

**No. 18-17233**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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JOHN WITHEROW,

*Plaintiff-Appellant,*

v.

HOWARD SKOLNIK, *ET AL.*,

*Defendants-Appellees*

On Appeal from the United States District Court for the District of Nevada  
No. 3:08-cv-00353-RCJ-CBC  
Hon. Robert C. Jones

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Brief of *Amici Curiae* Prison Law Office, American Civil Liberties Union,  
ACLU of Nevada, Ethics Bureau at Yale, National Association of Criminal  
Defense Lawyers, and National Juvenile Defender Center  
in Support of Plaintiff-Appellant and in Support of Reversal

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## **CORPORATE DISCLOSURE STATEMENT**

In accordance with Federal Rule of Appellate Procedure 26.1, the Amici Curiae further described below state that they are nonprofit organizations or academic institutions with no parent corporations and in which no person or entity owns stock.

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## IDENTITY AND INTEREST OF AMICI

Amici Curiae, described below, have a direct interest in the issues before this Court, and both parties have consented to the filing of this brief. No party authored and/or funded this brief.

The **Prison Law Office (“PLO”)** is a non-profit public interest law firm founded in 1978 that provides representation in class action impact litigation in California and Arizona to improve incarcerated persons’ conditions of confinement, and directly represents individuals in habeas corpus petitions, appeals, and parole consideration hearings. PLO has appeared before this Court in numerous cases involving prisoners’ rights, both as direct counsel and as amicus curiae. While most communication with clients is via legal mail, it is often necessary to have confidential legal calls with prisoners—especially those incarcerated in remote locations hundreds of miles from our office—who need to report urgent, rapidly-evolving problems at their prisons. PLO also represents people with disabilities, including blindness or upper-body mobility impairments, who physically cannot correspond via written letters in *Armstrong v. Newsom*, Case No. C94-2307-CW (N.D. Cal. filed 1994), and serves as class counsel in a case involving the rights of prisoners with intellectual and developmental disabilities in *Clark v. State of Calif.*, Case No. C96-1486-CRB (N.D. Cal. filed

1996), in which many class members are unable to read and write or have very limited abilities to do so.

The **American Civil Liberties Union (“ACLU”)** is a nationwide, non-profit, nonpartisan organization with more than 1.6 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and this nation’s civil rights laws. Consistent with that mission, the ACLU established the National Prison Project (NPP) in 1972 to protect and promote the civil and constitutional rights of prisoners. The NPP has decades of experience in complex prisoners’ rights class action suits and since 1990 has represented prisoners in five cases before the U.S. Supreme Court. The **ACLU of Nevada** is one the ACLU’s state affiliates, with over 4,400 members and supporters statewide.

The **Ethics Bureau at Yale (EBaY)** is a clinic at the Yale Law School that has drafted amicus briefs in matters involving lawyer, judicial, and prison official conduct and ethics; has assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility; and has provided assistance, counsel, and guidance on a pro bono basis to not-for-profit legal service providers, courts, state governments, and law schools.

The **National Association of Criminal Defense Lawyers (“NACDL”)** was founded in 1958 and is dedicated to advancing the proper, efficient, and just

administration of justice. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. It has a nationwide membership of approximately 10,000, and up to 40,000 including affiliate members. NACDL members are private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system.

The **National Juvenile Defender Center (NJDC)** was created to ensure excellence in juvenile defense and promote justice for all children. NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs, and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural, and tribal

areas. NJDC also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination. NJDC has participated as amicus curiae before the United States Supreme Court, as well as federal and state courts across the country.

\* \* \* \*

Interference with prisoners' confidential legal communications does serious harm to the rights of prisoners and pre-trial detainees, which are rights that Amici work to protect. Incarcerated people rely upon confidential legal calls not only to communicate with their criminal defense and appellate attorneys, but also to alert attorneys at civil rights organizations about unhealthy, dangerous, and unconstitutional conditions of confinement. Amici have an abiding interest in ensuring the right of incarcerated people to communicate fully and confidentially with their lawyers. Amici also have an interest in protecting their own First Amendment rights. Those rights are infringed, and Amici's ability to comply with their ethical obligations is compromised, when jail and prison personnel interfere with their confidential legal calls with incarcerated clients. We focus in this brief on the profound damage to the justice system caused when the rights of Amici and other similarly situated counsel are infringed in the ways presented by this case.

## INTRODUCTION

As defense attorneys, civil rights legal organizations that represent incarcerated people, and organizations that advocate for robust legal representation for people incarcerated in juvenile halls, jails, and prisons, Amici are familiar with the challenges lawyers face in communicating with incarcerated clients. Visits are extremely limited, expensive, and time-consuming; mail can be slow and unreliable; and confidential email is nonexistent.<sup>1</sup> Legal phone calls thus often provide the only means by which attorneys can communicate regularly and in a timely manner with clients. The Supreme Court has protected communications between incarcerated people and their counsel by holding that prison “[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid.” *Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989). Interference with prisoners’ communications with attorneys also burdens the lawyers’ First Amendment rights, as these are communications in which “the interests of both parties are inextricably meshed.” *Id.*, 416 U.S. at 408-09.

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<sup>1</sup> People incarcerated in the custody of the Nevada Department of Corrections (NDOC) have access to incoming email through a program called CorrLinks, but the system is monitored, not for legal mail, and not confidential. See [http://doc.nv.gov/Inmates/Inmate\\_Incoming\\_Messages\\_Information/](http://doc.nv.gov/Inmates/Inmate_Incoming_Messages_Information/).

Amici PLO and ACLU represent people incarcerated across the United States, often in remote areas, and are keenly aware of the paramount importance of legal calls in serving their clients. The travel and logistical planning required to arrange a confidential, in-person visit with a client presents a significant burden to Amici as well as to the prison staff. Amici also litigate class actions involving systemic prison conditions across the country. *See, e.g., Parsons v. Ryan*, Case No. 2:12-cv-00601-ROS (D. Ariz. filed 2012); *Plata v. Newsom*, Case No. 3:01-cv-01351-JST (N.D. Cal. filed 2001); *Coleman v. Newsom*, Case 2:90-cv-00520-KJM-DB (E.D. Cal. filed 1990). In these types of cases, confidential legal calls allow clients to quickly and adequately relay urgent information essential to counsel's representation of these clients. Cases involving medical and mental health care in particular often unfold in real time, and can require immediate communication with and attention by counsel to avoid serious harm to incarcerated persons. For example, if prison staff is denying an incarcerated person's lifesaving medication, or if there are no medical staff working at a prison for a week, any delay in scheduling an in-person visit to learn of the issue could result in serious injury or death to individual clients and/or class members. Amicus ACLU of Nevada represents the interests of incarcerated people, most recently in a challenge to NDOC's refusal to make public the records relating to lethal injection protocols.

*See Am. Civil Liberties Union of Nev. Found. v. State of Nev. ex rel. Nev. Dep't of Corrs.*, Case No. 18-OC-00163-1B (Nev. First Jud. Dist. filed July 3, 2018).

Amici NACDL and NJDC advocate for defense attorneys across the country who represent adults and children in criminal and juvenile proceedings, as well as in post-conviction or post-adjudication appeals. Defense attorneys often need to talk with their clients to clarify complicated factual and legal issues related to their case. These dialogues cannot be conducted effectively through legal mail given both literacy issues and inherent delays, nor through in-person visits that can be burdensome to all parties. Only phone calls give clients adequate opportunity to explain specific issues and enable attorneys to ask necessary follow-up questions.

Plaintiff John Witherow alleges that on numerous occasions NDOC staff surreptitiously listened to his legal phone calls with his attorney, both at the start of the call and periodically throughout the call. This is the consequence of the policy and practice NDOC adopted at Unit 13. Under a prior policy, prison staff placed phone calls to counsel and by so doing were able to establish that the calls were legal in nature without eavesdropping. Under the challenged policy, prison staff listen to the call ostensibly for the purpose of determining if the call is of a legal nature. Plaintiff alleges staff were not trained to evaluate the legal character of phone calls, based on an officer's testimony that she would stop listening only if she heard "any legal terminology that you might hear on television." ER 190.

Plaintiff also alleges NDOC used confidential information overheard in his attorney-client calls to gain an unfair advantage in his prison conditions litigation. ER 341-43.

Plaintiff's allegations describe actions by NDOC that violate attorneys' First Amendment rights. These actions jeopardize lawyers' ability to perform their affirmative duties to protect the lawyer-client relationship under ethics and professional responsibility rules. Defendants' acts place lawyers in the position of being unable to meet their ethical duties to communicate fully and openly with clients, to protect confidentiality, and to provide competent and diligent representation.

## **ARGUMENT**

### **I. NDOC STAFF'S ACTS OF LISTENING TO CONFIDENTIAL LEGAL CALLS BURDEN ATTORNEYS' FIRST AMENDMENT RIGHTS**

NDOC employees' eavesdropping on Plaintiff's legal calls with his attorneys not only violates his rights but also implicates the First Amendment rights of *all* lawyers or legal organizations who may communicate via legal calls with people in Nevada State Prison, Unit 13. The First Amendment rights of counsel are clear in litigation that involves systemic problems or conditions. In *NAACP v. Button*, the Supreme Court held that counsel's activities advising persons of their legal rights as well as soliciting prospective litigants were

protected by the First Amendment freedoms of expression and association. 371 U.S. 415, 429 (1963). The Court subsequently recognized the same principle in *Primus*, where an attorney communicated with a potential litigant for the ACLU. The Court acknowledged the ACLU's work "in the defense of unpopular causes and unpopular defendants," and noted that "[f]or the ACLU, as for the NAACP, 'litigation is not a technique of resolving private differences'; it is 'a form of political expression' and 'political association.'" *In re Primus*, 436 U.S. 412, 427-28 (1978) (quoting *Button*); see also *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) ("Attorneys have rights to speak freely subject only to the government regulating with narrow specificity.") (citing *Button*).

Prison or jail policies that unreasonably impede communication between attorneys and incarcerated people violate these First Amendment protections. See, e.g., *Am. Civil Liberties Union Fund of Mich. v. Livingston Cty.*, 796 F.3d 636, 642-48 (6th Cir. 2015) (affirming preliminary injunction and holding that ACLU showed likelihood of success on its claim that jail's restrictions on legal mail violated its First Amendment rights); *Sturm v. Clark*, 835 F.2d 1009, 1015 (3d Cir. 1987) (concluding that an attorney stated a First Amendment claim when her access to prisoner clients was restricted after she publicized staff misconduct); *Abel v. Miller*, 824 F.2d 1522, 1534 (7th Cir. 1987) (holding that a federal prison could not ban attorneys from a prisoners' rights organization in retaliation for the group's

exercise of its First Amendment rights to criticize and litigate against the institution); *Jean v. Nelson*, 711 F.2d 1455, 1508-09 (11th Cir. 1983) (holding that Haitian Refugee Center attorneys had a right to provide “know your rights” education for detained Haitian immigrants), *on rehearing*, 727 F.2d 957 (11th Cir. 1984), *rev’d on other grounds*, 472 U.S. 846 (1985); *Cruz v. Beto*, 603 F.2d 1178, 1180-81, 1186 (5th Cir. 1979) (holding that arbitrarily barring an attorney from communicating with incarcerated clients by mail or in person violated her First and Fourteenth Amendment rights); *Northwest Imm. Rights Project v. Sessions*, Case No. C17-716-RAJ, 2017 WL 3189032, \*4-5 (W.D. Wash. 2017) (enjoining U.S. Department of Justice regulation on the practice of immigration law as applied to a nonprofit immigrant legal services organization providing “know your rights” workshops for detained immigrants); *Haitian Ctr. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1040 (E.D.N.Y. 1993) (finding that the denial of a legal advocacy group’s access to Haitian detainees at Guantanamo Bay violated the group’s speech and associational rights).

Defendants can offer no explanation as to how the actions of NDOC staff in listening repeatedly to many—if not all—of the 112 phone calls Plaintiff made with his attorneys are “reasonably related to legitimate penological interests.” *Turner v. Safley*, 482 U.S. 78, 89-91 (1987); *see also Livingston Cty.*, 796 F.3d at 641-48 (holding the jail’s restrictions on legal mail did not satisfy *Turner* test).

## II. NDOC STAFF'S PRACTICE OF LISTENING TO LEGAL CALLS IMPAIRS ATTORNEYS' DUTY TO COMMUNICATE AND KEEP CLIENTS REASONABLY INFORMED

Under the Nevada Rules of Professional Conduct, attorneys must keep their clients “reasonably informed” throughout the representation. *See* NV ST RPC Rule 1.6. The American Bar Association (“ABA”) Standards for Criminal Defense Function, Standard 4-3.8(a) (4th ed. 2015), states that “[d]efense counsel should keep the client informed of the developments in the case and the progress of preparing the defense . . . .”<sup>2</sup>

Counsel cannot fulfill these duties simply by limiting communication to mail. Written correspondence with an incarcerated client is much slower than communicating by phone. Lawyers cannot effectively communicate with their clients if they are relying solely on a form of communication that requires days or weeks to have a dialogue. And even assuming that legal mail is unopened and unread, many incarcerated people are unable to communicate effectively through written correspondence. Nearly one-third of U.S. prisoners have little or no ability

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<sup>2</sup> Available at [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/). Similarly, Amici NJDC’s standards require that juvenile defense counsel “keep the client fully informed, using developmentally appropriate language, of all proceedings and potential outcomes” in order to “ensure the full and fair participation of the client.” National Juvenile Defender Center Juvenile Defense Standards (“NJDC Standards”), Commentary to Rule 8.2 (2013). *See* <https://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>.

to read, and a similar percentage do not have a high school degree.<sup>3</sup> According to NDOC, more than half of “Nevada’s inmates come to prison without having completed high school.”<sup>4</sup> Similarly, studies have found that 19 percent of people in prison and 31 percent of people in jail have a cognitive disability, which affects their ability to comprehend and respond to legal documents.<sup>5</sup> With such low literacy and education rates pervasive throughout the criminal justice system, neither incarcerated people nor their attorneys can depend only upon legal mail.

Legal phone calls are thus an essential part of representing incarcerated people. It is no answer for NDOC to say its officers in Unit 13 cease listening to the calls once they determine that they are legal in nature, given officers’ own admissions that they are unequipped to make any such determination. Calls

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<sup>3</sup> Nat’l Ctr. for Educ. Statistics, U.S. Dep’t of Educ., *Highlights from the U.S. PIAAC Survey of Incarcerated Adults* 6, B-3 (2016) (scoring the reading levels of incarcerated individuals from Level 1 to Level 5, and finding that 29 percent of incarcerated people scored *below* a Level 2 reading level. Level 2 readers “can integrate two or more pieces of information based on criteria, compare and contrast or reason about information, and make low-level inferences.” Level 1 readers can only “read relatively short...texts to locate a single piece of information that is identical to or synonymous with the information given in the question or directive.”) at <https://nces.ed.gov/pubs2016/2016040.pdf>. Because communication with clients often involves, at a minimum, a Level 2 reading ability, many incarcerated people are effectively unable to relay their legal issues to their attorneys via written mail.

<sup>4</sup> Nevada Dep’t of Educ., Education Services, *available at* [http://doc.nv.gov/Inmates/Education\\_Services/Home/](http://doc.nv.gov/Inmates/Education_Services/Home/)

<sup>5</sup> Jennifer Bronson, *et al.*, *Disabilities Among Prison and Jail Inmates*, 2011-12 (Dec. 2015) (national survey of almost 40,000 prisoners incarcerated in more than 200 state and federal prisons, including at least one facility located in each state), *available at* [www.bjs.gov/content/pub/pdf/dpji1112.pdf](http://www.bjs.gov/content/pub/pdf/dpji1112.pdf).

regarding prison conditions often do not include references to case numbers, criminal charges, statutes, or other generic legal buzzwords that untrained ears theoretically could recognize. For example, when speaking by phone with class members with physical disabilities, Amicus PLO attorneys may ask if the client is “getting around the prison” or interacting with staff; if the client can attend education classes or job assignments regularly; or if the client needs any assistive devices to navigate the prison. The content would not necessarily indicate that the call concerns a legal matter. While an officer may conclude the call is merely a casual conversation, in reality the lawyer is ensuring that prison staff is complying with the Americans with Disabilities Act (ADA). Moreover, the class member may be reporting misconduct or neglect by prison staff that violates the ADA.

Similarly, calls with class members with intellectual disabilities may not appear to be legal in nature to eavesdropping officers. In fact, counsel specifically avoid using legal jargon, so as to be intelligible to clients. For example, some class members with intellectual disabilities require regular prompting from officers to maintain basic hygiene. Rather than a complicated legal question such as, “Have you been consistently instructed by correctional officers to maintain adequate hygiene, as required by the *Clark* Remedial Plan,” PLO attorneys would instead ask, “Do guards tell you to brush your teeth every day after chow?” The simple

language the attorneys use is necessary to meet their ethical duty to communicate with and update their intellectually disabled clients.

### **III. NDOC STAFF'S ACTIONS PREVENT ATTORNEYS FROM COMPLYING WITH THEIR ETHICAL DUTY OF CONFIDENTIALITY**

Both the Nevada Rules of Professional Conduct and the ABA Model Rules of Professional Conduct require that attorneys ensure the confidentiality of information relating to the representation of a client.<sup>6</sup> *See* NV ST RPC Rule 1.6; ABA Model Rules of Prof'l. Conduct R. 1.6 (2016); *see also* NJDC Standards, Rule 2.3(c) (2013) (“Counsel must zealously protect confidential information from public disclosure. Counsel should not discuss the case or any confidential information when people other than the client are present and able to hear”).<sup>7</sup>

NDOC's actions in Unit 13 violate the confidentiality of attorney-client communications recognized by the Supreme Court. Defendants' practice prevents attorneys from complying with their ethical duty to maintain the confidentiality of all lawyer-client communications. *See Lanza v. New York*, 370 U.S. 139, 143-44 (1962) (“[E]ven in a jail, or perhaps especially there, the relationships which the

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<sup>6</sup> Nevada incorporated the ABA Model Rules into its state rules, including rules relating to attorney-client confidentiality. NV ST RPC Rule 1.6; ABA Model Rules of Prof'l. Conduct R. 1.6 (2016). Under the District of Nevada's Local Rules of Practice, the Nevada Rules apply to attorneys authorized to practice before the federal district court. D. Nev. Loc. R. Prac. IA 11-7.

<sup>7</sup> ABA Criminal Justice Standards for the Defense Function, Standard 4-1.4(a) (4th ed. 2015), similarly requires that defense counsel “act zealously within the bounds of the law and applicable rules to protect the client's confidences.”

law has endowed with particularized confidentiality must continue to receive unceasing protection.”); *see also Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014) (“In American criminal law, the right to privately confer with counsel is nearly sacrosanct.”); ABA Standards for Criminal Justice: Treatment of Prisoners, 310-11 (3d ed. 2011) (“[C]orrectional officials should implement procedures to enable confidential telephonic contact between counsel and a prisoner who is a client, prospective client, or witness, subject to reasonable regulations, and should not monitor or record properly placed telephone conversations between counsel and such a prisoner.”).<sup>8</sup>

NDOC’s practice of listening to legal calls has a chilling effect on robust communication and is profoundly destructive to the administration of justice. If a client fears interference with or disclosure of confidential communications, “the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.” *Fisher v. United States*, 425 U.S. 391, 403 (1976);

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<sup>8</sup> ABA Criminal Justice Standards for the Defense Function, Standard 4-2.2 (4th ed. 2015), similarly states that jurisdictions should guarantee by statute or rule “the right of a criminally-detained or confined person to . . . confidential . . . communication with a defense lawyer” and that prisons provide “confidential *and unmonitored* telephonic and other communication facilities to allow effective confidential communication between defense counsel and their detained clients.” (emphasis added). In fact, Standard 4-2.2(d) states that “[a]bsent a credible threat of immediate danger or violence, or advance judicial authorization, persons working in detention or imprisonment institutions should be prohibited from examining, monitoring, recording, or interfering with confidential communications between defense counsel and their detained clients.”

*see also Nordstrom*, 762 F.3d at 910 (“It takes no stretch of imagination to see how an inmate would be reluctant to confide in his lawyer about the facts of the crime, perhaps other crimes, possible plea bargains, and the intimate details of his own life and his family members’ lives, if he knows that a guard is going to be privy to them, too.”).

This is especially clear in cases involving mitigation defenses, as well as challenges to conditions of confinement, including medical or mental health care, improper uses of force, or abuse, all of which may introduce sensitive issues. Incarcerated people may be reporting information related to their physical or mental health that is extremely personal or embarrassing, or could lead to a risk of attack or exploitation if widely known (such as HIV status or mental health conditions). They also could be reporting physical, sexual, and/or verbal abuse by staff or other incarcerated people.

Confidential legal calls also are necessary for prisoners to timely report staff misconduct or abuse to their attorneys without fear of retaliation. NDOC’s practice of surreptitiously listening to legal calls made by Plaintiff and other people in Unit 13 places prisoners at risk of retaliation from prison staff. Indeed, Plaintiff alleges NDOC staff retaliated against him and others after listening to his legal calls. Specifically, NDOC officers retaliated against another prisoner after Mr. Witherow

asked his attorney (on what he thought was a confidential call) to assist in the other person's discrimination challenge to prison officials. ER 138-40, 335-40.

This Court, as well as nearly every other Circuit, has observed that staff retaliation occurs within prison systems and has held such retaliation to violate the Constitution. *See, e.g., Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005) (setting out the elements of a prisoner's retaliation claim); *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001) (holding "repeated threats of transfer because of [an inmate's] complaints about the administration of the [prison] library" were sufficient to ground a retaliation claim); *see also Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 545 (4th Cir. 2017) (holding that a prisoner has a right to be free from retaliation); *Gee v. Pacheco*, 627 F.3d 1178, 1189 (10th Cir. 2010) (same); *Watkins v. Kasper*, 599 F.3d 791, 798 (7th Cir. 2010) (same); *Haynes v. Stephenson*, 588 F.3d 1152, 1156 (8th Cir. 2009) (same); *Bibbs v. Early*, 541 F.3d 267, 270-72 (5th Cir. 2008) (same); *Thomas v. Eby*, 481 F.3d 434, 440 (6th Cir. 2007) (same); *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003) (same). This Court has found that this retaliation chills free speech and prevents prisoners from having meaningful access to the courts. *See, e.g., Jones v. Williams*, 791 F.3d 1023, 1035 (9th Cir. 2015) (observing "[t]he First Amendment guarantees a prisoner a right to seek redress of grievances from prison authorities and as well as a right of

meaningful access to the courts”) (citing *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995)).<sup>9</sup>

Even without specific instances of retaliation in every case, NDOC’s practice has highly pernicious and predictable results. The interference with legal calls compromises lawyers’ ability to communicate fully and confidentially with their clients, regardless of whether any information is actually used against the client. As this Court recognized in the context of confidential legal mail between incarcerated people and their attorneys, it is the tangible *risk* of the use of the confidential information and the resulting chilling effect, rather than its actual use by a third party, that fatally impairs attorney-client communication. *See Nordstrom*, 762 F.3d at 911 (“The harm [plaintiff] alleges is not that tainted evidence was used against him but that his right to privately confer with counsel has been chilled. This is a plausible consequence of the intentional reading of his confidential legal mail.”).

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<sup>9</sup> A recent study by California’s Office of the Inspector General (“OIG”) into the California Department of Corrections and Rehabilitation’s grievance process for staff misconduct determined that it is “inadequate” at addressing prisoners’ complaints. Cal. Off. of the Inspect. General, *Special Review of Salinas Valley State Prison’s Processing of Inmate Allegations of Staff Misconduct* at 1 (Jan. 2019), available at: [https://www.oig.ca.gov/wp-content/uploads/2019/05/2019\\_Special\\_Review\\_-\\_Salinas\\_Valley\\_State\\_Prison\\_Staff\\_Complaint\\_Process.pdf](https://www.oig.ca.gov/wp-content/uploads/2019/05/2019_Special_Review_-_Salinas_Valley_State_Prison_Staff_Complaint_Process.pdf). The OIG found that prison staff “demonstrated [a] lack of concern for maintaining confidentiality” when investigating grievances, and that “inmates express[ed] . . . feelings of being threatened in retaliation for filing staff complaints.” *Id.* at 29, 63.

#### **IV. NDOC STAFF’S ACTIONS PREVENT ATTORNEYS FROM COMPLYING WITH THEIR ETHICAL DUTIES OF COMPETENT AND DILIGENT REPRESENTATION**

The Nevada Rules of Professional Conduct require lawyers to act with thoroughness and preparation as is reasonably necessary to represent a client, (NV ST RPC Rule 1.1), and to “act with reasonable diligence and promptness in representing a client.” NV ST RPC Rule 1.3.<sup>10</sup> And relevant to Amici who represent incarcerated people in class action litigation, class counsel “must be willing and able to vigorously prosecute the action.” 7A Fed. Prac. & Proc. Civ. § 1769.1 (3d ed. 2013).

In this case, because Plaintiff’s attorneys learned that their calls with him had been overheard, these attorneys—and indeed all attorneys representing people in Unit 13—are placed in a double bind. They cannot meet the duty to provide competent and diligent representation without sacrificing the confidential nature of communications; but if they stop or limit communication to ensure confidentiality, they will not provide competent and diligent representation. Due to NDOC’s acts, lawyers must meet with clients in-person to ensure a confidential real-time exchange of information. A policy that requires lawyers to meet with incarcerated

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<sup>10</sup> See also ABA Model Rules of Prof’l. Conduct R. 1.1, 1.3 (2016); NJDC Standards, Standard 1.1 (“Counsel must provide competent, diligent, and zealous advocacy to protect the client’s procedural and substantive rights.”).

clients in person for any attorney-client interaction “impose[s] a substantial burden on the right of access to the courts.” *Procunier*, 416 U.S. at 420.

NDOC’s practice of listening to legal calls also puts attorneys at an unfair disadvantage in litigation, implicating their obligation to diligently and zealously represent their clients. As the Seventh Circuit held, “allowing [a prisoner’s] opponents to eavesdrop on his communications with the lawyer would undermine the prisoner’s right to be represented[] at a hearing[] by counsel . . . .” *Guajardo-Palma v. Martinson*, 622 F.3d 801, 803 (7th Cir. 2010); *see also Nordstrom*, 762 F.3d at 911 (“One threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of free exchanges between defendant and counsel because of the fear of being overheard”) (quoting *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977)).

And in fact, this is what appears to have happened to Mr. Witherow. He suggested to his attorney on a call that two defendants be deposed separately, because one of them would be more forthcoming if she was not feeling pressured in the presence of a colleague. However, because staff listened to this discussion, the litigation strategy was thwarted at the deposition when the parties insisted on sitting together at the same table during the deposition. ER 341-43. If Defendants adopted that tactic based on a privileged conversation on which they eavesdropped,

the result would be outrageous.<sup>11</sup> But whether or not they did so based on the conversation, the fact that they eavesdropped at all—along with the fact that Mr. Witherow and his counsel know that their calls were monitored—now means that all other attorneys talking by phone to clients at Unit 13 are significantly limited in their ability to zealously advocate for their clients.

Given NDOC's acts, no lawyer representing persons in Unit 13 can comply fully with their ethical duties and professional responsibility mandates. This is far more than a technical matter. The Nevada Rules require that as a prophylactic measure, attorneys must *withdraw* from any representation that violates or will violate the Rules. NV ST RPC Rule 1.16 (a)(1). Because destroying attorney-client confidentiality is a violation of the Rules, any attorney who represents a person in Unit 13 will encounter the same ethical conflict if legal calls are compromised. Thus, every current and subsequent lawyer representing a person in Unit 13 would have to withdraw under Rule 1.16(a)(1). This is an intolerable situation that runs contrary to the purpose of the Rules of Professional Conduct.

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<sup>11</sup> If NDOC's attorneys had any role in this, their behavior is a violation of the Nevada Rules of Professional Conduct. NV ST RPC Rule 4.4 ("In representing a client, a lawyer shall not ... use methods of obtaining evidence that violate the legal rights of [a third] person"). Such behavior is sanctionable. NV ST RPC Rule 1.0A (c) ("Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process"); *see also Gomez*, 255 F.3d at 1131-35 (affirming award of sanctions against attorneys for their involvement in prison staff's interception of confidential attorney-client communications).

## CONCLUSION

For the foregoing reasons, the Court should reverse the district court's grant of summary judgment and remand for trial. NDOC's practice violates lawyers' First Amendment rights, is a direct intrusion into the attorney-client relationship, and prevents lawyers from complying with numerous affirmative rules of professional responsibility.

Respectfully submitted,

Date: October 25, 2019

PRISON LAW OFFICE

*/s/ Corene T. Kendrick* \_\_\_\_\_

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(4)(G), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 29(5) and 32(a)(7)(B) because this brief contains 5,081 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) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: October 25, 2019

PRISON LAW OFFICE

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 25, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: October 25, 2019

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