Case No.: 16-15277

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SCOTT D. NORDSTROM,
Plaintiff-Appellant,

v.

CHARLES L. RYAN, Director of ADOC,
Defendant-Appellee.

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

BRIEF OF *AMICI CURIAE* NEW YORK COUNTY LAWYERS ASSOCIATION, and NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* New York County Lawyers Association and the National Association of Criminal Defense Lawyers each make the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.
2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Date: June 22, 2016

Respectfully submitted,

s/Elliot Dolby Shields
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TABLE OF CONTENTS

Page No(s):

TABLE OF AUTHORITIES

Page No(s):

Cases

Federal Rules

Other

Amici curiae New York County Lawyers Association and the National Association of Criminal Defense Lawyers (collectively, "*amici*") submit this brief in support of Plaintiff-Appellant Scott D. Nordstrom.[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, last year the New York County Lawyers Association 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 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

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

[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.

direct and vital interest in the issues before this Court. This brief has been approved by the New York County Lawyers Association Executive Committee.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to promote justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 9,000 members, and up to 40,000 including affiliates' members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in the ABA House of Delegates. NACDL is dedicated to advancing the proper, efficient, and just administration of justice and files numerous amicus briefs each year in this Court and other federal and state courts, addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

PRELIMINARY STATEMENT

This brief challenges the constitutionality of an Arizona Department of Corrections (ADC) policy that impacts the rights of inmates and their properly

marked outgoing legal mail.[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 read the substance of prisoners' properly addressed outgoing legal mail. Such a ruling would create an untenable disparity between the constitutional rights of prisoners in the Ninth Circuit and the rights of inmates[4] elsewhere in the country where traditional legal mail is sacrosanct with regard to attorney-client privilege.

Plaintiff-Appellant Scott Nordstrom requested an ADC officer process and send a letter clearly marked as "legal mail," ER 395, and properly addressed to his court-appointed attorney, ER 3. The officer removed the letter from the envelope and read it in Nordstrom's presence. ER 94, 316. Nordstrom alleges that when he objected, the correction officer told him that ADC policy permitted him to read the letter to ensure it was actually of a "legal subject matter." ER 3, 94.

After Nordstrom had navigated ADC's grievance process, ADC Director Charles L. Ryan ultimately denied Nordstrom's final grievance appeal, citing ADC's outgoing legal mail policy, which states:

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[3] For the purposes of this brief, "outgoing legal mail" shall be defined as: properly addressed and marked "legal mail" sent from a prisoner to an attorney representing the inmate in a civil or criminal matter that is related to his legal claims and contains confidential, personal or privileged information, but unless otherwise noted, shall not include mail to courts, government agencies, not-for-profits, etc.

[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.

> 1.4.2.2 All outgoing letters to an inmate's attorney or to a judge or court shall be brought to the mail room by the inmate, where the letter shall not be read or censored but shall be inspected for contraband and sealed in the presence of the inmate. All outgoing legal documents to an inmate's attorney or to a judge or court (other than letters to an inmate's attorney or to a judge or court, such as pleadings, briefs and motions) shall not be censored, but staff are not prohibited from reading such documents to the extent necessary to establish the absence of contraband.

ER. 51. Director Ryan "reasoned that, '[s]taff … *is not prohibited from reading the mail* to establish the absence of contraband and ensure the content of the mail is of legal subject matter.'" ER 52. Nordstrom filed a civil rights action under 42 U.S.C. §1983 and a *Monell* claim on the basis of ADC's policy and practice of reading outgoing legal mail. ER 401; *Nordstrom* v. *Ryan*, 762 F.3d 903, 911 (9th Cir. 2014); ER 95 (Nordstrom testified that ADC correction officers have been reading his outgoing legal mail since he first entered death row over 17 years ago).

The District Court initially granted ADC's motion to dismiss, and Nordstrom appealed to this Court ("*Nordstrom I*"). In opposition to Nordstrom's initial appeal, "[ADC] contend[ed] that they are permitted to read Nordstrom's legal mail as long as they do so in his presence." ER 58.

This Court rejected that argument—an inmate's presence during an officer's improper reading of outgoing legal mail does not cure the constitutional violation. *Nordstrom*, 762 F.3d at 910–11. Rather, "the practice of requiring an inmate to be

present when his legal mail is opened is a measure designed to prevent officials from reading the mail in the first place." *Id.* When prison officials are permitted to inspect legal mail, there is an inherent risk that they will actually read the substance of the communication, in violation of the prisoner's rights. As explained *infra*, Section I, the constitutionally permitted amount of risk that prisoners' rights may be infringed upon under a specific prison mail regulation is determined by the severity of the security threat posed by the type of mail being regulated. Thus, prison policies regulating the inspection of prisoner mail must include two components: (1) clear and unambiguous procedural safeguards to minimize the risk that prison officials will read the substance of legal communications, which must be (2) proportional to the security threat posed by the specific type of mail being regulated. As explained *infra*, Section I, unlike every other type of prison mail, *outgoing legal* mail poses no inherent threat to prison security; and as explained *infra*, Section II, *outgoing legal* mail poses no specific security threat in Arizona prisons. ADC's outgoing legal mail policy nevertheless requires inspection of all outgoing legal mail, but is devoid of any procedural safeguards, does not legitimately further the interests of penal administration, and automatically destroys confidentiality and waives attorney-client privilege.

ADC's outgoing legal mail policy requires correction officers to subjectively and arbitrarily determine if prisoners' properly marked legal mail to attorneys is of

a "legal subject matter." ER 37, 407. If the officer decides the letter is not of a "legal subject matter," then the letter is considered contraband, seized, and the prisoner may be punished. ER 244–45, 386. Despite acknowledging that ADC "presented no specific instance where an inmate has included criminal communications in a letter to or from a legitimate licensed attorney," the District Court upheld ADC's outgoing legal mail policy on the basis that "the Court cannot conclude that the ADC faces no risk of such communications." ER 9.

As explained *infra*, Section I, District Court's finding that outgoing legal mail poses a possible security threat is insufficient to justify its policy of inspecting all outgoing legal mail under *Procunier* v. *Martinez*, 416 U.S. 396, 413 (1974), which must be applied to analyze regulation of outgoing prison mail. While the District Court said it was applying *Procunier*, a close inspection of its findings and the evidentiary record reveals that it actually applied the more flexible "rationally related" test outlined in *Turner* v. *Safley*, 482 U.S. 78 (1987), which applies to regulation of incoming legal mail because it poses an inherently greater security risk than outgoing mail.

The District Court therefore erred in two ways: (1) it made erroneous factual findings to hold that properly marked *outgoing* legal mail to an attorney poses the same security threat as *incoming* legal mail; and (2) it applied the wrong constitutional framework for analyzing outgoing legal mail.

Plaintiff-Appellant has extensively briefed how the evidentiary record reveals that the ADC policy violates both the First and Sixth Amendment rights of Mr. Nordstrom. We do not repeat those arguments. Instead, *amici* (i) explore and argue for the proper constitutional framework through which the District Court should have viewed, and this Court must view, the ADC policy—ultimately asserting that *outgoing legal* mail cannot be opened or inspected absent good cause, (ii) contend that the ADC policy raises Eighth and Fourteenth Amendment concerns and (iii) demonstrate that the unconstitutionality of the ADC policy affects not just Plaintiff-Appellant, Scott Nordstrom, but all inmates—with particular discussion for others on death row and pretrial detainees (with respect to whom prison officials are held to a stricter standard).

ARGUMENT

I. OUTGOING INMATE LEGAL MAIL SHOULD BE HELD TO THE HIGHEST PROTECTIVE CONSTITUTIONAL STANDARD

The District Court applied the incorrect legal standard to evaluate the constitutionality of ADC's outgoing legal mail policy. 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.

Turner, however, is inapplicable to claims challenging prison policies effecting prisoners' right to *send* mail—whether personal or legal. *Thornburgh* v. *Abbott*, 490 U.S. 401, 413–14 (1989). The "express flexibility of the *Turner* reasonableness standard," must be applied by lower courts to analyze *incoming* legal mail policies. *Id.* at 414. *Outgoing personal* mail is protected by a higher standard of scrutiny. *Procunier*, 416 U.S. at 413–14 (1974). *Outgoing legal* mail deserves (and at least four other Circuit courts have held) an even more stringent standard.

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 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]

[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

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 413. Prison officials are not permitted the same flexibility with regard to outgoing mail because "[t]he implications of outgoing correspondence for prison security

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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*").

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] Thus, *outgoing legal* mail must, *a fortiori*, be provided greater protection than *outgoing personal mail*.

[6] The *amici* 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

Applying the framework outlined herein, prison officials must be prohibited from opening or inspecting prisoners' *outgoing legal mail* absent good cause to believe not only that (1) the letter contains contraband or criminal communications, but also that (2) the attorney will further the inmates' criminal conduct. ADC's outgoing legal mail policy is unconstitutional on its face because it fails the three different prison mail tests: *Turner*, *Procunier*, and the heightened *Procunier* framework described herein that must be applied to *outgoing legal* mail.

II. ARIZONA'S OUTGOING LEGAL MAIL POLICY IS OVERBROAD

ADC's unconstitutionally overbroad outgoing legal mail policy (1) lacks minimum procedural safeguards to ensure that outgoing legal mail remains unread, (2) does not further any legitimate interest of penal administration, and (3) automatically destroys confidentiality and waives attorney-client privilege with respect to all outgoing legal mail.

A. ADC's outgoing legal mail policy lacks procedural safeguards

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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-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).

Inmates are entitled to "receive and send mail, subject only to the institution's right to censor letters or withhold delivery if necessary to protect institutional security, and if accompanied by appropriate procedural safeguards." *Hudson* v. *Palmer*, 468 U.S. 517, 547 (1984); *accord Procunier* v. *Martinez*, 416 U.S. 396, 417 (1974) ("[T]he decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards."). Because the ADC cannot point to one instance where outgoing legal mail has ever been abused, its outgoing legal mail policy is unnecessary to protect prison security. Even if there were a legitimate security interest, the ADC's policy lacks minimum procedural safeguards to ensure that prison officials do not read the substance of prisoners' legal communications. Importantly, no circuit court has ever upheld a prison policy allowing inspection of *outgoing legal* mail based on a purported security justification, let alone a policy completely devoid of any procedural safeguards.

Several circuit courts have addressed whether prison officials may inspect the substance of outgoing legal mail in the context of postage credit policies, where prisoners are required to prove that legal mail will be delivered to an attorney or court prior to receiving additional funds to pay for the postage himself. *See Bout* v. *Abramajtys*, 28 F.3d 1213 (6th Cir. 1994). In *Bout*, a Panel of the Sixth Circuit reversed the District Court's grant of summary judgment to the defendant

Michigan Department of Corrections (MDOC) on an inmate's claims that MDOC's outgoing legal mail policy violated his Sixth Amendment right to effective representation and Fourteenth Amendment access to the court. In *Bout*, the postage credit policy required that, "the prisoner must submit the documents to be mailed *unsealed* along with any supporting documentation and a disbursement authorization to his RUM/ARUM [Resident Unit Manager/Assistant Resident Unit Manager] *for review*." *Id.* The court acknowledged that MDOC has a legitimate penological interest in reducing costs associated with postage for legal mail, but overturned the policy as overbroad, noting that there were less intrusive means available to further the government interest of ensuring that postage the prison provided free of charge is only used for legal mail. *Id*. Applying the *Procunier* test, the *Bout* court found:

> the regulation gives virtually unbridled discretion to prison officials to "review" prisoners' mail, but does not specify the nature or limits of that review. Without *procedural safeguards*, there can be no assurance that a prison official will not read a prisoner's mail, thereby hampering a prisoner's "free and open expression" for fear that its contents will be read by his jailers.

Id. (emphasis added).

"After *Bout*, MDOC implemented procedural safeguards to ensure that a prison employee only looks for identifiable information." *Bell-Bey* v. *Williams*, 87 F.3d 832, 839 (6th Cir. 1996). Two years after *Bout*, the same Circuit addressed the

constitutionality of MDOC's revised policy, which required prisoners, after using their monthly postage allotment, to prove "the mail is for pending litigation" by "showing the documents to the reviewing staff member who will be looking for court docket numbers, plaintiff versus, requests from either the court or attorney general for specific documents, etc." *Id.* at 834. There, the Court noted that there was no proof the policy required prison officials to read outgoing legal mail, and the prisoner did not produce evidence that any outgoing legal mail had ever been read. *Id.* at 839. The court went on to hold that the policy at issue did not violate prisoners' constitutional rights, because (1) legal mail is not inspected until after a prisoner uses up his allotment of stamps in a given month; (2) the mail is opened in the prisoner's presence; and (3) the limited inspection for only certain identifiable information prevents correction officers from reading the contents of a prisoner's outgoing legal mail. *Id.* at 839.

The ADC policy at hand falls short of any such procedural safeguards.[7]

[7] *Amic*i note that the Sixth Circuit's holding in *Bell-Bey* rests on shaky grounds to the extent that it relies in part on *Wolff* v. *McDonnell*, 418 U.S. 539, 577 (1974), which upholds the constitutionality of an *incoming* mail regulation. But this only helps the Appellant here. If the procedural safeguards listed in text are necessary to protect a prisoner's rights in connection with incoming legal mail, then those safeguards are *a fortiori* also necessary to protect a prisoner's rights in connection with outgoing mail, which poses a *lesser* threat to prison security than incoming mail.

B. The ADC Policy does not legitimately further the interests of penal administration

Thornburgh clarified that "outgoing personal correspondence from prisoners [does] not, by its very nature, pose a serious threat to prison order and security." 490 U.S. 401, 412 (1989). As explained *supra*, Section I, *outgoing legal* mail poses even less of a threat. The evidentiary record confirms this general proposition in the case of Arizona prisons, ER 9, and similar circumstances reveal that the ADC has multiple alternatives that are not as broad reaching and intrusive as its current policy.

We acknowledge that prisons have a legitimate interest in ensuring that outgoing legal mail is being sent to an *actual* attorney. However,

> system[s] in which the Jail may *first independently screen* the substance of the legal communication … defeat the very reason to protect legal mail—to safeguard sensitive and confidential legal communication. Of course, this means the Jail would not know the contents of the communication, but this is true of all legal mail.

Am. Civil Liberties Union Fund of Michigan v. *Livingston Cty.*, 796 F.3d 636, 645 (6th Cir. 2015), *cert. denied sub nom. Livingston Cty., Mich.* v. *Am. Civil Liberties Union Fund of Michigan*, 136 S. Ct. 1246 (2016). Thus, the ADC has a legitimate interest in ensuring that outgoing legal mail is addressed to an *actual* attorney, but not in reviewing the substance of such communications absent good cause.

To achieve its interest in penal administration, the ADC has alternatives that do not require the reading, or creating circumstances that may require the reading, of legal mail. In fact, prison officials have discovered criminal communications in *purported* legal mail where a letter's "postmark did not match the law firm's address on the envelope and letterhead." ER 8. The ADC can ensure outgoing legal mail is addressed to an actual attorney by simply checking the name and address of the attorney to whom the letter is addressed. Additionally, the ADC can require prisoners to provide the name and address of their attorney(s), in advance, to ease the burden on prison officials. *See e.g. Bout* v. *Abramajtys*, 28 F.3d 1213, *2 (6th Cir. 1994).

The existence of readily available alternatives to ensure that outgoing legal mail is addressed to an actual attorney provides strong evidence that the ADC's regulation is overbroad. *Id.* at 1213 ("[T]he presence of ready alternatives in this case is evidence that the regulation is overbroad."); *see also Procunier* v. *Martinez,* 416 U.S. 396, 413 (1974) ("[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."); *Bell* v. *Wolfish,* 441 U.S. 520, 538–39 (1979) (prison regulation may be unconstitutional if a court finds that it "appears excessive in relation" to the government's proffered alternative purpose). Even *Turner*, which espouses the more flexible standard that applies to

incoming legal mail, acknowledges the importance of alternatives. *Turner* v. *Safely*, 482 U.S. 78, 90–91 (1987) ("the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concern," and while not requiring "a 'least restrictive alternative' test … if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard").

C. The ADC outgoing legal mail policy functions as an automated privilege waiver

If this Court affirms the District Court's holding, inmates and their attorneys nationwide would face unprecedented restrictions on their ability to communicate confidentially via legal mail.

As discussed in Appellant's Opening Brief at Section I.A.1., the attorney-client privilege protects confidential legal communications between a party and her attorney from being used against her, thus encouraging full and frank communication. It is, moreover, a privilege to which incarcerated individuals remain entitled. *Gomez* v. *Vernon*, 255 F.3d 1118, 1133 (9th Cir. 2001). However, for the privilege to attach, the parties to the communication must have an objectively reasonable and subjective expectation that the communication is and

will remain confidential. *United States* v. *Van Poyck*, 77 F.3d 285, 290–91 (9th Cir. 1996) (because inmate knew prison telephone calls are recorded, "an expectation of privacy in outbound calls from prison is not objectively reasonable"); *United States* v. *Gann*, 732 F.2d 714, 723 (9th Cir. 1984) (holding that statements made by a client to his attorney over the telephone while detectives were searching his house were not privileged); *United States* v. *Hatcher*, 323 F.3d 666, 674 (8th Cir. 2003) (monitored telephone calls are not privileged because the presence of a recording device is the "functional equivalent of a third party"); *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) (holding, "disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed").

Arizona inmates and their attorneys do not have a reasonable expectation of privacy with respect to outgoing legal mail because ADC's outgoing legal mail policy states that all letters to attorneys are monitored and may be read to "verify that its contents qualify as legal mail and do not contain communications about illegal activity." ER 386. Thus, the ADC's outgoing legal mail policy *automatically* destroys confidentiality and waives attorney-client privilege, effectively prohibiting inmates and their attorneys from communicating in writing about confidential case matters. *See Jones* v. *Brown*, 461 F.3d 353, 359 (3d Cir. 2006) (policy and practice 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"); *accord Al-Amin* v. *Smith*, 511 F.3d 1317, 1334 (11th Cir. 2008); *see also U.S.* v. *Walia*, No. 14–CR–213 (MKB), 2014 WL 3734522, at *16 (E.D.N.Y. Jul. 25, 2014) (where inmate and attorney were on notice of prison policy of monitoring all email communications, their emails were not entitled to privilege); Opinion and Order at 2–3, *United States* v. *Asaro*, No. 1:14-cr-0026 (E.D.N.Y. July 17, 2014) (because inmate and attorney were aware of BOP policy of monitoring all emails, inmate-attorney emails were unprivileged and prosecutors were permitted to read them).

The Ninth Circuit has recognized that the attorney-client relationship includes an enhanced privacy interest that warrants heightened judicial protection when searches involve review of attorney-client documents. *See DeMassa* v. *Nunez,* 770 F.2d 1505, 1507 (9th Cir. 1985). Thus, to ensure the attorney-client privilege is not gutted with respect to Ninth Circuit inmates' outgoing legal mail, this Court must hold that prison officials are prohibited from inspecting the contents of properly marked outgoing legal mail absent good cause.

Based on the foregoing, because the ADC policy (i) does not incorporate necessary procedural safeguards, (ii) does not utilize less intrusive readily available alternatives that have been successfully used in other correctional facilities to

further the same interests in penal administration, and (iii) functions as an automatic privilege waiver, the ADC's outgoing legal mail policy should be struck down as unconstitutionally overbroad.

III. OVERBROAD LEGAL MAIL POLICIES RAISE EIGHTH AMENDMENT AND DUE PROCESS CONCERNS

The ADC's policy requires unskilled prison employees to arbitrarily decide whether the substance of inmates' letters to attorneys is legally relevant.[8] If not deemed sufficiently legal in nature, the consequences are troubling—the letter is automatically deemed contraband, ER 9, will be confiscated, and the prisoner could be infracted and punished. ER 244–45.

A system where correction officers can impose punishment with unlimited discretion is a violation of procedural due process, also implicating Eighth Amendment rights. *See Cota* v. *Galetka*, 147 F. App'x 9 (10th Cir. 2005) (Tenth Circuit panel reversed dismissal of state inmate's claim that prison staff denied him access to courts by refusing to provide him with extra postage he needed to mail legal pleadings to prosecute his claim concerning denial of medical care, which

[8] Further, *amici* note that the question of what constitutes "legal mail" is a question of law. *See Sallier* v. *Brooks*, 343 F.3d 868, 871 (6th Cir. 2003) (holding that the "determination of whether particular kinds of correspondence qualify for the constitutional protection accorded a prisoner's 'legal mail' is a question of law properly decided by the court, not one of fact that can be submitted to a jury").

implicated his Eighth Amendment right not to be subjected to cruel and unusual punishment); *see also Hudson* v. *Palmer*, 468 U.S. 517, 546 (1984) (O'Connor, J., concurring) (arguing that majority's "implication that prisoners have no possessory interests that by virtue of the Fourth Amendment are free from state interference cannot, in my view, be squared with the Eighth Amendment," because holding that "a prisoner's possession of a letter from his wife, or a picture of his baby, has no protection against arbitrary or malicious perusal, seizure, or destruction would not, in my judgment, comport with any civilized standard of decency"); *Landman* v. *Peyton*, 370 F.2d 135, 141 (4th Cir. 1965) ("lawful incarceration must not include exposure of the prisoner to the risk of arbitrary and capricious action … Where the lack of effective supervisory procedures exposes men to the capricious imposition of added punishment, due process and Eighth Amendment questions inevitably arise"); *Doe* v. *Delie*, 257 F.3d 309, 311-12, 323 (3d Cir. 2001) (due process claim stated because prison officials disclosed inmate's HIV condition to escorting officers, conducted open door medical exams, and announced medication in public).

Just like the regulation struck down in *Procunier*, ADC's policy "invite[s] prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship." 416 U.S. 396, 415 (1974). Such

arbitrariness is particularly likely to cause constitutional violations with respect to (i) Arizona death row inmates and (ii) pretrial detainees.

A. ADC's Outgoing Legal Mail Policy is Particularly Likely to Violate the Rights of Death Row Inmates

As explained in Section III of Appellant's Opening Brief, death row inmates challenging their death sentences, like Appellant Scott Nordstrom, must provide their attorneys with facts and information that may *seem* irrelevant to an inmate's legal claims. *See Penry* v. *Johnson*, 532 U.S. 782, 803 (2001) (Reversed holding of Fifth Circuit denying Texas death row inmate's habeas petition based on absence of instructions on mitigating evidence during penalty phase, and approving new Texas statutory scheme which required the jury to decide "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.").

Thus, because of the uniquely personal and factual nature of pleading mitigating circumstances, Arizona death row inmates face a greatly increased likelihood that correction officers will arbitrarily determine the information conveyed in letters to their attorneys is not "of a legal nature," and capriciously

punish them for supposedly abusing the legal mail system by including "contraband" information in letters to their attorneys.

B. ADC's Outgoing Legal Mail Policy is Particular Likely to Violate the Rights of Pretrial Detainees

ADC's policy applies equally to convicts and pretrial detainees. However, prison policies restricting a specific constitutional right of pretrial detainees are held to a stricter standard than those affecting only the rights of convicted prisoners because the Fourteenth Amendment prohibits any "punishment" of pretrial detainees. *Bell* v. *Wolfish*, 441 U.S. 520, 538 (1979); s*ee also Benjamin* v. *Frasier*, 264 F.3d 175, 178 n. 10 (2d Cir. 2001) (Despite finding policy unconstitutional under *Turner*, noted that *Turner* is likely inapplicable to pretrial detainees because, "[p]enological interests are interests that relate to the treatment … of persons convicted of crimes."); *Mauro* v. *Arpaio*, 188 F.3d 1054, 1059 n. 2, 1067 (9th Cir. 1999) (en banc) (Kleinfeld, J., dissenting) (arguing that *Turner* is inappropriate standard for pretrial detainees since *Turner* speaks of "penological interests," and state does not have legitimate penological interests as against unconvicted persons; majority held this argument waived). Under *Bell*, "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment," and thus unconstitutional. *Bell*, 441 U.S. at 539. Additionally, under

Bell, even if a condition is not punitive, it may be unconstitutional if a court finds that it "appears excessive in relation" to the government's proffered alternative purpose. *Id*. at 538–39.

Thus, if an ADC officer determines a pretrial detainee's letter to his attorney is not sufficiently legal in nature and confiscates the letter and/or punishes the detainee for sending "contraband," the correction officer has likely violated the detainee's due process rights.

Additionally, "[b]ecause the Fifth Amendment's protection against testimonial self-incrimination may be threatened by the act of disclosure" of legal communications, "that constitutional guarantee also supports" prohibiting prison officials from inspecting outgoing legal mail absent good cause. *See DeMassa* v. *Nunez*, 770 F.2d 1505, 1507 (9th Cir. 1985). For example, if a prison guard read a prisoner's letter to his attorney in which he expressed his wish to plead guilty, since ADC's outgoing legal mail policy automatically destroys confidentiality and waives attorney-client privilege, such a letter could be introduced into evidence against the defendant.

According to the U.S. Department of Justice, roughly half a million people in jail are pretrial at any given time, with a national trend of 63%.[9] In California,

[9] Todd D. Milton and Zhen Zeng, *Jail Inmates at Mid-Year 2014*, U.S. DEP'T OF JUSTICE (June 2014), http://www.bjs.gov/content/pub/pdf/jim14.pdf.

"71% of jail beds are filled with pretrial detainees."[10] 74% of Maricopa County, Arizona's 7,972 jail inmates in 2015 were pretrial detainees.[11] In New York, where the majority of the New York County Lawyers Association's membership resides, 85% of Rikers Island's nearly 10,000 detainees are awaiting trial.[12] The statistics speak for themselves; given the ADC policy applies equally to convicts and pretrial detainees, the likelihood of constitutional violations of pretrial detainees' rights is high.

IV. CONCLUSION

This case is about whether prison officials may inspect and read the substance of a prisoner's properly marked outgoing legal mail to his attorney in the absence of any evidence that such letter contains contraband or communications regarding any crime, or that the attorney would facilitate the inmate's crime. As outlined herein, anything less than an Order from this Court reversing the District

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[10] PARTNERSHIP FOR COMMUNITY EXCELLENCE, PRETRIAL DETENTION & COMMUNITY SUPERVISION: BEST PRACTICES AND RESOURCES FOR CALIFORNIA COUNTIES (Sharon Aungst ed., 2012), https://caforward.3cdn.net/7a60c47c7329a4abd7_2am6iyh9s.pdf.

[11] *Maricopa County Jail System Average Daily Population Count*, MORRISON INSTITUTE FOR PUBLIC POLICY, http://arizonaindicators.org/visualization/maricopa-county-jail-system-average-daily-population-count (last visited June 20, 2016).

[12] Alice Speri, *Happy Sunday: Welcome to Rikers*, THE INTERCEPT, June 1, 2016, https://theintercept.com/2016/06/01/amid-a-growing-movement-to-close-rikers-one-prisoner-approaches-six-years-without-trial/.

Court and prohibiting inspection of outgoing legal mail absent good cause would cause an unprecedented chilling effect on the attorney-client privilege and pose a fundamental threat to the First, Fifth, Sixth, Eighth and Fourteenth Amendment rights of prisoners nationwide.

Prison policies permitting inspection of legal mail always pose a risk that some legal mail will be read, in violation of prisoners' constitutional rights. Where legal mail poses a legitimate security threat, the risk of such constitutional violations is tolerable. However, in the case of *outgoing legal* mail, which poses no inherent threat to prison security, any risk that such mail will be read is unacceptable. Thus, a bright-line rule prohibiting prison officials from inspecting outgoing legal mail absent good cause is necessary to eliminate the risk of prison officials violating prisoners' rights by arbitrarily or mistakenly reading their outgoing legal mail.

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 Arizona, as the *amici* have seen this time and again in New York as well.[13] To protect

[13] *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,

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 mail regulations, (1) clear and unambiguous procedural safeguards to minimize the risk that prison officials will read the substance of legal communications, which must be (2) proportional to the security threat posed by the specific type of legal mail being regulated.

The *amici* urge reversal of the District Court's holding and implore this court to hold that prison officials are prohibited from opening or inspecting properly marked outgoing legal mail absent good cause.

Sept. 27, 2015, http://www.nytimes.com/2015/09/28/nyregion/guarding-the-prison-guards-new-york-states-troubled-disciplinary-system.html?_r=0.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d), 32(a)(7)(C), and Ninth Cir. R. 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 6,981 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

/s/ Elliot Dolby Shields
Elliot Dolby Shields

June 22, 2016

CERTIFICATE OF SERVICE

I certify that on June 22, 2016, 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.

/s/ Elliot Dolby Shields
Elliot Dolby Shields