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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REPLY BRIEF OF APPELLANT MICHAEL RIVERA

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SUMMARY OF ARGUMENT

Mr. Rivera had a clearly-established constitutional right of access to the courts that extended throughout all phases of his underlying case, and Defendants violated this right when they denied him access to *all* legal resources before and during his trial. Defendants offer no counter to Mr. Rivera's straightforward plain-text reading of Supreme Court and Third Circuit precedent, and instead point to nonbinding and secondary sources to argue that their actions were not clearly unlawful. Defendants also insist that Mr. Rivera must identify an identical prior case to show that his constitutional right was clearly established, one in which "an inmate who, after his case has been pending for nearly two years, when he is temporarily transferred to another prison closer to the courthouse and placed in segregated housing on the eve of trial, requests access to legal materials." Defs.' Br. 11. This level of specificity is absurd—and is not required. In light of Supreme Court precedent and this Court's precedent, Defendants had more than "fair notice" that their conduct was unconstitutional.

Defendants also contend that Mr. Rivera failed to plead all the elements of a constitutional violation. Because the district court did not reach this issue, this Court need not reach it either, and can remand to the district court to resolve it in the first instance. Should this Court decide to reach the question, however, it should hold that Mr. Rivera adequately pled all the elements of an access to courts claim.

ARGUMENT

I. Defendants Are Not Entitled To Qualified Immunity.

A. Supreme Court and Third Circuit Precedent Clearly Establish That a Prisoner's Right of Access to the Courts Persists Throughout the Course of His Underlying Claim.

Since the Supreme Court first considered the question in *Bounds v. Smith*, it has been "established beyond doubt that prisoners have a constitutional right of access to the courts." 430 U.S. 817, 821, 828 (1977). And while the Court subsequently constrained right of access claims in some ways in *Lewis v. Casey*, 518 U.S. 343 (1996), that case makes clear that the fundamental right of access extends to all phases of litigation. *See* Opening Br. 18-21. Defendants' argument to the contrary—that the constitutional right ends after a prisoner files a complaint, Defs.' Br. 29-30—fails. First, they do not meaningfully challenge Mr. Rivera's textual reading of the majority opinion in *Lewis* or the Court's later reasoning in *Christopher v. Harbury*, 536 U.S. 403 (2002). Instead, they rely exclusively on a *dissenting* opinion and two secondary sources—neither of which are binding sources of law that can undermine clearly-established law set out by the Supreme Court. Second, Defendants cannot explain why—if such a right does not exist—this Court has addressed on the merits numerous access to courts claims at all different stages of litigation.

1. Defendants Misread *Lewis* and Ignore *Christopher*.

Lewis reflects a robust constitutional right of access that broadly protects incarcerated litigants' rights to meaningfully *present* and *pursue*—not just file—legal claims. Mr. Rivera's opening brief pointed to *nine* instances where the *Lewis* Court used language conveying that the right continues throughout the litigation process. Opening Br. 18-21. Defendants acknowledge this, *see* Defs.' Br. 30, and do not in any way contest Mr. Rivera's reading of these terms.[1] Rather than offering an alternative interpretation of this language, Defendants argue that "this Court need not do that" because Justice Souter's partial dissent in *Lewis*, as well as two secondary sources discussing the case, support their view that the clearly-established law provides a right of access to the courts only to *file* a complaint, and no further.[2] Defs.' Br. 30-31. Not so.

Defendants' reference to a single line in Justice Souter's partial dissent in *Lewis* does not change the plain meaning of the Court's holding, which embraced a broad constitutional right of access to the courts. A dissent's understanding of the

[1] Defendants take issue with Mr. Rivera's use of dictionaries, Defs.' Br. 30, but turning to dictionaries is the natural way to determine what the Court meant in *Lewis*, *see, e.g.*, *Herrera-Reyes v. Att'y Gen. of U.S.*, 952 F.3d 101, 108 (3d Cir. 2020) (using a dictionary to interpret precedent), and Defendants cannot muster any alternative interpretation of the Court's plain language.

[2] Defendants also point to the "litigate effectively" language in *Lewis* to support their reading of the case, Defs.' Br. 30, but Mr. Rivera already explained why this language does not suggest that the right of access terminates upon the filing of a complaint, Opening Br. 28-29.

majority opinion does not create binding precedent or change the scope of the majority's holding—dissenting opinions "carry no legal force." *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1511 (2020). "As every judge learns the hard way, 'comments in [a] dissenting opinion' about legal principles and precedents 'are just that: comments in a dissenting opinion.'" *Id.* (quoting *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177 n.10 (1980)). Indeed, Defendants cannot identify a single case from the Supreme Court, this Court, or any other Court of Appeals citing Justice Souter's dissent to interpret the scope of *Lewis* in the quarter-century since *Lewis* was decided. Put simply, the majority opinion in *Lewis* was clear on its face that the right of access was an *ongoing* one, and a single sentence from a partial dissent cannot undermine that.

At any rate, even if the extent of the right was unclear in *Lewis*, Justice Souter's broad view of the access right won out in *Christopher v. Harbury*, 536 U.S. 403 (2002). In *Christopher*, Justice Souter, now writing for the majority, explained that the constitutional right of access extends to an entire class of backward-looking claims alleging that official acts "have caused the *loss* or inadequate *settlement* of a meritorious case." *Id.* at 414 (emphases added). Such backward-looking claims can arise from official acts that hindered plaintiffs' ability to present their claims at *any* stage of past litigation. *See* Opening Br. 21-22. Notably, Defendants offer no alternative interpretation of *Christopher*. This is unsurprising, since their cramped

understanding of the right of access would eviscerate the class of backward-looking claims that *Christopher* explicitly embraces. *Id.* Instead, Defendants contend that *Christopher* does not clearly establish the law because it "did not arise in the 'prison context.'" Defs.' Br. 32 n.22. But no such divide exists in the caselaw: *Christopher* interpreted *Lewis*, offered no reason to distinguish the access claim at issue from one arising in the prison context, Opening Br. 21, and this Court has repeatedly cited *Christopher* in prison-based access cases.[3]

Defendants' reliance on a couple of secondary sources to support their narrow view of the right is also faulty. Defs.' Br. 31. Initially, as Defendants recognize, only one of these sources actually supports their view of the law, *id.*; the second opines that the "stronger argument" is that "the right of access does not end with the initial court filing," Michael B. Mushlin, 3 Rights of Prisoners §12:7 (5th ed.).[4] At any rate, a law professor's reading of a Supreme Court decision cannot alter clearly established law or change the broad text of *Lewis* and *Christopher*, and Defendants point to no cases suggesting otherwise.

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[3] *See, e.g.*, *Monroe v. Beard*, 536 F.3d 198, 205 (3d Cir. 2008); *Monroe v. Superintendent Coal Twp. SCI*, 597 F. App'x. 109, 111 (3d Cir. 2015); *Lewis v. Wetzel*, 794 F. App'x. 157, 159 (3d Cir. 2020).

[4] Another commentator, not cited by Defendants, agrees. John Boston, Overview of Prisoners' Rights 152 (2013), https://law.loyno.edu/sites/law.loyno.edu/files/Boston%20PLRA%20Overview%20Nov%202013.pdf (reading *Lewis* to extend the right "to all stages of the litigation").

2. This Court's Precedent Clearly Established Mr. Rivera's Constitutional Right.

This Court has confirmed that prisoners' right of access extends throughout the course of litigation by addressing, on the merits, a host of access claims that arise at different stages of litigation. *See* Opening Br. 23-26. Defendants seek to undermine these cases in four ways. None are persuasive.

First, Defendants attempt to discount some cases Mr. Rivera identified by noting that they "are non-precedential." Defs.' Br. 32. But, as Mr. Rivera's opening brief noted, while they are not binding, nonprecedential decisions can serve as "persuasive authorities" for the clearly-established inquiry. *James v. N.J. State Police*, 957 F.3d 165, 170 (3d Cir. 2020); Opening Br. 23 n.5. Moreover, as Defendants concede, Mr. Rivera also cites precedential decisions from this Circuit; the nonprecedential decisions are merely additional, persuasive authorities.

Second, Defendants suggest that some of this Court's cases are irrelevant because they "involved active interference" instead of "affirmative legal assistance." Defs.' Br. 32. But this dichotomy is found nowhere in *Lewis* or *Christopher*, nor is it reflected in this Court's caselaw. Defendants rely on mostly out-of-circuit cases for the proposition that such a distinction exists, Defs.' Br. 16 n.8, 32, and the only case they cite from this Circuit actually shows that this Court does *not* distinguish in this way, describing the right of access as one that "prohibits active interference with a prisoner's preparation or filing of legal documents *and* ensures a reasonably

adequate opportunity to *present* violations of fundamental constitutional rights." *Edney v. Haliburton*, 658 F. App'x 164, 166 (3d Cir. 2016) (emphases added) (cited at Defs.' Br. 16 n.8).[5] Faced with a multitude of cases from this Circuit addressing—on the merits—access claims that arise throughout the course of litigation, and no binding precedent from the Supreme Court or this Court drawing this supposed distinction, no reasonable officer could have concluded that an incarcerated litigant's right of access to the courts protected him from "active interference," but not from a refusal to furnish "affirmative legal assistance."

Next, Defendants claim that some of the cases Mr. Rivera cites are inapposite because they ultimately "held that the inmate did not show an actual injury." Defs.' Br. 32-33. But this misses the point: In those cases, this Court did not dismiss a litigant's right of access claim *because* the right ended at the time the plaintiff successfully filed suit. That this Court reached the merits of these cases at all shows that it has always accepted that the constitutional right of access extends past the filing of complaints. Had the Court believed otherwise, it surely would have disposed of all these cases on that ground alone, without touching the more fact-specific question of actual injury. *See* Opening Br. 26.

[5] Even if this distinction was meaningful, Defendants admit that among the many cases Mr. Rivera identified in his opening brief, several concern what they would deem "affirmative legal assistance." Defs.' Br. 32.

Defendants' final claim, found in a footnote, is that the law cannot be clearly established if it is only "implicit" in this Court's precedent. Defs.' Br. 33 n.24. But, of course, in addressing whether the law is clearly established, this Court looks to "controlling authority," *El v. City of Pittsburgh*, 975 F.3d 327, 339 (3d Cir. 2020), meaning to precedent from this Court *and* Supreme Court precedent. Moreover, this Court *explicitly* cited *Lewis* for the proposition that a plaintiff must show that "his efforts to pursue" (not file) a legal claim were frustrated. *Allah v. Seiverling*, 229 F.3d 220, 224 n.5 (3d Cir. 2000). Indeed, in *Allah*, this Court quoted the "efforts to pursue" language from *Lewis* immediately before stating that the plaintiff's inability "to file a brief"—something that necessarily takes place after the filing of a complaint—was "sufficient to state a claim under [*Lewis*]." *Id*. The many cases presuming that the right of access extended throughout all stages of litigation reflect this clearly established law. Opening Br. 22-26.

The clear state of the law is reflected in Defendants' admission that, "it is the policy of the [Pennsylvania] DOC to give inmates access to legal materials throughout the pendency of their cases." Defs.' Br. 29 n.19 (citing Pa. DOC Policy No. DC-ADM 007, *Access to Provided Legal Services*, at 1); *cf. Hope v. Pelzer*, 536 U.S. 730, 743-44 (2002) (considering DOC regulations "[r]elevant to the question whether" caselaw gave "fair warning" to officers "that their conduct violated the Constitution"); *Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) (relying in part on

state law to find that defendant was "on notice that he acted unconstitutionally"). So, too, the clarity of the constitutional rule is reflected in the ABA's professional guidelines, which state that "prisoners' 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/; Opening Br. 31-32 n.19. Likewise, that other circuits read the relevant Supreme Court precedent to create a continuing access right reflects the clarity of the law. *See Kane*, 902 F.3d at 196 (explaining that "[a]nalogous cases from other circuits [can] underscore that the right . . . was clearly established"); *Marshall v. Knight*, 445 F.3d 965, 969 (7th Cir. 2006) (rejecting argument that *Lewis* "confines access-to-courts claims to situations where a prisoner has been unable to file a complaint or an appeal"); *Fox v. N.C. Prison Legal Servs.*, 751 F. App'x. 398, 400 (4th Cir. 2018) (holding that "'a prisoner's simple ability to file a complaint is not dispositive' of an access-to-courts claim" (quoting *Marshall*, 445 F.3d at 969)). Given all this, no reasonable officer would have thought the Constitution allowed them to deny Mr. Rivera all legal materials immediately before and during his trial.

* * *

As Mr. Rivera's opening brief laid out in considerable detail, and which Defendants left unrebutted, adopting Defendants' view of the extent of the access right would prevent incarcerated plaintiffs from vindicating fundamental constitutional rights and create perverse incentives for prisons. *See* Opening Br. 35-39. A right to file a complaint is meaningless if prisoners are then left powerless to actually pursue or litigate their claims; such a limited right is an abdication of courts' fundamental duty to "provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm." *Lewis*, 518 U.S. at 349.

B. Defendants Make a Mockery of the "Clearly Established" Inquiry.

Defendants demand an absurd level of specificity from prior caselaw to defeat qualified immunity. Under their case-matching view of the clearly established inquiry, Mr. Rivera must find a case where a prisoner was unable "to access the legal materials on the few days he demands, just before and during trial, even though his case had been pending for nearly two years." Defs.' Br. 22; *see also id.* at 26-27 (describing facts that would be required in a prior case to clearly establish the law in *four* sentences spanning almost a full page). That is, Defendants suggest Mr. Rivera must find a prior case that mirrors the precise factual contours of his case, down to minute details like the exact timing of his request for legal materials, and the same number of years his case was pending before he was denied access.

But this parody version of qualified immunity badly misreads Supreme Court precedent, and contravenes this Court's oft-repeated recognition that "[t]o be clearly established, the very action in question need not have previously been held unlawful." *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 993 (3d Cir. 2014); *see also Kedra v. Schroeter*, 876 F.3d 424, 450 (3d Cir. 2019). Both the Supreme Court and this Court have consistently and overwhelmingly affirmed that a "factual wrinkle" does not render prior case law inapplicable or unclear. *Hicks v. Feeney*, 770 F.2d 375, 380 (3d Cir. 1985); *see also Ziglar v. Abassi*, 137 S. Ct. 1843, 1866 (2017) ("It is not necessary, of course, that 'the very action in question has previously been held unlawful.'") (citation omitted). Indeed, insisting on "precise factual correspondence" with a prior case defeats the purpose of qualified immunity "by permitting . . . officials one liability free violation of a constitutional or statutory requirement." *Kopec v. Tate*, 361 F.3d 772, 778 (3d Cir. 2004) (quotation marks and citation omitted). As a result, this Court has explicitly acknowledged time and again that an "unduly narrow construction of the right at issue" would render the "clearly established" prong meaningless. *Estate of Lagano v. Bergen Cty. Prosecutor's Office*, 769 F.3d 850, 859 (3d Cir. 2014). Requiring Mr. Rivera to find another case where a prisoner had a case pending for two years and requested access to legal resources in the days before his trial would impose an absurd and purposeless burden on him and immunize Defendants from patently unconstitutional conduct.

To the extent that the Supreme Court has suggested highly-specific precedent is ever required to put officials on notice of constitutional rights, it has limited such statements to the Fourth Amendment context and analogous claims where officials are forced to make fact-intensive judgments in the face of novel, unpredictable circumstances—not to claims like this one. *See, e.g.*, *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) ("[S]pecificity is especially important in the Fourth Amendment context."); *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) ("Probable cause turns on the assessment of probabilities in particular factual contexts and cannot be reduced to a neat set of legal rules" (quotation marks, alterations, and citations omitted)); *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (describing the "hazy border between excessive and acceptable force"). Indeed, every Supreme Court case that Defendants cite to suggest that the clearly-established inquiry must be highly specific involved a Fourth Amendment claim, where "the result depends very much on the facts of each case." *Brosseau*, 543 U.S. at 201; Defs.' Br. 24-26.[6]

Here, the general rule set out in *Lewis* and *Christopher* is sufficiently clear. Indeed, this Court has explained that "[i]t is well settled that prisoners have a constitutional right [of] access to the courts," *Allah*, 229 F.3d at 224, and has

[6] Likewise, this Court's opinion in *Sauers v. Borough of Nesquehoning*, 905 F.3d 711 (3d Cir. 2018), cited by Defendants, Defs.' Br. 26, addressed a claim of reckless endangerment by an officer during a high-speed chase, a situation in which "officers are often forced to make split-second judgments . . . in circumstances that are tense, uncertain, and rapidly evolving." *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014).

demonstrated that this right extends to each step of the litigation process, such as the filing of a brief, *id*. at n.5, and the prosecution of an appeal, *Tourscher v. McCullough*, 184 F.3d 236, 242 (3d Cir. 1999); *see also* Opening Br. 22-26. Faced with this precedent, no reasonable official in Defendants' positions would have needed a factually identical case to understand that Mr. Rivera had a clearly-established right to access the courts before and during his jury trial.

C. Qualified Immunity is Inappropriate Because the Constitutional Violation Was "Obvious."

Ultimately, "the salient question" is whether Defendants had "fair warning" that their conduct was unconstitutional. *Hope*, 536 U.S. at 741. Sometimes, "a general constitutional rule already identified in the decisional law" will make a constitutional violation "obvious." *Id.* (quotation marks omitted); *see also Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020). Indeed, this Court has observed that "[i]f the unlawfulness of the defendant's conduct would have been apparent to a reasonable official," then "it is not necessary that there be binding precedent from this circuit so advising." *Williams v. Bitner*, 455 F.3d 186, 192 (3d Cir. 2006). Given that (1) *Bounds* held that "meaningful access to the courts is the touchstone," 430 U.S. at 823 (internal quotation marks and alterations omitted); (2) *Lewis* time again used language denoting a continuing right, 518 U.S. at 348-49, 351-57, 360; (3) *Christopher* discusses "backward-looking" claims that address "the loss or inadequate settlement of a meritorious case," 536 U.S. at 414-15; (4) this Court has

repeatedly addressed access claims on the merits that arise throughout the litigation process; and (5) it is Pennsylvania DOC's policy to "give inmates access to legal materials throughout the pendency of their cases," Defs.' Br. 29 n.19, it was "obvious" that denying Mr. Rivera all legal materials on the eve of his trial was unconstitutional.

II. Mr. Rivera Adequately Pled an Access to Courts Claim.

Defendants contend that Mr. Rivera failed to plead all the elements of a constitutional violation. Because the district court did not reach this issue, this Court need not reach it either, and can remand to the district court to resolve it in the first instance. Should this Court decide to reach the question, however, it should hold that Mr. Rivera adequately pled all the elements of an access to courts claim related to his complete inability to access legal materials in July 2017.[7] He described an injury to a "nonfrivolous" underlying conditions-of-confinement claim, *Christopher*, 536 U.S. at 415, established that the denial of access hindered his efforts to pursue that claim, *Lewis*, 518 U.S. at 351, and adequately alleged the involvement of the Defendants.

[7] Mr. Rivera made clear that his claim centers on the denial of legal materials that occurred in July 2017. *See* Opening Br. 7 n.4. Thus, the three pages Defendants spend discussing other times when Mr. Rivera was denied access to legal materials is a red herring. *See* Defs.' Br. 16-19; *see also id.* at 19 (recognizing July 2017 allegations as "at the heart of Rivera's claim").

A. Defendants Do Not Give Mr. Rivera's *Pro Se* Complaint the Liberal Construction It Is Owed.

As an initial matter, Defendants ignore that they must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom," *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996), and that the central question is whether Mr. Rivera is entitled to relief "under any reasonable reading of the complaint," *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Phillips v. Cy. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)). Likewise, Defendants attempt to foist unduly exacting requirements on Mr. Rivera's *pro se* complaint even though it must be "held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *see also In re Energy Future Holdings Corp.*, 949 F.3d 806, 824 (3d Cir. 2020) (explaining that courts must accord *pro se* plaintiffs "special care" when reviewing their complaints).

When viewed properly—accepting Mr. Rivera's factual allegations as true and affording his *pro se* pleadings the liberal construction they are owed—the Complaint states a clear access to courts claim.

B. Mr. Rivera Sufficiently Alleged an Actual Injury.

1. Mr. Rivera Adequately Alleged Injury To a Nonfrivolous Underlying Claim.

At the outset, *Lewis* made clear that only certain types of underlying claims can form the basis of an access to courts claim, and there is no dispute here that Mr. Rivera's "challenge [to] the conditions of [his] confinement" meets this requirement. *Lewis*, 518 U.S. at 355; Defs.' Br. 14 (conceding that "here, a past legal claim related to conditions of confinement is at issue").

Defendants argue that the Complaint failed to give sufficient information about the underlying claim. *See* Defs.' Br. 19-20. But Mr. Rivera described the nature of his claim, JA 36 (Compl. ¶ 11), stated that it proceeded to a civil jury trial, JA 39 (Compl. ¶ 25), and explained that he testified and attempted to introduce medical documents and a declaration into evidence, *id*. On top of this, he made additional facts available to the district court and to Defendants by providing the case name and number ("*Rivera v. O'Haire, et al.*, No. 1:15-CV-1659"). JA 36 (Compl. ¶ 11). With that citation, all publicly available details are readily accessible through the case docket; indeed, the district court took judicial notice of it. JA 7.[8] Defendants, too, took notice of this information, observing that "[t]he underlying claim was that, after Rivera was subdued following his assault of a correctional

[8] Defendants also recognize that "court[s] may take notice of matters of public record." Defs.' Br. 4.

officer, several officers retaliated by assaulting him and so used excessive force." *See* Defs.' Br. 3-4, 20.

The information Mr. Rivera provided in his Complaint about his underlying claim stands in stark contrast to the vague language in other complaints the dismissal of which this Court has affirmed. JA 36, 39 (Compl. ¶¶ 11, 25). For example, in *Toussaint v. Good*, this Court affirmed a grant of summary judgment where the plaintiff alleged an inability to file a motion for bail pending appeal but "alleged no specific facts regarding this alleged harm; he provided no case numbers, dates of attempted filing, or details describing how his litigation was affected." 276 F. App'x 122, 124 (3d Cir. 2008); *see also Obiegbu v. Werlinger*, 581 F. App'x 119, 123 (3d Cir. 2014) (affirming dismissal of an access claim where the complaint simply described underlying matters as "ongoing criminal appeals"); *Heath v. Link*, 787 F. App'x 133, 136 (3d Cir. 2019) (affirming dismissal where plaintiff did not describe the "claims the [confiscated] materials would purportedly support").

If Defendants' actual suggestion is that the underlying claim was frivolous, this gambit fails as well. This Court affirms dismissals only when the underlying claim is *clearly* frivolous, such as when the same claim was previously raised and rejected on the merits. *See, e.g.*, *Spuck v. Ridge*, 347 F. App'x 727, 730 (3d Cir. 2009). Here, Mr. Rivera stated—and a docket search confirms—that his underlying

claim proceeded all the way to *trial*, so the district court in that case necessarily determined that the case was not frivolous. JA 36, 39 (Compl. ¶¶ 11, 25).

2. The Complaint Plausibly Connects the Denial of Access to the Loss of The Underlying Claim.

Mr. Rivera explained how the denial of legal materials hindered his efforts to pursue his underlying legal claim. As set forth in the Complaint, between July 7 and July 11, 2017, both computers in the mini law library were inoperable, JA 37-39 (Compl. ¶¶ 16-18, 21-22, 24-25), and Mr. Rivera was denied access to all the legal books he requested, JA 38-39 (Compl. ¶¶ 22-24). As a result, he was unable to access electronic or physical copies of the Federal Rules of Evidence and the Federal Rules of Civil Procedure, JA 38-39 (Compl. ¶¶ 22, 24), which prevented him from having medical documents and an unsworn declaration admitted into evidence during his trial, JA 39 (Compl. ¶ 25). The exclusion of this evidence led to an adverse verdict. *Id*. These detailed factual allegations—by a *pro se* litigant, no less—described how the denial of legal resources led to the loss of the underlying claim.

This Court has held that complaints including similar allegations sufficiently connect the denial of access with the alleged injury. For example, like the plaintiff in *Jones v. Domalakes*, 161 F. App'x 216, 217-18 (3d Cir. 2006), Mr. Rivera alleged that Defendants' actions resulted in the loss of a claim, JA 39 (Compl. ¶¶ 25-26); identified the dates on which he was denied access to the computers and books, JA 37-39 (Compl. ¶¶ 16-19, 22, 24); and included the case name and number of the

underlying claim so the lower court could verify the jury's verdict, JA 36 (Compl. ¶ 11); *Jones*, 161 F. App'x at 217 (noting that complaint included first page of court opinion indicating that plaintiff's brief was untimely filed).

Defendants contend—notably, without any legal support—that Mr. Rivera was required to identify a specific hearsay exception under which he would have had the excluded documents admitted. Defs.' Br. 20. But this proposed requirement is anathema to a court's review of a *pro se* complaint at the motion to dismiss stage. Mr. Rivera set forth "sufficient facts to support plausible claims," which is all he was required to do. *Fowler*, 578 F.3d at 211-12. Mr. Rivera alleged that the documents "were deemed to be considered as hearsay by Judge Mehalchick because Rivera failed to testify about them while on the witness stand," and that "if he had been allowed access to the federal legal reference books he was requesting…he would have known that he had to testify about the discovery documents he wanted to introduce into evidence." JA 39 (Compl. ¶ 25). This level of detail in a *pro se* complaint is more than sufficient. *See Erickson*, 551 U.S. at 94 (holding *pro se* complaint "must be held to less stringent standards than formal pleadings drafted by lawyers").

Defendants next argue that Mr. Rivera did not sufficiently describe the contents of the excluded documents or their relevance. Defs.' Br. 20. But Mr. Rivera's Complaint makes clear that the excluded documents included medical

documents, JA 39 (Compl. ¶ 25), and that the underlying claim concerned excessive force, JA 7 n.1. He is entitled to the reasonable—and, in fact, obvious—inference that preventing a jury from viewing medical documents would impact the jury's verdict on an excessive force claim.

Mr. Rivera's Complaint is a far cry from those cases where dismissal is warranted because the alleged connection between the denial of resources and the lost claim is implausible or impossible. For instance, in *Whitehead v. Schmid*, this Court found that the complaint failed to establish the connection required by *Lewis* because the missed deadline for filing a direct appeal came approximately six months before defendant's alleged actions. 148 F. App'x 120, 122 (3d Cir. 2005). And in *Credico v. W. Goshen Police*, this Court affirmed dismissal of an access to courts claim where the defendant's removal of the plaintiff's pencil during a court hearing came after the court had dismissed the charges. 574 F. App'x 126, 129-30 (3d Cir. 2014). Mr. Rivera's allegations are starkly different: He alleged that he was denied access to the Federal Rules of Evidence and Federal Rules of Civil Procedure both before and during his trial, that his inability to review those rules is closely tied to the exclusion of documents from his civil jury trial, and that the exclusion of documents led to an adverse verdict. There is nothing implausible about these allegations.

Mr. Rivera's allegations are nothing like those in *Monroe*, which Defendants cite for the proposition that Mr. Rivera did not sufficiently demonstrate the relevance of the medical documents to the underlying excessive force claim. Defs.' Br. 20 (citing *Monroe v. Superintendent Coal Twp. SCI*, 597 F. App'x 109, 113 (3d Cir. 2015)). In *Monroe*, the complaint outlined a chain of causation that was "too attenuated and speculative": If letters with no return address had not been destroyed, Monroe could have sought counsel, who could have located the author of the letter, who could have identified exculpatory evidence, which would have been admitted, which would have changed the outcome of the trial. *Monroe*, 597 F. App'x at 111, 114. In contrast, the connection called into question here—that admission of medical documents would have had an impact on a jury verdict in an excessive force trial—is clear and direct.[9]

C. Mr. Rivera Sufficiently Alleged the Involvement of Defendants Monko and Gilbert.

Defendants next argue that even if Mr. Rivera pled an actual injury, "Lt. Monko and Sgt. Gilbert were not the cause of it." Defs.' Br. 21.[10] They make the

[9] Defendants' reliance on *Bowens v. Matthews*, 765 F. App'x 640 (3d Cir. 2019), is similarly unpersuasive. *See* Defs.' Br. 20. There, the Court concluded that Mr. Bowens "failed to allege a plausible access-to-the-courts claim" because "Bowens failed to submit" the confiscated reports at issue "well before the defendants confiscated them." *Bowens*, 765 F. App'x at 643.

[10] Defendants frame this as a "causation" requirement in an access to courts claim. Defs.' Br. 13. Regardless of the label, Mr. Rivera has met this requirement.

uncontroversial point that Mr. Rivera was required to allege that each Defendant "took or was responsible for actions that hindered [his] efforts to pursue a legal claim." Defs.' Br. 14. That is just what Mr. Rivera did here.

At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice" to demonstrate the involvement of defendants. *Lewis*, 518 U.S. at 358 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). And where a plaintiff plausibly alleges the defendants "personally committed the alleged acts," dismissal is not appropriate. *Gorrell v. Yost*, 509 F. App'x 114, 118 (3d Cir. 2013). The factual allegations in Mr. Rivera's Complaint easily meet this threshold.

Mr. Rivera made the following specific allegations that show Defendants Gilbert and Monko exercised control over the legal resources that he was denied:

- "Defendants Monko and Gilbert are the two ranking officers within the RHU at SCI-Retreat, and both are responsible for the upkeep and maintenance of the law library legal research computers." JA 39 (Compl. ¶ 27).
- On Friday, July 7, 2017, Defendant Monko told Mr. Rivera he would "get [him] . . . in the law library sometime today" and agreed to provide Mr. Rivera with law library access "as much as possible." JA 36 (Compl. ¶ 14).
- That evening, Defendant Gilbert told Mr. Rivera "sometime after dinner, I'll put you in the law library," and later escorted him there. JA 37 (Compl. ¶ 16).
- Defendant Gilbert attempted to log onto the law library computers and then promised Mr. Rivera that he would "get with Lieutenant Monko

> and the Law Librarian" "to get the computers fixed." JA 37 (Compl. ¶¶ 18, 20).

Not only did Mr. Rivera—a *pro se* litigant—plausibly plead that Defendants exercised responsibility over the law library and relevant legal materials, but among these allegations Mr. Rivera recounts statements *by the defendants themselves* that place the responsibility for providing Mr. Rivera with law library access directly on their shoulders. Thus, Mr. Rivera has not made conclusory allegations about the Defendants' involvement. Rather, he set forth specific factual allegations, supported by the Defendants' own words and actions, demonstrating their involvement.

Instead of accepting these factual allegations as true, as they must, Defendants baldly assert that Defendants Monko and Gilbert "certainly" did not cause the denial of Mr. Rivera's access to the courts. Defs.' Br. 21. They cite *nothing* to support this claim. To credit Defendants' evidence-free assertions here would be "at odds with [the Court's] obligation to assume the truth of [Mr. Rivera's] factual proffer." *Watson v. Sec'y Pa. Dep't of Corr.*, 436 F. App'x 131, 135 (3d Cir. 2011). Defendants are free to pursue such factual disputes during discovery, and to argue these issues on summary judgment, but they may not do so here. *See Fowler*, 578 F.3d at 213 (noting that a plaintiff "need only put forth allegations that raise a reasonable expectation that discovery will reveal evidence of the necessary element") (quotation marks omitted).

D. Mr. Rivera Is At Least Entitled To An Opportunity to Amend.

If this Court decides to reach the question of the sufficiency of Mr. Rivera's Complaint in the first instance (and it need not), it should hold that the Complaint alleges all the necessary elements of an access to courts claim. At the very least, if this Court has doubts, it should remand to the district court with instructions that Mr. Rivera be given an opportunity to amend his Complaint.

"[I]f a complaint is subject to a Rule 12(b)(6) dismissal," a plaintiff must be given an opportunity to amend "unless such an amendment would be inequitable or futile." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 245 (3d Cir. 2008). This opportunity is afforded even if the plaintiff does not seek leave to amend. *Id.* Nor are prior opportunities to amend dispositive. *See Rose v. Bartle*, 871 F.2d 331, 354 (3d Cir. 1989) ("Although both Hill and Rose already have amended their original complaints once, we do not believe that they are thereby automatically precluded from seeking to amend their complaints a second time in accordance with our analysis here, in light of the liberal amendment policy underlying Fed.R.Civ.P. 15(a)."); *see also Mullin v. Balicki*, 875 F.3d 140, 152-53 (3d Cir. 2017) (refusing to treat prior leave to amend as dispositive).

If this Court determines that Mr. Rivera's allegations were insufficiently pled, affording him an opportunity to amend his Complaint would be neither futile nor inequitable. The alleged deficiencies Defendants point to, such as the need for

additional description of the underlying claim and excluded documents, can easily be addressed through amendment. And since Mr. Rivera only amended the Complaint once—with no guidance from the district court, and no counsel—no inequity would result from a second opportunity to amend. *C.f. Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 166 (3d Cir. 2004) (affirming dismissal without leave to amend where plaintiffs failed to cure the deficiencies identified by the district court and defendants had already defended against three complaints). If nothing else, this Court should remand to the district court to determine whether an opportunity to amend would be futile or inequitable. *See Estate of Lagano v. Bergen Cty. Prosecutor's Office*, 769 F.3d 850, 861 (3d Cir. 2014) (mandating an opportunity to amend the complaint unless the district court makes a finding of futility).

CONCLUSION

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

Dated: February 2, 2021

Respectfully submitted,

s/ Devi M. Rao

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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 6,162 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: February 2, 2021

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.

February 2, 2021 *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 February 2, 2021 and that no virus was detected.

February 2, 2021

s/ Devi M. Rao
Devi M. Rao

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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.

February 2, 2021

s/ Devi M. Rao
Devi M. Rao

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2021, I electronically filed the foregoing *Reply Brief of Appellant Michael Rivera* with the Clerk of the Court for the United States Court of Appeals for the Third 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.

Dated: February 2, 2021

s/ Devi M. Rao
Devi M. Rao