17-55289

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDREW L. "KICKING HORSE" MCCARTER,

Plaintiff-Appellee,

v.

D. ASUNCION, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California

No. CV16-5672 BRO (JEMx)
Hon. Beverly Reid O'Connell, District Judge

APPELLANTS' OPENING BRIEF

XAVIER BECERRA
Attorney General of California
WILLIAM C. KWONG
Acting Senior Assistant Attorney General
JILLIAN R. O'BRIEN
Deputy Attorney General
TODD GRABARSKY
Deputy Attorney General
State Bar No. 286999
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6044
Fax: (213) 897-7604
Email: Todd.Grabarsky@doj.ca.gov
Attorneys for Defendants-Appellants
D. Asuncion, E. Lake, J. Lazar, B. Russell,
and J. Soto

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INTRODUCTION

In order to build a new medical facility, officials at California State Prison, Los Angeles County, had to relocate one of the prison's Native American sweat lodges. When they designated a new site on a recreational yard for the exclusive use of Native American religious ceremonies, Appellee Andrew L. "Kicking Horse" McCarter claimed that the site was "unacceptable," because sweat lodge ceremonies might be interrupted by other inmates' recreational activities. Despite the fact that statewide prison policy provides protection for such religious sites, Mr. McCarter refused to try to use the designated site, and instead sued prison officials for monetary damages and injunctive relief.

But these officials are entitled to qualified immunity. Mr. McCarter failed to plausibly demonstrate that they violated a clearly-established right by designating the new area for the sweat lodge. Mr. McCarter did not show that reasonable officials acting under the same circumstances would have understood that designating this site on the yard would amount to a constitutional violation. Mr. McCarter has also failed to identify factually-analogous precedent about the requirements for an outdoor religious space in prison that would have put prison officials on notice that relocating the site would be a clear constitutional violation. The district court also applied an

obsolete and incorrect legal standard. Thus, this Court should reverse the denial of qualified immunity.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over this action under 28 U.S.C. § 1331, because Mr. McCarter alleged violations of federal law. On February 3, 2017, the district court partially granted the prison officials' motion to dismiss, but denied them qualified immunity. (CD 40; ER 8.)[1] The officials brought a timely interlocutory appeal of the denial of qualified immunity on March 3, 2017. (CD 41; ER 1.)

An order rejecting qualified immunity at the pleading stage is immediately reviewable under the collateral-order doctrine, so long as the defense turns on an issue of law. 28 U.S.C. § 1291; *Behrens v. Pelletier*, 516 U.S. 299, 307 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 524–27, 530 (1985). In adjudicating qualified immunity, "the contours of the right at issue, and the reasonableness of defendants' actions, is not a question of fact—it's a question of law." *Rodriguez v. Maricopa Cty. Comm. Coll. Dist.*, 605 F.3d 703, 707 (9th Cir. 2010) (citation omitted). Because this appeal

[1] "CD" refers to the clerk's docket sheet contained in Appellant's Excerpts of Record, and the accompanying number is a reference to the clerk's docket number. "ER" refers to Appellant's Excerpts of Record.

raises those legal issues, the Court has jurisdiction to review the district court's denial of qualified immunity.

STATEMENT OF ISSUES

1. The Supreme Court changed the pleading standards applicable to a motion to dismiss in *Twombly* and *Iqbal*. In ruling on a motion to dismiss, district courts no longer determine whether it is beyond a doubt that the plaintiff can prove no set of facts that would support liability. Instead, the district court determines whether a complaint contains sufficient factual matter to state a plausible claim. Did the district court here err in analyzing the issue of qualified immunity under the "no set of facts" pleading standard instead of the correct "plausibility" pleading standard?

2. Qualified immunity shields government officials from money damages unless it is beyond debate that reasonable officials under the same circumstances would have understood that their actions amounted to a constitutional violation. Did the district court err in denying qualified immunity based on cases that articulated constitutional rights at too high a level of generality, cases factually distinct from the circumstances at hand, and cases with no precedential weight?

3. Mr. McCarter alleges that he has been given unimpeded access to a prison's site for Native American sweat lodge ceremonies, but that it might

be disturbed by surrounding yard activities. Are the prison officials who designated that site entitled to qualified immunity, where their actions did not amount to a clearly-established constitutional violation based on prior case law?

STATEMENT OF THE CASE

I. SUMMARY OF ALLEGATIONS

The following facts are taken from Mr. McCarter's Complaint (CD 2; ER 28–46), which Appellants accept as true only for purposes of deciding the motion to dismiss.

Mr. McCarter is an inmate under the custody of the California Department of Corrections and Rehabilitation (CDCR) and is housed in Facility A at California State Prison, Los Angeles County, in Lancaster, California (LAC). (CD 2; ER 29, 30.) Mr. McCarter is a person of Native American descent who practices traditional Native American religion. (CD 2; ER 29, 33.)

At LAC, practicing Native American inmates are provided access to the traditional sweat lodge ceremony. (CD 2; ER 29, 33.) The ceremony involves building an open fire to heat rocks, which are transported along an east-west path to the inside of the lodge, where water is poured over them to produce steam. (CD 2; ER 34.) The site at the prison designated for the

Native American sweat lodge and the ceremonies themselves are explicitly protected by the CDCR Operations Manual. (CD 2; ER 29, 35.) Section 101060.9 of the Operations Manual guarantees that "[t]he designated area in which the American Indian Sweat Lodge is situated is to be considered sacred[,]" and that "[t]he sanctity must be observed and preserved, not only by inmates, but staff as well."[2] (CD 2; ER 29, 35.)

Mr. McCarter and the other Native American inmates assigned to Facility A previously conducted sweat lodge ceremonies at a site located outside the Facility A recreational yard. (CD 2; ER 35.) Sometime in 2013, Mr. McCarter was informed of the need to construct a new medical building at that location. (CD 2; ER 36.) In October of 2014, the sweat lodge was relocated to accommodate construction of the medical building. (CD 2; ER 36.)

Mr. McCarter admits that prison officials designated an area on the Facility A recreation yard as the new site exclusively for Native American sweat lodge ceremonies. (CD 2; ER 36.) The new site is a plot of land separated from the rest of the yard by a four-foot-tall fence. (CD 2; ER 36.)

[2] The relevant section of the CDCR Operations Manual, updated through January 1, 2017, is included in an addendum to this brief under Ninth Circuit Rule 28-2.7. The same section was in effect from 2014–2016.

As Mr. McCarter's complaint admits, the site is afforded protections by the CDCR Operations Manual, including section 101060.9, which requires prison staff to protect the sanctity and security of the site. (CD 2; ER 29, 35.)

Mr. McCarter contends that the new location is "unsuitable for sweat lodge ceremonies" because it is left "almost wholly unprotected" and is "not oriented east-west." (CD 2; ER 36.) Mr. McCarter asserts that the Facility A recreational yard contains "a baseball field, a soccer field, a basketball court, fitness equipment, and other recreational areas," and that the new sweat lodge site is "approximately five yards from the volleyball court" and "is surrounded by picnic tables." (CD 2; ER 36.)

Mr. McCarter would not use the new site for his religious practices, claiming that it is unacceptable. (CD 2; ER 36, 38.) In 2015, the LAC Officials brought a Native American Spiritual Leader to assist the Facility A Native American inmates in the spiritual blessing and consecration process of the new site. (CD 2; ER 39.) Mr. McCarter, who describes himself as a leader of the Native American sweat ceremonies, refused to participate in the consecration process, so the Native American Spiritual Leader declined to bless the area. (CD 2; ER 29, 39.) Several months later, prison officials brought the same Native American Spiritual Leader back to LAC. (CD 2; ER 39.) The Spiritual Leader again would not consecrate the site after

speaking with Mr. McCarter, but there is no indication that he found the site's location inappropriate. (CD 2; ER 39.)

Even though prison officials have set aside a parcel of land for the exclusive use of Native American religious practitioners, and prison staff are required to protect the sanctity and security of the site, Mr. McCarter has not used it. (*See* CD 2; ER 29, 35, 39.) No sweat ceremony has taken place at the location, the grounds have not been consecrated, and no sweat lodge structure has been built. At present, the site lies fallow, an empty plot of land fenced off from the rest of the yard that cannot be used by any non–Native American inmate of Facility A.

Mr. McCarter alleges that this non-consecrated, empty area has been "repeatedly invaded" by non–Native American inmates, who have jumped the fence to retrieve recreational items like soccer balls, as well as by those inmates who are participating in the canine therapy-rehabilitation program at Facility A. (CD 2; ER 37.) Mr. McCarter claims to have observed trash and on one occasion a "dead animal" at the site. (CD 2; ER 34.) In the years since the site was designated and tendered to the Native American practitioner inmates, Mr. McCarter identifies one instance of violence near the site. (CD 2; ER 37.) He alleges, on information and belief, that in or

around October of 2015, two inmates engaged in a fistfight near the site. (CD 2; ER 37.)

Mr. McCarter also contends that non–Native American inmates could stand near the area and "observe and comment upon the ceremonies as they occur." (CD 2; ER 38.) Mr. McCarter asserts that pepper spray used by correctional officers could "stray into the sweat lodge area if used in the vicinity" and that "[y]ard announcements blare from the P.A. system during the religious ceremonies," though no religious ceremonies have ever taken place at the new site. (CD 2; ER 38.) Mr. McCarter also alleges that inmate access to the Facility A recreational yard "entirely overlaps" with the timeframes for sweat lodge activities on the yard. (CD 2; ER 36–37.) The Complaint, however, fails to allege that any disruptions have actually occurred, because no sweat ceremonies or other rituals have taken place there due to Mr. McCarter's refusal to utilize the site.

Dissatisfied with the new site's location, Mr. McCarter proposed alternative locations that did not provide sufficient security and safety protections. (CD 2; ER 39, 40.)

II. PROCEDURAL HISTORY

On July 29, 2016, Mr. McCarter filed suit alleging violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et*

seq. (RLUIPA), and the First Amendment Free Exercise Clause, as well as a claim for retaliation. (CD 2; ER 28.) Mr. McCarter sued CDCR Secretary Kernan, CDCR Community Resources Manager Skaggs, Former LAC Warden Soto, present LAC Warden Asuncion, former LAC Community Resources Manager Russell, present LAC Community Resources Manager Lake, and LAC Chaplain Lazar. (CD 2; ER 28.) In addition to declaratory and injunctive relief, Mr. McCarter sought compensatory damages on his First Amendment Free-Exercise claim against Defendants Asuncion, Soto, Russell, Lake, and Lazar (the LAC Officials). (CD 2; ER 46.)

Defendants moved to dismiss the Complaint and asserted qualified immunity from Mr. McCarter's claim for damages. (CD 37; ER 54.) The Court partially granted the motion on February 3, 2017, dismissing the retaliation claim but denying the motion in all other respects. (CD 40; ER 8.) The court concluded that the LAC Officials were not entitled to qualified immunity. (CD 40; ER 8.)

On March 3, 2017, the LAC Officials timely filed an interlocutory appeal of the district court's denial of qualified immunity. (CD 41; ER 1.)

STANDARD OF REVIEW

This Court reviews de novo whether an asserted federal right was clearly established for qualified immunity purposes. *Elder v. Holloway*, 510

U.S. 510, 515 (1994); *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir. 2010). This Court also reviews de novo a district court's denial of a motion to dismiss on the basis of qualified immunity. *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012).

SUMMARY OF ARGUMENT

The district court's denial of qualified immunity was erroneous. First, the district court analyzed whether the Complaint asserted the violation of a clearly-established right under the abrogated "no set of facts" pleading standard explicitly rejected by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The district court failed to analyze the allegations under the correct, fact-based pleading standard articulated in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), which, like the present case, was on appeal from the denial of qualified immunity at the pleading stage. This error requires the Court to vacate the district court's denial of qualified immunity and decide the question de novo.

Second, the district court below failed to identity factually-analogous precedent putting officials on notice that moving the sweat lodge site to build a new medical facility would violate the Constitution, nor precedent indicating that every official under the same circumstances would have understood these acts to be a violation.

Third, even under the correct pleading standard, the Complaint does not demonstrate the violation of a clearly-established constitutional right. Mr. McCarter does not allege that he has been barred from or disciplined for carrying out a sweat lodge ceremony. Rather, he refused to utilize the new sweat lodge site despite LAC Officials taking multiple of steps to ensure that he is able to perform the sweat ceremonies as dictated by CDCR policy. At most, what Mr. McCarter alleges amounts to the claim that using the new site for the sweat ceremonies would diminish his spiritual fulfillment; but such an allegation has not been recognized as a clearly-established violation of an inmate's right to religious exercise.

Accordingly, this Court should reverse the district court's ruling and instead hold that the LAC Officials are entitled to qualified immunity.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE INCORRECT STANDARD WHEN ADJUDICATING QUALIFIED IMMUNITY.

When ruling on a motion to dismiss, district courts must analyze whether government officials are entitled to qualified immunity under the "governing pleading standard," in which the "'complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Wood v. Moss*, 134 S. Ct. 2056, 2067 (2014) (quoting *Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009)). In its discussion of the legal standard controlling the determination of qualified immunity, the district court applied an incorrect legal standard, stating

> In determining immunity, we accept the allegations of respondent's complaint as true. [Citations.] "Dismissal is appropriate only where it appears beyond doubt that the plaintiff can prove no set of facts, . . . where the plaintiff's allegations if true, would not support personal liability because the defendant is entitled to immunity."

(CD 40; ER 13 (quoting *Fitzpatrick v. Gates*, No. CV0004191-GAF-AJWx, 2001 WL 630534, at *4 (C.D. Cal. Apr. 18, 2001) (citing *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999)); *see also* ER 26.) In other words, the district court found it appropriate to deny qualified immunity where any theoretical facts could deprive the prison officials of the qualified immunity protections. This statement of law comes from the now-abrogated standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) ("[A] complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief." (emphasis added)), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).[3]

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[3] Although the district court cited *Fitzpatrick* and *Morley,* rather than *Conley* directly, the standard the district court used is derived from an

The Supreme Court in *Twombly* explicitly rejected *Conley*'s "no set of facts" standard. 550 U.S. at 563. The Court explained that *Conley*'s "beyond doubt" and "no set of facts" language would permit "a wholly conclusory statement of claim [to] survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Twombly*, 550 U.S. at 561. Thus, the Court concluded, the "no set of facts" standard "has earned its retirement" and is "best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Id.* at 563.

Relying on *Twombly*, the Supreme Court later articulated the proper, more rigorous pleading standard in *Ashcroft v. Iqbal*, a case—like the case at hand—on appeal from a denial of qualified immunity at the pleading stage. 556 U.S. 662. The *Iqbal* Court stated, "To survive a motion to dismiss, a

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unbroken chain of authority that tracks directly to the obsolete *Conley* standard: *Fitzpatrick*, 2001 WL 630534, at *4, cites *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999); *Morley*, 175 F.3d at 759, cites *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997); *Johnson*, 113 F.3d at 1117, cites *Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996); *Lewis*, 87 F.3d at 1545, cites *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); *Parks*, 51 F.3d at 1484, cites *Everest & Jennings, Inc. v. Am. Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir. 1994)); *Everest & Jennings*, 23 F.3d at 228, cites *Gobel v. Maricopa Cty.*, 867 F.2d 1201, 1203 (9th Cir. 1989); *Gobel*, 867 F.2d at 1203, cites *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980); *Jablon*, 614 F.2d at 682, cites *Conley*, 355 U.S. 41.

complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). In that regard, courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Wood*, 134 S. Ct. at 2065 n.5 (internal quotation marks and citation omitted); *see also Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) ("[A] court discounts conclusory statements, which are not entitled to the presumption of truth, before determining whether a claim is plausible.").

Rather than applying the *Iqbal* plausibility standard, the district court below incorrectly used the obsolete *Conley* standard to deny the LAC Officials qualified immunity. Relying on *Fitzpatrick* and *Morley*—both decided before the Supreme Court's rejection of *Conley* in *Twombly*, and its articulation of the proper pleading standard in *Iqbal*—the district court concluded that it was not the case "that 'plaintiff can prove *no set of facts*, . . . where the plaintiff's allegations if true, would" deprive defendants to qualified immunity. (CD 40; ER 25 (quoting *Fitzpatrick*, 2001 WL 630534 at *4) (emphasis added); *see also* ER 26 ("[I]t is not '*beyond doubt*' that [Mr. McCarter's] allegations cannot support personal liability because the Defendants are entitled to qualified immunity." (quoting *Fitzpatrick*, 2001 WL 630534 at *4) (emphasis added)).)

The district court should have used the correct *Iqbal* standard: whether the Complaint states sufficient factual matter, accepted as true, to plausibly demonstrate the violation of a clearly-established constitutional right, such that officials would not be entitled to qualified immunity. Applying the obsolete pre–*Twombly* and *Iqbal* pleading standard, the district court erred in denying the LAC Officials qualified immunity.

II. THE DISTRICT COURT ERRED IN DENYING THE LAC OFFICIALS QUALIFIED IMMUNITY.

A. Mr. McCarter Has the Burden to Show That Every Reasonable Prison Official Would Have Understood That Relocating the Sweat Lodge Site Violated the Constitution.

Government officials sued under 42 U.S.C. § 1983 are entitled to qualified immunity, unless they violated a right that was clearly established at the time of the challenged conduct. *Plumhoff v. Rickard*, 572 U.S. ---, 134 S. Ct. 2012, 2023 (2014) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). Once an official claims qualified immunity, the burden shifts to the plaintiff to prove both that the right was violated and that the right was clearly established at the time of the alleged misconduct. *Isayeva v. Sacramento Sheriff's Dep't*, --- F.3d ---, No. 15-17065, 2017 WL 4341744, at *5 (9th Cir. Oct. 2, 2017) (citing *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011)).

Qualified immunity shields individuals from liability for money damages, unless it is "beyond debate" that "every reasonable official" under the same circumstances would have understood that the defendant's actions amounted to a constitutional violation. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam). The right's contours must be "sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff*, 134 S. Ct. at 2023.

Where there is a "hazy border" between constitutional conduct and unconstitutional conduct such that the officer "reasonably misapprehends the law governing the circumstances," qualified immunity protects that officer. *Shafer v. Cty. of Santa Barbara*, 868 F.3d 1110, 1118 (9th Cir. 2017) (citing *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam)). This exacting standard gives government officials "breathing room" to make "reasonable but mistaken judgments" by "'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'" *City and County of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (quoting *al-Kidd*, 563 U.S. at 744); *Hamby v. Hammond*, 821 F.3d 1085, 1091 (9th Cir. 2016) ("[S]tate officials are entitled to qualified immunity so long as none of our precedents squarely governs the facts here, meaning that we cannot say that only someone plainly incompetent or who knowingly violate[s] the law would

have . . . acted as [the officials] did." (internal quotation marks omitted)). In that sense, the purpose of qualified immunity is to shield government officials who make reasonable mistakes from "undue interference with their duties" and "potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982); *see also Hughes v. Kisela*, 862 F.3d 775, 782 (9th Cir. 2016), *as amended* (June 27, 2017) ("The purpose of qualified immunity is to strike a balance between the competing need to hold public officials accountable . . . and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." (internal quotation marks omitted)).

The Supreme Court recently reaffirmed the "longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 580 U.S. ---, 137 S. Ct. 548, 552 (2017) (per curiam) (quoting *al-Kidd*, 563 U.S. at 742). The clearly-established right must be "'particularized' to the facts of the case" at hand; "[o]therwise, '[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 639, 640 (1987)). This standard requires a plaintiff to point to prior precedential case law that articulates a constitutional rule specific enough to

"alert *these* [officers] *in this case* that *their particular conduct* was unlawful." *Sharp v. Cty. of Orange*, --- F.3d ---, No. 15-56146, 2017 WL 4126947, at *7 (9th Cir. Sept. 19, 2017) (emphasis in original). In order to provide that notice to the officers in question, the prior precedential case law must come from the Ninth Circuit or the United States Supreme Court, or otherwise be embraced by a "consensus" of courts outside this jurisdiction. *Id.* at *7.

Applying these principles, the Supreme Court in *White v. Pauly* vacated the denial of qualified immunity, because the lower court failed to identify a case where a government official acted under "similar circumstances" and relied solely on case law that viewed constitutional principles at an excessively generalized level. 137 S. Ct. at 552–53. Similarly, in *City and County of San Francisco v. Sheehan*, the Supreme Court reversed this Court's denial of qualified immunity because the Court relied on cases that established "far too general a proposition" and cases that were distinguishable from the factual circumstances at hand. 135 S. Ct. at 1775–76. And in *Mullenix*, the Supreme Court reversed the denial of qualified immunity after distinguishing cases cited by the lower court and pointing to more factually-analogous cases ignored by the lower court that demonstrated the official's actions were reasonable. 136 S. Ct. at 311–12.

Cases like *White, Mullenix,* and *Sheehan* are demonstrative of the Supreme Court's recent trend of reversing appellate rulings in qualified immunity cases due to those courts erroneously defining a "clearly established right" at too high a level of generality. *See White*, 137 S. Ct. at 551; *Sheehan*, 135 S. Ct. at 1774 n.3; *Mullenix*, 136 S. Ct. at 312; *al-Kidd*, 563 U.S. at 742. This Court has recognized the Supreme Court's "recent frustration with failures to heed its holdings," and, having heard the Supreme Court "loud and clear," has recognized the need to define a clearly-established right at a sufficient level of specificity. *S.B. v. County of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017). Thus, before a court can impose liability on individual officers, the court must identify factually-comparable precedent that put the officers on clear notice that their actions under the particular factual circumstances would be unconstitutional. *Id.* at 1015–16.

Accordingly, in order for the LAC Officials to be held individually liable for monetary damages, their actions—as plausibly alleged in the Complaint—must have amounted to a clear constitutional violation. The burden is on Mr. McCarter to identify that sufficiently definite and clearly-established right through factually-analogous precedent that put the officials on notice that their relocation of the sweat lodge site was plainly unconstitutional. *Isayeva*, 2017 WL 4341744, at *5. For the reasons

explained herein, Mr. McCarter has not met—nor could he meet—that burden; thus, the LAC Officials are entitled to qualified immunity.

B. None of the Cases Cited by the District Court Are Factually-Analogous or Sufficient to Put the LAC Officials on Notice that Their Conduct Violated Clearly-Established Law.

The district court below erred in denying qualified immunity based on cases that articulated free-exercise rights at too high a level of generality, cases factually distinct from the case at hand, and cases with no precedential weight. None of the cases cited by the district court would have put the LAC Officials on notice about the Constitution's locational requirements for Native American sweat lodge sites or other outdoor religious grounds in the prison setting.

The district court first cited several cases in support of the proposition that state and federal prisons, including those in California, provide Native American religious practitioner inmates with access to a sweat lodge. (CD 40; ER 25–26.) None of those cases, however, discussed the requirements for locating prison religious sites, nor did any of them find a First-Amendment violation with respect to a prison's sweat lodge site or outdoor religious grounds more generally. In fact, all but three of those cases perfunctorily mentioned sweat lodges only to provide context to the inmates'

religious backgrounds. *See Henderson v. Terhune*, 379 F.3d 709 (9th Cir. 2004) (a prison's short-hair grooming policy did not violate a Native American inmate's right to the free exercise of his religion); *Greybuffalo v. Bertrand*, No. 03–C–559–C, 2004 U.S. Dist. LEXIS 22356 (W.D. Wis. Nov. 1, 2004) (a prison's decision not to revive a council for Native American inmates did not pose a substantial burden on the inmates' religious exercise, given, *inter alia*, that the inmates had access to a sweat lodge); *Crocker v. Durkin*, 159 F. Supp. 2d 1258, 1264 (D. Kan. 2001) (concerning a challenge brought by inmate members of the Nation of Islam and not concerning the prison's sweat lodge, outdoor religious spaces, or the Native American religion); *Indian Inmates of Neb. Penitentiary v. Grammer*, 649 F. Supp. 1374, 1376 (D. Neb. 1986) (concerning a religious exercise challenge to the prison's policy banning use of peyote during Native American religious ceremonies, not concerning access to or the contours of the sweat lodge site), *aff'd sub nom. Indian Inmates of NE v. Grammer*, 831 F.2d 301 (8th Cir. 1987).

In the three cases the district court cited that actually addressed sweat lodge sites, the prison policies were *upheld* against inmates' free-exercise challenges. In *Allen v. Toombs*, this Court held that an outright ban on prisoners housed in disciplinary segregation from accessing the prison's

sweat lodge did not violate those inmates' free-exercise rights. 827 F.2d 563 (9th Cir. 1987). In *Runningbird v. Weber*, the South Dakota district court rejected a Native American inmate's claim that a two-hour time period was inadequately short to meaningfully carry out the sweat ceremony. No. CIV. 03-4018-RHB, 2005 WL 1363927, at *1, *5 (D.S.D. June 8, 2005), *aff'd*, 198 F. App'x 576 (8th Cir. 2006). The *Runningbird* Court held that even though it was "clear" that the inmate was unable to practice his religion as he preferred, he was afforded "sufficient means for practicing the major tenets of his religion" and thus no free-exercise violation existed. *Id.* at *5. And in *Brown ex rel. Indigenous Inmates v. Schuetzle*—in lockstep with the similar rulings by district courts within this circuit[4]—the North Dakota district court held that a prison's policy of permitting the attendance of non–Native American inmates during sweat ceremonies did not violate the Native

[4] *E.g. Mauwee v. Donat*, No. 3:06-cv-00122-RCJ-VPC, 2009 WL 3062787, at *2 (D. Nev. Sept. 18, 2009), *aff'd*, 407 F. App'x 105 (9th Cir. 2010); *Sessing v. Beard*, No. 1:13-CV-01684-LJO, 2015 WL 3953501, at *2 (E.D. Cal. June 29, 2015), *report and recommendation adopted*, No. 1:13-CV-1684-LJO-MJS-PC, 2015 WL 6872807 (E.D. Cal. Nov. 9, 2015); *Nible v. Cal. Dep't of Corr. & Rehab.*, No. 1:13-CV-01127 DLB PC, 2014 WL 458186 (E.D. Cal. Feb. 4, 2014); *Fowler v. Cal. Dep't of Corr. & Rehab.*, No. 1:13-CV-00957 DLB PC, 2014 WL 458168 (E.D. Cal. Feb. 4, 2014); *Birdwell v. Cates*, No. CIV S-10-0719 KJM, 2012 WL 1641964 (E.D. Cal. May 9, 2012), *subsequently aff'd sub nom.*, *Birdwell v. Beard*, 623 F. App'x 884 (9th Cir. 2015). These cases are discussed in Section II.C.2, *infra*.

Americans' free-exercise rights. 368 F. Supp. 2d 1009, 1023–24 (D.N.D. 2005).

In attempting to identify precedent that would have put the LAC Officials on notice that their conduct constituted a constitutional violation, the district court below pointed to several cases—none of which are precedential—that are factually distinct from the present circumstances. (CD 40; ER 26.) In *Thomas v. Gunter*, the Eighth Circuit in 1994 found that a prison's denial of a Native American inmate's daily access to a sweat lodge for religious worship could have constituted a substantial burden on the inmate's religious exercise. 32 F.3d 1258, 1261 (8th Cir. 1994) ("*Thomas I*") (cited in CD 40; ER 26). Reliance on that case for the "clearly established" determination, however, is problematic for several reasons. First, unlike the *Thomas I* plaintiff, Mr. McCarter makes no allegation that he was prohibited from carrying out the sweat ceremonies or accessing the sweat lodge site. Second, in a later ruling in the same case, the Eighth Circuit found that no constitutional violation had occurred because there were legitimate penological reasons for denying the requests for daily sweat ceremonies. *Thomas v. Gunter*, 103 F.3d 700, 703 (8th Cir. 1997) ("*Thomas II*"). In fact, the *Thomas II* Court affirmed dismissal of the case on qualified immunity grounds. *Id.* Third, the Eighth Circuit has since held that *Thomas I* was

solely a fact-based inquiry and "did not enunciate a general legal rule to be applied in qualified immunity analysis." *Sisney v. Reisch*, 674 F.3d 839, 845 (8th Cir. 2012). Fourth, more recent Eighth Circuit precedent demonstrates a lack of clarity as to whether and to what degree denying inmates access to a sweat lodge or other outdoor religious sites constitutes a free-exercise violation. *See Hamilton v. Schriro*, 74 F.3d 1545, 1551 (8th Cir. 1996) (a prison's denial of a Native American inmate's access to a sweat lodge was not a constitutional violation); *Fowler v. Crawford*, 534 F.3d 931, 942 (8th Cir. 2008) (upholding a prison's outright prohibition on the construction of a Native American sweat lodge in the face of an RLUIPA challenge); *Sisney*, 674 F.3d at 845 (granting prison officials qualified immunity where they denied a Jewish inmate's request to erect and eat meals in a "succah" (a temporary tent or booth) on the prison's yard for the Sukkot holiday).

Finally, whatever influential effect *Thomas I* may have, it is eclipsed by decisions of *this* Court and district courts within *this* circuit. *E.g.*, *Allen*, 827 F.2d at 567 (holding that an outright ban on an inmate in disciplinary segregation from accessing the sweat lodge did not violate the First Amendment); *see also, e.g.*, *Mauwee v. Donat*, No. 3:06-cv-00122-RCJ-VPC, 2009 WL 3062787, at *2 (D. Nev. Sept. 18, 2009) (finding prison officials to be qualifiedly immunized from a Native American inmate's

claim that allowing non–Native American inmates to enter the sweat lodge grounds violated free exercise rights) (discussed in Section II.C.2, *infra*), *aff'd*, 407 F. App'x 105 (9th Cir. 2010); *Sessing v. Beard*, No. 1:13-CV-01684-LJO, 2015 WL 3953501, at *2 (E.D. Cal. June 29, 2015) (finding that an inmate did not state a First-Amendment claim based on being denied exclusive access to a fire pit and pagan worship grounds) (discussed in Section II.C.2, *infra*), *report and recommendation adopted*, No. 113-CV-1684-LJO-MJS-PC, 2015 WL 6872807 (E.D. Cal. Nov. 9, 2015); *Fletcher v. Whorton*, No. 2:06-CV-00818-PMP-GWF, 2010 WL 2559882 (D. Nev. Mar. 22, 2010) (finding that a Wiccan inmate was unable to demonstrate at trial that the denial of a Wiccan sweat lodge substantially burdened his religious exercise).

The district court also cited a 2001 district court case from the Northern District of Iowa, *Youngbear v. Thalacker*, in which a one-year delay in constructing a sweat lodge site at a newly-opened prison was found to violate the Free-Exercise Clause. 174 F. Supp. 2d 902, 915 (N.D. Iowa 2001). However, the *Youngbear* Court held that the prison officials *were, in fact, entitled to qualified immunity* for the delay. *Id.* at 919–20. That court reasoned that the speed with which prison officials were required to make the necessary logistical and security arrangements to provide a sweat lodge

had not been clearly established; thus, "the contours of the right were not clear and specific enough that 'a reasonable official would understand that what he is doing violates that right.'" *Id.* at 919–20 (quoting *Anderson*, 483 U.S. at 640). *Youngbear*'s finding of a free-exercise violation does not mean that the LAC Officials should be denied qualified immunity, because, like *Thomas I*, its precedential effect is dwarfed by more on-point, controlling cases from within this circuit.

The district court also identified *Sousa v. Wegman*, an unpublished district court case in which a prison denied an inmate practitioner of the Mexican Indian religion access to Mexican Indian sweat lodge rituals, but only allowed him to use the sweat lodge with Native American inmates. No. 1:11-CV-01754-LJO, 2015 WL 3991100, at *3 (E.D. Cal. June 30, 2015), *report and recommendation adopted*, No. 1:11-CV-01754-LJO, 2015 WL 5027585 (E.D. Cal. Aug. 14, 2015). The inmate alleged that partaking in Native American sweat lodge ceremonies would not satisfy his religious mandate, because his religion required separate and distinct Mexican Indian sweat lodge rituals. *Id.* at *2–*3. The district court denied defendants summary judgment, finding disputes of fact over the religious nature of the inmate's beliefs and the reasonableness of the prison's actions. *Id.* at *5–*6.

The factual differences between *Sousa* and Mr. McCarter's case are striking. The *Sousa* plaintiff was only permitted to go onto the sweat lodge grounds during the time allotted for Native American rituals and was not given an opportunity to conduct Mexican Indian rituals. Mr. McCarter, in contrast, makes no allegation that prison officials are denying him access to the sweat lodge site. Rather, as Mr. McCarter alleges in the Complaint, the LAC Officials designated the new location as the sweat lodge site for Mr. McCarter's religion, and Mr. McCarter is free to utilize that site.

Additionally, the *Sousa* summary judgment order did not concern the location of the outdoor sweat lodge site, or the degree to which that site had to be separated or protected from outside activity. And, that ruling was issued in an unpublished decision on August 14, 2015, after Mr. McCarter alleges the LAC Officials had already moved the sweat lodge site (CD 2; ER 36). Thus, the district court should not have relied on *Sousa* for providing instruction to officials relocating the Facility A sweat lodge site.

The circumstances of Mr. McCarter's case are also factually distinct from those in *Greene v. Solano County Jail*, cited by the district court (CD 40; ER 24), in which this Court held that "an outright ban on a particular religious exercise is a substantial burden on that religious exercise," 513 F.3d 982, 988 (9th Cir. 2008). In *Greene*, a substantial burden existed where

the prison denied a maximum security inmate's request to attend group religious worship services; essentially, the inmate was only permitted to worship or practice his religion by himself in his own cell. *Id.* at 985. In the case at hand, however, Mr. McCarter makes no allegation that he was prohibited from carrying out the sweat ceremonies.[5] Rather, the Complaint

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[5] It is also unclear to what extent limiting access to a Native American sweat lodge site amounts to a violation of a clearly-established right; cases within and outside this Circuit come out differently on the matter. *Compare, e.g.*, *Allen v. Toombs*, 827 F.2d 563, 567 (9th Cir. 1987) (upholding a prohibition on disciplinary segregation prisoners from using a sweat lodge as non-violative of the First Amendment); *Fowler v. Crawford*, 534 F.3d 931, 942 (8th Cir. 2008) (upholding a prison's outright prohibition on the construction of a Native American sweat lodge altogether); *Hamilton v. Schriro*, 74 F.3d 1545, 1551 (8th Cir. 1996) (holding that the prison's denial of a Native American inmate's access to a sweat lodge did not constitute a constitutional violation); *McElhaney v. Elo*, No. 98-1832, 2000 WL 32036, at *4 (6th Cir. Jan. 6, 2000) (upholding prison's preventing high security inmates from accessing the Native American sweat lodge); *Chance v. Tex. Dep't of Criminal Justice*, 730 F.3d 404, 414–16 (5th Cir. 2013) (a prison's permitting only monthly ceremonies, and rejecting an inmate's request for more frequent ceremonies, did not violate RLUIPA); *Bailey v. Isaac*, No. CIV. 11-25-ART, 2012 WL 4364088, at *3 (E.D. Ky. Sept. 24, 2012) (denial of Native American inmate's request to build a sweat lodge was not a constitutional violation); *and Farrow v. Stanley*, No. CIV.02-567-PB, 2005 WL 2671541, at *12–*13 (D.N.H. Oct. 20, 2005) (entitling prison officials to qualified immunity for their outright denial of a request to build a sweat lodge), *with Sousa v. Wegman*, No. 1:11-CV-01754-LJO, 2015 WL 3991100, at *5 (E.D. Cal. June 30, 2015) (finding questions of fact as to whether a prison's denying an inmate practitioner of the Mexican Indian religion from accessing to a sweat lodge to conduct Mexican Indian-specific rituals constituted a free-exercise violation), *report and recommendation adopted*, No. 1:11-CV-01754-LJO, 2015 WL 5027585 (E.D. Cal. Aug. 14,

describes the multitude of steps the LAC Officials took to further Mr. McCarter's ability to carry out the sweat ceremonies: designating the new site exclusively for Native American rituals (CD 2; ER 36); building a fence around the site separating it from the rest of the yard to the exclusion of non-Native American inmate practitioners (CD 2; ER 36); tendering the site to the Native American practitioners to consecrate, build a sweat lodge, and carry out the ceremonies under the department policy protections (CD 2; ER 35, 36); and twice arranging for a Native American Spiritual Leader to assist the Native American inmates in setting up the lodge and consecrating the site (CD 2; ER 39). Accordingly, the Complaint fails to allege the violation of a clearly-established right in the form of a ban on religious practices.

The district court below also cited an unpublished Eastern District of California order denying prison officials summary judgment where a Wiccan inmate was not permitted to use spiritual oil during his religious practices.

2015); *Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) (reversing a grant of summary judgment on an RLUIPA claim in favor of prison officials who denied an inmate in a special protective unit from accessing the sweat lodge, but not addressing whether the denial constituted a First Amendment free-exercise violation); *and Trapp v. Roden*, 473 Mass. 210, 215, 219 (2015) (holding that a complete closure of a sweat lodge violated RLUIPA, but not addressing whether it constituted a First Amendment free-exercise violation). But, in any event, Mr. McCarter's Complaint indicates no such ban on his access to sweat ceremonies at the new site.

(CD 40; ER 24 (citing *Oliverez v. Albitre*, No. 1:09-CV-00352-LJO-SK, 2012 WL 3778861, at *10 (E.D. Cal. Aug. 31, 2012), *report and recommendation adopted*, No. 1:09-CV-00352-LJO, 2012 WL 4433477 (E.D. Cal. Sept. 24, 2012)).) However, numerous cases from this Court and from district courts within this circuit have dismissed, awarded prison officials summary judgment, or entitled them to qualified immunity on claims that denial of access to prayer oils substantially burdened religious exercise. *See Curry v. Cal. Dep't of Corr.*, No. C-09-3408 EMC PR, 2012 WL 968079, at *7 (N.D. Cal. Mar. 21, 2012) (listing cases).

For these reasons, the district court failed to identify precedent that "squarely governs the facts here" and placed it beyond debate that every reasonable official under the same circumstances would have understood that moving the sweat lodge site to the Facility A yard violated the Constitution. *Mullenix*, 136 S. Ct. at 308–10. Accordingly, the district court erred in denying qualified immunity.

C. The LAC Officials Are Entitled to Qualified Immunity, Because Mr. McCarter Did Not Allege the Violation of a Clearly-Established Right.

Even looking beyond the case law the district court identified, the right Mr. McCarter claims to have been violated was not clearly established so as to deprive the LAC Officials of qualified immunity for relocating the sweat

lodge. There is no factually-analogous precedential case law in which officials acting under the same circumstances were held to have plainly violated the Constitution. Therefore, even if the LAC Officials violated the Constitution, this alleged violation was not so plain or unreasonable as to deny them qualified immunity.

1. Inmates' First-Amendment Right to Religious Exercise Is Necessarily Limited by the Fact of Incarceration and Subject to Penological Goals.

In relocating the sweat lodge site, the LAC Officials were generally on notice of the First Amendment Free-Exercise rights of prisoners, which are "necessarily limited" by the fact of incarceration and "may be curtailed in order to achieve legitimate correctional goals or to maintain prison security." *McElyea v. Babbitt*, 833 F.2d 196, 197 (9th Cir. 1987). Valid penological and correctional goals include the deterrence of crime, rehabilitation of inmates, and institutional security. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). If the prison regulation is reasonably related to legitimate penological interests—as analyzed under the factors set forth *Turner v. Safley*, 482 U.S. 78, 89–90 (1987)[6]—there is no First Amendment violation.

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[6] Those balancing factors are (1) "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "alternative means of exercising the right that

O'Lone, 482 U.S. at 349; *Shakur v. Schriro*, 514 F.3d 878, 884 (9th Cir. 2008).

Inmates asserting a free-exercise claim must show that the prison's action or policy "substantially burdens" the practice of their religion, *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015), meaning that a limitation imposes a "significantly great restriction or onus" upon the religious exercise, *Walker v. Beard*, 789 F.3d 1125, 1135 (9th Cir. 2015) (citing *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)). While an "outright ban" on a religious exercise can constitute a substantial burden, *Greene*, 513 F.3d at 988, a mere inconvenience on a religious exercise, practice, or ceremony does not, *Jones*, 791 F.3d at 1031. Rather, to constitute a substantial burden, the prison's policy must coerce or exert substantial pressure on individuals to violate their religious beliefs. *Id.* at 1031–32. That pressure is demonstrated where the prison denies an important benefit because of conduct mandated by religious belief, or imposes discipline or other sanctions for the inmate's engagement in

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remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) "the absence of ready alternatives" as opposed to the "existence of obvious, easy alternatives." *Turner*, 482 U.S. at 89–90 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

religious practices. *Shakur*, 514 F.3d at 888; *Walker*, 789 F.3d at 1135 (citing *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707 (1981)). A government action or policy that allegedly diminishes a practitioner's spiritual fulfillment or the sacredness of a religious practice—even to the point of desecration—is not a substantial or undue burden. *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1063 (9th Cir. 2008) (en banc); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988).

Although these principles provide guidance to prison officials as to the general contours of prisoners' free-exercise rights, the right for which Mr. McCarter seeks redress must be defined with far greater specificity and particularity. *White*, 137 S. Ct. at 552. For the reasons explained herein, however, there is no sufficiently-analogous precedential case law to have put the LAC Officials on notice that relocating the Facility A sweat lodge site would be plainly unconstitutional. *S.B.*, 864 F.3d at 1015.

2. The LAC Officials Are Entitled to Qualified Immunity for Placing the Sweat Lodge Site on the Recreational Yard, Which Did Not Amount to the Violation of a Clearly-Established Right.

Taking Mr. McCarter's allegations as true, he does not allege the LAC Officials violated a clearly-established right. Controlling case law involving

allegations of disruptions to Native American worship practices or the desecration of religious grounds would not have put the LAC Officials on notice of a constitutional violation in this case. To the contrary, precedent available at the time indicated to the LAC Officials that locating the sweat lodge site on the Facility A recreational yard would likely have comported with inmates' free-exercise rights. Therefore, the LAC Officials are entitled to qualified immunity.

This Court, sitting en banc, has rejected a free-exercise claim that worship on Native American religious ground was substantially burdened by proximate recreational activity. *Navajo Nation*, 535 F.3d 1058. In *Navajo Nation*, the federal government permitted the operation of a ski resort on a public mountain sacred to and used by a Native American group for religious worship. 535 F.3d at 1064–65. The resort planned to use artificial snow derived from recycled wastewater containing small amounts of human waste in its operations. *Id.* at 1065–66. In addition to arguing that the presence and operation of the ski resort generally desecrated the sacredness of the mountain, the group claimed that the artificial snow would desecrate the mountain, deprecate their religious ceremonies, and injure their religious sensibilities. *Id* at 1062–63, 1065. Although this Court agreed that the presence of the resort and usage of the artificial snow desecrated the sacred

mountain and diminished the group's spiritual fulfillment, it held that this did not constitute a substantial burden on religious exercise. *Id.* at 1070. The Court explained that the Native American group was not forced to choose between following the tenets of its religion and receiving a governmental benefit, nor was the group threatened with government sanctions if it continued to worship on the (now desecrated) mountain. *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)); *see also Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm.*, 545 F.3d 1207, 1214–15 (9th Cir. 2008) (holding that relicensing a hydroelectric dam at a sacred site imposed no substantial burden on religious exercise).

The *Navajo Nation* en banc decision relied on the Supreme Court's decision in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). 535 F.3d at 1071–73. In *Lyng*, Native American tribes challenged the United States Forest Service's plans to build a logging road in an area of land the tribes held as an "integral and indispensable part of Indian religious conceptualization and practice" and had been used by those groups for rituals that depended on the private, silent, and undisturbed natural setting. 485 U.S. at 442–43. Although the Supreme Court acknowledged that the road-building plan would indeed "interfere significantly" with the tribes' ability to practice their religion, it found no substantial burden on the

exercise of their religion. *Id.* at 449. Even operating under the assumption that the road and logging activity would have devastating effects on the tribes' religious practices to the point that it would "virtually destroy" their ability to practice their religion, the Court still did not find a substantial burden. *Id.* at 451–52. The rationale—the same that this Court would use two decades later in *Navajo Nation*—was that the tribes were not being coerced into violating their religious beliefs or punished for exercising their religious mandate. *Id.* at 449–50 (citing *Sherbert*, 374 U.S. 398; *Yoder*, 406 U.S. 205; *Thomas v. Review Bd.*, 450 U.S. 707)); *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 96 (D.D.C. 2017) (holding that *Lyng* would likely prevent a Native American tribe from demonstrating a substantial burden from an easement for an oil pipeline that would desecrate the tribe's sacred waters), *appeal dismissed sub nom.*, No. 17-5043, 2017 WL 4071136 (D.C. Cir. May 15, 2017).

The rationale of *Navajo Nation* and *Lyng* has been applied to cases within this circuit involving Native American sweat lodge grounds and other outdoor religious worship spaces at prisons. Indeed, this Court has affirmed a district court's ruling that prison officials were qualifiedly immune from an inmate's claim that a prison's Native American sweat lodge site had been desecrated and destroyed. *Mauwee v. Donat*, No. 3:06-cv-00122-RCJ-VPC,

2009 WL 3062787, at *2 (D. Nev. Sept. 18, 2009), *aff'd*, 407 F. App'x 105 (9th Cir. 2010). In that case, prison officials began permitting non–Native American inmates to use the prison's sweat lodge, which had previously been designated for exclusive use by the Native American practitioners. *Id.* at *1, *2. The plaintiff claimed that this change in policy, and the presence of non–Native American inmates on the grounds, amounted to the "desecration and destruction" of the sweat lodge area. *Id.* at *2. Relying on the Supreme Court's decision in *Lyng*, however, the district court granted summary judgment based on its finding that prison officials' actions did not violate any clearly-established right, because—even if the sweat lodge grounds had been desecrated to the point of destruction—the plaintiff was not prevented from carrying out the sweat ceremonies. *Id.* at *7. In affirming that ruling, this Court in an unpublished memorandum also found no First Amendment violation, let alone a clearly-established violation. 407 F. App'x at 107 (citing *Navajo Nation*, 535 F.3d at 1069–70, for the proposition that "perceived, subjective desecration of sacred sites does not constitute an undue burden on religion because it neither coerces action violating religious beliefs nor penalizes religious activity").

Other district courts within this circuit have similarly found that a prison's provision of outdoor spaces for religious worship satisfies the First

Amendment's free-exercise requirement, even where those outdoor spaces may not comply with each and every aspect of the worshiper's religious requirements and contours. For example, in *Sessing v. Beard*, an inmate practitioner of the "Asatru/Odinism" religion sought a separate outdoor space to exercise ceremonies and practices required by his religion. No. 1:13-CV-01684-LJO, 2015 WL 3953501, at *2 (E.D. Cal. June 29, 2015), *report and recommendation adopted*, No. 113-CV-1684-LJO-MJS-PC, 2015 WL 6872807 (E.D. Cal. Nov. 9, 2015). When prison officials offered the inmate shared use of either an already-in-place Native American sweat lodge site or the outdoor "pagan grounds," the inmate claimed that sharing sites with other religions would violate the sacredness of the land his religion required to be "secure from trespassers." *Id.* at *2–*3. The inmate—similar to Mr. McCarter—also complained that the outdoor grounds were not "permanently separated" from the rest of the recreational yard. *Id.* The district court, however, held that the inmate did not state a claim by alleging that his religious practice was substantially burdened by the "less-than-ideal worship conditions" of the outdoor religious spaces offered to him by the prison, because the inmate could still undertake his religious ceremonies there. *Id.* at *4.

Similarly, in twin cases featuring similar complaints, a district court found that the "Asatru/Odinic" plaintiffs failed to plausibly demonstrate a substantial burden based on allegations that they were not afforded exclusive outdoor religious grounds, despite their insistence that their religion required worshiping on a space free from other religions. *Nible v. Cal. Dep't of Corr. & Rehab.*, No. 1:13-CV-01127 DLB PC, 2014 WL 458186 (E.D. Cal. Feb. 4, 2014); *Fowler v. Cal. Dep't of Corr. & Rehab.*, No. 1:13-CV-00957 DLB PC, 2014 WL 458168 (E.D. Cal. Feb. 4, 2014). Another district court found—in a ruling affirmed by this Court—that an Odinist inmate failed to articulate how sharing an outdoor space burdened his ability to practice his religion, despite the inmate's claim that he could not use the shared area because it was desecrated by other religions. *Birdwell v. Cates*, No. CIV S-10-0719 KJM, 2012 WL 1641964 (E.D. Cal. May 9, 2012), *aff'd sub nom.*, *Birdwell v. Beard*, 623 F. App'x 884 (9th Cir. 2015); *see also Rice v. Curry*, No. C 09-1496 LHK PR, 2012 WL 4902829, at *13–*14 (N.D. Cal. Oct. 12, 2012) (no substantial burden where an inmate of the Ansar El Mohammad faith was denied access to the prison chapel separate from general Muslim access). And, another district court found that a Wiccan inmate failed to prove that a prison's outright denial of his request to build a religious sweat

lodge did not constitute a substantial burden on his religious exercise. *Fletcher*, 2010 WL 2559882.[7]

The weight of these cases demonstrates that the LAC Officials would not have been on notice that relocating the sweat lodge to the recreational yard amounted to a plain and unreasonable constitutional violation. Similar to the plaintiffs in the aforementioned cases, Mr. McCarter contends that the sacredness of the sweat lodge ceremonies would be diminished because the sweat lodge grounds, the lodge itself, and the ceremonies might be desecrated by yard activity surrounding the new location. Like the inmates in *Mauwee*, *Sessing*, *Nible*, *Fowler v. CDCR*, and *Birdwell*—all of whom argued that using the lodge grounds the prison provided to them would violate their religious mandate—Mr. McCarter asserts that utilizing the new site would result in spiritually-diminished worship or even worship on desecrated grounds. Such a claim is not a substantial burden on religious

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[7] Other policies that burden inmates' religious exercise beyond the sweat lodge context have been upheld by this Court and district courts within this circuit. *See, e.g.*, *Henderson v. Terhune*, 379 F.3d 709 (9th Cir. 2004) (holding that a prison's short-hair grooming requirement did not violate the First Amendment, because the policy was reasonably related to a legitimate penological interest); *Standing Deer v. Carlson*, 831 F.2d 1525 (9th Cir. 1987) (no First Amendment violation from a prison's ban on the wearing of Native American religious headgear); *Curry*, 2012 WL 968079, at *6 (no substantial burden where the prison prohibited an inmate from using religiously-mandated prayer oils).

exercise. *Navajo Nation*, 535 F.3d 1058; *Lyng*, 485 U.S. 439. And, like the *Sessing* plaintiff, who complained that the sweat lodge site was not permanently separated from the yard, Mr. McCarter's primary complaint is that the sweat lodge was moved to an area on the recreational yard. However, he has not stated how the site violates the requirements of the Native American religion. He merely claims that the sweat ceremonies would take place under less-than-ideal conditions, which does not show a violation of a clearly-established right so as to deny qualified immunity.

Even if Mr. McCarter's ability to conduct the sweat ceremonies is severely diminished due to surrounding yard activity, invasions and intrusions by "outside persons or objects," loud noises, and the observations and commentary by non-Native American inmates (CD 2; ER 34, 38), such interference does not constitute a clearly-established constitutional violation. As *Lyng* and *Navajo Nation* have instructed the LAC Officials, even government action that would "virtually destroy" the religious practitioners' ability to practice their religion, on its own, does not constitute a substantial burden. *Lyng*, 485 U.S. at 451; *Navajo Nation*, 535 F.3d at 1072. Instead, practitioners must show that they have been coerced into violating their religious beliefs by being disciplined or denied a benefit for exercising those beliefs. *Shakur*, 514 F.3d at 888. However, like the plaintiffs in *Lyng* and

Navajo Nation, Mr. McCarter makes no allegation that the LAC Officials coerced or disciplined him for accessing the sweat lodge area or attempting to carry out the sweat ceremonies.

For these reasons, Mr. McCarter cannot show that the LAC Officials were on notice that relocating the sweat lodge area to the Facility A recreational yard was patently unconstitutional and clearly violated Mr. McCarter's free-exercise rights. As the controlling precedent demonstrates, the LAC Officials would not have reasonably understood that Mr. McCarter's subjective and speculative concerns about potential yard activity surrounding the new site would amount to a constitutional violation. Therefore, the prison officials are entitled to qualified immunity for their relocation of the sweat lodge site to the recreational yard.

3. The LAC Officials Are Entitled to Qualified Immunity for the Alleged Delay in Relocating the Site and the Alleged Error Regarding the Site's Orientation.

The Complaint also suggests that there may have been a time period when there was no sweat lodge site at which Mr. McCarter could worship. (*See, e.g.*, CD 2; ER 29, 43–44; *see also* CD 40; ER 24 ("Defendants allegedly imposed a substantial burden upon Plaintiff's worship in sweat lodge ceremonies by their failure to preserve the prior sweat lodge location

before designating a suitable alternative location.").) While this time period is not clearly defined in the Complaint, the earliest it could have been was October of 2014, when the prior location was removed to build the medical facility, and it could not have extended beyond July of 2015, when the new site was designated and ready for consecration and use for the sweat ceremonies. (CD 2; ER 29, 36.)

The LAC Officials are also entitled to qualified immunity for that alleged delay, because there is no factually-analogous precedent that would have put the LAC Officials on notice of such a constitutional requirement. In fact, limited delays in providing sweat lodges or outdoor religious spaces have been found not to constitute free-exercise violations or unreasonable violations of clearly-established constitutional rights. *See, e.g.*, *Youngbear*, 174 F. Supp. 2d at 919–20 (entitling prison officials to qualified immunity for a twelve-month delay in providing a sweat lodge) (cited in CD 40; ER 26); *Cubero v. Burton*, No. 96-1494, 1996 WL 508624, at *2 (7th Cir. Sept. 3, 1996) (affirming the grant of summary judgment in prison officials' favor from months-long closure of the prison sweat lodge to make logistical arrangements necessary for the operation of the lodge and associated ceremonies). Given the multitude of rulings on the issue, it is unclear whether temporary limitations on access to sweat lodges violate a clearly-

established right. (*See supra*, note 5.) Accordingly, there is little precedential case law on the speed by which the LAC Officials were required to make the logistical and security arrangements to relocate the sweat lodge. *See Youngbear*, 174 F. Supp. 2d at 919–20.

With regard to the orientation of the new sweat lodge site, the only allegation Mr. McCarter offers in the Complaint is that the site "is not oriented east-west, so that sweat lodge participants cannot traverse an east-west line between the sacred fire and the lodge." (CD 2; ER 36). However, the Complaint does not contain allegations that Mr. McCarter has not been permitted to arrange the sweat lodge structure and fire pit in a directional orientation he and the other Native American inmates so choose. Nor has Mr. McCarter alleged that the size of the sweat lodge area makes the east-west orientation of the sweat lodge structure and fire pit impossible. Accordingly, Mr. McCarter fails to allege that the orientation plausibly coerces or pressures him to violate his religious beliefs beyond an inconvenience or diminishment of spiritual fulfillment. *Jones*, 791 F.3d at 1031; *Shakur*, 514 F.3d at 888.

The sole allegation regarding the site's orientation is indicative of, at most, claims that Mr. McCarter may not be as spiritually-fulfilled worshipping at the new location as he was at the prior location, to which he

has no clearly-established right. *See Lyng*, 485 U.S. 439; *Navajo Nation*, 535 F.3d 1058. And the district court did not identify precedent sufficient to put the LAC Officials on notice that the alleged error in the site's orientation would have amounted to a clear constitutional violation, of which reasonable officials would have been aware. Accordingly, the Complaint does not allege a violation of a clearly-established right with regard to the new site's orientation.

CONCLUSION

This Court should reverse the ruling of the district court and hold that the LAC Officials are entitled to qualified immunity. Not only did the district court decide qualified immunity under an incorrect pleading standard, it also failed to identify factually-analogous precedent indicating that the relocation of the sweat lodge site amounted to a violation of a clearly-established right. Indeed, Mr. McCarter does not allege a ban on the sweat lodge ceremonies. He merely alleges that his spiritual fulfillment would be harmed by the new location, due to possible activity on the yard. Such an allegation, however, has not been recognized as a substantial burden on inmates' religious exercise, let alone the violation of a clearly-established right. And, there exists no precedential case law concerning the requirements

for prison outdoor worship spaces sufficient to have put officials on notice that moving the sweat lodge site amounted to a constitutional violation.

Dated: October 20, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
WILLIAM C. KWONG
Acting Senior Assistant Attorney General
JILLIAN R. O'BRIEN
Deputy Attorney General

/S/ *Todd Grabarsky*
TODD GRABARSKY
Deputy Attorney General
Attorneys for Defendants-Appellants D. Asuncion, E. Lake, J. Lazar, B. Russell, and J. Soto

LA2017504992

17-55289

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANDREW L. "KICKING HORSE" MCCARTER,

Plaintiff-Appellee,

v.

D. ASUNCION, et al.,

Defendants-Appellants.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: October 20, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
WILLIAM C. KWONG
Acting Senior Assistant Attorney General
JILLIAN R. O'BRIEN
Deputy Attorney General

/S/ *Todd Grabarsky*
TODD GRABARSKY
Deputy Attorney General
Attorneys for Defendants-Appellants D. Asuncion, E. Lake, J. Lazar, B. Russell, and J. Soto

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-55289

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

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Signature of Attorney or Unrepresented Litigant: s/ Todd Grabarsky

Date: Oct 20, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

(Rev. 12/1/16)

ADDENDUM PURSUANT TO NINTH CIRCUIT RULE 28-2.7

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State of California

California Department of Corrections and Rehabilitation
Adult Institutions, Programs, and Parole

Operations Manual

"Public Safety, Public Service"©

Updated Through
January 1, 2017

- Volunteer non-paid community clergy and/or religious or spiritual leader representatives.
- Inmates.

101060.6 Worship Services

Chaplains and Native American Spiritual Leaders shall be responsible for:

- Organizing, scheduling, and conducting the worship services and religious programs appropriate to their faith.
- Approving the scheduling and conducting of worship services and religious programs by volunteer community clergy and volunteer religious representatives.

101060.6.1 Scheduling of Worship Services

Reasonable time for religious services, in keeping with institution security and other normal and necessary operations and activities within the institution, shall be allowed.

Insofar as possible, other institutional activities shall not be planned which will conflict with or disrupt scheduled religious services.

101060.6.2 Inmate Assistant

Inmates may assist in conducting worship services and in the religious programs or as" Sweat Leaders."

101060.6.3 Use of Inmate Ministers

In the event an officially ordained chaplain of a particular faith cannot be obtained to conduct services within the institution for that faith, the Warden may at his/her discretion, and subject to such controls as are reasonably required for institution security, designate a qualified inmate to minister to the religious needs of that particular faith.

In determining the qualifications of an inmate to conduct such services, the Warden shall, wherever possible, seek the advice and counsel of outside religious leaders of that faith.

No inmate shall be assigned as a minister or as a religious counselor on a full-time basis in lieu of regular institution work and program assignment, nor shall any inmate who is approved to minister to the religious needs or interests of other inmates be considered as a state employee or be paid by the state for his or her services.

101060.6.4 Inmate Attendance

Revised October 14, 2009

Inmate attendance in the religious program shall be voluntary. Institution heads shall make every reasonable effort to provide for the religious and spiritual welfare of all interested inmates, including, but not limited to, affording inmates a reasonable accommodation to attend a scheduled Religious Service if they are unable to do so due to conflicting work/education assignments. Reasonable accommodation may include, but is not limited to, modified work schedule, use of accrued time or allowable breaks, granting of a job/assignment change, changes of regular days off, etc. Use of regular accommodation shall in no way adversely impact an inmate's credit earning status. The use of excused time off (ETO) for routine religious services shall be limited to instances where it is not possible to change the conflicting work/education assignment.

For inmates with work assignments outside prison grounds, a reasonable accommodation to attend religious programs shall be limited to an assignment change. Certain assignments may only permit the granting of a job/assignment change as a means of providing reasonable accommodation. This would apply when permitting an inmate to leave the job site is not practical and is unduly burdensome to program operations. Examples include, but are not limited to the following assignments:

- Conservation Camps during the course of firefighting efforts.
- Community Work Crews.
- Other Off Reservation Work Details.

101060.7 Special Religious Services/Programs

Religious services/programs may be conducted in special areas of the institution when an individual or a group of inmates cannot participate or attend the regular institution religious services/programs.

The staff chaplain and Native American Spiritual Leader shall be responsible for establishing religious services and instruction for individual inmates housed in a special housing unit. These services shall be coordinated through the unit captain and approved by the associate Warden.

101060.8 Location and Use of Chapel

Chapel facilities are designated for daily religious uses and programs. Use of the chapels for other than religious activities shall require the approval of the Warden.

Wherever feasible, multi-faith chapels or individual chapels for faith groups represented by a substantial number of inmates shall be provided at each facility.

Where only one chapel is available, a schedule for the use of the chapel shall be prepared by the staff chaplains and approved by the Warden or designee.

Where chapels are not available, the Warden shall designate a suitable area for the religious services and approve the scheduling of services in such temporary facilities.

101060.9 Location and Use of Sweat Lodge

The designated area in which the American Indian Sweat Lodge is situated is to be considered sacred. The sanctity must be observed and preserved, not only by inmates, but staff as well.

101060.9.1 Sweat Lodge Ceremonies

The designated pipe holder, volunteer spiritual persons or the leader of the religious group are responsible for organizing and conducting the sweat ceremonies.

A sacred pipe is used during sweat ceremonies and prayer offerings. It shall be retained by a designated pipe holder, who shall be responsible for the protection of the pipe and pipe bag.

All sacred items used in the sweat lodge ceremony may be acquired from the Native American community or from an approved vendor of Native American supplies. Only those items approved by the Warden or his/her designee shall be permitted.

The Sweat Lodge ceremonies consist of, but are not limited to, the use of the following sacred items.

- Sacred pipe and pipe bag.
- Kinnikinnick.
  - Mixture of red willow bark, cedar, tobacco, bear berries, yellow willow bark, and herbs.
- Eagle feathers.
- Sage.
- Sweet grass.
- Buffalo or deer skull.
- Antler.
- Lava or river rocks.
- Water.
- Non-metallic dipper and non-metallic bucket.

101060.10 Sacramental Wine and Religious Artifacts

Wine and religious artifacts approved by the Warden for sacramental and worship purposes may be brought into the institution.

Chaplains shall have prior written approval to purchase and bring into the institution the sacramental wine.

The approval, signed by the Warden or designee, shall accompany the wine through the normal security processing of each given facility.

The sacramental wine shall be maintained in a specified secured location inaccessible to inmates. The applicable chaplain shall remove the wine on the day of use and maintain control of the wine until the religious ceremony is concluded. The applicable chaplain will then return the unused portion and/or the empty container to the designated secured location.

Religious artifacts are those items which American Indians wear on religious/ceremonial occasions and include their tribal designations, personal and religious totems and items which have spiritual significance in their lives. The items may be distinguished by tribal colors and tribal totems.

These items include, but are not limited to, the following:

- Choker.
- Eagle feathers.
- Headband.
- Wristband.
- Medicine bag.
  - Medicine bags shall be small, constructed of soft leather or other natural material without lining, and shall not exceed 1 1/2 inches in diameter. They are usually worn around the neck or hung from the belt.
  - After inclusion of the individual's medicine in the bag, it may be either sewn shut or closed with a drawstring in the presence of staff. The medicine bag must be closed in such a manner that will allow for subsequent inspection of its contents.

CERTIFICATE OF SERVICE

Case Name: **McCarter v. Kernan, et al.** No. **17-55289**

I hereby certify that on October 20, 2017, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLANTS' OPENING BRIEF.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On October 20, 2017, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Munger, Tolles & Olson LLP
355 South Grand Avenue
50th Floor
Los Angeles, CA 90071
Attn: Melinda E. LeMoine
Seth J. Fortin

U.S. District Court
Central District of California
Western Division
312 North Spring Street
Room G-8
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 20, 2017 at Los Angeles, California.

D. Arciniega	***/s/ D. Arciniega***
Declarant	Signature

LA2017504992

CERTIFICATE
For Brief in Paper Format

U.S. Court of Appeals Docket Number: 17-55289

I, Todd Grabarsky, certify that this brief is identical to the version submitted electronically on October 20, 2017, pursuant to Rule 6(c) of the Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases.

Dated: October 20, 2017

Signature: ____