No. 16-15277

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCOTT D. NORDSTROM,

Plaintiff-Appellant,

v.

CHARLES L. RYAN, Director of ADOC,

Defendant-Appellee.

On appeal from the United States District Court for the District of Arizona

No. 2:11-CV-02344-DGC

ANSWERING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Director Ryan agrees with the Opening Brief's Jurisdictional Statement.

ISSUES PRESENTED FOR REVIEW

1. Does Nordstrom, who is currently in postconviction proceedings under state law, have Article III standing to assert a Sixth Amendment claim?

2. In *Nordstrom I*, this Court held that prison officials may not "read" an inmate's outgoing legal mail but may "inspect" it to ensure that it is not being used for nefarious means, like planned escapes. Doing the latter requires officials to be able to comprehend the meaning of some words. Did the district court properly reject Nordstrom's argument that officials are precluded from visually scanning legal letters?

3. Did Nordstrom prove that the Arizona Department of Corrections' legal-mail policy violate his free-speech rights under the First Amendment?

STATEMENT OF THE CASE

I. Statement of Facts.

The district court made numerous findings of fact after a full-day evidentiary hearing that featured the testimony of seven witnesses (SER 45) and thirty-six exhibits (SER 44). *Nordstrom v. Ryan*, 128 F. Supp. 3d 1201, 1205-12 (D. Ariz. 2016) ("*Nordstrom II*"). The district court also relied on the later deposition

testimony of Scott Nordstrom and his criminal appellate counsel, Emily Skinner.[1] *Id*. at 1211 (citing SER 67-1 and 67-2). The hearing and the exhibits established the following facts.

A. Arizona's Penological Interests in Inspecting Outgoing Legal Mail.

Arizona's prison system is tasked with balancing two important interests: (1) enabling prisoners to communicate with their lawyers about ongoing criminal proceedings and (2) maintaining the safety and security of prison facilities and the public at large. Director Ryan presented a largely undisputed set of facts to the district court to explain the details underlying this second factor. This resulted in a factual finding "that [the Arizona Department of Corrections (the "ADC")] has legitimate interests in maintaining institutional security and preventing gangs and criminal organizations from using its facilities to run their operations." *Id*. at 1205.

[1] Nordstrom denounces the State's counsel for "interrogating" him and Skinner. (Op. Br. at 52.) The "interrogations" that he refers to were these depositions. Nordstrom's trial counsel agreed to a routine discovery schedule that included the two depositions, never objected to them, and never suggested that there was anything improper about scheduling them. (SER 52 ["The Court and counsel agreed that this case should be resolved on the basis of the evidence presented at the preliminary injunction hearing and after two additional depositions . . . ."]; SER 55 [Joint Stipulation to Modify Scheduling Order]; SER 61 [Joint Stipulation to Modify Scheduling Order (2nd Request)]). Only after the depositions were completed did Nordstrom's counsel inexplicably begin referring to them as "interrogations."

The principal facts supporting that conclusion came from exhibits and the live testimony of two witnesses: a police detective in the Phoenix Police Department's gang unit who had two decades of experience and a lieutenant in the Arizona prison's Special Security Unit. *Id*. Nearly all the Phoenix Police Department's gang investigations involve prisoners in Arizona's jails or prison facilities. *Id*. (citing SER 67-9 at 5). One prominent gang, the Arizona Mexican Mafia, "actually runs its sophisticated criminal enterprise from" prison units such as the Eyman Prison's Browning Unit. *Id*. (citing SER 67-9 at 114-15; SER 67-11 at 12). The Arizona Mexican Mafia's "criminal operations require regular communications" between the Browning Unit and the outside world for the purpose of employing "violence, fear, and intimidation" to "control the prisons, jails, and streets." *Id*. (citing SER 67-11 at 12). The gang fulfills these aims squarely "through the misuse of the attorney-client privilege." *Id*. (citing SER 67-9 at 112; SER 67-11 at 9).

This problem "is particularly bad in Arizona." *Id*.; *see also* SER 67-9 at 97-99. The district court credited the unchallenged testimony of police Detective Clint Davis, who personally witnessed prison inmates "misuse legal mail 'thousands of times.'" *Nordstrom II*, 128 F. Supp. 3d at 1205 (citing SER 67-9 at 97-99). The problem was so grave that in 2014, Detective Davis authored a twenty-eight page report documenting and summarizing it, not knowing at the time

that this litigation on the same topic was pending. (SER 67-11; SER 67-9 at 108-09.) The fraudulent legal-mail problem is "rampant," and attempts by prisoners to commit criminal acts using legal mail occur "on a 'daily basis.'" *Nordstrom II*, 128 F. Supp. 3d at 1205 (quoting SER 67-9 at 117-18, 199). Legal-mail abuse has "facilitated numerous felony crimes and attempted crimes, including money laundering, drug trafficking, homicide, extortion, and arson." *Id*. (citing SER 67-9 at 99). Gangs, criminal organizations, and prisoners "are aware of the legal mail inspection process, and they attempt to use this knowledge to conceal" their criminal activities from correctional staff. *Id.* (citing SER 67-9 at 97, 206).

Director Ryan presented numerous exhibits to illustrate these points, none of which Nordstrom credibly challenged. He offered one letter written by an Arizona prisoner that contained instructions to a gang member on how to fraudulently use the legal-mail procedure to smuggle into the prison a cellphone, a razor blade, and drugs. *Id*. (citing SER 67-9 at 210-16). The instructions explained how to print out "950 pages of caselaw from Westlaw" and to hide the contraband within the pages. *Id*. at 1206. The instructions even provided "sample labels from a legitimate law office with a diagram illustrating where the labels should be placed on the envelope to make the package look authentic." *Id*.

In another fraudulent legal-mail exhibit, an Arizona prisoner wrote a purported letter that started with authentic legal-sounding language: "Please be

advised that I recently obtained the copy of your 'Petition for Review' in which you filed in the Div. #2 court of appeals on my behalf." *Id*. (quoting Exhibit 133 at 2). But in the middle of the letter's second paragraph, the "tone of the language changed" and the author advised the reader to "hide contraband in a stack of caselaw to avoid detection." *Id*. At the end of the letter, "the inmate resumed the professional tone to match the introduction." *Id.*

The district court reviewed, found credible, and described in detail numerous other examples that Director Ryan provided. They included a prisoner using legal mail to facilitate a police officer's murder (*id*. [citing SER 67-9 at 104]), a fake motion in limine that contained detailed micro-written instructions to carry out certain violent crimes, including murder (*id*. [citing SER 67-9 at 4, 5, 118-22 & SER 67-11 at 2]), a fake attorney letter that was actually a coded message to the Aryan Brotherhood (*id*. at 1207 [citing SER 67-9 at 199-206]),[2] and another letter disguised to look as though it was from a law firm that contained caselaw, but that actually contained coded gang messages and the Aryan Brotherhood's member roster (*id*. [citing SER 67-9 at 209-10]). The district court found that "some inmates clearly attempt to misuse incoming and outgoing legal mail to facilitate criminal activity." *Id*.

[2] This particular exhibit is now part of the record. (SER 67-12.)

The record also contains additional examples of legal-mail abuse in Arizona-even by lawyers or their staff members. The district court credited four specific examples that Director Ryan presented, including an Arizona lawyer who provided Mexican Mafia inmates with illegal contraband, a second Arizona lawyer who smuggled into prison legal pads containing heroin and methamphetamine, a third Arizona lawyer who used her status to smuggle information and money between gang members, and an Arizona mitigation specialist who used her status to smuggle communications and contraband to a prisoner. *Id*. ("[C]riminal activities sometimes also include attorneys or their assistants.").

B. The ADC's Legal-Mail Policies and Procedures.

The district court found that the "ADC implemented and followed" its written legal-mail policies and procedures. *Id*. It noted that the parties "have stipulated—and there is no evidence to the contrary—that Director's Instruction 333 was implemented and is followed." *Id.* Instruction 333 directs staff to "inspect" legal letters and "scan" them to ensure that they are actually legal mail, but it also prohibits staff from reading mail. *Id*. The district court found that officers "are trained not to read letters line-by-line." *Id*.

C. The Legal-Mail Inspection Process.

The district court entered detailed findings about how exactly prison staff inspect legal mail. *Id*. at 1208-10. Based on the testimony of several ADC witnesses, the district court found that prison staff will "inspect" a document "page by page, one at a time" to determine whether it actually is legal mail. *Id*. at 1209. The court specifically declined Nordstrom's request to find that prison staff "read, rather than scan and inspect, legal mail." *Id*. at 1210 n.3. It found that officers do not read legal mail but merely scan it with the goal of "identify[ing] certain words to make sure that [the legal mail] is not contraband." *Id*. (internal quotation marks omitted). It specifically found that "inspecting officers do not read inmates' legal mail during the inspection process." *Id*.

The court also noted that "there is no evidence that inspecting officers provide to prosecuting authorities any information gleaned from legal mail." *Id.* at 1210 (citing multiple exhibits). And if an officer had done so, "a supervisor would be required to file a complaint against the offending officer, who likely would be disciplined or fired for his actions." *Id*.

D. Specific Instances of Mail Inspection that Nordstrom Asserts.

The district court noted the only two instances of mail inspection that Nordstrom has brought forth in this litigation. One was his original 2011

allegation that an officer was "reading" a letter addressed to Nordstrom's lawyer because the officer's "eyes were on the words of the page." *Id*. (citing SER 67-9 at 40). In Nordstrom's original representations not only to the district court but to this Court on appeal, he falsely insinuated that this letter had subsequently disappeared, when in fact it had simply been processed as regular mail rather than as legal mail. (SER 67-9 at 64-66.)

Nordstrom's second alleged instance of a legal-mail incident involved another inmate, Bryan Hulsey, in 2014. *Nordstrom II*, 128 F. Supp. 3d at 1210. A correctional officer was inspecting legal mail addressed to Hulsey that supposedly came from a law firm. *Id.* The officer noticed that the letter was handwritten, not typed, and as he scanned it, he noticed two unusual phrases in the letter: "I have never met someone in prison before" and "Bryan, you're such a con." *Id.* (citing SER 67-9 at 150). Even though the officer suspected that the letter was not actually legal mail, he merely gave it back to Hulsey so that it could be delivered and later reported the situation to his supervisor. *Id.* at 1211. In other words, the officer did not continue reading the letter, confiscate it, lift details from it and send them to a prosecutor, or engage in any other improper conduct.

E. Alleged Chilling of Nordstrom's Communications.

The district court's final category of findings of fact related to Nordstrom's argument that the ADC's legal-mail policies had a chilling effect on his

communications with his lawyers. The court found that Nordstrom had not experienced any chilling effect at any time before the 2011 incident. *Id*. Although Nordstrom had ongoing appellate and postconviction proceedings then, he did not raise this issue in those proceedings. *Id.* He also admitted that he experienced no chilling incidents after the 2011 incident, leaving that incident as the sole incident of the ADC's handling of his mail that purportedly supported his claim. (SER 67-1 at 38.)

The district court found that Nordstrom had many ways to communicate with his lawyers. For example, he could communicate by telephone and during in-person meetings with his lawyers. *Nordstrom II*, 128 F. Supp. 3d at 1211. Although he claimed that he was "better able to communicate" in writing, the court found that his ability to communicate with counsel had "not been undermined." *Id*. at 1211-12. The court also found that the ADC does not monitor telephone calls or in-person meetings between inmates and attorneys. *Id*. at 1212. In-person meetings typically last about two hours, and telephone calls typically last about thirty minutes. *Id*. (citing SER 67-1). There is "no evidence that a piece of Nordstrom's legal mail has ever been confiscated," and Nordstrom has always been able to convey information to his attorneys through one method of communication or another. *Id.*

F. The Facts Relevant to Standing.

A jury in Pima County convicted Nordstrom of multiple counts of first-degree murder in 1997, for which the trial judge sentenced him to death. *State v. Nordstrom*, 25 P.3d 717, 726 (Ariz. 2001), *overruling on separate grounds recognized by State v. Nordstrom*, 77 P.3d 40 (Ariz. 2003) While he was appealing his conviction, the U.S. Supreme Court decided *Ring v. Arizona*, which held in part that a death sentence imposed without a specific jury determination to support it violates the Sixth Amendment right to a jury trial. 536 U.S. 584 (2002). This new constitutional rule did not affect Nordstrom's conviction, but it did result in the Arizona Supreme Court vacating his death sentence and remanding for a new sentencing trial. *Nordstrom*, 77 P.3d at 45. After a new sentencing trial, a jury again recommended death sentences. *State v. Nordstrom*, 280 P.3d 1244, 1248 (Ariz. 2012), *cert. denied*, 133 S. Ct. 985 (2013).

Nordstrom appealed the sentences to the Arizona and the U.S. Supreme Courts respectively, through appellate counsel. *Id.* While his state supreme court appeal was pending, he filed the current civil action against Director Ryan and other defendants in 2011. (ER 1.) Nordstrom alleged below, as he does on appeal, that Arizona's prison-mail policies hamper his ability to communicate candidly and openly with his attorneys. This hindrance to communication, he asserts, threatens his constitutional right to counsel during criminal proceedings. (Op. Br.

at 70.) Despite this, he did not mention the point to the Arizona Supreme Court, which was hearing his appeal when he filed this action. Both Nordstrom and his appellate counsel, Emily Skinner, confirmed this at their depositions. (SER 67-1 at 15:04 to 16:15; SER 67-2 at 05:25 to 06:20.) The Arizona Supreme Court's 2012 opinion further confirmed it by making no mention of a prison-mail argument. *Nordstrom*, 280 P.3d at 1254, ¶ 48 (analyzing Nordstrom's principal arguments and referencing and rejecting twenty additional appellate claims).

After the Arizona Supreme Court affirmed his sentences and the U.S. Supreme Court denied certiorari, Nordstrom filed a petition for postconviction relief with the trial court in Pima County, under Arizona Rules of Criminal Procedure 32. (SER 67-5 to 67-8; *see generally, State v. Carriger*, 692 P.2d 991, 994-95 (Ariz. 1984) [providing broad overview of nature and scope of Rule 32 proceedings]). As *Carriger* explains, a Rule 32 petition is not a creature of state constitutional law. When a criminal defendant is convicted in Arizona state court, his right to a direct appeal is guaranteed by the Arizona constitution, "but the Rule 32 procedure is not." *Carriger*, 692 P.2d at 994. Direct appeals under state law are designed to give "prompt, full appellate review," whereas Rule 32 is designed for "the unusual situation where justice ran its course and yet went awry." *Id.* at 995.

Nordstrom's criminal appellate counsel filed a 161-page petition on June 30,

2015. (SER 67-5 to 67-8.) It presented Nordstrom's complete family history dating to 1878, when his "great-great-grandparents" immigrated from Norway. (SER 67-7 at 81.) It raised the following challenges to past trial court proceedings: state misconduct, ineffective assistance of trial counsel, ineffective assistance of sentencing counsel, ineffective assistance of appellate counsel, judicial bias, juror bias, newly discovered evidence, right to be present, unconstitutional aggravator of a death penalty factor, cumulative error, and DNA testing. (SER 67-5 at 3-6, Table of Contents, pages ii to v.) Nordstrom's "state misconduct" argument was that the prosecutor withheld electronic-monitoring evidence, failed to disclose evidence that another person had committed the murders, failed to disclose fingerprint evidence, elicited false eyewitness-identification testimony, argued inconsistent theories to the jury, improperly cross-examined witnesses, and failed to correct false testimony about David Nordstrom's work records. (*Id.* at 18-34.)

During Skinner's deposition, she testified that her current representation of Nordstrom was "not pursuant to the Sixth Amendment." (SER 67-2 at 5.)

II. Procedural History and Rulings Presented for Review.

Nordstrom filed suit in 2011. (ER 1.) The district court dismissed the Complaint for failure to state a claim with leave to amend, pursuant to the screening requirements of the Prison Litigation Reform Act, 28 U.S.C. § 2925A(b)(1), (2). (Dkt 4.) Nordstrom filed a First Amended Complaint. (ER

393.) The court screened and dismissed it for failure to state a claim. (ER 81.) Nordstrom appealed. After inviting the State of Arizona to argue its position as an amicus curiae, this Court reversed and remanded to the district court. *Nordstrom v. Ryan*, 762 F.3d 903 (9th Cir. 2014) ("*Nordstrom I*"). The State petitioned for panel rehearing and rehearing en banc, which the Court denied. (Dkt. 70, Order, Sept. 25, 2014.)

On remand, the district court conducted a full-day evidentiary hearing on Nordstrom's Motion for Preliminary Injunction, which it denied. (SER 43.) By agreement of the parties, the State deposed Nordstrom and his appellate counsel, and both sides agreed that no further hearing was necessary on Nordstrom's request for a permanent injunction. (SER 52.) After further briefing, the district court heard oral argument and issued a ruling denying Nordstrom's claim on the merits. (ER 2.) It entered final Judgment on February 5, 2016. (ER 1.)

SUMMARY OF THE ARGUMENT

Nordstrom does not have standing to assert his chief argument that the ADC is violating the Sixth Amendment. The constitutional right to counsel is one that attaches during the pendency of a criminal trial. The U.S. Supreme Court has explicitly held that it does not attach during state postconviction proceedings such as those that Nordstrom is currently pursuing.

On the merits of the Sixth Amendment claim, this Court held in its 2014 opinion that prisons have the constitutional authority to "inspect" a prisoner's letter to his attorney "to make sure that it does not contain, for example, a map of the prison yard, the time of guards' shift changes, escape plans, or contraband." *Nordstrom I*, 762 F.3d at 910. This Court distinguished the act of "reading" a prisoner's legal letter from "merely scanning and inspecting the letter for contraband." *Id*. at 906. Nordstrom essentially asks this Court to overrule the 2014 opinion without explicitly saying so. He urges such an outcome even though the factual record developed before the district court was far deeper and more detailed than the facts at issue in many of the appellate precedents from other circuits that have touched on this issue.

The district court properly concluded that the ADC's updated policy on outgoing legal mail complies with this Court's 2014 holding and therefore does not violate the Sixth Amendment. Nordstrom does not squarely state why the district court erred. He instead seeks to distract this Court with inaccurate assertions concerning the legal-mail policies of other jurisdictions. And even though the State specifically tailored its new policy to comply with this Court's 2014 holding that explained what the boundaries of an inspection policy should be, Nordstrom continues to insist that the policy is violating a "nearly sacrosanct" right of confidentiality. He is, in other words, challenging the 2014 holding.

The prison's problem of prisoners engaging in legal-mail abuse to conduct criminal activity is literally rampant in the State of Arizona. At the same time, Nordstrom's ability to effectively communicate with his attorneys is not hindered due to any fear on his part that a correctional officer will see sensitive information in a letter and pass it on to use against him. And the perceived threat that Nordstrom complains of—that ADC officers will intercept and share with Arizona prosecutors information that the latter will use against him—has never occurred and is not in danger of occurring. This is because, as the district court concluded, any Arizona correctional officer who would lift information from a legal letter and improperly report it to law enforcement would be promptly disciplined or fired.

Finally, Nordstrom has presented no facts to support any claims under the First or the Fourteenth Amendments.

ARGUMENT

I. Nordstrom Lacks Standing to Assert a Sixth Amendment Claim.

A. Standard of Review.

This Court reviews de novo a district court's conclusion regarding Article III standing. *Braunstein v. Arizona Dep't of Transp.*, 683 F.3d 1177, 1184 (9th Cir. 2012).

B. The Sixth Amendment Does Not Apply in PostConviction Proceedings.

Standing is "one of the controlling elements in the definition of a case or controversy under Article III." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 613 (1989). A party asserting standing must show "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Here, no injunction that a court issued based on Nordstrom's Sixth Amendment claim for injunctive relief would actually affect any of Nordstrom's Sixth Amendment rights. He is currently in the midst of state postconviction proceedings. His criminal appellate counsel, Emily Skinner, conceded that the Sixth Amendment does not govern such proceedings. (SER 67-2 at 5.) This is consistent with Supreme Court precedents. In *Coleman v. Thompson*, a criminal defendant petitioning for habeas relief argued that "attorney error" had caused a default in his habeas proceedings. 501 U.S. 722, 752 (1991). The Court rejected this argument and observed, "There is no constitutional right to an attorney in state post-conviction proceedings." *Id.* (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987) and *Murray v. Giarratano*, 492 U.S. 1 (1989) [applying the rule to capital cases]); *but cf. Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012) (holding that the Sixth Amendment right to effective assistance of counsel may apply as an exception to the general rule, but that "[t]his is not the case [to] resolve whether

that exception exists as a constitutional matter."), and *Mempa v. Rhay*, 389 U.S. 128 (1967) (holding that Sixth Amendment applies to post-conviction probation-revocation proceedings). The Ninth Circuit has repeated this point: "[S]tate prisoners do not have a constitutional right to counsel when mounting collateral attacks upon the judgment of a state court." *Avagyan v. Holder*, 646 F.3d 672, 678 (9th Cir. 2011).

The district court concluded that Nordstrom had standing under *Cornett v. Donovan*, 51 F.3d 894, 897 (9th Cir. 1995), reasoning that "the key point in time is the filing of the complaint." *Nordstrom II*, 128 F. Supp. 3d at 1213 n.6. But this reasoning contradicts the Supreme Court's holdings that '"an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."' *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974)). Moreover, *Cornett* actually reached the same conclusion that Director Ryan is urging here. In *Cornett*, four involuntarily committed patients at an Idaho hospital had filed suit seeking a declaration of their constitutional right of access to the courts. 51 F.3d at 896. Of the four, one plaintiff "was no longer institutionalized at the time plaintiffs filed this complaint." *Id*. at 897. The Court concluded that this rendered the fourth plaintiff unable to meet the standing test's redressability element. *Id*. The other three plaintiffs did demonstrate standing, but Nordstrom's position here is that of

the fourth plaintiff, not of the remaining three. Nordstrom therefore lacks standing to assert his Sixth Amendment claim for the same reason that the fourth plaintiff in *Cornett* lacked standing.

II. The ADC's Policy Does Not Violate the Sixth Amendment.

A. Standard of Review.

Nordstrom essentially argues that this Court should review de novo all of the district court's findings and rulings. (Op. Br. at 21.) The district court took pains to distinguish the portion of its opinion that constituted its findings of fact. *Nordstrom II*, 128 F. Supp. 3d at 1205-12. While this Court indeed reviews de novo mixed questions of law and fact implicating constitutional rights as Nordstrom argues, *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1066 (9th Cir. 1995), it reviews questions of fact under a clearly erroneous standard. *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982). Nordstrom argues that questions of fact should nonetheless be reviewed de novo when the constitutionality of a restriction on speech is at issue. (Op. Br. at 22 [citing *Tucker v. Calif. Dep't of Educ.*, 97 F.3d 1204, 1209 n.2 (9th Cir. 1996)].) But *Tucker* was a First Amendment free-speech case and Nordstrom cites no authority for the proposition that this rule extends to Sixth Amendment arguments.

B. The ADC Acts Consistently with This Court's *Nordstrom I* Holding by Scanning and Inspecting Outgoing Legal Mail but Not Reading It.

The origin of the issue now before this Court lies with the Supreme Court's decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974). While meriting only one passing mention in Nordstrom's Opening Brief (Op. Br. at 35), *Wolff* acknowledged the authority of prison staff to "inspect" a prisoner's correspondence to his or her attorney, noting that "freedom from censorship is not equivalent to freedom from inspection or perusal." *id*. at 576. The Supreme Court recognized that such inspection or perusal is constitutional as long as it occurs in the prisoner's presence. *Id*. at 577.

The Supreme Court did not define "inspection or perusal." Neither had any other court until this Court's 2014 opinion, in which it sharpened the focus slightly but appears to have primarily relied on the district court to permit discovery, hear facts, and color in additional details that would meet the Supreme Court's intentions in *Wolff*. *Nordstrom I*, 762 F.3d at 911. This Court held that "inspection" describes correctional officer activity that does not include reading but that does include scanning through the pages of outgoing legal mail to detect, for example, a "map of the prison yard, the time of guards' shift changes, escape plans, or contraband." *Id*. at 910. This holding struck the correct balance. It turns out that an actual Arizona prisoner was knowledgeable enough about the

procedures for inspecting legal mail to know how to bury a secret criminal message inside 950 pages of Westlaw caselaw. *Nordstrom II*, 128 F. Supp. 3d at 1206. This Court's "escape plans" standard for inspecting letters allows for at least an opportunity to intercept such a communication.

The district court recognized this, noting dicta from the Supreme Court stating that refusing to send or deliver letters concerning escape plans or '"other information concerning proposed criminal activity"' constituted an '"obvious example of justifiable censorship of prisoner mail."' *Id*. at 1212 (quoting *Procunier v. Martinez*, 416 U.S. 396, 412-13 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989)). Construing the *Nordstrom I* standard, the district court found that "inspecting or scanning legal mail necessarily entails reading at least some of the words." *Id*. at 1214-15. The court concluded that what *Nordstrom I* prohibited was "reading in the traditional sense—reading the text of the letter line-by-line." *Id*. at 1215. No other conclusion made sense in light of *Nordstrom I's* holding in that an inspection could permissibly "detect escape plans or guard shift changes." *Id.*

The district court recognized that the balance struck by permitting officials to scan letters in an inmate's physical presence "does not serve all interests perfectly." *Id*. Both the inmate and the prison staff are forced into a compromise—the inmate by having "some chilling effect" caused by the scanning

and prison officials by being prohibited from the line-by-line reading that could detect every prospective crime or illicit activity of which a prison population is capable. *Id*. But the imperfection is a reasonable and necessary one, which is mitigated to some degree by the alternative modes of communication that a prisoner has to communicate with his attorney. *Id*. (citing *Guajardo-Palma v. Martinson*, 622 F.3d 801, 805 (7th Cir. 2010) [noting that this "imperfection is necessary to protect the prison's interest in security and is lessened by allowing prisoners to engage in unmonitored phone conversations with their lawyers."]).

Nordstrom does not acknowledge the balance that *Wolff* and *Nordstrom I* struck. He instead insists that scanning legal mail in a prisoner's presence "does nothing to mitigate the breach of confidentiality." (Op. Br. at 31.) He argues that the ADC's process renders the "nearly sacrosanct" right of attorney-client confidentiality "a dead letter in Arizona." (*Id*. at 18.) He further contends that the ADC "has ripped the envelope of attorney-client confidentiality away altogether." (*Id*.) With this sweeping rhetoric, Nordstrom is not actually challenging the ADC's policy at all. He is instead challenging *Nordstrom I*. In *Nordstrom I*, this court rejected the absolutist position that Nordstrom now urges and instead held that the right to privately confer with counsel is "*nearly* [not absolutely] sacrosanct." 762 F.3d at 910 (emphasis added). This Court therefore

acknowledged that prison officials may inspect letters to detect things such as escape plans without violating that right.

Ignoring this point altogether, Nordstrom argues that the need to inspect legal mail is illusory because there has "never been an episode of abuse of outgoing legal mail correctly addressed to a prisoner's lawyer" in Arizona. (Op. Br. at 31.) This assertion does not address the serious threat of crime and violence that legal-mail abuses pose. As the district court concluded in reacting to this argument, "inmates send criminal communications in mail masquerading as attorney-client correspondence, sometimes even appropriating the names and addresses of licensed attorneys." *Nordstrom II*, 128 F. Supp. 3d at 1216. It acknowledged based on the evidence that Director Ryan presented that the "sad fact" is that even attorneys and their staff have now been proven with "unrefuted evidence" to have engaged in "criminal activities with inmates, including aiding in criminal communications." *Id*.

The district court found that the ADC's policy meets these legitimate challenges, that it fits squarely within the 2014 opinion's standard, and that the ADC's staff actually followed and adequately implemented it. *Id.* at 1207 ("[T]he Court finds that ADC implemented and followed its legal mail policies and procedures."). The policy flatly prohibits staff from "reading" any letter, explicitly stating that a prisoner's letter "shall not be read by staff." *Id.* at 1208 (citing SER

28-3). As this Court recognized, Nordstrom argued that the ADC's previous policy should have prohibited "reading," but did not: "Reading legal mail—not merely inspecting or scanning it—is what Nordstrom alleges the Department of Corrections is doing, and it is what he seeks to enjoin." *Nordstrom I*, 762 F.3d at 906.

Although Nordstrom has never pointed to a single instance of literal "reading" of his letters outside the unsettled facts of the one 2011 occurrence, the State has since clarified that its policy does not actually threaten the conduct that he fears and has proven that its staff correctly implements its policy. Nordstrom's reaction to this is to essentially move the goalposts. He now argues that a flat prohibition on reading is insufficient because even a mere visual glance at a letter's pages should be unconstitutional regardless of *Nordstrom I*'s holding. This argument simply contradicts that holding. A plain review of the ADC's policy and of the district court's findings of fact shows that the ADC engages in only a cursory scanning of prisoner letters to ensure that they are not fraudulent attempts to communicate gang business or other criminal activities.

Nordstrom's counsel was more candid in attacking *Nordstrom I* during oral argument before the district court: "*Wolff* in 1975 says you can't read. [The] Ninth Circuit somehow morphs that into the *Nordstrom* decision. They are irreconcilable as far as I'm concerned." (SER 67-9 at 18:19 to 18:24.) Nordstrom's attacks on

Nordstrom I are not well-taken. That opinion binds the panel that will hear this appeal. *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc). In any event, its standards were sound and ADC complies with them. Nordstrom's attacks on *Nordstrom I* are not well-taken. That opinion binds the panel that will hear this appeal. *Miller v. Gammie*, 335 F.3d 889-892-93 (9th Cir. 2003) (enbanc). In any event, its standards were sound and the ADC complies with them.

C. Nordstrom's Representations Concerning Other States' Policies Are Inaccurate.

Nordstrom has repeatedly relied since his 2013 appeal to this Court on an asserted "survey" of prison policies in other states to argue that Arizona's policy is an unusual one. Director Ryan opted not to challenge this survey assertion during the 2013 appeal. But when Nordstrom repeated the survey argument to the district court, Director Ryan objected and observed that several of Nordstrom's assertions about the content of other states' prison policies were incorrect. (Dkt. 74 at 4-6.) The district court handled the objection by effectively overruling it but by also observing that Nordstrom's survey assertion was "not . . . particularly helpful." *Nordstrom II*, 128 F. Supp. 3d at 1211 n.4.

Nordstrom had argued to the district court that Arizona's legal-mail policy "stands as an extreme outlier" because totally prohibiting visual scanning of prisoner legal mail is something that "nearly every other state prison system is already doing." (Dkt. 69 at 18.) On appeal, he initially scales down that argument

only to revive it later in his brief, contradicting himself and presenting a confusing picture to this Court. Early in his brief, he modestly walks back from his extreme-outlier position and argues that "a growing majority (now twenty-seven)" states do not allow even inspections of legal mail "absent some individualized suspicion of wrongdoing." (Op. Br. at 6.) But just a few pages later, he reverts back to arguing that Arizona is "[a]lone among the States . . . . " (*Id*. at 31.)

If twenty-three states agree with Arizona's approach, Arizona is not alone. Nor does Nordstrom cite any authority supporting the relevance of such a survey. The Supreme Court has cited legislation "enacted by the country's legislatures" as relevant to informing it concerning proportionality review under the Eighth Amendment's "evolving standards of decency" analysis. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). But that test does not apply here. Moreover, Nordstrom continues to underestimate the number of states that agree with Arizona. For example, he cites Alaska as one of twenty-seven anti-inspection states. (*Id*. at 19) (quoting Alaska policy as follows: "Staff may not read or search outgoing privileged mail for contraband"). But Alaska explicitly allows the opening and even the *scanning* of privileged mail "if there is doubt as to whether mail is in fact privileged." (Op. Br. at 92 [quoting Alaska Corr. Dep't Policy § 810.03.])

Nordstrom cites New Mexico as another anti-inspection state. (*Id*. at 19 n.2) (quoting New Mexico's policy as follows: "[L]egal mail and privileged

correspondence will not be routinely opened for inspection."). Yet in a passage not quoted in the brief, New Mexico takes a position similar—if not even *more* intrusive than—Arizona's. Its policy states that legal mail may be "opened, inspected, and *read*" to the extent needed to "determine its legitimacy." (*Id*. at 98) (quoting N.M. Corr. Dep't Reg. CD-151201(H)(4)) [emphasis added]). Nordstrom does not explain how New Mexico's policy supports his argument here. Nor can he. New Mexico continues to do what Arizona opted to stop doing once this Court issued its 2014 opinion: suggesting to correctional staff that a prisoner's letter may be "read."

Yet another example is Nordstrom's flawed assertion that South Dakota now "limits inspection" of outgoing legal mail to "prevent the movement of contraband." (*Id*. at 20.) The actual South Dakota policy quoted in Nordstrom's appendix again appears to be virtually identical to Arizona's policy. (*Id*. at 101 [quoting S.D. Corr. Policy § 1.5.D.3]) ("Staff will not read the privileged/legal correspondence but may inspect the contents page-by-page . . . ."). Nordstrom does not explain how this "inspection of contents page-by-page" procedure differs from Arizona's scanning and inspecting procedure in any meaningful way. Furthermore, the policy goes on to state that "[i]f there is a question by staff whether the offender's correspondence qualifies as legal mail," the mail may then "be retained" until a "determination is made." (*Id*.) Unlike Arizona's policy,

South Dakota's policy does not appear to offer any clarification or specificity concerning numerous aspects of this procedure. Unlike Arizona's policy, it contains no prohibition on reading. It appears to allow staff members to retain a letter and to simply make their own determination as to whether a letter is legitimate without any limiting restrictions on how they should make the determination. South Dakota is not, in short, an anti-inspection state at all.

If one removes Alaska, New Mexico and South Dakota alone from the list of twenty-seven states that Nordstrom claims are anti-inspection states, he is actually left with twenty-four, rendering a majority of twenty-six States that presumably side with Arizona's policy. Nordstrom's assertions that Arizona stands alone, as an extreme outlier and that anti-inspection states are a growing majority are simply incorrect.

III. The ADC's Policy Does Not Violate the First Amendment.

A. Standard of Review.

Director Ryan agrees with the Opening Brief's standard of review on this issue.

B. Nordstrom Failed to Prove His Free-Speech Claim.

Ignoring the Supreme Court's decision in *Wolff*, 418 U.S. 539, Nordstrom cites a number of free-speech cases to support his argument that the right of

confidentiality between a prisoner and counsel should be "totally respected." (Op. Br. at 61.) As addressed below, his citations have several flaws or are plainly distinguishable. But as the district court recognized, he also simply failed to prove facts that met the standards of a First Amendment claim.

A prison regulation that impinges on an inmate's free-speech rights is valid if the regulation is "reasonably related to legitimate penological interests." *Frost v. Symington*, 197 F.3d 348, 354 (9th Cir. 1999) (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987). A four-pronged test applies. First, there must be a valid, rational connection between the prison policy and the legitimate governmental interest put forward to justify it. *Id*. Second, courts should consider whether there are "alternative means of exercising the right that remain open to prison inmates." *Id*. Third, courts should consider the impact that accommodation of the asserted constitutional right will have on correctional staff, on other inmates, and on the allocation of prison resources generally. *Id*. Fourth and finally, the "absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Id*.

Nordstrom failed to offer evidence that adequately met these elements. The rational connection between the ADC's legal-mail policies and ADC's interest in security and public safety is clear, and the district court correctly found that "[t]he legitimate penological interest in mitigating such threats justifies" the ADC's inspection policy. *Nordstrom II*, 128 F. Supp. 3d at 1219. As to the second factor,

the district court recognized that there are indeed alternative means for Nordstrom to communicate with his lawyers. *Id*. at 1215. As to the third factor, the effect of accommodating Nordstrom's position here has been amply proven to a degree that Nordstrom has not seriously contested: legal-mail abuse has "been used to actually perpetrate or attempt . . . to perpetrate a homicide" in Arizona. (SER 67-9 at 98.) Nordstrom offers no argument or facts to suggest any mitigation of this fact. Finally, Nordstrom has offered no evidence of "ready alternatives" to the balance that ADC staff strike when they scan legal mail in the prisoner's presence.

Nordstrom's cited legal precedents are unpersuasive. His principal case for the proposition that a prisoner's right to First Amendment confidentiality should be "totally respected" is *Smith v. Robbins*, 454 F.2d 696 (1st Cir. 1972) (Op. Br. at 61), which was decided two years before *Wolff*. Not only would *Wolff* have overruled *Smith* to the extent there was any conflict between these cases, but *Smith* explicitly states that the issue was whether incoming legal mail could be opened "in the absence of the prisoner." *Id*. at 697. That is not the issue here. *Smith* is therefore inapplicable and unpersuasive.

The same or other flaws are present in Nordstrom's remaining citations. (Op. Br. at 61-62.) Three of his cited precedents involved claims of opening prisoners' mail outside the prisoner's presence. *See Al-Amin v. Smith*, 511 F.3d 1317, 1330-31 (11th Cir. 2008) (holding that a prison may not open legal mail

outside a prisoner's presence); *Jones v. Brown*, 461 F.3d 353, 359 (3rd Cir. 2006) ("[O]pening legal mail outside the presence of the addressee inmate interferes with protected communications . . . . "), *Ramos v. Lamm*, 639 F.2d 559, 582 (10 Cir. 1980) ("[P]rivileged legal mail . . . can only be opened in the presence of the sending inmate."). Nordstrom has never argued that the ADC seeks to open his legal mail outside his presence and offered no evidence to support such a claim.

Nordstrom cites *Jones v. Caruso*, 569 F.3d 258 (6th Cir. 2009), to support his free-speech theory. (Op. Br. at 61.) But that opinion does not support his position. While recognizing that legal mail is afforded certain constitutional protections, the *Jones* court held that the written materials before it were not even legal mail in the first place. *Id*. at 268. Nordstrom also cites *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2004) (Op. Br. at 61), but it too involved opening mail outside the prisoner's presence. *Id*. at 686. And like the materials in *Jones*, the materials there did not qualify as legal mail. *Id*.

Nordstrom finally relies on *ACLU Fund of Michigan v. Livingston County*, 796 F.3d 636 (6th Cir. 2015), arguing that it has "striking parallels" to this case and that it enjoined a prison from making a "subjective and inexpert determination as to whether a particular legal matter is 'legitimate.'" (Op. Br. at 62.) Neither of these assertions is true. *Livingston County* concerned a jail policy that flatly censored all letters that ACLU attorneys sent to prisoners by seizing them and

refusing to inform either the ACLU or the prisoners that they had been seized. *Id*. at 638. This is not what the ADC's policy does, and Nordstrom does not argue that it threatens to do so. And the court's criticism of a "subjective and inexpert determination" of what constitutes legal mail was addressing that jail's determination that mass mailings from the ACLU to prisoners were not legal mail. *Id*. at 648. The jail's determination there was repeatedly shown to be arbitrary and erroneous: "Why an out-of-county attorney cannot send legal mail to over four inmates at a time is entirely unclear." *Id*. In short, *Livingston County* is inapposite to Nordstrom's free-speech argument here and simply does not support his view that even a cursory, inspection-related visual scan of a legal letter is unconstitutional under the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should affirm the Judgment.

Respectfully submitted this 29th day of August, 2016.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendants-Appellees state that they are not aware of any related cases pending in the Ninth Circuit.

/s/Neil Singh
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Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,115 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

Dated this 29th day of August, 2016.

/s/ Neil Singh
Neil Singh
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that 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 on August 29, 2016. 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.

s/ S. O'Quinn
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