Case No. 17-55289

In the United States Court of Appeals for the Ninth Circuit

ANDREW L. "KICKING HORSE" MCCARTER,
***Plaintiff-Appellee*,**
v.
DEBRA ASUNCION, et al.,
***Defendants-Appellants*.**

On Appeal from the United States District Court for the Central District of California, Case No. CV16-5672 BRO (JEMx)
The Honorable Beverly Reid O'Connell, United States District Judge

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TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. STATEMENT OF JURISDICTION 3

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 4

IV. STATEMENT OF THE CASE 4

A. Factual Background 4

1. Defendants Abruptly Destroy an Existing Sweat Lodge and—After Completely Barring Sweat Ceremonies for an Extended Period—Offer a Patently Unsuitable Alternative Location. 6

2. Defendants Ignore Reasonable Alternative Locations. 8

B. Procedural History 10

V. STANDARD OF REVIEW 11

VI. SUMMARY OF THE ARGUMENT 12

VII. ARGUMENT 16

A. The Complaint Plausibly Alleges That Defendants Violated Mr. McCarter's Free Exercise Rights By Effectively Prohibiting Him From Performing Sweat Lodge Ceremonies 16

1. Inmates Retain the Right to Reasonable Accommodations for Religious Exercise, Which Prison Officials May Not Limit Arbitrarily or Without Reason. 16

2. The Facts Alleged in the Complaint Plausibly Allege That Defendants Substantially Burdened Mr. McCarter's Free Exercise Rights by Effectively Banning Sweat Lodge Ceremonies and Forcing Him to Worship in a Manner That Violates His Religious Beliefs. 19

3. The Complaint Suggests That There Is No Legitimate Penological Justification for Defendants' Conduct. 27

4. Cases Upholding Restrictions on Sweat Lodge Access Are Irrelevant Because They Were Uniformly Decided at Summary Judgment, Based on Case-Specific Penological Justifications and Evidence That Are Absent Here. 30

5. Defendants' Reliance on Navajo Nation Is Misplaced Because Mr. McCarter Is Being Coerced to Act Contrary to His Religious Beliefs. 32

6. Defendants' Reliance on Factually Dissimilar Open Access Cases Is Also Misplaced. 37

B. In October 2014, It Was Clearly Established That Prison Officials May Not Substantially Burden Inmates' Free Exercise Rights by Banning Their Religious Ceremonies Without a Legitimate Penological Justification. 42

C. The District Court's Passing Reference to the Abrogated Conley Standard Does Not Warrant Reversal Because the District Court Applied the Proper Pleading Standards And, in Any Event, Any Error Is Harmless. 47

VIII. CONCLUSION 49

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Allen v. Toombs,
827 F.2d 563 (9th Cir. 1987) 30, 32, 44

Anderson v. Creighton,
483 U.S. 635 (1987)..42, 43

Arpin v. Santa Clara Valley Transp. Agency,
261 F.3d 912 (9th Cir. 2001) 29

Ashcroft v. Iqbal,
556 U.S. 662 (2009)..10, 48

Bailey v. Isaac,
No. CIV. 11-25-ART, 2012 WL 4364088 (E.D. Ky. Sept. 24,
2012) 30, 31

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..10, 48

Birdwell v. Cates,
No. CIV S-10-0719 KJM, 2012 WL 1641964 (E.D. Cal. May 9,
2012) 41

Browning v. Vernon,
44 F.3d 818 (9th Cir. 1995) 43

Burwell v. Hobby Lobby Stores, Inc.,
134 S. Ct. 2751 (2014)...35

Chance v. Tex. Dep't of Criminal Justice,
730 F.3d 404 (5th Cir. 2013) 30, 32

City & Cty. of San Francisco, Cal. v. Sheehan,
135 S. Ct. 1765 (2015)..46

Cmty. House, Inc. v. City of Boise, Idaho,
623 F.3d 945 (9th Cir. 2010) 4, 12

Conley v. Gibson,
355 U.S. 41 (1957)..47

Cutter v. Wilkinson,
544 U.S. 709 (2005)...23, 36

Dunn v. Castro,
621 F.3d 1196 (9th Cir. 2010) 49

Elder v. Holloway,
510 U.S. 510 (1994)..11

Farrow v. Stanley,
No. CIV.02-567-PB, 2005 WL 2671541 (D.N.H. Oct. 20, 2005) 30, 32

Ford v. City of Yakima,
706 F.3d 1188 (9th Cir. 2013) 16

Fowler v. CDCR,
No. 1:13CV00957 DLB PC, 2014 WL 458168 (E.D. Cal. Feb. 4,
2014) 40, 41

Fowler v. Crawford,
534 F.3d 931 (8th Cir. 2008) 30, 32

In re Grand Jury Investigation,
974 F.2d 1068 (9th Cir. 1992) 49

Greene v. Solano Cty. Jail,
513 F.3d 982 (9th Cir. 2008) 20

Haight v. Thompson,
763 F.3d 554 (6th Cir. 2014) 21, 25

Hamilton v. Schriro,
74 F.3d 1545 (8th Cir. 1996) 30, 32

Haspel v. State Farm Mut. Auto. Ins. Co.,
241 F. App’x 837 (3d Cir. 2007) 49

Jenkins v. Campos,
689 F. App’x 535 (9th Cir. 2017) 29

Johnson v. Moore,
948 F.2d 517 (9th Cir. 1991) 16

Jones v. Williams,
791 F.3d 1023 (9th Cir. 2015) .... 17, passim

Karl v. City of Mountlake Terrace,
678 F.3d 1062 (9th Cir. 2012) 11

Lyng v. Northwest Indian Cemetery Protective Association,
485 U.S. 439 (1988)..37, 38

Makin v. Colo. Dep't of Corr.,
183 F.3d 1205 (10th Cir. 1999) 19, 44

Malik v. Brown,
16 F.3d 330 (9th Cir. 1994) 17

Malik v. Brown,
71 F.3d 724 (9th Cir. 1995) 19

Mauwee v. Donat,
407 F. App'x 105 (9th Cir. 2010) 39

Mauwee v. Donat,
No. 3:06-cv-00122-RCJ-VPC, 2009 WL 3062787 (D. Nev. Sept. 18, 2009), aff'd, 407 F. App'x 105 (9th Cir. 2010)............................ 14, passim

May v. Baldwin,
109 F.3d 557 (9th Cir. 1997) 18, 25, 42

McElhaney v. Elo,
No. 98-1832, 2000 WL 32036 (6th Cir. Jan. 6, 2000).......................................30

In re Mercury Interactive Corp. Sec. Litig.,
618 F.3d 988 (9th Cir. 2010) 28

Mitchell v. Forsyth,
472 U.S. 511 (1985)..3

Mosier v. Maynard,
937 F.2d 1521 (10th Cir. 1991) 19

Mullenix v. Luna,
136 S. Ct. 305 (2015)..46

Murphy v. Mo. Dep't of Corr.,
372 F.3d 979 (8th Cir. 2004) 21

Navajo Nation v. U.S. Forest Service,
535 F.3d 1058 (9th Cir. 2008) .... 14, passim

Nible v. CDCR,
No. 1:13-CV-01127 DLB PC, 2014 WL 458186 (E.D. Cal. Feb. 4, 2014) 40, 41

O'Lone v. Estate of Shabazz,
482 U.S. 342 (1987)..16

Padilla v. Yoo,
678 F.3d 748 (9th Cir. 2012) 3

Penilla v. City of Huntington Park,
115 F.3d 707 (9th Cir. 1997) 11

Pierce v. Cty. of Orange,
526 F.3d 1190 (9th Cir. 2008) 43

Rouser v. White,
630 F. Supp. 2d 1165 (E.D. Cal. 2009) 26

Salahuddin v. Goord,
467 F.3d 263 (2d Cir. 2006) 29, 31, 47

Sessing v. Beard,
No. 1:13-CV-01684-LJO, 2015 WL 3953501 (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) 40, 41

Shakur v. Schriro,
514 F.3d 878 (9th Cir. 2008) 16, 17, 44

Sharp v. Gay,
No. 2:11 CV 925-ROS, 2014 WL 3556341 (D. Ariz. July 18, 2014) 25, 26

Sherbert v. Verner,
374 U.S. 398 (1963)..18

Sorrels v. McKee,
290 F.3d 965 (9th Cir. 2002) 43

Taylor v. Barkes,
135 S. Ct. 2042 (2015)...42

Thomas v. Gunter,
32 F.3d 1258 (8th Cir. 1994) 45, 46, 47

Thompson v. Holm,
809 F.3d 376 (7th Cir. 2016) 18, 19

Turner v. Safley,
482 U.S. 78 (1987)...12, 17, 27

Vernon v. City of Los Angeles,
27 F.3d 1385 (9th Cir. 1994) 25

Walker v. Beard,
789 F.3d 1125 (9th Cir. 2015) 18

Wall v. Wade,
741 F.3d 492 (4th Cir. 2014) 29

Warsoldier v. Woodford,
418 F.3d 989 (9th Cir. 2005) 18, 24, 25, 45

White v. Pauly,
137 S. Ct. 548 (2017)..46

Yellowbear v. Lampert,
741 F.3d 48 (10th Cir. 2014) 21

State Cases

Trapp v. Roden,
473 Mass. 210 (2015) 21

Federal Statutes

28 U.S.C. § 1291 3

28 U.S.C. § 1331 3

42 U.S.C. § 1983 3

42 U.S.C. § 2000cc *et seq.* 10

FEDERAL RULES

Federal Rule of Civil Procedure 8(a) 10, 48

Federal Rules of Civil Procedure 12(b)(6) 3

I. INTRODUCTION

Appellee Andrew L. "Kicking Horse" McCarter is a Native American inmate at California State Prison-Los Angeles County ("CSP-LAC"). Mr. McCarter, whom the prison system has recognized as a model inmate, worships according to his traditional Native American faith. This worship centers around a consecrated space called a "sweat lodge." For years, CSP-LAC permitted Mr. McCarter and others who worship as he does to maintain a sweat lodge in a safe, prison-monitored space that the adherents could preserve in its consecrated state. That changed in October 2014, when prison officials abruptly destroyed this sweat lodge. After months of refusing to provide Mr. McCarter *any* sweat lodge space, prison officials declared that a new sweat lodge could be constructed—but only in a space in the middle of the prison recreational yard that is patently unsuited for worship. Unsurprisingly, the prison's own Native American spiritual advisor has twice refused to consecrate this "alternative" space for religious use. Prison officials have stubbornly insisted on this space despite the availability of other, suitable locations. As a consequence, Mr. McCarter and his fellow adherents cannot practice their faith as its tenets require.

In response to this violation of his rights, Mr. McCarter brought suit against Appellants Debra Asuncion, John Soto, Beverly Russell, Erika Lake, and Joseph

Lazar (collectively "Defendants" or "prison officials"),[1] in their individual capacities for, among other claims, violating his First Amendment right to free exercise of religion. Defendants moved to dismiss based on qualified immunity, but the District Court (the Honorable Beverly Reid O'Connell, District Judge) denied their motion. The court found that: (1) it is clearly established that prisoners have a right to freely practice their sincerely held religious beliefs; (2) numerous state and federal prisons provide Native American inmates with access to sweat lodge ceremonies; and (3) courts have previously determined that prison officials preventing inmates from conducting sweat lodge ceremonies may violate the Free Exercise clause such that Defendants may not be entitled to qualified immunity. Defendants appealed.

This Court should affirm. Mr. McCarter indisputably has a First Amendment right to exercise his religious faith. Well-founded and clear-established precedent forbids prison officials from denying him that right where, as alleged in Mr. McCarter's Complaint, there is no legitimate penological basis for the restriction.

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[1] Defendants Soto and Russell were previously employed (until 2015) as prison officials at CSP-LAC—Soto as Warden and Russell as a Community Resources Manager. Defendants Asuncion, Lake, and Lazar remain employed as prison officials at CSP-LAC—Asuncion is Acting Warden, Lake is Acting Community Resources Manager, and Lazar is Chaplain (acting as spiritual advisor to Native American inmates at Facility "A," since the Native American Spiritual Advisor position has remained unfilled for several years).

II. STATEMENT OF JURISDICTION

Mr. McCarter filed a prisoner civil rights action against state officials in the United States District Court for the Central District of California, pursuant to 42 U.S.C. § 1983. The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331.

Defendants moved to dismiss Mr. McCarter's Complaint for compensatory damages, pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), asserting qualified immunity. In an order dated February 3, 2017, the District Court found that Defendants were not entitled to qualified immunity and denied Defendants' motion. (CD 40; ER 8.)[2] Defendants filed a notice of appeal on March 3, 2017. (CD 41; ER 1.) This Court has jurisdiction over Defendants' timely appeal from the District Court's order denying Defendants qualified immunity, as it is an immediately appealable final decision under 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012). Appellate jurisdiction is limited to questions of law. Thus, the Court may consider qualified immunity even where the facts are disputed, "so long as [it] assume[s] that the version of the material facts asserted by the non-moving party is correct."

[2] "CD" refers to the Central District of California docket, and the accompanying number identifies the docket number of the relevant filing or order. "ER" refers to Appellant's Excerpts of Record.

Cmty. House, Inc. v. City of Boise, Idaho, 623 F.3d 945, 968 (9th Cir. 2010) (internal quotation marks and citation omitted).

III. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Did the District Court properly deny Defendants' motion to dismiss Mr. McCarter's claims for compensatory damages based on qualified immunity where the Complaint alleges that Defendants substantially burdened Mr. McCarter's free exercise of his religion without a penological justification?

IV. STATEMENT OF THE CASE

A. Factual Background

Mr. McCarter is a sincere practitioner of traditional Native American religion. (Plaintiff's Amended Complaint ("Compl."), CD 2 ¶ 1; ER 29) He resides in the Facility "A" housing unit of CSP-LAC, which is meant to provide "expanded opportunities for positive rehabilitative development" to inmates such as Mr. McCarter who have exemplary records of model behavior. (Compl. ¶ 18; ER 33.) As such, it provides greater privileges to inmates than on other yards, including access to programs and equipment that is otherwise restricted. (*Id*.)

A central element of Mr. McCarter's religious practice involves participation in a sacred ritual in a structure known as a "sweat lodge." (Compl. ¶ 19; ER 33.) Mr. McCarter leads and participates in religious sweat lodge ceremonies. (Compl. ¶¶ 19, 24; ER 33, 35.) Such a ceremony can last several hours. (Compl. ¶ 22; ER

34.) During the ceremony, participants are first consecrated by means of "smudging," or the burning of sacred herbs. (*Id.*) Worshippers heat special stones called "Grandfathers" in a sacred fire in an open pit close to the sweat lodge structure. (*Id.*) Once heated, the stones are transported along an east-west path to the inside of the lodge, while water is poured over them to produce steam. (*Id.*) Worshippers sit in close proximity to the stones, where they are spiritually purified by the heat and steam. (*Id.*) This ceremony is repeated four times and prayers are conducted before, during, and after each ceremony. (*Id.*) If participants leave the consecrated area during the ceremony (e.g., to use off-site restroom facilities), they may not participate again until they are once more "smudged" and purified. (Compl. ¶ 23; ER 35.) At the conclusion, worshippers ceremonially feast together. (Compl. ¶ 22; ER 34.)

Every stage of the sweat lodge ceremony—from the selection and consecration of the site, to the construction of the lodge, to the exit of the participants at the end of the ceremony—is governed by traditional spiritual practices and customs that are considered sacred to adherents of this form of Native American religion. (Compl. ¶ 20; ER 34.) Selection of the sweat lodge area must be conducted in accordance with religious beliefs, which require the sweat lodge area to have certain characteristics, including: the ability to walk along an

appropriate east-west axis and freedom from interference by outside persons, objects, or loud and intrusive noises. (Compl. ¶ 21; ER 34.)

1. Defendants Abruptly Destroy an Existing Sweat Lodge and—After Completely Barring Sweat Ceremonies for an Extended Period—Offer a Patently Unsuitable Alternative Location.

Prior to October 2014, CSP-LAC provided a designated area away from intrusion, yet subject to monitoring by correctional officers, to conduct sweat lodge ceremonies ("Prior Location"). (Compl. ¶ 2; ER 29.) The Prior Location met all of the requirements necessary for a consecrated sweat lodge ceremony. (Compl. ¶¶ 24, 25; ER 35.) But, in October 2014, Defendants destroyed the Prior Location to use the area for other purposes. (Compl. ¶ 3; ER 29.) Then, for nine months, Defendants refused to provide Mr. McCarter *any* area to conduct Native American sweat lodge ceremonies.

It was not until July 2015 that Defendants finally proposed a new space for the sweat lodge ("Proposed Location"). (*Id.*) But the Proposed Location is manifestly unsuitable for sweat lodge ceremonies for several reasons. (*Id.*) For example:

- The Proposed Location is in the middle of a noisy, public recreation yard, a mere five yards from a volleyball court. The area is surrounded by picnic tables, and general inmate access to the yard entirely overlaps with the timeframe for sweat lodge activities. (Compl. ¶¶ 31, 32; ER 36, 37.)

- Inmates present on the recreational yard, including in the Proposed Location, are required to assume a seated positon on the ground whenever a general alarm sounds or when an inmate is being transferred through the yard. (Compl. ¶ 40; ER 38.)
- Pepper spray used by correctional officers to control inmates on the yard can blow into the sweat lodge area, and blaring yard announcements from the P.A. system will interrupt religious ceremonies. (*Id.*)
- The Proposed Location, which is bounded by nothing more than a flimsy four-foot fence,[3] is left open to invasion by physical objects and intrusion by other inmates. (Compl. ¶¶ 34–39; ER 37–38.)
- The Proposed Location is also not appropriately east-west oriented, (Compl. ¶ 30; ER 36), and does not have access to a toilet or water source.

Unsurprisingly, given the area's numerous defects, Defendants have been unable to provide *any* Native American spiritual advisor who is willing to approve Defendants' Proposed Location for religious use.[4] (Compl. ¶ 42; ER 39.) Indeed, Defendants have twice arranged for a Native American Spiritual advisor to visit

[3] By contrast, Defendants are building an eight-foot security fence for a "canine recreation area" on the yard. (Compl. ¶ 51; ER 41.)

[4] Ritual consecration and purity requirements are hardly unique to the Native American Religion. Several other religions, including Christianity, Islam, and Judaism, require similar ritual purification.

CSP-LAC for the purpose of spiritually blessing the Proposed Location, but the advisor has twice refused to approve the location for sweat ceremonies. (*Id.*)

Because the Proposed Location does not comport with traditional Native American religious requirements, Mr. McCarter's beliefs prevent him from consecrating it or conducting a sweat lodge ceremony in such an unsuitable environment. (Compl. ¶ 3; ER 29.) Although Mr. McCarter informed the Defendants of the numerous problems with the Proposed Location and Defendants assert that they can make the site acceptable, they have not yet attempted to do so. (Compl. ¶¶ 30–40; ER 36–38.) In fact, Defendants refuse to take *any* action to address the problems with the Proposed Location unless Mr. McCarter first violates his beliefs by consecrating and building a sweat lodge in this manifestly unsuitable space. (Compl. ¶ 41; ER 38–39.) Thus, for over three years, Defendants have prevented Mr. McCarter from conducting religious sweat lodge ceremonies, in violation of his First Amendment right to the free exercise of religion.

2. Defendants Ignore Reasonable Alternative Locations.

Mr. McCarter and other Native American inmates have proposed several alternative sweat lodge locations, close to the Facility "A" recreational yard, which comply with CSP-LAC's security requirements but also would allow for consecration and use for sweat lodge ceremonies. (Compl. ¶ 43; ER 39.)

The first is a secure site located south of a Dining Hall building east of and across from the Facility "A" recreational yard ("Secure Alternative 1"). This area is enclosed by a tall fence topped with razor wire, is accessible only by correctional officers, and would not violate any applicable fire codes. (Compl. ¶¶ 44–45; ER 39–40.) Yet, Defendants have repeatedly denied requests to relocate the sweat lodge to Secure Alternative I, making blanket assertions that it is not ideal from a security standpoint without considering the feasibility of any security measures that might be taken to accommodate the relocation. (Compl. ¶ 46; ER40.) Meanwhile, inmates have, for years, maintained a garden within the immediate vicinity of Secure Alternative 1, and Defendants have recently approved the construction of a canine recreation area for a canine therapy program in just this location. (Compl. ¶ 50; ER 41.)

Another secure and feasible area is across from the South yard and adjacent to the canteen ("Secure Alternative 2"). This area is visible to correctional officers, supplied with water, and separated from the recreational yard; all that is required to consecrate the land and conduct sweat lodge ceremonies is the construction of a reasonable fence. (Compl. ¶ 47; ER 40.) Yet Defendants refuse to consider this location and have not provided *any* explanation for why relocation to this area is infeasible. (Compl. ¶ 48; ER 41.)

B. Procedural History

On July 29, 2016, Mr. McCarter brought suit against Defendants for violations of the First Amendment Free Exercise Clause and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.* (RLUIPA), seeking declaratory and injunctive relief on all claims and compensatory damages on his First Amendment claim against Defendants. (Compl. ¶¶ 61–71; ER 43–46.) Defendants moved to dismiss the Complaint for several reasons, including asserting that qualified immunity bars Mr. McCarter's claim for compensatory damages for violation of his First Amendment rights. (CD 37.)

The District Court denied Defendants' motion to dismiss on the basis of qualified immunity on February 3, 2017. (*See* CD 40; ER 8.) Applying *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the Court held that Mr. McCarter sufficiently alleged a First Amendment Free Exercise claim under Federal Rule of Civil Procedure 8(a). (CD 40; ER 18–19.) Next, it held that Mr. McCarter plainly alleged that Defendants have substantially burdened his "worship in sweat lodge ceremonies by their failure to preserve the prior sweat lodge location before designating a suitable alternative location" and "that Defendants have had knowledge of their actions' burden upon Plaintiff's religious exercise, and nonetheless have continued to prevent Plaintiff from exercising his religious beliefs." (CD 40; ER 24.) The District Court thoroughly

examined case law establishing Mr. McCarter's right to freely practice his sincerely held religious beliefs, including access to a sweat lodge. (CD 40; ER , 22–26.) It found that: (1) "it is clearly established that all prisoners have a right to freely practice their sincerely held religious beliefs"; (2) "a number of the nation's state and federal prisons, including California prisons, provide Native American inmates with access to a sweat lodge"; and (3) "appellate and district courts have previously determined that officers' prevention of prisoners' exercise of sweat lodge ceremonies may violate the Free Exercise Clause, and that defendant officers may not be entitled to qualified immunity in cases involving interference with sweat lodge ceremonies." (CD 40; ER , 25–26.)

Defendants appealed the District Court's denial of its motion to dismiss on the basis of qualified immunity.

V. STANDARD OF REVIEW

A district court's denial of qualified immunity is reviewed de novo. *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997) (citing *Elder v. Holloway*, 510 U.S. 510, 516 (1994)). When, as here, qualified immunity is raised on a motion to dismiss, the Court's "review is limited to whether the defendant would be entitled to qualified immunity as a matter of law," *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1068 (9th Cir. 2012), and the court must

assume as true all facts plausibly alleged in the complaint. *See Cmty. House, Inc.*, 623 F.3d at 968.

VI. SUMMARY OF THE ARGUMENT

Defendants are not entitled to qualified immunity as a matter of law where the complaint plausibly alleges that they violated Mr. McCarter's Free Exercise rights by effectively prohibiting him from performing sweat lodge ceremonies. The contours of inmates' Free Exercise rights have long been established by both Supreme Court and Ninth Circuit precedent. Specifically, it is clearly established that inmates retain First Amendment protections, including the right to reasonable accommodations for religious exercise, and that prison officials, such as Defendants, may not substantially burden such rights arbitrarily or without reason. In outlining the contours of inmates' rights to religious practice, the Supreme Court established a two-part test evaluating the constitutionality of restrictions placed on such rights: first, an inmate must demonstrate that the officials' action substantially burdens his religious practice, and, second, the action or policy is evaluated under the *Turner* test to determine whether it is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). The Supreme Court and Ninth Circuit have long held that a constitutionally significant substantial burden arises where, as here, prison officials' policies or actions coerce

an inmate to engage in conduct violating his sincerely held religious beliefs or to forgo such beliefs.

As the District Court correctly found, Mr. McCarter plausibly alleges that Defendants have substantially burdened his Free Exercise rights by (1) completely depriving Mr. McCarter of any location to conduct sweat lodge ceremonies for nine months after destruction of the Prior Location; and (2) then demanding that Mr. McCarter either conduct sweat lodge ceremonies in a patently unsuitable location, which cannot be consecrated, notwithstanding the availability of other suitable alternative locations, or abandon his religious practice. Because Mr. McCarter, as an inmate, is dependent on Defendants' permission and accommodation for exercise of his religion, he cannot simply conduct sweat lodge ceremonies in any location. He is therefore left with only two options: forgo sweat lodge rituals altogether, or conduct such ceremonies in a space that cannot properly be consecrated. Either option violates his religious beliefs.

Such restrictions pass constitutional muster only when reasonably related to a legitimate government interest pursuant to the *Turner* test. Mr. McCarter's complaint demonstrates that there is no legitimate penological reason for the Defendants' actions in refusing to designate any new sweat lodge site for nine months after destroying the Prior Location or in siting the Proposed Location in the middle of a busy recreational yard and taking no action to address the defects Mr.

McCarter identified. Because the case is before this Court on a motion to dismiss, the Court must accept these facts as true. And a possibility that Defendants can present facts demonstrating justifications for their actions at a later stage cannot prevent Mr. McCarter from proceeding to discovery and further development of his damages claims. Without discovery, the record necessary to evaluate the reasonableness of Defendants' actions under the *Turner* test is nonexistent.

In an effort to avoid liability, Defendants point the Court to several cases decided at the *summary judgment* stage and with facts entirely different than the allegations at issue here. The defendants in those cases explained their rationale for burdening the inmates' sweat lodge worship *and* submitted evidence to support their argument that their restrictions were grounded in legitimate penological justifications. No such facts or evidence exist here because this case is at the motion to dismiss stage of proceedings. Mr. McCarter has plausibly alleged facts showing that Defendants' substantially burdened his religious exercise without any legitimate justification. That is enough to survive a motion to dismiss.

Defendants' reliance on *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), and *Mauwee v. Donat*, No. 3:06-cv-00122-RCJ-VPC, 2009 WL 3062787, at *1 (D. Nev. Sept. 18, 2009), *aff'd*, 407 F. App'x 105 (9th Cir. 2010), is equally misplaced. *Navajo Nation*'s substantial burden test does not clearly apply to Free Exercise claims, as the Court limited its analysis to claims

brought under the Religious Freedom Restoration Act. But even if the test is applicable, Mr. McCarter satisfies its requirements as he plausibly alleges that Defendants' conduct forces him to act contrary to his religious beliefs on threat of sanctions. Specifically, Mr. McCarter, who may worship only in the space designated by Defendants and in the manner allowed by prison rules and regulations, risks threat of punishment for violating such rules and so must conform to practices that violate his beliefs. And, unlike in *Mauwee*, Mr. McCarter does not seek to exclude disfavored individuals from participation in sweat lodge ceremonies; nor do his claims threaten the rights of other inmates.

Finally, the District Court's passing reference to a now-abrogated motion to dismiss standard does not warrant reversal for two reasons: (1) the District Court applied the proper pleading standards in its analysis; and (2) any error is harmless. The District Court found that Mr. McCarter plainly alleged that Defendants have substantially burdened his religious practice and, despite having knowledge of their actions' burden on his religious exercise, continue to prevent Mr. McCarter from exercising his beliefs. It then analyzed case law to find that it is clearly established that inmates have a right to freely practice sincerely held religious beliefs, and courts have found that prison officials' prevention of inmates' access to sweat lodge ceremonies may violate the Free Exercise Clause. In any event, because this

Court's review is *de novo* and, as explained below, Defendants are not entitled to qualified immunity, any error by the District Court is harmless.

VII. ARGUMENT

A prison official cannot claim qualified immunity if "(1) [the] facts viewed in the light most favorable to the injured party show that the officer violated a constitutional right and (2) the right was clearly established at the time of the alleged misconduct." *Ford v. City of Yakima*, 706 F.3d 1188, 1192 (9th Cir. 2013).

A. The Complaint Plausibly Alleges That Defendants Violated Mr. McCarter's Free Exercise Rights By Effectively Prohibiting Him From Performing Sweat Lodge Ceremonies.

1. Inmates Retain the Right to Reasonable Accommodations for Religious Exercise, Which Prison Officials May Not Limit Arbitrarily or Without Reason.

Despite incarceration, "[i]nmates retain the protections afforded by the First Amendment, 'including its directive that no law shall prohibit the free exercise of religion.'" *Shakur v. Schriro*, 514 F.3d 878, 883–84 (9th Cir. 2008) (quoting *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987)). Although inmates' Free Exercise rights are necessarily limited by the "considerations underlying our penal system," *id.* at 884, prisons must "provide inmates with a 'reasonable opportunity' to worship in accord with their conscience." *Johnson v. Moore*, 948 F.2d 517, 520 (9th Cir. 1991).

From these principles, this Court has developed a two-part test for evaluating restrictions placed on inmates' religious practice. In order to state a Free Exercise claim, an inmate "must show that the government action in question substantially burdens the [inmate's] practice of her religion." *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015).[5] Once this showing is made, the Court must then evaluate the "reasonableness" of the prison's policy or conduct under the factors outlined in *Turner*. *Id*. at 1032. Under *Turner*'s two-part test, policies or actions that (1) substantially burden an inmate's religious exercise are impermissible unless (2) they are "reasonably related to legitimate penological interests." *Shakur*, 514 F.3d at 884 (quoting *Turner*, 482 U.S. at 89).

A burden on religious exercise rises to the level of being "substantial" when it "tends to coerce the individual to forego her sincerely held religious beliefs or to engage in conduct that violates those beliefs." *Jones*, 791 F.3d at 1033. A substantial burden can also arise when the conduct or policy at issue "denies [an important benefit] because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his

[5] In order to implicate the Free Exercise Clause, a belief must be both "'sincerely held' and 'rooted in religious belief[.]'" *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994). Here, the District Court concluded that the Complaint plausibly alleges that Mr. McCarter sincerely believes in the necessity of sweat lodge ceremonies to his religious exercise. Defendants do not challenge that conclusion.

beliefs." *Walker v. Beard*, 789 F.3d 1125, 1135 (9th Cir. 2015) (alteration in original) (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005)).

Importantly, a policy need not directly compel or coerce an adherent to change his religious beliefs to be constitutionally infirm. *Warsoldier*, 418 F.3d at 995 (explaining that "indirect" compulsion may nonetheless substantially burden a religious practice); *Sherbert v. Verner*, 374 U.S. 398, 404 n.5 (1963) ("Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."). It is enough that the inmate faces considerable pressure to abandon the religious exercise at issue. *Jones*, 791 F.3d at 1031–32.

For instance, a substantial burden arises when an individual is forced on threat of sanctions to act in ways that violate his religious beliefs. *See Warsoldier*, 418 F.3d at 996 (substantial burden established by inmate who was punished for violating prison grooming standards that violated his religious scruples). Similarly, an inmate's rights are substantially burdened when he faces an illusory Hobson's choice where the only realistically possible course of action violates his religious beliefs. *See May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997) (holding that choice between undoing dreadlocks in violation of Rastafarian beliefs mandating dreadlocks and sacrificing freedoms constitutes a substantial burden); *Thompson v. Holm*, 809 F.3d 376, 380 (7th Cir. 2016) (holding inmate's religious practice

substantially burdened when he was "forced to choose between foregoing adequate nutrition or violating a central tenant of his religion").

Policies or actions fail the second prong of *Turner* if they burden an inmate's religious practice arbitrarily, for reasons unrelated to any penological objective, or in a way that avoids only a "small" burden on the prison's penological objectives. *See Malik v. Brown*, 71 F.3d 724, 729 (9th Cir. 1995) (holding prison could not burden inmate's religious exercise—use of a religious name—where "[t]he burden on the prison is so small that . . . there was no legitimate penological interest"); *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1212 (10th Cir. 1999) (rejecting "unacceptable notion that prison authorities may burden the observance of religious practices for no legitimate reason at all"); *Mosier v. Maynard*, 937 F.2d 1521, 1525 (10th Cir. 1991) ("[W]hat constitutes a reasonable opportunity must be evaluated with reference to legitimate penological objectives of the prison[.] . . .").

2. The Facts Alleged in the Complaint Plausibly Allege That Defendants Substantially Burdened Mr. McCarter's Free Exercise Rights by Effectively Banning Sweat Lodge Ceremonies and Forcing Him to Worship in a Manner That Violates His Religious Beliefs.

Defendants argue that the conduct Mr. McCarter complains of amounts to a "mere inconvenience" to his religious practice. (Appellants' Opening Br. 43.) Not so. As the District Court correctly held, Mr. McCarter plausibly alleges that Defendants have effectively banned him from engaging in sweat lodge

ceremonies—an essential aspect of his religious life—by forcing him to conduct those ceremonies in a manner that violates his religious beliefs or forgo them completely. Defendants have exerted this pressure in two primary ways—first by destroying the Prior Location without designating any replacement for a nine-month period, and second by forcing Mr. McCarter to use a new sweat lodge site that effectively cannot be consecrated.

For nine months, Defendants made *no* effort to accommodate Mr. McCarter's religious exercise. Mr. McCarter alleges that although inmates had previously been permitted to engage in sweat lodge ceremonies in an area that was sheltered from intrusion, Defendants destroyed the Prior Location in October 2014 without designating a replacement location. (Compl. ¶¶ 24, 28; ER 35,36.) Defendants failed to provide Mr. McCarter any location to perform sweat lodge ceremonies until July 2015, when they finally informed Mr. McCarter that he could perform ceremonies in a small area in the middle of a recreational yard. (Compl. ¶ 29; ER 36.)

By failing to designate *any* space for Mr. McCarter's use for nine months, Defendants directly prevented him from performing sweat lodge ceremonies. This conduct amounts to a complete ban on Mr. McCarter's religious practice, which clearly supports a Free Exercise claim. *See Greene v. Solano Cty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008) ("[A]n outright ban on a particular religious exercise is a

substantial burden on that religious exercise."); *see also Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) (denial of sweat lodge substantially burdened plaintiff's religious exercise under RLUIPA); *Haight v. Thompson*, 763 F.3d 554, 564 (6th Cir. 2014) (finding substantial burden where prison barred death row inmates from sweat lodge ceremonies); *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (holding ban on "communal worship" substantially burdened inmate's religious exercise); *Trapp v. Roden*, 473 Mass. 210, 215 (2015) ("[W]e have no trouble concluding that the DOC's absolute closure of the [sweat] lodge at SBCC substantially burdens [the inmate's] exercise of religion.").

Nor have Defendants meaningfully reduced this burden by belatedly designating an unsuitable sweat lodge site. What was previously direct prevention is now prevention by indirect means: Defendants offer a site that cannot actually be used for sweat lodge ceremonies. As explained in the Complaint, the Proposed Location is in the middle of a busy, noisy recreational yard. (Compl. ¶ 31; ER 36.) In myriad ways, this prevents Mr. McCarter's religious practices.

For instance, although the sweat lodge ceremonies require walking in a ceremonial manner, any time a general alarm sounds, all inmates in the recreational yard (including in the sweat lodge area) are required to immediately be seated. (Compl. 40; ER 38.) Although the sweat lodge ceremony involves ceremonial cleansing by inhaling steam from Grandfather stones, pepper spray

used by correctional officers to control other inmates on the yard blows into the sweat lodge area. (*Id.*) And because the designated area has nothing more than a flimsy four-foot fence around it (Compl. ¶ 30; ER 36), the area is routinely invaded by unconsecrated objects such as trash and volleyballs, or by inmates who are not part of the ceremony. (Compl. ¶ 34; ER 37.) Nor does the space have access to toilets or water, imposing insurmountable difficulties on adherents who must be "smudged" or purified every time they leave the space. (Compl. ¶ 23; ER 35.)

Just as with consecrated areas in other faiths—or with kosher or halal cleanliness codes—the sweat lodge can only serve its role as a center of Mr. McCarter's faith if it remains unpolluted. Because Mr. McCarter's religion "prevent[s] him from consecrating an inappropriate and unprotected Area," he simply cannot use the impermissible site without violating his religious beliefs. (Compl. ¶ 41; ER 38–39.)

As alleged in the Complaint, Mr. McCarter has informed Defendants of these problems, but they have refused to provide an alternative space or to take any steps whatsoever to make the area more suitable. For example, they have not attempted to designate a space with access to a toilet and water. They have not attempted to provide a secure fence, although they are willing to provide secure fencing for recreational programs. (Compl. ¶¶ 30, 51; ER 36, 41.) They have not attempted to conform the space to allow participants to walk the necessary distance

along an east-west line between the fire pit and the lodge, nor have they offered to schedule sweat lodge ceremonies at a different time than when other inmates have general access to the recreational yard. (Compl. ¶ 30; ER 36.) Rather than remedying the sweat lodge site to make it suitable for its intended religious purposes, Defendants insist upon Mr. McCarter using the area as it currently exists, without modification—even though a Native American spiritual advisor appointed *by Defendants* has twice declined to consecrate the area or approve it for religious use. (Compl. ¶ 42; ER 39.)

It is hard to imagine a more substantial burden on an inmate's religious rights. Inmates like Mr. McCarter are not free to simply set up a sweat lodge anywhere they like; they "are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005). Mr. McCarter can worship only in the manner and location the prison permits. By refusing to either consider alternative, feasible locations or make modest modifications to their own proposed site, Defendants leave Mr. McCarter only two options, both of which violate his religious beliefs: forgo sweat lodge rituals altogether, or carry them out in a space that cannot be properly consecrated. By forcing Mr. McCarter to worship in a space and manner forbidden by his religion

on threat of sanctions, Defendants plainly pressure him to "modify his behavior and to violate his beliefs." *Jones*, 791 F.3d at 1031–32.

This Court's decision in *Warsoldier* illustrates the point. There, a Native American inmate brought a RLUIPA challenge against a prison policy requiring all male inmates to maintain their hair no longer than three inches. 418 F.3d at 991–92. The inmate refused to comply with the policy because his sincere religious beliefs required him to wear his hair long, and he was punished by confinement in his cell, the imposition of additional duty hours, and revocation of certain privileges. *Id*. at 991–92. This Court held that the policy substantially burdened the inmate's religious exercise because punishments imposed by the prison "coerce[d] him into compliance." *Id.* 995–96. In reaching this conclusion, the Court rejected the argument that the inmate's religious practice was not substantially burdened because he was not physically forced to cut his hair, reasoning that "[s]uch an argument flies in the face of Supreme Court and Ninth Circuit precedent that clearly hold that punishments to coerce a religious adherent to forgo her or his religious beliefs is an infringement on religious exercise." *Id*. at 996.

As in *Warsoldier*, Defendants' policies pressure Mr. McCarter to violate his religion. By forcing Mr. McCarter to choose between betraying his religious principles and submitting to potential disciplinary action, Defendants push Mr. McCarter towards a form of religious practice his religion will not allow. The

substantial burden test requires nothing more. *Id.*; *see also Vernon v. City of Los Angeles*, 27 F.3d 1385, 1393 (9th Cir. 1994) (finding that "pressuring [an inmate] to commit an act forbidden by the religion" is a constitutionally significant burden on Free Exercise rights); *see also May*, 109 F.3d at 563 (concluding that the choice between undoing dreadlocks or adhering to Rastafarian beliefs mandating dreadlocks and sacrificing freedoms constitutes a substantial burden).

This is not controversial and indeed amounts to clearly established law. While Defendants imply that a substantial burden arises only where there is an outright ban on any exercise of religious belief, courts routinely hold that prison restrictions or conditions on the exercise of a religious ceremony can constitute an effective or de facto ban in violation of the Free Exercise Clause. For instance, in *Haight v. Thompson*, the Sixth Circuit held that prison officials' denial of Native American inmates' request for traditional foods for their annual powwow imposed a substantial burden on their religious practices. 763 F.3d 554 (6th Cir. 2014). The officials did not ban the powwow but rather authorized it to proceed, albeit without the requested foods. Nonetheless, the court found that the officials substantially burdened the inmates' religious practice by forcing them to "perform[] less-than-complete powwows with less-than-complete meals." *Id.* at 565.

Similarly, in *Sharp v. Gay*, the court held that a prison policy that prevented inmates from purchasing firewood for sweat lodge ceremonies substantially

burdened the inmates' religious practice. No. 2:11 CV 925-ROS, 2014 WL 3556341 (D. Ariz. July 18, 2014). The prison in that case authorized sweat lodge ceremonies and provided an area where ceremonies could be performed, and inmates retained the option of performing ceremonies without a fire or obtaining firewood through contributions from people outside the prison. *Id.* at *3. Nonetheless, the court held that "the policy effectively prevents inmates from holding sweat ceremonies" in the manner their religion requires, thereby burdening their religious practice. *Id.* at *7; *see also Rouser v. White*, 630 F. Supp. 2d 1165, 1182 (E.D. Cal. 2009) (holding policies that made Wiccan religious practices "more difficult or circumscribed," such as restrictions on chapel space, were a substantial burden).

These decisions recognize that because inmates are dependent on prison officials for opportunities to worship, officials substantially burden an inmate's religious practice when they restrict or circumscribe his religious practice in a way that violates his beliefs. While such restrictions may be constitutional, they are valid only if they are reasonably related to a legitimate government interest under the *Turner* factors. Were this rule otherwise, prison officials could avoid even the modest *Turner* inquiry by providing worship opportunities that do not comport with any of the inmate's religious requirements. If an inmate needed access to a Bible to engage in communal prayer, prison officials could require him to use a

telephone book. If he needed unleavened bread for Passover, officials could provide Wonder Bread instead. If the inmates complained, prison officials could argue that their religious exercise was not substantially burdened because they remained free to worship within the constraints imposed by prison rules. This would, of course, violate the fundamental principle that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84.

3. The Complaint Suggests That There Is No Legitimate Penological Justification for Defendants' Conduct.

Because Defendants have substantially burdened Mr. McCarter's religious practice by failing to provide a sweat lodge site that comports with his religious requirements, their conduct is unconstitutional unless the limitations on Mr. McCarter's faith are driven by legitimate penological needs. But Mr. McCarter alleges that there is no legitimate penological reason for Defendants' conduct. Defendants have yet to offer Mr. McCarter *any* justification for their actions in this case—they have not explained why they chose not to designate *any* new sweat lodge site for nine months after removing the Prior Location; nor have they explained their reasoning for siting the Proposed Location area in the middle of a busy recreational yard.

The Complaint alleges, for instance, that Mr. McCarter has identified two alternatives to Defendants' sweat lodge site, which would protect the sanctity and

safety of the sweat lodge area while also accommodating the prison's security interests. (Compl. ¶ 43; ER 39.) Even though Defendants permit inmates to garden and play with dogs in Secure Alternative I (Compl. ¶ 50; ER 41), Defendants claim there are security concerns in allowing part of that area to be used by Mr. McCarter and his fellow adherents (Compl. ¶ 46; ER 40). These concerns are unspecified, however, and the prison has not evaluated the feasibility of security measures that could address those concerns. (*Id.*) As for Secure Alternative II, Defendants have offered no explanation at all for why it cannot be used. (Compl. ¶¶ 47–48; ER 40–41.)

Accepting these facts as true, which this Court must at the motion to dismiss stage, Mr. McCarter has plausibly alleged that Defendants violated his clearly established Free Exercise rights by substantially burdening his religious practice without justification. If there are other facts that one or more Defendants can present that explain their decisionmaking, those facts must be presented later, after the parties have conducted discovery and created the record necessary to evaluate the reasonableness of Defendants' conduct under the *Turner* test.[6] But the

[6] Given the early stage of this litigation, these issues were not litigated in the motion to dismiss briefing in the District Court. Procedurally, Defendants cannot properly present argument relating to this on appeal, nor do they attempt to do so. However, to the extent Defendants address these issues in their reply, they have waived such arguments. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) ("We apply a 'general rule' against entertaining (footnote continued)

possibility that certain Defendants may eventually be entitled to immunity based on justifications they have not yet offered, supported by a record that does not yet exist, cannot prevent Mr. McCarter from proceeding to discovery and further development of his damages claims.[7]

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arguments on appeal that were not presented or developed before the district court." (citations and quotation marks omitted)); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) ("[I]ssues which are not specifically and distinctly argued and raised in a party's opening brief are waived.").

[7] Circuit courts, including this Court, routinely deny officials qualified immunity for impinging on inmate's religious practices without a sufficient factual showing as to what penological interests are served by their conduct.

- In *Salahuddin v. Goord*, 467 F.3d 263 (2d Cir. 2006), the Second Circuit held that prison officials who refused to allow separate Sunni and Shi'ite Ramadan services were not entitled to qualified immunity at summary judgment because officials did not "point[ ] to anything in the record to show that they relied on legitimate penological justifications." *Id.* at 275.

- The Fourth Circuit reached the same conclusion in *Wall v. Wade*, 741 F.3d 492 (4th Cir. 2014), denying qualified immunity at summary judgment for officials who refused an inmate's request for dietary accommodations for Ramadan observance. The court explained that "[the inmate's] right to participate in Ramadan was clearly established, and when the defendants abridged this right without first satisfying *Turner's* reasonableness test, they subjected themselves to the potential for liability." *Id.* at 502.

- This Court reached the same conclusion in a recent prison civil rights case, albeit in an unpublished decision, denying qualified immunity at summary judgment for prison officials who prohibited practicing wudhu in prison restroom. *Jenkins v. Campos*, 689 F. App'x 535, 536 (9th Cir. 2017). The Court explained that because officials failed to identify any evidence connecting the prohibition to "a legitimate and neutral governmental objective," they were not entitled to qualified immunity. *Id.*

4. Cases Upholding Restrictions on Sweat Lodge Access Are Irrelevant Because They Were Uniformly Decided at Summary Judgment, Based on Case-Specific Penological Justifications and Evidence That Are Absent Here.

Defendants try to inject uncertainty into settled law by citing several cases in which courts have upheld the decision of prison administrators to restrict access to sweat lodges based on a variety of rationales. (Appellants' Opening Br. 28 n.5 (citing *Allen v. Toombs*, 827 F.2d 563, 567 (9th Cir. 1987); *Fowler v. Crawford*, 534 F.3d 931, 942 (8th Cir. 2008); *Hamilton v. Schriro*, 74 F.3d 1545, 1551 (8th Cir. 1996); *McElhaney v. Elo*, No. 98-1832, 2000 WL 32036, at *4 (6th Cir. Jan. 6, 2000); *Chance v. Tex. Dep't of Criminal Justice*, 730 F.3d 404, 414–16 (5th Cir. 2013); *Bailey v. Isaac*, No. CIV. 11-25-ART, 2012 WL 4364088, at *3 (E.D. Ky. Sept. 24, 2012); *Farrow v. Stanley*, No. CIV.02-567-PB, 2005 WL 2671541, at *12–*13 (D.N.H. Oct. 20, 2005)).)

All of these cases, however, were decided at the *summary judgment* stage, based on a factual record, not on the pleadings. The defendants in those cases, moreover, had submitted evidence in support of their arguments that they had reasonable penological justifications for the restrictions at issue, which the court could evaluate to determine the reasonableness of the deprivation. *See, e.g.*, *Fowler*, 534 F.3d at 934-35 (noting that "[n]umerous officials . . . have offered a myriad of reasons why they believe Fowler's request for a sweat lodge compromises security at JCCC to an unacceptable degree" and discussing

supporting evidence); *Bailey*, 2012 WL 4364088, at *2 (noting that "defendants have offered a number of legitimate reasons for their denial of Bailey's request for a sweat lodge" and evaluating reasonableness of denial in light of those reasons).

There are no comparable facts here because at the motion-to-dismiss stage of the proceedings, Mr. McCarter's plausible allegations control, not the prison's say-so. Mr. McCarter has plausibly alleged facts that show both the substantial burden on his exercise of religion and the lack of any legitimate security needs for forbidding that exercise of religion. That is enough to survive a motion to dismiss particularly where, as here, Defendants have not even attempted to show that security concerns prevent the operation of a sweat lodge in CSP-LAC. *See Salahuddin*, 467 F.3d at 275–76 (prison officials who refused separate Sunni and Shi'ite Ramadan services not entitled to qualified immunity at summary judgment where mixed services substantially burdened Muslim inmates' religious rights and officials did not "point[] to anything in the record to show that they relied on legitimate penological justifications").

It is also significant that none of Defendants' cases upheld the restrictions on a sweat lodge based on the conclusion that the plaintiffs' religion had not been

substantially burdened. Rather, all but one of Defendants' cases[8] recognized that the restrictions imposed on inmates' sweat lodge access substantially burdened the inmates' Free Exercise rights. *See, e.g.*, *Farrow v. Stanley*, No. CIV.02-567-PB, 2005 WL 2671541, at *8 (D.N.H. Oct. 20, 2005) ("[D]enying [inmate] access to a sweat lodge requires him to modify his religious behavior significantly and therefore substantially burdens his religious exercise."). These courts upheld the sweat lodge restriction only because prison officials justified the restriction based on case-specific justifications and evidence. Thus, Defendants' cases support *Mr. McCarter's* position, not Defendants. Because Mr. McCarter alleges there is no legitimate penological reason for restricting his sweat lodge rights, the Defendants' challenge on appeal to the first step of *Turner* finds no support in *Allen*, 827 F.2d at 567, *Fowler*, 534 F.3d at 942, *Hamilton*, 74 F.3d at 1551, or any of Defendants' remaining cases. To the contrary, those cases all support the District Court's ruling that Defendants are not entitled to qualified immunity at the motion to dismiss stage.

5. Defendants' Reliance on *Navajo Nation* Is Misplaced Because Mr. McCarter Is Being Coerced to Act Contrary to His Religious Beliefs.

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[8] In *Chance*, the Fifth Circuit assumed for purposes of its analysis that restricting the number of Native American services substantially burdened the plaintiff's religious rights but did not decide the issue. *Chance*, 730 F.3d at 414.

In a further effort to avoid liability, Defendants argue that "Mr. McCarter asserts that utilizing the new site would result in spiritually-diminished worship or even worship on desecrated grounds." (Appellants' Opening Br. 40.) Relying principally on a federal land use case brought under the Religious Freedom Restoration Act ("RFRA"),[9] *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), Defendants argue that such conduct is not a substantial burden on Mr. McCarter's First Amendment rights. Defendants misunderstand both *Navajo Nation* and the allegations in Mr. McCarter's Complaint.

In *Navajo Nation*, this Court dismissed a RFRA claim by Native American tribes challenging the Forest Service's decision to authorize the use of recycled wastewater for snowmaking at a ski resort on public land. 535 F.3d at 1066. The resort was located on a mountain in the San Francisco Peaks—an area held sacred by several tribes and their members. The tribes alleged that the recycled wastewater would desecrate the San Francisco Peaks and injure the tribes' religious sensibilities. Following an 11-day bench trial, the district court rejected

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[9] Defendants describe *Navajo Nation* as a "free exercise" case, suggesting that it involved claims brought under the Free Exercise clause of the First Amendment. That is incorrect. Plaintiffs in *Navajo Nation* brought suit under RFRA and other federal statutes. Unlike Mr. McCarter, they did not assert claims under the First Amendment. *See Navajo Nation*, 535 F.3d at 1066.

the tribes' RFRA claim, holding that snowmaking would not substantially burden their religious exercise. *Id.* at 1066. This court, sitting en banc, affirmed.

The Court explained that under RFRA, the government imposes a substantial burden on religion "only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Id.* at 1091. It reasoned that although the "presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities," this purely subjective injury did not satisfy either prong of the test. *Id.* at 1070. Plaintiffs were not forced to choose between following their religious scruples and receiving government benefits; nor were they "fined or penalized in any way for practicing their religion on the Peaks or on the Snowbowl." *Id*. To the contrary, "Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes." *Id.* at 1063.

Navajo Nation is plainly distinguishable. As an initial matter, it is unclear whether *Navajo Nation*'s substantial burden test applies to Free Exercise claims. In articulating the standards for demonstrating a "substantial burden," the court limited its analysis to the RFRA statute. It did not discuss the standards that govern the "substantial burden" test under the First Amendment or the related federal statute, RLUIPA, and specifically refrained from deciding whether RFRA

standards apply to the latter statute. *Id.* at 1077 n.23 ("Because RLUIPA is inapplicable to this case, we express no opinion as to the standards to be applied in RLUIPA actions.").[10]

Even if *Navajo Nation*'s substantial burden test is applicable, Mr. McCarter's allegations easily satisfy its requirements. As discussed above, Defendants' conduct forces Mr. McCarter to act contrary to his religious beliefs on

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[10] Further, even if the *Navajo Nation* test does apply in the First Amendment context, the Supreme Court's subsequent ruling in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791 (2014), casts doubt on its continuing validity. In construing "substantial burden" under RFRA *Navajo Nation* noted that RFRA's purpose was to "restore the compelling interest test as set forth in [*Sherbert* and *Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened." From this premise, the Court concluded that "the cases that RFRA expressly adopted and restored—*Sherbert*, *Yoder*, and federal court rulings prior to *Smith*—also control the 'substantial burden' inquiry." *Navajo Nation,* 535 F.3d at 1069. In other words, *Navajo Nation* requires a substantial burden test frozen in time: "government actions never recognized by the Supreme Court to constitute a substantial burden on religious exercise [prior to *Smith*]" cannot support a RFRA claim. *Id.* at 1075. More recently, the Supreme Court explained in *Hobby Lobby* that by adopting a least restrictive means test for evaluating burdens on religious exercise (a feature that was not part of the pre-*Smith* jurisprudence), "RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader protection for religious liberty than was available under those decisions." *Hobby Lobby*, 134 S. Ct. at 2761 n.3. Contrary to *Navajo Nation*'s conclusion that pre-*Smith* cases limit RFRA's reach, the court explained that "there is no reason to believe . . . that the law was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases." *Id.* at 2767 n.18. By rejecting the principle that RFRA is confined by pre-*Smith* case law, *Hobby Lobby* suggests that *Navajo Nation* may have erred in holding that religious adherents must fit their case into the *Sherbert*/*Yoder* paradigm in order to state a religious rights claim.

the threat of sanctions. Unlike the tribes in *Navajo Nation*, Mr. McCarter cannot perform religious ceremonies anywhere he desires. *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005) (noting that inmates "are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion"). Because he is incarcerated, Mr. McCarter may worship only in the space designated by prison officials and in the manner allowed by prison rules and regulations. Violations of those rules carry the threat of punishment, which pressure Mr. McCarter to conform to practices that violate his beliefs.

This threat of sanctions was completely absent in *Navajo Nation*, which was a critical factor in the Court's analysis. In explaining why the presence of recycled wastewater did not substantially burden the tribes' religious practice, *Navajo Nation* contrasted snowmaking with a hypothetical law *requiring* adherents to use recycled wastewater in religious ceremonies or consume foods forbidden by their faith. *Navajo Nation*, 535 F.3d at 1078 n.25. It reasoned:

> When a law "permits only" recycled wastewater to carry out baptisms or "permits only" non-Kosher food for Orthodox Jews, the government compels religious adherents to engage in activities repugnant to their religious beliefs under the penalty of sanctions. Such government compulsion is specifically prohibited by the Supreme Court's decision in *Yoder*. A law permitting Indians to use only recycled wastewater in their religious or healing ceremonies would likewise constitute a substantial burden on their religious exercise.

Id.

The hypothetical in *Navajo Nation* is directly analogous to the situation faced by Mr. McCarter. Like a religious adherent living under a wastewater-only regime, Mr. McCarter is forced by prison policies to worship in a manner that violates his religious beliefs or forgo worshipping altogether. Defendants' policies thus force Mr. McCarter "to engage in activities repugnant to [his] religious beliefs under the penalty of sanctions." *Id.* As *Navajo Nation* recognizes, this is the very definition of a substantial burden.[11]

6. Defendants' Reliance on Factually Dissimilar Open Access Cases Is Also Misplaced.

In a related effort to minimize the burden their actions impose on Mr. McCarter, Defendants cite *Mauwee v. Donat*, 2009 WL 3062787, at *1 and several other cases that upheld inclusive worship policies over the objections of inmates who wished to restrict religious ceremonies or spaces to certain groups. These cases are irrelevant. Stated simply, Mr. McCarter is not seeking to exclude any

[11] *Lyng v. Northwest Indian Cemetery Protective Association* is inapposite for the same reason. 485 U.S. 439 (1988). In *Lyng* Native American tribes challenged the Forest Service's plans to build a logging road on public land held sacred by tribe members. The Court rejected the tribes' Free Exercise claims, reasoning that the logging road's "incidental effects" did not compel the tribes to violate their beliefs or penalize them for exercising their religious rights. *Id.* at 450. Here, by contrast, Mr. McCarter must practice his religion in the form dictated by Defendants on threat of penalties in the form of disciplinary action. Thus, unlike the tribes in *Lyng*, Mr. McCarter is subject to a constitutionally significant level of government coercion.

individuals from participating in sweat lodge ceremonies who want to participate. Rather, Mr. McCarter seeks only to conduct sweat lodge ceremonies in a location that is protected from disturbance by prisoners who are not participating in the ceremony or by other intrusions, such as noise, trash and animal carcasses, pepper spray, etc.

In *Mauwee*, a Native American inmate alleged that the prison's policy of allowing non-Native inmates to use the sweat lodge area "desecrated" the area and substantially burdened his religious exercise. *Id.* at *1–3. The District Court held, on summary judgment, that prison officials were entitled to qualified immunity because a reasonable official would not have known that allowing non-Natives to sweat would violate the Native inmate's RLUIPA rights. *Id.* at *7. It reasoned that "[t]he state of the law regarding the forced exclusion of non-Indian persons from Indian religious ceremonies is not entirely clear" and that "it would actually be a violation of the rights of non-Indian inmates to refuse them the ability to engage in traditionally Indian ceremonies, just as it would be a violation of one's equal protection and free exercise rights to refuse to allow a non-Jew to participate in Judaic ceremonies or a non-Italian to participate in Catholic ceremonies." *Id.* at *7. In passing, and without discussion, the District Court also cited *Lyng*, for the proposition that "no free exercise claim lies based purely on desecration of sacred ground where one's own ability to practice is not impeded or penalized." *Id*. (citing

Lyng, 485 U.S. at 448–51). This Court, affirming in an unpublished opinion, cited *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." *Mauwee v. Donat*, 407 F. App'x 105, 107 (9th Cir. 2010).

As explained above, however, Mr. McCarter does not allege merely that the site is or would be desecrated, leaving his "own ability to practice . . . not impeded or penalized." *Mauwee*, 2009 WL 3062787 at *7. He alleges that his religious beliefs prevent him from undertaking the sweat lodge ceremony *at all*. As alleged in the Complaint, Mr. McCarter cannot consecrate the designated sweat lodge area, much less participate in sweat lodge ceremonies at that site without violating his religious beliefs. Indeed, *Defendants' own* Native American religious advisor has twice refused to approve the land for spiritual practice. While Mr. McCarter could theoretically avoid violating his beliefs by consecrating a space outside of the designated area, such conduct would subject him to the threat of disciplinary action. Thus, Mr. McCarter has alleged a greater degree of coercive force than the inmate in *Mauwee*.

Moreover, the central concern driving the *Mauwee* analysis is simply inapplicable here. In that case, a conflict between inmates forced prison officials to strike a balance between incompatible constitutional rights: Non-Native inmates

claimed a Free Exercise right to participate in sweat lodge ceremonies, while Native inmates argued that excluding non-Natives was their constitutional prerogative. Given the ambiguities of this situation, the District Court sensibly held that prison officials could not be personally liable for burdening Native inmates to avoid violating the rights of others. *See Mauwee*, 2009 WL 3062787, at *8 ("In this delicate situation, Defendants clearly took the route less likely to pose a constitutional problem. Defendants therefore have qualified immunity as to the Count II claims."). No such conflict appears in Mr. McCarter's allegations, and Defendants do not raise even the possibility of a conflict between competing constitutional interests.

Defendants' remaining open access cases are also inapposite. Defendants cite several District Court cases that dismissed Free Exercise claims by inmates who sought exclusive access to outdoor religious spaces. Three of these cases were decided at the screening stage by a District Court evaluating complaints filed by pro se litigants. *See Sessing v. Beard*, No. 1:13-CV-01684-LJO, 2015 WL 3953501 (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. CDCR*, No. 1:13-CV-01127 DLB PC, 2014 WL 458186 (E.D. Cal. Feb. 4, 2014); *Fowler v. CDCR*, No. 1:13CV00957 DLB PC, 2014 WL 458168 (E.D. Cal. Feb. 4, 2014). In each case, the District Court dismissed the inmates' claims because they failed to

plead any facts showing *why* worshipping in a shared space was inadequate under their religious beliefs. *See Sessing*, 2015 WL 3953501, at *4 (explaining that inmate "has not alleged facts to support his claim that . . . he has been unable to practice his religion as a result of the inability to have a fire or the obligation to share worship grounds with other faiths"); *Nible*, 2014 WL. 458186, at *7 ("[T]here was no explanation as to why this was insufficient for Plaintiff to practice his faith."); *Fowler*, 2014 WL 458168, at *7 (same). Similarly, in *Birdwell v. Cates*, the court granted summary judgment for prison officials when an Odinist inmate argued for a religious space exclusively for Odinists but failed to explain how sharing space with other groups would burden his religious exercise. No. CIV S-10-0719 KJM, 2012 WL 1641964, at *14 (E.D. Cal. May 9, 2012).

Unlike the plaintiffs in those cases, Mr. McCarter has explained, both in his Complaint and in his dealings with prison officials, precisely how Defendants' Proposed Location violates his religion. (*See, e.g.*, Compl. ¶ 21; ER 34 (suitable sweat lodge space must allow worshippers to walk along east-west axis and be free from constant invasions or other interference by outside persons or objects); Compl. ¶ 41; ER 38 ("Due to the unprotected nature of the Defendants' Unprotected Sweat Lodge Area, exemplified by the intrusions that have already occurred as described above, the Area cannot be consecrated nor can a sweat lodge be constructed by Mr. McCarter at that location.").) These allegations are more

than sufficient to show that Mr. McCarter cannot worship under the conditions imposed by Defendants consistent with his religion. The substantial burden test requires nothing more.

B. In October 2014, It Was Clearly Established That Prison Officials May Not Substantially Burden Inmates' Free Exercise Rights by Banning Their Religious Ceremonies Without a Legitimate Penological Justification.

Mr. McCarter's claim sits well within clearly established pre-October 2014 precedent protecting religious practices by inmates. "A right is clearly established for purposes of qualified immunity if, at the time the right was allegedly violated, its contours were 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *May*, 109 F.3d at 561. This standard does "not require a case directly on point." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (per curiam). Rather, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*; *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("[I]n the light of pre-existing law the unlawfulness must be apparent . . . ."). And, as this Court has held, a court "may also look to the law of other circuits to determine if a principle is clearly established." *Jones*, 791 F.3d at 1034.

While it is true that a court must define the right at the appropriate level of specificity before determining whether it has been clearly established, Defendants confine the right at issue far too narrowly. They argue that they are immune from

personal liability for damages because there are no Ninth Circuit or Supreme Court cases defining the "locational requirements" for prison sweat lodge sites. (Appellants' Opening Br. 20); (Appellants' Opening Br. 33) (arguing that "there is no sufficiently-analogous precedential case law to have put [Defendants] on notice that relocating the Facility A sweat lodge site would be plainly unconstitutional.").)

It is true that this Court has not addressed the precise factual scenario in this case, where officials burdened a Native American inmate's religious practices by siting a sweat lodge in an unsuitable location. But "[c]losely analogous preexisting case law is not required to show that a right was clearly established." *Sorrels v. McKee*, 290 F.3d 965, 970 (9th Cir. 2002). "[I]t is not necessary that a prior decision rule 'the very action in question' unlawful to deny a defendant the protection of qualified immunity," as long as "the contours of the right [are] sufficiently clear so that a reasonable official would know that his conduct violates that right." *Browning v. Vernon*, 44 F.3d 818, 823 (9th Cir. 1995) (citing *Anderson v. Creighton*, 483 U.S. at 640).

Such is the case here. At the time Defendants removed the former sweat lodge site in October 2014, it was clearly established in this Circuit and others that inmates' general right to freely exercise their religion gives them the more specific right to engage or participate in religious services and ceremonies while in prison. *Pierce v. Cty. of Orange*, 526 F.3d 1190, 1209 (9th Cir. 2008) (holding that denial

of access to religious worship opportunities may violate First Amendment). It also had long been established that prison officials may substantially burden that specific First Amendment right when prison administration so requires, but *only when* the burden is reasonable under the *Turner* factors. *Shakur*, 514 F.3d at 884; *see also Makin*, 183 F.3d at 1212 (rejecting the "unacceptable notion that prison authorities may burden the observance of religious practices for no legitimate reason at all"). And courts had long held that a constitutionally significant burden arises any time a prison official's conduct "tends to coerce the [inmate] to forego her sincerely held religious beliefs or to engage in conduct that violates those beliefs." *Jones*, 791 F.3d at 1033.

Finally, in case there was any doubt in October 2014 about whether these rules applied to sweat ceremonies, this Court had applied this exact constitutional analysis in a dispute involving sweat lodge access. *See Allen*, 827 F.2d at 567. In *Allen*, this Court upheld a state prison policy that prevented inmates in segregation from accessing a sweat lodge for religious rituals. *Id.* at 567. In reaching this decision, the Court assumed that the sweat lodge ban substantially burdened the inmate's religious practice and proceeded to analyze the reasonableness of the policy under *Turner*. *Id.* While the Court held (based on an evidentiary record at summary judgment) that penological interests justified the ban under the facts of that case, its analysis showed that the restriction passed constitutional muster only

because it was grounded in legitimate penological justifications. By contrast, restrictions on sweat lodge access imposed arbitrarily or for *no reason whatsoever* would have violated the inmate's First Amendment rights, and this violation would have been obvious to any reasonable prison official.

For this reason, one circuit court has expressly held that qualified immunity was unavailable to officials who denied a Native American prisoner daily access to a sweat lodge for prayer—at least in the absence of a sufficient factual showing as to "what penological interests the appellees hoped to advance by restricting his access to the sweat lodge." *Thomas v. Gunter ("Thomas I")*, 32 F.3d 1258, 1260–61 (8th Cir. 1994). The Court explained that "[u]ntil those [interests] are delineated, we cannot say whether it is reasonable to believe that these interests would be comprised by allowing daily access to the sweat lodge for brief prayer." *Id.* at 1260.[12]

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[12] In trying to downplay *Thomas I*, Defendants argue that unlike the inmate in that case, Mr. McCarter does not allege that officials have completely prevented him from engaging in sweat lodge ceremonies. (*See* Appellants' Opening Br. 33–35.) Setting aside the fact that Mr. McCarter *was* completely barred from ceremonial practice for the nine-month period when Defendants failed to provide *any* sweat lodge location, it has long been established that a policy need not formally ban a practice to constitute a substantial burden. *See Warsoldier*, 418 F.3d at 1001 ("[P]utting substantial pressure on an adherent to modify his behavior and to violate his beliefs' infringes on the free exercise of religion."). As discussed in Section VII(A)(2), while Defendants have designated a sweat lodge site, the Proposed Location does not meet any of Mr. McCarter's religious requirements, and he cannot consecrate or use it without violating his religious beliefs. Forcing (footnote continued)

In sum, at the time of Defendants' conduct, it was clearly established both that Mr. McCarter had a right to perform sweat ceremonies essential to his faith and that Defendants could not infringe that right without sufficient justification under *Turner*. In light of that precedent, no reasonable official could have believed that he or she could simply deprive Mr. McCarter of any sweat lodge space for a nine-month period in the absence of some justification. Nor could a reasonable official think it permissible to confine Mr. McCarter's religious exercise to an area that—as Mr. McCarter has repeatedly informed Defendants—did not meet *any* of his religious requirements and would not be consecrated by the prison's own Native American spiritual advisor. As would have been plain to any reasonable official in Defendants' position, such arbitrary restrictions on Mr. McCarter's rights would violate the Constitution.[13]

Mr. McCarter to worship in an unsuitable place or not at all creates substantial pressure to conform, which is all the substantial burden test requires. Like the complete ban in *Thomas I*, such conduct may be justified only with reference to a legitimate penological goal. So prison officials cannot obtain qualified immunity without first explaining the basis for their actions.

[13] In arguing for a narrower formulation of the relevant right, Defendants cite three recent Supreme Court opinions on qualified immunity. (Appellants' Opening Br. 17–18 (discussing *White v. Pauly*, 137 S. Ct. 548, 552 (2017); *City & Cty. of San Francisco, Cal. v. Sheehan*, 135 S. Ct. 1765 (2015), and *Mullenix v. Luna*, 136 S. Ct. 305 (2015).) But all three cases addressed claims under the Fourth Amendment, seeking to enforce the general right to be free from excessive force—an area of law where the Supreme Court has emphasized the need for exceptional specificity. *See Mullenix*, 136 S. Ct. at 308 ("[S]pecificity is especially important in the Fourth
(footnote continued)

As discussed more fully in SectionVII(A)(3) above, Defendants have yet to offer any justification for substantially burdening Mr. McCarter's religious rights. Nor does a justification appear in the allegations in Mr. McCarter's Complaint. Thus, Defendants are not entitled to qualified immunity at this stage of proceedings. *See Thomas I*, 32 F.3d at 1260–61; *Salahuddin*, 467 F.3d at 275–76. For Defendants to escape potential liability for burdening Mr. McCarter's religious practice without even explaining the basis for their decisionmaking would fly in the face of *Turner* and the qualified immunity doctrine.

C. The District Court's Passing Reference to the Abrogated *Conley* Standard Does Not Warrant Reversal Because the District Court Applied the Proper Pleading Standards And, in Any Event, Any Error Is Harmless.

Defendants argue that reversal is warranted because the District Court's ruling on Defendants' motion to dismiss cited the now-abrogated "no set of facts" standard articulated in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). But the District Court's mere recitation of the retired *Conley* language is not a reason to overturn its decision.

Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'"). None of these cases address the First Amendment or illustrate how courts should formulate rights guaranteed by the Free Exercise Clause in resolving issues of qualified immunity.

To begin, the District Court's analysis demonstrates that it applied the proper pleading standard, despite its recitation of a now-abrogated standard. The District Court correctly held that Mr. McCarter has sufficiently alleged a Free Exercise Claim pursuant to Federal Rule of Civil Procedure 8(a), including that Defendants substantially burdened his Free Exercise rights. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The District Court also thoroughly examined Supreme Court and Circuit law in holding that Mr. McCarter's right to freely practice his sincerely held religious beliefs was clearly established in 2014. Thus, a mere reference to *Conley* does not alone warrant reversal of the District Court.

But even if the District Court relied on the incorrect *Conley* standard, it arrived at the correct conclusion. As discussed above, Defendants are not entitled to qualified immunity because Mr. McCarter has a clearly established right to be free from substantial burdens to his religious exercise imposed arbitrarily or for reasons unrelated to legitimate penological goals. The facts alleged in Mr. McCarter's Complaint demonstrate that Defendants substantially burdened Mr. McCarter's practices by refusing to provide a sweat lodge site for an extended period and then, belatedly, providing a site that meets none of Mr. McCarter's religious requirements. Furthermore, the District Court's findings are not relevant

to this Court's review of the issue presented, as such review is de novo. *Dunn v. Castro*, 621 F.3d 1196, 1198 (9th Cir. 2010).

Because the District Court reached the correct conclusion, and because review is de novo, any error stemming from the District Court's citation to *Conley* is harmless. *See In re Grand Jury Investigation*, 974 F.2d 1068, 1074 (9th Cir. 1992) (holding district court's application of incorrect standard amounted to harmless error); *Haspel v. State Farm Mut. Auto. Ins. Co.*, 241 F. App'x 837, 839 n.3 (3d Cir. 2007) ("Even if the District Court reached its conclusion based on what we now understand to be an improperly narrow interpretation of *Conley*, we conclude that such error is harmless because we find that the facts alleged here are not 'suggestive of illegal conduct' even viewed in light of *Twombly's* clarification of the motion to dismiss standard.").

VIII. CONCLUSION

This Court should affirm the District Court's denial of qualified immunity because Defendants have not presented any error requiring reversal. The Defendants are not entitled to qualified immunity as a matter of law on Mr. McCarter's Free Exercise claim, as it was clearly established at the time of the violations that: (1) an effective ban on religious sweat lodge ceremonies constitutes a substantial burden on Mr. McCarter's religious exercise; and (2) officials could not substantially burden Mr. McCarter's right to free exercise of religion by

denying him effective access to a sweat lodge absent some legitimate penological justification.

DATED: January 22, 2018

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Mr. McCarter states that he is unaware of any related cases pending in this Court.

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.*

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Signature of Attorney or Unrepresented Litigant: /s/ Melinda E. LeMoine

Date: 01/22/2018

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

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