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

OPENING BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

Scott Nordstrom, a death row inmate in the custody of the Arizona Department of Corrections (ADC), composed a handwritten letter to his court-appointed attorney for the appeal. Having consistently proclaimed his innocence on the homicide charges, he was heartened by the discovery that the prosecutor had withheld police reports and other documents contradicting key witnesses and pointing to another suspect. When Nordstrom handed the letter to a correctional officer, the officer began to peruse the contents. After Nordstrom loudly protested, the officer insisted he was entitled to review the letter to ensure that it was proper legal mail. In a practice sharply at odds with the Federal Bureau of Prisons and other States, the ADC Director proclaimed that prison staff may read legal mail "to ensure the content of the mail is of legal subject matter." ER407.

In *Nordstrom v. Ryan*, 762 F.3d 903 (9th Cir. 2014), this Court issued a landmark opinion upholding Scott Nordstrom's Sixth Amendment right to correspond confidentially with his attorney and firmly rejecting the position of the ADC that officers may read outgoing legal mail:

> In American criminal law, the right to privately confer with counsel is nearly sacrosanct. 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.

Id. at 910 (citation omitted; emphasis in original).

Rather than revising its legal mail policy to respect the confidentiality of attorney-client legal mail, the ADC dismissed this Court's constitutional ruling as a quibble about "vocabulary words." ER384. Other than a cosmetic substitution of the words "inspect" or "scan" for "read," the new ADC policy reaffirms review of the text of a letter to counsel to "verify that its contents qualify as legal mail and do not contain communications about illegal activity." ER386. The ADC acknowledged that the new policy reflects no change in practice, but merely corrects what the ADC terms a "somewhat awkward choice of words." ER384 & n.1.

After an evidentiary hearing, the District Court agreed that officers are "reading portions of the letter," ER37, by "scanning it for keywords," ER34. The prison's mail supervisor explained that reviewing the content of the legal letter for "keywords to determine its legal legitimacy" takes from 15 to 30 seconds for each page. ER221-222. Nonetheless, the District Court ruled that reading of legal mail is prohibited only if it involves "reading the text of the letter line-by-line." ER20.

Believing that a brief inspection of legal mail could be accomplished without impairing confidentiality, this Court allowed the prison to leaf through legal mail for markers that "could jeopardize institutional security," namely, "such suspicious features as maps of the prison yard, the times of guards' shift changes, and the like." *See Nordstrom*, 762 F.3d at 906. The ADC has seized upon that language to

justify skimming outgoing legal mail for keywords and components, reviewing each page of a letter for up to half a minute.

The ADC's witnesses admitted there had not been a single episode in the history of the Arizona prison system in which legal mail sent to an actual lawyer had been abused. ER196, 271. Nonetheless, because three lawyers for jail inmates elsewhere had engaged in misconduct (not involving legal mail), the ADC regards all lawyers as security risks. *See* ER22-23. On that unsound basis, confidentiality in prisoner legal correspondence has been sacrificed.

No ethically-responsible lawyer may permit a prisoner client to commit sensitive information to writing that is being skimmed or scanned by agents of the State in a search for keywords. Arizona has become the only State in the nation in which a lawyer is ethically-prohibited from use of legal mail for privileged communications with a prisoner. Representation of prisoners in Arizona has been made considerably more burdensome — and ethically challenging.

By upholding Arizona's aberrational practice, the District Court nullified this Court's promise of confidentiality and departed from the conscientious protection of confidentiality in prisoner legal mail guaranteed by all eight other circuits to address this question. This Court should once again restore the fundamental constitutional right of a death row inmate to confidentiality in correspondence with his court-appointed lawyers.

JURISDICTIONAL STATEMENT

The District Court properly exercised federal question jurisdiction under 28 U.S.C. § 1331 over plaintiff-appellant Scott D. Nordstrom's civil rights action under 42 U.S.C. § 1983 raising a constitutional challenge to the policy and practice of the Arizona Department of Corrections allowing correctional officers to read the substance of confidential legal mail sent by a prisoner to his lawyer. ER393-406.

On March 27, 2012, the District Court ordered the dismissal of plaintiff's amended complaint, ER81-86, and entered a final judgment, ER80. On August 11, 2014, this Court reversed and remanded the case to the District Court. ER46, 61. On February 5, 2016, the District Court ruled against the plaintiff on the merits, ER2-29, and entered another final judgment, ER1. On February 23, 2016, plaintiff Scott Nordstrom filed a notice of appeal, ER279-282, which was timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

The issues presented to this Court for review on appeal are:

Whether the Arizona Department of Corrections may scan/skim the text of a confidential letter by a death row prisoner to his lawyer, searching for keywords and components of wrongdoing and to verify the "legal" nature of the legal mail —

1. Under this Court's ruling in *Nordstrom v. Ryan*, 762 F.3d 903 (9th Cir. 2014), that a prisoner in a criminal matter has a Sixth Amendment right to correspond confidentially with his attorney, allowing the prisoner to write candidly about incriminating and personal matters without being chilled, subject only to a simple inspection of legal mail for "suspicious features" such as inclusion of a map of the prison or a chart of prison guard shift changes.

2. Under the Free Speech Clause of the First Amendment, which has been interpreted by every circuit to address the question as requiring that confidentiality in prisoner correspondence with his lawyer be "totally respected" and thus barring access by prison officials to the substantive contents of that correspondence.

3. Under the First Amendment, Sixth Amendment, and Fourteenth Amendment Due Process Clause, that the fundamental right of confidentiality in attorney-client correspondence must be preserved against interference by officers of the State that seeks to execute a death row inmate.

CONSTITUTIONAL PROVISIONS, REGULATIONS, AND POLICIES

Pursuant to Circuit Rule 28-2.7, pertinent constitutional provisions and regulations and policies are included in the Addendum to this brief.

STATEMENT OF THE CASE

A. The Federal Bureau of Prisons and Other State Correctional Departments Protect the Confidentiality of Outgoing Legal Mail, While the Arizona Department of Corrections Allows Prison Officers to Evaluate the Text of a Prisoner's Letter to His Counsel

Before the District Court on remand, a chart was entered into the record with the regulations and policies of the Federal Bureau of Prisons and the correctional departments of each of the fifty States regarding outgoing privileged correspondence from prisoners to their lawyers. ER296-311.[1]

The Federal Bureau of Prisons and a growing majority (now twenty-seven) of State correctional departments allow prisoners to send outgoing legal mail without it being subsequently opened or inspected by prison personnel, absent some individualized suspicion of wrongdoing. *See, e.g.*, 28 C.F.R. § 540.18(c)(1) ("outgoing special mail may be sealed by the inmate and is not subject to

[1] In the District Court, the Arizona Department of Corrections (ADC) objected to references to the policies of correctional departments as hearsay. ER15 n.1. The District Court concluded that it could "take judicial notice of such policies" and "reviewed the summaries of legal mail policies from other states." *Id.* The District Court stated it did not find these policies "particularly helpful," as "the Court's task is to decide whether the ADC's policies violate the Constitution, not whether they constitute best practices." *Id.* In *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974), the Supreme Court stated that, "[w]hile not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." Updates in citations or changes in State policies since the date of the chart in the record are listed on the last page of the Addendum to this brief.

inspection"); Alaska Dep't of Corrections Policies & Procedures, § 810.03, VII.D.1.a (2013) ("Staff may not read or search outgoing privileged mail for contraband."); 20 Ill. Adm. Code 525.130(c), (d) (2003) ("Outgoing mail which is clearly marked as privileged and addressed to a privileged party may not be opened for inspection" absent reasonable suspicion of contraband); N.Y. Dep't of Corrections & Community Supervision, Privileged Correspondence No. 4421, 7 NYCRR 721.3, III.A.2, C (2014) ("Outgoing privileged correspondence may be sealed by an inmate, and such correspondence shall not be opened, inspected, or read without express written authorization by the facility Superintendent" supported by facts giving reason to believe the law has been violated or safety endangered).[2]

As an example from the State with the largest prison population, the Texas Department of Criminal Justice directs: "In order to facilitate the attorney-client privilege, an offender may send sealed and uninspected letters directly to legal correspondents. No correspondence from an offender to any legal correspondent

[2] In the last year, Delaware revised its policy to direct that "[o]utgoing legal/privileged mail will be recorded and shall not be opened for inspection or any other purpose or otherwise impeded in its transmission," if properly addressed and marked and passing a fluoroscope examination. Del. Dep't of Corrections Policy Manual, Ch. 4, § 4.0, IV.D.2 (2015). New Mexico continued this basic approach, directing that "[l]egal mail and privileged correspondence will not be routinely opened for inspection," so that outgoing "[l]etters in this category should be sealed by the inmate and dropped in the special box provided for such letters." N.M. Corrections Dep't, Correspondence Regulations CD-151201(H) (2015).

shall be opened or read." Texas Dep't of Criminal Justice, Uniform Offender Correspondence Rules, BP-03.91, III.A (2013).

While a couple of States do authorize a "scan" or "inspection" of outgoing legal mail, such correctional policies typically provide that outgoing legal mail may be inspected for contraband, but without reviewing the text of the correspondence.[3] As a prominent example, California — which has the second largest prison population — directs that, when outgoing legal mail is inspected for contraband, prison staff are directed to "remove the contents of the envelope upside down to prevent reading." Cal. Code Reg., tit. 15, § 3142 (2014).

At the time this litigation began, the Arizona Department of Corrections (ADC) stated that outgoing legal mail "shall not be read or censored but shall be inspected for contraband and sealed in the presence of the inmate." ER371. However, the policy further provided "staff are not prohibited from reading such documents to the extent necessary to establish the absence of contraband." *Id*. In the administrative proceedings for this case, the Director expanded the authority of

[3] In the last year, Colorado revised its policy to provide that prisoners may "*send sealed letters"* to counsel, subject only to an inspection for contraband before being sealed. Colo. Dep't of Corrections Admin. Regulation 300-38 (IV.D) (2015). South Dakota removed language that previously authorized inspection of outgoing legal mail "to confirm the contents are privileged/legal," and instead now limits inspection to "prevent the movement of contraband." S.D. Corrections Policy, 1.5.D.3, at IV.6.C (2015).

prison officials to review the contents of "Legal Mail": "Staff is authorized to scan and 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." ER407.

After remand by this Court, as discussed further in Part D of this Statement of the Case, Arizona revised its legal mail to replace the word "read" with "scan" or "inspect." ER386. The policy continues to provide that a correctional officer may review a prisoner's letter to his lawyer to "verify that its contents qualify as legal mail and do not contain communications about illegal activity." ER386.

B. Nordstrom Attempts to Mail a Confidential Letter to His Lawyer on His Death Sentence Appeal, When a Correctional Officer Examines the Words of the Letter, Chilling Nordstrom's Legal Correspondence

Scott D. Nordstrom is a prisoner on death row in the custody of the Arizona Department of Corrections at the prison complex in Florence, Arizona. From the beginning, Nordstrom has steadfastly maintained his innocence in the murders of six people during two robberies in Tucson, Arizona in 1996.

His brother David Nordstrom had initially been arrested for the murders, but immediately sought to cast the blame in another direction. Having accepted a plea agreement for a short prison term, suspect-turned-prosecution-witness David insisted that his similar-looking sibling Scott was the one who had committed the crimes along with Robert Jones. With no fingerprint or forensic evidence from the crime scenes, David Nordstrom became the star witness for the prosecution in

securing a conviction and death sentence against Scott Nordstrom. Appellant's Opening Brief at 12-14, *State v. Nordstrom*, 280 P.3d 1244 (Ariz. 2012) (No. CR-09-0266-AP); ER342, 352, 365.

After the Arizona State Bar filed a disciplinary complaint against prosecutor David White for allowing false evidence in a parallel prosecution, White suddenly died in 2003. Appellant's Opening Brief at 13, *State v. Nordstrom*, *supra*; Patty Machelor, *2nd County Prosecutor Accused of Misconduct*, Tucson Citizen, July 24, 2001. Investigators for Scott Nordstrom learned that prosecutor White had failed to disclose material evidence undermining the brother's alibi claim by indicating that he had defeated electronic monitoring, had withheld witness reports to police indicating participation of another party in the homicides who also knew the location of the murder weapons, and had presented false testimony about procedures used by police to elicit identification from the eyewitness. ER354-368. After remand of the capital case for jury sentencing in 2009, Nordstrom attempted to raise this new information casting serious doubt on the validity of the conviction. The judge refused to admit any evidence that contradicted the previous conviction. *See State v. Nordstrom*, 280 P.3d 1244, 1249-51 (Ariz. 2012).

Scott Nordstrom's confidential letter to his appointed lawyer was examined by a prison officer during the direct appeal from this re-sentencing. ER3. On May 2, 2011, Nordstrom notified the correctional officer that he had legal mail to be

processed. ER3. Nordstrom had clearly marked the envelope as "Legal Mail," ER395, and addressed the envelope to his court-appointed attorney, ER3.

Nordstrom testified that when Officer Hawthorne took the envelope from Nordstrom, he removed the two-page letter from the envelope and proceeded to read it. ER94, 316. Telling Nordstrom not to "tell me how to do my job," Officer Hawthorne insisted that he was "authorized to search legal mail for contraband as well as scan the content of the material to ensure it is of legal subject matter." ER3, 94. As this Court described it on the earlier appeal, "[w]hen [Nordstrom] protested to the guard that the letter was a confidential attorney-client communication and should not be read, the guard told him to go pound sand." *Nordstrom v. Ryan*, 762 F.3d 903, 906 (9th Cir. 2014).

On remand to the District Court, the ADC chose not to present any evidence concerning the episode involving Officer Hawthorne. During the prison grievance process, the Director of the ADC had confirmed ADC policy allowed correctional officers to "read" legal mail. ER407; *Nordstrom*, 762 F.3d at 911. In its final decision, the District Court concluded that rather than "read[ing] the letter aloud," Officer Hawthorne had conducted a review of Nordstrom's letter consistent with the ADC policy and practice "that handwritten letters can be scanned for key words in about 15 seconds." ER23.

After this episode, given the "continued threat to read any outgoing legal correspondence," Nordstrom self-censored his letters to his attorneys. ER14; ER316. Nordstrom explained that he will not commit to writing with his lawyers any facts about his family history, life experiences, traumatic events, and criminal record. ER97-98, 103, 320-321. Nordstrom testified that, "because I know the officers are going to read it," he is careful to include no sensitive information in his letters to attorneys, instead "being super vague about whatever it is I'm talking about." ER323. In its final decision, the District Court concluded that Nordstrom has been chilled in written communications with his counsel. ER15.

C. This Court Reverses the District Court's Dismissal of Nordstrom's Civil Rights Action and Holds That Confidentiality in Prisoner Legal Mail is Guaranteed by the Sixth Amendment

In 2011, after rejection of his prison grievance, Scott Nordstrom filed a pro se civil rights action in the District of Arizona. ER393. He alleged that the correctional officer insisted on reading his outgoing letter to a lawyer appointed to represent him on direct appeal from a sentence of death, in violation of his rights to freedom of speech, court access, assistance of counsel, and due process under the First, Sixth, and Fourteenth Amendments. ER393-404. Nordstrom requested a declaration as to the unconstitutionality of and an injunction against further reading by prison officials of his outgoing legal mail. ER405.

In 2012, the District Court dismissed Nordstrom's civil rights action by a screening order as failing to state a claim. ER81. The District Court held that "the reading of an inmate's legal mail, in the inmate's presence, to check for the presence of contraband or illegal activity is the type of regulation allowed for the purpose of maintaining institutional security." ER85.

In 2014, this Court reversed. *Nordstrom v. Ryan*, 762 F.3d 903 (9th Cir. 2014). Citing the "nearly sacrosanct" right of confidentiality between a client and a lawyer, the Court held that a prisoner is entitled under the Sixth Amendment to correspond confidentially with his lawyer, particularly about matters that might implicate criminal conduct. *Id.* at 906, 910. This Court held that that "the Constitution does not permit . . . reading outgoing attorney-client correspondence." *Id.* at 910-11. By contrast, the Court stated that the prison may inspect for "such suspicious features as maps of the prison yard, the times of guards' shift changes, and the like." *Id.* at 906.

This Court also rejected the ADC's contention that a prisoner seeking to prospectively enjoin a prison policy allowing reading of confidential legal mail must show an actual injury or prejudice beyond chilling interference with the attorney-client relationship. *Nordstrom*, 762 F.3d at 911-12.

One judge dissented, believing that "some reading of the mails" is necessary to guard against dissemination of escape plans and other proposed criminal activity. *Nordstrom*, 762 F.3d at 916-17 (Bybee, J., dissenting).

D. The Arizona Department of Corrections Reiterates Its Policy to Review the Text of Legal Mail for Its Legal or Non-Legal Character

On remand, the ADC revised its legal mail policy to authorize prison staff to "inspect" or "scan" a prisoner's correspondence with his lawyer to "verify that its contents qualify as legal mail and do not contain communications about illegal activity." ER386. The new policy also amended the definition of "contraband" to include "any non-legal written correspondence or communication discovered as a result of scanning incoming or outgoing legal mail." ER388.

The ADC stated the new policy reflects no change in practice, but corrects what the ADC termed a "somewhat awkward choice of words." ER384 & n.1.

At the hearing, ADC Sgt. Daniel McClincy, the prison mail supervisor, stated that correctional officers should "inspect that document page by page, one at a time." ER222. In this inspection, the officer looks at the content of the letter for "keywords to determine its legal legitimacy." ER221. He explained that inspecting, not only for contraband but also for "whether it qualifies as legal mail," takes from 15 to 30 seconds for each page. ER222.

Associate Deputy Warden Hope Ping, the highest prison official to testify, explained that she instructed staff under her supervision by memorandum on the procedures for legal mail. ER241-242. She testified that correspondence between a prisoner and counsel about music, sports, or anything beyond "legal documents" constitutes "contraband." ER244-245. As "contraband," the letter could be seized for further examination. ER244-245.

Correctional Officer Brandon Nail, who collects mail on death row, stated that he "scans" mail to "make sure that it actually is, in fact, legal mail and it's not anything personal in nature." ER202. When asked on cross-examination about the difference between scanning and reading, Officer Nail volunteered that "the definition of 'scanning' is to hastily read something." ER209.

At the conclusion of the hearing, the District Court stated on the record: "[W]hat these officers are doing are reading portions of the letter. I can't get around that." ER37. In its final decision, the District Court stated that the officers "are trained not to read letters line-by-line," but they do scan "the general content of the letter, looking for different fonts, micro-writing, or keywords indicating that a letter may not actually be legitimate legal mail." ER25.

E. The District Court Approves the ADC's Policy to Examine the Contents of Prisoner Correspondence with Lawyers for Keywords

After the parties agreed that the case could be resolved on the merits based on the evidentiary hearing and evidentiary submissions in final briefing by the parties, ER2, the District Court denied the plaintiff's request for an injunction and entered judgment for the defendant, ruling that the ADC's policy and practice do not violate the First, Sixth, or Fourteenth Amendments, ER2, 27-28.

Although acknowledging that Scott Nordstrom has been chilled in written communications with his lawyers and thus is unwilling to discuss such matters as family history, life experience, traumatic events, and criminal conduct in correspondence, ER14-15, the District Court concluded that the ADC nonetheless was justified in scanning legal mail for keywords as long as it does not involve line-by-line reading of such letters, ER21-22.

The District Court recognized that the ADC policy chills inmate written communication with lawyers, but ruled that the ADC has a legitimate reason to "scan legal mail for indicators of criminal communications" and that inmates retain "greater privacy during meetings and telephone calls." ER21. The District Court declined to resolve the factual question of whether a prisoner's submission of written communications to a lawyer at an in-person meeting is subject to the same review of contents by correctional officers. ER16 n.5; *see also* ER284-286.

The District Court reasoned that the ADC's policy of searching the contents of outgoing attorney-client mail for keywords and nomenclature was justified by the problem of "inmates send[ing] criminal communications masquerading as attorney-client correspondence." ER23. The District Court acknowledged that the evidence presented about the problem of "bogus legal mail," ER7, had not included any example of "criminal communications in a letter to or from a legitimate licensed attorney," ER9. Instead, the District Court relied on evidence that three lawyers and a mitigation specialist had passed illegal drugs in or had carried messages out from in-person meetings in a county jail, ER8-9, to conclude that "prison officials cannot assume a communication does not present a security threat simply because it is addressed to or from a licensed attorney," ER23.

Accordingly, the ADC's policy of reviewing the substantive contents of prisoner mail to legal counsel was held by the District Court to "comport with the Sixth Amendment." ER23. The District Court also rejected the First and Fourteenth Amendment claims. ER 27-28.

SUMMARY OF THE ARGUMENT

What this Court characterized as the "nearly sacrosanct" right of confidentiality between a prisoner and lawyer in legal mail, *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014) (*Nordstrom I*), has been rendered a dead letter in Arizona. To belabor the pun, by insisting on the power to evaluate the substance of outgoing prisoner mail to attorneys, the ADC has not merely pushed the envelope. The ADC has ripped the envelope of attorney-client confidentiality away altogether.

In *Nordstrom I*, this Court held that a prisoner is entitled under the Sixth Amendment to correspond confidentially with his lawyer, especially about matters that might implicate criminal conduct. *Id.* at 906 ("[I]t is highly likely that a prisoner would not feel free to confide in his lawyer such things as incriminating or intimate personal information — as is his Sixth Amendment right to do — if he knows that the guards are reading his mail").

Nonetheless, the ADC has adhered to its policy of searching the contents of legal mail to evaluate the "legal" versus "non-legal" content of a prisoner's confidential letter to his attorney. ER386. Indeed, the ADC's protocol of skimming for "keywords" or "key components," ER223, is tailor-made to uncover the very type of communication — about "facts of the crime, perhaps other crimes," etc. — that this Court specifically declared should not be uncovered by a prison guard. *See Nordstrom*, 762 F.3d at 910.

The ADC's policy nullifies this Court's constitutional promise in *Nordstrom I* of confidentiality for prisoners in corresponding with their lawyers. This frank appraisal is not the typical argumentative hyperbole. Because the Arizona prison engages in a practice of skimming for "keywords" and "non-legal" content on each page, ER210, 222, the confidentiality of the letter is irretrievably lost. Alone among the States, Arizona has made it ethically-impermissible for a lawyer to engage in any privileged exchange with a prisoner by mail.

Sidestepping this Court's ruling in *Nordstrom I*, the ADC on remand insisted that confidentiality must be set aside for prison security needs. *See also Gomez v. Vernon*, 255 F.3d 1118, 1133 (9th Cir. 2001) (rejecting as inconsistent with constitutional rights the proposition that "penological necessity" makes it impossible "to keep privileged documents confidential").

In any event, the ADC's evidentiary submission fell woefully short of showing that outgoing prisoner mail to counsel poses such a substantial risk as to override the Sixth Amendment guarantee of confidentiality. The ADC's witnesses had to admit there had never been an episode of abuse of outgoing legal mail correctly addressed to a prisoner's lawyer in the history of the Arizona prison system. ER196, 271.

The ADC's policy and practice of evaluating the substantive contents of outgoing prisoner letters to lawyers is based on a dangerous syllogism that is

destructive of fundamental constitutional rights and due process. Because three lawyers elsewhere (who were not using legal mail) violated the law, ER23, all lawyers are treated as a security risk to the prison. Because all lawyers thus are regarded as criminal suspects, all prisoner letters to lawyers are subjected to an intrusive examination of the substantive text.

In *Nordstrom I*, this Court modestly permitted the prison to conduct a quick inspection for "such suspicious features as maps of the prison yard, the times of guards' shift changes, and the like." *Nordstrom*, 762 F.3d at 906. Allowing an inspection of legal mail in a manner that does not undermine confidentiality was viewed by this Court as an unremarkable clarification. But the ADC has transmuted a simple inspection into an open-ended warrant to rove through the text of prisoner letters to lawyers. In essence, the ADC convinced the District Court to follow the approach of the dissent in *Nordstrom I*, which had insisted that "some reading of the mails" was necessary to guard against dissemination of escape plans and other proposed criminal activity. *Id.* at 916-17 (Bybee, J., dissenting).

Even a limited inspection of the contents cannot be sustained under the alternative First Amendment theory for protection of legal mail, which this Court found unnecessary to address on the first appeal. *Nordstrom*, 762 F.3d at 909. Every circuit to address the legal mail question under the First Amendment — eight circuits — has ruled that "the prisoner has a right to have the confidence

between himself and his counsel *totally respected*." *Smith v. Robbins*, 454 F.2d 696, 697 (1st Cir. 1972) (emphasis added); *see also American Civil Liberties Union Fund of Michigan v. Livingston County*, 796 F.3d 636, 645 (6th Cir. 2015); *Al-Amin v. Smith*, 511 F.3d 1317, 1330-32 (11th Cir. 2008); *Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006).

STANDARD OF APPELLATE REVIEW

When the District Court's ruling on a request for injunctive relief turns on a question of law, this Court reviews that decision *de novo*. *Gathright v. City of Portland*, 439 F.3d 573, 576 (9th Cir. 2006); *see also California First Amendment Coalition v. Woodford*, 299 F.3d 868, 872 (9th Cir. 2002) (reviewing *de novo* a district court's grant of a permanent injunction against a prison regulation that was challenged as violating the public's First Amendment right to access to government proceedings, i.e., executions). Because the District Court held there was no constitutional violation in this case, ER23, the abuse of discretion standard of review to evaluate the injunctive remedy is not implicated. *See Citizens for Clean Government v. City of San Diego*, 474 F.3d 647, 650 (9th Cir. 2007) ("While we review the district court's decision to deny permanent injunctive relief for abuse of discretion, we review *de novo* any legal conclusions underlying that decision.").

Moreover, "[q]uestions of law or mixed questions of law and fact implicating constitutional rights are reviewed de novo." *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1066 (9th Cir. 1995). In addition, "[w]hen the district court upholds a restriction on speech as constitutional, [this Court] conducts a *de novo* review of the facts." *Tucker v. California Dep't of Educ.,* 97 F.3d 1204, 1209 n.2 (9th Cir.1996).

The primary question on this appeal is whether the prison's page-by-page review of a death row inmate's privileged letter to a lawyer to search for keywords infringes on the prisoner's constitutional right to confidential correspondence with counsel. With few exceptions (see Part III of this brief), which even then focus on inferences drawn rather than on historical facts or witness credibility, the underlying adjudicative facts are largely uncontested. *See Suzy's Zoo v. Commissioner of Internal Revenue*, 273 F.3d 875, 878 (9th Cir. 2001) (stating that a mixed question subject to *de novo* review "exists when primary facts are undisputed and ultimate inferences and legal consequences are in dispute"). What is disputed here is the meaning and application of those facts in a constitutional context. *See Brown v. California Dep't of Transp.*, 321 F.3d 1217, 1221 (9th Cir. 2003) ("[W]e review the application of facts to law on free speech questions de novo.").

ARGUMENT

I. The Arizona Department of Corrections Policy to Skim Legal Mail for Keywords to Evaluate the Legal Content Contradicts This Court's Ruling in *Nordstrom I* That the Sixth Amendment Guarantees Prisoner Confidentiality in Correspondence with Counsel

A. In *Nordstrom I*, this Court Ruled that the Sixth Amendment Demands Confidentiality in Correspondence Between a Prisoner and His Counsel in a Criminal Proceeding

In *Nordstrom v. Ryan*, 762 F.3d 903 (9th Cir. 2014) (*Nordstrom I*), this Court issued a landmark opinion upholding a prisoner's Sixth Amendment right to correspond confidentially with his court-appointed attorney on direct appeal from a death sentence. At the heart of the opinion, this Court said:

> A criminal defendant's ability to communicate candidly and confidentially with his lawyer is essential to his defense. In American criminal law, the right to privately confer with counsel is nearly sacrosanct. 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.

Id. at 910 (citation omitted); *see also Wolff v. McDonnell*, 418 U.S. 539, 577 (1974) (explaining that a prison policy allowing opening of incoming legal mail could not "chill such communications, since the inmate's presence insures that prison officials will not read the mail").

1. Confidentiality is the Cornerstone of the Attorney-Client Relationship, Especially in a Death Penalty Case, Which the Lawyer is Ethically Obliged to Protect

Without the guarantee of confidentiality, "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976); *see also* American Bar Ass'n, *Standards Relating to the Prosecution Function and the Defense Function* 149 (3rd ed. 1993) ("Without [confidentiality], the client may withhold essential information from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and perhaps most significantly, defense counsel may not be forewarned of evidence that may be presented by the prosecutor."). Indeed, if denied that right of "private consultation," the client "does not enjoy the effective aid of counsel." *Nordstrom I*, 762 F.3d at 910.

Scott Nordstrom's challenge to his conviction and death sentence raises poignant questions of family betrayal and prosecutorial misconduct. Central to his case is the awkward and painful accusation that the real culprit was his own brother, who then betrayed him to save his own skin. Statement of the Case (Part B); ER342. Moreover, Nordstrom has been placed in the difficult position of opposing the State's law enforcement establishment. He is highlighting the misconduct of a prosecutor who withheld evidence, made false factual statements, and presented false evidence to the jury to secure a conviction and death sentence,

ER354-368. Nordstrom thus has a critical need for regular and confidential communications with his counsel, without agents of the State that seeks to execute him looking over his shoulder at his correspondence.

A lawyer has an ethical duty to ensure that communications with a client are kept confidential. *See* Rule 1.6(c), Model Rules of Prof'l Conduct ("A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."); Rule 1.6(e), Ariz. Rules of Prof'l Conduct (same); Comment 23 to Rule 1.6, Ariz. Rules of Prof'l Conduct ("When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.").

Moreover, the vital attorney-client privilege may be lost when communications are not made in confidence. If a third person may intercept the message, the communication is not in confidence and the privilege does not attach. *See In re Jordan*, 500 P.2d 873, 879 (Cal. 1972) (invalidating prison review of legal mail because "letters read by mailroom guards would not be 'confidential' within the meaning of [the statutory privilege] and the inmate could not claim the privilege").

When someone outside the attorney-client relationship invades confidential communications, the lawyer faces an ethical quandary. The lawyer may not

continue with the communication, as confidentiality has been breached and the attorney-client privilege is compromised. The lawyer then may be unable to uphold the duties of regular and open communication, sharing copies and receiving annotations back on all relevant documents and drafts, diligently obtaining necessary information, and maintaining a trusting relationship. *See* Rules 1.3 (diligence), 1.4 (communication), Ariz. Rules of Prof'l Conduct. A lawyer faced with the irreconcilable dilemma of an unavoidable intrusion into the confidentiality of attorney-client communications must then withdraw from the representation.

"From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). As a matter of constitutional right and fundamental due process, and to ensure the scrupulous accuracy of factual findings and the legal justifiability of a sentence of death, a capital defendant's right to confidentiality in communications with counsel must be protected against interference by the State. To uphold the dignity of death row prisoners and attorneys, to encourage attorneys to undertake these difficult and emotionally-draining cases, and to invite prisoners to freely share all relevant information with counsel, courts must be vigilant in assuring that a capital defendant's right to effective and attentive counsel is not compromised by prison officials who pry into confidential correspondence.

2. Recognizing that an Inmate Would Not Confide in His Lawyer if a Guard Would be "Privy" to His Writings, This Court Mandates Confidentiality in Legal Mail

Describing the confidentiality of attorney-client communications as "nearly sacrosanct," this Court in *Nordstrom I*, 762 F.3d at 910, admonished that prison officials may not read a prisoner's correspondence with his lawyer. As the Court explained:

> It takes no stretch of imagination to see how an inmate would be reluctant to confide in his lawyer about the facts of the crime, perhaps other crimes, possible plea bargains, and the intimate details of his own life and his family members' lives, if he knows that a guard is going to be privy to them, too.

Id. at 910; *see also Al-Amin v. Smith*, 511 F.3d 1317, 1331 (11th Cir. 2008) (protecting the confidentiality of legal mail ensures that "the inmate's correspondence with his attorney is not inhibited or chilled by his fear that this correspondence may be read by prison officials").

Scott Nordstrom indisputably has been chilled in his correspondence with his lawyer, ER316, 323, as the District Court acknowledged, ER15. Indeed, because Nordstrom is uncomfortable speaking about embarrassing matters by telephone or in-person, ER331, and yet cannot entrust sensitive matters to legal mail, there have been "multiple times" that he has been unable to communicate matters to his counsel pertinent to his criminal proceedings, ER333-334.

3. This Court Prohibits Reading of Outgoing Prisoner Legal Mail Because Confidential Correspondence is Essential to Uphold the Prisoner's Sixth Amendment Right to Counsel

In *Nordstrom I*, this Court joined every other circuit to address the matter in holding that the Constitution prohibits the reading of prisoner legal mail to attorneys and did so in a case that "fall[s] squarely within the scope of the Sixth Amendment right to counsel." *Nordstrom I*, 762 F.3d at 909. "A criminal defendant's ability to communicate candidly and confidentially with his lawyer is essential to his defense," and, for that reason, "the right to privately confer with counsel is nearly sacrosanct." *Id.* at 910. Because reading by prison officials of an inmate's letters to 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," this Court held that "the Constitution does not permit . . . *reading* outgoing attorney-client correspondence." *Id.* (emphasis in original).

In sum, when the State engages in "the odious practice of eavesdropping on privileged communication between attorney and client," *State v. Fuentes*, 318 P.3d 257, 258 (Wash. 2014), the defendant is deprived of his Sixth Amendment right to enjoy the assistance of counsel without interference by the State.

B. This Court's Specific Holding that a Prisoner is Entitled to Correspond in Confidence About Criminal Conduct is Directly Contradicted by the ADC's Targeted Search of Legal Mail for Keywords Regarding Criminal Conduct

1. This Court Held that a Prisoner is Entitled to Confide Incriminating Information to His Lawyer Through Legal Mail

In affirming a prisoner's Sixth Amendment right to confidentiality in legal mail, this Court in *Nordstrom I* repeatedly singled out such matters as facts about crimes as requiring that protection. This Court observed that "it is highly likely that a prisoner would not feel free to confide in his lawyer such things as incriminating or intimate personal information — as is his Sixth Amendment right to do — if he knows that the guards are reading his mail." *Nordstrom I*, 762 F.3d at 906.

The Court listed several topics about which a prisoner should be able to correspond confidentiality with his lawyer and to which a prison guard should not be privy: "the facts of the crime, perhaps other crimes, possible plea bargains, and the intimate details of his own life and his family members' lives." *Id.* at 910.

And yet, as discussed below, this is precisely the nature of information to which the ADC demands access. Indeed, the keyword-skimming scheme designed by the ADC is tailor-made to identify and disclose incriminating matters, thereby unraveling altogether the protection of confidentiality guaranteed in *Nordstrom I*.

2. After *Nordstrom I*, the ADC Reiterated the Same Policy of Searching Outgoing Legal Mail for Substantive Content

Even after this Court in *Nordstrom I* rejected the ADC's insistence that it was entitled to read outgoing letters by prisoners to their counsel, the ADC chose not to revise its legal mail policy to protect confidentiality, beyond the cosmetic substitution of the words "scan" or "inspect" for "read." ER386. Indeed, the ADC acknowledged that the revised policy offers no real change, but merely corrects what the ADC terms a "somewhat awkward choice of words." ER384 & n.1. The Director renewed authorization for prison staff to "inspect" or "scan" a prisoner's correspondence with his lawyer to "verify that its contents qualify as legal mail and do not contain communications about illegal activity." ER386.

To prop up the policy of intrusive "scanning" of the substantive contents of prisoner correspondence with counsel, the ADC further altered the common definition of "contraband" to now cover "non-legal" documents submitted as legal mail. ER 388. *See In re Jordan*, 500 P.2d 873, 876 (Cal. 1972) (characterizing prison's reference to "verbal contraband" to justify "inspecting" the "subject matter" of prisoner legal mail as "an ingenious effort to expand the reasonable (and legislative) meaning of a term to include what was never meant to be included within the meaning of 'contraband'").

Whatever the new "vocabulary" of the ADC policy, ER384, this official protocol to review the substantive legal nature of the correspondence perpetuates

"the chilling effect likely to result from an inmate's knowledge that every word he writes to his lawyer may be intercepted by prison guards and possibly used against him." *See Nordstrom I*, 762 F.3d at 910.

3. The ADC's Policy and Practice of Skimming Prisoner Letters to Counsel for Keywords on Legality Extinguishes Confidentiality in Legal Mail

As discussed above, this Court repeatedly emphasized that a prisoner may confide to his lawyer by mail about "incriminating" information, including "the facts of the crime, perhaps other crimes." *Nordstrom I*, 762 F.3d at 906, 910. And yet the ADC policy is targeted directly at the content that this Court unequivocally held was to be kept outside the purview of the prison guard.

The ADC presented considerable evidence on remand to confirm that its policy of searching for "keywords, "key components," or "buzzwords," ER223, ER313, is in active operation. ER209-210, 222. The ADC's witness explained that this mandatory process involves spending 15 to 30 seconds to review the text of each page, even of outgoing legal mail. ER222.

That correctional officers say they are not "reading" line-by-line but rather are skimming for "keywords," as the District Court framed it, ER25, 33-34, does nothing to mitigate the breach of confidentiality. Indeed, the Associate Deputy Warden acknowledged that she could "scan" a document and "pick out several

words and know what this entire memo is about without reading the entire thing." ER246.

As the District Court stated on the record: "[W]hat these officers are doing are reading portions of the letter. I can't get around that . . . . They may only pick one word out of a sentence. But they're reading that word." ER37.

If a prisoner writes a letter to counsel containing a "keyword" such as "sexual assault" — whether to describe himself as a victim or as a perpetrator — the ADC's "inspection" protocol guarantees the content will be accessed by the correctional officer "scanning" the letter. And if the officer in the initial scan discovers a "keyword" or "key component," ER 223 — such as "kill" or "gun" or "gang" — that the officer mistakenly believes indicates a security threat, then the officer or his supervisor will have to delve deeper to determine the context of the passage, which almost surely will be discussion about the underlying criminal case.

In sum, the very kinds of sensitive topics that this Court held up to exemplify the need for confidentiality in prisoner correspondence with a lawyer are also the very kinds of nomenclature that the ADC's policy is designed to access.

As a consequence, nothing meaningful remains of confidentiality in legal mail, which was the central message of this Court's ruling in *Nordstrom I*. This commonsense and unavoidable conclusion can be pointedly illustrated by a commonplace example. Consider the classic episode of the big sister's diary being

intercepted by the nosy little brother. If when caught with the diary in hand, the brother were to retort that he was "not reading it, but only skimming for keywords," the sister would not be mollified. Skimming no less than reading wholly destroys confidentiality and invades the privacy of the narrative.

Far from being "nearly sacrosanct," attorney-client confidentiality in legal mail has become a false and illusory promise under the ADC policy and practice. *In re Jordan*, 500 P.2d 873, 876 (Cal. 1972) (allowing prison staff to "inspect" legal mail not only for contraband but for its "subject matter" would "emasculate[] the confidentiality"). No circuit has hinted that the clear prohibition on reading of outgoing legal mail may be evaded by searching for "keywords" or that the permissible inspection for contraband permits skimming the text of the letter for the substance of the contents. *See Reneer v. Sewell*, 975 F.2d 258, 260 (6th Cir. 1992) ("[I]t is difficult to understand why prison officials would ever have to *read* an inmate's legal mail in search of such 'contraband.'").

C. The ADC's Claim of a Security Risk Cannot Justify Intrusion into Legal Mail, Especially When ADC Witnesses Admitted No Abuse of Outgoing Legal Mail to Actual Lawyers Had Ever Occurred at the Prison

Unwilling to accept this Court's recognition in *Nordstrom I* of a prisoner's fundamental constitutional right to confidential correspondence with his attorney, as discussed above, the ADC on remand insisted on attempting to prove a pressing

security need to review the substance of Scott Nordstrom's outgoing letters to his court-appointed counsel.

In the end, the ADC's showing at the hearing confirmed the wisdom of this Court's protection of confidentiality in legal mail. The ADC was unable to adduce a single episode in the history of the Arizona prison system of abuse of genuine outgoing legal mail to an actual lawyer — as contrasted with counterfeit legal mail surreptitiously being sent to a non-lawyer. ER196, 271.

1. This Court's *Nordstrom I* Decision May Not be Overturned by the ADC's Claim on Remand that Security Risks Override Legal Mail Confidentiality

This Court's ruling in *Nordstrom I* was not equivocal. A confidential letter from a prisoner to his lawyer may not be read by prison officials. *Nordstrom I*, 762 F.3d at 906. Most of the ADC's evidentiary submissions on remand were designed to show that this Court was mistaken in protecting legal mail and restricting the ADC's intrusion into the contents of such mail. Moreover, even before *Nordstrom I*, this Court had rejected the proposition that "penological necessity renders it impossible for inmates to keep privileged documents confidential." *Gomez v. Vernon*, 255 F.3d 1118, 1133 (9th Cir. 2001).

In addition, the Supreme Court has held that prison regulations pertaining to *outgoing* mail demand a "closer fit between the regulation and the purpose it serves" because departing correspondence from prisoners does not "by its very

nature, pose a serious threat to prison order and security." *Thornburgh v. Abbott*, 490 U.S. 401, 411-12 (1989); *see also Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995). Because "[t]he implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials," the Supreme Court applies a more exacting test for prison regulations affecting even *non-legal* outgoing mail. *Thornburgh*, 490 U.S. at 413.

2. The ADC's Witnesses Admitted Legal Correspondence by a Prisoner with an Actual Lawyer had Never Been Found to be Misused or Pose a Security Threat

Despite witness testimony by both law enforcement and prison officials, the ADC was unable to establish any misuse of legal mail involving actual lawyers anywhere, much less in the Arizona prison system. Although maintaining that such a risk lingered, the District Court acknowledged "it is true that the foregoing evidence does not include" any "specific instance where an inmate has included criminal communications in a letter to or from a legitimate licensed attorney." ER9. Over the expanse of time, the ADC could only show that, in a county jail, three lawyers had violated the law by carrying contraband to in-person meetings with inmates or carrying messages back out. ER159-163, 195-196.

Despite its longstanding and ongoing practice of "scanning" all outgoing legal mail, the ADC has never found an outgoing letter from a prisoner to an actual lawyer at the correct address that posed any security threat, enclosed any

contraband, or asked any lawyer to engage in illegal activity. The Special Security Unit Coordinator, with 26 years at the Arizona prison, ER252, stated he had never seen abuse of legal mail involving actual lawyers. ER271. Likewise, the police detective who described county jail episodes admitted he could not recount a single incident where a letter going from a prisoner to an actual lawyer had been intercepted as improper. ER196. Not one of the episodes of fraudulent legal mail presented by the ADC at the hearing involved genuine prisoner correspondence to an actual lawyer. ER5-9; *see, e.g.*, ER226-229.

Out of many thousands of interactions between lawyers and prisoner clients, the ADC could point to only a handful of episodes of misconduct by licensed lawyers, none of which involved legal mail and none of which occurred in the Arizona prison system. Three lawyers and a mitigation specialist had carried contraband into or messages out from client meetings in a county jail. ER8-9. And because attorney meetings are not monitored, each of these isolated episodes apparently was detected by ordinary law enforcement methods based on individualized suspicion.

By contrast, despite the ADC having the most aggressive approach to reviewing the contents of legal mail, not a single episode of abuse could be found over decades in the Arizona prison system involving outgoing prisoner mail correctly addressed to a lawyer. If anything, the evidence confirms that genuine

legal mail poses little or no security risk and that the ordinary means of detecting wrongful behavior are more than adequate.

3. Consistent with *Nordstrom I* and Legitimate Prison Security Needs, Other Circuits and Correctional Departments Respect Confidentiality in Legal Mail

In *Jones v. Brown*, 461 F.3d 353 (3rd Cir. 2006), the Third Circuit held that a prison's supposition that legal mail might contain plans for escape or to incite violence could not justify opening and reading legal mail: "[W]hile it was true that legal mail conceivably might contain such plans and the opening of it might conceivably thwart those plans, the risk allegedly addressed was too insubstantial to justify incursion on First Amendment interests." *Id.* at 361; *see also American Civil Liberties Union v. Livingston County*, 796 F.3d 636, 647 (6th Cir. 2015) (dismissing jail's fears that lawyers would correspond on non-legal matters as a "parade of horribles" that did not justify intrusion into contents of legal mail).

Moreover, neither the Federal Bureau of Prisons nor other State correctional departments have found it necessary to sacrifice attorney-client confidentiality in outgoing legal mail in order to protect prison security. In *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974), *overruled on other grounds by Thornburgh*, *supra*, the Supreme Court said that, "[w]hile not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction."

The Arizona Department of Corrections stands alone among Federal and State correctional systems when it insists on regular access to the substantive contents of outgoing legal mail. As outlined earlier in the Statement of the Case and included in the District Court record, ER296-311, the typical State correctional regulation provides — at most — that outgoing legal mail may be "inspected" for contraband. For example, California takes commendable measures to ensure that the confidentiality of prisoner legal mail is respected. When outgoing legal mail is inspected for contraband, prison staff are directed to "remove the contents of the envelope upside down to prevent reading." Cal. Code Reg., tit. 15, § 3142 (2014).

Indeed, the Federal Bureau of Prisons and the majority of State correctional departments decline to monitor outgoing attorney-client correspondence in any manner, as they rightly are not willing to presume that every receiving lawyer is a criminal suspect. *See, e.g.*, 28 C.F.R. § 540.18(c)(1); Texas Dep't of Criminal Justice, Uniform Offender Correspondence Rules, BP-03.91, III.A to B (2013).

4. The ADC May Properly Protect Against Fraudulent Legal Mail by Simple Verification of the Correct Address to the Lawyer, as the ADC is Already Doing

In its evidentiary submissions on remand, the ADC certainly demonstrated that what the District Court described as "bogus legal mail" that is "disguise[ed] to look like legal mail" and "masquerade[s] as attorney-client correspondence," ER6-7, 23, is a serious problem in the Arizona system, threatening criminal

activity inside and outside the prison. ER155, 158, 164-165,171-172, 227-229, 271. (The same is true in other jurisdictions, although, as discussed above, Federal and State correctional systems across the country address the problem of counterfeit legal mail without sacrificing attorney-client confidentiality.)

Nothing in this Court's *Nordstrom I* decision or our arguments prevent the ADC from intercepting bogus legal mail that is not being sent to an actual lawyer. Through readily available measures that do not involve any intrusion into content, the ADC may confirm that legal mail is correctly addressed to an actual attorney and not being used deceptively to communicate illegally with non-attorneys. *See, e.g.*, Alaska Dep't of Corrections Policies and Procedures, VII.D.1.a (2013) (verifying propriety of legal mail by confirming the envelope is addressed to the privileged addressee); Florida Admin. Code R. 33-210.102(8)(g) (2012) (providing that "[o]nly the address may be read to determine whether it is properly addressed to a person or entity").

The ADC has ample alternative and less intrusive means to verify that a prisoner's correspondence is with an actual lawyer, just as the prison verifies that the person on a confidential telephone call or at an in-person meeting with a prisoner is a duly-authorized lawyer. The ADC may scan the address to the lawyer on the envelope to confirm it is correct. Indeed, the ADC mail supervisor testified that he refers to the lawyer directory "every single day." ER231. And of course

the prison may investigate when probable cause exists that a particular prisoner poses a security risk that may be advanced by supposed legal mail.

5. The ADC has Fully Vetted Nordstrom's Court-Appointed Counsel and Cannot Justifiably Monitor Those Attorney-Client Communications

To our knowledge, never before in history has a State seeking to execute a man been permitted to interrogate both him and his attorney about their attorney-client relationship, without a hint of possible misconduct and while crucial court proceedings are ongoing. On remand, the State twice directed questions under oath to Scott Nordstrom and his attorney, Emily Skinner of the Arizona Capital Representation Project, about whether the State's own intrusive prison policies have undermined the ability of Nordstrom and his attorney to effectively seek relief against the State. ER100-105, 144-147, 317-331, 338-340.

To say that the State has had ample opportunity to "vet" Scott Nordstrom's counsel is an understatement. The ADC admitted below that it does not believe that Nordstrom's counsel "are engaged in any criminal conduct whatsoever." ER294. For that reason alone, the ADC cannot legitimately insist that correspondence between Nordstrom and counsel continue to be monitored for security risks.

D. This Court's Allowance for an Inspection of Legal Mail for Prominent "Features" of Risk, Such as a Map of the Prison or Guard Shift Changes, Does Not Permit Skimming the Substantive Content of Confidential Legal Mail

In contrast with the ADC's policy of searching the text of legal mail for words and components, the *Nordstrom I* opinion trained the authorized inspection directly on such emblems of risk as prison maps and charts of guard shift changes, items that may be quickly identified by merely riffling through the pages. This Court chose its words carefully, describing the limited scope of the inspection for identifying "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.

Notably, this Court in *Nordstrom I* selected the term "*feature*" — a prominent characteristic that stands out boldly — to describe the nature and scope of the permitted inspection that could be conducted consistent with confidentiality in content. A "suspicious feature" that indicates illegitimate purpose is the kind of highly visible marker that literally leaps off the page. Indeed, it is the kind of thing that could be readily seen even if the letter is reviewed "upside down," as done in the California prison system "to prevent reading" of outgoing legal mail. *See* Cal. Code Reg., tit. 15, § 3142 (2014).

The District Court denied that this Court's choice of the word "feature" has any meaning or prevents any reading of words, citing this Court's later reference to the inspection as directed to detect "a map of the prison yard, the time of guards'

shift changes, escape plans, or contraband." ER20-21 n.7 (quoting *Nordstrom I*, 762 F.3d at 910-11). Because the phrase "feature" was not repeated in this passage, and because the District Court believed that "escape plans" could be detected only by reading, the District Court gave the thumbs-up to the ADC's policy of skimming legal mail for keywords. ER21 n.7.

The District Court too readily dispensed with this Court's careful description of an inspection that could be conducted consistent with, rather than destructive of, confidentiality. The choice of the term "feature" — in contrast with such terms as "words," "passages" or "text" — speaks volumes. And the mention of "escape plans" hardly supports enhanced access by the prison to substantive content. This Court referred to such plans within the same context as such markers as prison maps and charts of shift changes, which after all are themselves specific indicators of plans to escape the prison. In sum, the reference to "escape plans" falls into the same category as such stand-out features as maps, charts, drawings, tables, etc.

The District Court's alternative reading throws the door wide open to prison browsing and nullifies confidentiality in legal mail. The District Court forthrightly rejected the suggestion of any distinction between (1) a proper inspection for such features as maps, pictures, charts and contraband and (2) an improper inspection that involves reading the words of the letter. *See* ER21 n.7. Indeed, the District

Court candidly approved any form of reading, skimming, etc. by prison officials that stops short of "reading the text of the letter line-by-line." ER20.

In this way, the District Court followed the same line of analysis and employed much the same language as the dissent in *Nordstrom I*. As discussed above, this Court repeatedly emphasized that a prison official may *not* read the legal mail, frequently placing the prohibition on reading in italics. *Nordstrom I*, 762 F.3d at 906, 909-10. The dissent, however, protested that "some reading of the mails" was necessary to guard against dissemination of escape plans and other proposed criminal activity. *Id.* at 916-17 (Bybee, J., dissenting). On remand, the District Court sounded the same note as the dissent, saying that the inspection to detect escape plans or guard shift changes cannot happen "unless the official reads at least some of the words." ER20.

In this regard, what the *Nordstrom I* majority did *not* say is just as important as what it did say. Nowhere did the majority hint that a prison guard's inspection could meander into the substantive text of a prisoner's letter to counsel, perusing the words and phrases. In sharp contrast, the dissent would have allowed prison personnel "to read legal mail to the extent necessary to detect illegal conduct." *Nordstrom I*, 762 F.3d at 916 (Bybee, J., dissenting). The dissent insisted we should "tolerate some reading of the mails," and that prison officials should be

permitted to "examine[] and grasp[] the meaning of printed characters, words, or sentences." *Id.* But nothing of the kind is replicated in the majority opinion.

The majority never suggested that a prison official could search the contents of a letter as long as it is done hastily. *See* ER209. The majority never sanctioned skimming. The majority never approved searches for "keywords" or "buzzwords" or *any* kind of words. The majority respected *confidentiality*.

And, in the end, *confidentiality* is why the ADC's policy of examining the substantive content for keywords, and the District Court's approval of that policy, cannot be reconciled with the *Nordstrom I* precedent. As discussed above, the heart of the *Nordstrom I* majority opinion affirms the vital necessity of confidentiality in a prisoner's correspondence with counsel and upholds the prisoner's Sixth Amendment right to communicate by mail with a lawyer without a prison guard being privy to its contents. *Nordstrom I*, 762 F.3d at 906, 909-10. By contrast, the ADC's skimming of legal mail for "keywords" or "key components," ER223, nullifies confidentiality and thereby renders *Nordstrom I* a dead letter.

E. This Court's *Nordstrom I* Ruling Specifically Mandates Confidentiality in Legal Mail, While Alternative Means of Communication are Burdensome, Often Ineffective, and Doubtfully Confidential

On the first appeal in this case, the ADC argued that confidentiality in legal mail was unimportant because a prisoner would have other means — such as telephone and in-person meetings — to communicate with a lawyer. Amicus Curiae Br. of the State of Arizona at 5-6, Nordstrom v. Ryan, No. 12-15738. This Court turned that feint aside and expressly held in *Nordstrom I* that "prison officials don't have the right to . . . read a confidential letter from an inmate to his lawyer." *Nordstrom I*, 762 F.3d at 906.

And, indeed, no court has suggested that confidentiality in legal mail could be sacrificed, even if other means of communication for a prisoner with a lawyer are fully effective and confidential (neither of which is true here). Arizona has become the only State in the country in which confidentiality in legal mail is so severely compromised that a lawyer cannot conduct privileged exchanges and is ethically prohibited from using correspondence for any sensitive matter.

Moreover, the Arizona Department of Corrections itself instructs prisoners to rely on the mail as the primary means of communicating with their lawyers. By prison regulation, the ADC directs that "[i]nmates shall communicate legal matters through the mail whenever possible." ER372.

In any event, while telephone and in-person meetings may play an important role in maintaining the relationship between the attorney and prisoner client, these alternative forms of communication are limited in significant ways and impose additional burdens and costs. Correspondence with a prisoner is an essential venue for the attorney-client relationship, especially when counsel is out-of-state or when it is necessary to share documents such as drafts of pleadings or briefs and obtain the client's written comments or interlineations on such documents. In-person meetings with death row inmates are strictly limited, requiring scheduling weeks or even months in advance,[4] ER147, and thus effectively are available only about once a month, ER318. In addition to the considerable expense of traveling to the prison to share every document and then repeat that trip to get feedback from the prisoner, court deadlines do not neatly fit the ADC's wait times for legal visits, which makes legal mail essential to timely exchange documents.

[4] The District Court erroneously suggested that lawyer visits could take place more frequently, noting that the record indicated Nordstrom had daily visits from lawyers at one point in the past. ER16. However, the reference in the record was to a specific timeframe when Nordstrom had been returned to a county jail for re-sentencing. ER326-328. The only evidence in the record about scheduling of visits to Nordstrom on death row in the Arizona prison complex was from his lawyer, Emily Skinner, who testified that she has to wait weeks or months for a legal visit with him. ER147.

Nordstrom explained that written correspondence remains essential. He frequently suffers anxiety and is "embarrassed" to talk about sensitive matters in person or by telephone, but is "not embarrassed writing the issue out." ER331. Moreover, he testified he is "able to articulate myself a lot better" when he can "think through what it is I want to discuss and I can put down each point." ER332. Taking notes for use at a visit is not sufficient, because he explained "the conversation could get sidetracked and I may not be able to complete the thought that I was wanting to complete." ER322. After a visit, he often has additional thoughts he would like to share by letter. ER127. As a consequence, Nordstrom testified that there have been "multiple times" when he has been unable to share things with his attorney either in a face-to-face meeting or by letter. ER334.

Moreover, whether a prisoner sends a letter to his attorney through the prison mail system or by handing the missive directly to the lawyer at a meeting at the prison, the ADC's policy of reviewing the substantive contents of the document stands as an obstacle to confidentiality. Without presenting any affidavit or testimony by an ADC official or citing to any ADC policy, the ADC's counsel suggested to the District Court in its final arguments that a prisoner could hand deliver a document to an attorney at a meeting without any search. ER16 n.5. Nordstrom then moved to supplement the record to confirm that death row prisoners being moved to an attorney visit are subject to a search that includes the

same inspection of documents brought by the prisoner to the meeting as the prison applies to outgoing legal mail. ER284-286.

As summarized in that motion, the supplemental affidavit would state that only two business days after the final oral argument in the District Court, Nordstrom was repeatedly asked by correctional officers what he had been told by prison staff about bringing legal materials to a legal visit. ER285. Nordstrom explained that the question was not whether he was permitted to bring legal materials to these visits, but rather whether those legal materials were subject to search beforehand. Both correctional officers then emphasized to Nordstrom that any legal materials he wished to bring to a legal visit would be searched/inspected/scanned before he left his cell, with no exceptions. ER285.

In its final decision, the District Court declined to resolve this factual dispute, instead emphasizing that it was not relying on any supposed confidentiality in the exchange of documents at an in-person meeting, ER16 n.5, and for that reason denied the motion to supplement the record as moot, ER29.

II. Under the Free Speech Clause of the First Amendment, Every Circuit to Address the Question Agrees That Confidentiality in Legal Mail Must be "Totally Respected," Without an Exception for Even a Limited Inspection of Content for Purported Security Risks

Even if this Court's narrow permission under the Sixth Amendment for a prison to inspect for obvious "features" of security risk were read as broadly as the ADC hopes, a confidentiality-swallowing exception could not be sustained under Nordstrom's alternative constitutional challenge grounded in the Free Speech Clause of the First Amendment. Every circuit to address the legal mail question under the First Amendment — eight circuits — has ruled that "the prisoner has a right to have the confidence between himself and his counsel *totally respected*." *Smith v. Robbins*, 454 F.2d 696, 697 (1st Cir. 1972) (emphasis added); *see also Al-Amin v. Smith*, 511 F.3d 1317, 1330-32 (11th Cir. 2008); *Jones v. Caruso*, 569 F.3d 258, 267 (6th Cir. 2009); *Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006); *Kaufman v. McCaughtry*, 419 F.3d 678, 686 (7th Cir. 2005); *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003); *Thongvanh v. Thalacker*, 17 F.3d 256, 258-59 (8th Cir. 1994); *Ramos v. Lamm*, 639 F.2d 559, 582 (10th Cir. 1980).[5]

[5] Dicta in the Seventh Circuit's decision in *Guajardo-Palma v. Martinson*, 622 F.3d 801 (7th Cir. 2010), is not to the contrary. The court suggested that a prison employee opening an *incoming* envelope "will have to glance at the content to verify its bona fides." *Id*. at 805. But none of the letters at issue in that case were from the prisoner's lawyer. *Id*. at 806. And the Seventh Circuit highlighted that none of the letters were "outgoing mail." *Id*. at 806.

In a recent case with striking parallels to the present case, the Sixth Circuit in *American Civil Liberties Union Fund of Michigan*, 796 F.3d at 648, enjoined jail personnel from making a "'subjective' and inexpert determination as to whether a particular legal matter is 'legitimate'" for attorney correspondence to a prisoner to be treated as protected legal mail. The Sixth Circuit rejected such a review of "the content of the letters," saying that—

> a system in which the Jail may *first independently screen* the substance of the legal communication from an attorney to a specific inmate regarding the constitutionality of jail policies would 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.

Id. at 645 (emphasis in original). When the jail administration expressed fears that lawyers would correspond on non-legal matters or engage in other misconduct, the Sixth Circuit dismissed this as a "parade of horribles" that cannot justify intrusion into privileged contents of legal mail. *Id.* at 647. (If anything, the argument for strict confidentiality is even stronger here than in the Sixth Circuit case because Nordstrom's case involves the confidentiality of *outgoing* legal mail, which the Supreme Court has held does not "by its very nature, pose a serious threat to prison order and security." *See Thornburgh*, 490 U.S. at 411-12.)

Even the Fifth Circuit, which has departed from every other circuit to allow the physical inspection (but not reading) of incoming legal mail to occur outside

the prisoner's presence, still draws the line at gaining access to the contents of a prisoner's outgoing letter to a lawyer. *See* Aaron C. Lapin, *Are Prisoners' Rights to Legal Mail Lost Within the Prison Gates?*, 33 Nova L. Rev. 703, 727 (2009) (describing Fifth Circuit decision as an "anomaly"). Although "incoming legal mail was opened and inspected for contraband outside [the prisoner's] presence," *Brewer v. Wilkinson*, 3 F.3d 816, 825 (5th Cir. 1993), prison officials were not alleged to have actually read the attorney-client correspondence. And, importantly, the Fifth Circuit emphasized that the prisoner's "claim regarding *outgoing* legal mail poses a different question." *Id*. (emphasis in original). As the Fifth Circuit had stated earlier in *Taylor v. Sterrett*, 532 F.2d 462, 473-74 (5th Cir. 1976), there is "no justification whatsoever for opening or reading correspondence addressed to the courts, prosecuting attorneys, parole or probation officers, and identifiable attorneys. The content of this outgoing mail cannot, except on the most speculative theory, damage the security interests of jail administration."

In the *Nordstrom I* decision, this Court found it sufficient to decide the case on the Sixth Amendment and found it unnecessary to consider whether Nordstrom also stated a case under the First Amendment. *Nordstrom I*, 762 F.3d at 909. The District Court agreed that the First Amendment issue had been fully preserved both

on the prior appeal and on remand.[6] ER4 n.1. While rejecting the First Amendment claim on merits as well, ER27-28, the District Court failed to address the Sixth Circuit's then-recent decision in *American Civil Liberties Union Fund of Michigan* or any of the other circuit decisions affirming strict confidentiality in legal mail under the First Amendment.

By aggressively intruding into the core contents of outgoing legal mail and chilling any use of legal mail by a prisoner for privileged communications with counsel, the ADC may have made it necessary on this second appeal to address the First Amendment claim grounded in the special relationship of the attorney and client. While this Court reasoned in *Nordstrom I* that the Sixth Amendment did not prevent a limited inspection of legal mail for prominent "suspicious features," *Nordstrom I*, 762 F.3d at 906, the First Amendment emphatically does not countenance the ADC's transmutation of a power of inspection into an end-around the confidentiality of legal mail.

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[6] On remand, the ADC surprisingly contended that Nordstrom's First Amendment claim had been waived on appeal. ER314. The ADC represented to the District Court that, "[b]efore the Ninth Circuit, Nordstrom through his then-appellate counsel failed to properly brief or argue any First Amendment claims." ER314. As confirmed by this Court's appellate record for that earlier appeal (No. 12-15738), Nordstrom devoted more than a third of the opening brief to the First Amendment theory, from the statement of the issue presented through separate sections with special headings devoted exclusively to the First Amendment theory. Replacement Opening Brief at 2, 22-25, 32-38, Nordstrom v. Ryan, No. 12-15738.

III. The Arizona Prison Policy Allows for a Broad and Wide-Ranging Search into Legal Mail for Its "Legal" Versus "Non-Legal" Character, Authorizing Prison Officials to Access and Subjectively Evaluate Whether the Contents are Legitimate for a Letter to a Lawyer

Attempting to save the Arizona Department of Corrections from its greatest excesses, the District Court construed the new legal mail inspection policy as allowing prison officials access to the text of the letters to skim only for keywords related to criminal conduct that might be a security risk. ER24-25 & n.10. Contradicting the ADC's admissions and explicit testimony by ADC witnesses, the District Court chose to assume that the ADC does not evaluate legal mail for whether it is "'legal' in the traditional sense" and would not "seize a letter from an attorney to an inmate, even though it includes an article about sports." ER25.

As discussed in Part I.B, even if the ADC were looking only for supposed language of illegality, the ADC policy is targeted at the very kind of incriminating information that this Court specifically held a prisoner may confide to a lawyer in a letter. But by also failing to correctly identify the wide-ranging nature of the policy, the District Court left Nordstrom vulnerable to the even more far-reaching search that the ADC has announced in plain policy text, that its officials have described in court, and that the ADC has never disavowed. At the very least, the ADC should be enjoined from conducting any inspection or search beyond matters that "could jeopardize institutional security." *See Nordstrom I,* 762 F.3d at 906.

To begin with, the express language of the policy authorizes ADC staff to review legal mail, not only to ensure that it does "not contain communications about illegal activities," but also "to verify that its contents qualify as legal mail." ER386. Throughout this litigation, the ADC has consistently asserted the power to evaluate the contents of prisoner correspondence with lawyers for whether the letter is "legal" or "non-legal" in its inexpert estimation. *But see American Civil Liberties Union Fund of Michigan*, 796 F.3d at 648 (enjoining jail's "arbitrary policies" of making "a 'subjective' and inexpert determination as to whether a particular legal matter is 'legitimate'" in correspondence from a licensed attorney and so should be treated as legal mail).

For example, in its final submission to the District Court, the ADC expressly confirmed a sweeping search for the "legal" versus "non-legal" content of legal mail. The ADC's counsel supplemented the record for the specific purpose of defending evaluation of all outgoing legal mail for its legal or non-legal character as supposedly justified by the prison's interest in ensuring that any advancing of postage by the prison for legal mail from indigents was not being abused. ER291.

An attorney's statement on behalf of a client constitutes a judicial admission. *United States v. Wilmer*, 799 F.2d 495, 502 (9th Cir. 1986); *see also United States v. FMC Corp.*, 531 F.3d 813, 824 (9th Cir. 2008) (stating that what the party's lawyer had "represented to the court" at oral argument was binding on the party).

The ADC may not now be heard to pretend its search policy does not extend expansively to anything its staff regards as non-legal content, when it put its broader purpose on the record through a representation by ADC counsel to the District Court as its last submission in the record. *See* ER291.

Most importantly, Associate Deputy Warden Hope Ping testified forthrightly that prisoner correspondence to a lawyer addressing anything other than legal documents should be seized as "contraband."[7] ER243-245. In testimony that the District Court acknowledged only in passing, ER25 n.10, this high-level prison official testified without contradiction that correspondence between a death row inmate and his counsel about music, sports, or anything beyond "legal documents" constitutes "contraband" that, as far as she was "concerned" has nothing to do with the representation. ER244-245. And this is the prison official who instructs staff under her supervision on the proper procedures for legal mail. ER241-242.

[7] In a footnote, the District Court suggested that Nordstrom might lack standing to challenge the definition of "contraband" in the ADC policy because Nordstrom's correspondence had not been seized. ER25 n.11. The District Court's suggestion artificially separates the definitional section from the rest of the legal mail policy, while also ignoring the origin and purpose of the ADC's peculiar redefinition of "contraband." As discussed earlier, the unusual re-definition of "contraband" to cover "non-legal" documents, ER388, was designed as a bootstrap justification for the extraordinarily broad "scanning" provision, ER386. As Warden Ping's testimony confirms, these provisions work in tandem.

Moreover, far from disclaiming their superior's testimony, the correctional officers who implement the legal mail policy confirmed this astonishingly invasive practice of reviewing the substance of prisoner letters, beyond supposed indicia of illegality. Sgt. Daniel McClincy, the mail supervisor, emphasized that correctional officers are supposed "to inspect that document page by page, one at a time," for "whether it qualifies as legal mail." ER222. Officer Brandon Nail, who collects mail on death row, said that he "scans" mail to "make sure that it actually is, in fact, legal mail and it's not anything personal in nature." ER202. He explained his understanding of what is appropriate correspondence that is of "a legal nature" as "pertain[ing] to their legal issues and concerns that they have." ER210.

Especially in a death penalty case, "non-legal" subjects are not only relevant, both for establishing innocence and in parsing out what might be considered mitigating for capital punishment proceedings, but may be painfully sensitive in nature. *See Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (saying that mitigating factors include "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"). Moreover, counsel for death row inmates need to correspond with their clients on a multitude of apparently non-legal matters to evaluate the client and establish rapport. Scott Nordstrom's own attorney, Emily Skinner, testified to the particular need for lawyers in capital cases to be able to

discuss wide-ranging matters beyond the legal issues in the case, including religious beliefs, philosophy, and even dreams. ER138-142.

To provide effective assistance, capital defense counsel must persuade their clients to talk about their most horrifying and shameful personal and family experiences. As a matter of fundamental due process, confidential correspondence is an essential element of this process, by allowing for continual contact through an inexpensive means by which a prisoner may articulate concerns in confidence.

Finally, in *Nordstrom I,* this Court located the primary chilling effect in the ADC's own statement that staff "is not prohibited from reading the [legal] mail to establish the absence of contraband and ensure the content of the mail is of legal subject matter." *Nordstrom I,* 762 F.3d at 906, 907, 911. During the hearing in the District Court, the ADC's leading officials and experts testified that every page of even outgoing legal mail should be reviewed for the legal or non-legal nature of the contents of the correspondence. ER202, 222.

Scott Nordstrom was present in the courtroom to hear this intensely chilling testimony. No reasonable person could have left the courtroom harboring any doubt that the ADC intended to examine every page of legal correspondence and to digest the contents for its own subjective and unauthorized evaluation of what counts as legal substance. By the time the ADC completed its evidentiary showing, the chilling temperatures had been lowered to a deeply frigid degree.

IV. Nordstrom has Established Entitlement to Injunctive Relief, Narrowly Framed to Protect the Confidentiality of Outgoing Correspondence to His Lawyers

The District Court denied injunctive relief because it concluded that the ADC's policy did not offend the Sixth Amendment or the First Amendment. ER27. If a constitutional violation were found, the District Court recognized that "the Court of Appeals stated that Plaintiff's allegations 'support a claim for injunctive relief.'" ER378 (quoting *Nordstrom I*, 762 F.3d at 911).

Because the District Court confirmed that Scott Nordstrom's letter had been subjected to the ADC's practice of reviewing the contents for keywords, ER23, and the ADC has reaffirmed its unusually-invasive legal mail policy with the expressly-stated purpose of evaluating the character and substance of prisoner mail to legal counsel, Nordstrom now is entitled to an injunction against further intrusion into the textual contents of his legal mail. "[W]here the harm alleged is directly traceable to a written policy, there is an implicit likelihood of its repetition in the immediate future." *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001) (citations omitted), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504-05 (2005).

Nordstrom asks for an individual injunctive remedy targeted to the forbidden conduct of examining the substantive contents of his legal mail, without questioning other security measures such as physical inspection of legal mail for

contraband. *See Clement v. California Dep't of Corrections*, 364 F.3d 1148, 1153 (9th Cir. 2004) ("The injunction does not require court supervision, enjoins only enforcement of the unconstitutional policy and does not interfere with prison mail security measures."); *see also* 18 U.S.C. § 3626(a)(1) (directing that prospective relief in a prisoner case shall be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right").

Nordstrom narrowly asks that the Court declare that the ADC policy of reviewing the substantive contents of his letters to counsel for keywords violates his constitutional rights and enjoin the ADC from continuing that practice with respect to his correspondence with his lawyers. In sum, Nordstrom only asks that Arizona be required to do what every other State is already doing.

CONCLUSION

For the foregoing reasons, 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: June 15, 2016 Respectfully submitted,

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STATEMENT OF RELATED CASES

In *Evans v. Baker*, No. 16-15502, currently pending on appeal in this Court, the District Court relied on the allowance for an inspection of legal mail in *Nordstrom v. Ryan*, 762 F.3d 903, 906 (9th Cir. 2014), as justifying a "check in" by Nevada prison officials during prisoner legal telephone calls to verify that the prisoner remains on the line with an attorney. *Evans v. Skolnik*, No. 3:08-cv-00353, 2016 WL 632223 (D. Nev. Feb. 16, 2016).

While also raising the issue of prison official monitoring of prisoner-lawyer communications, the *Evans* appeal differs from the present *Nordstrom II* appeal in several ways: First, in *Evans*, the prisoner's claim for unmonitored telephone calls to counsel is premised on the Fourth Amendment Search and Seizure Clause, not on the Sixth Amendment Right to Counsel Clause that was the ground for this Court's *Nordstrom I* decision or the First Amendment Free Speech Clause raised in *Nordstrom II* and relied on by other circuits to protect confidentiality in prisoner legal mail. Second, in *Evans*, Nevada prison officials defend the "check in" to the telephone calls as intended merely to verify the prisoner's continuing connection to an attorney. By contrast, the Arizona Department of Corrections searches the content of legal mail by skimming for keywords of possible impropriety. Third, this Court had reversed and remanded the summary judgment dismissal of the Fourth Amendment claims in No. 13-17361 (9th Cir. Dec. 24, 2015), directing the

District Court to address penological interests and to "give particular attention" to possible alternative prison policies. On remand, the District Court granted summary judgment to the prison defendants *sua sponte*, without receiving evidentiary submissions or requesting briefing by the parties.

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 13,807 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

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 was prepared using a proportionally spaced typeface in 14 point Times New Roman.

Date: June 15, 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 June 15, 2016, 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:

OPENING BRIEF OF PLAINTIFF-APPELLANT

I also electronically filed the **EXCERPTS OF RECORD** in three volumes.

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 June 15, 2016 at Minneapolis, Minnesota.

/s/ Gregory C. Sisk

Addendum

ADDENDUM TABLE OF CONTENTS

CONSTITUTIONAL PROVISIONS

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REGULATIONS AND CODIFIED POLICIES

Arizona Department of Corrections: Department Order 902:11 Legal Mail to 902:12(1.1) Legal Phone Calls(July 6, 2013) [ER369-372]

902.11 LEGAL MAIL

1.1 Inmates shall identify outgoing legal mail by writing "Legal Mail" on the lower left-hand corner of the envelope. (See Definitions for guidance on what constitutes “Legal Mail”.)

1.2 Outgoing mail not labeled as legal mail shall be processed as regular mail.

1.3 All legal mail, outgoing or incoming, shall be logged.

1.4 Staff who process incoming or outgoing inmate mail shall:

1.4.1 Generally identify all legal mail and record it on a log by indicating the inmate's name and the sender's name.

1.4.2 Inspect such mail for contraband, stamp the envelope "LEGAL MAIL, ARIZONA DEPARTMENT OF CORRECTIONS" using a commercial stamp, and log it before it is placed in the envelope and sealed by the inmate.

1.4.2.1 All incoming mail, letters, memoranda, and documents, from an inmate’s attorney or from a judge or court, shall be opened for inspection purposes in the presence of the inmate. Such incoming mail may be scanned in the conducting of an inspection for contraband, but shall not be read or censored by staff.

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.

1.4.3 Send legal mail as first class mail regardless of the inmate's ability to pay the required postage.

1.4.4 Submit names of inmates claiming to have inadequate funds for postage to the Business Office, indicating postage due from the inmate. The Business Office shall either debit the inmate account or, if there are insufficient funds to pay the postage, place a hold on the inmate account.

1.4.5 Return the mail to the inmate if he/she requests mail to be sent as legal mail and it is not to an attorney, judge or court. The inmate may request to have the Paralegal review the mail to determine whether it may be approved as legal mail. The Paralegal may contact the Legal Access Monitor for direction.

1.5 Designated staff who process incoming mail shall attempt to make a determination, based on an inspection of the envelope, whether the contents constitute legal mail. The return address may be indicative of whether the contents of the envelope constitute legal mail. Designated staff shall not rely solely on the words "legal mail" having been stamped on the envelope. If there is any serious doubt as to whether the contents of the envelope contain legal mail, designated staff shall contact the Legal Access Monitor for direction.

1.6 Staff suspecting abuse of the legal mail designation shall advise the Warden or Deputy Warden who shall take appropriate action following consultation with the Department's General Counsel. An inmate who intentionally sends personal mail to a private address and falsely claims it is legal mail shall be subject to disciplinary action in accordance with Department Order #803, Inmate Disciplinary Procedure.

1.7 When applicable, staff shall take the following steps to locate inmates to whom legal mail is addressed and to forward such mail to the inmate.

1.7.1 Use the Adult Information Management System (AIMS) and inmate records to locate any addressee of legal correspondence who is not located at the institution which received the correspondence, and to locate any inmate who has received legal mail which does not have an ADC number as part of the address.

1.7.1.1 Staff shall have inmates verify they are the person to whom the legal mail is addressed utilizing the inmate's identification card.

1.7.2 Forward any legal correspondence to any inmate addressee who is under commitment to or supervised by the Department.

1.7.2.1 Inmates, releasees and parolees receiving forwarded legal correspondence shall notify the sender of their new address.

1.7.3 When legal mail is forwarded, in addition to the requirements outlined in 1.4.1 of this section, the inmate's forwarding address and the date forwarded shall be logged.

1.7.4 Return legal correspondence to the sender only if the addressee is no longer an inmate, releasee or parolee, in which case the sender shall be advised of this fact.

902.12 LEGAL PHONE CALLS - Inmates who have retained counsel may make legal phone calls in accordance with the following:

1.1 Inmates shall communicate legal matters through the mail whenever possible.

* * *

Arizona Department of Corrections:
Director's Instruction #333, Modification of Department Order 902, Inmate Legal Access to the Courts (January 8, 2015) [ER385-388]

This Director's Instruction is effective immediately and supersedes Department Order #902, Inmate Legal Access to the Courts, Section 902.11 – Legal Mail, dated July 6, 2013; and amends the definition of "Contraband" in the applicable Department Orders. This Director's Instruction will remain in effect until incorporated into Department Order #902, Inmate Legal Access to the Courts.

PURPOSE

This Director's Instruction provides procedures for legal mail.

902.11 LEGAL MAIL

1.1 Inmates shall identify outgoing legal mail by writing "Legal Mail" on the lower left-hand corner of the envelope. (See Definitions for guidance on what constitutes "Legal Mail".)

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1.4 Staff who process incoming or outgoing inmate mail shall:

1.4.1 Generally identify all legal mail and record it on a log by indicating the inmate's name and the sender's name.

1.4.2 Inspect such mail for contraband, stamp the envelope "LEGAL MAIL, ARIZONA DEPARTMENT OF CORRECTIONS" using a commercial stamp, and log it before it is placed in the envelope and sealed by the inmate.

1.4.2.1 **All incoming legal mail will be opened in the presence of the inmate and checked for contraband, but shall not be read by staff. Staff**

may inspect the document but only to the extent necessary to determine if the mail contains contraband, or to verify that its contents qualify as legal mail and do not contain communications about illegal activities. Staff may contraband the mail if staff determines it does not qualify as legal mail, following consultation with, and approval from, the Deputy Warden or designee.

1.4.2.1.1 **Staff who deliver incoming legal mail shall have the inmate sign and date the log, acknowledging delivery.**

1.4.2.2 **All outgoing legal mail shall be brought to the mail room by the inmate, where the letter will be inspected for contraband, but shall not be read by staff, and scanned to ensure it is in fact legal mail. The envelope shall be sealed in the presence of the inmate. If an inmate is ineligible to bring outgoing legal mail to the mail room, then an officer will inspect and seal the mail in front of the inmate's cell. Staff may inspect the document but only to the extent necessary to determine if the mail contains contraband, or to verify that its contents qualify as legal mail and do not contain communications about illegal activities. Staff may contraband the mail if staff determines it does not qualify as legal mail, following consultation with, and approval from, the Deputy Warden or designee.**

1.4.3 Send legal mail as first class mail regardless of the inmate's ability to pay the required postage.

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funds to pay the postage, place a hold on the inmate account.

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1.7.2.1 Inmates, releasees and parolees receiving forwarded legal correspondence shall notify the sender of their new address.

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1.7.4 Return legal correspondence to the sender only if the addressee is no longer an inmate, releasee or parolee, in which case the sender shall be advised of this fact.

DEFINITION

CONTRABAND – For the purpose of this Department Order, contraband is defined as any item considered to be a detriment to the safe and orderly operation of an institution or parole office. Contraband includes, but is not limited to:

- Any item that could be used as an aid to escape.
- **Any non-legal written correspondence or communication discovered as a result of scanning incoming or outgoing legal mail.**
- Any item that could be used to disguise or alter an inmate's appearance.
- Any item of clothing or items for personal use or consumption that are not cleared first through security or the property room of the institution.
- Cameras, video, audio or related equipment, unless authorized by order of written instructions.

- The introduction and/or possession of any separate components that may aid in the use of wireless devices and/or multimedia storage devices. This includes, but may not be limited to:
    - Cell phone chargers.
    - Mobile chargers.
    - Cell phone batteries.
    - Any other item that staff reasonably determines may aid in the use of wireless devices and/or multimedia storage devices.
- Allowable items which are:
    - Possessed without permission.
    - Discovered in improper locations.
    - Are over set allowable amounts.
    - Obtained in improper manners or methods.
    - In altered forms or conditions.

United States: Federal Bureau of Prisons, 28 C.F.R. § 540.18(c) (2009)

(c)(1) Except as provided for in paragraph (c)(2) of this section, outgoing special mail may be sealed by the inmate and is not subject to inspection.

(2) Special mail shall be screened in accordance with the provisions of paragraph (c)(2)(iii) of this section when the special mail is being sent by an inmate who has been placed on restricted special mail status.

> (i) An inmate may be placed on restricted special mail status if the Warden, with the concurrence of the Regional Counsel, documents in writing that the special mail either has posed a threat or may pose a threat of physical harm to the recipient (e.g., the inmate has previously used special mail to threaten physical harm to a recipient).
>
> (ii) The Warden shall notify the inmate in writing of the reason the inmate is being placed on restricted special mail status.
>
> (iii) An inmate on restricted special mail status must present all materials and packaging intended to be sent as special mail to staff for inspection. Staff shall inspect the special mail material and packaging, in the presence of the inmate, for contraband. If the intended recipient of the special mail has so requested, staff may read the special mail for the purpose of verifying that the special mail does not contain a threat of physical harm. Upon completion of the inspection, staff shall return the special mail material to the inmate if the material does not contain contraband, or contain a threat of physical harm to the intended recipient. The inmate must then seal the special mail material in the presence of staff and immediately give the sealed special mail material to the observing staff for delivery. Special mail determined to pose a threat to the intended recipient shall be forwarded to the appropriate law enforcement entity. Staff shall send a copy of the material, minus the contraband, to the intended recipient along with notification that the original of the material was forwarded to the appropriate law enforcement entity.
>
> (iv) The Warden shall review an inmate's restricted special mail status at least once every 180 days. The inmate is to be notified of the results of this review. An inmate may be removed from restricted special mail status if the Warden determines, with the concurrence of the Regional Counsel, that the special mail does not threaten or pose a threat of physical harm to the intended recipient.

(v) An inmate on restricted mail status may seek review of the restriction through the Administrative Remedy Program.

Alaska Department of Corrections Policies and Procedures, § 810.03, VII.D.1.a (2013)

D. Inspection/Reading of Mail

1. Privileged Mail
The Department may not restrict or censor a prisoner's legal correspondence. All legal mail to or from a prisoner is privileged mail. Prisoners (except indigent prisoners) shall pay all postage costs. If there is doubt as to whether or not mail is in fact privileged, such as mail received from an unknown organization, the mail may be opened in the presence of the prisoner and scanned to determine whether it is privileged mail.

a. Outgoing

Staff may not read or search outgoing privileged mail for contraband. However, staff may verify, in the prisoner's presence, that the intended recipient of the mail is the same person as the privileged addressee.

* * *

California Code of Regulations, Title 15 Crime Prevention and Corrections, Div. 3, Subchapter 2, Art. 4 §§ 3142 (2014)

In order to be accepted and processed as confidential correspondence, an inmate's letter shall comply with the following requirements:

(a) The letter must be addressed to a person or to the office of a person listed in Section 3141. The address of an attorney must match the address listed with the State Bar.

(b) The inmate's full name, department identification number, and the address of the facility shall be included in the return address appearing on the outside of the envelope.

(c) The word ”confidential” shall appear on the face of the envelope. Failure to do this will result in the letter being processed as regular mail or being returned to the inmate if for any reason the mail cannot be processed as regular mail.

(d) Inmates shall post confidential mail by presenting the mail unsealed to designated staff. In the presence of the inmate, the staff shall remove the contents of the envelope upside down to prevent reading of the contents. Staff shall remove the pages and shake them to ensure there is no prohibited material, consistent with these regulations. If no prohibited material is discovered, the contents shall be returned to the envelope and sealed. Staff shall place their signature, badge number and date across the sealed area on the back of the envelope. Staff shall then deposit the confidential mail in the appropriate depository.

(e) If prohibited material is found in the confidential mail, the prohibited material shall be confiscated; however, the letter may be returned to the inmate or mailed following the process outlined above. If the prohibited material indicates a violation of the law or intent to violate the law, the matter may be referred to the appropriate authorities for possible prosecution. Administrative and/or disciplinary action shall also be taken against all parties involved.

Colorado Department of Corrections Administrative Regulation 300-38 (IV.B) (2015)

B. Incoming and Outgoing Restricted Inspection Mail: ***Offenders are permitted to send sealed letters to a specified class of persons and organizations, including but not limited to the following: courts, counsel, officials of the confining authority, state and local chief executive officers, administrators of grievance systems, and members of the paroling authority.*** *DOC employees, contract workers, or volunteers****, in the presence of the offender, may be allowed to inspect outgoing privileged mail for contraband before it is sealed. Mail to offenders from this specified class of persons and organizations may be opened only to inspect for contraband and only in the presence of the offender, unless waived in writing or in circumstances which may indicate contamination. [4-4492]*** Suspicious circumstances may include, but are not limited to: packages or letters of unusual appearance or different from mail normally received or sent by the offender; inconsistent postmark and return address; inconsistent title/organization and address or which cannot otherwise be verified; packages and letters which are stained, leaking or emitting odors, substances, or residues.

* * *

5. Outgoing mail to attorneys, their authorized representatives, and legal aid organizations, require a legitimate and identifiable attorney, law office/firm or legal organization name and verifiable business mailing address and must be marked "PRIVILEGED" or "CONFIDENTIAL."

Delaware Department of Corrections Policy Manual, Chapter 4, Section 4.0, IV.D.2 (2015)

D. Legal/Privileged Mail

* * *

2. Outgoing legal/privileged mail will be recorded and shall not be opened for inspection or any other purpose or otherwise impeded in its transmission if it:
   a. Is addressed to a person eligible to receive legal/privileged mail under this policy;
   b. Includes the offender's name and return address on the outside of the envelope;
   c. Has been marked by the institution to indicate to the addressee that:
      3) The letter was sent by an inmate in a State Prison
      4) The State is not responsible for debts incurred, or for the contents of the letter
   d. Successfully passes a fluoroscope examination for contribution.

* * *

Florida Administrative Code Rule 33-210.102(8)(g) (2012)

(g) Inmates shall present all outgoing legal mail unsealed to the mail collection representative to determine, in the presence of the inmate, that the correspondence is legal mail, bears that inmate's return address and signature, and that it contains no unauthorized items. Only the address may be read to determine whether it is properly addressed to a person or entity identified in subsection (2) of this rule. If the outgoing mail contains unauthorized items or is not legal mail, the inmate shall be subject to disciplinary action. If the outgoing mail is legal mail and it contains no unauthorized items, the mail collection representative shall stamp the document(s) to be mailed and the inmate's copy, if provided by the inmate. The date stamp shall be in the following format: "Provided to (name of institution) on (day, month and year blank to insert date) for mailing, by (officer's initials)." The mail collection representative shall then have the inmate initial the document(s) next to the stamp and have the inmate seal the envelope in the mail collection representative's presence. For confinement areas, the staff member who picks up the legal mail each day shall stamp the documents, have the inmate place his or her initials next to the stamp, and have the inmate seal the envelope in the staff member's presence. The use of mail drop boxes for outgoing legal mail is prohibited.

20 Illinois Administrative Code 525.130(c) to (d) Mail Procedures (2003)

c) Outgoing privileged mail must be clearly marked as “privileged” and sealed by the offender. Outgoing mail which is clearly marked as privileged and addressed to a privileged party may not be opened for inspection except as provided in subsection (d) of this Section.

d) In adult facilities, outgoing privileged mail shall be examined for dangerous contraband, using an x-ray, fluoroscope, or other similar device. Such examination may be conducted in juvenile facilities. Outgoing privileged mail may be inspected for dangerous contraband by other means which do not damage the mail and which do not permit the mail to be read. Except in an emergency, outgoing privileged mail shall not be opened, unless there is reasonable suspicion that dangerous contraband is contained therein, legal services is consulted, and the mail is opened in the offender's presence.

New Mexico Corrections Department, Correspondence Regulations CD-151201(H) (2015)

H. Legal Mail and Privileged Correspondence: [4-4275] [4-4492]

1. Legal mail and privileged correspondence will not be routinely opened for inspection.

2. Incoming legal mail and privileged correspondence will be tracked and signed for on the **Incoming Legal Mail and Privileged Correspondence Log** form *(CD-151201.2)*.

3. Letters in this category should be sealed by the inmate and dropped in the special box provided for such letters.

4. Incoming and outgoing legal mail and privileged correspondence may be opened, inspected, and read to the limited extent necessary to determine its legitimacy; in the presence of the inmate in an appropriate, secure area of the facility by the Warden or a designee to help determine if the mail is legitimate, contains contraband, or when there is an indication of contamination. Opened privileged correspondence will be documented on the **Receipt for Open Privileged Mail** form *(CD-151201.3)*.

New York Department of Corrections and Community Supervision, Privileged Correspondence No. 4421, 7 NYCRR 721.3, III.A, C (2014)

III.A Outgoing Privileged Correspondence.

(1) For the purpose of this directive, outgoing mail will not be considered to be privileged correspondence until it has been placed in the control of the facility administration for processing.

(2) Outgoing privileged correspondence may be sealed by the inmate, and such correspondence shall not be opened, inspected, or read without express written authorization from the facility superintendent as specified in subdivision (c) of this section. Notwithstanding the foregoing or any other provision of this Chapter, outgoing mail to the Secretary of State, Department of State, corporation division or uniform commercial code unit of any state shall be submitted by the inmate unsealed and is subject to inspection.

* * *

III.C Authorization to Read Privileged Mail.

(1) The superintendent shall not authorize the reading of incoming or outgoing privileged correspondence unless there is a reason to believe that the provisions of this or any directive or rule or regulation have been violated, that any applicable State or Federal law has been violated, or that the content of such correspondence threatens the safety, security, or good order of a facility or the safety or well being of any person. Such authorization by the superintendent shall be in writing and shall set forth facts forming the basis for the action.

(2) The superintendent is advised to consult with the department's office of counsel before issuing such authorization. If the facility superintendent authorizes the reading of privileged correspondence, it shall be read only by the superintendent, a deputy superintendent or central office staff.

(3) If after reading the contents of privileged correspondence there is reason to believe that the provisions of this or any directive or rule or regulation have been violated, or that any State or Federal law has been violated, or that the content of such correspondence threatens the safety, security good order

of a facility or the safety or well-being of any person, then the correspondence may be confiscated, and the inmate must be given written notice of the confiscation, unless doing so would be inconsistent with the need to safeguard an investigation. The notice must include the reason(s) for the confiscation, and it must inform the inmate of the right to appeal the confiscation to the deputy commissioner for program services. In the case of incoming correspondence, the correspondent must also be given a copy of such notice and accorded the right to appeal, unless doing so would be inconsistent with the need to safeguard an investigation. Reason to believe that privileged correspondence is being used to introduce contraband or other materials not entitled to the privilege shall be sufficient reason for confiscation.

(4) This subdivision shall not be deemed to require the express written authorization of the superintendent to inspect incoming privileged correspondence, in the presence of the inmate, to ensure that the materials contained in the correspondence are entitled to the privilege.

South Dakota Corrections Policy, 1.5.D.3, at IV.6.C Offender Correspondence (2015)

C. Outgoing privileged/legal correspondence from adult offenders will be inspected.

1. Staff will not read the privileged/legal correspondence but may inspect the contents page-by-page in the offender's presence to prevent the movement of contraband.

2. If there is a question by staff whether the offender's correspondence qualifies as legal mail, the mail may be retained until determination is made. Correspondence may be held for no more than 24 hours, excluding weekends and holidays.

Texas Department of Criminal Justice, Uniform Offender Correspondence Rules, BP-03.91, at III.A to B (2013)

III. Legal Correspondence

A. Permissible Correspondence

In order to facilitate the attorney-client privilege, an offender may send sealed and uninspected letters directly to legal correspondents. No correspondence from an offender to any legal correspondent shall be opened or read. All incoming correspondence from any legal correspondent shall be opened and inspected for contraband only. The inspection shall be in the offender's presence. No correspondence to an offender from any legal correspondent shall be read.

B. Exceptions

When an offender violates the law or the correspondence rules using legal correspondence, the offender may have legal mail privileges suspended except to the offender's attorney of record, upon obtaining written permission of the CID director or designee. The attorney of record must submit a written statement naming them as the attorney of record for the offender. The CID director shall approve the restriction of legal correspondence privileges.

Changes in Citations to or Revisions of State Policies on Outoing Legal Mail Since March, 2015 in the Chart at ER296-311

State	**On-Line Source**
Arkansas: Administrative Regulations, State of Arkansas, Board of Corrections, Inmate Correspondence 860 (2010)	http://adc.arkansas.gov/images/uploads/AR860.pdf
Colorado: Colorado Department of Corrections Administrative Regulation 300-38 (IV.B) (2015)	https://drive.google.com/file/d/0B4vYiI52TzO6a0FWYjRuaFpfWTQ/view
Delaware: Department of Corrections Policy Manual, Chapter 4, Section 4.0, IV.D.2 (2015)	http://www.doc.delaware.gov/downloads/policies/policy_4-0.pdf
Iowa: Iowa Admin. Code 201-20.4 (2010)	https://www.legis.iowa.gov/docs/iac/chapter/08-05-2015.201.20.pdf
Nebraska: Department of Correctional Services, State of Nebraska, Administrative Regulation 205.01, at I.E, Inmate Mail (2015)	http://www.corrections.nebraska.gov/pdf/ar/mail/AR%20205.01.pdf
New Jersey: New Jersey Admin. Code, Title 10a. Corrections, Chapter 18. Mail, Visits, and Telephone, Subchapter 3. Legal Correspondence (2016)	http://www.state.nj.us/corrections/pages/njadmin10a.html

South Dakota: Corrections Policy, 1.5.D.3, at IV.6.C Outgoing Privileged/Legal Correspondence (2015)	https://doc.sd.gov/documents/about/policies/Offender%20Correspondence.pdf