Case No.: 18-17233

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN WITHEROW,
Plaintiff-Appellant,

v.

HOWARD SKOLNIK, et al.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

BRIEF OF *AMICUS CURIAE* CIVIL RIGHTS AND LIBERTIES COMMITTEE of the NEW YORK COUNTY LAWYERS ASSOCIATION; URGING REVERSAL

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Amicus curiae Civil Rights and Liberties Committee of the New York County Lawyers Association ("*amicus*") submits this brief in support of Plaintiff-Appellant John Witherow.[1]

STATEMENT OF INTEREST

The New York County Lawyers Association is a not-for-profit membership organization of approximately 8,000 members committed to applying their knowledge and experience in the field of law to the promotion of the public good and ensuring access to justice for all. More specifically, the New York County Lawyers Association has an interest in the ability of clients to communicate with their lawyers nationwide, and has advocated successfully to protect and promote this fundamental right.

In 2016, the New York County Lawyers Association filed an amicus brief in *Nordstrom* v. *Ryan*, 856 F.3d 1265 (9th Cir 2017), which held that the Arizona Department of Corrections policy of inspecting and reading outgoing legal mail violated prisoners' First and Sixth Amendment rights.

In 2016, the New York County Lawyers Association also published a report on attorney-client e-mail monitoring in the federal prison system, which called upon the Federal Bureau of Prisons to extend the same protections afforded to

[1] Pursuant to FRAP Rule 29(a), counsel for *amicus* certifies that all parties have consented to the filing of this brief. Pursuant to FRAP Rule 29(c)(5), counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, their members, or their counsel made a monetary contribution to its preparation or submission.

traditional legal mail, to e-mail communications between attorneys and their incarcerated clients. On February 8, 2016, the American Bar Association adopted Resolution 10A, which formally endorsed the report as the position of its nearly 400,000-member national organization.[2] For these reasons, the New York County Lawyers Association has a direct and vital interest in the issues before this Court. This brief has been approved by NYCLA's Appellate Courts Committee and approved for filing by NYCLA's President; it has not been reviewed by NYCLA's Executive Committee and does not necessarily represent the views of its Board.

PRELIMINARY STATEMENT

This brief challenges the constitutionality of a Nevada Department of Corrections (NDOC) policy that impacts the rights of inmates and their properly placed legal telephone calls.[3]

An affirmation in favor of Defendant-Appellee would create a Circuit split wherein the Ninth Circuit would stand alone in allowing prison officials to surreptitiously monitor and listen to the substance of prisoners' properly placed legal telephone calls. Such a ruling would create an untenable disparity between

[2] ABA Res. 10A, House of Delegates, Midyear Meeting 2016 (Feb. 2016) (adopted), http://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/10a.html.

[3] For the purposes of this brief, "properly placed outgoing legal calls" shall be defined as: properly dialed telephone calls to an attorney that a prisoner had previously notified the Nevada Department of Corrections was representing the inmate in a civil or criminal matter.

the constitutional rights of prisoners in the Ninth Circuit and the rights of inmates[4] elsewhere in the country where traditional legal telephone calls are sacrosanct with regard to attorney-client privilege.

In 2007, John Witherow, an inmate at the Nevada State Prison (the "prison"), requested to be housed in the prison's administrative segregation unit, Unit 13, because he feared retaliation from prison staff for his prominent advocacy to improve the prison's conditions—including his status as a plaintiff in several lawsuits. ER 127–29. Prior to being moved to Unit 13, per Nevada Department of Corrections ("NDOC") policy, Mr. Witherow's telephone calls to his attorneys were unmonitored. ER 57; NEV. ADMIN. REG. 718.01(3). He provided the prison with the telephone numbers of his three attorneys, who were verified and registered in the inmate telephone system. Pursuant to policy, when he wanted to place a legal call, he made the request 24 hours in advance, and when the call was placed, a correctional officer would dial the attorney's number and then hand him the telephone. ER 279. The inmate telephone system technology prevented calls to a preregistered attorney telephone number from being recorded, and alerted prison staff if the recipient forwarded or conferenced the call with a third party. ER 104, 234–36. If the call was forwarded or conferenced with a third party, the system could automatically terminate the call. ER 102–03.

[4] For the purposes of this Brief, the terms "inmate", "incarcerated client" and "prisoner" refer to both pre-trial detainees and convicts, unless otherwise noted.

Despite these regulations, in approximately 2004, the NDOC passed a secret "post order" that required the surreptitious monitoring of attorney-client telephone calls of inmates in segregated housing unit to "determine validity". ER 350–51. Prison staff circumvented the protections in the inmate telephone system by installing wiring from Unit 13's two telephones to a speaker in the control room, known as "the bubble," that allowed them to listen to attorney-client telephone calls. ER 137, 348–49, 358–59, 364.

But the NDOC never provided correctional officers with any training about how to confirm the validity of a legal call. ER 177, 182, 193, 214. And correctional officers did not notify prisoners or their attorneys that their calls were being monitored. ER 131, 183–89, 243.

After he was moved to Unit 13, Mr. Witherow began to suspect that his calls were being monitored. ER 139–40, 315, 335–43. He conducted legal research and learned that surreptitious monitoring was often indicated by a faint "beeping" sound, which he immediately realized he heard during every telephone call. ER 139, 143, 151. He informed his attorney Don Evans that their call was being secretly monitored, and when Evans profanely objected, ER 208–09, Officer Ingrid Connally terminated the call. ER 156–57. Connally then filed a report about Evans' profanity. ER 209.

After this Court reversed the District Court's grant of summary judgment a second time, the District Court granted defendants' motion for summary judgement a third time, this time finding that it was not clearly established in 2007 and 2008 that it was unlawful to secretly monitor inmates' privileged telephone calls with their attorneys, and dismissing the case based on qualified immunity. ER 12–13. In doing so, the District Court failed to recognize that, construing the facts most favorably to Mr. Witherow, it was obvious that prison officials knew their surreptitious monitoring of attorney-client telephone calls constituted an unreasonable search. Qualified immunity turns on whether a reasonable officer would know that his conduct is impermissible. That is to say, the law is clearly established "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights." *Harlow* v. *Fitzgerald,* 457 U.S. 800, 819 (1982) (emphasis added). Thus, the "salient question" for the "clearly established" prong of the qualified immunity test "is whether the state of the law at the time of an incident provided fair warning to the defendants that their alleged conduct was unconstitutional." *Tolan* v. *Cotton,* 572 U.S. 650, 656 (2014) (quotation and alteration omitted).

Here, case law has demonstrated with clarity the limitations on officers' monitoring and seizure of attorney-client communications. For purposes of qualified immunity, it is not relevant whether officers were put on notice by virtue

of the Fourth Amendment. Officers have long known that they cannot secretly monitor or seize privileged attorney-client communications.

The District Court also ignored Plaintiff's demand for injunctive and declaratory relief, which are not subject to dismissal on qualified immunity grounds.

Officers Baker and Connally acted at the direction and with the knowledge of Lieutenant Henley, ER172-73, who received the prison grievance objecting to interception of Witherow's legal calls. ER178. NDOC Deputy Director Don Helling also received the prison grievance. ER145. Prison Warden William Donat testified that he was aware of the separate telephone system in Unit 13, and apparently approved its installation and the monitoring of legal telephone calls. ER235, 353-56.

Plaintiff-Appellant has extensively briefed how the evidentiary record reveals that the NDOC policy and practice of surreptitiously monitoring inmates' telephone calls with their attorneys violates the Fourth Amendment. We do not repeat those arguments. Instead, *amicus* argues that District Court erred by (i) holding that the Defendants were entitled to qualified immunity because they obviously knew that secretly monitoring inmates' telephone calls with their attorneys was unlawful in 2007 and 2008; and (ii) ignoring Mr. Witherow's demand for declaratory relief, which is not subject to dismissal on qualified

immunity grounds. This Court's holding affects not just Plaintiff-Appellant, John Witherow, but all inmates—and a holding in favor of the Defendants-Appellees would permit prison officials to secretly monitor privileged conversations between attorneys and their inmate clients throughout the Ninth Circuit. This situation would be untenable and would create a split among the Circuits, where the Ninth Circuit would stand alone in allowing such secret monitoring.

For these reasons, *amicus* respectfully submits that this Court should reverse the District Court and declare that it was clearly unlawful for prison officials to surreptitiously monitor an inmate's telephone call with his attorney as of 2007.

ARGUMENT

I. It was clearly established in 2007 that secretly monitoring attorneys' telephone conversations with their inmate clients was unlawful, and so the District Court clearly erred by granting defendants summary judgment on Mr. Witherow's Fourth Amendment claims based on qualified immunity.

The District Court clearly erred by granting the defendants qualified immunity on Mr. Witherow's Fourth Amendment claims at the summary judgment stage of this case, because it was clearly established in 2007 that secretly monitoring and listening to attorneys' telephone conversations with their inmate clients was unlawful.

Even if no prior court had held that the precise conduct at issue in this case was unconstitutional, the NDOC officials were clearly on notice in 2007 that

secretly listening to inmates' telephone conversations with their attorneys was unlawful. Secretly listening to inmates' legal calls did not promote prison security or any other legitimate penological interest. As of 2007, the consensus of authority regarding the monitoring of attorney-client communications clearly demonstrated that secretly monitoring attorney-client telephone calls was unlawful. Moreover, the fact that the officials here acted in secret suggests that they knew their conduct was unlawful.

By holding that Defendants were entitled to qualified immunity, the District Court "neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Tolan* v. *Cotton*, 572 U.S. 650, 656 (2014); *see also Parker* v. *City of Long Beach,* 2014 U.S. App. LEXIS 7346 *3 (2d Cir.) (Amended Summary Order) ("Absent incontrovertible evidence 'utterly discredit[ing]' Parker's position, *Zellner v. Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007), the district court was required to view the evidence in the light most favorable to Parker and to draw all reasonable inferences and resolve all ambiguities in Parker's favor, *see Grain Traders, Inc*. v. *Citibank, N.A.,* 160 F.3d 97, 100 (2d Cir. 1998).").

For these reasons, as detailed below, this Court should reverse and hold that it was clearly established as of 2007 that secretly monitoring attorneys' telephone calls with their inmate clients was unlawful, and that Defendants here are not

entitled to qualified immunity.

A. Officials can be on notice that their conduct violates clearly established law even in novel factual circumstances.

After discovery and once a case reaches the summary judgment phase, a motion based on qualified immunity "may only be granted when a court finds that an official has met his or her burden demonstrating that no rational jury could conclude '(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.'" *Coollick* v. *Hughes*, 699 F.3d 211, 219 (2d Cir. 2012). Any factual disputes at the summary judgment stage are for a jury to decide and would preclude dismissal based on qualified immunity. *See Zellner* v. *Summerlin*, 494 F.3d 344, 368 (2d Cir. 2007) (citing cases).

It is Defendants' burden to show that the right was not clearly established, *see Tellier* v. *Fields*, 280 F.3d 69, 84 (2d Cir. 2000), or that Defendants' conduct was objectively reasonable. *See McKenna* v. *Wright*, 386 F.3d 432, 436 (2d Cir. 2004). "To determine whether the relevant law was clearly established, [courts] consider the specificity with which a right is defined, the existence of Supreme Court or Court of Appeals case law on the subject, and the understanding of a reasonable officer in light of preexisting law." *Terebesi* v. *Torreso*, 764 F.3d 217, 231 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015). "The relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was

unlawful in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001). That inquiry turns on "the objective reasonableness of the action taken, assessed in light of the rules that were clearly established at the time it was taken." *Pearson* v. *Callahan*, 555 U.S. 223, 244 (2009).

The focus is not on the abstract matter of the right or rights at issue, but on the officer's conduct and whether that conduct violated established legal duties or rules relevant to the situation confronted by the officer. As the Supreme Court has explained:

> "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, … but it is to say that in the light of pre-existing law the unlawfulness must be apparent*."

Anderson v. *Creighton*, 483 US 635, 640 (1987) (emphasis added); *accord*, *Ziglar* v. *Abbasi*, 137 S Ct 1843, 1866-1867 (2017).

Once an officer's duty to act or refrain from acting is "clearly established," an officer cannot prevail on the second prong of the qualified immunity analysis by claiming, or pointing to, confusion over the right's constitutional source. The "proper inquiry is whether the right itself—rather than its source—is clearly established." *Russo* v. *City of Bridgport*, 479 F.3d 196, 212 (2d. Cir. 2007); *see, e.g.*, *Poe* v. *Leonard*, 282 F.3d 123, 137-39 (2nd Cir. 2002). "[C]ourts should

define the 'clearly established' right at issue on the basis of the 'specific context' of the case." *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1866 (2014), *quoting Saucier*, 533 U.S. at 201 and *citing Anderson*, 483 U.S. at 640-41.

"[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances," *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002), and "there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 590 (2018), *quoting Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004). In other words, "the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established." *Johnson* v. *Newburgh Enlarged Sch. Dist*., 239 F.3d 246, 251 (2d Cir. 2001). "'[T]he salient question … is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1866 (2014), *quoting Hope* v. *Pelzer*, 536 U.S. at 741 (alteration in original). "Of course, in an obvious case, the[] standards [from a prior case] can 'clearly establish' the answer, even without a body of relevant case law." *Brosseau* v. *Haugen*, 543 US at 199 (*citing Hope* v. *Pelzer*, 536 U.S. at 738 as one such "case where the Eighth Amendment violation was 'obvious'").

Citing *Tolan's* "fair warning" as the fundamental touchstone to determining

whether government officials are on notice regarding the unconstitutionality of particular duties to act or refrain from acting, the Supreme Court has expressly rejected a requirement that previous cases be "fundamentally similar," holding that even "materially similar" facts are unnecessary to a finding that officers were on notice that their conduct would violate clearly established legal duties. *See Hope* v. *Pelzer*, 536 U.S. at 741(*discussing United States* v. *Lanier*, 520 U.S. 259, 269-71 (1997) (discussing the "fair warning" standard)). In *Lanier*, the Supreme Court stated,

> "[i]n some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful,' *Anderson*, *supra*, at 640."

520 U.S. at 271.

An "officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Terebesi* v. *Torreso*, 764 F.3d 217, 237 (2d Cir. 2014) (denying qualified immunity in case arising from the first time that the specialized tactical unit involved had ever used a distraction device); *see also Graham* v. *Hildebrand*, 203 Fed. Appx.

726, 730-731 (7th Cir. 2006).

"Even if this or other circuit courts have not explicitly held a law or course of conduct to be unconstitutional, the unconstitutionality of that law or course of conduct will nonetheless be treated as clearly established if decisions by this or other courts 'clearly foreshadow a particular ruling on the issue.'" *Scott* v. *Fischer*, 616 F3d 100, 104-05 (2nd Cir. 2010) (internal citations omitted) (relying on decisions by other Circuits finding similar searches unconstitutional, even though the Second Circuit had not yet reached the issue, in concluding that the defendant was not entitled to immunity); *accord*, *Terebesi* v. *Torreso*, 764 F.3d at 231; *see also Higginbotham* v. *City of New York*, 105 F.Supp.3d 369, 378 (SDNY 2015).

Thus, even if no prior court had held that it was unconstitutional for prison officials to secretly monitor and listen to inmates' telephone calls with their attorneys, Defendants here are still not entitled to qualified immunity because decisions by the Supreme Court, this Court and a consensus of other courts clearly demonstrated that, as of 2007, it was unlawful for prison officials to secretly monitor and inspect inmates' telephone calls with their attorneys.

B. The NDOC's policy of monitoring calls between Unit 13 inmates and their attorneys was obviously unlawful because it did not promote prison security or any other legitimate penological interest.

Prison policies that impact inmates' constitutional rights "must be evaluated in light of the central objective of prison administration, safeguarding institutional

security." *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979); *accord Hudson* v. *Palmer*, 468 U.S. 517, 524 (1984); *Pell* v. *Procunier*, 417 U.S. 817, 823 (1974). Courts generally defer to prison officials on matters involving prison security but will strike down prison regulations if the purported security threat is speculative or the regulation infringes on prisoners' fundamental rights. *Turner* v. *Safley*, 482 U.S. 78, 84–85 (1987); *accord Procunier* v. *Martinez*, 416 U.S. 396, 413 (1974); *Bell*, 441 U.S. 520, 538–39. Recognizing the need for a flexible framework that allocates deference where appropriate, but also contemplates court intervention when prison restrictions unreasonably deprive inmates of rights, *Turner* sets forth a multifactor test, which ultimately asks whether the prison policy is "reasonably related to legitimate penological interests" or if it is an "exaggerated response" to prison concerns. *Turner*, 482 U.S. at 89–90.

The *Turner* Court held that four factors are particularly relevant in determining the reasonableness of prison regulations: (1) a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) alternative forms of expression available to the inmate; (3) the burden on guards, prison officials, and other inmates if the prison is required to provide the freedom claimed by the inmate; and (4) the existence of less restrictive alternatives that might satisfy the governmental interest. *Turner*, 482 U.S. at 89–90.

The NDOC's Unit 13 attorney call monitoring policy fails each of the four *Turner* factors. The first factor weighs against the Unit 13 attorney call monitoring policy because it was not implemented to address any security concern. Instead, the District Court stated that the "legitimate penological interest" at issue was "ensuring that the right to confidential attorney-client communications is not abused." ER 5. This is clearly insufficient to justify a policy that impacts inmates' fundamental constitutional right to communicate confidentially with their attorneys, as the District Court failed to identify any threat to prison security that Unit 13's attorney-client telephone call monitoring policy was intended to address. *See Nordstrom* v. *Ryan*, 856 F.3d 1265, 1272 (9th Cir. 2017) ("Legitimate penological interests that justify regulation of outgoing legal mail include 'the prevention of criminal activity and the maintenance of prison security.'" *quoting O'Keefe* v. *Van Boening*, 82 F.3d 322, 326 (9th Cir. 1996)). Because the policy does not support any legitimate penological interest but impacts prisoners' fundamental right to communicate confidentially with their attorneys, it is unconstitutional and should be struck down.

Second, there were no adequate comparable means of communication available to inmates housed in Unit 13 and their attorneys. In-person attorney visits are very difficult to arrange, especially for inmates housed in segregated units. Additionally, in-person visits are very time consuming for attorneys and often take

an entire day. In-person meetings also pose a greater threat to prison security, because any time a person enters the jail, there is a risk that drugs, weapons or other contraband could be introduced into the jail; and the prison must allocate correctional officers and other resources to transport the prisoner from his unit to the meeting room and to screen and monitor the visitor. Legal mail is also incomparable because it can take weeks to receive and reply to a letter. And legal mail also poses a greater risk of introducing drugs, weapons or other physical contraband into the prison.

Third, there would be no burden on guards, prison officials and other inmates, because properly placed outgoing calls to inmates' attorneys are not monitored in any of the prison's other units.

Fourth—and most significantly—there are several less restrictive alternatives available. First, the NDOC could have used wall-mounted telephones for legal calls in Unit 13 instead of cordless phones; they simply would have had to take prisoners out of their cells individually to make legal calls, and followed the same procedures used for legal calls in the rest of the jail. Second, the NDOC could have used a separate cordless phone for legal calls that was not wired to "the bubble", thus allowing for personal calls to be monitored but not attorney calls. Third, the NDOC could have used the same wireless phones, but instead of secretly monitoring the call, correctional officers could have dialed the attorney's telephone

number, spoken to the person on the receiving end of the call to verify they were an attorney, then handed the inmate the cordless telephone. In all these alternatives, the inmate telephone system could have alerted prison staff if the call was forwarded or conferenced with a third party.

In *Nordstrom* v. *Ryan*, 856 F.3d 1265 (9th Cir 2017), this Court recently applied *Turner* to strike down the Arizona Department of Corrections policy of "inspecting" the properly postmarked outgoing legal mail to an inmate's attorney. In *Nordstrom*, this Court held that,

> "At most, a proper inspection entails looking at a letter to confirm that it does not include suspicious features such as maps, and making sure that illegal goods or items that pose a security threat are not hidden in the envelope. ADC's legal mail policy does not meet this standard because it requires that prison officials 'verify that [the letter's] contents qualify as legal mail.'"

Id. at 1272.

Here, the District Court attempted to circumvent *Nordstrom* by claiming that "[a] telephone call cannot of course include the transmission of illegal items, but may include 'suspicious features.'" ER 8. The District Court identified "suspicious features" as including "whether the call has been forwarded, whether the call has been placed on speakerphone, whether a non-lawyer has joined the call, or other aspects of the call indicating an abuse of non-monitored calls." *Id*.

The District Court ignored the fact that *Nordstrom* justified inspection of

outgoing legal mail because it could secrete "in the envelope" "items that pose a security threat," such as maps. 856 F.3d at 1272. However, *Nordstrom* prevents prison officials from reading the content of properly addressed outgoing legal mail precisely because it cannot be presumed that an attorney would help a prisoner commit a crime or circumvent prison policies. *Id*. at 1273; *Marquez* v. *Miranda*, 83 F.3d 427, 427 (9th Cir. 1996) (Court cannot justify monitoring inmate-attorney communications based on "speculative danger" cited by prison that attorneys might assist prisoners avoid prison regulations); *Taylor* v. *Sterrett*, 532 F.2d 462, 474 (5th Cir. 1976) ("it must be assumed that mail addressed to … licensed attorneys containing contraband or information about illegal activities will be treated by the recipients in a manner that cannot cause harm").

The NDOC's policy of monitoring Unit 13 inmates' telephone calls with their attorneys was clearly unlawful because it did not promote prison security or any other legitimate penological interest. Monitoring inmates' legal calls was excessive in relation to any hypothetical interest in safeguarding institutional security. Moreover, the policy increased administrative burdens and costs compared to the rest of the prison, where legal calls were unmonitored, because staff resources were required to monitor and listen to the calls. In fact, the NDOC's policy of monitoring attorney calls in Unit 13 diminished prison security and increased administrative burdens and costs because it increased the amount of

traditional letter mail and in-person attorney visits, each of which risked introduction of drugs, weapons or other contraband into the jail. Thus, the NDOC lacked a legitimate penological interest in monitoring Unit 13 legal calls.

Thus, a proper application of *Turner* and *Nordstrom* demonstrates that in 2007, it was obvious that the NDOC's policy of secretly monitoring and listening to Unit 13 inmates' telephone calls with their attorneys was unlawful.

C. The consensus of authority on monitoring of inmates' communications with attorneys demonstrates that the NDOC's policy of secretly monitoring calls between Unit 13 inmates and their attorneys was clearly unlawful as of 2007.

A consensus of authority would have put a reasonable correctional officer on notice that as of 2007, their secret monitoring of Mr. Witherow's telephone calls with his attorneys was objectively unreasonable and unconstitutional.

Courts have long recognized that the ability to communicate privately with an attorney by telephone is essential to the exercise of the constitutional rights to counsel and to access to the courts. *Murphy* v. *Waller*, 51 F.3d 714, 718 & n.7 (7th Cir. 1995) ("Restrictions on a detainee's telephone privileges that prevented him from contacting his attorney violate the Sixth Amendment right to counsel . . . In certain limited circumstances, unreasonable restrictions on a detainee's access to a telephone may also violate the Fourteenth Amendment."); *Tucker* v. *Randall*, 948 F.2d 388, 390-91 (7th Cir. 1991)(denying a pre-trial detainee telephone access to his lawyer for four days would implicate the Sixth Amendment); *Johnson-El* v.

Schoemehl , 878 F.2d 1043, 1051 (8th Cir. 1989) (holding that inmates' challenge to restrictions on the number and time of telephone calls stated a claim for violation of their rights to counsel); *Miller* v. *Carlson* , 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd & modified on other grounds*, 563 F.2d 741 (5th Cir. 1977)(granting a permanent injunction precluding the monitoring and denial of inmates' telephone calls to their attorneys); *see also* Dana Beyerle, *Making Telephone Calls From Jail Can Be Costly*, TIMES MONTGOMERY BUREAU (Sept. 22, 2002) (Etowah, Alabama county jail under court order to provide phones to people incarcerated in the jail based in part on complaints they could not talk to lawyers).

Courts have struck down prisons' telephone policies that interfere with the ability of incarcerated people to communicate with their lawyers, such as collect call-only policies. *See, e.g.*, *Lynch* v. *Leis*, 2002 WL 33001391, Docket No. C-1-00-274 (S.D. Ohio Feb. 19, 2002)(granting permanent injunction based on finding that where public defender's office and many private attorneys refused most collect calls, a prison's collect call-only policy was unconstitutional); *In re Ron Grimes*, 208 Cal. App. 3d 1175, 1178 (1989)(holding that switch by Humboldt County, California Jail from coin operated to collect-only calls violated the constitutional rights of people incarcerated there because the public defender's office, other county departments, and some private attorneys did not accept collect calls); *Amati*

v. *City of Woodstock*, 1997 WL 587493, *2 (N.D.Ill. Aug.7, 1997) ("[A]lleged conduct of surreptitiously recording telephone of conversations without listening is a violation of ... the Fourth Amendment."); *In re State Police Litigation*, 888 F.Supp. 1235 (D. Conn 1995) (it was clearly established that recording telephone calls between inmates and their attorneys was unlawful); *Walden* v. *City of Providence*, 495 F. Supp. 2d 245, 268 (D.R.I. 2007) (denying qualified immunity because the Court found that as of 2007, it was clearly established that the Fourth Amendment protected "the right to privacy in wire communications—telephone calls—and that the surreptitious recording of those calls (which, it goes without saying was carried out without Plaintiffs' knowledge or consent) violated the Fourth Amendment right to privacy").

In a similar case, the 11th Circuit recently affirmed the District Court's grant of summary judgment to a plaintiff on his claim that the prison officials' surreptitious monitoring and recording of his conversations with his attorney violated his Fourth Amendment rights. *Gennusa* v. *Shoar*, 879 F. Supp. 2d 1337, 1349–50 (M.D. Fla. 2012), *aff'd sub nom. Gennusa* v. *Canova*, 748 F.3d 1103 (11th Cir. 2014). There, the District Court held,

> "Since at least the Supreme Court's decision in *Katz*, it has been clearly established that the Fourth Amendment prohibits the police from electronically intercepting communications without a warrant when the speakers have a reasonable expectation of privacy. This is especially clear when the intercepted communications

> involve privileged attorney-client communications. *See Lonegan*, 436 F.Supp.2d at 436–39 (holding that, under precedent such as *Katz*, prison officials were not entitled to qualified immunity with respect to their actions in recording attorney-client conversations). Under the facts of this case, this rule applies "with obvious clarity" to defendants' actions in secretly recording and actively monitoring plaintiffs' private attorney-client conversations. *Hope*, 536 U.S. at 741, 122 S.Ct. 2508.
> "This might be a different case if the recording of attorney-client discussions had been mistaken, inadvertent, or fleeting. But this was none of that: it was a purposeful and advised recording and monitoring of privileged communications by law enforcement officers who then used the information learned to try to advance their case against Studivant."

Id.

The case law on attorney-client letter mail further demonstrates the clear impropriety of defendants' actions in this case. For more than 40 years, courts have held that prison officials are prohibited from reading attorney-client letter mail. *Wolff* v. *McDonnell*, 418 U.S. 539, 577 (1974). However, they can and do "inspect" legal mail to ensure it does not contain drugs or other physical contraband. *Nordstrom* v. *Ryan*, 856 F.3d 1265 (9th Cir 2017).

The majority of Federal Circuit Courts have held that prisoners have a constitutionally protected right to have their incoming legal mail not only delivered unread, but also opened only in their presence. *See Al-Amin* v. *Smith*, 511 F.3d 1317, 1330–31 (11th Cir. 2008) ("Applying *Turner*'s factors to this case, we conclude that our well-established law in *Taylor* and *Guajardo*—that inmates have

a constitutionally protected right to have their properly marked attorney mail opened in their presence—is not changed by *Turner* and remains valid, well-established law."); *Jones* v. *Brown*, 461 F.3d 353, 359 (3d Cir. 2006) (holding that opening incoming legal mail in inmates' presence is necessary to ensure it remains unread, and that policy of opening incoming legal mail outside of prisoners' presence, "deprives the expression of confidentiality and chills the inmates' protected expression, regardless of the state's good-faith protestations that it does not, and will not, read the content of the communications").[5]

Inspection of *outgoing personal* mail, however, is subject to heightened scrutiny and "must further an important or substantial governmental interest" to pass constitutional muster. *Thornburgh*, 490 U.S. at 413; *Procunier*, 416 U.S. at

[5] *Accord Kaufman* v. *McCaughtry*, 419 F.3d 678, 686 (7th Cir. 2005) (stating, "when a prison receives a letter for an inmate that is marked with an attorney's name and a warning that the letter is legal mail, officials potentially violate the inmate's rights if they open the letter outside of the inmate's presence"); *Sallier* v. *Brooks*, 343 F.3d 868, 877–78 (6th Cir. 2003) (concluding that no penological interest or security concern justifies opening attorney mail outside prisoner's presence when prisoner requested otherwise); *Davis* v. *Goord*, 320 F.3d 346, 351–52 (2d Cir. 2003) (noting, "[i]nterference with legal mail implicates a prison inmate's rights to access to the courts" but concluding two incidents of mail interference "are insufficient to state a claim for denial of access to the courts because [the inmate] has not alleged that the interference with his mail either constituted an ongoing practice of unjustified censorship or caused him to miss court deadlines or in any way prejudiced his legal actions"); *Powells* v. *Minnehaha County Sheriff Dep't*, 198 F.3d 711, 712 (8th Cir. 1999) (concluding inmate stated constitutional claim based on officers opening legal mail when he was not present); *Bieregu* v. *Reno*, 59 F.3d 1445, 1458 (3d Cir.1995) (disagreeing with Fifth Circuit's *Brewer*, and concluding the pattern and practice of opening inmate's properly marked incoming "court mail" outside his presence fails the *Turner* reasonableness standard and violates inmate's rights to free speech and access to courts) (*abrogated in part on other grounds by Lewis* v. *Casey*, 518 U.S. 343 (1996) (overruling *Bieregu*'s holding that a prisoner is not required to show actual injury in an access-to-courts claim); *Lemon* v. *Dugger*, 931 F.2d 1465, 1467 (11th Cir. 1991) ("The Department of Corrections rule states that all incoming legal mail is to be forwarded unopened when it can be determined from the envelope that the correspondence is legal in nature and does not contain contraband. If inspection of the envelope is not enough, then the legal mail may be opened for inspection in front of the inmate, but only the signature and letterhead may be read."); *but see Brewer* v. *Wilkinson*, 3 F.3d 816, 825 (5th Cir. 1993) (holding "that what we once recognized in *Sterrett* as being "compelled" by prisoners' constitutional rights—i.e., that a prisoner's incoming legal mail be opened and inspected only in the prisoner's presence, *see Sterrett*, 532 F.2d at 469—is no longer the case in light of *Turner* and *Thornburgh*").

413. Prison officials are not permitted the same flexibility with regard to outgoing mail because "[t]he implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials." *Procunier,* 416 U.S. at 413. *Procunier* requires that regulation of outgoing personal mail be narrowly tailored to ensure prisoners' constitutional rights are not restricted "greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* at 413. "Security, order, and rehabilitation" are the only three governmental interests that were recognized as "substantial." *Id.* Further, "a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad." *Id.* at 413–14; *see also Cancel* v. *Goord*, 2001 WL 303713, at *7 (S.D.N.Y. March 29, 2001) ("[T]he penological interests for the interference with outgoing mail must be more than just the general security interest which justifies most interference with incoming mail.").

Procunier holds that *outgoing* *personal* mail is entitled to heightened scrutiny because it does not directly threaten to introduce contraband into the prison. *Outgoing* *legal* mail poses an even lesser security risk. "[T]he reading of inmates' mail to attorneys cannot be justified by reference to any valid prison need … At most, there appears to be only a very remote and wholly speculative danger that an attorney, an officer of this court, would assist a prisoner in avoiding

legitimate prison regulations." *Marquez* v. *Miranda*, 83 F.3d 427, 427 (9th Cir. 1996) (Fernandez, J., concurring) (internal citations omitted); *see also Taylor* v. *Sterrett*, 532 F.2d 462, 474 (5th Cir. 1976) ("it must be assumed that mail addressed to … licensed attorneys containing contraband or information about illegal activities will be treated by the recipients in a manner that cannot cause harm"); *Davidson* v. *Scully*, 694 F.2d 50, 52–53 (2d Cir. 1982) (agreeing with Fifth Circuit holding in *Taylor* that outgoing legal mail does not pose a legitimate security threat); *Davis* v. *Goord*, 320 F.3d 346, 351 (2d Cir. 2003) ("courts have consistently afforded greater protection to legal mail than to non-legal mail, as well as greater protection to outgoing mail than to incoming mail"); *see also Sallier* v. *Brooks*, 343 F.3d 868, 873–74 (6th Cir. 2003) (finding that legal mail is entitled to a heightened level of protection to avoid impinging on a prisoner's legal rights, the attorney-client privilege, and the right to access the courts); *DeMassa* v. *Nunez*, 770 F.2d 1505, 1507 (9th Cir.1985) (prisoners' enhanced privacy interest in attorney-client documents entitles them to heightened judicial protection and subjects prison officials to heightened judicial supervision when a search requires review of attorney-client documents). [6] Unlike letter mail, telephone

[6] *Amicus* also notes that in the context of expanding inmate communications via e-mail in other jurisdictions, such as the Federal Bureau of Prisons, traditional legal mail is acknowledged as even more "sacrosanct," in the words of this Court in *Nordstrom I*. The New York County Lawyers Association has separately argued for the same protections in e-mail communications as they are already widely acknowledged and protected in traditional legal mail scenarios. *See* NEW YORK COUNTY LAWYERS ASSOCIATION, ATTORNEY-CLIENT EMAIL MONITORING IN THE FEDERAL PRISON SYSTEM (2015); ABA Res. 10A, House of Delegates, Midyear Meeting 2016 (Feb. 2016) (adopted), http://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-

communications cannot contain drugs or other physical contraband. Thus, because unmonitored attorney telephone calls reduce the opportunities for illegal drugs or contraband to be introduced into NDOC facilities through inmate mail and in-person meetings, the NDOC cannot justify monitoring attorney calls on the basis of promoting prison security.

The legal mail cases demonstrate that as of 2007, it was clearly established that as a minimal procedural safeguard, prison officials must inform inmates and their attorneys that they are "inspecting" the legal communication for "suspicious features." The caselaw requires that as a minimal procedural protection, both incoming and outgoing legal mail can only be "inspected" in the inmate's presence to ensure prison officials do not read the substance of the communication. Here, Unit 13 inmates and their attorneys were afforded no such procedural safeguards as the NDOC did not inform them that their privileged communications were being monitored. Thus, it is not even a close question that the NDOC's policy of secretly monitoring Unit 13 inmates' telephone calls with their attorneys was unlawful, and that any reasonable correction officer in 2007 would have known that secretly monitoring the privileged attorney-client telephone calls was unlawful.

Lastly, the fact that the monitoring of Unit 13 inmates' telephone calls with their attorneys was done *secretly* strongly suggests that prison officials *knew* their

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resolutions/10a.html; *see also* Ruben, Brandon P., Note, *Should the Medium Affect the Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email*, 83 FORDHAM L. REV. 2131 (2015).

conduct was unlawful. Thus, this case falls into the category of the "rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear" even if the Court finds that "existing precedent does not address similar circumstances." *District of Columbia* v. *Wesby*, 138 S.Ct. 577, 590 (2018), *quoting Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (*per curiam*).

For these reasons, this Court should hold that it was clearly established as of 2007 that prison officials could not secretly monitor or listen to attorney-inmate telephone calls, and remand with instructions to the District Court that Appellees are not entitled to qualified immunity in this case.

II. Qualified Immunity is not a defense against claims for injunctive or declaratory relief against officials in their official capacities.

The District Court clearly erred by dismissing Mr. Witherow's claims for declaratory and injunctive relief, which may be granted even where defendants raise valid claims of qualified immunity. *See, e.g.*, *Washington* v. *Harper*, 494 U.S. 210, 218 (1990) (individual defendants were entitled to qualified immunity; case was allowed to proceed, but only to consider claims for injunctive and declaratory relief under § 1983 as well as state law); *Eagon Through Eagon* v. *City of Elk City, Okla.*, 72 F.3d 1480 (10th Cir.1996) (declaratory and injunctive relief granted; damages claims against individual defendants dismissed on qualified immunity grounds).

"Qualified immunity applies to claims for monetary relief against officials in

their individual capacities, but it is not a defense against claims for injunctive relief against officials in their official capacities. *Frank v. Relin*, 1 F.3d 1317, 1327 (2d Cir. 1993), *citing Hafer v. Melo*, 502 U.S. 21, 22–23 (1991).

"An action for injunctive relief no matter how it is phrased is against a defendant in official capacity only; plaintiff seeks to change the behavior of the governmental entity." *DeVargas v. Mason & Hanger–Silas Mason Co., Inc.*, 844 F.2d 714, 718 (10th Cir.1988), citing *Scott v. Lacy*, 811 F.2d 1153, 1153–54 (7th Cir. 1987) (per curiam).

Essentially the same is true of claims seeking declaratory relief. "[C]laims for injunctive and declaratory relief are unaffected by qualified immunity." M*alik* v. *Brown*, 16 F.3d 330, 335 n. 4 (9th Cir.1994) *citing Los Angeles Police Protective League* v. *Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993). "Qualified immunity is only an immunity from a suit for damages, and does not provide immunity from suit for declaratory or injunctive relief." *Hydrick* v. *Hunter*, 669 F.3d 937, 940 (9th Cir. 2012), *citing Center for Bio–Ethical Reform, Inc*. v. *Los Angeles County Sheriff Dept*., 533 F.3d 780, 794–95 (9th Cir. 2008); *Los Angeles Police Protective League v. Gates*, 995 F.2d at 1472.

Accordingly, even if this Court finds that Defendants are entitled to qualified immunity, it should reverse and remand to the District Court for consideration of Mr. Witherow's claims for injunctive and declaratory relief.

CONCLUSION

This case is about whether prison officials may secretly monitor and listen to the substance of a prisoner's properly placed outgoing telephone call to his attorney in the absence of any evidence that the inmate will discuss criminal activities, or that the attorney would facilitate the inmate's crime. As outlined herein, anything less than an Order from this Court reversing the District Court and prohibiting monitoring of legal telephone calls absent good cause would cause an unprecedented chilling effect on the attorney-client privilege and pose a fundamental threat to the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights of prisoners nationwide.

Prison policies permitting monitoring of legal calls always pose a risk that some privileged discussions will be overheard, in violation of prisoners' constitutional rights. Where a telephone call poses a legitimate security threat, the risk of such constitutional violations is tolerable. However, in the case of *properly placed legal calls to an inmate's registered attorney*, which poses no inherent threat to prison security, any risk that such conversation will be monitored and listened to is unacceptable. Thus, a bright-line rule prohibiting prison officials from monitoring properly placed outgoing legal phone calls to an inmate's attorney at his registered telephone number, absent good cause, is necessary to eliminate the

risk of prison officials violating prisoners' rights by arbitrarily or mistakenly listening to the substance of inmates' conversations with their attorneys.

Anything less than a bright-line rule risks abuse by prison administration and its officers. The abuse of power by prison officers is inevitable; such abuse (and risk of such abuse) should be avoided and battled. This is not unique to Nevada, as the *amicus* have seen this time and again in New York as well.[7] To protect institutional security, the Supreme Court has granted varying degrees of flexibility to develop and implement policies that infringe, to some degree, upon inmates' constitutional rights; however, to prevent an abuse of power and gutting of the sacrosanct attorney-client privilege, such policies must include in the context of legal communications, (1) clear and unambiguous procedural safeguards to minimize the risk that prison officials will listen to the substance of legal communications, which must be (2) proportional to the security threat posed by the specific type of legal communication being regulated.

The *amicus* urges reversal of the District Court's holding and implore this court to hold that prison officials are prohibited from surreptitiously monitoring properly placed outgoing legal calls to an inmate's attorney absent good cause.

[7] *See e.g.* Letter from Preet Bharara, U.S. Attorney for the S.D.N.Y., to NYC Mayor Bill de Blasio and NYC Dept. of Corr. Comm'r Joseph Ponte (Aug. 4, 2014), *available at* https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf; Tom Robins, *Guarding the Prison Guards: New York State's Troubled Disciplinary System*, N.Y. TIMES, Sept. 27, 2015, http://www.nytimes.com/2015/09/28/nyregion/guarding-the-prison-guards-new-york-states-troubled-disciplinary-system.html?_r=0.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d), 32(a)(7)(C), and Circuit Rule 32-1, I certify that the attached amicus brief is proportionally spaced, has a typeface of 14 points or more, and, pursuant to the word-count feature of the word processing program used to prepare this brief, contains 6,785 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

October 25, 2019

/s/ Elliot D. Shields
Elliot D. Shields

CERTIFICATE OF COMPLIANCE

I certify that on October 25, 2019, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants on record.

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