Case No. 81513

IN THE SUPREME COURT OF THE STATE OF NEVADA

SONJIA MACK,

Appellant,

vs.

BRIAN WILLIAMS; JAMES DZURENDA;
ARTHUR EMLING, Jr.; and MYRA LAURIAN;

Respondents.

On Response to Order Accepting Certified Questions from the
U.S. District Court for the District of Nevada
Case No. 2:18-cv-00799-APG-VCF
Honorable Judge Andrew P. Gordon, U.S District Court Judge

APPELLANT'S OPENING BRIEF

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NEVADA RULES OF APPELLATE PROCEDURE

RULE 26.1 ("NRAP 26.1") DISCLOSURE

The undersigned counsel of record certifies the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. The Appellant, SONJIA MACK ("Ms. Mack"), is an individual to whom the corporate ownership disclosures under NRAP 26.1(a) are inapplicable. Ms. Mack is appearing under her proper name and is not using any pseudonym.
2. The undersigned counsel of record has appeared in this matter before the U.S. District Court, and there are no prior proceedings in this matter in the courts of the State of Nevada.

DATED this 3rd day of September 2021.

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I. STATEMENT OF JURISDICTION

Jurisdiction is proper in the instant matter pursuant to NRAP 5(a) which provides, in relevant part, that "[t]he Supreme Court may answer questions of law certified to it by ... a United States District Court ... when requested by the certifying court, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court or Court of Appeals of this state."

II. ROUTING STATEMENT

This matter is presumptively and properly retained by the Supreme Court under the authority of NRAP 17(a)(6) which provides that "[t]he Supreme Court shall hear and decide... [q]uestions of law certified by a federal court."

III. CERTIFIED QUESTIONS PRESENTED FOR REVIEW

1. Is there a private right of action under the Nevada Constitution, Article 1, § 8?

2. Is there a private right of action under the Nevada Constitution, Article 1, § 18?
3. If there is a private right of action, what immunities, if any, can a state actor defendant raise as a defense?
4. If there is a private right of action, what remedies are available to a plaintiff for these claims?

V. STATEMENT OF THE CASE.

Appellant Sonjia Mack ("Ms. Mack") filed a 42 U.S.C. § 1983 civil rights action in the U.S. District Court for the District of Nevada (the "District Court") of Nevada against Nevada Department of Corrections ("NDOC") prison officials alleging they violated her various civil rights under directly analogous provisions of both the U.S. and Nevada Constitutions when they detained Ms. Mack during a visit to an inmate and further subjected her, in contravention of established NDOC regulations, to an unconsented, invasive, and entirely unproductive strip search without reasonable suspicion, without a search warrant, and without first affording her the opportunity to leave the prison facility.[1]

Following motion by Respondents, the District Court granted summary judgment in part and denied summary judgment in part as to Ms. Mack's various federal and state law claims.[2] The parties filed their respective objections to the summary judgment order, thereby prompting the District Court to certify questions to this Court as to the following questions of law:

1. Is there a private right of action under the Nevada Constitution, Article 1, § 8?

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[1] Appellant's Complaint, EOR 0001-0010.
[2] District Court Order on Respondents' Motion for Summary Judgment, EOR 0011-000.

2. Is there a private right of action under the Nevada Constitution, Article 1, § 18?
3. If there is a private right of action, what immunities, if any, can a state actor defendant raise as a defense?
4. If there is a private right of action, what remedies are available to a plaintiff for these claims?[3]

This Court requested clarification regarding the certified questions,[4] which the District Court duly provided.[5] This Court ultimately decided to accept the certified questions and ordered briefing by the parties.[6]

VI. STATEMENT OF FACTS.

On the morning of February 19, 2017, Ms. Mack and a female companion, Tina Cates ("Ms. Cates"),[7] arrived at the NDOC facility, High Desert State Prison ("HDSP"), to visit separately with their respective boyfriends.

After routine processing and while awaiting entrance into the visiting room area, Ms. Mack observed that Ms. Cates was approached by Defendant Arthur Emling, Jr., ("Defendant Emling") who called Ms. Cates

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[3] District Court Order Certifying Questions, EOR 0030-0033.
[4] Supreme Court Order Requesting Clarification, EOR 0034-0036.
[5] District Court Order Clarifying Certification Question, EOR 0037-0038.
[6] Supreme Court Order re Briefing, EOR 0039-0040.
[7] *See Cates v. Stroud, et al.*, U.S. District Court Case No.: 2:17-cv-01080-GMN-PAL; United States Court of Appeals for the Ninth Circuit Case No.: 18-17026; pending *certiorari* before the Supreme Court of the United States, Case No. 20-1438

by name and asked her to follow him outside, stating that the matter would only take a "few minutes."

Shortly thereafter, Ms. Mack was approached by Defendant John Does 1 and 2 who were both wearing black jumpsuits, who ordered Ms. Mack to come with them. Defendant John Does 1 and 2 gave Ms. Mack no choice of refusing to come with them or otherwise indicated that she was free to leave HDSP.

Defendant John Does 1 and 2 escorted Ms. Mack from the visiting waiting room area to an administrative building where they turned her over to the custody of Defendant Myra Laurian ("Defendant Laurian"). Defendant Laurian immediately escorted Ms. Mack to a separate room and ordered her to remove all of her clothing.

Ms. Mack was not informed and had no prior indication that she was to be strip searched. Further, Ms. Mack gave no consent, verbal or written, to be strip searched but was offered no choice in the matter by Defendant Laurian. Again, Defendant Laurian gave Ms. Mack no indication that she could refuse the strip search or that she was free to leave HDSP.

As she was not afforded any opportunity to refuse and also because she felt extremely unnerved and intimidated, Ms. Mack fully complied

with the strip search order given by Defendant Laurian. Defendant Laurian ordered the completely naked Ms. Mack to bend over and spread her buttocks, against which order Ms. Mack felt powerless to refuse.

Ms. Mack had no reason to believe that the search was even going to occur, much less that it could possibly extend to such a degree. Accordingly and understandably, she found the entire process and strip search extremely demeaning and humiliating.

Nothing illegal was discovered on or in Ms. Mack's person following the unclothed and invasive search of her person or personal effects by Defendant Laurian.

Ms. Mack was subsequently detained and interrogated, for a substantial period of time, by Defendant Emling in the HDSP administration building regarding what she knew about Ms. Cates and a rumored[8] attempt to bring drugs into HDSP and whether Ms. Mack was involved in any such attempt.

During the interrogation, Defendant Emling informed (threatened) Ms. Mack that she could go to jail.

Ms. Mack emphatically denied any attempt to bring drugs into the facility, any knowledge of any such attempt, and further informed

[8] At best, it was strictly a rumor as no drugs or anything illegal was discovered with Ms. Cates, in her personal effects, or in her vehicle.

Defendant Emling that she had recently just been in telephone contact Ms. Cates and was merely catching a ride with her to the prison so that Ms. Mack could visit with Ms. Mack's boyfriend.

Following the strip search and interrogation, despite finding no drugs or illegal substance, Defendant Emling and Defendant Laurian refused to allow Ms. Mack to visit with her boyfriend. Neither Defendant Emling nor Defendant Laurian gave Ms. Mack any reason for denying her visit to her boyfriend, which was the sole purpose of her being at HDSP.

After refusing to allow her visitation, Defendant Emling and Defendant Laurian summarily ordered Ms. Mack to leave HDSP.

In contravention of NDOC Administrative Regulation ("AR") 719 and NDOC Operational Procedure ("OP") 712, Defendant Emling gave Ms. Mack no reason for his actions nor did he inform her of any appeals process for the denied visitation.

In discussing the matter later with Ms. Cates, Ms. Mack discovered that Ms. Cates had also been strip searched by Defendant Laurian and had her vehicle searched by Defendant Emling, yet nothing illegal had been found in either search.

Approximately one week later, Ms. Mack received a letter dated February 22, 2017, from now-deceased former HDSP Warden Bruce

Stroud, stating that Ms. Mack's visiting privileges had been suspended indefinitely and that she would not be allowed to return to HDSP without written request and permission from the HDSP Warden or NDOC Director.

In contravention of prison regulations, Warden Stroud's notice did not provide Ms. Mack any reason whatsoever for his decision and actions and gave her no instructions for appealing the action.

On the morning of October 26, 2017, Ms. Mack, believing her constitutional rights had been violated, visited counsel's office seeking direction and possible representation on the matter herein.

Attorney Barrick drafted and faxed a letter to Defendant James Dzurenda ("Defendant Dzurenda") and Defendant Brian Williams ("Defendant Williams") seeking an investigation into this matter, and further requesting that Ms. Mack's visiting privileges be immediately restored based.

No response was ever received from either Defendant Dzurenda or Defendant Williams, and Ms. Mack's visiting privileges have still never been restored as of the date. Defendants Williams and Dzurenda upheld and maintained the indefinite termination and suspension of Ms. Mack's NDOC visiting privileges for reasons that neither party has ever specified.

Ms. Mack suffered from a preexisting anxiety disorder for which she was medicated at the time of the incident. As a result of the psychological trauma and mental anguish caused to Ms. Mack by the incident and the subsequent termination and suspension of her NDOC visiting privileges, Ms. Mack's medication had to be elevated by her treating physician in order to assist her in coping with her trauma.

On May 4, 2018, Ms. Mack filed her Complaint, as referenced above.

On September 25, 2019, in response to Respondents' December 20, 2018, Motion for Summary Judgment and associated pleadings, the District Court denied summary judgment on Ms. Mack's state procedural due process claim under Article 1 § 8 of the Nevada Constitution in Count One, related to the Respondents' failure to adhere to established prison regulations regarding visitor strip searches and detention. The District Court ruled Respondents were not entitled to qualified immunity on Ms. Mack's state law due process claim under Article 1 § 8 of the Nevada Constitution because there were disputed fact issues as to whether Ms. Mack consented to the strip search and knew she was free to leave and also because the doctrine of qualified immunity does not apply to state law claims.[9]

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[9] EOR at 0031.

The District Court further denied summary judgment on Ms. Mack's unreasonable search and seizure claims under the Fourth Amendment and Article 1 § 18 of the Nevada Constitution in Count Three related to the strip search and seizure. The Court found Respondents were not entitled to qualified immunity and fact issues existed as to whether Ms. Mack consented to the strip search, whether she felt she was free to leave, and whether the Respondents had reasonable suspicion to strip search Ms. Mack.[10]

In Respondents' October 23, 2019, Motion for Reconsideration, Respondents argued, for the very first time, that the District Court erred in denying summary judgment on Ms. Mack's claims under Article 1 §§ 8 and 18 of the Nevada Constitution because Respondents assert that there is no private cause of action under either Article 1 § 8 or § 18 of the Nevada Constitution. Respondents asked the District Court to certify the question to this Court in the event there was indecision. Ms. Mack opposed the motion, to which the Respondents duly replied. The District Court heard arguments from the parties and reconsidered its decision to allow Ms. Mack's state law claims to proceed. In doing so, the District Court certified questions to this Court, as herein described.[11]

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[10] EOR at 0031.
[11] EOR at 0030.

VII. SUMMARY OF ARGUMENT.

A right without a remedy is no right at all. The right of the individual, a private citizen of Nevada or any state, to bring a civil action against a state actor for a violation of the constitution of that same state is so inherent and fundamental to the premise and purpose of the constitution that it requires no further express provision, either embodied in the constitution itself or in a separately enacted statute. This sentiment analogizes to and is directly supported by the finding in *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 397 (1971), wherein Justice Brennan articulated that "[t]he very essence of civil liberty... consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

Any immunity against a civil action asserted by a state actor depends upon the position of the actor. As a general rule, with the exception of complete sovereign immunity which is typically not reserved to the exclusion of all civil actions, immunities (*e.g.*, absolute immunity and discretionary immunity.) are specific authorizations by the legislature, designed and implemented to protect state actors from interference with the performance of their duties.

Qualified immunity, as it is presently styled, has no analogy in

Nevada and is generally a federal judicial doctrine, with no broad support judicially or legislatively in the several states and, as a result of actual or perceived national abuse of police powers, is facing increasing national disfavor. Notably, in 2020, Colorado enacted a complete ban on qualified immunity,[12] while Connecticut and the New York City Council banned qualified immunity for constitutional violations by police departments.[13] New Mexico enacted a law similar to Colorado's in 2021, and bills are pending in the United States Congress and well over a dozen other states.[14]

Private citizens have an unrestricted right to all relevant remedies for violation of their civil rights by state actor. As articulated in *Bivens*, remedies in the form of injunction and monetary damages are manifestly available for the vindication of constitutionally protected personal interests, as would be all remedies not affirmatively excluded by statute or "special factors counselling hesitation." *Id.* at 396.

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[12] While the immunity is banned, there is a statutory limit on damages in the same bill for certain claims, limited to $25,000.
[13] These bans, as noted, is limited solely to the police force, and, in NYC, it only covers claims related to unreasonable search and seizure and excessive force.
[14] https://innocenceproject.org/new-mexico-historic-legislation-to-end-qualified-immunity/

VIII. ARGUMENT.

1. There is Inherently an Implied Private Right of Action Under the Nevada Constitution, Article 1, § 8 and Article 1, § 18.[15]

The Nevada Constitution, like its federal counterpart, the United States Constitution, confers certain inalienable and civil rights upon the citizens of the State of Nevada. Article 1, NV. Const. Relevant here are Article 1, § 8 and Article 1, § 18.

Article 1 § 8 of the Nevada Constitution functionally replicates the Fourteenth Amendment of the U.S. Constitution and states:

> Rights of accused in criminal prosecutions; jeopardy; due process of law; eminent domain.
>
> 1. No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this State may keep, with the consent of Congress, in time of peace, and in cases of petit larceny, under the regulation of the Legislature) except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or Attorney General of the State, and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself.

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[15] Because the argument would be virtually the same for the certified questions regarding Article 1 §§ 8 and 18 of the Nevada Constitution, Appellant has combined the certified questions into a single argument to avoid redundancy.

> 2. No person shall be deprived of life, liberty, or property, without due process of law.
> 3. Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.

Article 1 § 18 of the Nevada Constitution functionally replicates the Fourth Amendment of the U.S. Constitution and states:

> Unreasonable seizure and search; issuance of warrants.
>
> The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by Oath or Affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things to be seized.

Congress, after the Civil War, enacted the Enforcement Act of 1871, which includes, most relevantly, 42 U.S.C. § 1983 ("§ 1983"), as a vehicle for challenging violations of civil rights conferred by the U.S. Constitution where state actors are involved. The enactment of § 1983 was specifically in response to a failure by certain southern states to guarantee the civil rights of African Americans and recently freed slaves. More precisely stated, Congress passed a statute which allowed individuals to bring a civil action against a governmental actor in a state for a violation of a right articulated at the federal level in the U.S. Constitution. Presumably, the argument by Respondents is that such a vehicle is necessary in Nevada to bring a civil

action against a Nevada state actor to enforce the analogous rights articulated in the Nevada state Constitution. For the reasons enumerated below, which are likely already clear, this argument drastically misses the mark.

While the Nevada Legislature has passed certain legislation allowing for various tort actions against state actors pursuant to NRS 41.010, *et seq.*, the Nevada Legislature has not otherwise specifically created a separate and distinct vehicle for challenging the violation of civil rights or other protected interests conferred by the Nevada Constitution where Nevada state actors are involved. The reason for this perceived lack of authorizing statute is really quite simple... no such specific statute is required.

Logically, since a right without a remedy would obviously amount to no right at all, it is manifest that the Nevada Legislature found no prior need to legislate the issue or enact a statute authorizing a cause of action for constitutional violations since such right is inherently implied in the premise and purpose of Nevada Constitution. The mere articulation of the right arguably gives the citizens of Nevada the cause of action. Otherwise, Nevada civil rights and constitutional protections would be reduced to a mere form of words, thereby rendering them moot and meaningless. This would be absurd and a

contradiction of the canons of statutory interpretation. *Arizona State Bd. For Charter Schools v. U.S. Dist. Of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) (But well-accepted rules of statutory construction caution us that "statutory interpretations which would produce absurd results are to be avoided.").

More instructive than even the obvious rationality is the full text of *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971), which succinctly summarized the argument as such: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 397. The U.S. Supreme Court's ruling in *Bivens*, speaks very analogously to the questions before the Court and resolves the matter in favor of Appellant. In *Bivens*, a citizen sued federal government actors for the violation of his Fourth Amendment right under the U.S. Constitution against unreasonable search and seizure. At that time, there was no congressional statute particularly authorizing such suits, since, as noted, § 1983 was enacted only to allow civil actions against a governmental actor in a state for a violation of a right articulated at the federal level in the U.S. Constitution.

In finding in favor of Bivens, the U.S. Supreme Court ruled that a

victim of deprivation a federal constitutionally assured right could sue a federal government actor for the violation of such right despite the lack of any federal statute authorizing such a suit. *Bivens* at 396 - 397, fn. 3 and fn. 8. The U.S. Supreme Court reasoned that the existence of a cause of action for the violation was implied by the importance of the interest in the right violated. "Thus, the interest which Bivens claims -- to be free from official conduct in contravention of the Fourth Amendment -- is a federally protected interest. *See generally* Katz, The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in *Bell v. Hood,* 117 U.Pa.L.Rev. 1, 33-34 (1968). Therefore, the question of judicial *power* to grant Bivens damages is not a problem of the 'source' of the 'right;' instead, the question is whether the power to authorize damages as a judicial remedy for the vindication of a federal constitutional right is placed by the Constitution itself exclusively in Congress' hands." *Bivens* at 400.

The *Bivens* court, held that the power does <u>not</u> exclusively lie with the legislature, stating: "The contention that the federal courts are powerless to accord a litigant damages for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant

compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment. Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute." *Id.* at 402.

Here, the analogy to *Bivens* is clear and direct. To paraphrase the U.S. Supreme Court's conclusion in the instant context, Respondents' contention that the Nevada courts (or federal courts standing effectively in their stead with respect to enforcement of Nevada constitutional provisions) are powerless to accord Ms. Mack damages for the invasion of her Nevada constitutional rights until the Nevada Legislature explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment. Thus, in this suit, for damages based on violations by Nevada state actors of Ms. Mack's Nevada constitutional rights, even in the absence of a Nevada statutes authorizing a damage remedy, this Court has authority to accord such relief where, in its view, damages are necessary to effectuate both the letter of and the policy underpinning the substantive provisions of the Nevada Constitution.

Further analogizing to *Bivens* in the instant matter is the fact that the rights implicated under Article 1, §§ 8 and 18 are inarguably fundamental and extremely important to the citizens of the State of Nevada, as they speak to due process and unreasonable search and seizure, respectively. These rights are too necessary and important to be lacking a remedy, nor should individuals deprived of the Nevada constitutional rights be compelled to find their sole relief in federal court or in a federal cause of action. If the Nevada Constitution fails to confer rights, by and in accord with its own language, which can be redressed in Nevada courts, it is indeed a shallow and superfluous document. This is neither presently true nor should it be allowed to become so by application of the Respondents' misplaced legal theory.

In the District Court proceedings, Respondents relied on *Baldonado v. Wynn Las Vegas, LLC*, 128 Nev. 951, 958 (2008) for the proposition that there can be no private civil cause of action unless the legislature impliedly provided for such cause of action. However, *Baldonado* dealt with a state statute where the plaintiff was suing for its enforcement. It did not deal, as here and as in *Bivens*, with an important and fundamental civil right conferred by the applicable Constitution.

Respondents also relied on *Roadhouse v. Las Vegas Metro. Police Dept.*, 290 F.R.D. 535 (D. Nev. 2013) in support of their argument. In *Roadhouse*, the plaintiff sued under Article 1 § 18 of the Nevada Constitution because, after being jailed, he was subjected to a strip search in front of other inmates without reasonable suspicion. The federal court dismissed the plaintiff's Nevada Constitution claim under Article 1 § 18 stating that "the Nevada Supreme Court has never created a right under Article 1 § 18 to be protected from a suspicionless strip search before entering the jail population." In short, the *Roadhouse* court ruled that there was no right at all against the particular conduct of which the plaintiff complained. *Roadhouse* in no way stood for the proposition that there can be no cause of action for a violation of rights actually conferred under Article 1 § 18 of the Nevada Constitution, quite directly stating that it was not reaching that exact question: "As to the argument of whether Nevada law has an enabling statute to permit its citizens to seek redress for violations of state constitutional rights, the court need not address the issue since it declines the opportunity to create a new right under the Nevada Constitution." *Id.* at 542.

For many years, the District Court has been inundated with Nevada constitutional claims brought along with federal constitutional

claims pursuant to 42 U.S.C. § 1983. The Court has a very longstanding tradition and uninterrupted record of routinely entertaining causes of action brought by plaintiffs for the violation of rights conferred by the Nevada Constitution.[16]

Some judges of the District Court have allowed these state constitutional claims to proceed past a motion to dismiss since there appears to be no clear Nevada precedent for disallowing such claims. *Mathis v. County of Lyon*, 2008 WL 11350175 (D. Nev. 2008) ("...because the parties have not sufficiently shown that Nevada has or has not created a cause of action for Nevada Constitutional violations of Article 1 §§ 8 and 18."). Other judges of the Court have allowed the Nevada Constitution claims to silently survive or fail depending on the direction of their federal counterparts. *Cates v. Stroud*, No. 2:17-cv-01080-GMN-PAL and *Blankenship v. Stewart*, No. 2:17-cv-01019-RFB-VCF. Some judges have also allowed the state law claims to proceed despite the failure of federal

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[16] See *American Civil Liberties Union of Nevada v. Cortez Masto*, 719 F. Supp.2d 1258 (D. Nev. 2008); *Mathis v. County of Lyon*, 2008 WL 11350175 (D. Nev. 2008); *Gypsum Resources, LLC v. Masto*, 672 F. Supp. 2d 1127 (D. Nev. 2009); *Cinque v. Ward*, 2010 WL 3312608 (D. Nev. 2010); *Johnson v. Nevada ex rel. Board of Prison Com'rs*, 2013 WL 5428423 (D. Nev. 2013); *180 Land Co LLC, et al., v. City of Las Vegas, et al.*, 2018 WL 6729640 (D. Nev. 2018).

claims due to the unavailability of qualified immunity on state law claims, as in the subject case giving rise to these proceedings. *Mack v. Williams*, 2:18-cv-00799-APG-VCF, Dkt. 27 at 7 and 9.

This Court has consistently relied upon the U.S. Supreme Court's decisions interpreting the United States Constitution to define the fundamental liberties protected under the Nevada Constitution, such as the Due Process Clause. *State v. Eighth Judicial District Ct.* (Logan D.), 306 P.3d 369, 377 (Nev. 2013). For purposes of clarity and to resolve the perceived lack of clarity, the questions now before the Court are ripe for consideration, and there is only one proper conclusion.

Even in the absence of judicial precedence or legislative enactment, a private right to a civil action to seek damages or injunctive relief against a Nevada state actor for a violation of a Nevada citizen's important and fundamental right under the Nevada Constitution must be recognized and enforced by Nevada courts to avoid the absurd result of rendering the Nevada Constitution and its incorporated civil rights meaningless.

2. There are Various Immunities that can be Raised in defense to Private Rights of Action Under Article 1, §§ 8 and 18 of the Nevada Constitution.

Without doubt, the Nevada Legislature has created certain immunities that can be raised by government actors in defense of tort and

civil rights actions, though sovereign immunity, inherent in the creation of any sovereign state is, of course, limited or generally waived, in accordance with the provisions of NRS 41.031.

Absolute immunity,[17] judicial immunity,[18] and discretionary immunity[19] would all reasonably be available defenses in accord with current legislation and standards of interpretation and applicability.

Qualified immunity, however, is a federal doctrine that deals strictly with the question of clearly established *federal law*. Thus, the courts have long established that qualified immunity only applies to federal claims, not state law claims. *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1171 (9th Cir. 2013). Accordingly, the federal doctrine of qualified immunity is not an immunity defense against claims brought under the Nevada Constitution or any other state law.[20]

If some sort of qualified immunity doctrine is to be adopted in Nevada for state law claims, and there is no generally established or

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[17] *See generally* Marvin v. Fitch, 232 P.3d 425 (Nev. 2010).
[18] *Id.*
[19] *See* NRS 41.032.
[20] It is referenced narrowly, with little guidance and not as a state doctrine specifically, in NRS 41.920, related to actions for wrongful conviction: All provisions of existing law relating to the absolute or qualified immunity of any judicial officer, prosecutor or law enforcement officer, including all applicable provisions of federal and state law, apply to an action brought pursuant to NRS 41.900.

asserted indicator that it need be, it should not be engineered as broadly as is often presently applied, only allowing recovery by an aggrieved complainant when caselaw is clearly established against the alleged unconstitutional conduct. Such doctrine, if even allowed, should more narrowly reflect the idea of whether or not a reasonable person would have known that his conduct was wrong,[21] and also preclude qualified immunity when state agency's mandatory administrative rules and regulations were clearly established against the alleged misconduct yet intentionally disregarded by the defendant.

Inherently and axiomatically, most state civil rights claims are against state agencies and their employees whose mandatory administrative rules and regulations are designed to, among other things, prevent the violation of state laws and civil rights. Therefore, when a state agency or employee is alleged to have intentionally disregarded clearly established mandatory state administrative rules and regulations under which they have been trained, and which leads to a violation of state civil rights, they should not be entitled to any degree of immunity.

In the instant case, there was indisputable evidence that Defendant Emling and Defendant Laurian repeatedly disregarded clearly established

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[21] *See Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020), which best reflects the current view and appropriate application of the doctrine.

mandatory prison rules and regulations in strip searching Ms. Mack. Adherence to the regulations on which they were instructed and trained would have prevented the violation of Ms. Mack's civil rights on all fronts, and immunity against their actions, in light of this clear understanding of what was right and wrong, should not be accorded to them.

More broadly and as referenced above, qualified immunity is rapidly falling into substantial disfavor and facing legislative limitations. Judicial creation of the doctrine in Nevada would be both untimely and unsound. In conclusion, sufficient immunities exist, as discussed, and nothing further should be afforded to violators of civil rights in Nevada.

3. There are Various Remedies that Can be Available to a Plaintiff Through a Private Right of Action Under Article 1, § 8 and § 18 of the Nevada Constitution.

In *Bivens*, the Supreme Court discussed remedies available for the violation of federal civil rights such as the Fourth Amendment. The Court found that, historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. *Bivens* at 395. "Having concluded that petitioner's complaint states a cause of action under the Fourth Amendment, *supra*, at 403 U.S. 390-395, we hold that petitioner is entitled to recover money damages for any injuries he has

suffered as a result of the agents' violation of the Amendment." *Id.* at 397. In addition to monetary damages, remedies in the form of injunction are manifestly available for the vindication of constitutionally protected personal interests, as would be all remedies not affirmatively excluded by statute or "special factors counselling hesitation." *Id.* at 396.

There would be no rational basis to depart from the above analysis. Accordingly, all civil remedies should be available.

IX. CONCLUSION.

Based on the foregoing, this Court should unequivocally find that a private right of action is inherently implied in the Nevada Constitution for the violation of Article 1 § 8 and § 18 of the Nevada Constitution, federal qualified immunity does not apply to such claims, and that, among other things, damages, injunctive, and declaratory remedies are available to a plaintiff for such claims .

Dated this 3rd day of September 2021.

GALLIAN WELKER & BECKSTROM, L.C.

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X. CERTIFICATE OF COMPLIANCE.

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, 14 point Georgia type style.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains roughly 5,200 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 3rd day of September 2021, I served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** as filed, by way of the Supreme Court's electronic filing system to the following:

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Case No. 81513

IN THE SUPREME COURT OF THE STATE OF NEVADA

SONJIA MACK,
Appellant,
vs.
BRIAN WILLIAMS; JAMES DZURENDA;
ARTHUR EMLING, Jr.; and MYRA LAURIAN;
Respondents.

On Response to Order Accepting Certified Questions from the
U.S. District Court for the District of Nevada
Case No. 2:18-cv-00799-APG-VCF
Honorable Judge Andrew P. Gordon, U.S District Court Judge

EVIDENCE OF RECORD

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List of exhibits

	Description	Pages
1	Appellant's Complaint	0001-0010
2	District Court Order on Respondents Motion for Summary Judgment	0011-0029
3	District Court Order Certifying Question	0030-0033
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5	District Court Order Clarifying Certification Question	0037-0038
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Exhibit 1

Appellant's Complaint

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UNITED STATES DISTRICT COURT
DISTRICT NEVADA

SONJIA MACK, an individual;

Plaintiff,

v.

BRIAN E. WILLIAMS, Sr., in his individual capacity;
JAMES E. DZURENDA, in his individual capacity;
ARTHUR EMLING, JR., in his individual capacity;
MYRA LAURIAN, in her individual capacity;
JOHN DOES 1 and 2, in their individual capacities,

Defendants.

Case No.: 2:18-cv-799

CIVIL RIGHTS COMPLAINT PURSUANT TO 42 U.S.C. §1983

JURY TRIAL DEMANDED

Plaintiff, Sonjia Mack ("Ms. Mack"), by and through her attorneys of the law firm of GALLIAN WELKER & BECKSTROM, LC, and as for her Civil Rights Complaint against Defendants, avers as set forth below.

JURISDICTION AND VENUE

1. At all times relevant herein, Plaintiff, Sonjia Mack ("Ms. Mack"), was an individual domiciled in Clark County, Nevada.

2. Upon information and belief, Defendant Brian Williams ("Williams") is and was

an individual domiciled in the State of Nevada.

3. Upon information and belief, Defendant James Dzurenda ("Dzurenda") is and was an individual domiciled in the State of Nevada.

4. Upon information and belief, Defendant Arthur Emling, Jr. ("Emling") is and was an individual domiciled in the State of Nevada.

5. Upon information and belief, Defendant Myra Laurian ("Laurian") is and was an individual domiciled in the State of Nevada.

6. Upon information and belief, Defendants John Does 1 and 2 are and were individuals domiciled in the State of Nevada.

7. This Court has jurisdiction over Plaintiff's claims under 42 U.S.C. §1983, 28 U.S.C. §1343(a)(3), and 28 U.S.C. §1331.

8. Venue over Plaintiff's claims properly lies in this Court under 28 U.S.C. §1391(b).

GENERAL FACTUAL ALLEGATIONS

9. Ms. Mack reasserts and realleges all other allegations of this Complaint and incorporates them herein as if set forth in full.

10. Ms. Mack is currently a resident of Clark County, Nevada.

11. At all relevant times, Defendant Williams was acting under color of law in his individual capacity as Warden at High Desert State Prison ("HDSP").

12. At all relevant times, Defendant Dzurenda was acting under color of law in his individual capacity as Director of the Nevada Department of Corrections ("NDOC").

13. Upon current information and belief, at all relevant times Defendant Arthur Emling, Jr. was acting under color of law in his individual capacity as an investigator for the Nevada Inspector General's Office (IG).

14. Upon current information and belief, at all relevant times Defendant Myra

Laurian was acting under color of law in her individual capacity as an investigator for NDOC and/or the Nevada Inspector General's Office.

15. At all relevant times, John Does 1 and 2 were acting under color of law in their individual capacities as correctional officers at HDSP.

SPECIFIC FACTUAL ALLEGATIONS

16. On the morning of February 19, 2017, Ms. Mack and a female companion, Tina Cates ("Ms. Cates"), arrived at HDSP to visit with their respective boyfriends, prisoners Karl Joshua and Daniel Gonzales.

17. After routine processing and awaiting entrance into the visiting room area, Ms. Mack observed that Ms. Cates was approached by Defendant Emling, who called Ms. Cates by name and asked her to follow him outside, stating that the matter would only take a few minutes.

18. Shortly thereafter, Ms. Mack was approached by Defendant John Does 1 and 2 who were both wearing black jumpsuits.

19. Defendant John Does 1 and 2 ordered Ms. Mack to come with them.

20. Defendant John Does 1 and 2 gave Ms. Mack no choice of refusing to come with them.

21. Defendant John Does 1 and 2 never indicated to Ms. Mack that she was free to leave the institution at her leisure.

22. Defendant John Does 1 and 2 escorted Ms. Mack from the visiting waiting room area to an administrative building and turned her over to Defendant Laurian.

23. Defendant Laurian then escorted Ms. Mack to a room and ordered her to remove her clothing.

24. Ms. Mack had no clue she was to be strip searched.

25. Ms. Mack gave no consent to be strip searched but was offered no choice in the matter by Defendant Laurian.

26. Defendant Laurian gave Ms. Mack no indication that she could refuse the strip search or that she was free to leave the institution at her leisure.

27. Ms. Mack felt extremely unnerved and intimidated and therefore fully complied with the strip search order given by Defendant Laurian.

28. Defendant Laurian then ordered a completely naked Ms. Mack to bend over and spread her buttocks. Again, Ms. Mack complied.

29. Ms. Mack had no reason to believe that the search would extend to such a degree and found it extremely demeaning and humiliating.

30. Nothing illegal was discovered on Ms. Mack's person stemming from the unclothed search of her person by Defendant Laurian.

31. Ms. Mack was then interrogated by Defendant Emling as to what she knew about Tina Cates and some sort of attempt to bring drugs into the institution.

32. Ms. Mack essentially responded that she had recently just met Ms. Cates and was merely catching a ride with her to the prison to see Ms. Mack's boyfriend, Karl Joshua.

33. Ms. Mack stated that she knew nothing about Ms. Cates or anyone else trying to bring drugs into the institution.

34. Ms. Mack was interrogated by Defendants Emling as to whether she herself was trying to bring drugs into the institution.

35. Ms. Mack emphatically denied trying to bring drugs into the institution.

36. Defendant Emling informed Ms. Mack that she could go to jail.

37. Ms. Mack was detained at the Administration Building while Defendant Emling conducted a search of Ms. Cates' vehicle in the parking lot.

38. Again, nothing illegal was discovered from Defendant Emling's search of Ms. Cates' vehicle.

39. Defendants Emling and Laurian refused to allow Ms. Mack to visit with inmate Karl Joshua.

40. Defendants Emling and/or Laurian gave Ms. Mack no reason for denying her visit with inmate Karl Joshua.

41. Defendants Emling and Laurian ordered Ms. Mack to leave the institution.

42. In contravention of Administrative Regulation ("AR") 719 and Operational Procedure ("OP") 712, Defendant Emling gave Ms. Mack no reason for his actions and did not inform her of any appeals process.

43. In discussing the matter with Ms. Cates, Ms. Mack discovered that Ms. Cates had also been strip searched and that nothing illegal had been found on her person.

44. Approximately 1 week later, Ms. Mack received a letter dated February 22, 2017, from now deceased former Warden Bruce Stroud stating that her visiting privileges have been suspended indefinitely and that she would not be allowed to return to HDSP without written request and permission from the HDSP Warden or NDOC Director.

45. In contravention of AR 719 and OP 712, Stroud's notice did not provide Ms. Mack any reason whatsoever for his actions and gave her no instructions for appealing the action.

46. On the morning of October 26, 2017, Ms. Mack, believing her constitutional rights had been violated, visited Mr. Barrick's office seeking direction and possible representation on the matter herein.

47. Mr. Barrick drafted and faxed a letter to Defendant Dzurenda and Defendant Williams seeking an investigation and to have Ms. Mack's visiting privileges

immediately restored based on the circumstances described above.

48. To date, no response has been received from either Defendant Dzurenda or Defendant Williams, and Ms. Mack's visiting privileges have not been restored.

49. Defendants Williams and Dzurenda have essentially upheld and/or maintained the indefinite termination/suspension of Ms. Mack's NDOC visiting privileges for reasons that have never been specified.

50. Ms. Mack suffered from a preexisting anxiety disorder that she was being prescribed medication for at the time of the incident.

51. As a result of the trauma caused her by the incident and the subsequent termination/suspension of her NDOC visiting privileges, Ms. Mack's medication had to be altered/elevated by her treating physician in order to assist her in coping with her trauma.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
14th Amendment and Article 1§8 of the Nevada Constitution—Due Process

52. Ms. Mack reasserts and realleges all other allegations of this Complaint and incorporate them herein as if set forth in full.

53. Ms. Mack was denied and deprived of her rights to procedural due process under the 14th Amendment of the U.S. Constitution and Article 1§8 of the Nevada Constitution by Defendants Emling, Laurian, and John Does 1 and 2 when they detained Ms. Mack without probable cause and conducted a warrantless strip search of her person without her consent.

54. Defendants fully understood they had no warrant to search Ms. Mack, but yet proceeded to intimidate and detain Ms. Mack for the purpose of conducting a very intrusive and demeaning strip search that went well beyond the type of clothed body

search authorized by prison regulations.

SECOND CAUSE OF ACTION
14th Amendment and Article 1§8 of the Nevada Constitution—Cruel and Unusual Punishment

55. Ms. Mack reasserts and realleges all other allegations of this Complaint and incorporate them herein as if set forth in full.

56. Ms. Mack was denied and deprived of her rights against cruel and unusual punishment under the 14th Amendment and Article 1§8 of the Nevada Constitution by Defendants Emling, Laurian, and John Does 1 and 2 when they detained Ms. Mack without probable cause and conducted a warrantless **strip search** of her person without her consent.

57. Ms. Mack prays for judgment and damages against Defendant Laurian as is more fully enumerated below.

THIRD CAUSE OF ACTION
4th Amendment and Article 1§18 of the Nevada Constitution—Unreasonable Search and Seizure

58. Ms. Mack reasserts and realleges all other allegations of this Complaint and incorporate them herein as if set forth in full.

59. Ms. Mack was denied and deprived of her rights against unreasonable search and seizure under the 4th Amendment of the U.S. Constitution and Article 1§18 of the Nevada Constitution by Defendants Emling, Laurian, and John Does 1 and 2 when they detained her without probable cause and conducted a warrantless strip search of her person without her consent.

60. Defendants clearly understood they had no probable cause or warrant to strip search Ms. Mack, but proceeded to detain her and conduct an intrusive, offensive strip

search without her consent.

61. Ms. Mack prays for judgment and damages against Defendant Laurian as is more fully enumerated below.

FOURTH CAUSE OF ACTION
14th Amendment and Article 1§8 of the Nevada Constitution—Due Process

62. Ms. Mack reasserts and realleges all other allegations of this Complaint and incorporates them herein as if set forth in full.

63. Ms. Mack was denied and deprived of her rights to procedural due process under the 14th Amendment of the U.S. Constitution and Article 1§8 of the Nevada Constitution by Defendants Williams and Dzurenda when they upheld or maintained the indefinite termination/suspension of Ms. Mack's visiting privileges despite awareness that deceased Warden Bruce Stroud had (i) failed to give Ms. Mack a clear reason for suspending her visiting privileges, (ii) failed to provide Ms. Mack instructions for appealing his decision in compliance with AR 719, and (iii) abused his discretion in terminating /suspending Ms. Mack's visiting privileges indefinitely.

64. Defendants Williams and Dzurenda furthered their violation of Ms. Mack's due process rights by abusing their discretion in upholding or maintaining the indefinite termination/suspension of Ms. Mack's visiting privileges without just cause.

65. Ms. Mack prays for judgment and damages against Defendants Williams and Dzurenda as is more fully enumerated below.

FIFTH CAUSE OF ACTION
14th Amendment—Equal Protection

66. Ms. Mack reasserts and realleges all other allegations of this Complaint and incorporates them herein as if set forth in full.

67. Ms. Mack was denied and deprived of her rights to equal protection under the

14th Amendment of the U.S. Constitution by Defendants Williams and Dzurenda when they indefinitely terminated, and/or upheld or maintained the indefinite termination, of Ms. Mack's visiting privileges while allowing other similarly situated visitors to maintain theirs.

68. Defendants were well aware that Ms. Mack had done absolutely nothing to violate her NDOC visiting privileges but yet treated her indiscriminately from similarly situated visitors who also had done nothing to violate their NDOC visiting privileges by allowing them to continue enjoyment of their NDOC visiting privileges while taking away Ms. Mack's.

69. Ms. Mack prays for judgment and damages against Defendants Stroud, Williams, and Dzurenda as is more fully enumerated below.

WHEREFORE, Ms. Mack requests judgment against the Defendants as follows:

1. For Declaratory Relief that, by an Order of the Court, once approved, Ms. Mack has a 14th Amendment due process right to have her NDOC visiting privileges uninterrupted, absent a clear and legitimate reason for denying and suspending them.
2. For Injunctive Relief that, by an Order of the Court, Ms. Mack's NDOC visiting privileges be immediately restored.
3. For the general damages against each Defendant that Ms. Mack has suffered, including pain and suffering, emotional distress, impairment and loss of quality of life, in amounts to be proven at trial;
4. For all consequential, incidental and special damages against each Defendant that Ms. Mack has suffered, in amounts to be proven at trial;
5. For punitive damages against each Defendant in amounts to be determined by a

jury;

6. Pursuant to NRS 17.1310, prejudgment interest at the legal rate from the date of the filing of Ms. Mack's complaint until paid;

7. For attorney fees and costs arising available under 42 U.S.C. §1988 and §1997e;

8. For costs incurred and accruing; and

9. For such other and further relief as the Court deems just under the circumstances.

DATED this 4th day of May 2018.

By: /s/ Travis N. Barrick
Travis N. Barrick, SBN 9257
GALLIAN WELKER
& BECKSTROM, LC
Attorneys for Plaintiff Sonjia Mack

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Exhibit 2

District Court Order on Respondents Motion for Summary Judgment

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SONJIA MACK,

Plaintiff

v.

BRIAN E. WILLIAMS, et al.,

Defendants

Case No.: 2:18-cv-00799-APG-VCF

Order (1) Denying the Plaintiff's Motion to Strike and (2) Granting in Part the Defendants' Motion for Summary Judgment

[ECF Nos. 19, 24]

Plaintiff Sonjia Mack brought this civil rights lawsuit against defendants Brian Williams, James Dzurenda, Arthur Emling, and Mayra Laurian. Mack alleges the defendants deprived her of her constitutional rights when they detained and strip searched her without a warrant or her consent and indefinitely suspended her visiting privileges at High Desert State Prison (HDSP). Mack asserts the following claims under 42 U.S.C. § 1983.

The first three counts are against defendants Emling and Laurian. Count one alleges a procedural due process violation under the Fourteenth Amendment and Article 1 § 8 of the Nevada Constitution. Count two alleges cruel and unusual punishment in violation of the Fourteenth Amendment and Article 1 § 8 of the Nevada Constitution. Count three alleges an unreasonable search and seizure in violation of the Fourth Amendment and Article 1 § 18 of the Nevada Constitution.

The final two counts are against defendants Dzurenda and Williams. Count four alleges a procedural due process violation under the Fourteenth Amendment and Article 1 § 8 of the Nevada Constitution. Count five alleges an equal protection violation of the Fourteenth Amendment. The defendants move for summary judgment on all claims.

Mack moves to strike Exhibit A to the defendants' reply, which is a recording of a telephone conversation between Mack and inmate Karl Joshua. ECF No. 24. She argues the defendants impermissibly presented new evidence in a reply brief. *Id.*

I deny Mack's motion to strike. I grant the defendants' motion with respect to the federal claim in count one, as well as the federal and state claims in counts two, four, and five. I deny the defendants' motion with respect to the state claim in count one and the federal and state claims in count three.

I. BACKGROUND

On February 19, 2017, Mack arrived at HDSP with Tina Cates to visit their respective boyfriends, Karl Joshua and Daniel Gonzales. ECF Nos. 1 at 3; 11 at 3. Mack signed a form consenting to a search of her person, vehicle, or other property that she brought onto prison grounds. ECF No. 19-1 at 2. While Mack and Cates were in the waiting room, Emling and Laurian—investigators with the Nevada Inspector General's Office—asked Cates to go with them. ECF No. 19-3 at 5, 10. Emling had a warrant to search Cates and her car for illegal controlled substances. ECF No. 19-5 at 2. Cates was searched and no contraband was found. ECF No. 21-8 at 7.

Shortly after Emling and Laurian left with Cates, two HDSP officers—Officer Ronczka and Officer Krohm—approached Mack and escorted her to an administrative building. ECF No. 19-3 at 5-6. Although the order of the following events is unclear, the evidence shows that Laurian conducted a strip search of Mack. ECF No. 19-4 at 6-7. Additionally, Mack spoke with Emling about (1) whether she had anything illegal on her, (2) a prior occasion where she paid $300 to an unknown male on Joshua's behalf, and (3) whether she had knowledge of ongoing crimes. ECF Nos. 19-3 at 6; 21-8 at 6. Emling stated in his response to requests for admissions

that the $300 money exchange was a fact used in procuring the search warrant against Cates. ECF No. 21-8 at 6. He also stated that he had reasonable suspicion that Mack was connected to Cates through the exchange of money. *Id.* at 13-14. Mack avers that the money exchange occurred about six months prior to the day she was searched and had nothing to do with drugs. ECF No. 21-1 at 4.

Nevada Department of Corrections (NDOC) Administrative Regulation (AR) 422 requires officials to inform a visitor of the type of search to be performed and the ability to refuse the search. ECF No. 21-4 at 7. It also requires that a visitor give written consent to be strip searched unless a search warrant has been obtained and a peace officer is present. *Id.* To conduct a strip search, officers must have reasonable suspicion that a visitor possesses contraband. *Id.*

The parties disagree as to whether Mack consented to the strip search. Mack avers she never consented to a strip search and was never informed that she could refuse or that she was free to leave at any time. ECF No. 21-1 at 3-4. Emling asserts Mack was informed that she was free to leave and did not have to answer any questions. ECF No. 19-3 at 5-6. Laurian asserts Mack consented to the search because she had already signed the consent to search form and then she verbally consented to the strip search. ECF No. 19-4 at 6. In a recorded telephone conversation Mack had with Joshua after the fact, Joshua asked her if she complied with Emling and Laurian's requests and she said yes and that she "even volunteered to let them search me." ECF No. 22-1 at 9:40-9:50.[1] Mack also told Joshua "I just got to a point . . . I'm [going] to go.

[1] Mack seeks to strike the recording of the telephone conversation. *See* ECF No. 24. When new evidence is presented in a reply brief, district courts should not consider the new evidence without giving the non-moving party an opportunity to respond. *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). But even considering this evidence, genuine issues of fact remain as to whether Mack consented to a strip search and whether she felt free to leave. Thus, I deny Mack's motion as moot.

You done? I'm going. And I left." *Id.* at 20:50-20:58. No contraband was found on Mack as a result of the strip search. ECF No. 19-4 at 7.

After Mack was strip searched and questioned, she was denied visiting privileges for the day. ECF No. 19-3 at 9. On February 22, 2017, Mack received a letter from HDSP stating her visiting privileges were indefinitely suspended. ECF No. 21-6 at 2. The letter did not provide a reason. *Id.* It stated that Mack was "not allowed to return to this Institution without written request and permission through the Warden and/or Director." *Id.* NDOC policy requires that written denials of visits "shall clearly explain the reason for the action, the length of time the action will apply, the circumstances under which the action will be reconsidered, and instructions for appealing the action taken." ECF No. 21-3 at 16.

In his response to interrogatories, Williams, who is the Warden at HDSP, stated that Mack's visitation rights were suspended the day she was strip searched because "there [was] reason to believe she was involved in introducing contraband into the facility." ECF No. 19-6 at 6-7. He also stated that Mack was indefinitely suspended under AR 719, which states that "[t]he Warden has the authority to restrict or suspend an inmate's regular visiting privileges temporarily when there is reasonable suspicion that the inmate has acted in a way that would indicate a threat to the good order o[r] security of the institution." *Id.* at 6; *see also* ECF No. 21-3 at 3. When asked to admit that Mack was never given instructions on how to appeal the suspension, Dzurenda, the director of NDOC, stated that NDOC's administrative regulations are available on its website and made available to all inmates. ECF No. 21-7 at 6-7.

II. ANALYSIS

Summary judgment is appropriate if the movant shows "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(a), (c). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) ("To defeat summary judgment, the nonmoving party must produce evidence of a genuine dispute of material fact that could satisfy its burden at trial."). I view the evidence and reasonable inferences in the light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

The doctrine of qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In ruling on a qualified immunity defense, I consider whether the evidence, viewed in the light most favorable to the plaintiff, shows the defendants' conduct violated a constitutional right. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002). If so, I then determine whether the right was clearly established. *Id*. I may perform this two-step inquiry in any order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

"A government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every reasonable

official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quotation omitted). The plaintiff need not identify a case "directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* I make this second inquiry "in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). "If a genuine issue of material fact exists that prevents a determination of qualified immunity at summary judgment, the case must proceed to trial." *Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003).

A. Count One

Mack alleges Emling and Laurian deprived her of procedural due process when they detained her without probable cause and conducted a warrantless strip search without her consent.[2] The defendants argue that Mack consented to the search and knew she was free to leave. They also argue, as with all their claims, that they are entitled to qualified immunity. Mack responds that she did not consent to the search and was not informed that she could refuse the search or that she was free to leave. She further argues that NDOC's prison regulations relating to strip searches create a protected liberty interest.

As described below, genuine issues of fact remain as to whether Mack consented to the strip search and whether she knew she was free to leave. But even assuming a violation occurred, Mack has failed to point to any clearly established law that would have put the defendants on notice that their conduct violated her right to procedural due process under the Fourteenth Amendment. For example, Mack does not cite to a case holding that Nevada's prison

[2] I apply the same analysis for both the U.S. Constitution and the Nevada Constitution due process claims. *See State v. Eighth Jud. Dist. Ct. (Logan D.)*, 306 P.3d 369, 377 (Nev. 2013) ("This court has consistently relied upon the Supreme Court's holdings interpreting the federal Due Process Clause to define the fundamental liberties protected under Nevada's due process clause."). This also applies to Mack's second and fourth causes of action.

regulations relating to strip searches created a protected liberty interest. Therefore, the defendants are entitled to qualified immunity on Mack's federal procedural due process claim.

However, "the doctrine of qualified immunity does not shield defendants from state law claims." *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1171 (9th Cir. 2013). The only reasons the defendants offer for summary judgment on this claim are qualified immunity and that Mack consented to the search and knew she could leave. But qualified immunity does not apply to the state law claim and genuine issues of fact exist. Therefore, I deny the defendants' motion as to Mack's state procedural due process claim.

B. Count Two

Mack alleges that Emling and Laurian inflicted cruel and unusual punishment on her in violation of the Fourteenth Amendment and Article 1 § 8 of the Nevada Constitution when they detained and strip searched her without probable cause, a warrant, or her consent. The defendants argue that the prohibition against cruel and unusual punishment arises under the Eighth Amendment, but that amendment does not apply to Mack because she is neither a prisoner nor a pre-trial detainee. ECF No. 19 at 4-5. They also argue that they are entitled to qualified immunity. Mack's only response is that her claim does not arise under the Eighth Amendment. ECF No. 20 at 5.

The Eighth Amendment does not apply here because Mack is not a prisoner. [3] *See City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally

[3] Nevada's constitutional prohibition against cruel and unusual punishment under Article 1 § 6 similarly does not apply. *See State v. Eighth Jud. Dist. Ct. (Logan D.)*, 306 P.3d 369, 388 n.13 (Nev. 2013) (noting that when a person is not within the criminal punishment scheme, the application of cruel and unusual punishment does not apply).

associated with criminal prosecutions.") (citation omitted). But Mack's claim is based upon the Fourteenth Amendment. ECF No. 1 at 7. Neither party addresses whether that amendment can support a claim of cruel and unusual punishment. However, even if Mack is correct that the Fourteenth Amendment could be the source of a prison visitor's right to freedom from cruel and unusual punishment, she points to no clearly established law that would have put the defendants on notice that their conduct would violate that right. The defendants are thus entitled to qualified immunity on Mack's federal constitutional claim.

As to her state law claim, Mack again provides no authority for the proposition that the Nevada Constitution's due process clause (Article 1 § 8) protects prison visitors from cruel and unusual punishment. Nevada interprets due process under its constitution the same as the Supreme Court of the United States interprets due process under federal law. *See supra* n.2. The Supreme Court has found that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth . . . Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997).

For example, in *Graham v. Connor* the petitioner alleged excessive force during an investigatory stop in violation of the Fourteenth Amendment. 490 U.S. 386, 390 (1989). The Court held that an excessive force claim in this context "is most properly characterized as one invoking the protections. . . against unreasonable. . . seizures" and should be analyzed under the Fourth Amendment—rather than the Fourteenth Amendment—because it "provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct." *Id.* at 394-95 (quotation omitted). Consequently, a substantive due process analysis is not appropriate here if Mack's claim is covered by a specific Nevada constitutional provision,

such as its equivalent to the Fourth Amendment. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998).

Mack alleges in this count two that her detention and strip search amounted to cruel and unusual punishment under Nevada's due process clause. Mack also asserts in count three that the same alleged acts constituted an unreasonable search and seizure under Article 1 § 18 of the Nevada Constitution. Given the allegations, it is more appropriate to analyze Mack's claim under Article 1 § 18 than it is to analyze her claim under a novel theory that the state's due process clause protects her from cruel and unusual punishment. Further, Mack provides no authority for the proposition that Nevada would apply its due process standards rather than the state's unreasonable search and seizure standards. While there is no Nevada case directly on point, I predict that Nevada would follow the Supreme Court of the United States to hold that when a claim is covered by a specific state constitutional provision, as Mack's claim is covered by the unreasonable search and seizure clause here, courts should analyze the claim under that specific provision and not under substantive due process principles.[4] Accordingly, I grant the defendants' motion as to Mack's second cause of action.

C. Count Three

Mack alleges that Emling and Laurian deprived her of her right to be free from unreasonable searches and seizures when the defendants detained and strip searched her.[5] The

[4] When a federal court interprets state law, it is bound by the decisions of the state's highest court. *Assurance Co. of Am. v. Wall & Assocs. LLC of Olympia*, 379 F.3d 557, 560 (9th Cir. 2004). Where the state's highest court has not decided the issue, a federal court must predict how that court would decide. *Orkin v. Taylor,* 487 F.3d 734, 741 (9th Cir. 2007). I may use "decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Assurance Co. of Am.*, 379 F.3d at 560 (quotation omitted).

[5] I apply the same analysis for the unreasonable search and seizure claims under the Fourth Amendment and the Nevada Constitution. *See Cortes v. State*, 260 P.3d 184, 191 (Nev. 2011)

defendants argue that Mack consented to the search and knew that she was free to leave. Mack avers that she did not consent, and she did not know she could refuse or leave.

Viewing the evidence in the light most favorable to Mack, a genuine dispute exists as to whether Mack consented to the strip search. Although she signed the consent form, the form does not specifically state a person is consenting to be strip searched. And a reasonable jury could find that she signed the form prior to being informed what kind of search would be conducted. Thus, a reasonable jury could find that Mack consented to only a routine pat down search and not the strip search. Additionally, Emling and Laurian state that Mack verbally consented to the strip search but Mack denies it. It is the jury's role to determine whether Mack verbally consented.

Emling and Laurian also assert that Mack was told that she was free to leave at any time. The defendants point to a telephone conversation between Mack and Joshua to show that Mack knew she was free to leave when she said, "I just got to a point . . . I'm [going] to go. You done? I'm going. And I left." But Mack denies under oath that she felt free to leave. A reasonable jury could find that Mack did not feel free to leave.

1. Strip Search

The defendants argue that, regardless of consent, the strip search was valid because Emling and Laurian needed only reasonable suspicion. They contend they had reasonable suspicion that Mack had introduced contraband into the prison because of her association with Cates and the $300 payment she made to an unknown male months prior. Mack argues that the defendants did not have reasonable suspicion because their suspicion was directed at Cates, not

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(declining to impose a stricter standard to the search and seizure clause of the Nevada Constitution than the U.S. Constitution requires in a traffic stop setting).

her, and because the defendants have failed to explain how a $300 payment was related to the introduction of contraband.

"The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Bonivert v. City of Clarkston*, 883 F.3d 865, 873 (9th Cir. 2018) (quoting U.S. Const. amend. IV). "The test of reasonableness. . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

Officials need reasonable suspicion that a prison visitor possesses contraband in order to strip search her. *See Martinez v. Cty. of San Diego*, 962 F.2d 14, 1992 WL 98452 (9th Cir. 1992) ("[A] review of all available decisional law establishes that by September 1988, a reasonable officer would have surmised she needed reasonable suspicion to carry out [a strip] search.") (quotation and internal citation omitted). Reasonable suspicion requires that an officer, looking at the totality of the circumstances, have a "particularized and objective basis for suspecting" that an individual is engaged in criminal activity. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). While this process "allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them," officers need to demonstrate more than a "mere hunch." *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002) (citation omitted). It is a "commonsense, nontechnical conception[ ] that deal[s] with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983)).

Viewing the evidence in the light most favorable to Mack, a reasonable jury could find that the defendants did not have reasonable suspicion to strip search her. Emling stated in his response to interrogatories that "Ms. Mack was not suspected of bringing drugs or contraband into HDSP." *See* ECF No. 21-5 at 5. The defendants present no evidence demonstrating that the $300 money exchange was related to drugs or to Cates, that Mack was conspiring with Cates, or that Mack knew of any plan to bring contraband into the facility. A genuine dispute exists as to whether Emling and Laurian had reasonable suspicion to strip search Mack.

The defendants alternatively contend that they are entitled to qualified immunity because they were not on clear notice that their actions violated Mack's constitutional rights. Mack argues that it was clearly established law that strip searches of prison visitors must be based on reasonable suspicion.

While not addressed by the Supreme Court or the Ninth Circuit in a published decision, many other circuit courts, dating back to the 1980s, have held officers need reasonable suspicion that a prison visitor possesses contraband in order to strip search them.[6] And the Ninth Circuit,

[6] *See Spears v. Sowders*, 71 F.3d 626, 630 (6th Cir. 1995) (requiring prison officials have at least reasonable suspicion that a visitor has contraband before conducting a body cavity search); *Wood v. Clemons*, 89 F.3d 922, 927 (1st Cir. 1996) ("a prison-visitor strip search must be predicated upon reasonable suspicion") (quotation omitted); *Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir. 1997) (finding it was clearly established that correctional officers need reasonable suspicion to strip search prison visitors); *Thorne v. Jones*, 765 F.2d 1270, 1277 (5th Cir. 1985); *Burgess v. Lowery*, 201 F3d 942, 945 (7th Cir. 2000) ("In a long and unbroken series of decisions by our sister circuits stretching back to the early 1980s, it had become well established. . . that strip searches of prison visitors were unconstitutional in the absence of reasonable suspicion that a visitor was carrying contraband."); *Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) ("[W]e conclude that the Constitution mandates that a reasonable suspicion standard govern strip searches of visitors to penal institutions.").

in unpublished opinions, has similarly required reasonable suspicion to strip search prison visitors.[7]

Because a reasonable officer would have known he needed reasonable suspicion to strip search a prison visitor, Emling and Laurian are not entitled to qualified immunity. I thus deny the defendants' motion as to Mack's unreasonable search claim.

2. Seizure

The defendants argue that Mack was never seized because she was informed that she could refuse the strip search and that she could leave at any time. Mack avers that she was never informed that she could refuse or leave.

A person is seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *U.S. v. Mendenhall*, 446 U.S. 544, 554 (1980). "Examples of circumstances that might indicate a seizure, even where a person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* "If a reasonable person would feel free to terminate the encounter, then he or she has not been seized." *U.S. v. Drayton*, 536 U.S. 194, 201 (2002).

[7] *See Martinez v. Cty. of San Diego*, 962 F.2d 14, 1992 WL 98452 (9th Cir. 1992) ("[A] review of all available decisional law establishes that by September 1988, a reasonable officer would have surmised she needed reasonable suspicion to carry out [a strip] search.") (quotation and internal citation omitted); *Evans v. Cty. of Sacramento*, 165 F.3d 915, 1998 WL 823395 (9th Cir. 1998) (finding no Fourth Amendment violation where a prison visitor was subjected to "non-invasive body searches" based on reasonable suspicion that she was in possession of contraband).

Viewing the evidence in the light most favorable to Mack, a genuine dispute exists as to whether Mack was seized. Mack saw Cates taken away by Emling and Laurian. Mack was then escorted into a different building and separated from the routine visiting process. All of this was done inside the prison, with officers and investigators present. Mack disputes under oath that she was told she was free to leave. Because a jury could find that a reasonable person in Mack's position would have believed that she was not free to leave, I deny the defendants' motion as to Mack's unreasonable seizure claim.

D. Count Four

Mack alleges that Dzurenda and Williams deprived her of procedural due process when they upheld or maintained the indefinite suspension of her visiting privileges. The defendants argue that Mack has no protected liberty interest in prison visitation and that Mack cannot point to a regulation or case law to support the proposition that a liberty interest has been created. Mack responds that AR 719 and the accompanying inmate visitation manual created a liberty interest by prohibiting the arbitrary suspension of visitation privileges and mandating certain criteria be met before a suspension.

To prevail on a procedural due process claim, Mack must prove "(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998). "The fundamental requirements of procedural Due Process are notice and an opportunity to be heard. . . ." *Conner v. City of Santa Ana*, 897 F.2d 1487, 1492 (9th Cir. 1990) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

A liberty interest may arise from either the due process clause or state law. *Mendoza v. Blodgett*, 960 F.2d 1425, 1428 (9th Cir. 1992) (citing *Hewitt v. Helms*, 459 U.S. 460, 466

(1983)). Whether state law gives rise to a protected liberty interest for purposes of the federal constitution is a question of federal law. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756-57 (2005). A state creates a protected liberty interest when it places substantive limitations on official discretion. *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 462 (1989). State law may create a protected liberty interest "by establishing substantive predicates to govern official decision-making, . . . and . . . by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Id.* (quotation and internal citation omitted).

For a state prison regulation to create a protected liberty interest, the regulation must contain explicit, mandatory language directing a certain course that the decision-maker must follow. *Thompson*, 490 U.S. at 463. Even if a state regulation creates an entitlement, the court still must determine whether that constitutes a liberty interest for purposes of the due process clause in the U.S. Constitution. *Town of Castle Rock, Colo.*, 545 U.S. at 766.

In *Kentucky Department of Corrections*, the Supreme Court was asked whether the state's regulations governing general prison visitation created a liberty interest that required due process protections. 490 U.S. at 456-59. The Court found the regulations created certain "substantive predicates." *Id.* at 463-64. For example, the regulations explain when a visitor may be excluded, provide a list of reasons for denying visitation, and contain standards for staff to apply in determining when to refer a situation to the officer on duty. *Id.* Ultimately, the Court held that the regulations did not establish a liberty interest protected by the due process clause because they lacked the requisite mandatory language that would deprive decision-makers of discretion. *Id.* 464-65 (noting that the procedures memorandum began with a caveat that the staff reserves the right to allow or disallow visits and the language throughout provided the staff with directions on what they may do, not what they had to do).

The Ninth Circuit has concluded that there is no constitutional right to prison visitation. *See Dunn v. Castro*, 621 F.3d 1196, 1201-03 (9th Cir. 2010) (detailing the Circuit's prior decisions holding that prisoners do not have a constitutional right to visitation); *see also Egberto v. McDaniel*, No. 3:08-CV-00312-HDM-VPC, 2011 WL 123358, at *8 (D. Nev. Mar. 28, 2011), *aff'd*, 565 F. App'x 663 (9th Cir. 2014) ("A Nevada inmate and prison visitor are never guaranteed visitation, which is a discretionary privilege and not a right.").

Mack does not have a protected liberty interest in visitation. AR 719 contains substantive predicates to guide the decision-maker. For example, Mack notes that the regulation provides that: 1) "denial and any subsequent restriction, suspension, or termination of previously approved visits, shall be documented. . . and a copy sent to the applicant/visitor as soon as practicable;" and 2) "such documentation shall include the name of the official taking or ordering the action, shall clearly explain the reason for the action, the length of time the action will apply, the circumstances under which the action will be reconsidered, and instructions for appealing the action taken." ECF No. 20 at 13. But that language is irrelevant to determining whether the regulation "requires the decisionmaker to apply certain substantive predicates in determining whether an inmate [or visitor] may be deprived of the particular interest in question." *Thompson*, 490 U.S. at 464 n.4.

The relevant language in AR 719 states that the Warden "may suspend visiting privileges of a visitor" and provides a nonexhaustive list of the possible reasons for suspension. ECF No. 21-3 at 15. Ultimately, the Warden retains discretion to determine who may visit and when to reinstate visiting privileges if they have been suspended or terminated. *See id.* at 14-16. The prison regulations, therefore, lack the required mandatory language necessary to create a protected liberty interest. I grant the defendants' motion as to Mack's fourth cause of action.

E. Count Five

Mack alleges that her Fourteenth Amendment right to equal protection was violated when Williams and Dzurenda indefinitely terminated or upheld the termination of Mack's visiting privileges while allowing other similarly situated visitors to maintain their visiting privileges. The defendants argue they had a legitimate reason to suspend Mack's visiting privileges because of the information gathered by the Inspector General's office and because of her association with Cates. Mack argues it was unreasonable to suspend her visiting privileges after she was strip searched and no contraband was found.

The Equal Protection Clause of the Fourteenth Amendment is essentially a direction that all similarly situated persons be treated equally under the law. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Given that Mack has not alleged that she is a member of a protected class or that a fundamental right was violated, she must show that the defendants purposefully treated her differently than similarly situated individuals without any rational basis for the disparate treatment. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."). "When a state policy does not adversely affect a suspect class or impinge upon a fundamental right, all that is constitutionally required of the state's program is that it be rationally related to a legitimate state objective." *Coakley v. Murphy*, 884 F.2d 1218, 1221-22 (9th Cir. 1989).

"Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547. "[I]n the

absence of substantial evidence in the record to indicate that officials have exaggerated their response [to detect and deter the possession of contraband in their facilities,] courts should ordinarily defer to their expert judgment in such matters." *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 328 (2012) (quotation omitted).

Mack provides insufficient evidence from which a reasonable jury could find the defendants purposefully treated her differently from similarly situated visitors. Under a routine search, when no contraband is found visitors may proceed with visitation. *See* ECF No. 19-3 at 8. However, the search here was not routine. Mack has not presented evidence of another visitor who was 1) associated with a person who had a search warrant against her; 2) suspected of introducing contraband into the facility through such association as well as a money exchange; and 3) currently involved in a confidential investigation by NDOC. Nor has she shown that such an individual retained visiting privileges while Mack's privileges were suspended.

The defendants have demonstrated that the suspension of Mack's visiting privileges was a rational response to a legitimate interest in preventing the introduction of contraband into the prison. They cite to *Robinson v. Palmer*, 841 F.2d 1151 (D.C. Cir. 1988) to justify the indefinite suspension of visiting privileges. In *Robinson*, the court found the permanent denial of visitation to be a rational response after marijuana was found on the plaintiff during a visit. 841 F.2d at 1153. Here, the defendants did not find any contraband on Mack. But given the strong deference afforded to prison administrators in securing the safety of the institution, and under the facts described above, no reasonable jury could find that Mack's suspension was not a rational response to the perceived threat of the introduction of contraband into the prison. Because there is no genuine issue in dispute, I grant the defendants' motion as to Mack's fifth cause of action.

IV. CONCLUSION

IT IS THEREFORE ORDERED that the defendants' motion for summary judgment **(ECF No. 19)** is **GRANTED IN PART**. The motion is granted as to the federal claim in count one and as to the state and federal claims in counts two, four and five. The motion is denied as to the state claim in count one and as to the state and federal claims in count three.

IT IS FURTHER ORDERED that plaintiff Sonjia Mack's motion to strike **(ECF No. 24)** is **DENIED**.

DATED this 25th day of September, 2019.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

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Exhibit 3

District Court Order Certifying Question

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

No. 81513

SONJIA MACK,

Plaintiff

v.

BRIAN E. WILLIAMS, et al.,

Defendants

Case No.: 2:18-cv-00799-APG-VCF

Order Certifying Questions to the Supreme Court of Nevada

I respectfully certify to the Supreme Court of Nevada the following questions of law that may be determinative of matters before me and as to which there is no clearly controlling precedent in the decisions of the Supreme Court of Nevada or the Nevada Court of Appeals:

- Is there a private right of action under the Nevada Constitution, Article 1, § 8?
- Is there a private right of action under the Nevada Constitution, Article 1, § 18?
- If there is a private right of action, what immunities, if any, can a state actor defendant raise as a defense?
- If there is a private right of action, what remedies are available to a plaintiff for these claims?

I. BACKGROUND

Sonjia Mack sues state employees Brian Williams, James Dzurenda, Arthur Emling, and Maya Laurian, alleging she was unreasonably detained and strip searched without a warrant or her consent while visiting High Desert State Prison (HDSP). She also alleges the defendants indefinitely suspended her visiting privileges at HDSP without due process. She asserts federal constitutional claims under 42 U.S.C. § 1983 and their state law equivalents under the Nevada Constitution.

20-27079

The defendants moved for summary judgment on all of Mack's claims but presented no arguments specific to the state law claims. I granted summary judgment on Mack's federal procedural due process claim arising from the detention and strip search because the defendants are entitled to qualified immunity. And I granted summary judgment in the defendants' favor on Mack's claims alleging cruel and unusual punishment, a procedural due process violation based on her suspended visiting privileges, and an equal protection violation. I denied summary judgment on Mack's unreasonable search and seizure claims under federal and state law because the defendants are not entitled to qualified immunity and genuine issues of fact remain as to whether Mack consented to a strip search and whether the defendants had reasonable suspicion to conduct a strip search. I also allowed Mack to proceed on her state procedural due process claim based on the detention and strip search because qualified immunity "does not shield defendants from state law claims." *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1171 (9th Cir. 2013). Thus, the following claims remain pending: (1) deprivation of procedural due process under the Nevada Constitution Article 1, § 8 based on the defendants detaining and strip searching Mack without a warrant or her consent and against prison regulations; and (2) unreasonable search and seizure in violation of the Fourth Amendment of the United States Constitution and Article 1, § 18 of the Nevada Constitution.

Both parties moved for reconsideration. I denied Mack's motion. The defendants now argue that there is no private right of action under the Nevada Constitution. They also argue that if such a right exists, Nevada courts would apply the doctrine of qualified immunity consistent with the corresponding federal constitutional case law. I reconsidered the portion of my order allowing the state law claims to proceed because the Supreme Court of Nevada has not addressed whether a private cause of action exists under Nevada Constitution, Article 1, §§ 8 and 18.

Whether a private right of action exists under the Nevada Constitution and, if so, what defenses and remedies are available are important and novel questions of Nevada law. Thus, I certify the above questions because (1) the Supreme Court of Nevada should be allowed to interpret and decide important state law issues in the first instance; and (2) certification will save time and judicial resources. *See Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008) ("Certification of open questions of state law to the state supreme court can in the long run save time, energy, and resources and helps build a cooperative judicial federalism, but its use in a given case rests in the sound discretion of the federal court." (quotations and alterations omitted)).

II. PARTIES' NAMES AND DESIGNATION OF APPELLANT AND RESPONDENTS

Plaintiff: Sonjia Mack

Defendants: Brian E. Williams, Sr., James E. Dzurenda, Arthur Emling, Jr., and Myra Laurian.

Given that the defendants argue that they are entitled to summary judgment on Mack's state law claims because there is no private right of action under the Nevada Constitution, I designate the plaintiff as the appellant.

III. NAMES AND ADDRESSES OF COUNSEL FOR THE PARTIES

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Las Vegas, NV 89101

IV. ANY OTHER MATTERS THE CERTIFYING COURT DEEMS RELEVANT TO A DETERMINATION OF THE QUESTIONS CERTIFIED

I defer to the Supreme Court of Nevada to decide whether it requires any other information to answer the certified questions. I do not intend my framing of the questions to limit the Supreme Court of Nevada's consideration of the issues.

V. CONCLUSION

I THEREFORE ORDER the clerk of court to forward this order and my order on summary judgment (ECF No. 27) under official seal to the Supreme Court of the State of Nevada, 201 South Carson Street, Suite 201, Carson City, Nevada 89701-4702.

DATED this 17th day of July, 2020.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

I hereby attest and certify on 7/17/20 that the foregoing document is a full, true and correct copy of the original on file in my legal custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA

By _____ Deputy Clerk

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Exhibit 4

Supreme Court Order Requesting Clarification

IN THE SUPREME COURT OF THE STATE OF NEVADA

SONJIA MACK,
Appellant,
vs.
BRIAN WILLIAMS; JAMES DZURENDA; ARTHUR EMLING, JR.; AND MYRA LAURIAN,
Respondents.

No. 81513

FILED

OCT 13 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER REQUESTING CLARIFICATION

This matter involves legal questions certified to this court, under NRAP 5, by the United States District Court for the District of Nevada. Specifically, the U.S. District Court has certified the following questions to this court:

1. Is there a private right of action under the Nevada Constitution, Article 1, § 8?
2. Is there a private right of action under the Nevada Constitution, Article 1, § 18?
3. If there is a private right of action, what immunities, if any, can a state actor defendant raise as a defense?
4. If there is a private right of action, what remedies are available to a plaintiff for these claims?

Having considered these questions and the U.S. District Court's certification order, it appears that the questions may not be determinative once appellant's 42 U.S.C. § 1983 unlawful-search-and-seizure claim proceeds to trial. That is, if appellant prevails on that claim, she may not be entitled to any additional damages for a successful state-constitution due-process claim because that claim is based on the same allegations of an unlawful strip search and detention. Alternatively, if respondents prevail,

then their conduct would appear to be reasonable, meaning they in all likelihood did not violate appellant's due process rights.

Accordingly, before deciding whether to accept the certified questions, we request that the U.S. District Court clarify whether our above-mentioned understanding of the case is correct. We will take no further action on this matter until we receive such clarification.

It is so ORDERED.

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Cadish, J.
Cadish

Silver, J.
Silver

STIGLICH, J., dissenting:

I would accept the certified questions based on the information already provided by the U.S. District Court. As I would prefer that the court answer the certified questions without unnecessary delay, I dissent.

Stiglich, J.
Stiglich

cc: Gallian Welker & Beckstrom, LC/Las Vegas
Attorney General/Carson City
Attorney General/Las Vegas
Clerk, United States District Court for the District of Nevada

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Exhibit 5

District Court Order Clarifying Certification Question

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SONJIA MACK,

Plaintiff

v.

BRIAN E. WILLIAMS, SR.,

Defendant

Case No.: 2:18-cv-00799-APG-VCF

Order

81513

On July 17, 2020, I certified questions to the Supreme Court of Nevada. ECF No. 37. On October 13, 2020, the Supreme Court of Nevada entered an order indicating that the certified questions "may not be determinative once appellant's 42 U.S.C. § 1983 unlawful-search-and-seizure claim proceeds to trial." *Mack v. Williams*, Nev. S. Ct. No. 81513 (Oct. 13, 2020). The court posited that if Mack prevails on her § 1983 claim, then she may not be entitled to additional damages for her state law claims that are based on the same factual allegations. And if she does not prevail, then the respondents' conduct would have been reasonable and so would not have violated Mack's rights under state law either. *Id.* The court thus requested that I "clarify whether [the court's] above-mentioned understanding of the case is correct." *Id.* And it indicated it would take no further action until I responded. *Id.*

Unfortunately, I did not receive a copy of this order from the Supreme Court of Nevada, and the parties did not file it in this court's docket. I was unaware it existed until recently.

I now respond by clarifying that, in my view, the certified questions are dispositive of issues pending before this court regardless of how the § 1983 claim is resolved. The § 1983 claim is presently on appeal at the Ninth Circuit.[1] If the Ninth Circuit concludes that the § 1983

[1] Ninth Circuit Case No. 20-16590.

claim fails, then the only remaining claims in this case will be the state law claims, for which I will require guidance from the Supreme Court of Nevada regarding whether such claims exist, and if so, the remedies and defenses that apply. If the § 1983 claim is remanded for trial, I will still need the same guidance from the Supreme Court of Nevada because the § 1983 claim and the state law claims will proceed to trial at the same time. Thus, I and the parties will need to know whether the state law claims exist and what defenses may apply, so we may prepare for trial, instruct the jury, and prepare the verdict form. And because qualified immunity is a defense to the § 1983 claim, it is theoretically possible for the defendants to prevail on the § 1983 claim but still lose on the state law claims if qualified immunity is not also a defense to the state law claims.

Further, it is unclear whether Mack's damages would be redundant if she prevailed. It is possible a jury may find that vindication of independent constitutional rights warrants separate damage awards, even if one or both are only nominal. And among the certified questions are what remedies are available to Mack if her state law claims exist. Thus, it appears premature to conclude that her state law claims could not result in additional damages. I respectfully request that the Supreme Court of Nevada assist in this case by accepting and answering the certified questions.

I ORDER the clerk of court to forward this order under official seal to the Supreme Court of Nevada, 201 South Carson Street, Suite 201, Carson City Nevada 89701-4702.

DATED this 20th day of May, 2021.

ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

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Exhibit 6

Supreme Court Order re Briefing

IN THE SUPREME COURT OF THE STATE OF NEVADA

SONJIA MACK,
Appellant,
vs.
BRIAN WILLIAMS; JAMES DZURENDA; ARTHUR EMLING, JR.; AND MYRA LAURIAN,
Respondents.

No. 81513

FILED

JUL 21 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER ACCEPTING CERTIFIED QUESTIONS, DIRECTING BRIEFING, AND DIRECTING SUBMISSION OF FILING FEE

This matter involves legal questions certified to this court, under NRAP 5, by the United States District Court for the District of Nevada. Specifically, the U.S. District Court has certified the following questions to this court:

1. Is there a private right of action under the Nevada Constitution, Article 1, § 8?
2. Is there a private right of action under the Nevada Constitution, Article 1, § 18?
3. If there is a private right of action, what immunities, if any, can a state actor defendant raise as a defense?
4. If there is a private right of action, what remedies are available to a plaintiff for these claims?

As no clearly controlling Nevada precedent exists with regard to these legal questions and the answers may determine part of the federal case, we accept these certified questions. *See* NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006) (discussing the factors this court considers when determining whether to accept a certified question).

Appellant shall have 30 days from the date of this order to file and serve an opening brief. Respondents shall have 30 days from the date the opening brief is served to file and serve an answering brief. Appellant

shall then have 21 days from the date the answering brief is served to file and serve any reply brief. The parties' briefs shall comply with NRAP 28, 28.2, 31(c), and 32. *See* NRAP 5(g)(2). The parties may file a joint appendix containing any portions of the record before the U.S. District Court that are necessary to this court's resolution of the certified questions. *See* NRAP 5(d), (g)(2).

Lastly, in any proceeding under NRAP 5, fees "shall be the same as in civil appeals . . . and shall be equally divided between the parties unless otherwise ordered by the certifying court." NRAP 5(e). The U.S. District Court's order does not address the payment of this court's fees. Accordingly, appellant and respondents shall each tender to the clerk of this court, within 14 days from the date of this order, the sum of $125, representing half of the filing fee. *See* NRAP 3(e); NRAP 5(e).

It is so ORDERED.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Silver

_____, J.
Pickering

_____, J.
Herndon

cc: Gallian Welker & Beckstrom, LC/Las Vegas
Attorney General/Carson City
Attorney General/Las Vegas
Clerk, United States District Court for the District of Nevada
Hon. Andrew P. Gordon, Judge, United States District Court for the District of Nevada