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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION TO REPLY

Fighting faithfully to establish his innocence, Scott Nordstrom, a death row inmate, learned that the deputy county attorney who prosecuted him had died while under ethics investigation by the state bar, after which troves of documents withheld in homicide cases were discovered in his office. As law enforcement documents, witness reports, and police files undermining the alibi of the state's lead witness and identifying other likely culprits came to light, ER354-368, Nordstrom found renewed hope in his long and frustrating search for justice.

Standing alone against the State and isolated in his segregated death row cell, Nordstrom took pen in hand to write a confidential letter to his only ally — the court-appointed attorney for his criminal appeal. ER3, 395.

Now if this death row inmate had been incarcerated in California (the State with the highest prison population in this Circuit), his letter to his lawyer would have been assured confidentiality, as inspecting prison staff are directed to "remove the contents of the envelope upside down to prevent reading." California Code of Reg., Title 15, Div. 3, Ch. 1, Subch. 2, Art. 4 § 3142(d) (2014).

Indeed, if he had been incarcerated inside the borders of Arizona, but at the Federal Correctional Institution in Phoenix, before handing it to the correctional officer, the inmate would have sealed that outgoing letter addressed to his lawyer, which then would "not [be] subject to inspection." 28 C.F.R. § 540.18(c)(1).

But because Scott Nordstrom is under the control of the Arizona Department of Corrections (ADC), the substance of his letter to his lawyer was explored by a correctional officer, searching for keywords and components, ER34, ER221-222, and evaluating whether the letter's "contents qualify as legal mail," ER386.

Scott Nordstrom is literally fighting for his life. No one in our society has a more compelling need to communicate in complete confidence with a lawyer than a death row prisoner challenging a wrongful conviction. No one has a greater need to be able to write to his lawyer — without inhibition and free from prying eyes — about highly personal matters, tragic events, and official misconduct. *See* N.Y. Cnty. Lawyers Ass'n/Nat'l Ass'n Crim. Def. Lawyers Amicus Br. at 24-25.

Missing from the ADC's answering brief is any appreciation for the core constitutional value of attorney-client confidentiality or any understanding that Arizona's extraordinary and idiosyncratic practice of word-searching a prisoner's letter to his attorney has destroyed that confidentiality.

Prison legal mail is an essential element of the attorney-client relationship, allowing a prisoner to more effectively organize his thoughts and to exchange drafts of legal documents. *See* Opening Br. at 24-28, 45-48; Equal Justice Initiative Amicus Br. at 5-7. By eliminating written communication as an avenue for confidential discourse, Arizona has left lawyers representing prisoners with an untenable ethical dilemma. *See* Ethics Bureau of Yale Amicus Br. at 2-16.

ARGUMENT IN REPLY

I. Resisting This Court's Protection of Confidentiality in Legal Mail, the ADC (a) Defends Its Practice of Page-by-Page Review of the Word Text as a Mere "Inspection" and Not "Reading," (b) Submits Evidence That Fails to Show Abuse of Genuine Legal Mail, (c) Mischaracterizes the Policies of Other States, and (d) Dismisses the Rulings of Other Circuits

Like every other circuit to address the question, this Court has recognized a prisoner's constitutional right to correspond with his lawyer in confidence. *Nordstrom v. Ryan*, 762 F.3d 903, 909-12 (9th Cir. 2014). As the Supreme Court reiterated just this past term, "the need for confidence" is an essential ingredient of that constitutionally-protected attorney-client relationship. *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016) (plurality). Without such "private consultation," the client "does not enjoy the effective aid of counsel." *Nordstrom I*, 762 F.3d at 910.

Confidential legal mail is fundamental to ethically-responsible representation of a prisoner, especially for out-of-town counsel and for evaluating draft documents. Opening Br. at 45-48. The ADC by policy instructs prisoners to communicate legal matters through the mail. ER372. And, in the Arizona system, documents may not be confidentially exchanged even during in-person meetings, *see* ER284-286 — an issue that the District Court chose not to resolve, ER16 n.5.

Beyond echoing (at 28) the *dissenting* view that legal mail confidentiality is unnecessary because of alternate means, *Nordstrom I*, 762 F.3d at 919 (Bybee, J., dissenting), the ADC ignores each of these specific concerns in its answering brief.

A. The ADC Defends Its Page-by-Page Search of Legal Mail for Keywords and Legal Content by Re-Defining What Constitutes Prohibited "Reading" in a Manner Disregarding Confidentiality

Striving to take its practices outside this Court's prohibition of reading of legal mail, the ADC (at 27-28, 30) offers a crabbed definition of "literal 'reading' " as strictly confined to a line-by-line apprehension of an entire document. A textual search by prison officers of legal mail for keywords and components is re-characterized (at 14-15) as a mere "inspection." But this constitutional case is not, as the ADC has suggested, a "vocabulary word" game. *See* ER384. The question is the nature of the intrusion into legal correspondence and whether that practice is consistent with the confidentiality promised by this Court in *Nordstrom I*.

What counts as "reading" in a particular context turns on its purpose and effect. A driver "reads" a stop sign and understands its message, even though the sign contains only one word. A diner at a restaurant "reads" the menu by browsing for entrées of interest. A person "reads" a newspaper, not by scrutinizing every line of every story on every page, but by checking over the stories that are of greatest interest to that reader. Each has "read" in a consequential way.

When a correctional officer explores the writing committed to paper by a prisoner to his lawyer by searching each page for keywords and evaluating the legal or non-legal nature of the text, the officer is engaged in "reading" by any meaningful measure. The privacy of the prisoner's letter is destroyed, and the

essence of the message is revealed to the prison officer. *See* Opening Br. at 31-33. As the deputy warden admitted, she could "pick out several words and know what this entire memo is about without reading the entire thing." ER246.

This Court explained that a prisoner must be able "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" — without a prison guard becoming "privy" to that confidential correspondence. *Nordstrom I*, 762 F.3d 910. Ignoring this crucial passage in *Nordstrom I*, the ADC persists in searching the text of legal mail by a protocol that is tailor-made to access this very subject matter. The ADC thereby "emasculates the confidentiality" of client-attorney communications. *See In re Jordan*, 500 P.2d 873, 876 (Cal. 1972).

In the end, the ADC's word-searching practice is indistinguishable from the approach advocated by the *Nordstrom I* dissent that "some reading of legal letters is permissible," including examination of the "meaning" of "words" and other components. *See Nordstrom I*, 762 F.3d at 916 (Bybee, J., dissenting).

To preserve its anomalous policy and practice, the ADC invokes (at 26) the *Nordstrom I* reference to scanning of legal mail for "such suspicious features as maps of the prison yard, the times of guards' shift changes, and the like." *Nordstrom I*, 762 F.3d at 906. The ADC has seized on this unremarkable allowance of an inspection as a general warrant to hunt through the words and text of legal mail.

Properly understood as directed to that kind of standout "feature" that leaps off the page, such a carefully restricted inspection for obvious markers or prominent figures of illegitimacy fits comfortably with the Court's simultaneous and emphatic assurance of confidentiality over sensitive topics. *See* Opening Br. at 41-44. Indeed, such a proper inspection is well-illustrated by the principled approach of the California Department of Corrections to inspect legal mail "upside down to prevent reading." California Code Reg., tit. 15, § 3142(d) (2014). *See Morrison v. Hall*, 261 F.3d 896, 905 (9th Cir. 2001) (observing that the California correctional policy on receipt of commercial mail by prisoners provided "evidence of an easy and obvious alternative" to the more restrictive Oregon prison rule).

B. The ADC's Supposed Proof of a Security Need for Substantive Review of Outgoing Legal Mail May Not Override a Constitutional Ruling as a Matter of Law and Failed as a Matter of Fact

In *Nordstrom I*, this Court ruled that confidentiality in a prisoner's letter to his attorney is guaranteed by the Constitution. *Nordstrom I*, 762 F.3d at 709-12. In *Thornburgh v. Abbott*, 490 U.S. 401, 411 (1989), the Supreme Court declared that prisoner mail that is leaving the prison cannot "by its very nature, pose a serious threat to prison order and security." This Court did not suggest that its legal mail confidentiality precedent may be discarded when a prison or lower court believes it unwise. The Supreme Court has not revisited its declaration that security risks posed by outgoing mail are of a "categorically lesser magnitude." *Id.*

at 413. On the proper standard of constitutional review for outgoing legal mail, see N.Y. Cnty. Lawyers Ass'n/Nat'l Ass'n Crim. Def. Lawyers Amicus Br. at 7-13.

De Novo *Constitutional Review:* The ADC (at 25) may not evade the constitutional rulings of this Court and the Supreme Court by framing constitutionally-significant inferences drawn from evidence on remand as binding factual findings, to which this Court supposedly must defer. As the Supreme Court said in *Bose Corp. v. Consumers Union*, 466 U.S. 485, 501 n.17 (1984), "in some areas of the law, the stakes — in terms of impact on future cases and future conduct — are too great to entrust them finally to the judgment of the trier of fact."

To the ADC's argument (at 25) that factual findings may not be overturned unless clearly erroneous, the *Bose* decision provides the direct response: the "rule of federal constitutional law" requires "independent appellate review" to "preserve the precious liberties established and ordained in the Constitution." *Id.* at 510-11. While deference to historical factual findings that turn on the truth or credibility of witnesses may be appropriate — an issue not presented on this appeal — the inferences to be drawn from that testimony implicate the appellate court's "primary function as expositor of the law." *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

While independent factual review is particularly robust for First Amendment claims — which of course are also presented in this case — the ADC is mistaken to suggest (at 25) that *de novo* review of mixed questions of law and fact that

"implicate constitutional rights" does not apply to other constitutional claims. *See In re Arizona Appetito's Stores*, Inc., 893 F.2d 216, 218 (9th Cir. 1990) (Fifth Amendment); *see also United States v. Benlian*, 63 F.3d 824, 826 (9th Cir. 1995) (*de novo* review of Sixth Amendment claim of ineffective assistance of counsel raising mixed questions of fact and law).

Addressing the Problem of Fraudulent Legal Mail: Even on its own account, the ADC's evidentiary showing on remand failed to justify intrusion into the constitutionally-protected confidentiality of outgoing legal mail. *See* Opening Br. at 33-40. Buried in the middle of its description (at 11) of the real security problems posed by prison gangs using counterfeit legal mail, the ADC acknowledges that the "rampant" problem at issue here is "fraudulent legal-mail."

For *outgoing* legal mail, "this concern can be ameliorated by requiring prisoners to provide in advance the name and business address of the attorney with whom they wish to communicate so that the prison officials may verify it in state and reference books containing attorneys admitted to practice." *Bout v. Abramajtys*, No. 93-1383, 1994 WL 329219, at *2 (6th Cir. July 7, 1994); *see also In re Jordan*, 500 P.2d at 878 (same); *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) ("When a prison regulation affects outgoing mail as opposed to incoming mail, there must be a 'closer fit between the regulation and the purpose it serves' "). *See, e.g.*, Alaska Dep't of Corr. Policies & Proc., § 810.03, VII.D.1.a (2013).

The ADC inaccurately asserts (at 13) that "[t]he record also contains additional examples of legal-mail abuse in Arizona — even by lawyers or their staff members." As confirmed by the description that follows in the ADC's brief, and, more importantly, the evidence presented at the hearing, no episode of misconduct by a lawyer or legal staff member involved "legal-mail abuse." Rather, three lawyers and a mitigation specialist had carried contraband into or messages out from client meetings in a county jail. ER8-9. Because of a bad apple found in another barrel, the ADC tries to repeal the constitutional right to confidential correspondence between a death row inmate and his court-appointed lawyer.

On the actual question before this Court of *outgoing* legal mail, the District Court acknowledged there was no "specific instance where an inmate has included criminal communications in a letter to or from a legitimate licensed attorney." ER9. Even with the benefit of its aggressive practice of reviewing the contents of outgoing legal mail, the ADC's Special Security Unit Coordinator (with 26 years of experience in the Arizona system, ER252) admitted that the Arizona prison had never experienced abuse of legal mail involving actual lawyers. ER271. That is sufficient to decide this case. *See American Civil Liberties Union Fund of Mich. v. Livingston County*, 796 F.3d 636, 647 (6th Cir. 2015) (characterizing the jail's argument that legal mail might pose a security threat as a "parade of horribles" that could not justify intrusion into its contents), *cert. denied*, 136 S. Ct. 1246 (2016).

C. By Routinely Searching the Words of Outgoing Legal Mail Without Probable Cause, Arizona Stands Alone Among Federal and State Correctional Departments

When evaluating whether prison security interests demonstrate "the need for a particular type of restriction," the Supreme Court has advised that "[w]hile not necessarily controlling, the policies followed at other well-run institutions would be relevant." *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974); *see also Warsoldier v. Woodford*, 418 F.3d 989, 999-1000 (9th Cir. 2005) (observing that other states, while having "the same compelling interest in maintaining prison security, ensuring public safety, and protecting inmate health," had less restrictive policies that did not infringe on a prisoner's religious liberty).

Anxious not to be recognized as an outlier, the ADC reaches to assert error in our description of other federal and state correctional policies, but in so doing the ADC misreads the terms of other state policies (at 31-34):

Outgoing Legal Mail: To begin with, the ADC conflates policy language involving *incoming* legal mail (which arguably requires more careful inspection to verify the lawyer sender) with that for *outgoing* legal mail (which the Federal Bureau of Prisons and most states do not inspect at all). *See, e.g.*, Alaska Dep't of Corr. Policies & Proc., § 810.03, VII.D.1.a (2013) (allowing scanning of *incoming* mail to determine whether privileged, while barring any reading or even inspection for contraband of *outgoing* legal mail, other than to verify the address).

Proper Inspection: Next, the ADC misapprehends state policies that authorize "inspection" or "scanning" of legal mail as being the equivalent of Arizona's extraordinary text-searching protocol. While "scan" in ADC parlance has become a weasel word for "hastily read[ing] something," ER209, the ADC may not project that abuse on to other states that appropriately inspect legal mail for such limited purposes as detecting contraband. *See, e.g.*, South Dakota Corr. Policy, 1.5.D.3, at IV.6.C (2015) (inspection "page-by-page" to "prevent the movement of contraband"); Colorado Dep't of Corr. Admin. Reg. 300-38, IV.B.11 (IV.D) (2015) (inspection for contraband).

Probable Cause Exception: Most tellingly, the ADC stretches to put itself in the same company as other states that allow non-routine searches of legal mail, even to the point of reading, under such exceptional circumstances as probable cause of wrongdoing. *See, e.g.*, New Mexico Corr. Dep't, Correspondence Regs. CD-151201(H) (2015); New York Dep't of Corr. & Community Supervision, 7 NYCRR 721.3, III.A.2, C (2014); *see also Reneer v. Sewell*, 975 F.2d 258, 260 (6th Cir. 1992) (explaining that reading of a particular inmate's legal mail is permissible when "there is probable cause to believe the inmate is conspiring with persons outside the prison to traffic in contraband or to arrange a breakout").

But Arizona's anomalous policy of substantive review of legal mail is *not* properly limited to when probable cause of misconduct is shown for an individual

prisoner. *That* is the problem. The ADC has adopted a blanket practice of examining every outgoing letter to a lawyer, "page by page, one at a time," for "keywords" or "key components," and to determine whether the correspondence is sufficiently legal in nature. ER222-223. Indeed, the ADC insists the policy covers Scott Nordstrom, even though ADC counsel has stated on the record that Nordstrom's lawyers pose no risk to ADC security interests. ER294.

In sum, no other correctional department routinely searches the text of outgoing legal letters by word and component regardless of individualized suspicion. Arizona truly stands alone. *See* Opening Br. at 6-8., 37-38. Confidentiality is as routinely respected elsewhere, as it is routinely denied in Arizona.

And we do not expect the Court to simply take our word for it. We presented a complete table with citations in the record, ER296-311, and included the outgoing mail policies of several states in the addendum to the opening brief.

D. Courting Conflict with Rulings of Eight Other Circuits, the ADC Dismisses the Well-Established and Expansive Right to Confidentiality in Legal Mail Under the First Amendment

None of the circuits confirming the protection of legal mail under the First Amendment would accept a prison's removal of the constitutionally-protected right of confidentiality in attorney-client correspondence based on a never-experienced security risk without any individualized suspicion. *See* Opening Br. at 49-53.

The key feature of these First Amendment legal mail decisions in other circuits is the conscientious protection of attorney-client confidentiality in correspondence against intrusion by state agents. *See, e.g., Al-Amin v. Smith*, 511 F.3d 1317, 1330 (11th Cir. 2008) ("Of all communications, attorney mail is the most sacrosanct;" citation omitted); *Sallier v. Brooks*, 343 F.3d 868, 877 (6th Cir. 2003) (protecting legal mail because "the prisoner's interest in unimpaired, confidential communication with an attorney is an integral component of the judicial process").

Without responding to the ADC's arguments on each First Amendment decision, a single example confirms that the ADC's request for affirmance is indeed a request that this Court enter into conflict with other circuits. The ADC dismisses (at 37-38) the Sixth Circuit's decision in *American Civil Liberties Union Fund* as merely chastising the jail for segregation of incoming legal mail. But the ADC neglects to quote the dispositive language of the Sixth Circuit decision, which sharply faulted the illegitimate reason given by the jail to withhold those letters.

The Sixth Circuit held that the jail may not review the contents of those letters for the constitutionally unauthorized purpose of rendering "a 'subjective' and inexpert determination as to whether a particular legal matter is 'legitimate.' " *American Civil Liberties Union Fund*, 796 F.3d at 648. That, of course, is precisely what the ADC presumes to do here, that is, evaluate the "legal" versus "non-legal" nature of a prisoner's letter to his lawyer. *See* ER222, 386, 388.

Most importantly, the Sixth Circuit forthrightly agreed that this meant the jail "would not know the contents of the communication, but this is true of all legal mail." *American Civil Liberties Union Fund*, 796 F.3d at 645.

Yes, "this is true of all legal mail" — except in Arizona.

II. The ADC Tries to Avoid Its Duty to Respect Confidentiality in Legal Mail by Challenging this Court's Precedential Rulings That (a) This Case Falls "Squarely" Under the Sixth Amendment, and (b) Standing is Established by the Chilling Effect on Prisoner Correspondence

Understandably wishing to avoid this Court's review of the constitutional merits, the ADC raises two arguments styled as questions of standing. Each argument directly challenges a key ruling in this Court's precedential decision in *Nordstrom I*. And each was rightly rejected by the District Court on remand.

A. Stating That the Sixth Amendment "Squarely" Covers This Case, the *Nordstrom I* Holding is Precedential Law of the Circuit

After urging this Court to address legal mail under the Sixth Amendment rather than the First Amendment in the first appeal, Ariz. Br. at 2, Nordstrom v. Ryan, No. 12-15738, the ADC now backpedals to argue (at 23-25) that the Sixth Amendment does not apply because the state criminal appeal was decided during the pendency of this litigation and post-conviction proceedings have been initiated.

The posture of this case remains the same as it was when this Court decided *Nordstrom I*, that is, post-criminal appeal. In the *Nordstrom I* appeal, both parties

notified this Court that the death sentence had been affirmed on appeal. Ariz. Br. at 4; *supra*; Opening Br. at 28, 48, Nordstrom v. Ryan, No. 12-15738. On that first appeal, Nordstrom forthrightly explained that he "fears ongoing intrusion into his confidential legal mail, in violation of his right to due process, while he prepares a petition for post-conviction relief to present subsequently-discovered evidence that bolsters his claims of innocence and prosecutorial misconduct." Opening Br. at 28, Nordstrom v. Ryan, No. 12-15738. Nordstrom also briefed the constitutional protection of the right to counsel under the Sixth Amendment for criminal cases and the implications for post-conviction proceedings.[1] *Id.* at 48-49.

After briefing on these questions, this Court ruled unequivocally that, because the episode that prompted the complaint had occurred during the criminal appeal, the legal mail claims here "fall squarely within the scope of the Sixth Amendment right to counsel," *Nordstrom I*, 762 F.3d at 909. On remand, the

[1] Under current jurisprudence, post-conviction petitions presenting issues that could not have been raised during the criminal proceedings fall into something of a twilight zone, as the ADC also acknowledges in its answering brief (at 23-24). In *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012), the Supreme Court observed that when a prisoner's first opportunity to raise an issue arises only with post-conviction remedies, "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." Likewise, in Nordstrom's case, the Arizona Supreme Court held that he had to wait until a post-conviction petition to raise the newly-discovered evidence of prosecutorial misconduct, *State v. Nordstrom*, 280 P.3d 1244, 1249-50 (Ariz. 2012), as he now has done, raising also claims of ineffective assistance of counsel.

District Court followed *Nordstrom I* and confirmed that "for standing analysis, the key point in time is the filing of the complaint." ER17 n.6.

Having expressly declared that the Sixth Amendment legal framework was appropriate for deciding this legal mail case, the governing law is settled. Not only does this holding in *Nordstrom I* establish the "law of the case" to be followed in this subsequent appeal in the same case, but the holding was presented in a published precedential opinion. *See Hilao v. Estate of Marcos*, 103 F.3d 767, 772 (9th Cir. 1996) (refusing to reconsider subject matter jurisdiction rulings because prior decisions "are both the controlling law of the circuit and the law of this case").

Even if *stare decisis* had not attached, the present case is similar to *United States v. Howard*, 480 F.3d 1005, 1008-10 (9th Cir. 2007), where this Court held that a challenge by criminal defendants to a federal policy requiring the shackling of all defendants making their initial appearance in a criminal case was not mooted by the conclusion of pretrial proceedings, because the dispute was capable of repetition, yet evading review. Although the Court could not assume that the particular defendants would be charged in the future with other crimes, the shackling policy would apply in the future to other criminal defendants. *Id.* at 1009-10.

Even more so in Nordstrom's case, the live nature of this controversy as to him individually cannot be doubted, as the ADC by formal policy and testified practice aggressively insists on reviewing the substantive text of outgoing legal

correspondence. The only way this dispute could become moot would be if Nordstrom were to cease being in the custody of the ADC. Indeed, repeated application of the policy in a direct Sixth Amendment context to Nordstrom himself is not speculative. Given the prosecutorial misconduct and discovery of evidence pointing to other culprits, ER354-368, we may fairly anticipate renewal of criminal proceedings in the future.

In any event, as discussed above, every other circuit to address the prisoner legal mail question has guaranteed confidentiality for the special relationship between the attorney and client — in either a civil or criminal matter — under the Free Speech Clause of the First Amendment. As discussed below, First Amendment standing is manifestly present here.

B. This Court Held in *Nordstrom I* That a Prisoner Need Not Show Prejudice Beyond the Obvious Chilling Effect Caused by Reading of Legal Mail to Establish a Constitutional Violation

In *Nordstrom I*, this Court rejected the ADC's contention that a prisoner seeking to prospectively enjoin a prison practice intruding into confidential legal mail must show an actual injury or prejudice beyond chilling interference with the attorney-client relationship. *Nordstrom I*, 762 F.3d at 911-12. Nonetheless, the ADC persists in re-litigating the standing question, replaying the argument (at 17-19) that Nordstrom has failed to show a prejudicial impact on the underlying challenge to the wrongful conviction *and* mischaracterizing (at 22) the chilling concern

as resolving down only to the fear "that ADC officers will intercept and share with Arizona prosecutors information that the latter will use against him."

As the District Court recognized, the ADC's "argument appears to directly contradict the Court of Appeals' finding that 'the harm [Nordstrom] alleges is not that tainted evidence was used against him but that his right to privately confer with counsel has been chilled[, which] is a plausible consequence of the intentional reading of his confidential legal mail.' " ER380 (quoting *Nordstrom I*, 762 F.3d at 911). Indeed, this Court found the chilling effect not merely "plausible," but "obvious": "It is obvious to us that a policy or practice permitting prison officials to not just inspect or scan, but to *read* an inmate's letters to his counsel is highly likely to inhibit the sort of candid communications that the right to counsel and the attorney-client privilege are meant to protect." *Nordstrom I*, 762 F.3d at 910.

And contrary to the ADC's suggestion (at 16) of a contrary factual finding on remand, the District Court acknowledged that "his written communications with his lawyers are chilled." ER15. Indeed, in its attempt to revisit this issue on remand, the ADC succeeded only in adducing additional evidence that Nordstrom has been chilled and consequently has censored correspondence with his lawyers because he fears that ADC officers will read the contents. ER316, 323, 331-334.

Moreover, the chilling effect on legal correspondence flows not only from the 2011 incident that prompted the filing of this civil rights suit, but also from the

ADC's written policy and public testimony that place Nordstrom on clear notice. In *Nordstrom I*, this Court repeatedly focused on the chilling effect of the written statement by the ADC Director allowing for review of the subject matter of legal mail. *Nordstrom I*, 762 F.3d at 906, 907, 911. On remand, the ADC reiterated a formal policy to "scan" legal mail to "verify that its contents qualify as legal mail and do not contain communications about illegal activity," ER386, and offered testimony that correctional officers should "inspect that document page by page, one at a time" for "keywords to determine its legal legitimacy." ER222.

In any event, in the many circuits that uphold confidentiality in legal mail under the First Amendment, a prisoner objecting to interference with legal mail need not prove an injury-in-fact "beyond the infringement of constitutionally-protected speech." *Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006).

Accordingly, when a prisoner objects on free speech grounds to intrusion by prison officials into confidential legal mail, he need not "allege any consequential injury stemming from that violation, aside from the violation itself." *Id.*; *see also Al-Amin v. Smith*, 511 F.3d 1317, 1334 (11th Cir. 2008) (same); *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001) (demanding showing of an injury "no more tangible than a chilling effect" on free speech rights for standing).

CONCLUSION

For the foregoing reasons and those stated in the opening brief, plaintiff-appellant Scott D. Nordstrom asks this Court to reverse the District Court's judgment, enter a declaratory judgment, and permanently enjoin the Director of the Arizona Department of Corrections from reviewing the substantive contents of Nordstrom's privileged correspondence with his legal counsel.

Date: October 4, 2016 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32 TYPE-VOLUME, TYPEFACE AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4778 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

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Date: October 4, 2016

s/
Gregory C. Sisk

PROOF OF SERVICE

I, Gregory C. Sisk, hereby declare: I am employed in Minneapolis, State of Minnesota. I am over the age of 18 years, and not a party to the within action. My business address is University of St. Thomas School of Law, 1000 LaSalle Ave., MSL 400, Minneapolis, MN 55403-2015.

I hereby certify that on October 4, I electronically filed the following with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF System:

REPLY BRIEF OF PLAINTIFF-APPELLANT

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on October 4, 2016 at Minneapolis, Minnesota.

/s/ Gregory C. Sisk