard Oil Co. of Cal.*, 680 P.2d 137, 138 (Ariz. 1984) ("This court is committed to a policy of granting review only

where substantial issues of law exist or serious error has occurred."). Thus, where a court errs by overlooking a controlling opinion—as Merrick argues the Arizona Court of Appeals did in this case, discussed *infra*—the appellant would be more likely to succeed with a motion for reconsideration than in a petition for review. *See* Appellant Br. 41-43. Consequently, that Lillie filed Merrick's Petition for Review does not mitigate her refusal to file his Motion for Reconsideration.

C. Merrick's Motion for Reconsideration Appropriately Argued that the Arizona Court of Appeals Overlooked Key Law and Facts, and Lillie Has Conceded that These Arguments Were Not Frivolous.

Lillie responds to Merrick's demonstration that his Motion for Reconsideration presented nonfrivolous arguments regarding errors of law and fact made by the Arizona Court of Appeals by stating that "the Arizona Court of Appeals had already considered and rejected these arguments." Appellee Br. 18-19. Lillie's response reflects a misunderstanding of the very purpose of a motion for reconsideration, which is to present argument about "specific points or matters in which it is claimed the appellate court has erred in determination of facts or law." Ariz. R. Crim. P. 31.18(d). The comments support the plain meaning of the rule, stating that motions for reconsideration should be filed to "inform the court of factual errors in its decision, order, or opinion… that the party believes the court has

overlooked." Ariz R. Crim. P. 31.18, cmt. to 1997 amend. Merrick's Motion for Reconsideration attempted to alert the court to exactly these types of errors.[4] In fact, Arizona courts generally "do not consider arguments raised for the first time in a motion for reconsideration," with only limited exceptions not relevant here. *Ramsey v. Yavapai Family Advocacy Ctr.*, 235 P.3d 285, 290 (Ariz. Ct. App. 2010) (civil context). Thus, Lillie's argument turns the law on its head—had Merrick's Motion for Reconsideration included novel arguments, Lillie would have been within her rights to argue they should not be considered; she cannot argue that the reverse is also true.

Because Lillie's only argument regarding the substance of Merrick's Motion for Reconsideration is that the Arizona Court of Appeals already considered and rejected Merrick's arguments, she has effectively conceded that Merrick's arguments were not frivolous. As this Court has previously held, an appellee waives any argument it fails to raise in its answering brief. *United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) ("an appellee waives any argument it fails to raise in its answering brief"); *Stetco v. Holder*, 498 F. App'x 677, 679 (9th Cir. 2012) (government waived any challenge to the arguments raised by the appellant when its sole mention of

[4] Merrick's Motion for Reconsideration argued the court of appeals either overlooked or misapplied relevant court decisions and statutes, and misconstrued the factual record. Appellant Br. 41-43. As Lillie does not refute the substance of these arguments, Merrick does not repeat them here.

the appellant's argument consisted of a footnote indicating that the cases cited by appellant were not applicable); *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (appellee waived argument regarding presumption of prejudice flowing from instructional error by failing to advance any argument in his answering brief that the error was harmless). Accordingly, this Court should conclude that the arguments advanced in Merrick's Motion for Reconsideration were not frivolous.

D. Lillie Acted with the Requisite Level of Culpability, or, at Minimum, Merrick Established a Genuine Issue of Material Fact as to Whether Lillie's Conduct Is Actionable.

1. Lillie's Conduct Was Intentional.

Lillie argues that her refusal to file Merrick's Motion for Reconsideration resulted from a series of confusing events and therefore amounts to a reasonable mistake. Appellee Br. 20-22. However, as the preceding section as well as Merrick's opening brief show, Lillie's repeated refusal to file Merrick's Motion for Reconsideration was more than a mistake; it was a series of intentional acts sufficient to support an access to courts claim. *See Simkins v. Bruce*, 406 F.3d 1239, 1242 (10th Cir. 2005) (An access to courts claim requires a plaintiff "to allege intentional conduct interfering with his legal mail, and does not require an additional showing of malicious motive," such that holding plaintiff's mail for over one year in

contravention of prison regulations alleged intentional conduct sufficient to violate his right of access to the courts). The cases on which Lillie relies to support her argument that her conduct was merely negligent, Appellee Br. 19-20, are inapposite in that they involved accidents, rather than a prolonged refusal to file court documents in the face of an obligation to do so. *See Ferrone v. Onorato*, 298 F. App'x 190, 192 (3d Cir. 2008) (involving a mistake by the computer services division that resulted in blocking all e-mails from a domain name rather than one e-mail address); *Pink v. Lester*, 52 F.3d 73, 74-75 (4th Cir. 1995) (inmate's money order request to pay docketing fee was never delivered to prison accounting office, a mistake that was "ministerial in nature"); *Kincaid v. Vail*, 969 F.2d 594, 602 (7th Cir. 1992) (summary judgment was proper where there was no evidence that alleged misplacement of a complaint was anything more than an isolated accident, and no prejudice resulted); *Longshore v. Wash. State Dep't of Corr.*, No. 3:15-CV-05059-KLS, 2015 WL 5797560, at *2 (W.D. Wash. Oct. 2, 2015) (loss of legal materials was negligent where prison officials placed materials in prison mail and searched for them after being notified that they were missing).[5]

[5] Lillie argues that the fact that Merrick did include a copy of the Arizona Court of Appeals decision with his Motion for Reconsideration is enough to render this case similar to cases involving accidents or episodes of

Alternatively, even if this Court holds that the chain of undisputed events does not establish that Lillie acted intentionally, at minimum, there is a genuine dispute of material fact as to Lillie's intent. *See Simmons v. Dickhaut*, 804 F.2d 182, 184 (1st Cir. 1986) (plaintiff alleged adequate facts to show intentional deprivation of access to courts when he requested materials three times before he was told he could pick them up, at which point it was determined that the legal material was missing); *Jackson v. Procunier*, 789 F.2d 307, 311 (5th Cir. 1986) (deliberate holding of plaintiff's mail is sufficient to allege deprivation of substantive constitutional right, when officials should reasonably have known delay would deprive plaintiff of right to access the courts).

2. At Minimum, Lillie's Conduct Was Grossly Negligent, and Courts Permit Liability Where a Defendant's Actions Fall Short of Intentional Conduct.

Even if Lillie's conduct was not intentional, this Court should nonetheless reverse the district court's grant of summary judgment on Merrick's court access claim, either because negligent conduct can support

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carelessness. Appellee Br. 20-21. As discussed above, this argument does not hold water for many reasons, including that it fails to construe facts in the light most favorable to Merrick, and that Lillie actually saw a copy of the decision before the filing deadline.

such a claim, see *Dorn v. Lafler*, 601 F.3d 439, 444 (6th Cir. 2010),[6] or because Lillie's conduct satisfies an intermediate culpability standard at minimum.

An intermediate standard of culpability is appropriate for four reasons. First, courts have recognized that intermediate standards of culpability such as gross negligence and deliberate indifference are proper where, as here, plaintiffs are particularly dependent on the state. *See, e.g.*, *Bovarie v. Tilton,* No. 06CV687JLS (NLS), 2008 WL 761853, at *1, *5 n.2 (S.D. Cal. Mar. 19, 2008) (prison officials acted with gross negligence and deliberate indifference when they effected procedures that restricted access to the prison law library); *see also Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc) (allegations that state officials' gross negligence and deliberate indifference rendered foster child comatose stated claim for deprivation of liberty interest); *Davidson v. O'Lone*, 752 F.2d 817, 828 (3rd Cir. 1984) (en banc) (although officials' conduct amounted only to negligence, gross negligence or reckless indifference was sufficient to establish a § 1983 claim based on injuries inflicted on claimant-inmate by another inmate). Second, court access violations do not involve

[6] Merrick argued in his opening brief that negligent conduct is sufficient to show a violation of a prisoner's right of court access, Appellant Br. 32-34, and does not repeat that argument here.

the kind of "unforeseen circumstances" demanding "instant judgment" that the Supreme Court has held merit an intent-to-harm standard in the substantive due process context, *Sacramento v. Lewis*, 523 U.S. 833, 853 (1998). Instead, as in this case, they will typically involve "time to make unhurried judgments," so that indifference in the face of "extended opportunities to do better . . . teamed with protracted failure even to care" is "truly shocking." *Id*. Third, an intermediate standard is appropriate where, like here, prison officials have an affirmative duty to ensure inmates have meaningful access to the courts. *Bounds*, 430 U.S. at 824.

Finally, courts that have rejected court access claims premised on simple negligence have either agreed, or else left open the possibility, that such claims are sufficient when premised on gross negligence or deliberate indifference. *See Scheeler v. City of St. Cloud*, 402 F.3d 826, 831 (8th Cir. 2005) (requiring plaintiffs show that defendants displayed deliberate indifference to satisfy a right to access the courts claim); *Snyder v. Nolen*, 380 F.3d 279, 291 n.11 (7th Cir. 2004) (affirming dismissal because, although allegations that court clerk removed inmate's *pro se* dissolution petition from the docket without consulting a judge constituted more than mere negligence, the official action complained of did not fall within scope of an access to courts claim); *Crawford-El v. Britton*, 951 F.2d 1314, 1318-

19 (D.C. Cir. 1991) (at minimum, a showing of "deliberate indifference" to a right of court access would overcome qualified immunity); *see also Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986) (declining to decide whether recklessness or gross negligence is enough to trigger the protections of the Due Process Clause).

Deliberate indifference requires a showing that a defendant recognized a specific unreasonable risk and acted intentionally to expose the plaintiff to that risk; gross negligence requires a showing that the defendant acted unreasonably with regard to a known risk. *See, e.g.*, *L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir. 1996) (defining deliberate indifference as encompassing situations in which "the defendant ha[s] actual knowledge of, or willfully ignore[s], impending harm," and explaining that gross negligence "does not incorporate this notion of impending harm");[7] *Woodward v. City of Worland*, 977 F.2d 1392, 1399 n.11 (10th Cir.1992) ("[R]ecklessness [i.e., reckless indifference] is generally regarded as satisfying the scienter requirement of section 1983 because it requires proof that the defendant focused upon the risk of unconstitutional conduct and deliberately assumed or acquiesced in such risk."); *Archuleta v. McShan,*

[7] While this Court in *Grubbs* did not affirmatively define gross negligence, it analyzed the jury instruction defining gross negligence by contrasting it to the instruction on deliberate indifference and explaing that gross negligence requires only unreasonable acts in the face of a known risk. *Id.* at 899-900.

897 F.2d 495, 499 (10th Cir.1990) ("[R]ecklessness includes an element of deliberateness—a *conscious,* acceptance of a known, serious risk.") (emphasis in original) (citation omitted)); *Archie v. City of Racine,* 847 F.2d 1211, 1219 (7th Cir.1988) (en banc) (recklessness contains an intent component because the "reckless disregard of a great risk is a form of knowledge or intent"); *Nishiyama v. Dickson Cnty., Tenn.*, 814 F.2d 277, 282 (6th Cir. 1987) (defining gross negligence: "a person may be said to act in such a way as to trigger a section 1983 claim if he 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, and of a magnitude such that it is highly probable that harm will follow").[8]

Drawing all inferences in Merrick's favor, Lillie's conduct was deliberately indifferent because her intentional and repeated refusal to file Merrick's motion—in the face of his diligent efforts to inform Lillie of his *pro per* status, and her actual knowledge of the contents of the court of

[8] *Nishiyama* held that an allegation of gross negligence was sufficient to state a § 1983 claim for a violation of substantive due process, without regard to whether the plaintiff was in the custody of the state. *See id.* The Sixth Circuit restricted *Nishiyama*'s holding in *Stemler v. City of Florence*, which held that reckless indifference was required for a prisoner to state a substantive due process claim. 126 F.3d 856, 870 (6th Cir. 1997) (citing *Farmer v. Brennan,* 511 U.S. 825, 834 (1994); *Wilson v. Seiter,* 501 U.S. 294, 303 (1991); *Estelle v. Gamble,* 429 U.S. 97, 106 251 (1976)). However, the Court did not revise *Nishiyama*'s definition of gross negligence.

appeals decision permitting him to file, discussed *supra*, 7-8 and at Appellant Br. 3-6, 23-29—prevented Merrick from pursuing relief from the court of appeals. Alternatively, at a minimum, Lillie's conduct constitutes recklessness or gross negligence, because her refusal to file Merrick's Motion for Reconsideration completely disregarded the obvious risk that Merrick's motion would never reach the courthouse.

II. MERRICK'S COMPLAINT STATED CLAIMS FOR VIOLATIONS OF HIS RELIGIOUS LIBERTY THAT SHOULD NOT HAVE BEEN DISMISSED AT THE SCREENING STAGE.

The State argues that Merrick did not sufficiently allege that the jail policy of prohibiting unmonitored clergy phone calls substantially burdened his religious exercise, as required to state a claim under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 *et seq*. and Arizona's substantially identical Free Exercise of Religion Act ("FERA"), Ariz. Rev. Stat. § 41-1493.01 *et seq*. Appellee Br. 25. This argument inaccurately reflects both Merrick's complaint and RLUIPA's requirements. Moreover, it fails to construe the complaint liberally in Merrick's favor, as it must do both because the complaint was dismissed at the screening stage and because Merrick was *pro se* in the district court.

A. Merrick Alleged that the Jail's Policy Against Unmonitored, Telephonic Confessions Substantially Burdened His Religious Exercise.

The State argues that "Merrick did not allege . . . that his religious belief mandates contact with his clergy by telephone, or, more specifically, unmonitored phone call[s]." Appellee Br. 25. But this ignores that Merrick's complaint alleged plainly that he requested that jail personnel "approve unmonitored, unrecorded clergy calls *as a requirement of his religious practices* (confession, spiritual guidance, and counseling)." ER 263 (emphasis added). On the same page, Merrick alleged that the effect of the denial of private clergy calls was that he "was not allowed to practice his religious sacraments," and that he "believes GOD has punished him and will do so later." *Id*. Later, Merrick again 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. Although, as argued below, Merrick was not required to demonstrate that private phone calls are a mandatory aspect of his religious practice in order to merit protection under RLUIPA, these allegations satisfy even the

State's overly strict view of "substantial burden."[9]

In the same vein, the State argues that Merrick did not allege that in-person visits from his clergy in Oklahoma "were impossible," but any reasonable reading of Merrick's complaint permits the inference that his clergy is unable to travel from Oklahoma to Merrick's prison, located on Arizona's western border; at minimum, Merrick's allegation that he was indigent, ER 265, demonstrates that he would be unable to fund the lengthy journey. Additionally, the State argues that Merrick's description in his direct appeal of "his written correspondence to his clergy as 'confessions, counseling and spiritual guidance,' demonstrat[es] that confession via mail is acceptable under the precepts of his religious beliefs." Appellee Br. 25-26 (internal citations omitted). That Merrick apparently practiced religion in another fashion in the past is, at most, a question for the State to explore during discovery—and not an appropriate basis to dismiss his RLUIPA claim at the screening stage. In this regard, it is significant that Merrick testified during his deposition that his religious beliefs had changed since the

[9] The State's brief cites *Hartman v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1125 (9th Cir. 2015), for its definition of substantial burden: "to state a claim under RLUIPA, inmates must "plead . . . factual allegations showing their religious exercise was so burdened as to pressure them to abandon their beliefs." Appellee Br. 24. While *Hartman* provides one example of a substantial burden arising out of the Ninth Circuit, the cases cited in Merrick's Opening Brief more fully define "substantial burden," particularly regarding religious accommodation claims. *See* Appellant Br. 47-49.

events that gave rise to his conviction, so his previous religious practice does not shed light on the substantial burden question. ER 117-18.

In any event, even if Merrick's religion did permit him to confess to clergy via other methods, it is irrelevant because a burdened practice need not be part of a central tenet of an adherent's faith in order to receive RLUIPA's protections. The text of RLUIPA itself defines "religious exercise" to include "any exercise of religion, *whether or not compelled by*, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added); *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) ("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"); *Cutter v. Wilkinson,* 544 U.S. 709, 725 n.13 (2005) ("RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion"); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith"); *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 332 (5th Cir. 2009) ("The practice burdened need not be central to the adherent's belief system"). "Religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit" protection. *Thomas v. Review*

Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707, 714 (1981); *see also Lindell v. McCallum*, 352 F.3d 1107 (7th Cir. 2003) (The fact that the inmate's alleged religious belief was not a mainstream religion was not a disqualifying fact).

Finally, the Court should resist the State's invitation to question Merrick's sincerity at the screening stage, Appellee Br. 26, because whether Merrick's beliefs are sincerely held and rooted in religious belief are questions of fact. *United States v. Seeger*, 380 U.S. 163, 185 (1965) ("the threshold question of sincerity which must be resolved in every case . . . is, of course, a question of fact"); *United States v. Zimmerman*, 514 F.3d 851, 854 (9th Cir. 2007) ("whether [inmate's] religious beliefs are sincerely held. . . is a question of fact."). Merrick alleges that they are sincerely held and rooted in religious belief, and on review of the district court's screening order, the Court must accept Merrick's factual allegations as true and grant him the benefit of all inferences that may be derived from them. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

B. The District Court Erred in Dismissing Merrick's Establishment Clause Claim.

Although the district court did not discuss its reasons for dismissing Merrick's Establishment Clause claim, the State argues for affirmance on the alternate ground that Merrick failed to allege sufficient facts to support that claim. Appellee Br. 27-29. In so doing, the State relies on the district court's

language that Merrick "has not alleged facts demonstrating that the Jail's phone policies were enforced without a legitimate penological purpose." ER 17-18. Additionally, the State argues that "Merrick does not allege the jail policy against unmonitored phone calls to clergy unduly preferred another religion over his own," asserting that "the alleged facts demonstrate the jail officials' attempts to accommodate Merrick's request for counseling and spiritual guidance." Appellee Br. 28. Furthermore, the State argues that "Merrick does not explain how this general policy or attempts at accommodation 'pressured [him] to change his beliefs and practices to ones that the Jail would allow (which were other faiths),' when those other faiths apparently are subject to the same policy." Appellee Br. 29 (internal citations omitted). This Court should nonetheless reverse.

First, in arguing that Merrick did not allege that the prison's policy lacked a legitimate penological purpose,[10] the State misstates the relevant burdens. Under *Turner*, Merrick need only include sufficient facts to indicate the plausibility that the actions of which he complains were not reasonably related to legitimate penological interests. *See Gee v. Pacheco*,

[10] Courts balance a prisoner's right to be afforded a reasonable opportunity to exercise religious freedom against the prison's legitimate penological goals. *See Turner v. Safley*, 482 U.S. 78, 89 (1987). Under the *Turner* standard, a regulation is valid if it is "reasonably related to legitimate penological interests." *Id*.

627 F.3d 1178, 1188 (10th Cir. 2010) (prisoner plaintiff does not need to "identify every potential legitimate interest and plead against it," but rather should "plead facts from which a plausible interest can be drawn that the action was not reasonably related to a legitimate penological interest" because "we do not intend that pro se prisoners must plead, exhaustively, in the negative in order to state a claim"). Because the State was not required to respond to Merrick's complaint, the record contains no indication why the jail denied the phone calls. However, Merrick alleged in his complaint that unmonitored legal calls were permitted, ER 268, raising questions as to why unmonitored clergy calls present different or greater challenges to prison administration. *See, e.g.*, *Ortiz v. Downey*, 561 F.3d 664, 669-70 (7th Cir. 2009) (holding it premature at the pleading stage to determine whether budgetary restrictions or security concerns were legitimate penological reasons to deny a detainee religious articles); *see also Maddox v. Love*, 655 F.3d 709, 720 (7th Cir. 2011) (holding it premature at the pleading stage to determine whether budgetary restrictions or security concerns were legitimate penological reasons to cancel African Hebrew Israelite services).

Second, the State's argument that Merrick's complaint "does not allege the jail policy against unmonitored calls to clergy unduly preferred another religion over his own," Appellee Br. 28, fails to draw all inferences

in Merrick's favor, as is required at the screening stage. *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").

Merrick alleged that the jail unduly preferred other religions over his own when he asserted that jail officials "pressured [him] to change his beliefs and practices to ones that the Jail would allow (which were other faiths)." ER 267. Additionally, Merrick alleged that Defendant Wade told him "confessions are done anonymously and he doesn't have to have one of his faith"; that Defendant Garcia told him he "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." ER 267-68. Finally, Merrick alleged that, in suggesting that he consult with a clergyperson 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.

These allegations are sufficient to survive the screening stage based on the Establishment Clause principle that "the efforts of prison administrators, when assessed in their totality, must be evenhanded" and "the treatment of all inmates must be qualitatively comparable." *Maddox,* 655 F.3d at 719-20 (citing *Al-Alamin v. Gramley*, 926 F.2d 680, 686 (7th

Cir. 1991)). Jail personnel statements that Merrick did not need to engage in confession with his own clergy, and that confessions do not need to be anonymous, as well as their suggestion that Merrick confess to a clergy from another religion, are sufficient to allege that the jail disfavored Merrick's religion, while endorsing other religions over Merrick's. *United States v. Kahane*, 396 F. Supp. 687, 698 (E.D.N.Y. 1975) ("The state, through the establishment clause, cannot require persons to worship in particular ways").

Accordingly, Merrick's religious freedom claims should be remanded for further proceedings.

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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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 6,841 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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