

No. _____

In the Supreme Court of the United States

CALVIN JOHNSON,

Petitioner,

v.

LUIS CARDENAS-ORNELAS,

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Plaintiff Luis Cardenas-Ornelas pleaded a claim alleging that restrictions on yard time during the COVID-19 pandemic deprived him of opportunities for outdoor exercise in violation of the Eighth Amendment. The Ninth Circuit relied on its caselaw generally identifying a right to “outdoor exercise or otherwise meaningful opportunities for recreation” under the Eighth Amendment to satisfy the clearly established law prong of qualified immunity before considering the specific circumstances of Cardenas-Ornelas’s constitutional claim to decide only whether the alleged claim presented a viable constitutional violation that could survive summary judgment.

The questions presented are:

Whether the Ninth Circuit’s opinion, which inverted the test for qualified immunity and considered whether a right to “outdoor exercise or otherwise meaningful recreation” is clearly established as a general matter of law before considering whether the specific circumstances of this case present a viable constitutional claim, conflicts with this Court’s repeated warnings to avoid defining clearly established law at a high level of generality.

Whether the Ninth Circuit’s opinion conflicts with this Court’s controlling opinions because the record lacks evidence of an “objectively intolerable risk of serious harm” necessary to satisfy the objective and subjective criteria for proving a claim under the Cruel and Unusual Punishment Clause.

PARTIES TO THE PROCEEDINGS

Petitioner is Nevada Department of Corrections (NDOC) Warden Calvin Johnson, an individual who was one of the defendants and the appellant below.

Respondent is Luis Cardenas-Ornelas, an individual who is lawfully incarcerated by NDOC, and was the plaintiff and appellant below.

DIRECTLY RELATED PROCEEDINGS

Luis Cardenas-Ornelas v. Calvin Johnson, et al.,
United States Court of Appeals for the Ninth Circuit
Case No. 24-6755 (9th Cir.), Order Denying Petition
for Rehearing entered April 22, 2026.

Luis Cardenas-Ornelas v. Director Wickham, et al.,
United States District Court for the District of Nevada
Case No. 2-21-cv-00030, Order Granting in part and
Denying in part Defendants' Motion for Summary
Judgment entered Sept. 30, 2024.

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PETITION FOR WRIT OF CERTIORARI

The COVID-19 pandemic required many government officials to make judgment calls on matters of public health and safety with incomplete and constantly evolving information. Prison officials were no exception. This case presents a challenge to decisions Warden Calvin Johnson made when he was in the unenviable position of balancing the need to protect the inmates in his custody from a potentially deadly and highly contagious disease with providing those inmates with opportunities for exercise and social interaction. The unique circumstances and challenges that COVID-19 created as it ravaged the globe present a textbook foundation for granting qualified immunity to corrections officials like Warden Johnson.

Qualified immunity is available unless the reviewing court can “identify a case where an officer taking similar *actions* in similar *circumstances* ‘was held to have violated’ the Constitution.” *Zorn v. Linton*, 607 U.S. 568, 574 (2026) (emphasis added). Decisions that improperly deny qualified immunity “wrongly subject individual officers to liability” and undermine the important role qualified immunity plays in “shield[ing] officials from harassment, distraction, and liability when they perform their duties reasonably.” *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015); *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

For that reason, this Court has repeatedly instructed lower courts “not to define clearly established law at a high level of generality.”

Sheehan, 575 U.S. at 613 (internal quotation marks omitted). And it has repeatedly warned that the identification of general principles of law like stating “that an officer may not use unreasonable and excessive force” is insufficient to conclude that the law is clearly established when considering the specific circumstances of any given case. *Kisela v. Hughes*, 584 U.S. 100, 105 (2018). “An officer cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood he was violating it.” *Id.* (internal quotation marks omitted).

This case calls for this Court to correct a lower court’s repetition of the same class of error this Court corrected last term in *Zorn* and many times over in past cases from the Ninth Circuit. *Zorn*, 607 U.S. 572–74; *Kisela*, 584 U.S. at 104 (quoting *Sheehan*, 575 U.S. at 613). The Ninth Circuit’s published opinion here fails to comply with the relevant standard in a seemingly novel way that warrants a decision from this Court. While inverting the test for applying qualified immunity, which *Pearson* admittedly allows, the Ninth Circuit improperly considered whether its case law “clearly established a prisoner’s Eighth Amendment right to outdoor exercise or otherwise meaningful opportunities for recreation” *before* considering the specific factual circumstances of the case only to decide whether the underlying claim presents a viable constitutional violation.

This published opinion has already led another panel of the Ninth Circuit astray and will continue to do so without this Court’s intervention. *See, e.g.*,

McGuire v. Johnson, Case No. 25-1457, 2026 WL 1330543 (9th Cir. May 13, 2026). To make matters worse, the Ninth Circuit’s underlying merits analysis conflicts with the standard from *Farmer v. Brennan*, 511 U.S. 825 (1994). And the Ninth Circuit’s infidelity to controlling legal standards in this case and in others involving challenges to corrections officials’ responses to the COVID-19 pandemic has created an untenable conflict within the Ninth Circuit. *Hampton v. California*, 83 F.4th 754, 770 (9th Cir. 2023); *see also Maney v. Oregon*, Case No. 24-2715, 2025 WL 1794110 (9th Cir. June 30, 2025). This Court should grant the petition and summarily reverse. Sup. Ct. R. 10(c).

OPINIONS BELOW

The Ninth Circuit’s opinion dated January 29, 2026, affirming in part, and reversing in part the district court’s judgment is reported at *Cardenas-Ornelas v. Johnson*, 165 F.4th 1234 (9th Cir. 2026). App. 2a–15a. The Ninth Circuit’s related memorandum is unreported but can be found at *Cardenas-Ornelas v. Johnson*, No. 24-6755, 2026 WL 237695 (9th Cir. 2026). App. 16a–21a. The Ninth Circuit’s order denying rehearing and rehearing *en banc* was filed on April 22, 2026. App. 64a–65a. The Nevada district court’s September 30, 2024 order denying Warden Johnson’s motion for summary judgment asserting qualified immunity is unreported but can be found at *Cardenas-Ornelas v. Wickham*, Case No. 2:21-cv-00030-ART-VCF, 2024 WL 4368152, at *1 (D. Nev. Sept. 30, 2024). App. 22a–63a.

* * *

JURISDICTION

The court of appeals entered judgment on January 29, 2026, (App. 1a), and denied Petitioner’s timely petition for rehearing and rehearing *en banc* on April 22, 2026, (App. #64a). On August 27, 2026, Justice Kagan granted Warden Calvin Johnson’s application (26A71) to extend the time to file a petition for writ of certiorari until September 18, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent asserted a violation of the Eighth Amendment to the United States Constitution, which provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Respondent’s claim was brought pursuant to 42 U.S.C. § 1983, which provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

STATEMENT OF THE CASE

I. Legal Background

Conditions of confinement claims are examined under the Cruel and Unusual Punishment Clause of the Eighth Amendment. *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). First, an inmate must establish that, as an objective matter, he was “incarcerated under conditions posing a substantial risk of serious harm.” *Farmer*, 511 U.S. at 834. Second, the inmate must establish that the official knew of and disregarded “an excessive risk to inmate health or safety.” *Id.* at 837.

“Government officials enjoy qualified immunity from suit under § 1983 unless their conduct violates clearly established law.” *Zorn*, 607 at 571. “A right is clearly established when it is sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Id.* at 572 (internal quotation marks omitted). But when existing precedent does not put a constitutional question “beyond debate,” clearly established it is not. *Id.* (internal quotation marks omitted). A finding that a right is clearly established generally requires identification of “a case where an officer acting under similar circumstances was held to have violated the Constitution.” *Id.* (internal quotation marks omitted). “The relevant precedent must define the right with a high degree of specificity, so that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply.” *Id.* (internal quotation marks omitted). Officials “receive qualified immunity unless they could have read the relevant precedent beforehand and known that it proscribed

their specific conduct.” *Id.* (internal quotation marks and brackets omitted). When there is no case holding that an official violated the Constitution by “taking similar actions in similar circumstances,” the official is generally entitled to immunity. *Id.* at 574.

II. Factual Background

1. In February of 2020, Plaintiff Luis Cardenas-Ornelas was an inmate in the custody of the Nevada Department of Corrections and housed in Unit 9 of High Desert State Prison. App 3a. Around that time, NDOC added COVID-19 to its medical directive on communicable diseases, Medical Directive 231. 3-ER-426 ¶2. MD 231 provided guidance to NDOC’s custody and medical staff on proper procedures for responding to communicable diseases. 3-ER-426 ¶2; *see also* 3-ER-202–207.

Beginning in March 2020, as the entire world was experiencing the onset of a global pandemic that would cause the World Health Organization to declare a “global health emergency” for a period of more than three years,¹ the NDOC Medical Director established specific protocols for addressing COVID-19 in Nevada’s prisons. 3-ER-426–427 ¶¶3, 5. NDOC implemented these policies through the NDOC Director. 3-ER-426 ¶¶3–4. As HDSP’s warden, Calvin Johnson instructed HDSP staff to comply with all protective protocols communicated by the NDOC

¹ Northwestern Medicine, *When did the Pandemic Start and End? Covid 19 Pandemic Timeline*, <https://www.nm.org/healthbeat/medical-advances/new-therapies-and-drug-trials/covid-19-pandemic-timeline> (updated Apr. 2025) (last viewed Sept. 15, 2026).

Medical Director, including COVID-19 protocols. 3-ER-421, ¶4. Those protocols imposed regulations on testing for NDOC staff and the process for addressing potential exposure of staff to COVID-19. 3-ER-421–422, ¶¶7, 9.

NDOC also took additional internal measures to avoid the potential for spread of COVID-19 within the prison environment. Those measures included isolation of symptomatic inmates, masking requirements for inmates and staff, and sanitizing common areas. 3-ER-422, ¶¶8–12.

Warden Johnson “also had an Emergency Operation Command Center that dealt with COVID-19 related incidents and was in contact with all of the other institutions for open communication.” 3-ER-422, ¶13. NDOC established protocols for isolation and testing of inmates that were transported from another facility or that required transport for legal or medical reasons. 3-ER-422, ¶¶14–15. Outside visitors, volunteers, and contractors were also prohibited from entering the prison “to protect the inmate population from COVID-19.” 3-ER-422, ¶16.

2. “On March 18, 2020, Cardenas-Ornelas’s Unit—Unit 9—was placed on quarantine because a canteen staff member tested positive for COVID-19, and inmate canteen workers assigned to Unit 9 had been in close contact with them.” App. 3a.

Unit 9 offenders, however, were permitted to work in Prison Industries, with Cardenas-Ornelas working twice per week for eight- or nine-hour shifts, enabling those inmates to (1) leave their cells for extended

periods of time, and (2) continue to earn wages and good-time credits. App. 27a–28a; 2-ER-56, ¶8; 3-ER-268, 293; 4-ER-467. And “only inmates in Unit 9 worked in Prison Industries.” 2-ER-56, ¶8. But inmates could freely mix and interact with offenders from other units when on the prison yard. 2-ER-56, ¶8.

Work in Prison Industries also occurred in an indoor space, which allowed staff to ensure that offenders followed COVID-19 protocols. 2-ER-56, ¶¶9–10. And NDOC could use a fogger device to disinfect the workspace between shifts. 2-ER-56, ¶11. But neither of those precautions could be taken with the prison yard. 2-ER-56, ¶¶9, 11.

Unit 9 received medical clearance on April 27, 2020. App. 27a. As a result, Unit 9 offenders were no longer quarantined after April 27, 2020. 3-ER-423, ¶21.

3. By May 18, 2020, “three HDSP staff members . . . tested positive for COVID-19.” 3-ER-423, ¶23. The next day, an HDSP inmate tested positive. App. 27a; 3-ER-423, ¶23. Also, some correctional officers needed to be placed on administrative leave due to COVID-19 exposure. 3-ER-423, ¶23. To protect inmates and staff, HDSP was put on lockdown. App. 27a–28a; 3-ER-423, ¶23. During a lockdown inmates may exercise in their cells. 3-ER-423, ¶23.

Within less than ten days, three additional HDSP inmates tested positive for COVID-19. App. 27a; 3-ER-224. Each of them had come from the Clark

County Detention Center and were kept in isolation. 3-ER-224, 423, ¶24. Inmates at HDSP were isolated for a minimum of twenty days to allow medical staff to monitor for symptoms to determine if any other offenders at HDSP contracted COVID-19. App. 27a; 3-ER-224–225, 423–424, ¶24.

On June 12, 2020, Cardenas-Ornelas initiated the grievance process by submitting an informal grievance, which was denied. App. 28a. In the grievance, Cardenas-Ornelas complained of a lack of “exercise yard time” as a result of the quarantine and lockdown. App. 28a; 3-ER-268. After denial of the informal grievance, he filed a first-level grievance, which went to Warden Johnson for a response. App. 28a. When responding, Warden Johnson said, “NDOC has not placed any institution on lock-down but has quarantined in an effort to adhere to important Center for Disease Control and prevention guidelines.” App. 28a. Deputy Director Wickham confirmed the prior responses to Cardenas-Ornelas’s grievance at the second level. App. 28a–29a.

By June 23, 2020, inmates in units without people “suspected of contracting COVID-19 were permitted to resume yard time.” 3-ER-424, ¶26. “Unit 9, Cardenas-Ornelas’s unit, however, remained in quarantine” because inmates in that unit continued testing positive for COVID-19. 3-ER-424, ¶26.

Despite the quarantine, offenders in Unit 9 were able to continue working in Prison Industries for twice-weekly shifts of up to eight or nine hours, which continued to allow those offenders to exit their cells for an extended period of time and continue to earn

wages and good-time credits. App 28a; 2-ER-56, ¶8; 3-ER-293; 4-ER-467. As before, this was permitted because Unit 9 inmates would not mix with inmates from other units when working in Prison Industries, but yard time would create opportunities for inmates from other units to intermingle with Unit 9 inmates. 2-ER-56–57, ¶¶8–12.

4. By at least January 13, 2021, inmates in Unit 9D group 2, where Cardenas-Ornelas was housed, were allowed one hour per week of yard time. 4-ER-480, 484. Approximately five to six weeks later, the yard time provided was increased to three hours per week. 4-ER-480; 4-ER-501. And by late July, Cardenas-Ornelas was allowed five hours per week outdoor exercise time, three hours per week of gymnasium time, and 25 hours a week of tier time for exercise. 4-ER-467.

II. Proceedings Below

1. In his complaint, Cardenas-Ornelas alleged claims concerning NDOC's response to the COVID-19 pandemic. App. 23a–24a; 4-ER-577-613. The district court screened Cardenas-Ornelas's complaint and allowed a claim alleging that Defendant Warden Johnson, and other Defendants, violated the Eighth Amendment, the Equal Protection Clause, and the Nevada Constitution by denying yard time. App. 23a–24a.

2. Defendants, including Warden Johnson, moved for summary judgment. App. 24a. The district court partially granted the motion but denied the motion with respect to Cardenas-Ornelas's Eighth Amendment, Equal Protection, and state-law claims

against Warden Johnson challenging restrictions to yard time. App. 49a–57a, 63a. Defendants, including Warden Johnson, appealed. App. 2a.

3. A panel of the Ninth Circuit affirmed in part and reversed in part. App. 15a, 21a. Although the Court reversed on the equal protection claim and the state law claims, it affirmed the denial of qualified immunity under the Eighth Amendment. App 8a–21a. It divided its analysis on qualified immunity for the Eighth Amendment claim into two parts. App. 8a–12a.

First, the court indicated that it would “start [its] inquiry by considering whether, at the time of the alleged deprivation, Cardenas-Ornelas had a clearly established right to outdoor exercise under the Eighth Amendment.” App 8a. The court then defined the right at issue by relying on its own cases to conclude that “[b]y 2020 [the Circuit’s] case law had clearly established a prisoner’s Eighth Amendment right to outdoor exercise or otherwise meaningful opportunities for recreation.” App. 8a.

Second, it said “[t]he next question is whether a reasonable jury could find that Warden Johnson violated that clearly established right.” App. 9a. And the court concluded that “Cardenas-Ornelas presented sufficient evidence which, viewed in the light most favorable to him at summary judgment, raised triable issues on both prongs of his Eighth Amendment claim against Warden Johnson.” App. 9a.

The Court addressed the objective prong first. App. At 10a.–11a. To support its decision on that prong, the

court identified (1) evidence in the record showing Cardenas-Ornelas “was ‘confined to [his] cell for 23 to 23 1/2 hours a day’ except when he went to work in Prison Industries”; and (2) the absence of evidence from Defendants showing “that recreational opportunities had been afforded to Unit 9 in and after June 2020, while other units were allowed to resume yard time.” App. 9a.

The court then addressed the subjective prong, focusing on whether Cardenas-Ornelas had shown “that Warden Johnson had a sufficiently culpable state of mind—namely ‘deliberate indifference.’” App. 9a. The court again identified evidence on two points, (1) tying Warden Johnson’s subjective awareness “of the alleged risk” to his role in responding to the “first-level grievance, which alleged that Cardenas-Ornelas was ‘confined to his cell for 23 to 23 1/2 hours a day except for when [he] got to work’”; and (2) “Warden Johnson ordered Unit 9 inmates to work even as he denied them yard time.” App. 9a–10a.

The court then addressed and rejected Warden Johnson’s arguments on both prongs. On the objective prong, the court refused to recognize the potential for Cardenas-Ornelas’s work to provide an “affirmative program[] of training or rehabilitation,” consistent with the court’s decision in *Norbert v. City & Cnty of San Francisco*, 10 F.4th 918 (9th Cir. 2021). App. 10a–11a. Contrasting the two cases, the court identified opportunities for recreation time in *Norbert*, and the absence of “evidence that Unit 9 inmates had *any* access to meaningful opportunities for exercise between March 18, 2020, and July 27, 2021.” App. 10a–11a. And it said evidence of Cardenas-Ornelas’s

work, “sorting cards or hangars’ in Prison Industries did not constitute otherwise meaningful recreation,” when viewed in the light most favorable to Cardenas-Ornelas, and neither “did in-cell exercise.” App. 11a.

On the subjective prong, the court rejected Warden Johnson’s argument on the absence of evidence of deliberate indifference “because he was merely following, and was not required to reexamine, the medical judgments communicated through NDOC’s COVID-19 protocols.” App. 11a. The court (1) generally identified “a factual dispute regarding whether NDOC’s COVID-19 protocols required the denial of yard time for Unit 9 inmates for over a year”; and (2) returned to its reliance on Warden Johnson reviewing and denying the first-level grievance. App. 11a.

Finally, despite identifying an instance within its own cases suggesting “even when the alleged deprivation of exercise was, objectively, sufficiently serious, a prison official may still be entitled to qualified immunity under the subjective prong in extraordinary circumstances,” the Court still rejected Warden Johnson’s qualified immunity defense. App. 11a–12a. It did so because, despite Warden Johnson’s indication “that he restricted yard time for Unit 9 inmates to prevent COVID-19—a rational explanation,” a factual dispute remained as a result of “conflicting evidence which shows that Warden Johnson ordered Unit 9 to work despite the risk of COVID-19.” App. 11a–12a. This, the Court suggested, meant Warden Johnson’s COVID-19 “justification does not rule out deliberate indifference.” App. 11a–12a.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit’s Opinion Inverts the Test for Qualified Immunity, Leading to Misapplication of the Clearly Established Law Requirement.

The test for applying qualified immunity has two parts. The first is a threshold question of whether “the facts alleged show that the officer’s conduct violated a constitutional right.” *Saucier*, 533 U.S. at 201. If there is no violation, there is no need to proceed further. *Id.* “[T]he next, sequential step is to ask whether the right was clearly established.” *Id.* Consideration of this step “must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Id.*

True, this Court backed away from the mandate it imposed in *Saucier* that a reviewing Court must first analyze the threshold question of whether there is a violation before reaching the “clearly established” question. *Pearson v. Callahan*, 555 U.S. 223 (2009). In doing so, this Court recognized that “there will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all.” *Id.* at 239. And it seemed to do so in recognition that a court could skip straight to considering the clearly established law requirement when the court intended to grant qualified immunity because, regardless of whether the plaintiff adequately presents a violation, the qualified immunity defense must prevail due to the

absence of relevant clearly established law. *Id.* at 239–42.

But this Court continues to insist that the clearly established law prong be considered based on the specific circumstances of the case. *Zorn*, 697 U.S. at 572–74. Warden Johnson is aware of no case where this Court has countenanced flipping the inquiry in a way that results in a court considering the clearly established law prong in the abstract *before* engaging in a particularized inquiry of the case’s facts only when deciding whether the case presents a viable constitutional violation.

Yet that is what the Ninth Circuit did in this case. It inverted the inquiry, considering whether its case law clearly established the relevant right *before* it later engaged in a particularized inquiry about the facts of the case to determine only whether the evidentiary record was sufficient to support the denial of summary judgment on the merits of the underlying constitutional claim. App. 8a–12a.

By doing so, the Ninth Circuit only considered whether, as a general matter, its case law clearly establishes a right to outdoor exercise under the Eighth Amendment. App. 8a–9a. It did not ask whether “any reasonable official in [Warden Johnson’s] shoes would have understood he was violating” a clearly established right because “existing precedent . . . placed the statutory or constitutional question beyond debate.” *Sheehan*, 575 U.S. at 611 (internal quotation marks omitted and ellipses in original). And it did not, as this Court indicated is

necessary in *Zorn*, assess whether Warden Johnson could read the cases the court cited in its opinion and have known that there was no debating that the decision to quarantine inmates and deny them yard time in the midst of a global pandemic violated the Eighth Amendment. *Id.*

Had the Ninth Circuit engaged in the inquiry this Court’s opinions mandate, the result would have been different.² When considering Cardenas-Ornelas’s Eighth Amendment claim on its facts with relevant Ninth Circuit case law, the law was not so clearly established as to put the issue “beyond debate.” *Id.*

II. The Ninth Circuit’s Flawed Analysis Led to the Wrong Result.

The Ninth Circuit’s opinion improperly lowers the bar for Cardenas-Ornelas to overcome Warden Johnson’s entitlement to qualified immunity, despite this Court’s continuous reminders on where to set that bar. The bar is “demanding” and “protects ‘all but the

² This Court could issue an opinion that ends its analysis at this point to explain that, although *Pearson* allows courts to take the prongs of qualified immunity out of order, the lower court must (as the Ninth Circuit failed to do here) be careful to ensure that its initial analysis on clearly established law considers the particular circumstances of the case before it. The Court could then remand to have the Ninth Circuit conduct the appropriate analysis in the first instance. But as is explained below, the Ninth Circuit’s caselaw plainly supports an award of qualified immunity here. For that reason, this Court can, and should, summarily reverse and remand with instructions for the entry of judgment for Warden Johnson on the underlying Eighth Amendment claim.

plainly incompetent or those who knowingly violate the law.” *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). It applies if a court is unable to “identify a case where an officer taking similar actions in similar circumstances was held to have violated the Constitution.” *Zorn*, 607 U.S. at 574 (internal quotation marks omitted). Under the relevant, “demanding” standard, consideration of the Ninth Circuit’s Eighth Amendment jurisprudence exposes flaws in the Ninth Circuit’s reasoning that undermines the denial of qualified immunity.

As with the Second Circuit’s opinion in *Zorn*, the Ninth Circuit’s opinion here “contravene[s]” this Court’s demanding standard for determining when the law is clearly established. *Zorn*, 607 U.S. at 572. The Ninth Circuit broadly defined the right at issue as an “Eighth Amendment right to outdoor exercise or otherwise meaningful recreation.” App. 8a–9a. Yet it engaged in no detailed factual comparison of Warden Johnson’s alleged conduct to the cases it cited to determine whether Warden Johnson, along with every other reasonable official in his same position, could have “read” the cases and known that it was “beyond debate” that he was violating the Eighth Amendment by responding to the COVID-19 pandemic such as he did. *Zorn*, 607 U.S. at 572. The only factual comparison it made was to recognize that one of the cases it relied upon presented “more severe facts.” App. 8a–9a.

Had the panel conducted a more detailed inquiry, it would have found that none of the cases it relied upon present circumstances with the “high degree of specificity” this Court’s standard requires. *Zorn*, 607

U.S. at 572 (quoting *Wesby*, 583 U.S. at 63). First, the panel merely identified the right as a general legal principle. App. 8a–9a. It did not assess whether those cases clearly establish that right in the context of a prison warden balancing issues of prison safety in the midst of a global pandemic that threatened the health and safety of inmates and prison staff. App. 8a–9a. But to make matters worse, when addressing the clearly established law question, the Ninth Circuit failed to grapple with its own cases (discussed below) that recognize limits on the general principle the court identified as categorically clearly established.

True, the Ninth Circuit has noted that the denial of outdoor exercise may violate the Eighth Amendment. App. 8a–9a. But it has also recognized (1) it has never held that depriving inmates of outdoor exercise results in a *per se* violation of the Eighth Amendment, and (2) there are limits to any constitutional mandate to give inmates time for outdoor exercise, including during genuine emergencies. *Norbert*, 10 F.4th at 929; *Norwood v. Vance*, 591 F.3d 1062, 1068-70 (9th Cir. 2015).

Yet none of the cases the panel cited involved an emergency of any kind, much less a health emergency in the nature of the COVID-19 pandemic, such that those cases would have put Warden Johnson on notice that quarantining inmates violated the Eighth Amendment. Instead, each of the cases cited do not involve an emergency, and some of them provide contradictory principles that any reasonable corrections official in Warden Johnson’s shoes could read as permitting restrictions on yard time.

In *LeMaire v. Maass*, 12 F.3d 1444, 1457-58 (9th Cir. 1993), the Ninth Circuit held that the inmate had “not established an Eighth Amendment violation,” for an inmate that “had been deprived of outside exercise for most of a five-year period of incarceration” as a sanction for the inmate’s misconduct. When reviewing that decision in another case, the Ninth Circuit noted the court’s reliance on the point that the inmate in *LeMaire* “still [could] exercise within his cell,” including “low and non-impact aerobic exercise,” which “is thus consistent with how we approached this issue in” other cases. *Norbert*, 10 F.4th at 931.

Thus, *LeMaire* is far from the sort of case needed to support a denial of qualified immunity. *Zorn*, 607 U.S. at 574. It supports the proposition that unique, extraordinary circumstances can support restrictions on outdoor exercise for extended periods of time, even for periods extending multiple years, and opportunities for an inmate to exercise within their cell may be a sufficient substitute when allowing that inmate access to the prison yard poses a safety risk for other inmates and staff. *LeMaire*, 12 F.3d at 1458. But the Ninth Circuit never considered those parts of *LeMaire* when considering what was clearly established “in light of the specific context of this case.” *Saucier*, 533 U.S. at 201.

Second, *Shorter v. Baca*, 895 F.3d 1176, 1186 (9th Cir. 2018), focused on “logistical problems, such as inadequate staffing and limited recreational facilities, [which] may make it difficult for jail officials to provide adequate exercise to detainees.” But the court suggested that when logistical problems combine with other factors, the result may be different. *Shorter*, 895

F.3d at 1186. This case certainly presented challenges on logistics, staffing, and limitations with facilities, but this case is of a different quality because it involves Warden Johnson's response to a genuine medical emergency in the form of the COVID-19 pandemic. Moreover, in *Shorter*, the Ninth Circuit acknowledged that the Fourteenth Amendment standard applied to pretrial detainees, is "more protective" than "the Eighth Amendment prohibition against cruel and unusual punishment." *Id.* at 1183 (internal quotation marks omitted). Upon reading *Shorter*, Warden Johnson could not have known that restricting outdoor exercise during the genuine emergency presented by COVID-19 might violate the less protective Eighth Amendment prohibition against cruel and unusual punishment.

Third, *Thomas v. Ponder*, 611 F.3d 1144 (9th Cir. 2010), also involved no emergency. It involved a "modified program," applied to all maximum security inmates who would not sign a pledge of nonviolence, where the inmate was "deprived of all out-of-cell exercise, fed in [his] cell[], subjected to strip searches, and, on the rare occasions that [he was] permitted to leave [his] cell[], [he was] escorted in restraints" for a period of "13 months and 25 days." *Id.* at 1147-48. In contrast, this case undisputably involved Warden Johnson's response to the global COVID-19 pandemic, not the multitude of factors at issue in *Thomas*. Because the specific factual circumstances in *Thomas* were not similar to those faced by Warden Johnson, he could not have read *Thomas* and known that restricting outdoor exercise based on COVID-19 violated the Eighth Amendment.

Finally, the court cited *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979), which it expressly acknowledged involved “more *severe* facts” with segregation of inmates for over four *years*. App. 9a (emphasis added). Like *LeMaire*, *Shorter* and *Thomas*, inmates in *Spain* were not deprived of outdoor exercise in response to an emergency that posed a threat to the health and safety of the inmate population. 600 F.2d at 192.

Although, the Ninth Circuit has characterized *Spain* as the “foremost circuit precedent” on the right to exercise, the court also recognized that *Spain* “did not . . . ‘decide whether the deprivation of outdoor exercise is a per se violation of the Eighth Amendment.’” *Norbert*, 10 F.4th at 929 (quoting *Spain*, 600 F.2d at 199). In *Norbert*, the court determined that “several factors combined to make outdoor exercise a necessity” in *Spain*. See *Norbert*, 10 F.4th at 929 (quoting *Spain*, 600 F.2d at 199). But the Ninth Circuit conducted no analysis here to consider whether such factors are present—they are not—before concluding that *Spain* clearly established the law with respect to the unique, extraordinary subject of this case: responding to the COVID-19 pandemic.

So the cases the Ninth Circuit relied upon do not provide adequate factual comparators with “the high degree of specificity” this Court’s decisions demand. *Zorn*, 607 U.S. at 572, 574. They do not address the unique circumstances Warden Johnson faced in addressing the COVID-19 pandemic.

Considering other Ninth Circuit authorities not addressed in the Ninth Circuit’s analysis of what its law clearly establishes further undermines the Ninth Circuit’s conclusion that Cardenas-Ornelas can avoid an award of summary judgment for Warden Johnson based on qualified immunity. First, in *Norwood*, the Ninth Circuit held that prison officials could not be held liable for denying outdoor exercise when those officials exercised reasonable judgment in determining that “allowing outdoor exercise” presented a “greater risk of harm” when the officials instituted lockdowns to “keep inmates safe” from “a genuine emergency.” 591 F.3d at 1068–70. The Ninth Circuit reasoned that “[o]fficials must balance th[e] imperative [to keep inmates safe] against other obligations that our laws impose, such as providing outdoor exercise.” *Id.* at 1069.

The court expressly counseled that when “a lockdown was in response to a genuine emergency, and restrictions were eased as the prison administration determined that the emergency permitted, we may not lightly second-guess officials’ expert judgments about when exercise and other programs could safely be restored.” 591 F.3d at 1069. The Ninth Circuit did so despite prison officials imposing different restrictions against different inmate populations within the same institution based on particularized evaluations of safety threats to different groups of inmates. *Id.* at 1065. And the Ninth Circuit opined that even if “prison officials . . . err[ed] on the side of caution by maintaining lockdowns for longer than necessary,” “when it comes

to matters of life and death, erring on the side of caution is a virtue.” *Id.*

Second, in *Norbert*, the Ninth Circuit recognized that its caselaw does not demand opportunities for *outdoor* exercise and rejected a claim asserting a right to direct sunlight. 10 F.4th at 928–37. There, the Court recognized that in some cases the court had recognized a right to outdoor exercise based on specific facts of those cases. *Id.* at 929. But it rejected the proposition that the Constitution demands, as a categorical matter, access to opportunities for outdoor exercise. *Id.*

And although *Norbert* focused on the possibilities for indoor exercise presented in that case, it does not address in detail the limits of when opportunities for other indoor activities that allow inmates to exit their cells for extensive periods of time will not constitute “meaningful recreation” that satisfies the Eighth Amendment. 10 F.4th at 928–32. Instead, it recognized that the cases requiring access to outdoor exercise uniquely involved situations with inmates in segregation that had very limited, if any, opportunities to engage in any activity outside their cells. *Id.* Those cases are different from this case, where Cardenas-Ornelas admits that he was out of his cell twice a week for a total of at least 16 hours. 3-ER-293.

No case the Ninth Circuit cited holds that providing inmates with opportunities to work, rather than giving them yard time violates the Eighth Amendment. And even if one did, it would not have done so in the context of a global pandemic with

further consideration of the advantages that working in Prison Industries provided over yard time by still giving inmates who may have been exposed to COVID-19 meaningful time outside their cells in an environment that (1) prevented mixing inmates from different housing units, and (2) provided for disinfection of the workplace between work shifts. 2-ER-56–57, ¶¶9–12

These cases undermine the Ninth Circuit’s ruling on what was clearly established as of 2020. *Norwood* recognizes the need for prison officials to balance availability of outdoor exercise against potential danger to the prison population resulting from a genuine emergency. 591 F.3d at 1068–70. And there is no debate here that COVID-19 caused a genuine emergency; even the panel recognized that restricting yard time was “rational” but then only considered that within the context of its merits analysis, not its analysis on what the law clearly established. App. 12a.

Meanwhile *Norbert*, rejects the idea that Ninth Circuit case law establishes a categorical requirement for *outdoor* exercise. *Id.* at 929. And its discussion of relevant Ninth Circuit cases exposes the absence of precedent clearly defining the contours of the Eighth Amendment in a way that would clearly establish that a deprivation of outdoor exercise violates the Cruel and Unusual Punishment Clause when an inmate is otherwise able to work outside his cell at least twice a week for eight hours at a time.

By considering general standards on whether there is a clearly established right before considering

the specifics of the case, the panel did not conduct the particularized inquiry this Court's cases demand. App. 8a– 2a. Said in the words of *Zorn*, the Ninth Circuit identified no case that Warden Johnson could have “read” at any time between March 2020 and July 2021 and, as a result of reading that case, “known” that the denial of yard time as a protective measure implemented in response to the COVID-19 pandemic—a genuine public health emergency—violated the Cruel and Unusual Punishment Clause of the Eighth Amendment. *Zorn*, 607 U.S. at 572.

III. The Ninth Circuit's Merits Analysis is Wrong Under *Farmer*.

Setting aside the Ninth Circuit's error in defining the clearly established law, it also got the underlying merits analysis wrong. The record here lacks evidentiary support for the Ninth Circuit's conclusion that Cardenas-Ornelas's Eighth Amendment claim should go to trial. The Ninth Circuit improperly assumed that Cardenas-Ornelas could prove the elements of his claim without pointing to evidence necessary for him to succeed at trial.

To show an Eighth Amendment violation under *Farmer*, an inmate must first “objectively” establish that he was “incarcerated under conditions posing a substantial risk of serious harm.” 511 U.S. at 834. Second, the inmate must establish that the official had a “sufficiently culpable state of mind”: “deliberate indifference.” *Id.* at 834.

Although this Court's “cases recognize that subjecting individuals to a risk of future harm—not

simply actually inflicting pain—can qualify as cruel and unusual punishment.” *Baze v. Rees*, 553 U.S. 35, 49 (2008). “To establish that such exposure violates the Eighth Amendment . . . the conditions presenting the risk must be sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers.” *Id.* at 49–50 (internal quotation marks and emphasis in original omitted). There must be “an ‘objectively intolerable risk of harm.’” *Id.* at 50 (quoting *Farmer*, 511 U.S. at 846).

Under the “subjective” prong, “deliberate indifference” can only be established if the “prison official . . . knows of and disregards an excessive risk to inmate health and safety.” *Farmer*, 511 U.S. at 837. “[D]eliberate indifference entails something more than mere negligence.” *Id.* at 835. The “official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Id.* at 837. A prison “official’s failure to alleviate a significant risk that he should have perceived but did not” does not establish deliberate indifference. *Id.* at 838.

The Ninth Circuit’s opinion conflicts with the forgoing standard. The court just assumed that Cardenas-Ornelas suffered harm based on a lack of outdoor exercise. App. 9a. It identified no record evidence Cardenas-Ornelas produced that supports a triable issue of fact on the “objective” standard for harm. *Farmer*, 511 U.S. at 834.

Similarly, the court speculated that Warden Johnson knew that the lack of outdoor exercise posed

an “objectively intolerable risk of harm” to Cardenas-Ornelas under *Farmer*. App. at 9a–10a. The panel mistakenly relied on Warden Johnson’s review of Cardenas-Ornelas’s grievances to establish that Warden Johnson possessed the requisite state of mind. *See* App. 9a–10a.

Even though Cardenas-Ornelas submitted grievances concerning a lack of outdoor exercise, he never asserted that he suffered any adverse effects. App. 4a–5a; *see also* 3-ER-268–270, 276-278, 287–289 301-02, 312, 314, 316. More importantly, the Ninth Circuit identified no evidence showing that Warden Johnson had reason to suspect that Cardenas-Ornelas suffered any adverse effects from a lack of outdoor exercise, especially when working in Prison Industries provided Cardenas-Ornelas with consistent time outside of his cell in an environment that, unlike the prison yard, limited the potential for spread of COVID-19 by (1) preventing comingling of inmates in different housing units, and (2) providing for disinfection of the workplace between shifts. App. 9a–12a; 2-ER-56–57, ¶¶9–12

And even if Cardenas-Ornelas had grieved the lack of outdoor exercise actually caused depression, muscle loss, or joint pain, his claim still fails. He produced no objective medical evidence showing that the lack of outdoor exercise caused any of those supposed ailments, much less that Warden Johnson actually knew that the lack of outdoor exercise would cause such harm. *Cf. Peralta v. Dillard*, 744 F.3d 1076, 1087 (9th Cir. 2014) (holding an inmate’s complaint alleging a serious medical need could not provide the awareness required to establish deliberate

indifference because such “complaints often allege numerous violations, many of which turn out not be supported by the evidence”).

Again, in *Norwood*, the Ninth Circuit held that prison officials could not be held liable based upon a denial of outdoor exercise because those officials exercised reasonable judgment in determining outdoor exercise created “a greater risk of harm” to inmates resulting from a “genuine emergency.” 591 F.3d at 1065, 1068-70. Just as in *Norwood*, Warden Johnson had to make judgment calls on risks to inmate safety based on the potential for exposure to COVID-19.

On this record, Cardenas-Ornelas fails to show that Warden Johnson’s conduct caused Cardenas-Ornelas objective harm that rises to the level of an Eighth Amendment violation. And he fails to show that Warden Johnson denied outdoor exercise with a state of mind that constituted deliberate indifference, especially when considering that Warden Johnson was dealing with COVID-19, a genuine medical emergency.

IV. A Conflict Between the Ninth Circuit’s Opinions on Claims Challenging Corrections Officials’ Responses to COVID-19 Further Supports Granting Review.

Should this Court need further convincing that this is a good case for it to step in and correct the Ninth Circuit’s troubling denial of qualified immunity, there is more. The Ninth Circuit has issued

contradictory rulings on challenges to corrections officials' responses to COVID-19. These contradictory rulings put corrections officials who are still responding to COVID-19 litigation in the Ninth Circuit in an impossible situation.

In *Hampton*, 83 F.4th at 770, the Ninth Circuit denied a qualified immunity defense while holding that its case law clearly establishes that involuntary mixing of inmates when an inmate is even suspected of contracting COVID-19 violated the Eighth Amendment. But here, the Ninth Circuit held that its case law clearly establishes a right to outdoor exercise under the Eighth Amendment, despite the record indicating that restrictions were imposed to avoid potential mixing of inmates from different housing units to avoid potential for spread of COVID-19 within the prison population. App. 8a–9a; 2-ER-56–57, ¶¶8–12.

This conflict puts Warden Johnson and reasonable corrections officials like him in an untenable position. The Ninth Circuit has said Warden Johnson would violate a clearly established right under the Eighth Amendment by allowing offenders to mix when one of those inmates is suspected of having COVID-19. But it has also said that denying outdoor exercise to avoid mixing of inmates to avoid the spread of COVID-19 violates a clearly established right under Eighth Amendment. That puts correctional officials in a no-win situation when facing the heavy burden of ensuring the safety of the inmates in their custody during a once-in-a-lifetime health emergency like the COVID-19 pandemic. Those are precisely the sorts of things qualified immunity is intended to avoid.

Pearson, 555 U.S. at 231; *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (addressing qualified immunity’s purpose of avoiding “the general costs of subjecting officials to the risks of trial—distractions of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service”) (internal quotation marks omitted).

This irreconcilable conflict is firmly entrenched. The Ninth Circuit continues to apply *Hampton* and *Cardenas-Ornelas* as binding precedent. *McGuire*, at 2026 WL 1330543 (applying *Cardenas-Ornelas*); *Maney*, 2025 WL 1794110 (applying *Hampton*). Although this Court might ordinarily leave the Ninth Circuit to sort out its own internal conflict, this Court’s recognition that qualified immunity will be effectively lost for Warden Johnson with the denial of summary judgment provides sound reasoning for this Court to step in now. *Saucier*, 533 U.S. at 201. Moreover, proper application of qualified immunity to the truly unique circumstances corrections officials found themselves in during the COVID-19 pandemic (having to balance many different interests to protect the physical and mental wellbeing of the inmates in their custody and the staff under their supervision) creates an easy path to untangling that conflict. And it does so whilst reinforcing this Court’s recognition that it is not the business of federal courts to second-guess “judgment calls” made by prison officials. *See Bell v. Wolfish*, 441 U.S. 520, 562 (1979).

* * *

CONCLUSION

This Court should grant the petition and reverse.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT, FILED JANUARY 29, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-6755
D.C. No. 2:21-cv-00030-ART-MDC

LUIS CARDENAS-ORNELAS,

Plaintiff-Appellee,

v.

CALVIN JOHNSON; HAROLD WICKHAM;
CHARLES DANIELS; GARY PICCININI;
TIMOTHY STRUCK; ROBERT OWENS; JESSIE
BRIGHTWELL; MANUEL PORTILLO;
TIMOTHY JOHNSON,

Defendants-Appellants,

and

J. ALCOCK, JULIO CALDERIN,

Defendants.

Filed January 29, 2026

OPINION

Appendix A

Appeal from the United States District Court
for the District of Nevada

Anne R. Traum, District Judge, Presiding

Argued and Submitted October 9, 2025
Las Vegas, Nevada

Before: Mark J. Bennett, Gabriel P. Sanchez,
and Holly A. Thomas, Circuit Judges.

BENNETT, Circuit Judge:

Luis Cardenas-Ornelas, a prisoner in the custody of the Nevada Department of Corrections (“NDOC”), brought this action pursuant to 42 U.S.C. § 1983, alleging that staff at High Desert State Prison (“HDSP”) denied him outdoor exercise in violation of the Eighth Amendment and treated him and his unit differently from others in violation of the Fourteenth Amendment. Cardenas-Ornelas also brought analogous claims under the Nevada Constitution. The district court denied summary judgment on certain of these claims against Warden Calvin Johnson, and Warden Johnson appealed.¹ We affirm in part, reverse in part, and remand.²

1. The Notice of Appeal was filed by all Defendants. The opening brief makes clear, however, that the only Appellant is Warden Calvin Johnson.

2. In this opinion, we review the district court’s denial of Warden Johnson’s assertion of qualified immunity. In a concurrently filed memorandum disposition, we address Warden Johnson’s remaining arguments. In that disposition, we affirm in part and reverse in part.

*Appendix A***I.**

The focus of this appeal is Cardenas-Ornelas's claim that, during the COVID-19 pandemic, HDSP staff denied him outdoor exercise—despite ordering him to work and permitting yard time for inmates in other units. In early 2020, Cardenas-Ornelas was housed at HDSP and assigned to Unit 9, a protective segregation unit. HDSP allowed Unit 9 inmates to work in Prison Industries, where only Unit 9 inmates worked. By working in Prison Industries, eligible inmates could “earn wages and good time credits.” Defendants assert that, during the COVID-19 pandemic, it was possible to carry out social distancing and contact tracing in the enclosed Prison Industries warehouse, but not in the outdoor yard, where inmates from different units mixed freely. Defendants also contend that they disinfected the bays where inmates in Prison Industries worked. But Cardenas-Ornelas claims that he and many other inmates worked in very close quarters.

A.

In March 2020, Unit 9 was placed on quarantine after a canteen staff member who had been in close contact with Unit 9 inmates tested positive for COVID-19. After that quarantine ended in April 2020, Unit 9 was sent back to work in Prison Industries. Unit 9, however, continued to be denied yard time.

In May 2020, after an inmate tested positive for COVID-19, HDSP locked down. Defendants contend that “inmates could still exercise in their cell.” After more

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inmates tested positive, all were isolated for several weeks. While Unit 9 remained in quarantine without yard time, other units regained yard time.

In December 2020, after some Unit 9 inmates tested positive, Unit 9 was again placed on quarantine but, on several days, was still ordered to work at Prison Industries. Cardenas-Ornelas claims that this was despite HDSP staff's awareness that forty-eight Unit 9 inmates had just tested positive for COVID-19 and that other Unit 9 inmates were exhibiting symptoms.

Cardenas-Ornelas alleges that between March 2020 and July 2021, he was denied almost all outdoor exercise, and that this caused him anxiety, depression, muscle loss, and joint pain.

B.

In June 2020, Cardenas-Ornelas filed an informal grievance alleging the denial of his constitutional rights to exercise and yard time. Sergeant Timothy Struck denied the informal grievance because the lockdowns were needed to protect "the health and safety of all inmates."

In August 2020, Cardenas-Ornelas filed a first-level grievance alleging that he was "confined to [his] cell for 23 to 23 1/2 hours a day except for when [he went] to work which [was] for 8 to 9 hours in a crowded warehouse with about 130 other inmates." Warden Johnson denied the grievance, explaining that "NDOC has not placed any institution on lock-down but has quarantined in an effort to adhere to important Center[s] for Disease Control

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and prevention guidelines.” Addressing Cardenas-Ornelas’s working conditions, Warden Johnson noted that “[a]fter receiving medical clearance, Unit 9 inmate workers received authorization to return to work as early as April 27, 2020,” and that safety measures were in place to prevent COVID-19 spread in Prison Industries. Addressing the continued denial of yard time, Warden Johnson explained that “[t]he operations of inmates classified to Administrative and Disciplinary segregation continued as normal as possible because they [we]re equipped with the resources needed (rec. cages, locked showers, phone access),” implying that HDSP lacked the resources to provide protective segregation inmates with yard time. Cardenas-Ornelas then filed a second-level grievance, which was denied by Harold Wickham, Deputy Director of Programs for NDOC.

C.

In January 2021, Cardenas-Ornelas filed a *pro se* complaint under 42 U.S.C. § 1983 and Nevada state law against various HDSP officials, seeking declaratory and injunctive relief and monetary damages. The district court screened the complaint and allowed Cardenas-Ornelas to proceed on several claims, including claims alleging that Defendants’ denial of outdoor exercise violated prohibitions against cruel and unusual punishment under the Eighth Amendment, guarantees of equal protection under the Fourteenth Amendment, and analogous protections under the Nevada Constitution.³

3. The other claims that survived screening were: (1) an Eighth Amendment claim based on an alleged policy that required officers to come to work after they reported contact with

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In October 2023, Defendants moved for summary judgment. As relevant here, the district court denied Warden Johnson summary judgment on Cardenas-Ornelas's outdoor-exercise claims alleging cruel and unusual punishment and equal protection violations.⁴ In so doing, the district court denied Warden Johnson's assertion of qualified immunity on those claims. Warden Johnson timely appealed.

II.

Cardenas-Ornelas contends that we lack jurisdiction over this interlocutory appeal. But because the district court rejected Warden Johnson's assertion of qualified immunity, we have jurisdiction under the collateral order doctrine. *See Johnson v. Myers*, 129 F.4th 1189, 1193 (9th Cir. 2025). Our jurisdiction, however, "does not extend to claims in which the determination of qualified immunity depends on disputed issues of material fact." *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001) (per curiam). Thus, in reviewing the district court's denial of qualified immunity, we "assum[e] that the version of the material facts asserted by the non-moving party is correct." *Id.*

COVID-19 infected people, (2) a First Amendment claim alleging interference with mail, (3) federal and state free speech claims based on the alleged extended prohibition of all phone calls, and (4) federal and state equal protection claims based on the alleged denial of all phone calls.

4. On these two claims, the district court granted summary judgment to all Defendants other than Warden Johnson based on their lack of personal participation in the alleged violations. On all other claims, the district court granted summary judgment for Defendants.

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We review de novo a district court's grant or denial of summary judgment, "including officers' entitlement to qualified immunity." *Jones v. City of North Las Vegas*, 150 F.4th 1030, 1035 (9th Cir. 2025).

III.

Warden Johnson argues that he is entitled to qualified immunity on the Eighth Amendment and Fourteenth Amendment claims. We affirm the district court's denial of qualified immunity on the Eighth Amendment claim but reverse the district court's denial of qualified immunity on the Fourteenth Amendment claim.

Qualified immunity shields government officials performing discretionary functions "from liability for civil damages" when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). A right is clearly established only when "[t]he contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). We therefore must decide "whether 'the officer's conduct violated a constitutional right' and whether 'the right was clearly established' at the time of the alleged misconduct." *Alston v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011) (quoting *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), *overruled in part on other grounds by Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172

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L.Ed.2d 565 (2009)). Our inquiry may proceed in any order. *Id.*

A.

On the Eighth Amendment claim, the district court properly denied Warden Johnson qualified immunity. To violate the Eighth Amendment, the prison official's alleged deprivation "must be, objectively, 'sufficiently serious,'" and the "prison official must have a 'sufficiently culpable state of mind.'" *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (quoting *Wilson v. Seiter*, 501 U.S. 294, 297–98, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). "Some conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise" *Wilson*, 501 U.S. at 304, 111 S.Ct. 2321 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)).

We start our inquiry by considering whether, at the time of the alleged deprivation, Cardenas-Ornelas had a clearly established right to outdoor exercise under the Eighth Amendment. By 2020, our case law had clearly established a prisoner's Eighth Amendment right to outdoor exercise or otherwise meaningful opportunities for recreation. *See Shorter v. Baca*, 895 F.3d 1176, 1185–86 (9th Cir. 2018) (collecting cases). "Our case law uniformly stresse[d] the vital importance of exercise for prisoners." *Thomas v. Ponder*, 611 F.3d 1144, 1152 (9th

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Cir. 2010). We had said that exercise is “one of the basic human necessities protected by the Eighth Amendment.” *LeMaire v. Maass*, 12 F.3d 1444, 1457 (9th Cir. 1993). And though on more severe facts, we had held specifically that prisoners were unconstitutionally denied outdoor exercise when they were confined in small cells around the clock for more than four years. *Spain v. Procunier*, 600 F.2d 189, 199–200 (9th Cir. 1979). We therefore hold that, at the time of the alleged deprivation, Cardenas-Ornelas had a clearly established right to outdoor exercise or meaningful opportunities for recreation.

The next question is whether a reasonable jury could find that Warden Johnson violated that clearly established right. We hold that Cardenas-Ornelas presented sufficient evidence which, viewed in the light most favorable to him at summary judgment, raised triable issues on both prongs of his Eighth Amendment claim against Warden Johnson. On the objective prong, evidence supported Cardenas-Ornelas’s claim that he was “confined to [his] cell for 23 to 23 1/2 hours a day” except for when he went to work in Prison Industries. And Defendants failed to introduce evidence that recreational opportunities had been afforded to Unit 9 in and after June 2020, while other units were allowed to resume yard time. On the subjective prong, Cardenas-Ornelas introduced evidence supporting his claim that Warden Johnson had a sufficiently culpable state of mind—namely, “deliberate indifference.” *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (quoting *Wilson*, 501 U.S. at 297, 111 S.Ct. 2321). “A prison official acts with ‘deliberate indifference only if the prison official knows of and disregards an excessive risk to inmate health

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and safety.” *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (alterations accepted) (quoting *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002), *overruled in part on other grounds by Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc)). Here, evidence supported the claim that Warden Johnson was subjectively aware of the alleged risk because Warden Johnson responded to Cardenas-Ornelas’s first-level grievance, which alleged that Cardenas-Ornelas was being “confined to [his] cell for 23 to 23 1/2 hours a day except for when [he] got to work.”⁵ Moreover, Warden Johnson ordered Unit 9 inmates to work even as he denied them yard time.

Addressing the objective prong, Warden Johnson asserts that “walking from Unit 9 to the Prison Industries Warehouse” and “work[ing] for eight hours a day, two days a week” constituted “otherwise meaningful recreation” for Cardenas-Ornelas because Prison Industries provided “affirmative programs of training or rehabilitation.” This argument relies mainly on *Norbert v. City & County of San Francisco*, 10 F.4th 918 (9th Cir. 2021). In *Norbert*, we affirmed the district court’s finding that “inmates were given constitutionally sufficient recreation time” when inmates were “offered at least 30 minutes of exercise time in the [indoor] gyms seven days a week,” and “general population inmates c[ould] access the day room for 4.5

5. For this reason, Warden Johnson’s argument that he was not personally involved in any constitutional violation lacks merit. “[T]his is not a case where the defendants claim that they were unaware of either the circumstances resulting in the alleged deprivation or the likelihood that the deprivation would occur.” *Allen v. Sakai*, 48 F.3d 1082, 1088 (9th Cir. 1994).

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hours on weekdays and 8 hours on weekend days.” *Id.* at 933. Here, by contrast, there is no evidence that Unit 9 inmates had *any* access to meaningful opportunities for exercise between March 18, 2020, and July 27, 2021. Viewed in the light most favorable to Cardenas-Ornelas, “sorting cards or hangers” in Prison Industries did not constitute otherwise meaningful recreation. Nor did in-cell exercise. Thus, there is a genuine factual dispute whether the alleged deprivation of exercise was, objectively, sufficiently serious.

Addressing the subjective prong, Warden Johnson argues that he cannot be found to have been deliberately indifferent because he was merely following, and was not required to reexamine, the medical judgments communicated through NDOC’s COVID-19 protocols. But there is a factual dispute regarding whether NDOC’s COVID-19 protocols required the denial of yard time for Unit 9 inmates for over a year. Moreover, Warden Johnson personally reviewed and denied Cardenas-Ornelas’s first-level grievance, which alleged that Cardenas-Ornelas was being confined in his cell “for 23 to 23 1/2 hours a day” except for when he was called to work in Prison Industries. Thus, Warden Johnson failed to show at the summary judgment stage that he is entitled to qualified immunity as an official who was unaware of the prisoner’s complaints and merely following NDOC’s COVID-19 protocols.

To be sure, even when the alleged deprivation of exercise was, objectively, sufficiently serious, a prison official may still be entitled to qualified immunity under the subjective prong in extraordinary circumstances. In

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LeMaire v. Maass, for example, we held that an inmate failed to show the prison official's culpable state of mind when the inmate had been denied opportunities for exercise based on the inmate's own misconduct, which had "raise[d] serious and legitimate security concerns within the prison." 12 F.3d at 1458. Here, however, Warden Johnson's proffered justification does not rule out deliberate indifference. He claims that he restricted yard time for Unit 9 inmates to prevent the spread of COVID-19—a rational explanation. But viewed in the light most favorable to Cardenas-Ornelas, the non-movant, Warden Johnson's justification does not rule out deliberate indifference because there is conflicting evidence which shows Warden Johnson ordered Unit 9 to work despite the risk of COVID-19. Indeed, Cardenas-Ornelas presented evidence that Warden Johnson ordered Unit 9 inmates to work even when many Unit 9 inmates were symptomatic or had tested positive for COVID-19. Thus, there is a triable issue whether Warden Johnson acted with deliberate indifference when denying Unit 9 inmates yard time.

We therefore conclude that the district court properly denied qualified immunity on Cardenas-Ornelas's Eighth Amendment claim against Warden Johnson. Our holding, however, does not foreclose the trier of fact from making factual determinations which could result in the post-trial grant of qualified immunity on this claim for Warden Johnson.

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On the Fourteenth Amendment claim alleging a violation of equal protection, we conclude that Warden Johnson is entitled to qualified immunity. Because Cardenas-Ornelas does not allege any “classification [that] implicates a suspect class or infringes on a fundamental right,” we review under the rational basis standard. *Bottinelli v. Salazar*, 929 F.3d 1196, 1201 (9th Cir. 2019). We consider whether “there is any reasonably conceivable state of facts that could provide a rational basis for the classification,” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993), including the singling out of a “class of one,” *Gerhart v. Lake County*, 637 F.3d 1013, 1023 (9th Cir. 2011). Defendants “may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Cardenas-Ornelas bears the burden “to negative every conceivable basis which might support” the classification. *Beach Commc’ns*, 508 U.S. at 315, 113 S.Ct. 2096 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973)).

On this claim, Cardenas-Ornelas did not establish a genuine dispute of material fact because he failed to introduce summary judgment evidence which ruled out every conceivable basis which might support the alleged differences in yard time afforded Unit 9 and other units, or Cardenas-Ornelas and other inmates. Namely, confirmed and suspected cases of COVID-19 infection in

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Unit 9 provided a possible justification for continuing to deny yard time for inmates in Unit 9 while reopening the yard to inmates in other units. This justification was not “so attenuated” from the goal of preventing the spread of COVID-19 at HDSP “as to render the distinction arbitrary or irrational.” *City of Cleburne*, 473 U.S. at 446, 105 S.Ct. 3249.

In denying qualified immunity on this claim, the district court erred by crediting allegations in the complaint which were unsworn and unsupported by evidence in the record. *See Soto v. Sweetman*, 882 F.3d 865, 872 (9th Cir. 2018) (holding that parties, even *pro se* inmates, cannot rely on “statements in [their] district court [briefing] as competent summary judgment evidence”). “Although we do not ordinarily have jurisdiction on an interlocutory appeal to review a denial of qualified immunity based on the existence of a disputed fact, ‘when there is an *allegation* about the conduct part of the equation, but insufficient *evidence* of that conduct to create a genuine issue of material fact, our cases permit review.’” *Foster v. City of Indio*, 908 F.3d 1204, 1217 n.10 (9th Cir. 2018) (per curiam) (alteration accepted) (quoting *Jeffers*, 267 F.3d at 907).

Cardenas-Ornelas alleged in his complaint that he heard “a number of officers” say that “Warden Johnson does not like protective segregation (‘P.S.’) inmates, and that this allows him to lock down the P.S. units.” But that statement was not “based on personal knowledge” and did not “set[] forth the requisite facts with specificity,” and thus could not “serve as an affidavit for purposes of

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summary judgment.” *Moran v. Selig*, 447 F.3d 748, 759 n.16 (9th Cir. 2006). Further, Cardenas-Ornelas failed to “identify or submit some competent evidence,” *Soto*, 882 F.3d at 872, to support his claim that Warden Johnson treated Unit 9 inmates differently based on a personal dislike of protective segregation inmates. Thus, the district court erred in concluding that Cardenas-Ornelas’s “claims regarding Warden Johnson’s dislike of protective segregation inmates and Defendants’ failure to refute these claims” created a genuine dispute of material fact which precluded summary judgment. We accordingly reverse the district court’s denial of qualified immunity to Warden Johnson on Cardenas-Ornelas’s Fourteenth Amendment claim.

CONCLUSION

We affirm the district court’s denial of qualified immunity on the Eighth Amendment claim, reverse the district court’s denial of qualified immunity on the Fourteenth Amendment claim, and we remand for further proceedings consistent with this opinion and the concurrently filed memorandum disposition.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

**APPENDIX B — MEMORANDUM OF THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT, FILED JANUARY 29, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-6755
D.C. No. 2:21-cv-00030-ART-MDC

LUIS CARDENAS-ORNELAS,

Plaintiff-Appellee,

v.

CALVIN JOHNSON; HAROLD WICKHAM;
CHARLES DANIELS; GARY PICCININI;
TIMOTHY STRUCK; ROBERT OWENS; JESSIE
BRIGHTWELL; MANUEL PORTILLO;
TIMOTHY JOHNSON,

Defendants-Appellants,

and

J. ALCOCK, JULIO CALDERIN,

Defendants.

Filed January 29, 2026

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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Appeal from the United States District Court
for the District of Nevada

Anne R. Traum, District Judge, Presiding

Argued and Submitted October 9, 2025
Las Vegas, Nevada

Before: BENNETT, SANCHEZ, and H.A. THOMAS,
Circuit Judges.

Luis Cardenas-Ornelas, a prisoner in the custody of the Nevada Department of Corrections (“NDOC”), brought this action pursuant to 42 U.S.C. § 1983, alleging that staff at High Desert State Prison (“HDSP”) denied him outdoor exercise in violation of the Eighth Amendment and treated him and his unit differently from others in violation of the Fourteenth Amendment. Cardenas-Ornelas also brought analogous claims under the Nevada Constitution. The district court denied summary judgment on certain of these claims against Warden Calvin Johnson, and Warden Johnson appealed. We analyzed the district court’s denial of qualified immunity in an accompanying opinion and now turn to Warden Johnson’s other arguments.

1. We have jurisdiction to review the district court’s denial of Warden Johnson’s claim that Nevada’s Eleventh Amendment immunity provided Warden Johnson complete immunity from suit. *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).¹ We review

1. Unlike the appellant in *Taylor v. County of Pima*, 913 F.3d 930, 934 (9th Cir. 2019), Warden Johnson asserts an immunity from suit, not an immunity from liability. *Taylor* therefore does not apply.

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de novo, as a question of law, “[a] state instrumentality’s Eleventh Amendment sovereign immunity.” *Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147, 1152 (9th Cir. 2018).

2. Warden Johnson argues that the district court improperly considered factual allegations that postdated December 30, 2020, the date on which Cardenas-Ornelas signed his complaint. This argument relies on the general rule that a plaintiff may not present new factual allegations at summary judgment in violation of the fair notice requirement imposed by Federal Rule of Civil Procedure 8(a)(2). *See Pickern v. Pier 1 Imps. (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006). And under Federal Rule of Civil Procedure 15(d), a party must seek the district court’s leave “to serve a supplemental pleading setting forth transactions, occurrences, or events that have happened since the filing of the pleading.” 6A WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE § 1504 (3d ed. 2025); *see also Thorp v. District of Columbia*, 325 F.R.D. 510, 514 (D.D.C. 2018) (denying leave to file a supplemental complaint after discovery had closed in an action brought in part under § 1983).

But in civil rights cases, “[a] document filed *pro se* is ‘to be liberally construed.’” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Thus, we liberally construe the summary judgment appendix filed by Cardenas-Ornelas as having supplemented his complaint to allege continuing violations through July 27, 2021. And we understand the district court’s summary judgment decision as having granted

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leave under Rule 15(d) to supplement the complaint in that fashion. *See Garrett v. Wexford Health*, 938 F.3d 69, 81 n.17 (9th Cir. 2019). This was proper because prior filings notified Defendants that Cardenas-Ornelas was alleging an ongoing violation of his constitutional rights. *Cf. Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008) (holding that *pro se* prisoner’s “RLUIPA claim was presented to the district court because his complaint and subsequent filings provided [the defendants] with ‘fair notice’ of that claim”). And Defendants have demonstrated no resulting prejudice. Allowing Cardenas-Ornelas to supplement the complaint was therefore “well within the district court’s discretion under [Rule] 15(d), which is designed to permit expansion of the scope of existing litigation to include events that occur after the filing of the original complaint.” *Keith v. Volpe*, 858 F.2d 467, 471 (9th Cir. 1988).

3. Warden Johnson contends that Nevada’s sovereign immunity bars Cardenas-Ornelas’s state law claims against him because the State has conditioned its waiver of sovereign immunity on being named a party defendant, and Eleventh Amendment immunity bars any action in federal court against Nevada.

We conclude that the district court lacked jurisdiction to consider Cardenas-Ornelas’s claims against Warden Johnson brought under the Nevada Constitution. “The Eleventh Amendment grants a State immunity from suit in federal court . . . by its own citizens . . .” *Walden v. Nevada*, 945 F.3d 1088, 1092 (9th Cir. 2019). “A State may waive its sovereign immunity at its pleasure, and in some circumstances Congress may abrogate it by appropriate

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legislation.” *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253–54 (2011) (citation omitted). “But absent waiver or valid abrogation, federal courts may not entertain a private person’s suit against a State.” *Id.* at 254.

Under Nevada Revised Statute § 41.0337, “[n]o tort action arising out of an act or omission within the scope of a person’s public duties or employment may be brought against any present or former” NDOC officer or employee “unless the State or appropriate political subdivision is named a party defendant under [NEV. REV. STAT. § 41.031].” NEV. REV. STAT. § 41.0337. In other words, for certain tort actions, Nevada has conditioned its waiver of sovereign immunity on being named a party defendant. *See id.* Thus, to sue NDOC officers under state law in this action, Cardenas-Ornelas was required under § 41.0337 to name Nevada as a defendant. *See id.* But he could not do so in federal court because Nevada has not waived its Eleventh Amendment immunity from suit in federal court, and Congress has not abrogated state sovereign immunity for actions brought under 42 U.S.C. § 1983. *See O’Connor v. Nevada*, 686 F.2d 749, 750 (9th Cir. 1982) (first citing NEV. REV. STAT. § 41.031(3); and then citing *Quern v. Jordan*, 440 U.S. 332, 338–41 (1979)). Accordingly, the district court lacked jurisdiction over Cardenas-Ornelas’s state law claims. *See Stewart*, 563 U.S. at 254.²

2. We decline to reach whether the relevant clauses of the Nevada Constitution provide implied private rights of action for damages under the framework outlined in *Mack v. Williams*, 522 P.3d 434 (Nev. 2022).

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We **AFFIRM** in part and **REVERSE** in part as discussed in this memorandum disposition and in our concurrently filed opinion, and remand for further proceedings consistent with our decisions.

**APPENDIX C — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT
OF NEVADA, FILED SEPTEMBER 30, 2024**

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. 2:21-cv-00030-ART-VCF

LUIS CARDENAS-ORNELAS,

Plaintiff,

v.

WICKHAM, *et al.*,

Defendants.

Filed September 30, 2024

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Pro se Plaintiff Luis Cardenas-Ornelas (“Cardenas-Ornelas”) brings this action under 42 U.S.C. § 1983 against Defendants Jessie Brightwell (“Brightwell”), Charles Daniels (“Daniels”), Calvin Johnson (“Warden Johnson”), Timothy Johnson (“Officer Johnson”), Robert Owens (“Owens”), Gary Piccinini (“Piccinini”), Manuel Portillo (“Portillo”), Timothy Struck (“Struck”), and Harold Wickham (“Wickham”) (collectively, “Defendants”)

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for alleged constitutional violations that occurred while Plaintiff was quarantined at High Desert State Prison (“HDSP”) during the Covid-19 pandemic.

Before the Court is Defendants’ motion for summary judgment (ECF No. 84), Plaintiff’s response (ECF No. 87), and Defendants’ reply (ECF No. 93). For the reasons stated below, the Court grants in part and denies in part Defendants’ motion for summary judgment.

I. BACKGROUND

Cardenas-Ornelas is an inmate in custody of the Nevada Department of Corrections (“NDOC”). (ECF No. No. 1-1.) The events giving rise to this action took place in 2020 while Cardenas-Ornelas was housed at High Desert State Prison (“HDSP”). (*Id.*)

In January 2021, Cardenas-Ornelas filed the complaint in this case, asserting six counts under 42 U.S.C. § 1983 and seeking injunctive relief, declaratory relief, and monetary damages. (ECF No. 1-1.) After screening the complaint, the Court allowed Cardenas-Ornelas to proceed with two claims under Count Two; one claim under Count Four; one claim under Count Five; and two claims under Count Six. (ECF No. 12.)

Under Count Two, the Court allowed Plaintiff to proceed with a claim that Defendants Portillo, Owens, Warden Johnson, Struck, and Piccinini violated Plaintiff’s Eighth Amendment and the Nevada constitution’s prohibition against cruel and unusual punishment by

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denying Plaintiff yard time and outdoor exercise (2A); and a claim that Defendants Portillo, Owens, Warden Johnson, Struck, and Piccinini violated the federal and state constitutional right to equal protection by providing yard time to inmates other than Plaintiff (2B). Under Count Four, the Court allowed Plaintiff to proceed with his claim that that Defendants Daniels, Warden Johnson, Piccinini, and Struck violated the Eighth Amendment by requiring officers to come to work after they had reported coming into contact with people who had Covid-19. Under Count Five, the Court allowed Plaintiff to proceed with his claim that Defendant Officer Johnson violated the First Amendment by interfering with mail. Under Count Six, the Court allowed Plaintiff to proceed with (6A) a claim that Daniels, Wickham, Warden Johnson, Piccinini, Struck, Portillo, Brightwell and Owens violated the First Amendment and Nevada constitution by denying all phone calls; and (6B) a claim that Defendant Warden Johnson violated Plaintiff's equal protection rights by denying him phone calls but allowing other inmates to make phone calls.

In October 2023, Defendants filed a motion for summary judgment, seeking to dismiss Plaintiff's claims as meritless; barred because of failure to exhaust administrative remedies; and barred by qualified immunity. (ECF No. 84.) Plaintiff filed a response in opposition to the motion for summary judgment. (ECF No. 87.) Defendants filed a reply. (ECF No. 93.)

*Appendix C***II. LEGAL STANDARD****A. SUMMARY JUDGMENT**

A party is entitled to summary judgment when “the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is “genuine” if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is “material” if it could affect the outcome of the case. *Id.* at 248. Where reasonable minds could differ on the material facts at issue, summary judgment is not appropriate. *Anderson*, 477 U.S. at 250.

In considering a motion for summary judgment, all reasonable inferences are drawn in the light most favorable to the non-moving party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach & Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). However, if the evidence of the nonmoving party “is not significantly probative, summary judgment may be granted.” *Anderson*, 477 U.S. at 249-250 (citations omitted). The court’s function is not to weigh the evidence and determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255; *Anderson*, 477 U.S. at 249.

In deciding a motion for summary judgment, the court applies a burden-shifting analysis. “When the party

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moving for summary judgment would bear the burden of proof at trial, ‘it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.’ . . . In such a case, the moving party has the initial burden of establishing the absence of a genuine [dispute] of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations omitted). When the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party cannot establish an element essential to that party’s case on which that party will have the burden of proof at trial. *See Celotex*, 477 U.S. at 323-25.

If the moving party satisfies its initial burden, the burden shifts to the nonmoving party to establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine dispute of material fact conclusively in its favor. It is sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987) (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475 U.S. at 587. Instead, they must go beyond the assertions and allegations of the pleadings and

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set forth specific facts by producing competent evidence that shows a genuine dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

III. COUNT 2A: DENIAL OF YARD TIME**A. FACTS**

On March 18, 2020, Cardenas-Ornelas's Unit—Unit 9—was placed on quarantine because a canteen staff member tested positive for Covid-19, and inmate canteen workers assigned to Unit 9 had been in close contact with them. (ECF Nos. 84 at 5, 84-1 at 75, 229.) Cardenas-Ornelas claims that this decision was made by Defendants Portillo, Owens, Warden Johnson, Struck, and Piccinini. (ECF Nos. 1-1 at 12, 12 at 11.) This quarantine lasted until April 27, 2020, when Unit 9 inmates were permitted to work but denied yard time. (ECF Nos. 1-1 at 12, 84-1 at 75, 87 at 3.) On May 19, 2020, Unit 9 was placed on lockdown again after one inmate tested positive for Covid-19. (ECF Nos. 84 at 5, 84-1 at 229.) On May 26, 2020, four inmates tested positive for Covid-19, and all HDSP inmates were isolated for a minimum of twenty days. (ECF No. 84-1 at 229-30.)

During this time, Cardenas-Ornelas claims that he was denied all yard time but required to go to work, where there were at least 130 inmates working together in a warehouse and where social distancing was impossible. (ECF No. 1-1 at 12.) Cardenas-Ornelas was paid for work at the Prison Industries card room and hanger room at HDSP for most weeks from June 1, 2020 to July 30,

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2021. (ECF No. 87-1 at 43-46.) Cardenas-Ornelas claims that during this time he had multiple conversations with defendants Portillo and Struck regarding the issue of being sent to work while being denied yard time. (ECF No. 1-1 at 12.) Defendants said that the entire lockdown and ban on yard time was due to Covid-19 but did not explain why inmates were denied outdoor exercise while being allowed to work indoors. (*Id.*) Portillo and Struck do not deny or admit having these conversations. (*See* ECF No. 84-1 at 235-36, 255-56.) By June 23, 2020, inmates in other units were permitted to resume yard time, but Unit 9 remained in quarantine. (ECF No. 84-1 at 230.)

On June 12, 2020, Cardenas-Ornelas filed an informal grievance complaining about having been “confined to [his] cell for 23 to 23 ½ hours a day except for . . . work which is for 8 to 9 hours in a crowded warehouse with about 130 other [i]nmates.” (ECF No. 84-1 at 74.) On July 27, Struck denied that grievance, citing health and safety reasons. (*Id.*) On August 12, Cardenas-Ornelas filed a first level grievance, reiterating his original complaints. (*Id.*) On August 20, Warden Johnson denied that grievance, stating that “NDOC has not placed any institution on lock-down but has quarantined in an effort to adhere to important Center for Disease Control and prevention guidelines.” (*Id.* at 75) In his response, Warden Johnson explained that [a]fter receiving medical clearance, Unit 9 inmate workers received authorization to return to work as early as April 27, 2020.” (*Id.*) Warden Johnson did not explain why the return to work was not accompanied by a return to yard time. (*See id.*; ECF No. 1-1 at 14.) Cardenas-Ornelas filed a second level grievance, which Wickham denied, finding

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that his grievance had been “answered correctly at the informal and first levels.” (ECF No. 84-1 at 76.)

Cardenas-Ornelas claims that between March 18, 2020 and July 27, 2021, he has been denied all outdoor exercise except for about 20 hours. (ECF No. 87 at 3.) Cardenas-Ornelas claims that during this time, Defendants permitted every other unit within NDOC to continue receiving yard time. (ECF No. 1-1 at 15.) Defendants challenge these claims but do not offer evidence regarding Unit 9’s access to yard time after June 2020. (*See* ECF No. 84 at 17, 6.)

B. EIGHTH AMENDMENT

“It is undisputed that the treatment a prisoner receives in prison and the conditions under which [the prisoner] is confined are subject to scrutiny under the Eighth Amendment.” *Helling v. McKinney*, 509 U.S. 25, 31 (1993); *see also Farmer v. Brennan*, 511 U.S. 825, 832 (1994). To successfully challenge the conditions of confinement under the Eighth Amendment, a plaintiff must meet both an objective and subjective test. *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000).

The Ninth Circuit has “recognized that exercise is one of the basic human necessities protected by the Eighth Amendment.” *Norbert v. City & County of San Francisco*, 10 F.4th 918, 928–29 (9th Cir. 2021) (citation and internal quotation marks omitted). “Deprivation of outdoor exercise violates the Eighth Amendment rights of inmates confined to continuous and long-term

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segregation.” *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) (citing *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979)), *amended by* 135 F.3d 1318 (9th Cir. 1998); *see also* *Thomas v. Ponder*, 611 F.3d 1144, 1151–52 (9th Cir. 2010); *Richardson v. Runnels*, 594 F.3d 666, 672 (9th Cir. 2010); *Hearns v. Terhune*, 413 F.3d 1036, 1042 (9th Cir. 2005); *Lopez v. Smith*, 203 F.3d 1122, 1133 (9th Cir. 2000) (en banc); *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th Cir. 1995); *Allen v. City of Honolulu*, 39 F.3d 936, 938–39 (9th Cir. 1994); *LeMaire v. Maass*, 12 F.3d 1444, 1457–58 (9th Cir. 1993); *Toussaint v. Yockey*, 722 F.2d 1490, 1492–93 (9th Cir. 1984).

The prolonged deprivation of outdoor exercise to inmates confined to continuous and long-term segregation meets the objective prong of the Eighth Amendment. *Keenan*, 83 F.3d at 1089; *LeMaire*, 12 F.3d at 1458 (“the long-term deprivation of *outside* exercise for inmates is unconstitutional”). By contrast, “a temporary denial of outdoor exercise with no medical effects is not a substantial deprivation.” *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) (the denial of exercise for 21 days was not a violation of the Eighth Amendment). In *Spain v. Procunier*, the Ninth Circuit held that confinement of prisoners who were assigned to the “adjustment center” “for a period of [four] years without opportunity to go outside except for occasional court appearances, attorney interviews, and hospital appointments” was cruel and unusual punishment. *Spain*, 600 F.2d at 192, 200. In *Toussaint v. Yockey*, the Ninth Circuit upheld a preliminary injunction requiring the state to provide “outdoor exercise” where prisoners, who had been held in administrative segregation for over a year, were “confined to their cells for as much as 23 ½

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hours a day.” *Toussaint*, 722 F.2d at 1492-3. Prison officials may restrict outdoor exercise on the basis of weather, unusual circumstances, or disciplinary needs. See *Spain*, 600 F.2d at 199. However, “[t]he cost or inconvenience of providing adequate [exercise] facilities is not a defense to the imposition of a cruel punishment.” *Id.* at 200.

As to the subjective prong of the Eighth Amendment analysis, prisoners must establish prison officials’ “deliberate indifference” to unconstitutional conditions of confinement to establish an Eighth Amendment violation. See *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 303. To demonstrate that a prison official was deliberately indifferent to a serious threat to an inmate’s health and safety, the prisoner must show that the “the official [knew] of and disregard[ed] an excessive risk to inmate . . . safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [the official] must also draw the inference. *Farmer*, 511 U.S. at 846.

C. STATE CONSTITUTIONAL CLAIMS

The Court allowed Cardenas-Ornelas to proceed with associated claims under the Nevada Constitution because courts apply the same legal standards to the cruel and unusual punishment provision in Article 1, Section 6 of the Nevada Constitution as they do to the Eighth Amendment. (ECF No. 12 at 15.)

Defendants argue that this Court lacks jurisdiction to consider Cardenas-Ornelas’s state law claims because

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they are barred by sovereign immunity under the Eleventh Amendment. (ECF No. 84 at 8.) Defendants explain that Nevada has conditioned its waiver of sovereign immunity on meeting the requirements of NRS 41.031-41.0337, which require that the plaintiff “name the state as a party to any state tort claims” against state employees and entities. (*Id.*); *Craig v. Donnelly*, 135 Nev. 37, 38 (Nev. App. 2019). Plaintiff’s damages claim arising out of the Nevada Constitution, however, may proceed against state employees in their personal capacities. *Mack v. Williams*, 522 P.3d 434, 448 (2022) (rejecting defendants’ assertion that state tort law provides meaningful redress for invasions of the constitutional rights at issue).

In *Mack*, the Nevada Supreme Court held that a plaintiff may bring a private action against state actors for damages under Article 1, Section 18 of the Nevada Constitution (which is substantively identical to the Fourth Amendment of the U.S. Constitution). *Mack*, 522 P.3d at 442, 451. In reaching that conclusion, the court “recognize[d] that it is not necessary for the Nevada Constitution to expressly confer such a remedy, nor for the Nevada Legislature to expressly authorize one, because the search-and-seizure rights are self-executing limitations on, and thus inherently enforceable against, arbitrary abuse of government power.” *Id.* at 451. The court did not address whether a private right of action exists under other provisions of the Nevada Constitution. *See id.* at 441. However, the court adopted a “framework for answering whether a self-executing provision of the Nevada Constitution is enforceable through a damages remedy” based on California’s framework for the same

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inquiry, as set out in *Katzberg v. Regents of Univ. of Cal.*, 58 P.3d 339 (2002). *Id.* at 444-45, 451. This framework involves asking first “whether the language and history of the at-issue constitutional provision establishes an affirmative indication of intent to provide or withhold the requested remedy.” *Id.* at 451. If it does not, the court then considers “whether the several factors set forth in § 874A of the Restatement (Second) of Torts favor the requested remedy.” *Id.* If consideration of those factors favors a damages action, the court finally considers “whether any special factors counsel hesitation against recognition.” *Id.* at 452.

Nevada courts do not appear to have undertaken an analysis of Article 1, Section 6 of the Nevada Constitution under this framework yet. In the absence of a controlling state Supreme Court decision, a federal court applying state law must apply the law as it believes the state Supreme Court would apply it. *Gravquick A/S v. Trimble Navigation Int’l Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003) (citing *Astaire v. Best Film & Video Crop*, 116 F.3d 1297, 1300 (9th Cir.), *amended by* 136 F.3d 1208 (9th Cir. 1997)). “In other words, a federal district court . . . must predict how the Nevada Supreme Court would decide unresolved issues of state law, using statutes and decisions from other jurisdictions as interpretive aids.” *Mirch v. Frank*, 295 F. Supp. 2d 1180, 1183 (D. Nev. 2003).

Under the first step of *Katzberg*, the Court finds no language or history that establishing an affirmative indication of intent to provide or withhold a damages action. Article 1, Section 6 of the Nevada Constitution

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provides in its entirety: “Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained.” Nev. Const. art. I, § 6. Like Section 18, this language discloses no intent with regard to a right of action damages. *Mack*, 522 P.3d at 447. And like Section 18, this provision was ratified in 1864 and has not been amended since.

Under the second step, the Court considers several factors to determine whether a damages remedy is “in furtherance of the purpose of the provision” and “needed to assure the effectiveness of the provision.” *Mack*, 522 P.3d at 447–48. To answer this question, the Court considers “(1) the nature of the legislative provision, (2) the adequacy of existing remedies, (3) the extent to which a [constitutional] tort action supplements or interferes with existing remedies and enforcement, (4) the significance of the purpose of the provision, (5) the extent of the change in tort law and (6) the burden on the judiciary.” *Id.* at 448 (cleaned up).

These factors favor recognizing an implied right of action for damages. Section 6 is, like Section 18, a significant Constitutional right. Existing alternative remedies like state tort law serve “different interests” than constitutional guarantees. *Id.* at 448 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394–95 (1971)). Tort law establishes generally duties between members of the community, while constitutional remedies provide higher standards, because agents of the state must “not only . . . respect

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the rights of other citizens” but also “*protect and defend* those rights.” *Id.* (citation omitted). Rights of action for Section 6 do not interfere with existing remedies and enforcement, and they allow for development of the Nevada Constitution’s jurisprudence regarding prisoners’ rights. Finally, recognizing a damages action will not place an additional burden on the judiciary because federal courts apply the same legal standards to the cruel and unusual punishment provision in Article 1, Section 6 of the Nevada Constitution as they do to the cruel and unusual provision of the Eighth Amendment to the U.S. Constitution and routinely allow such claims to proceed. *Vickers v. Godecki*, No. 2:20-CV-01401-GMN-NJK, 2023 WL 2435110, at *2 (D. Nev. Mar. 8, 2023); *Meeks v. Nevada Dep’t of Corr.*, No. 3:18-CV-00431-MMD-WGC, 2020 WL 8084979, at *19 (D. Nev. Nov. 10, 2020) (collecting cases), *report and recommendation adopted sub nom. Meeks v. Bacca*, No. 3:18-CV-00431-MMD-WGC, 2021 WL 53619 (D. Nev. Jan. 6, 2021).

Finally, the Court sees no special factors that would militate against finding an implied right of action for damages under Section 6 where one already exists for Section 18. *See Mack*, 522 P.3d at 449-450.

Mack does not address claims for injunctive and declaratory relief and the Court declines to reach that issue. *Id.* at 441. Thus, Cardenas-Ornelas’s claims for damages against individual officers in this case may proceed.

*Appendix C***D. ANALYSIS**

In their motion for summary judgment, Defendants argue that Cardenas-Ornelas's claim should fail as a matter of law because he cannot establish either the objective or subjective prong of the Eighth Amendment test. (ECF No. 84 at 18.)

First, Defendants argue that Cardenas-Ornelas "has not and cannot establish that a lack of outdoor exercise caused an objectively serious risk of harm." (ECF No. 84 at 16.) However, Ninth circuit caselaw clearly establishes that denial of outdoor exercise for a prolonged period of time meets the objective prong of the Eighth Amendment analysis. *Keenan*, 83 F.3d at 1089; *LeMaire*, 12 F.3d at 1458.

Defendants rely on *Norbert v. City and County of San Francisco* to argue that, because Cardenas-Ornelas "was able to exercise in his cell," he cannot establish objective harm. (ECF No. 84 at 16.) In *Norbert*, the Ninth Circuit explained that "the constitutionality of conditions for inmate exercise must be evaluated based on the full extent of the available recreational opportunities." *Norbert*, 10 F.4th at 930. In that case, administrative segregation inmates received "at least one hour of recreation time seven days a week" between "the day room and gym," and general population inmates were allowed "at least 4.5 hours of total recreation time each day during the week, and at least 8 hours on weekends." *Id.* at 934. However, the facts of this case are more analogous to those in *Toussaint*, where inmates were confined to their cells for 23 hours

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a day for over one year. *Toussaint*, 722 F.2d at 1492-93. Defendants do not point to any recreation opportunities that Cardenas-Ornelas was given outside his cell, and do not challenge Cardenas-Ornelas's claim that he was "confined to [his] cell for 23 to 23 ½ hours a day" except when he went to work. (ECF Nos. 84-1 at 74, 1-1 at 13.)

Defendants also fail to provide evidence to counter Cardenas-Ornelas's claim that "except for about 2 hours from when the lockdown began on March 18th, 2020 up to when the defendants began giving Plaintiff 3 hours of yard a week on July 27th, 2021," Plaintiff was "denied all outdoor exercise." (ECF No. 87 at 3.) Defendants argue that it is "absolutely not the case" that Cardenas-Ornelas remained on lockdown for the seven months between May 20, 2020, until December 30, 2020,¹ but have not provided the Court with evidence of what occurred after June 2020. (See ECF Nos. 84 at 2-6, 84-1 at 230.) The facts, viewed in the light most favorable to Plaintiff, show that Cardenas-

1. Defendants ask the Court to consider only the time period from March 2020 to December 2020, when Cardenas-Ornelas filed his initial complaint in this case, citing to a private antitrust case that precluded damages arising from acts committed after the filing of the amended complaint. (ECF No. 93 at 13) n.2 (citing *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 749 (9th Cir. 2006) (quotations omitted) (emphasis added).) Defendants fail to cite any authority that this rule applies in a § 1983 context and the Ninth Circuit has long recognized that a civil rights plaintiff "who establishes liability for deprivations of constitutional rights actionable under 42 U.S.C. § 1983 is entitled to recover compensatory damages for *all injuries suffered as a consequence of those deprivations.*" See *Borunda v. Richmond*, 885 F.2d 1384, 1389 (9th Cir. 1988) (emphasis added).

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Ornelas was denied all outdoor exercise for over a year, which meets the objective test of the Eighth Amendment analysis.

Defendants next argue that Cardenas-Ornelas's claim should fail because he "cannot show that Defendants knew that the lack of outdoor exercise caused a serious risk of harm." (ECF No. 84 at 16.) Defendants argue that the Covid-19 pandemic was a "life and death emergency" and that the lockdown was "reasonably imposed at HDSP to protect inmates from Covid-19." (*Id.* at 17.) The Ninth Circuit has held that in cases of genuine emergency, the temporary deprivation of outdoor exercise may not violate the Eighth Amendment. *Hayward v. Procunier*, 629 F.2d 599, 603 (9th Cir. 1980). In that case, the temporary lockdown was imposed after two men were killed in separate acts of gang violence—in a year where twelve people had been killed—and "yard exercise was permitted within a month after the lockdown began, and the normal exercise routine was restored [within six months.]" *Id.* Here, Defendants have offered no evidence explaining when and how yard exercise was restored for inmates, including Cardenas-Ornelas, in Unit 9.

Defendants rely on *Norwood v. Vance*, a case which involved a prisoner who was denied outdoor exercise "during four separate extended lockdowns over the course of two years." *Norwood v. Vance*, 591 F.3d 1062, 1065 (9th Cir. 2010). Each lockdown—which lasted between two and four and a half months—was initiated after "serious inmate assaults on staff," and the prisoners were confined to their cells, with all normal programs suspended, "while

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officers investigated the violence.” *Id.* Because the record in that case “[made] clear that a great deal of violence took place during outdoor exercise,” the court found that “officials’ judgment that there was a greater risk of harm from allowing outdoor exercise was certainly reasonable.” *Id.* at 1070.

Here, unlike in *Norwood*, Defendants have failed to provide evidence to support a reasonable conclusion that there was a greater risk of harm from allowing outdoor exercise than indoor activities such as work. In their motion for summary judgment, Defendants almost entirely fail to respond to Cardenas-Ornelas’s claims that, for much of the time that he was quarantined, Cardenas-Ornelas was required to go to work, where there were at least 130 inmates working together in a warehouse, and where social distancing was impossible. (ECF No. 1-1 at 12.) In their reply to Plaintiff’s opposition, Defendants address this argument with an additional declaration by Jeremy Bean, HDSP Warden. (ECF No. 93-1 at 2-4.) Defendants claim that “prison officials balanced the risks of the COVID-19 pandemic against the privileges that had previously been provided to inmates and determined that while yard time would not comport with COVID-19 protocols, inmates could still be afforded the opportunity to work in Prison Industries and earn wages and good time credits.” (ECF No. 93 at 14.) Defendants argue that “[t]he level of supervision and affirmative measures to protect inmates from COVID-19 were simply not available in the yard, while Prison Industries had alternative funding to ensure adequate supervision, and a space where COVID-19 protocols could be enforced and where

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remedial measures, such as a fogger device used to kill COVID-19, could be implemented.” (*Id.*)

Defendants’ arguments regarding the cost of providing yard time fail to provide adequate justification because the Ninth Circuit has explained that “[t]he cost or inconvenience of providing adequate [exercise] facilities is not a defense to the imposition of a cruel punishment.” *Spain*, 600 F.2d at 200. While these arguments provide some justification for the disparity between yard time and work, they do not establish the absence of a genuine dispute of material fact. A rational finder of fact could find that that this after-the-fact justification for the disparity between access to the yard and access to work was pretextual.

Because under these facts, viewed in the light most favorable to Cardenas-Ornelas, a rational finder of fact could find that Defendants were deliberately indifferent by intentionally and unnecessarily denying Cardenas-Ornelas outdoor exercise, summary judgment is inappropriate as to Plaintiff’s Eighth Amendment and state constitutional claims on the basis of denial of yard time.

E. PERSONAL PARTICIPATION

Defendants also argue that Cardenas-Ornelas cannot establish that Defendants personally participated in any constitutional violation because each Defendant was “merely following the policies and procedures set forth by the NDOC Medical Director.” (ECF No. 84 at 22.)

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A defendant is liable under § 1983 “only upon a showing of personal participation by the defendant.” *Farmer*, 511 U.S. at 844. “A supervisor is only liable for the constitutional violations of . . . subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (citations omitted). “The requisite causal connection can be established . . . by setting in motion a series of acts by others or by knowingly refus[ing] to terminate a series of acts by others, which [the supervisor] knew or reasonably should have known would cause others to inflict a constitutional injury.” *Rodriguez*, 891 F.3d at 798 (quoting *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011)). A showing that a supervisor acted, or failed to act, in a manner that was deliberately indifferent to an inmate’s Eighth Amendment rights is sufficient to demonstrate the involvement—and the liability—of that supervisor. *Starr*, 652 F.3d at 1206–07.

The Ninth Circuit has held that a defendant can personally participate in a violation by denying a grievance. *Colwell v. Bannister*, 763 F.3d 1060, 1070 (9th Cir. 2014); see *Jackson v. Nevada*, No. 216CV00995APGNJK, 2019 WL 6499106, at *7 (D. Nev. Dec. 3, 2019), *aff’d*, No. 20-15007, 2022 WL 16756349 (9th Cir. Nov. 8, 2022). In *Snow v. McDaniel*, the Ninth Circuit denied summary judgment to a prison warden and associate warden because they were aware, through the grievance process and other documentation, that the prisoner needed surgery and they “failed to act to prevent future harm.” *Snow v. McDaniel*, 681 F.3d 978, 989 (9th Cir. 2012), *overruled*

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on other grounds in Peralta v. Dillard, 744 F.3d 1076, 1083-84 (9th Cir. 2014).

Defendants point to *Peralta v. Dillard*, a case which involved a claim of deliberate indifference to serious medical needs against a prison’s chief dental officer, chief medical officer, and staff dentist. *Peralta v. Dillard*, 744 F.3d 1076, 1081 (9th Cir. 2014). The Ninth Circuit found that neither the chief dental officer nor the chief medical officer was deliberately indifferent because both were administrators who signed appeals and did not personally participate in the prisoner’s treatment. *Id.* at 1086-87. Here, Defendants argue that they “are not doctors and therefore were not required to second guess the Medical Director’s judgment on how best to respond to the Covid-19 pandemic.” (ECF No. 84 at 22.)

However, the administrators in *Peralta* were not officers or wardens interacting with the prisoners—as is the case here—but supervisors who were not aware of the prisoner’s complaints, who had not directly interacted with the prisoner, and whose only involvement was the signing of second-level appeals. *Peralta*, 744 F.3d at 1086-87. The “medical judgments” discussed in *Peralta* were made not by a high-level medical officer, but by a staff dentist who treated the prisoner. *Id.* at 1086. Furthermore, *Peralta* did not involve a motion for summary judgment, but a motion for judgment as a matter of law after a jury trial. *Id.* at 1085. The court explained that, because the jury had found that the staff dentist was not liable, “the jury essentially resolved the question of [the chief dental officer and the chief medical officer’s] liability as well.” *Id.* at 1088.

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If Cardenas-Ornelas were bringing this lawsuit against NDOC's chief medical officer, and had already had a jury trial, *Peralta* might be applicable, but on the facts and procedural posture here, it is not. Finally, *Peralta* does not change the holding in *Snow* that, while a supervisor cannot be held vicariously liable, a supervisor can be liable as a participant based on knowledge and failure to act. *Snow*, 681 F.3d at 989.

i. Warden Johnson

Defendant Warden Johnson was warden of HDSP in 2020. (ECF No. 84-1 at 227.) In this role, he was “responsible for overseeing all aspects of HDSP, including overseeing NDOC policies, practices and procedures implemented at HDSP” and “overseeing the implementation of all medical protocols issued by the NDOC Medical Director[.]” (*Id.*) Cardenas-Ornelas claims that Warden Johnson was among the individuals who decided to quarantine Unit 9 in March 2020. (ECF Nos. 1-1 at 12, 12 at 11.) However, this occurred before Warden Johnson started his employment as warden as HDSP. (ECF No. 84-1 at 227, 229.) Warden Johnson states that lockdown decisions were made “for the protection [of] inmates and staff alike,” but does not address the discrepancy between denial of yard time and authorization to work. (*Id.* at 229.) Warden Johnson's declaration does not include any statements regarding quarantines imposed after June 2020. (*See id.* at 227-230.) On August 20, 2020, Warden Johnson denied Cardenas-Ornelas's first level grievance regarding denial of yard time. (ECF No. 84-1 at 75, 229.) In that response, Warden Johnson admits that “Unit 9 inmate workers received

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authorization to return to work as early as April 27, 2020.” (ECF No. 84-1 at 75.)

Warden Johnson personally reviewed and denied Cardenas-Ornelas’s first level grievance, and the evidence suggests that Warden Johnson had authority to resolve the underlying issue. While Warden Johnson may not have been responsible for the first quarantine decision in March 2020, he had authority in overseeing and implementing the Covid-19 regulations. (ECF No. 84-1 at 227.) Therefore, Warden Johnson is an appropriate defendant and summary judgment in his favor on this count is denied.

ii. Struck

In 2020, Defendant Struck was a correctional sergeant assigned to the visiting department at HDSP. (ECF No. 84-1 at 260.) In this role, his responsibilities included “supervision of staff under [his] command, supervision, custody, security, discipline, safety offenders, the security of safety and staff, and the security and safety of the institution to which [he is] assigned.” (*Id.*) Cardenas-Ornelas claims that Struck was among the individuals who decided to quarantine Unit 9 in March 2020. (ECF Nos. 1-1 at 12, 12 at 11.) Struck states that the Covid-19 protocols were communicated to him through the chain of command and that as correctional sergeant, he was required to and followed the protocols as directed. (ECF No. 84-1 at 235.) In July 2020, Struck responded to Cardenas-Ornelas’s informal grievance regarding denial of yard time on health and safety grounds. (ECF No. 74 at 262.) Struck claims that in 2020, he “never denied Cardenas-Ornelas’s access

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to scheduled yard time, except when required by the established Covid-19 protocols[.]” (ECF No. 84-1 at 236.)

Because Cardenas-Ornelas has not provided sufficient evidence showing that Struck had authority over implementing the Covid-19 protocols, Struck is entitled to summary judgment on this count.

iii. Portillo

In 2020, Defendant Portillo was a correctional lieutenant at HDSP, whose responsibilities included “supervision of staff under [his] command, supervision, custody, security, discipline, safety offenders, the security and safety of staff, and the security and safety of the institution to which [he is] assigned.” (ECF No. 84-1 at 255.) Cardenas-Ornelas claims that Portillo was responsible for deciding to quarantine Unit 9 on March 18, 2020 and that Cardenas-Ornelas had multiple conversations with Portillo regarding the issue of denial of yard time. (ECF Nos. 1-1 at 12, 12 at 11.) Portillo’s declaration does not admit or deny these conversations. (*See* ECF No. 84-1 at 255-56.) In his declaration, Portillo explains that “[b]eginning in March 2020, the NDOC Medical Director established specific protocols for addressing COVID-19, which were implemented by the NDOC Director, Chief of Nursing, and the warden at HDSP.” (ECF No. 84-1 at 255.) These protocols were “communicated to Portillo through the chain of command, town hall meetings, memos, and emails” and, as correctional lieutenant, Portillo was required to and followed these protocols as directed. (*Id.*) Portillo states that in 2020, he “never denied Cardenas-

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Ornelas's access to scheduled yard time, except when required by the established Covid-19 protocols." (ECF No. 84-1 at 255.)

Because Cardenas-Ornelas has not provided evidence showing that Portillo had authority over implementing the Covid-19 protocols or responded to any of the relevant grievances, Portillo is entitled to summary judgment on this count.

iv. Owens

In 2020, Defendant Owens was a lieutenant at HDSP, whose responsibilities included "supervision of staff under [his] command, supervision, custody, security, discipline, safety offenders, the security and safety of staff, and the security and safety of the institution[.]" (ECF No. 84-1 at 261.) Cardenas-Ornelas claims that he had multiple conversations with Owens regarding the issue of denial of yard time. (ECF Nos. 1-1 at 12, 12 at 11.) Owens does not admit or deny these conversations. (*See* ECF No. 84-1 at 261-62.) In his declaration, Owens states that the Covid-19 protocols were communicated to him through the chain of command and that as lieutenant, he was required to and followed those protocols as directed. (*Id.*) Owens claims that the only interaction he had with Cardenas-Ornelas was "responding to a grievance concerning his legal mail." (*Id.*) Owens also states that as lieutenant, he had "no control or input over phone access or tier, yard, chapel, and law library schedules at HDSP." (*Id.*)

Because Cardenas-Ornelas has not provided evidence showing that Owens had any decision-making authority

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regarding Cardenas-Ornelas's yard time and was involved in relevant grievance responses, Owens is entitled to summary judgment on this count.

v. Piccinini

From May 2020, Defendant Piccinini was an associate warden at HDSP. (ECF No. 84-1 at 258.) In this role, his responsibilities included "supervision of staff and programs at HDSP, supervision, custody, security, discipline, safety offenders, the security and safety of staff, and the security and safety of HDSP." (*Id.*) Cardenas-Ornelas claims that Piccinini was among the individuals who decided to quarantine Unit 9 in March 2020. (ECF Nos. 1-1 at 12, 12 at 11.)

Like other defendants, Piccinini states that the Covid-19 protocols were communicated to him through the chain of command and that as associate warden, he was required to and followed the protocols as directed. (*Id.*) Piccinini also states that as associate warden, he had "no responsibility over phone access or tier, yard, chapel, and law library schedules at HDSP, and therefore did not deny Cardenas-Ornelas access to . . . the yard." (*Id.*) Piccinini also states that the only interaction he had with Plaintiff was "responding to certain grievances which are not at issue in this lawsuit." (*Id.*) Although Cardenas-Ornelas claims that Piccinini denied several grievances, it does not appear that he had a role in the grievances submitted to this Court. (*See* ECF No. 84-1 at 64-79.) In his response to Defendants' motion for summary judgment, Cardenas-Ornelas does not provide further evidence regarding Piccinini's role in the relevant events. (*See* ECF No. 87.)

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Because Cardenas-Ornelas has not provided any evidence that Piccinini had decision-making authority regarding Cardenas-Ornelas's yard time and was not involved in the grievance responses, Piccinini is entitled to summary judgment on this count.

F. QUALIFIED IMMUNITY

Finally, Defendants argue that all Cardenas-Ornelas's claims are barred by qualified immunity. (ECF No. 84 at 23.) Defendants argue that Cardenas-Ornelas "cannot meet his burden of showing that Defendants violated any right, much less a right that was clearly established," but do not offer any arguments as to why they are entitled to qualified immunity on this count. (*Id.*)

As explained above, there are genuine disputes of material fact as to whether Warden Johnson violated Cardenas-Ornelas's Eighth Amendment rights by denying him outdoor exercise for a prolonged period. And Ninth Circuit case law as of 2020 clearly established that complete deprivation of outdoor exercise for prolonged periods of time constituted an objectively serious deprivation under the Eighth Amendment. *See Spain*, 600 F.2d 189 at 199; *LeMaire*, 12 F.3d at 1457; *Allen*, 40 F.3d 1001. Therefore, Warden Johnson is not entitled to qualified immunity on this count.

*Appendix C***IV. COUNT 2B: DENIAL OF YARD TIME****A. EXHAUSTION**

Defendants argue that Cardenas-Ornelas's equal protection claim is barred because he failed to exhaust his administrative remedies. (ECF Nos. 84 at 9, 93 at 6.) NDOC Administrative Regulation (AR) 740 requires inmates to complete a three-step grievance procedure, which includes an informal grievance, a first-level grievance, and a second-level grievance. AR 740.08-10.

Under the Prison Litigation Reform Act ("PLRA"), "[n]o action shall be brought with respect to prison conditions under . . . [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA requires "proper exhaustion" of an inmate's claims. *Woodford v. Ngo*, 548 U.S. 81, 90 (2006). This means that "a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court." *Woodford*, 548 U.S. at 88.

The only limit to § 1997e(a)'s mandate is the one in its text: An inmate need exhaust only such administrative remedies as are "available." *Ross v. Blake*, 578 U.S. 632, 648 (2016). The PLRA does not require exhaustion when circumstances render administrative remedies "effectively unavailable." See *Eaton v. Blewett*, 50 F.4th

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1240, 1245 (9th Cir. 2022); *McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir. 2015) (as amended) (“[F]ailure to exhaust a remedy that is effectively unavailable does not bar a claim from being heard in federal court.”) “[W]here inmates take reasonably appropriate steps to exhaust but are precluded from doing so by a prison’s erroneous failure to process the grievance, [the court has] deemed the exhaustion requirement satisfied.” *Fordley v. Lizarraga*, 18 F.4th 344, 352 (9th Cir. 2021).

The failure to exhaust administrative remedies is “an affirmative defense the defendant must plead and prove.” *Jones v. Bock*, 549 U.S. 199, 204, 216 (2007). The defendant bears the burden of proving that an available administrative remedy was not exhausted. *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014). If the defendant makes that showing, the burden shifts to the inmate to “show there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him by ‘showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.’” *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (quoting *Albino*, 747 F.3d at 1172).

A motion for summary judgment is typically the appropriate vehicle to determine whether an inmate has properly exhausted their administrative remedies. *Albino*, 747 F.3d at 1169. “If undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56.” *Id.* at 1166. But “[i]f material facts are

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disputed, summary judgment should be denied, and the district judge rather than a jury should determine the facts.” *Id.*

The record indicates that Plaintiff complained in an informal grievance, numbered 20063103224, on June 12, 2020 about protective custody inmates being denied equal protection of the laws by being denied yard time when other prison populations were being given yard time during Covid-19. (ECF No. 84-1 at 74, 82-84.) This grievance was responded to and denied. (*Id.* at 74, 85.) Plaintiff then filed a first level grievance regarding the same issue on August 6, 2020. (*Id.* at 82.) This was responded to and denied. (*Id.* at 75, 81.) Plaintiff then attempted to submit a second level grievance on August 28, 2024. (*Id.* at 118.) An Improper Grievance Memo states that this grievance was rejected because Plaintiff failed to attach a “DOC 3098 Improper Grievance Memo” to the grievance. (*Id.* at 117.) Handwritten on the Improper Grievance Memo it says “HDSP Officials have possession of this DOC 3089 already” and “I am unable to submit documents because HDSP officials have possession . . .” above what appears to be Plaintiff’s signature. (*Id.*) It appears that Plaintiff submitted another second level grievance on October 16, 2020, which was rejected as improper, stating, stating that a Second Level had already been submitted, and to “Please be patient and wait for an official response to your Second Level Grievance under this log number.” (*Id.* at 119-20.) Plaintiff’s second level grievance was responded to on November 11, 2020, and was denied. (*Id.* at 76.)

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The record is sufficient to create a genuine dispute as to whether Cardenas-Ornelas exhausted his remedies as to his equal protection claim. Thus, Defendants' motion for summary judgment on the basis of exhaustion is denied as to Count 2B.

B. EQUAL PROTECTION

“To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class.” *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013) (citation and internal quotation marks omitted). To establish a violation of the Equal Protection Clause, the prisoner must present evidence of discriminatory intent. *See Washington v. Davis*, 426 U.S. 229, 239–40 (1976); *Serrano*, 345 F.3d at 1082.

This Court allowed Cardenas-Ornelas to proceed with an equal protection claim that Defendants Portillo, Owens, Warden Johnson, Struck, and Piccinini provided other inmates at HDSP with yard time while denying Plaintiff yard time, and used Covid-19 as a baseless pretext to do so. (ECF No. 12 at 15-16.) Cardenas-Ornelas claims that while his unit was denied yard time, Defendants permitted “every other [unit] within the NDOC to continue receiving exercise, including General Population, Administrative and disciplinary segregation units.” (ECF No. 1-1 at 15.) The restrictions applied only to “inmates housed in protective segregation, and restrictions were imposed only on those activities which benefited the inmates.”

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(*Id.* at 15-16.) Cardenas-Ornelas further alleges that he has been “told by a number of officers, including Portillo, that Warden Johnson does not like protective segregation (“P.S.”) inmates, and that this allows him to lock down the P.S. units.” (*Id.* at 16.)

Defendants argue that Cardenas-Ornelas was not treated differently because prisoners were all restricted from accessing the yard when any prisoner in that unit had contracted Covid-19. (ECF No. 12 at 14.) Defendants argue that Cardenas-Ornelas has provided no evidence that Defendants treated him differently than other inmates in units exposed to Covid-19; and that when they did deny yard time, they had a rational basis for doing so: “Defendants were attempting to prevent the spread of Covid-19.” (ECF No. 84 at 14.) However, the only evidence that Defendants provide in their motion for summary judgment is the declaration of Warden Johnson. (See ECF No. 84 at 13-14.) Warden Johnson’s declaration explains that “by June 23, 2020, inmates in units who did not have persons suspected of contacted Covid-19 were permitted to resume yard time,” but that Unit 9 remained in quarantine “based on inmates in that unit having tested positive for Covid-19.” (ECF No. 84-1 at 230.) Warden Johnson states that “Units were quarantined based on whether inmates in that Unit tested positive for Covid-19, and therefore all inmates were treated equally.” (*Id.*) Warden Johnson does not explain when members of Unit 9 were allowed out of quarantine. (See *id.*) Defendants do not provide evidence to contradict Cardenas-Ornelas’s claim that he was not allowed yard time until more than a year later on July 27, 2021.

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Defendants point to *Seaplane Adventures, LLC v. County of Marin*, where the Ninth Circuit held that a county's public health order restricting recreational flights during the Covid-19 pandemic did not violate a seaplane operator's equal protection rights. *Seaplane Adventures, LLC v. Cnty. of Marin*, 71 F.4th 724, 731 (9th Cir. 2023). As Defendants point out, the Ninth Circuit in *Seaplane* explained that under an equal protection "class of one" claim, a plaintiff must demonstrate that the defendant "(1) intentionally (2) treated [plaintiff] differently than other similarly situated [individuals or groups], (3) without a rational basis." *Id.* at 729 (citing *Gerhart v. Lake Cnty.*, 637 F.3d 1013, 1022 (9th Cir. 2011)). To preclude a grant of summary judgment, the plaintiff must show that "a rational trier of fact could find for [plaintiff] on all three prongs of the 'class of one' claim." *Id.* at 729-30.

Defendants argue that the facts here are analogous to those in *Seaplane*, and that Defendants' restriction of "non-essential activities to prevent the spread of Covid-19 clearly satisfies the rational basis test." (ECF No. 84 at 14.) However, this argument fails to address Cardenas-Ornelas's claims that prisoners were allowed to work in crowded conditions indoors while being denied access to outdoor exercise for a prolonged period. In *Seaplane*, evidence in the record showed that the defendant had "ample bases for making the distinction" between recreational and non-recreational flights and banning only the former. *Seaplane*, 71 F.4th at 731. As explained above, Defendants' arguments justifying the disparity between yard time and work fail to establish the absence of a genuine dispute of material fact. Here, a rational

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trier of fact could find that Defendants' reasons for denying Cardenas-Ornelas and Unit 9 outdoor exercise were pretextual and lacked rational basis, based on the evidence Cardenas-Ornelas has provided regarding his return to work. A rational trier of fact could also find that Defendants treated Cardenas-Ornelas and Unit 9 differently than other similarly situated groups, namely inmates in general population, administrative and disciplinary segregation. Finally, a rational trier of fact could find that this different treatment was intentional, based on Cardenas's claims regarding Warden Johnson's dislike of protective segregation inmates and Defendants' failure to refute these claims.

C. PARTICIPATION

Defendants offer the same arguments regarding participation for this count as the first. (ECF No. 84 at 22.) For similar reasons, the Court grants summary judgment for defendants Portillo, Owens, Struck, and Piccinini, but denies summary judgment for defendant Warden Johnson on this basis.

While Plaintiff alleges that he had many conversations regarding this issue with Defendants Portillo and Owens, and that all Defendants implemented the lockdown program depriving him of yard time, there is no indication that any Defendants besides Warden Johnson had authority in implementing this policy. (ECF No. 1-1 at 12, 16). The record indicates that Struck responded to Plaintiff's first level grievance with regard to denial of outdoor exercise. (ECF No. 84-1 at 74.) It also indicates

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that Piccinini authored multiple “Improper Grievance Memos” to Plaintiff related to this claim. (*Id.* at 100, 105, 117, 119.) While his role is unclear, Portillo’s name appears on one of Plaintiff’s first level grievances. (*Id.* at 122.)

Because Plaintiff has not presented any evidence that these Defendants participated in any manner beyond implementation of a policy that they had no authority to change and responding to grievances, there is no genuine dispute of fact as to their personal participation. “Where the defendant’s only involvement in the allegedly unconstitutional conduct is ‘the denial of administrative grievances or the failure to act, the defendant cannot be liable under § 1983.’” *Grenning v. Klemme*, 34 F. Supp. 3d 1144, 1157 (E.D. Wash. 2014) (quoting *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999)); *see also Jackson v. State of Nevada*, No. 2:16-cv-00995-APG-NJK, 2019 WL 6499106, at *7 (D. Nev. Dec. 3, 2019) (“[M]erely denying a grievance without some decision-making authority or ability to resolve the underlying issue grieved is not enough to establish personal participation.”)

Accordingly, the Court grants summary judgment for Defendants Portillo, Owens, Struck, and Piccinini on this claim but denies summary judgment as to Warden Johnson.

D. QUALIFIED IMMUNITY

Defendants make the same general argument regarding qualified immunity for all claims. (ECF No. 84 at 23.) As discussed above, there are genuine disputes

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of material fact as to whether Warden Johnson violated Cardenas-Ornelas's equal protection right by denying Cardenas-Ornelas's unit access to the yard while allowing other units access to the yard. Furthermore, it is clearly established that a prisoner can assert a class-of-one equal protection claim by showing they were treated differently from other similarly situated prisoners and that there was no rational basis for the difference in treatment. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Therefore, Defendant Warden Johnson is not entitled to summary judgment on this claim on this basis.

V. COUNT 4: COVID-19 COME TO WORK POLICY**A. EXHAUSTION**

Defendants argue that Plaintiff's Eighth Amendment claim alleging a policy requiring officers to come to work after having reported contact with individuals who had contracted Covid-19 is barred because he failed to exhaust his administrative remedies. (ECF No. 84 at 9.)

Upon review of the grievance records (ECF No. 84-1), it does not appear that Plaintiff brought any grievances regarding a policy requiring officers to come to work after having been exposed to COVID-19.

Because Defendants have met their burden of showing an absence of genuine dispute of fact on this issue, the claim is dismissed. The Court grants Defendants' motion for summary judgment on Count 4.

*Appendix C***VI. COUNT 5: MAIL DELAY**

The Court allowed Cardenas-Ornelas to proceed with his claim that Officer Johnson deliberately interfered with the delivery of his mail in February 2020. (ECF No. 12 at 26.) Plaintiff alleges that Officer Johnson delivered mail from his attorney dated February 4 on February 21—a delay of approximately 17 days—interfering with Plaintiff’s ability to contact his lawyer and satisfy a judge’s order to timely comply with an order. (ECF No. 12 at 23-24.) As a result of Johnson’s failure to provide the legal mail within the 24-hour required period, Plaintiff claims that he was unable to properly research and write a response. (ECF No. 12 at 24.)

Defendants argue that Plaintiff has “no admissible evidence that Officer Johnson withheld his legal mail” because the mail was received at HDSP on February 20 and Officer Johnson delivered the mail to Plaintiff on February 21. (ECF No. 84 at 20.)

The record shows that the letter from Plaintiff’s attorney, David K. Neidert, was dated February 4, 2020. (ECF No. 87-1 at 80.) In the letter, Mr. Neidert informed Plaintiff that because of a decision by Judge Du on January 31, 2020, Plaintiff had 30 days to take action to avoid dismissal of his case. (*Id.*) Because Judge Du had found that one of Plaintiff’s claims was unexhausted in state court, Mr. Neidert explained that Plaintiff could do one of two things to avoid dismissal (which would be “catastrophic to [his] case.”) (*Id.*) Mr. Neidert asked Plaintiff to sign the document enclosed so that he could

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file it with the court to “get your petition moving again.” (*Id.* at 81.)

The stamp on the envelope was dated February 4, 2020. (*Id.* at 76.) In Warden Johnson’s response to Plaintiff’s grievance, he explains that this is a “printed stamp which identifies when the stamp was printed, not mailed.” (ECF No. 84-1 at 78.) The NDOC legal form does not show when the mail was received by HDSP. (*Id.*) The form indicates that the mail was received by Cardenas-Ornelas on February 21, 2020. (*Id.*)

In an informal grievance filed March 5, 2020, Plaintiff complained about the delay as being in violation of administrative regulations and his “First Amendment right to be free from interference of access to Courts.” (ECF No. 84-1 at 77.) The grievance was denied, and Cardenas-Ornelas filed a first level grievance reiterating his complaint. (*Id.*) Warden Johnson responded to that grievance, admitting that the officer “did not follow protocol as he failed to date stamp the envelope [] upon receipt at [HDSP].” (*Id.* at 78.) Warden Johnson stated that this was “unacceptable” and would result in the officer receiving “training to ensure he clearly understands Department Policy and his responsibility to ensure he properly processes incoming mail[.]” (*Id.*) Because there was no date stamp on the envelope, Warden Johnson was “unable to prove or disprove [Plaintiff’s] claim” that the letter for held for more than twenty-four hours. (*Id.*) Warden Johnson also did not identify the officer involved by name. (*Id.*)

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In his declaration, Officer Johnson asserts that in February 2020, he had “no responsibility for processing incoming mail or logging incoming mail.” He further states that he “delivered mail to inmates on the same day [he] received it” and “never delayed delivering legal mail, but followed the guidelines set forth in NDOC AR 722 and 750.” (ECF No. 84-1 at 225.)

The record does not clearly establish whether the delay occurred before the letter arrived at HDSP or after the letter arrived; whether Officer Johnson or another officer was responsible for the failure to stamp the mail upon receipt; or (if the letter arrived at HDSP before February 20) whether Officer Johnson or another officer was responsible for the delay. But viewing the facts in the light most favorable to Cardenas-Ornelas, a rational finder of fact could conclude that Officer Johnson delayed delivery of Plaintiff’s legal mail.

A. FIRST AMENDMENT

Prisoners have “a First Amendment right to send and receive mail.” *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (per curiam). Prisoners also have a constitutional right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 346 (1996). To establish a violation of the right of access to the courts, a prisoner must establish that he or she has suffered an actual injury. *See Lewis*, 518 U.S. at 349; *Nasby v. Nevada*, 79 F.4th 1062, 1056 (9th Cir. 2023); *Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir. 1999).

Defendants point to two Ninth Circuit cases finding that incidents of mishandling or delaying mail did not

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violate the First Amendment. (ECF No. 84 at 20.) In *Crofton*, the court found that a temporary delay of the plaintiff's publications, resulting from the prison official's security inspection, did not violate his First Amendment rights. *Crofton v. Roe*, 170 F.3d 957, 961 (9th Cir. 1999). In *Stevenson*, the court found that a prison official's conduct in handing legal mail to a guard, who then opened the mail outside the inmate's presence, was negligent but not unconstitutional. *Stevenson v. Koskey*, 877 F.2d 1435, 1441 (9th Cir. 1989). Both cases are distinguishable from the facts of this case, which involve the alleged *delay* of *legal* mail.

Defendants also argue that Cardenas-Ornelas cannot establish that Officer Johnson's delay caused actual harm. (ECF No. 84 at 21.) In his complaint, Cardenas-Ornelas argues that this delay meant that Plaintiff was "unable to properly research and write a response." (ECF No. 1-1 at 31.) This was "made worse by the fact that he could not get an appointment with the law library." (*Id.*) In his response to their motion for summary judgment, Cardenas-Ornelas reiterates his access to court claim, but does not argue that the delay caused harm. (*See* ECF No. 1-1 at 16.) Cardenas-Ornelas does not claim that he was unable to respond to his attorney or the court before the required deadline, or that the delay resulted in an adverse ruling.

Because Cardenas-Ornelas has failed to allege facts sufficient to create a genuine dispute of material fact as to whether the delay in receiving his legal mail resulted in actual harm, Defendants' motion for summary judgment on Count 5 is granted.

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VII. COUNT 6A: PHONE CALL BAN

A. EXHAUSTION

Defendants argue that Plaintiff's federal and state claims regarding a ban on phone calls are barred because he failed to exhaust his administrative remedies. (ECF No. 84 at 9.)

Upon review of the grievance records (ECF No. 84-1), it does not appear that Plaintiff brought any grievances regarding a ban on phone calls.

Because Defendants have met their burden of showing an absence of genuine dispute of fact on this issue, the claim is dismissed. The Court grants Defendants' motion for summary judgment on Count 6A.

VIII. COUNT 6B: PHONE CALL BAN

A. EXHAUSTION

Defendants argue that Plaintiff's equal protection claims regarding denial of phone calls are barred because he failed to exhaust his administrative remedies. (ECF No. 84 at 9.)

Upon review of the grievance records (ECF No. 84-1), it does not appear that Plaintiff brought any grievances regarding the denial of phone calls.

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Because Defendants have met their burden of showing an absence of genuine dispute of fact on this issue the Court grants Defendants' motion summary judgment on Count 6B.

IX. CONCLUSION

It is therefore ordered that Defendants' motion for summary judgment (ECF No. 84) is DENIED as to Plaintiff's Eighth Amendment and Equal Protection claims regarding denial of outdoor exercise (Counts 2A and 2B) against Warden Johnson, and GRANTED as to Defendants Portillo, Owens, Struck, and Piccinini.

Defendants' motion for summary judgment (ECF No. 84) is GRANTED as to Plaintiff's other claims (Counts 4, 5, 6A, and 6B).

Plaintiff's claim regarding deprivation of outdoor exercise in violation of the Eighth Amendment and Equal Protection clause (Counts 2A and 2B) will proceed against Defendant Warden Johnson. All other Defendants are dismissed from this case.

DATED THIS 30th day of September 2024.

/s/ Anne R. Traum
Anne R. Traum
United States District Judge

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**APPENDIX D — ORDER OF THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT, FILED APRIL 22, 2026**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-6755

LUIS CARDENAS-ORNELAS,

Plaintiff-Appellee,

v.

CALVIN JOHNSON; et al.,

Defendants-Appellants,

and

J. ALCOCK AND JULIO CALDERIN,

Defendants.

Filed April 22, 2026

ORDER

D.C. No. 2:21-cv-00030-ART-MDC
District of Nevada, Las Vegas

Before: BENNETT, SANCHEZ, and H.A. THOMAS,
Circuit Judges.

Appendix D

Appellant Warden Calvin Johnson filed a petition for panel rehearing and rehearing en banc on March 27, 2026. Dkt. No. 49. Appellee Luis Cardenas-Ornelas also filed a petition for panel rehearing and rehearing en banc on March 30, 2026. Dkt. No. 50. Judge Bennett, Judge Sanchez, and Judge H.A. Thomas voted to deny the Appellant's petition for panel rehearing and rehearing en banc, and also to deny the Appellee's petition for panel rehearing and rehearing en banc. The full court has been advised of both petitions for rehearing en banc, and no judge has requested a vote to rehear the matter en banc. *See* Fed. R. App. P. 40.

The petitions for panel rehearing and rehearing en banc are **DENIED**.

**APPENDIX E — RELEVANT
CONSTITUTIONAL PROVISIONS**

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.