No. 20-2531

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MICHAEL RIVERA,
Plaintiff-Appellant,

v.

KEVIN MONKO, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Pennsylvania, No. 3:19-cv-976
Before the Hon. Susan E. Schwab, United States Magistrate Judge

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OPENING BRIEF OF APPELLANT MICHAEL RIVERA AND JOINT APPENDIX VOL. I

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Plaintiff-Appellant Michael Rivera filed this civil rights action *pro se* alleging violations of his constitutional right of access to the courts. The district court had jurisdiction over Mr. Rivera's claims pursuant to 28 U.S.C. §§ 1331, 1441. On June 23, 2020, the magistrate judge entered a final order dismissing Mr. Rivera's action. JA 5. On July 22, 2020, Mr. Rivera filed a notice of appeal from the final judgment entered.[1] JA 1. The appeal was timely under Federal Rule of Appellate Procedure 4(a)(1)(A) and (c)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. §§ 636(c)(3), 1291.

ISSUES PRESENTED

The issues in this appeal are:

1. Whether prison officials are entitled to qualified immunity when they repeatedly deny a prisoner access to online and print legal research materials both before and during the prisoner's *pro se* conditions-of-confinement trial.
2. Whether a lower court may *sua sponte* grant qualified immunity to a defendant without giving a *pro se* plaintiff any notice or opportunity to be heard on whether the defendant is entitled to qualified immunity.

[1] Mr. Rivera's notice of appeal is dated July 20, 2020. JA 1. The postage stamp shows that it was mailed on July 22, 2020. JA 4. It was received and filed by the court on July 27, 2020. JA 1-2.

STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND[2]

A. Defendants Deny Mr. Rivera Access To Online And Print Legal Research Materials Despite His Repeated Requests.

On July 6, 2017, Michael Rivera was temporarily transferred from the State Correctional Institution Fayette to the State Correctional Institution Retreat ("SCI Retreat") so he could litigate a civil jury trial concerning his conditions of confinement.[3] JA 36 (Compl. ¶¶ 11-12). He required access to legal materials at SCI Retreat as he was litigating the conditions case *pro se*. JA 36 (*Id*. ¶¶ 11, 13). The day after Mr. Rivera arrived at the facility, Friday, July 7, 2017, JA 8 n.2, he submitted a request slip addressed to Defendant Monko, an officer assigned to the Restricted Housing Unit ("RHU") where Mr. Rivera was placed, seeking access to the RHU's mini law library, JA 35-36, 45 (Compl. ¶¶ 7, 13; *Id*. at Exhibit A). The request slip reads:

> At your earliest convenience, will you please allow me access to the RHU law library? Preferably some time before Monday that my trial starts, if at all possible, please?

[2] Because this appeal challenges the district court's order on a motion to dismiss, all relevant facts are taken from Mr. Rivera's Amended Complaint, which begins at JA 34.

[3] The underlying case challenging Mr. Rivera's conditions of confinement—specifically, the use of excessive force against him—can be found at *Rivera v. O'Haire, et al.*, No. 1:15-cv-1659 (M.D. Pa.).

JA 45 (Compl. Exhibit A). Later that day, Defendant Monko told Mr. Rivera not to worry and that he would get Mr. Rivera "in the law library sometime today" before leaving his post. JA 36 (Compl. ¶ 14). Mr. Rivera explained that he would need continuing access to the library during his trial and Defendant Monko agreed to provide as much access as possible. *Id*.

That evening, Defendant Gilbert told Mr. Rivera that "sometime after dinner, I'll put you in the law library." JA 37 (Compl. ¶ 16). Defendant Gilbert followed through and, along with C.O. Williamson, escorted Mr. Rivera to the law library later that evening. *Id*. Mr. Rivera was hoping to use the computers at the law library to prepare for his upcoming trial; the library does not contain any physical books. JA 37 (Compl. ¶¶ 17, 19). However, when Mr. Rivera attempted to log onto one of the two computers, he was unable to do so. *Id*. The computer was completely inoperable. *Id*. Defendant Gilbert then attempted to log onto the second computer. JA 37 (Compl. ¶ 18). Like the first one, it was not functional. *Id*. After approximately fifteen to twenty minutes of attempting—and failing—to log onto the two computers, Mr. Rivera was escorted back to his cell. JA 37 (Compl. ¶ 19). Defendant Gilbert assured Mr. Rivera that he would "get with Lieutenant Monko and the [l]aw [l]ibrarian [Defendant Doe] on Monday and try to get the computers fixed." JA 37 (Compl. ¶ 20). This did not occur. *Id*. The computers remained inoperable the entire time Mr. Rivera was housed at SCI Retreat. JA 38 (Compl. ¶ 21).

The next day, Saturday, July 8, 2017, Mr. Rivera spoke to Sergeant Frederick about his need to research and review the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the rules of the court to prepare for his upcoming trial—which was to take place in just two days. JA 38 (Compl. ¶ 22). Sergeant Frederick responded: "I understand and I apologize, but there's no one here that can fix the computers until Monday. I called, and that's what I was told." *Id*. Since he would not be able to conduct research on the computers, the only legal material in the RHU mini law library, Mr. Rivera asked whether he could borrow legal reference books from the general population law library. *Id*. Sergeant Frederick said that would not be possible because "the [l]aw [l]ibrarian said 'no.'" *Id*. Defendant Doe, the law librarian, refused Mr. Rivera's request despite the fact that he knew, or should have known, that the computers were not functional at the time Mr. Rivera requested the books. JA 38 (Compl. ¶ 23).

On Monday, July 10, 2017, Mr. Rivera's trial began. JA 38-39 (Compl. ¶ 24). Upon returning from court that day, Mr. Rivera learned that the legal research computers had not been repaired—despite Defendant Gilbert's assurance that he, Defendant Monko, and Defendant Doe would "try to get the computers fixed," on Monday, JA 37 (Compl. ¶ 20), and despite Sergeant Frederick's subsequent confirmation that the computers would be fixed that day, JA 38 (Compl. ¶ 22). Mr. Rivera asked, once again, whether he could have access to legal reference books

since the computers were still broken. JA 38-39 (Compl. ¶ 24). Defendant Gilbert said no, explaining that Mr. Rivera would not be given any legal reference books per Defendant Doe's instruction. *Id*. In sum, in the days leading up to his trial, and even through his trial, Mr. Rivera was denied access to all online and print legal materials.

B. The Denial Of All Legal Research Material Adversely Impacted Mr. Rivera's Ability To Present His Claims In Court.

Mr. Rivera's ability to represent himself during his trial was hindered by his total lack of access to legal research materials, whether electronic or in print. JA 38 (Compl. ¶¶ 21, 23). Specifically, the complete lack of legal materials impeded Mr. Rivera's ability to research and respond to two pretrial motions filed by the defendants in his conditions of confinement case, and to research issues related to discovery material that arose prior to jury selection. *Id*. It also made it incredibly difficult to respond to oral motions made at trial. JA 38-39 (Compl. ¶ 24).

One particularly consequential outcome of this deprivation took place on the second day of trial, Tuesday, July 11, 2017. JA 39 (Compl. ¶ 25). That day, Mr. Rivera took the stand to testify. *Id*. Because he had been denied access to legal research materials, including the Federal Rules of Evidence, he did not testify about the unsworn declaration and medical documents he wanted to introduce as exhibits. JA 38, 39 (Compl. ¶¶ 22, 25). As a result, the judge excluded the declaration and documents, deeming them to be hearsay because Mr. Rivera failed to testify about them while on the witness stand. JA 39 (Compl. ¶ 25). Though Mr. Rivera had tried

to research the Federal Rules of Evidence before and during trial, Defendants' actions made that impossible, leading to an adverse evidentiary ruling. *Id*. This adverse evidentiary ruling, in turn, led to an adverse verdict. JA 39 (Compl. ¶¶ 25-26).[4]

C. Mr. Rivera Exhausted All Available Administrative Remedies

After Mr. Rivera was denied access to online and print materials, he filed a grievance to alert SCI Retreat of these serious failures. JA 40 (Compl. ¶ 31); JA 53 (Compl. Exhibit I). He appealed the grievance responses and exhausted all available administrative remedies before filing suit. JA 54-59 (Compl. Exhibits J, K, L, M, N & O). Defendants have never contested Mr. Rivera's exhaustion. *See* Dkt. 21, 24.

II. PROCEEDINGS BELOW

Mr. Rivera filed suit *pro se* in Pennsylvania state court against Defendants Kevin Monko, Wynston Gilbert, and the John Doe Librarian. *Rivera v. Monko, et al.*, No. 201904215 (Ct. Com. Pl., Luzerne Cty.). He was permitted to proceed *in forma pauperis* and Defendants Monko and Gilbert were served by "Sheriffs

[4] The denials of law library access that took place in July 2017 are central to this case. But, it is worth noting that Mr. Rivera was denied access to legal materials on two other occasions, demonstrating the routine nature of such problems at SCI Retreat. First, Mr. Rivera was denied access to the law library in May 2017. JA 36-37 (Compl. ¶ 15). He filed a grievance concerning this denial, but never received a written response. *Id*. Second, he was denied access to the law library from August 1, 2017 through August 8, 2017, when he temporarily returned to SCI Retreat to attend court in a different matter. JA 40 (Compl. ¶ 28). Again, Mr. Rivera filed a grievance to attempt to redress this denial. *Id*.

Service." *Id*. These two Defendants subsequently removed the case to the U.S. District Court for the Middle District of Pennsylvania on June 6, 2019. Dkt. 1. Mr. Rivera then filed an amended complaint (hereinafter "Complaint"), which is the operative pleading in this case. JA 34-60. Defendant John Doe was not served. *See* JA 30; Docket, *Rivera*, No. 201904215 (Ct. Com. Pl., Luzerne Cty.). The district court did not provide notice to Mr. Rivera that he was required to complete service, nor did it give Mr. Rivera an opportunity to show good cause for the failure to serve. JA 30-33.

Following a motion to dismiss filed by Defendants Monko and Gilbert, the parties consented to have the motion adjudicated by Magistrate Judge Susan E. Schwab (hereinafter "the district court"). Dkt. 26. On June 23, 2020, the district court awarded qualified immunity to all three Defendants—even Defendant John Doe—and dismissed the case. JA 6-29. The court determined that no legal authorities "clearly established that a state's affirmative obligation to provide assistance to inmates in the form o[f] a law library or legal assistance extended through the time of trial of an underlying civil rights action." JA 25. That is, although the court recognized that there was support for the proposition that "the right of access does not end with the filing of the complaint," JA 25, 26, it concluded that this right did not clearly extend to the trial stage of a civil rights case. JA 28. The district court also applied this reasoning to Defendant Doe and *sua sponte* awarded him qualified

immunity despite noting that he "has not been served, and, thus, he has not raised qualified immunity." JA 28. This appeal followed.

STANDARD OF REVIEW

This Court's review of a dismissal under Rule 12(b)(6) is plenary. *See McGovern v. City of Phila.*, 554 F.3d 114, 115 (3d Cir. 2009). It must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Black v. Montgomery Cty.*, 835 F.3d 358, 364 (3d Cir. 2016), *as amended* (Sept. 16, 2016). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Complaints filed by *pro se* litigants, like Mr. Rivera, are liberally construed. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

SUMMARY OF ARGUMENT

On the eve of his *pro se* conditions-of-confinement trial, Mr. Rivera repeatedly asked prison officials for access to electronic legal research material. But the computers were broken, and Defendants never fixed them. So Mr. Rivera instead asked for print research materials, including the Federal Rules of Evidence and the Federal Rules of Civil Procedure. But the Defendants told him "no," despite his repeated requests for these legal texts. In all, despite Mr. Rivera's multiple requests,

he was denied *any* access to legal research materials before and during his § 1983 trial in federal court, where he was serving as his own counsel. As a result of his inability to research the applicable rules, the judge excluded critical evidence and, without the aid of this evidence, the jury returned a verdict against him. In short: This was a quintessential denial of a prisoner's right of access to the courts through the total deprivation of legal research material.

The district court concluded otherwise, however, holding that Defendants are entitled to qualified immunity because the law was not clearly established that a prisoner's right of access to the courts extends through trial. As the district court would have it, prisoners *do* have a clearly established right of access to the courts, but it's not clearly established how far that right runs.

But Supreme Court law, as well as this Court's precedent, confirms that prisoners have a right not just to *file* an action, but to *pursue* an action. A ruling to the contrary—which recognizes a right that exists while a prisoner is preparing to file suit but vanishes the moment he actually files it—would render illusory the right of access to the courts, as well as the underlying constitutional rights it is meant to protect. This Court should reverse the district court, and recognize the properly-defined right of access to the courts, which accompanies a prisoner throughout the litigation process.

ARGUMENT

I. The Defendants Are Not Entitled to Qualified Immunity

A. Standard of Review

Despite their participation in a constitutional violation, government officials "may nevertheless be shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity ensures that, before they are subjected to suit, officers are on notice that their conduct is unlawful. *See id.* "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

The qualified immunity analysis has two prongs. *Id.* at 232. The first prong asks whether the facts that the complaint has alleged make out a violation of a constitutional right. *Id.* The second prong asks whether the right at issue was "clearly established" at the time of defendant's conduct. *Id.*

B. Defendants Violated Mr. Rivera's Right of Access to the Courts by Denying Him Access to Online and Print Legal Materials.

"[P]risoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). That right originates in the First and Fourteenth

Amendments. *Monroe v. Beard*, 536 F.3d 198, 205 (3d Cir. 2008). And as this Court has explained, "[a] prisoner's constitutional right of access to the courts is undiminished when that prisoner is held in a segregated unit." *Peterkin v. Jeffes*, 855 F.2d 1021, 1038 (3d Cir. 1988).

The Supreme Court has held that a prisoner is entitled to the "tools [he] requires . . . in order to challenge the conditions of [his] confinement." *Lewis v. Casey*, 518 U.S. 343, 355 (1996). One such tool is access to "prison law libraries," which serve as "the means for ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *Id.* at 351 (quoting *Bounds*, 430 U.S. at 825). The Defendants repeatedly denied Mr. Rivera access to this critical tool.

Mr. Rivera was temporarily transferred to SCI Retreat so that he could litigate his civil jury trial concerning conditions of confinement. Yet, when he arrived at the facility, he was repeatedly denied the online and print legal materials he needed to prepare for his trial—denials that fundamentally and adversely impacted the outcome of the trial. Each of the three Defendants played a central role in denying Mr. Rivera these legal materials, thereby infringing his right to access the courts.

Mr. Rivera wasted no time in requesting access to the law library; he submitted a request slip to Defendant Monko the very day he arrived at the facility. JA 36 (Compl. ¶ 13); JA 45 (Compl. Exhibit A). And when he (and Defendants)

learned the computers in the law library were inoperable, he was told that Defendant Monko, Defendant Gilbert, and Defendant Doe would work on fixing them. JA 37-38 (Compl. ¶¶ 20, 22). That did not happen and the computers remained inoperable for the duration of Mr. Rivera's time at SCI Retreat. JA 38 (Compl. ¶ 21). Mr. Rivera asked for an alternative to law library access: print copies of the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the rules of the court from the general population law library. JA 38 (Compl. ¶ 22). Defendant Doe said "no." *Id*. Mr. Rivera was persistent, however, and continued to seek access to the materials he needed after his trial began. JA 38-39 (Compl. ¶ 24). He inquired again about the computers, but learned they were still broken despite past promises. JA 38-39 (Compl. ¶¶ 22, 24). And when he again asked in the alternative for print materials, Defendant Gilbert again said no, citing Defendant Doe's directive. JA 38-39 (Compl. ¶ 24).

In addition to alleging a denial of the "tools" required to access the courts, *Lewis*, 518 U.S. at 355, a prisoner must allege "actual injury"—that is, "that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim," *id.* at 351. Mr. Rivera's Complaint alleges that by denying him access to any and all legal research materials, both before and during his trial, the Defendants "frustrated and impeded [his] ability" to represent himself at that trial. JA 38-39 (Compl. ¶¶ 21, 25). Specifically, Defendants impeded his ability to

research and respond to two pretrial motions filed by the defendants in his conditions case, and to research issues related to discovery material that arose prior to jury selection. JA 38 (Compl. ¶ 21). It also made it incredibly difficult to respond to oral motions made at trial. JA 38-39 (Compl. ¶ 24). In particular, on the second day of trial, Mr. Rivera took the stand, but because he was unable to review the Rules of Evidence before his trial, he did not testify about several documents he wanted the jury to review, precluding him from introducing them into evidence. JA 39 (Compl. ¶ 25). Because the jury was unable to review these documents, it reached an adverse verdict. JA 39 (Compl. ¶¶ 25-26).

In sum, Defendants violated Mr. Rivera's constitutional rights because they interfered with his ability "to present [his] grievances to the court[]," and he alleged "actual prejudice with respect to . . . existing litigation." *Lewis*, 518 U.S. at 348, 360. Thus, Mr. Rivera has established a classic "backward-looking access claim[]" in which "litigation ended poorly" because the Defendants denied him access to necessary legal research materials. *Christopher v. Harbury*, 536 U.S. 403, 414-15 (2002).

C. Mr. Rivera's Right of Access to the Court Was Clearly-Established.

1. The "Clearly-Established" Inquiry.

At the second step of the qualified immunity inquiry, the "focus is on whether the officer had fair notice that her conduct was unlawful." *El v. City of Pittsburgh*,

975 F.3d 327, 334 (3d Cir. 2020). This Court typically looks to its own precedent and that of the Supreme Court in determining whether "a reasonable officer would anticipate liability for []his conduct." *Kedra v. Schroeter*, 876 F.3d 424, 450 (3d Cir. 2017). However, "it need not be the case that the exact conduct has previously been held unlawful so long as the 'contours of the right' are sufficiently clear, such that a 'general constitutional rule already identified in the decisional law' applies with 'obvious clarity.'" *Id.* (citations omitted). Accordingly, "'[o]fficials can still be on notice that their conduct violates established law even in novel factual circumstances,' because the relevant question is whether the state of the law at the time of the events gave the officer 'fair warning.'" *Id.* (quoting *Hope*, 536 U.S. at 741); *see also Taylor v. Riojas*, -- S.Ct. --, No. 19-1261, 2020 WL 6385693, at *2 n.2 (U.S. Nov. 2, 2020) (holding that qualified immunity is inappropriate where, even without a prior case with similar facts, there is no "doubt about the obviousness" of the plaintiff's right).

2. Supreme Court Precedent—*Bounds, Lewis,* and *Christopher*—Clearly Establishes That a Prisoner's Right of Access to the Court Exists at All Phases of a Conditions of Confinement Claim.

The district court held that although the Supreme Court in *Lewis v. Casey*, 518 U.S. 343, 349 (1996), recognized a prisoner's right of access to the courts via law library materials, it was not clearly-established that the right extended to the point of a prisoner's civil rights trial. In so holding, it badly misread *Lewis*, and other

relevant Supreme Court precedent. Those cases establish that the right of access to the courts persists throughout the course of a prisoner's civil rights case challenging the conditions of his confinement—not simply until he files a complaint, as the Defendants argued before the district court.

Our journey begins with *Bounds v. Smith*, 430 U.S. 817 (1977). By the mid-1970s, the Court held in *Bounds*, it was "established beyond doubt that prisoners have a constitutional right of access to the courts." *Id.* at 821. Under the Court's precedent, *Bounds* explained, the "touchstone" of prisoner access to the courts is whether such access "is adequate, effective, and meaningful." *Id.* at 822, 823. Ultimately, the Court held "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828.

Nearly twenty years later, in *Lewis*, 518 U.S. 343, the Supreme Court returned to the subject of prisoners' access to the courts. And although it clarified some of the language in *Bounds*, it did so in a way that reiterated and strengthened the very right on which Mr. Rivera's claim is based.

Lewis reached the Supreme Court after a three-month bench trial in a class action case brought by adult prisoners incarcerated by the Arizona Department of Corrections (ADOC), who argued ADOC policies violated their rights of access to

the courts. The district court ruled in favor of the inmates, and appointed a Special Master. After eight months of investigation, the Special Master proposed a 25-page injunctive order that "mandated sweeping changes designed to ensure that ADOC would 'provide meaningful access to the Courts for all present and future prisoners.'" *Id.* at 347. Among other things, the order set out "the minimal educational requirements for prison librarians"; "the content of a videotaped legal-research course for inmates," to be funded by ADOC; and declared that illiterate and non-English-speaking inmates were entitled to "direct assistance" from lawyers, paralegals, and/or bilingual legal assistants. *Id.* at 347-48. The Ninth Circuit affirmed both the finding of a constitutional violation under *Bounds* and the terms of the injunction. *See id.* at 348.

Before the Supreme Court, ADOC argued that "in order to establish a violation of *Bounds*, an inmate must show that the alleged inadequacies of a prison's library facilities or legal assistance program caused him 'actual injury'" and that the district court "did not find enough instances of actual injury to warrant systemwide relief." *Id.* at 348-49. The Court agreed with both propositions. It explained that the right at issue is not "to a law library or to legal assistance," rather, "[t]he right that *Bounds* acknowledged was the (already well-established) right of *access to the courts.*" *Id.* at 350, 351. "In other words, prison law libraries and legal assistance programs are not ends in themselves, but only the means for ensuring 'a reasonably

adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *Id.* at 351 (quoting *Bounds*, 430 U.S. at 825). Ultimately, "meaningful access to the courts is the touchstone." *Id.* (quoting *Bounds*, 430 U.S. at 823).

Lewis restricted access to courts claims in two ways. First, as urged by ADOC, it imposed an "actual-injury" requirement for access to courts claims. *See id.* at 349 ("[A]n inmate alleging a violation of *Bounds* must show actual injury."). Second, it held that only certain types of frustrated claims—direct or collateral attacks on a prisoner's sentence or suits challenging the conditions of their confinement—would suffice to make out an access to courts claim. *Id.* at 355. In these two ways, then, the Court conscribed a prisoner's right of access to the courts. But *Lewis* is unambiguous about the *extent* of that right: prisoners must be granted access to the courts throughout the course of litigation.

Over and over again, the Court in *Lewis* used language clearly identifying the right of access to the courts as extending throughout the course of litigation. When setting out the contours of the "actual injury" requirement, for example, the Court stated that a plaintiff:

- Must demonstrate "actual prejudice with respect to contemplated *or existing* litigation." *Id.* at 348 (emphasis added).
    - If the right of access to courts protected only a prisoner's ability to file suit, as the Defendants argued before the district court, the Court

would not have included "or existing" in its phrasing, and said instead: "actual prejudice with respect to contemplated ~~or existing~~ litigation."

- Needs to "show[] that an actionable claim . . . which he desired to bring has been *lost or rejected.*" *Id.* at 356 (emphasis added).
    - Claims, of course, can be "lost" or "rejected" at any stage of litigation. *See, e.g.*, *Jones v. Unknown D.O.C. Bus Driver & Transp. Crew*, 700 F. App'x 156, 157 (3d Cir. 2017) (relying on the loss or rejection language in *Lewis* to hold that a prisoner should be permitted to amend his access to the courts claim regarding allegations that he was stopped "from presenting [his] argument for [his] post-conviction motion").
- Is required to allege that "shortcomings in the library or legal assistance program hindered his efforts to *pursue* a legal claim." *Lewis*, 518 U.S. at 351 (emphasis added).
    - The Court's use of "pursue" is indicative of the continuing nature of the right. *See, e.g.*, *Pursue*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "pursue" as "[t]o prosecute," "[t]o follow persistently," "[t]o try persistently," "[t]o continue trying to find out about," "[t]o follow or proceed along with some particular end or object," "[t]o proceed with," and "[t]o continue to afflict"). Moreover, if the right ended after the *filing* of a legal claim—or, indeed, at any particular phase—surely the Court would have said as much.
- States a claim where "a nonfrivolous legal claim had been frustrated or was being impeded." *Lewis*, 518 U.S. at 353.
    - To "impede" something is "to interfere with or slow the progress of" the activity. *Impede*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/impede. (And, likewise, "frustrate" means to "impede." *Frustrate*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/frustrate.) Because the "progress of" litigation suggests a continuing course, and can be "interfere[d] with or slow[ed]" at any stage, the Court's use of the terms "impeded" and "frustrated" indicates that it understood the right to exist throughout the litigation process.

The Court also framed the *purposes* of the right of access to the courts in ways that are inconsistent with a meager right that does not accompany a prisoner

throughout his litigation journey, observing that:

- The Constitution requires that prisoners "be able to *present* their grievances to the courts." *Lewis*, 518 U.S. at 360 (emphasis added).
    - "Present" is commonly used to refer to putting forward one's case at all stages of litigation, including at trial. *See, e.g.*, *Reeves v. Fayette SCI*, 897 F.3d 154, 159-60 (3d Cir. 2018), *as amended* (July 25, 2018) (discussing failure of attorney to "present at trial" certain evidence); *Auxer v. Alcoa, Inc.*, 406 F. App'x 600, 604 (3d Cir. 2011) (discussing "the primary importance of a party's being able to present its case at trial"); *Lasko v. Watts*, 373 F. App'x 196, 201 (3d Cir. 2010) (discussing a litigant's ability to "present the necessary legal and factual issues to the court" at various stages of litigation).
- "It is the role of courts *to provide relief* to claimants." *Lewis*, 518 U.S. at 349 (emphasis added).
    - A court does not "provide relief" based only on a complaint, it provides relief at the ultimate adjudication of a dispute.

Finally, when discussing *Bounds*—and limiting the access right to only certain types of claims—*Lewis* highlighted that the right of access to the courts is functional, existing to protect a prisoner's core constitutional rights:

- *Bounds* gives prisoners the "tools" that "inmates need in order to *attack* their sentences, directly or collaterally, and in order to *challenge* the conditions of their confinement." *Id.* at 355 (emphases added).
    - A prisoner cannot effectively "attack" his sentence or "challenge" his conditions of confinement if he cannot move those claims through to the end of litigation.
- The access right covers § 1983 actions, which serve to "to *vindicate* 'basic constitutional rights.'" *Id*. at 354 (emphasis added).
    - "Vindicate" is a verb focused on *outcomes*—it means "to protect," "avenge," or "defend (one's interest) against interference or encroachment." *Vindicate*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/vindicate; *Vindicate*, BLACK'S LAW DICTIONARY (11th ed. 2019). A prisoner therefore may only see his

rights "vindicated" by a court if he is able to see his case through to completion; a right cannot be "protect[ed]," "avenge[d]," or "defend[ed]" by the mere filing of a complaint.

- "'[M]eaningful access to the courts is the touchstone.'" *Lewis*, 518 U.S. at 351 (quoting *Bounds*, 430 U.S. at 823).
    - For access to the courts to be meaningful, the right to access law library materials (or equivalent methods) must extend until the completion of a case.

As if *Lewis* were not clear enough, a few years later, in *Christopher v. Harbury*, 536 U.S. 403 (2002), the Supreme Court confirmed that the right of access to the courts extends through all stages of litigation. *Christopher* did not arise in the prison context, but looked broadly at access to courts cases in the Supreme Court and Courts of Appeals (including *Lewis*, which it repeatedly cited), noting that "two categories [of cases] emerge." *Id*. at 413. "In the first are claims that systemic official action frustrates a plaintiff . . . in preparing and filing suits at the present time." *Id.* These are suits that have not yet made it to court.

But in a second category of cases, "[t]he official acts claimed to have denied access may allegedly have caused the loss or inadequate settlement of [a] meritorious case." *Id.* at 414. These cases look "backward to a time when specific litigation ended poorly." *Id.* Such cases have made it into the court system, but are stymied due to denial of access to the courts.

Here, the district court misread the law as being only clearly established as to the first group of forward-looking claims; indeed, it reads out of the law entirely the

backward-looking claims that *Christopher* explicitly recognizes, and which Mr. Rivera brought in this case. JA 39 (Compl. ¶¶ 25-26). But Supreme Court precedent puts beyond dispute that prisoners must be afforded "meaningful" access to the courts, and that this right extends throughout the course of litigation.

3. This Court's Precedent Confirms That a Prisoner's Right of Access to the Courts Follows the Incarcerated Litigant Through the Litigation Process.

This Court's post-*Lewis* precedent confirms that a prisoner's right of access to the courts exists for every stage of the litigation process, and is not the anemic version of the right envisioned by the district court. For example, citing *Lewis* and *Christopher*, this Court recognized in *Monroe v. Beard*, 536 F.3d 198 (3d Cir. 2008), that prisoners may bring an access to courts claim where they "assert that defendants' actions have inhibited their opportunity to present a past legal claim." *Id.* at 205. To succeed on one of these "backward-looking" claims (per the *Christopher* Court's taxonomy) a litigant must show "that they lost a chance to pursue" an underlying claim and "must describe the 'lost remedy.'" *Id*. This Court's use of the words "present" and "pursue," rather than "file," makes clear that this Court in *Monroe* correctly read *Lewis* and *Christopher* as recognizing the right of access to courts as continuing through the litigation process—in other words, it recognizes just the sort of backward-looking access to courts claim the district court rejected. *See supra* at 19-20.

Similarly, in *Oliver v. Fauver*, 118 F.3d 175 (3rd Cir. 1997), a case decided shortly after *Lewis* and concerning an access to courts claim about appeal papers, this Court held that "to pursue a claim of denial of access to the courts an inmate must allege actual injury, such as the *loss or rejection* of a legal claim." *Id.* at 177 (emphasis added). Claims, of course, can be "lost" or "rejected" at any stage of litigation. *See supra* at 19. And in *Allah v. Seiverling*, 229 F.3d 220, 224 n.5 (3d Cir. 2000), this Court held that a prisoner had stated an access to courts claim under *Lewis* by alleging "that while he was in administrative segregation he did not have access to trained legal aids and as a result was unable to file a brief in his post-conviction appeal."

Consistent with this precedent, in case after case this Court has assumed that denial of a prisoner's access to the courts—whether by depriving a prisoner of law library material, interfering with legal mail, or otherwise—during the *pendency* of a claim is actionable.[5] This Court has addressed on the merits access to courts claims

[5] A few of the cases cited in this section were decided after Mr. Rivera was denied access to the law library in July 2017. However, "a later-decided case may be still be considered when assessing whether a principle was clearly established to the extent the case is merely 'illustrative of the proper application' of a previously established constitutional principle.'" *Kedra v. Schroeter*, 876 F.3d 424, 442 n.13 (3d Cir. 2017) (quoting *Wiggins v. Smith*, 539 U.S. 510, 522 (2003)). Likewise, unpublished opinions, though nonprecedential, are persuasive for purposes of the clearly established inquiry. *See James v. N.J. State Police*, 957 F.3d 165, 170 (3d Cir. 2020).

relating to an inmate's allegations surrounding his ability to file briefs,[6] prosecute an appeal,[7] litigate civil cases,[8] litigate post-conviction and habeas claims,[9] attend a court hearing,[10] meet deadlines,[11] and communicate with attorneys.[12]

As to civil rights actions, specifically, this Court has addressed on the merits an inmate's access to courts claim based on allegations that he was hindered in "his ability to prepare his . . . claims for trial,"[13] to proceed in forma pauperis,[14] to litigate

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[6] *Allah*, 229 F.3d at 224 n.5; *Watson v. Sec'y Pa. Dep't of Corr.*, 567 F. App'x 75, 78 (3d Cir. 2014)

[7] *McNeil-El v. Diguglielmo*, 271 F. App'x 283, 285 (3d Cir. 2008); *O'Connell v. Williams*, 241 F. App'x 55, 57 (3d Cir. 2007); *Obiegbu v. Werlinger*, 581 F. App'x 119, 122-23 (3d Cir. 2014); *Henry v. Moore*, 500 F. App'x 115, 117 (3d Cir. 2012); *Foster v. Sec'y, Pa. Dep't of Corr.*, 431 F. App'x 63, 65-66 (3d Cir. 2011); *Whitehead v. Schmid*, 148 F. App'x 120, 121-22 (3d Cir. 2005); *Tourscher v. McCullough*, 184 F.3d 236, 242 (3d Cir. 1999); *Oliver*, 118 F.3d at 176 n.3, 178.

[8] *Watson v. Sec'y Pa. Dep't of Corr.*, 436 F. App'x 131, 136 (3d Cir. 2011); *Atwell v. Metterau*, 255 F. App'x 655, 658 (3d Cir. 2007); *Bacon v. Carroll*, 232 F. App'x 158, 161 (3d Cir. 2007), *Jones v. Hendricks*, 173 F. App'x 180, 182 (3d Cir. 2007), *Jacobs v. Beard*, 172 F. App'x 452, 456 (3d Cir. 2006).

[9] *Hernandez v. Corr. Emergency Response Team*, 771 F. App'x 143, 145 (3d Cir. 2019); *Watson v. Wingard*, 782 F. App'x 214, 217-18 (3d Cir. 2019); *Gorrell v. Yost*, 509 F. App'x 114, 118 (3d Cir. 2013); *Tormasi v. Hayman*, 464 F. App'x 73, 74 (3d Cir. 2012); *Spuck v. Ridge*, 347 F. App'x 727, 730 (3d Cir. 2009); *Hairston v. Nash*, 274 F. App'x 375, 376 (3d Cir. 2007); *Gordon v. Morton*, 131 F. App'x 797, 798 (3d Cir. 2005); *Whitehead*, 148 F. App'x at 121-22.

[10] *Aruanno v. Johnson*, 568 F. App'x 194, 195 (3d Cir. 2014).

[11] *Schreane v. Holt*, 482 F. App'x 674, 676 (3d Cir. 2012).

[12] *Aruanno v. Main*, 467 F. App'x 134, 136-37 (3d Cir. 2012).

[13] *Williams v. Gavin*, 640 F. App'x 152, 154, 156-57 (3d Cir. 2016).

[14] *Jordan v. Cicchi*, 617 F. App'x 153, 157 (3d Cir. 2015); *Ingram v. S.C.I. Camp Hill*, 448 F. App'x 275, 279 (3d Cir. 2011).

the claims,[15] to pursue appeals [16] and to file a petition for certiorari.[17]

Likewise, time and again this Court has quoted *Lewis* for the proposition that a plaintiff must show that "his efforts to *pursue*"—not file—"a legal claim" at were hindered in order to make out an access-to-courts claim. *See, e.g.*, *Allah*, 229 F.3d at 224 n.5; *Oliver*, 118 F.3d at 178; *Jones v. Brown*, 461 F.3d 535, 359 (3d Cir. 2006); *Caterbone v. Lancaster Cty. Prison*, 811 F. App' x 721, 723 (3d Cir. 2020); *Heath v. Link*, 787 F. App'x 133, 136 (3d Cir. 2019); *Hernandez*, 771 F. App'x at 145; *Prater v. Wetzel*, 629 F. App'x 176, 177-78 (3d Cir. 2015); *Jordan*, 617 F. App'x at 157; *Aruanno v. Johnson*, 568 F. App'x at 195; *Mitchell v. Wydra*, 377 F. App'x 143, 145 (3d Cir. 2010); *Picquin-George v. Warden, FCI-Schuylkill*, 200 F. App'x 159, 162 (3d Cir. 2006); *Awala v. N.J. Dep't of Corr.*, 227 F. App'x 133, 135 (3d Cir. 2007). It has also affirmed summary judgment on an access to courts claim because a prisoner did not allege that he had an appropriate type of case "*pending*, much less that the defendants' actions interfered with them." *Aulisio v. Chiampi*, 765 F. App'x 760, 763 (3d Cir. 2019) (emphasis added)).[18]

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[15] *Spencer v. Bush*, 543 F. App'x 209, 213 (3d Cir. 2013); *Aruanno v. Johnson*, 442 F. App'x 636, 637 (3d Cir. 2011).

[16] *Brookins v. Cty. of Allegheny*, 350 F. App'x 639, 643 (3d Cir. 2009); *Tucker v. Monroe*, 314 F. App'x 433, 435-36 (3d Cir. 2008); *Bailey-El v. Fed. Bureau of Prisons*, 246 F. App'x 105, 108 (3d Cir. 2007).

[17] *Falciglia v. Erie Cty. Prison*, 279 F. App'x 138, 140 (3d Cir. 2008).

[18] In a multitude of other cases, this Court has echoed *Lewis*'s recognition that access claims can be based on events that occur post-filing. *See, e.g.*, *McBride v. Warden of Allegheny Cty. Jail*, 577 F. App'x 98, 99 (3d Cir. 2014) (requiring plaintiff show

Had this Court believed the right of access to the courts ended at the time a plaintiff files suit—or at any specific point thereafter—it would certainly have said as much (though, for the reasons stated above, that would have been incorrect under *Lewis* and *Christopher*). Not to mention, if the right of access did not continue for the lifespan of a case, as the district court believed, a host of this Court's cases discussing the right at different points in the litigation process, cited above, would have been decided incorrectly. In short, it would work a substantial change to existing law in this Circuit if the Court were to affirm the district court and hold that Mr. Rivera's right of access to the courts was not clearly-established. It was—based on *Bounds*, *Lewis*, *Christopher*, and a multitude of this Court's precedent.

4. The Seventh Circuit's Decision in *Marshall* Provides Further Evidence that The Law Was Clearly-Established.

Although not binding on this Court for purposes of the clearly-established inquiry, the Seventh Circuit's decision in *Marshall v. Knight*, 445 F.3d 965 (7th Cir.

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he "lost the opportunity to pursue" a claim); *Credico v. Guthrie*, 570 F. App'x 169, 171 (3d Cir. 2014) (same); *Aruanno v. Main*, 467 F. App'x at 136-37 (same); *Tinsley v. Giorla*, 369 F. App'x 378, 381 (3d Cir. 2010) (requiring demonstration that "claim was lost"); *Para-Prof'l Law Clinic at SCI-Graterford v. Beard*, 334 F.3d 301, 305 (3d Cir. 2003) (requiring "nonfrivolous legal claim [that] had been frustrated or was being impeded"); *Lyons v. Sec'y of Dep't of Corr.*, 445 F. App'x 461, 464 (3d Cir. 2011) (requiring allegations of "actual injury to [plaintiff's] ability to litigate a claim"); *Prater*, 629 F. App'x at 178 (requiring plaintiff to show how he was "hindered in his efforts to litigate"); *Picquin-George*, 200 F. App'x at 162 (requiring plaintiff to describe how he was unable to "bring or prosecute a claim"); *Watson v. Sec'y Pa. Dep't of Corr.*, 436 F. App'x at 135 (requiring showing of "loss or rejection of a legal claim").

2006), further supports that *Lewis* clearly established that Mr. Rivera's access to courts right was violated when he was completely denied access to law library materials both on the eve of his civil rights trial and during the trial.

In *Marshall*, the Seventh Circuit reached the same conclusion as this Court on the meaning of *Lewis*, rejecting the argument that the Defendants made to the district court here: that the right of access to the courts ends with the filing of an action. Marshall "alleged that the defendants reduced his law library access to a 'non-existent' level, and that his inability to research and prepare for a . . . court hearing caused him to lose custodian credit time that would have shortened his incarceration." *Id.* at 969. The district court concluded that Marshall failed to state a claim because *Lewis* "only requires that an inmate be given access to the courts to file a complaint or appeal." *Id.* The Seventh Circuit disagreed, squarely rejecting the district court's reading of *Lewis* that "confines access-to-courts claims to situations where a prisoner has been unable to file a complaint or an appeal." *Id.* The Court of Appeals noted that *Lewis* provided "that a prisoner could prove a denial of access to the courts by showing that a complaint he prepared *and filed* 'was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known.'" *Id.* (quoting *Lewis*, 518 U.S. at 351). "So," the Seventh Circuit concluded, "a prisoner's simple ability to file a complaint is not dispositive," and "[a] prisoner states an access-to-courts

claim when he alleges that even though he successfully got into court by filing a complaint . . . his denial of access to legal materials caused a potentially meritorious claim to fail." *Id.* *Marshall* represents the only correct reading of *Lewis*, a reading that this Court has ascribed to in its caselaw.

5. The District Court's Reasoning Does Not Withstand Scrutiny.

Despite the clarity of *Bounds*, *Lewis*, *Christopher*, and this Court's precedent, as well as the additional confirmation by *Marshall*, the district court held that it was not clearly established that a prisoner's right of access to the courts extended to trial. None of its reasoning withstands scrutiny.

The district court relied in large part on an out-of-context "statement in *Lewis* disclaiming the suggestion in *Bounds* that the state 'must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court." JA 23 (quoting *Lewis*, 518 U.S. at 354). But this language does not suggest that the right of access to the courts terminates upon the filing of a complaint, as the Defendants argued below. A couple of sentences after the "litigate effectively" language, the Supreme Court in *Lewis* made clear that it was only rejecting *Bounds* to the extent that it could be read to "demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population," which would effectively "demand permanent provision of counsel." *Lewis*, 518 U.S. at 354. *That* was the idea the Court in *Lewis* was rejecting—nothing more. Indeed, the Court in *Lewis* pulled

back on *Bounds* only insofar as it "went beyond the right of access recognized in earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished *to present*." *Id.* (emphasis added). As noted above, actually *presenting* a claim to a court involves more than the mere filing of a complaint. In short, a single sentence rejecting a state's affirmative obligation to assist prisoners in litigating their cases cannot reasonably be taken out of context to cut off a prisoner's right of access to courts after a case is initiated.

Next, the district court cited a treatise, which noted that "[o]n[e] way to read" the "litigate effectively" statement in *Lewis* is that the right ends at the filing of the complaint. JA 23. For the reasons just mentioned, this is not a plausible reading of that sentence in *Lewis*. At any rate, the treatise goes on to observe both that this statement was dicta *and* that the "stronger argument" is "that the right of access does not end with the initial court filing." 3 Michael B. Mushlin, *Rights of Prisoners* § 12:7. Just because a treatise notes that one *possible*—and, by its own account, weaker—construction of a single line from *Lewis* would end the right just inside the proverbial courthouse door cannot undermine the stronger, and correct, reading of *Lewis* that the Supreme Court (in *Christopher*), this Court, and the Seventh Circuit, have followed for years. Put another way, a reasonable officer could not read *Bounds*, *Lewis*, *Christopher*, years of precedent from this Circuit, and *Marshall*, on the one-hand, and the single out-of-context "effectively litigate" line from *Lewis*, on

the other, and think that he could constitutionally deny a prisoner total access to legal materials on the eve of his civil rights trial. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (explaining that "salient question" is "whether the state of the law" provided "fair warning" that particular action was unconstitutional).

The district court acknowledged that "*Marshall* supports the proposition that the right of access does not end with the filing of a complaint" and that "[c]ase law from the Third Circuit suggests the same." JA 25-26 (citing *Allah*, 229 F.3d at 224 n.5). Still, the district court continued, "that authority does not pinpoint how far the right to legal assistance extends." JA 26. That is, in the district court's view, because this Court has not yet had the opportunity to hold explicitly (as opposed to assume, as it has done repeatedly) that the right of access to courts extends to a civil rights trial, the law was not clearly established. That is a mistaken view of the clearly established inquiry. As this Court has explained, "there does not have to be 'precise factual correspondence' between the case at issue and a previous case in order for a right to be 'clearly established,'" and requiring such one-to-one case-matching gives "'officials one liability-free violation of a constitutional . . . requirement.'" *Kopec v. Tate*, 361 F.3d 772, 778 (3d Cir. 2004) (quoting *People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 144-45 (3d Cir.1984)).

Bounds establishes that "[m]eaningful access to the courts is the touchstone," 430 U.S. at 823 (internal quotation marks omitted), *Lewis* provides that a prisoner

can show his right was violated when officials "hindered his efforts *to pursue* a legal claim," 518 U.S. at 351 (emphasis added), and *Christopher* explicitly recognizes "backward-looking" claims, like Mr. Rivera's, that are based on the "loss" of a case, 536 U.S. at 414-15. Adding to the chorus, this Court has found it so *obvious* that the right of access extends throughout the course of litigation that it has not questioned that fact in the multitude of prior cases raising the issue. *See supra* Section I.C.3. That indicates the right was so clearly-established this Court took it as a given, not the contrary, as the district court erroneously concluded.

In short, because the "focus" of the qualified immunity inquiry "is on whether the officer had fair notice that her conduct was unlawful," *Bounds*, *Lewis*, *Christopher*, and the subsequent Third Circuit cases are sufficient to clearly establish the right at issue. *El v. City of Pittsburgh*, 975 F.3d 327, 334 (3d Cir. 2020) (quotation marks and citation omitted). That is, "the state of the law" was more than enough to give the Defendants "fair warning" that denying Mr. Rivera any access to legal materials before and during his trial was unconstitutional. *Hope*, 536 U.S. at 741; *see also Taylor v. Riojas*, -- S.Ct. --, No. 19-1261, 2020 WL 6385693, at *2 & n.2 (U.S. Nov. 2, 2020) (reaffirming that qualified immunity is inappropriate where, even without a prior case with similar facts, there is no "doubt about the obviousness" of the plaintiff's right).[19]

[19] In fact, the state of the law was so clear that it is reflected in American Bar

Despite the fair warning provided by Supreme Court and Third Circuit precedent, the district court relied on inapposite out-of-circuit cases. JA 26-27. Of these cases, the Seventh Circuit case has since been directly contradicted by *Marshall*; the Sixth and Tenth Circuit cases precede *Lewis* and *Christopher*; and to the extent the Ninth Circuit case can be read to construe the access right as limited to the pleading stages, that discussion is dicta and, as discussed above, simply incorrect. *See supra* Section I.C.1-4.

Bounds, *Lewis*, *Christopher*, this Court's precedent, and *Marshall* all clearly-establish that the right of access to courts extends throughout the course of litigation. This Court should reverse the district court's ruling on the "clearly-established" prong of qualified immunity, and take this opportunity to explicitly hold what is implicit in this Court's prior cases and evident in *Bounds*, *Lewis*, and *Christopher*:

Association standards concerning prisoners' access to the judicial process and to legal materials. *c.f. E. D. v. Sharkey*, 928 F.3d 299, 308 (3d Cir. 2019) (noting that "ICE policies and standards" can help determine constitutional violation). These standards make clear that "[p]risoners' access to the judicial process should not be restricted by . . . the phase of litigation involved." ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS, STANDARD 23-9.2(b) (2011), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners/. To give legs to this right, a "correctional facility should provide prisoners reasonable access to updated legal research resources." *Id.* at STANDARD 23-9.5(a). "Access to these legal resources should be provided either in a law library or in electronic form" and "[p]risoners who are unable to access library resources . . . should have access to an effective alternative to such access." *Id*.

that the right of access to courts does not stop at the filing of a complaint, but persists for the entire lifecycle of a claim.

D. The District Court Erred In *Sua Sponte* Granting Defendant Doe Qualified Immunity.

After awarding Defendants Monko and Gilbert qualified immunity, the district court went on to award immunity to Defendant Doe—the librarian—even though he did not raise the defense. This *sua sponte* grant of immunity was error.

While a court does have "the authority to *sua sponte* grant summary judgment on grounds not raised by the Defendants, such as qualified immunity," it must first ensure "the non-moving party has notice and an opportunity to be heard." *Njos v. Carney*, No. 3:12-cv-01375, 2017 WL 3217690, at *1 n.1 (M.D. Pa. July 28, 2017). Here, however, the district court granted *sua sponte* immunity without providing Mr. Rivera any notice or opportunity to be heard on whether Defendant Doe was entitled to it.

The district court's only justification for depriving Mr. Rivera of this opportunity was that he had an opportunity to respond to the qualified immunity arguments made by the *other* Defendants. JA 28-29. But this ignores the factual differences between those Defendants and Defendant Doe. Indeed, as the librarian, Defendant Doe occupies a distinct place in ensuring prisoner access to courts, and played a unique role here. *See* JA 37-39 (Compl. ¶ 20 (Defendant Gilbert indicating that he would "get with" the "Law Librarian . . . to get the computers fixed"), ¶ 22

(Sergeant Frederick explaining that the law librarian was the one who denied Mr. Rivera's request to borrow books), ¶ 24 (Defendant Gilbert explaining that Mr. Rivera could not access the reference books he requested because "[t]he Librarian" said so)). The district court's justification for granting Defendant Doe *sua sponte* qualified immunity falls flat in light of the factual differences between Defendant Doe and the officer Defendants. Mr. Rivera thus had no meaningful opportunity to contest qualified immunity as to the librarian—or a similarly situated defendant—making *sua sponte* qualified immunity for Defendant Doe impermissible.

This Court should correct the district court's erroneous decision to grant Defendant Doe qualified immunity, and dismiss him from the case, without first giving Mr. Rivera any notice or opportunity to be heard on the issue. It should remand the case and direct the district court to allow Mr. Rivera to identify and serve Defendant Doe.[20] Only then, if Defendant Doe chooses to raise qualified immunity,

[20] Federal Rule of Civil Procedure 4(m) states that where a defendant is not served within 90 days after the complaint is filed, the court "on motion or on its own *after notice to the plaintiff*" must dismiss the action without prejudice "or order that service be made within a specified time." Fed. R. Civ. P. 4(m) (emphasis added). Moreover, "if the plaintiff shows good cause for the failure [to serve], the court must extend the time for service for an appropriate period." *Id*. And "[e]ven if a plaintiff fails to show good cause, the District Court must still consider whether any additional factors warrant a discretionary extension of time." *Ideen v. Straub*, 613 F. App'x 117, 119 (3d Cir. 2015). Notably, the district court in this case took none of these steps: it did not provide notice to Mr. Rivera that he was required to complete service, it did not give Mr. Rivera an opportunity to show good cause for the failure to serve, and it did not consider Mr. Rivera's status as a *pro se* litigant who may have particular difficulty finding the name of the law librarian. JA 30-33.

or if the lower court chooses to raise it and gives Mr. Rivera adequate "notice and [] opportunity to be heard," *Njos*, 2017 WL 3217690, at *1 n.1, should the district court decide Defendant Doe's entitlement to immunity.

II. Affirming the District Court's Erroneous Interpretation of *Lewis* Would Have Profound Negative Consequences for Our Constitutional Scheme.

The importance of the right of access to the courts in our constitutional scheme cannot be overstated. "Because a prisoner ordinarily is divested of the privilege to vote," the right of access to the courts "might be said to be his remaining and most fundamental political right, because preservative of all rights." *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) (internal quotation marks omitted). And the underlying rights of the incarcerated are essential: The Supreme Court "has 'constantly emphasized'" that "habeas corpus and civil rights actions are of 'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." *Bounds*, 430 U.S. at 827 (quoting *Johnson v. Avery*, 393 U.S. 483, 485 (1969) and *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974)). Indeed, prisoner suits that "raise heretofore unlitigated issues . . . are the first line of defense against constitutional violations." *Id.* at 827-28.

For the right of access to the courts to mean anything, it must provide prisoners with the ability to have their claims actually *heard* by a court, so that a court may provide redress for any constitutional violations. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) ("[E]very right, when withheld, must have a

remedy, and every injury its proper redress."). Effectively, then, if prisoners lack access to the courts sufficient to actually vindicate their rights they lack the underlying rights themselves. *See, e.g.*, *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949) ("[A] right which . . . law creates but which it does not supply with a remedy is no right at all."). If the right of access to courts were to be read as the district court would have it—that a prisoner has a right to file, but not actually *pursue*, a civil rights claim—the right of access to courts would be rendered a nullity. So, too, would prisoners' underlying constitutional rights. After all, it does prisoners little good to allow them to file a complaint, but not to actually litigate it. "*Meaningful* access to the courts is the touchstone." *Bounds*, 430 U.S. at 823 (emphasis added; alteration and internal quotation marks omitted). The right as construed by the district court is the opposite—meaningless.

A right of access to the courts that is in-name-only would make a mockery of the judicial system itself. In our constitutional scheme "[i]t is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm" and, more specifically, "to remedy past or imminent official interference with individual inmates' presentation of claims to the courts." *Lewis*, 518 U.S. at 349. The Supreme Court observed in *Christopher* that "the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." 536 U.S. at 414-15. The courts cannot

provide relief if the right of access to the courts extends only to the filing of a complaint, but deserts a plaintiff thereafter. It is no wonder, then, that the American Bar Associations Standards for the Treatment of Prisoners state that "[p]risoners' access to the judicial process should not be restricted by . . . the phase of litigation involved," and that a "correctional facility should provide prisoners reasonable access to updated legal research resources." ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS, STANDARDS 23-9.2(b), 23-9.5(a) (2011), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners/.

A properly-interpreted access right not only reflects the courts' essential role in our constitutional scheme, but benefits the court system itself. *First*, law libraries allow a prisoner to better present their case to the court, assisting the court in its adjudication of the issue. Prisoners must already navigate a highly technical habeas corpus and post-conviction appeals process, and must maneuver through the increasingly complex jurisprudence under § 1983 and the Prison Litigation Reform Act. *See* David Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2021 (2018) (describing the "confluence of legal and situational factors—doctrinal reference, statutory hurdles, and the many difficulties associated with litigating a civil rights case against one's jailers"). Those mechanisms serve to screen out many prisoner cases; for those that

remain, the court system benefits from effective *pro se* advocacy, for which a prison law library is essential.

Second, a robust access to courts right allows cases to be actually adjudicated on the merits, rather than getting shunted out of the court system through prison officials' denial of law library access. The judicial system, as a whole, benefits from the presentation of serious civil rights violations, and many of the Supreme Court's recent and/or foundational prisoner rights cases were litigated by *pro se* prisoners. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352 (2015) (in case litigated by a *pro se* prisoner through the Court of Appeals' decision, holding that denial of a religious accommodation under prison system's grooming policy violates Religious Land Use and Institutionalized Persons Act); *Erickson v. Pardus*, 551 U.S. 89 (2007) (in case litigated by a *pro se* prisoner through the Court of Appeals' decision, finding the court of appeals departed from the liberal pleading standards and reaffirming that *pro se* documents are to be liberally construed); *Hudson v. McMillian*, 503 U.S. 1 (1992) (in case litigated by a *pro se* prisoner through the Court of Appeals' decision, holding that excessive force against prisoner may constitute cruel and unusual punishment even if prisoner does not suffer serious injury); *Bell v. Wolfish*, 441 U.S. 520 (1979) (in case arising from complaint filed by *pro se* prisoner, deciding the proper standard for evaluating the constitutionality of conditions of pretrial detention); *Estelle v. Gamble*, 429 U.S. 97 (1976) (in case litigated by *pro se* prisoner

before the district court, holding deliberate indifference to a prisoner's serious illness or injury constitutes cruel and unusual punishment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (in case litigated by *pro se* prisoner through the cert petition stage, holding that the Sixth and Fourteenth Amendments guarantee a right of legal counsel to anyone accused of a crime). A right of access to law library material that ends before the litigation process concludes would very likely have meant that many of these cases would never have been presented to the Court, to the detriment of the court system and society writ large.

Finally, a right that terminates sometime after a complaint is filed but before a case is terminated would create perverse incentives for prisons. The Supreme Court in *Lewis* explained that the right of access to the courts extends to only three types of suits: those that "attack their sentences, directly or collaterally," or "challenge the conditions of their confinement." 518 U.S. at 355. That third type of claim is generally brought against the very prison system that has control over the prisoner's access to courts. In other words, if the right of access to the courts stopped short of trial, a prison system could withdraw law library materials from an inmate after the filing of his complaint and effectively sabotage his ability to litigate a conditions of confinement claim *against that very same prison system*. That cannot be the law.

The district court's interpretation of the right of access to the courts is thus not only profoundly wrong on the law, it is deeply troubling.

CONCLUSION

For the reasons stated above, this Court should reverse the district court's dismissal of Mr. Rivera's Complaint on qualified immunity grounds.

Dated: November 12, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 10,420 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: November 12, 2020

s/ Devi M. Rao
Devi M. Rao

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1(e), I certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

November 12, 2020 *s/ Devi M. Rao*
Devi M. Rao

CERTIFICATE OF VIRUS SCAN

Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was performed on this electronic brief/file using Sophos Endpoint Advanced, version 10.8.9.2, last updated November 12, 2020 and that no virus was detected.

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Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2020, I electronically filed the foregoing *Opening Brief of Appellant Michael Rivera and Joint Appendix Vol. I* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. 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.

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