No. 23-3080

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Michael McNeil,

Plaintiff-Appellee,

v.

William Gittere, et al.,

Defendants-Appellants.

Appeal from the
United States District Court for the District of Nevada
D.C. No. CV 3:20-cv-00668, Judge Andrew P. Gordon

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Introduction

Michael McNeil was incarcerated at Ely State Prison when he was accused of smuggling drugs via the mail system. In a preliminary disciplinary hearing, he asked to view the evidence used against him, which included an envelope and a positive drug test result. Prison officials denied his request. After a formal hearing, a disciplinary committee found McNeil guilty and imposed significant sanctions. McNeil appealed twice in the prison grievance process. Each time, prison officials denied his appeal.

McNeil, a pro se plaintiff, filed a Section 1983 suit against the prison officials responsible for violating his Fourteenth Amendment right to due process. The district court held that Defendants violated McNeil's due-process right when they failed to provide him the evidence he requested. It is undisputed that Defendants denied McNeil access to the envelope and test result, so the court granted McNeil partial summary judgment on this claim. It determined that a factual dispute existed as to the scope of McNeil's request for all other evidence, so it sent that dispute to trial. The court also rejected Defendants' claim to qualified immunity. Then, 150 days after that ruling, Defendants filed this interlocutory appeal. They sought review of the district court's denial of qualified immunity and relied on the collateral-order doctrine as the basis for this Court's jurisdiction.

The appeal is untimely and must be dismissed for lack of jurisdiction. The time for appealing collateral orders starts at the moment the order is entered. But rather than appealing promptly, Defendants waited nearly five

months after the summary-judgment order was entered to file their notice of appeal.

If this Court reaches the qualified-immunity question, it should affirm. The district court properly found a due-process violation. Defendants expressly agreed in their motion for summary judgment below that McNeil was deprived of a protected liberty interest, so they have waived that issue for appeal. And the district court correctly held that Defendants deprived McNeil of the process he was due by denying his requests for the evidence used against him. Because each Defendant denied McNeil's requests, they were personally involved in this deprivation, and each may be held liable.

Statement of Jurisdiction

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331. As explained below (at 12-24), this Court lacks jurisdiction because this appeal was filed more than thirty days after the entry of the order denying Defendants qualified immunity. *See Bowles v. Russell*, 551 U.S. 205, 209 (2007). Defendants also ask this Court to resolve factual disputes over qualified immunity on an interlocutory basis, which this Court lacks jurisdiction to do. *See infra* at 32-33, 35-36.

Issues Presented

I. Whether this Court lacks jurisdiction over this appeal because Defendants filed their notice of appeal more than thirty days after the order denying them qualified immunity was entered on the docket.

II. Whether Defendants violated McNeil's Fourteenth Amendment right to procedural due process when they denied him access to the evidence used against him in his prison disciplinary hearing.

III. Whether Defendants carried out or participated in affirmative acts that violated McNeil's procedural due-process right, rendering them individually liable.

IV. Whether Defendants are entitled to qualified immunity.

Statement of the Case

I. Factual background

In 2020, Michael McNeil, a prisoner incarcerated at Ely State Prison (ESP) in Nevada, was charged with transporting drugs through the prison mail system. 3-ER-325; 2-ER-218. At a hearing, a disciplinary committee found McNeil guilty. 3-ER-332. Throughout the disciplinary process, McNeil was denied the opportunity to review the evidence against him, despite his multiple requests. 3-ER-331-32.[1]

A. Investigation and Notice of Charges

In April 2020, ESP Correctional Officer Sarah O'Donnell came across ten pieces of mail addressed to six inmates, including McNeil, from "Got it Girls Entertainment." 2-ER-203-04. Though the contents of the mail all tested negative for drugs, address labels on six of the ten envelopes tested positive

[1] Because McNeil is pro se, factual statements in his verified complaint are considered evidence. *See King v. County of Los Angeles*, 885 F.3d 548, 553 (9th Cir. 2018).

for cocaine. 2-ER-203-05. O'Donnell took photos of the envelopes, their contents, and the test results. 2-ER-204-05. ESP investigated six inmates as suspects in a possible conspiracy to bring drugs into the prison. 2-ER-218; 2-ER-203.

During the investigation, McNeil was placed on "red tag status," a type of "emergency" and "temporary" segregation. 3-ER-329-30; 2-ER-280; 2-ER-209. Red tag status is a severe restriction on an inmate's freedom. *See* 1-ER-17-18; 2-ER-209-10; 3-ER-329-30. It meant that McNeil spent twenty-three hours alone in his cell, was shackled anytime he left his cell, went out in the prison yard only once or twice a week, showered three times a week (and only if there was time), and was permitted only one or two phone calls a week. 3-ER-329-30.

Nearly two weeks after being placed on red tag status, McNeil received a "Notice of Charges" prepared by O'Donnell. 2-ER-218. The Notice of Charges informed McNeil that he was being charged with transporting and selling an illicit substance through the prison mail system, which is a "Class A," or major, offense. 2-ER-218; 2-ER-296. The Notice of Charges also said that ESP had received a piece of mail addressed to him with a label that had tested positive for cocaine. 2-ER-218. The Notice listed the evidence against McNeil—the envelope, positive drug test result, and recordings of phone calls with an alleged co-conspirator—all of which were in ESP's evidence vault. 2-ER-218.

B. Preliminary hearing

The same day McNeil received the Notice of Charges, Defendant-Appellant Sergeant Matthew Roman held a preliminary hearing at which McNeil maintained his innocence. 2-ER-217; 2-ER-221; 2-ER-279; 3-ER-330-31.

McNeil asked at the hearing if any other inmates were placed on red tag status or charged with the same infraction. 3-ER-330-31; 3-ER-333. Roman told McNeil there were not. 3-ER-333. That was incorrect: Several other inmates were also on red tag status and were suspects in the incident. 3-ER-333; 2-ER-203. McNeil also asked that Maurice Kelly, a former inmate, be present as a witness at McNeil's upcoming disciplinary hearing. 2-ER-215; 2-ER-221; 3-ER-330-31.

McNeil then requested to see the evidence referenced in the Notice of Charges. 2-ER-221; 3-ER-334. He asked that "the unauthorized mail [and the] positive test result for an intoxicant [be] brought in for review by the plaintiff and the additional evidence from ESP's vault [be] brought in as evidence." 3-ER-334; *see also* 2-ER-221. A Nevada Department of Corrections (NDOC) regulation states that "the inmate shall receive copies of any evidentiary documents." 2-ER-237. But instead of allowing McNeil to access this evidence, Roman just responded, "good luck getting that." 3-ER-331. McNeil was never allowed to view any of the evidence he requested. 3-ER-331-32.

C. Disciplinary hearing

McNeil's disciplinary hearing was held three days later by Sergeant Dennis Homan and Caseworker Amanda Allred. 2-ER-212-16; 2-ER-305. Homan informed McNeil at the hearing that he was charged with possession of intoxicants, a "Class A" offense. 2-ER-262, Audio Recording at 00:19-00:40; 2-ER-296. McNeil pleaded not guilty. 2-ER-262, Audio Recording at 1:25-1:30. McNeil again requested Kelly as a witness. 2-ER-262, Audio Recording at 1:28-1:56. The request was denied. 2-ER-305.[2]

The Committee also denied McNeil access to the evidence against him. Referring to the Notice of Charges, Homan explained: "Well, [O'Donnell] has more than just the letters. She has, well, you've seen the write-up, so you've got an idea of what she has against you. There's more behind it as well that you don't have access to." 2-ER-262, Audio Recording at 2:40-2:55. Homan never gave a reason for this denial at the hearing. But in his declaration Homan stated that McNeil was not allowed access to the evidence for two reasons: (1) the evidence had drugs on it, and (2) a blanket policy bars inmates from viewing evidence held in ESP's vault due to

[2] In his declaration, Homan offered two reasons why the Committee denied this request. First, Homan maintained that the reason they did not call Kelly was because McNeil provided no contact information, and they could not find him. 2-ER-305. Second, they believed Kelly's testimony would be hearsay and did not bear on the case. 2-ER-305. An NDOC regulation states that the rules of hearsay do not apply to prison disciplinary hearings. 2-ER-236.

"safety" concerns. 2-ER-305. It is unclear whether this blanket policy actually exists. NDOC regulations state that when inmates are not allowed to possess evidence, "the inmate must be given the opportunity to review the documents at the Disciplinary Hearing." 2-ER-237.

The hearing took less than ten minutes, including thirty-seven seconds of deliberations. 2-ER-262, Audio Recording at 7:00-7:37. At the end of the hearing, Homan told McNeil that he had been found guilty "based on the evidence presented, [and], like I say, Ms. O'Donnell has much more evidence in her office as well as in evidence." 2-ER-262, Audio Recording at 8:13-8:28. In the Summary of the Disciplinary Hearing, Homan stated that the disciplinary committee relied on the envelope and the envelope label, as well as recorded inmate phone calls between McNeil and a phone number registered to "Infinity King." 2-ER-214.

As a result of being found guilty of a "Class A" major offense, McNeil was sanctioned with loss of sixty days of statutory good-time credits, loss of ninety days of canteen privileges, and referral to the Nevada Attorney General for possible criminal prosecution. 2-ER-216; 2-ER-271.

D. The appeals process

McNeil then went through the prison's internal appeals process. In evaluating appeals, an NDOC regulation requires that prison officials "shall consider" whether the (1) hearing complied with the regulations, (2) finding of guilt was based on some evidence, and (3) sanctions imposed were appropriate. 2-ER-244. Based on those considerations, the reviewers may

then (1) affirm or reverse the decision of the disciplinary committee, (2) return the decision to the committee for further proceedings, or (3) modify but not increase the sanctions. 2-ER-244-45.

McNeil first appealed the disciplinary hearing finding to ESP's Warden, Defendant-Appellant William Gittere, objecting to the prison's refusal to grant him access to the evidence against him. 2-ER-268-70. Gittere denied McNeil's appeal, reasoning that the formal rules of evidence do not apply to disciplinary hearings and that there was no procedural defect. 2-ER-271.

McNeil then filed a second-level appeal to Defendant-Appellant Deputy Director Harold Wickham, again contending that he was improperly denied the opportunity to review the evidence used against him, 2-ER-265, referring to the letters and recorded phone calls mentioned as "additional evidence" in the Notice of Charges, 2-ER-218. Wickham agreed with Gittere and denied the appeal, maintaining that there was no procedural defect in refusing McNeil access to the evidence. 2-ER-266.

II. Procedural background

McNeil filed a Section 1983 lawsuit against Defendant-Appellants Warden William Gittere, Sergeant Matthew Roman, and Deputy Director Harold Wickham, as well as Defendants Sergeant Dennis Homan, Correctional Officer Sarah O'Donnell, and Caseworker Amanda Allred. 3-ER-325-26. He alleged that Defendants violated his Fourteenth Amendment due-process right by refusing him access to the evidence,

failing to call Kelly as a witness, and providing an insufficient Notice of Charges. *See* 3-ER-325-26; 3-ER-333-39. McNeil sought declaratory relief, expungement of the charges, damages, and all other appropriate relief. 3-ER-344.

The parties cross-moved for summary judgment. 2-ER-167-86; 2-ER-79-93; 2-ER-55-68. The magistrate judge recommended (1) granting summary judgment against all Defendants for refusing McNeil access to the evidence and (2) granting summary judgment to Defendants on the other claims. 1-ER-34-36. The district court accepted the recommendation in part and modified it in part. 1-ER-02.[3]

The district court granted partial summary judgment to McNeil on his denial-of-evidence claim. 1-ER-05-09; 1-ER-11. The district court held that Roman violated McNeil's due-process right by denying him access to copies of the mail and the positive test result. 1-ER-06-07. The district court also held that Gittere and Wickham violated McNeil's due-process right because (1) "McNeil's grievances were not about irreversible, completed

[3] Consistent with the magistrate judge's recommendation, the district court granted summary judgment to Defendants Dennis Homan, Amanda Allred, and Sarah O'Donnell on all issues. 1-ER-11 The district court also granted summary judgment to all Defendants on McNeil's claims regarding the denial of the witness (Maurice Kelly) and the deficiency of the Notice of Charges. 1-ER-05 n.2. These grants of summary judgment are not currently being appealed but remain appealable after entry of a final judgment on all issues. *See Emp. Staffing Servs., Inc. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994).

misconduct," and (2) "the NDOC regulations empowered Wickham and Gittere to correct the error in the disciplinary hearing." 1-ER-07-09.

The district court next held that Roman, Gittere, and Wickham were not entitled to qualified immunity because McNeil's due-process right was clearly established. 1-ER-09-11. The district court relied on this Court's decision in *Melnik v. Dzurenda*, 14 F.4th 981, 988-90 (9th Cir. 2021), which held that an inmate facing a prison disciplinary charge had a clearly established due-process right to view the evidence or copies of the evidence against him. 1-ER-10.

Finally, the district court found that a dispute of material fact remained regarding whether McNeil had clearly requested additional evidence beyond the mail and the positive test result. 1-ER-09; 1-ER-12. The district court sent this issue, as well as the issue of damages, to trial. 1-ER-12.

Summary of Argument

I. This Court lacks jurisdiction. Under 28 U.S.C. § 2107, parties must file a notice of appeal within thirty days after the entry of the order being appealed. But Defendants waited 150 days after the entry of the order to file their notice of appeal, so, under the text of the statute, it was untimely.

Although the Court should look no further than the text of the governing statute, Defendants argue that the Federal Rules of Civil and Appellate Procedure gave them more time because the rules require entry of a separate document to trigger the thirty-day clock, and no separate document was entered here. But the rules are ambiguous as to whether a separate document

must accompany a collateral order, which is the kind of order Defendants seek to appeal here. The advisory committee notes state that the separate-document requirement does not apply to collateral orders. That understanding of the rules dovetails with this Court's consistent practice of dismissing cases filed more than thirty days after the entry of a collateral order. Defendants' position, on the other hand, would create a host of practical problems that undermine the goals the separate-document requirement was designed to achieve.

II. Defendants violated McNeil's due-process right to view the evidence he requested so he could defend himself at his disciplinary hearing. A procedural due-process violation occurs when a person was (1) deprived of a liberty interest and (2) not afforded the process he was due.

Defendants have waived the right to argue that McNeil lacks a liberty interest, so we move to the next inquiry: whether Defendants gave him the process he was due. They did not. McNeil requested the mail and positive test result, but Defendants refused to provide him this evidence. McNeil thus could not defend himself at his hearing. McNeil also asked for all other evidence against him. Whether this latter request was made clearly enough is a factual question that must, as the district court held, be resolved by a trier of fact. Defendants' additional efforts to avoid these issues are unavailing. McNeil properly raised his requests for documents to the prison officials, and Defendants cannot claim harmless error.

III. Because each Defendant affirmatively deprived McNeil of the evidentiary access that he sought, each is legally responsible. McNeil first asked Roman at his preliminary hearing to view the evidence listed in his Notice of Charges, but Roman refused. And when McNeil appealed the decision to Defendants Gittere and Wickham, both had the authority to remedy McNeil's due-process violation and give him the requested evidence. Instead, they dismissed his appeals.

IV. Defendants are not entitled to qualified immunity on McNeil's due-process damages claim because his right was clearly established. In *Melnik v. Dzurenda*, 14 F.4th 981, 988-90 (9th Cir. 2021), this Court held that the right to access all requested evidence, including copies, was clearly established.

Standard of Review

This Court must ensure it has jurisdiction before reaching the merits. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). The district court's grant of summary judgment based on qualified immunity is reviewed de novo, and this Court must presume that all material facts as asserted by McNeil, the nonmoving party, are correct. *Rieman v. Vazquez*, 96 F.4th 1085, 1090 (9th Cir. 2024).

Argument

I. Defendants' notice of appeal was untimely, so this Court lacks jurisdiction.

Defendants waited to file their notice of appeal until 150 days after the district court's order was entered. This is well past the jurisdictional

deadline, which requires parties to file a notice of appeal within thirty days after entry of the order being appealed. Defendants argue that the Federal Rules of Appellate Procedure and Federal Rules of Civil Procedure give them more time because these rules require a separate document distinct from the district court's reasoned opinion to trigger the thirty-day appeal deadline. But that's incorrect.

The relevant statutes, rules, and this Court's precedent all point in the same direction: Collateral orders must be appealed within thirty days of their entry on the docket. A separate document is not required to start the clock for interlocutory appeals of collateral orders. To hold otherwise would frustrate the function of the separate-document rule, increase confusion, and reduce judicial efficiency. Because Defendants filed their notice of appeal beyond the thirty-day deadline, this Court must dismiss this appeal.

A. The thirty-day clock for appeal begins when a collateral order is entered on the docket.

Collateral orders are appealable on an interlocutory basis under 28 U.S.C. § 1291, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), subject to a thirty-day time limit for appeal, 28 U.S.C. § 2107. The question here is *when* the timer for these collateral-order appeals begins.

1. Under the controlling statute, parties must appeal within thirty days after the entry of a collateral order.

The statute governing the time limit for appeals from district courts to courts of appeals—28 U.S.C. § 2107—states that "no appeal shall bring any judgment, order or decree … before a court of appeals" unless the notice of appeal is filed "within thirty days after the entry of such judgment, order or decree." 28 U.S.C. § 2107(a). Put differently, Section 2107 starts the clock at the moment the judgment, order, or decree is entered. So, to determine when Section 2107's thirty-day deadline begins, a court must decide (1) what "judgment, order or decree" is being appealed, and (2) when "entry" of that "judgment, order or decree" occurred.

First, for collateral-order appeals, the order itself is being appealed. That is because a collateral order, such as one denying qualified immunity, is appealable "notwithstanding the absence of a final judgment." *Mitchell*, 472 U.S. at 530; *see Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) ("We hold this [collateral] *order* appealable." (emphasis added)). When an order is collateral—like when a district court denies a motion to dismiss or a motion for summary judgment on a defendant's request for qualified immunity—there is no final *judgment* to appeal. Indeed, the entire point of the district court's order is that judgment is denied, and the case *continues* in the district court.

Second, because under the collateral-order doctrine, the *order* itself is appealed, Section 2107's thirty-day clock starts at the entry of the order itself. So, under Section 2107's plain statutory terms, the thirty-day clock here began the day the order was entered, May 22, 2023, and Defendants' notice of appeal filed 150 days later was not timely.

An "order" is notably different from the other relevant word in Section 2107: "judgment." A judgment "*finally* determines rights of parties," *Judgment*, *Black's Law Dictionary* (4th ed. 1951) (emphasis added), and a party appeals that final determination. As indicated, in collateral-order appeals, a party appeals the order itself. But when a party appeals a final determination, the party is appealing the *judgment*. For example, when a final order grants in full a motion for summary judgment and conclusively determines the rights of the parties—leaving nothing else in the case for the court to resolve—the appeal stems from that final judgment, not from the summary-judgment order.

The difference, then, between appealing an "order" and appealing a "judgment" controls the calculation of time under Section 2107, which starts the clock upon the entry of the "judgment, order or decree" being appealed. Unlike the straightforward entry of an order, it has not always been clear when a judgment is entered. The Federal Rules of Civil Procedure help clarify when a judgment is entered. *See* Fed. R. Civ. P. 58(a). As explained below (at 16-19), that clarification applies only to "judgments," which are not, as we've said, the object of a collateral-order appeal.

2. Under the applicable rules, no separate document is required for collateral-order appeals.

Because Section 2107's controlling statutory text discussed above is clear, that should end the matter: Defendants' appeal came too late because it was filed more than thirty days after entry of the collateral order. This Court should dismiss this appeal on that basis alone.

Defendants ignore Section 2107 and instead string together three rules, which, in their view, gave them 180 days to file their notice of appeal. Even taken on its own terms, Defendants' rules-based argument does not hold water.

We begin with the relevant rules. First, Federal Rules of Civil Procedure 54(a) and 58(a) clarify when a judgment is entered. FRCP 54(a) defines "judgment" as used in the rules to include all orders from which an appeal lies. FRCP 58(a) then requires that every "judgment" (except for orders disposing of certain post-judgment motions) be set out in a separate document.

Next, Federal Rule of Appellate Procedure 4(a) sets the timer to appeal. FRAP 4(a)(1)(A) requires that the notice of appeal be filed within thirty days after entry of the judgment or order appealed from. FRAP 4(a)(7) clarifies when "entry" occurs for the purpose of calculating the appeal deadline. If FRCP 58(a) does not require a separate document, "entry" occurs when the judgment or order is entered on the civil docket. Fed. R. App. P. 4(a)(7)(A)(i). But if FRCP 58(a) does require a separate document, "entry" occurs when

the judgment or order is set forth on a separate document. Fed. R. App. P. 4(a)(7)(A)(ii). Or, if FRCP 58(a) requires a separate document, but none is issued, "entry" occurs when 150 days have run from entry of the judgment or order on the civil docket. *Id.*

Weaving together these rules, Defendants argue that a separate document was required for this collateral-order appeal. Defs.' Opening Br. 13-15. In their view, because FRCP 54(a)'s definition of judgment includes *all* appealable orders, a collateral order is a "judgment" that must be set out in a separate document under Rule 58(a). Because none was ever issued, Defendants assert that FRAP 4(a) gave them 180 days after the entry of the order denying them qualified immunity to file their notice of appeal.

But this reading—premised on its view that a collateral order is a "judgment"—is wrong. The rules themselves are ambiguous, so the advisory committee notes help illuminate the meaning. *See In re Kirkland*, 75 F.4th 1030, 1043 (9th Cir. 2023). And here, those notes expressly resolve the issue, stating that the separate-document requirement does not apply to collateral-order appeals.

Ambiguity. The rules themselves are ambiguous. First, the rules should not be read to conflict with the controlling statute. And, as discussed above (at 14-15), Defendants' reading runs counter to the clear statutory text.

Second, the rules are ambiguous because Defendants' reading would render other provisions of the rules superfluous, thus failing to give effect to each word. To explain: FRAP 4(a)(1)(A)—a key provision at issue—gives

parties thirty days to appeal after "entry of judgment *or order* appealed from." Defendants argue that under FRCP 54(a), the word "judgment" includes *all* appealable decisions. But if *all* appealable orders were "judgments," as Defendants maintain, the language "or order" could be stricken from FRAP 4(a)(1)(A) without changing its legal effect. Defs.' Opening Br. 14. That is, on Defendants' telling, "or order" in FRAP 4(a)(1)(A) is meaningless. Defendants' reading is therefore "at odds with one of the most basic interpretive canons," that provisions should be read "so that no part will be inoperative or superfluous." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quotation marks omitted).

As a result of Defendants' reading, the same superfluity problem surfaces in Federal Rule of Civil Procedure 79(b), which commands the district clerk to "keep a copy of every final judgment *and appealable order*." If a judgment were *any* appealable decision, the words "and appealable order" in Rule 79(b) would likewise be unnecessary.

Advisory committee notes. The advisory notes to Rule 58 clear up the superfluity problem. In 2002, when the drafters amended the rules to add the 150-day provision, they added notes explaining that "appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document." Fed. R. Civ. P. 58 advisory committee's notes to 2002 amendment. Driving home the point, they explained that the "appeal time should start to run when the collateral order

is entered without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2)." *Id.*

These notes "provide a reliable source of insight into the meaning of a rule." *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002); *In re Kirkland*, 75 F.4th at 1043. And here, they explain that the rules start the clock to appeal at the moment a collateral order is entered, with no separate document required. This is consistent with the purpose of separate documents: to signal to the parties when the judge believes the case is over and ripe for appeal. *See Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 383-85 (1978). But because collateral orders are both nonfinal and can be appealed later at the end of the case, requiring a separate document would run counter to this purpose.

B. This Court has never required a separate document for collateral-order appeals.

This Court's decisions confirm that collateral-order appeals do not require separate documents to start the thirty-day appeal timer. In *SEC v. Capital Consultants L.L.C.*, this Court remarked that, "[a]s with all final decisions, the time for appeal of an appealable collateral order begins to run on the date the court enters the order." 453 F.3d 1166, 1173 (9th Cir. 2006). Put differently, the clock for appealing collateral orders starts when the order itself—and not a separate document—is entered. This approach makes sense because "the essence of a 'collateral' order is the absence of a final judgment on a separate document." *Carson v. Block*, 790 F.2d 562, 564 (7th Cir.), *cert. denied*, 479 U.S. 1017 (1986).

Relying on *Capital Consultants*, this Court subsequently dismissed an appeal as untimely in *FTC v. Noland*, 854 F. App'x 898 (9th Cir. 2021) (mem.). There, the district court entered an order, and a notice of appeal was filed four months later. *Id.* at 899. This Court held that, assuming the order was appealable under the collateral-order doctrine, the time to appeal began to run when the order itself was entered. *Id.* The appeal was therefore untimely. *Id.* Significantly, no separate document was issued in that case. *See* Docket, *FTC v. Noland*, 475 F. Supp. 3d 992 (D. Ariz. 2020) (No. 2:20-cv-00047-DWL). Had a separate document been required, the appeal would have been timely because it was filed within the 180-day window after entry of the collateral order. *See* Fed. R. App. P. 4(a)(7)(A)(ii).

Noland is illustrative of this Court's repeated (and seemingly consistent) practice of dismissing collateral-order appeals as untimely because parties didn't appeal within thirty days of the entry of the collateral order. *See Clifford v. Rice*, 189 F.3d 472 (9th Cir. 1999) (table); *Titus v. County of Los Angeles*, 308 F. App'x 210 (9th Cir. 2009); *Pena v. Meeker*, 298 F. App'x 562 (9th Cir. 2008). In each of these cases, no separate document was ever issued. *See* Docket, *Clifford v. Rice*, (W.D. Wash. 1995) (No. 2:95-cv-00780-RSL); Docket, *Titus v. County of Los Angeles*, 2006 WL 8443072 (C.D. Cal. Oct. 20, 2006) (No. 2:06-cv-03690-ODW); Docket, *Pena v. Meeker*, 2007 WL 9761667 (N.D. Cal. Jan. 24, 2007) (No. 00-cv-04009-CW). And, as in *Noland*, if a separate document were required for collateral-order appeals, the appeals in each of these cases would have been timely, because the parties filed their appeal

within 180 days of entry of the collateral order. *See* Fed. R. App. P. 4(a)(7)(A)(ii). But because this Court does not impose a separate-document requirement for collateral orders, the time limit for appeal began when the orders were entered, and the appeals were dismissed as untimely.

That's unsurprising because it is the consistent practice of district courts to enter collateral orders without an accompanying separate document. For example, this Court decided eighteen interlocutory-appeal cases concerning the denial of qualified immunity between June and November of 2024. *See* Attached Addendum. Of these eighteen cases, district courts entered separate documents in zero. *See id.*

We are unaware of any case where this Court has allowed a collateral-order appeal that was filed more than thirty days after the entry of the interlocutory order being appealed. Defendants' contrary out-of-circuit decisions do not undermine this Court's consistent practice or the analysis discussed above, including Section 2107, a statutory provision that those decisions entirely ignore. *See* Defs.' Opening Br. 14-15 (citing *Abdulwali v. Washington Metro. Area Transit Auth.*, 315 F.3d 302, 304 (D.C. Cir. 2003); *Ueckert v. Guerra*, 38 F.4th 446, 450-53 (5th Cir. 2022)).

C. Practical considerations weigh against imposing a separate-document requirement for collateral-order appeals.

Requiring the issuance of separate documents in collateral-order appeals would increase confusion and reduce judicial efficiency. Recall that the purpose of a separate document is to provide clarity for the litigants by

signaling when the court believes it has issued a final, appealable decision. *See supra* at 19. Under Defendants' reading, a collateral order unaccompanied by a separate document could be appealed up to 180 days after the order was entered.

This extended time to appeal would open the door to a variety of inefficiencies. For example, the district court could proceed to trial, and then, on day 180, the defendant could appeal—mid-trial, or amid pre-trial preparation—which would delay resolving the case on the merits and be fundamentally unfair to the prospective appellee. Or the defendant, knowing that the district court has not issued a separate document, could take unfair advantage of the situation. If things are going well in the case on day 170, the defendant could forgo an appeal; if things are going poorly, the defendant could appeal. One circuit that (incorrectly) adopted Defendants' approach noted this practical problem. *See Ueckert v. Guerra*, 38 F.4th 446, 455 (5th Cir. 2022).

Moreover, it is often difficult to determine what qualifies as an appealable collateral order, which is anything but straightforward. Under *Johnson v. Jones*, interlocutory district-court rulings denying qualified immunity are not appealable if they seek resolution of factual disputes. 515 U.S. 304, 313 (1995). Denials of collateral-order appeals on *Johnson* grounds are common, *see, e.g., Est. of Anderson v. Marsh*, 985 F.3d 726, 733-34 (9th Cir. 2021); *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1170 (9th Cir. 2013); *Collins v. Jordan*, 110 F.3d 1363, 1374 (9th Cir. 1996), and a separate-

document requirement would force district courts to stop and parse which qualified-immunity decisions are purely legal and which involve factual disputes. Indeed, in this case, Defendants have failed to appreciate that they are seeking resolution of factual disputes, which, under *Johnson*, are not properly before this Court. *See infra* at 32-33, 35-36. District courts may, out of an abundance of caution, issue separate documents on *every* collateral-order determination, even those that present non-appealable *Johnson* situations. This would turn the signaling function on its head and cause an influx of wasteful qualified-immunity appeals in cases over which courts of appeals lack jurisdiction under *Johnson*.

Furthermore, Defendants' interpretation of the rules would apply to *all* appealable interlocutory orders, including appeals under 28 U.S.C. § 1292(a)(1) and the *Carson* progeny that accompanies it. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 86-90 (1981). This would mean that a district court would need to issue a separate document whenever it was "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). And just like it is often difficult to determine whether a denial of qualified immunity is appealable in light of *Johnson*, it is also sometimes very hard to know whether an order is injunctive "in character." *Carson*, 450 U.S. at 88-90. (1981); *see, e.g., In re Touch Am. Holdings, Inc. Erisa Litig.*, 563 F.3d 903, 906 (9th Cir. 2009).

District courts should not have to waste time parsing these issues, and litigants should not have to navigate increased confusion if district courts make a mistake. For these practical reasons, as well as the others discussed above, Defendants' notice of appeal was untimely, and this Court should dismiss for lack of jurisdiction.

II. McNeil's procedural due-process right was violated.

A procedural due-process violation occurs when a person was (1) deprived of a liberty interest, and (2) not afforded the process he was due. *Melnik v. Dzurenda*, 14 F.4th 981, 985 (9th Cir. 2021). Because both elements are satisfied here, the district court correctly granted McNeil partial summary judgment.

A. Defendants have waived the right to argue that McNeil lacks a liberty interest.

Defendants waived their right to argue that McNeil lacks a due-process liberty interest, so they cannot raise that argument for the first time on appeal. Waiver occurs "when a defendant 'considered the controlling law ... and, in spite of being aware of the applicable law,' relinquished his right." *United States v. Depue*, 912 F.3d 1227, 1233 (9th Cir. 2019) (quoting *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997)). Defendants, represented by the Attorney General of Nevada, would have considered the controlling law before writing that they "do not dispute that McNeil's liberty interests were implicated, as he was placed in red [tag] status pending his disciplinary hearing, and the disciplinary panel ultimately imposed a sanction of loss of

statutory time." 2-ER-177. Therefore, Defendants knowingly and explicitly waived the right to argue McNeil lacked a liberty interest.

By waiving the element, Defendants "affirmatively acquiesced to the district court's ruling" that a liberty interest was at stake. *Depue*, 912 F.3d at 1232. The magistrate judge stated in the report and recommendation that "Defendants do not dispute that a liberty interest was implicated in connection with the disciplinary action taken against [the] Plaintiff." 1-ER-20. Defendants could have contested this characterization in their objections, but chose not to do so. 2-ER-42-54; *see Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007) (failure to object to report and recommendation favors a finding of waiver on appeal). The district court also acknowledged that "the defendants do not dispute that McNeil's liberty interests were at stake such that due process protections apply." 1-ER-05 n.3.

Because of Defendants' acquiescence, "the district court made no error, plain or otherwise," so "waiver precludes appellate review altogether." *Depue*, 912 F.3d at 1232. Unlike forfeiture, which is reviewed for plain error, waiver forecloses appellate review entirely. *Id.*; *see also United States v. Hernandez-Guardado*, 228 F.3d 1017, 1029 (9th Cir. 2000). Because Defendants explicitly, knowingly, and expressly waived the liberty-interest element of the due-process claim, they cannot raise the issue on appeal.

Defendants contend that McNeil's purported lack of a liberty interest is not a new claim, but a "new argument in support of their consistent claim." Defs.' Opening Br. 39 n.3. Defendants misunderstand the waiver doctrine. A

liberty interest is an *element* of a due-process claim, not an argument in support of it. Waiving the liberty-interest element of the due-process claim is just as binding as waiving the entire claim. In *Costanich v. Department of Social & Health Services*, a due-process suit, the defendant failed to contest the protected liberty-interest element in the district court, and therefore had waived the issue on appeal. 627 F.3d 1101, 1110, 1116 n.15 (9th Cir. 2010); *accord Saavedra v. Scribner*, 482 F. App'x 268, 271 (9th Cir. 2012). The case for waiver here is even stronger than in *Costanich* or *Saavedra*. In those cases, the defense was silent on the liberty-interest issue in the district court, whereas here Defendants actively waived the issue.

Holding Defendants to their waiver is only fair. "A defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense." *Perez v. United States,* 830 F.2d 54, 57 (5th Cir. 1987); *see Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Had McNeil known that Defendants would contest whether they had deprived him of a constitutionally protected liberty interest, he could have presented more evidence. For example, McNeil could have expanded on his complaints in his second-level grievance to Wickham that NDOC Regulation 733.01 (Disciplinary Segregation) was being violated. 2-ER-267. McNeil also could have presented more evidence regarding the consequences of having a "Class A" disciplinary charge on his record, beyond the sanctions directly imposed at the hearing. Several NDOC regulations state or imply that inmates convicted of more serious offenses experience collateral consequences, like administrative segregation, transfer

to a different facility, and the inability to work certain jobs.[4] None of these consequences were fully presented or scrutinized at the district-court level precisely because Defendants waived the issue.

B. Defendants violated McNeil's due-process right to view the evidence he requested.

The district court correctly concluded that McNeil had a right to view the evidence he requested. McNeil asked for the mail and positive test result, and Defendants improperly denied him access to this evidence. McNeil also sought all other evidence against him. Insofar as Defendants challenge the scope of this latter request, this Court does not have jurisdiction to review Defendants' argument, which lacks merit anyway. Lastly, McNeil properly preserved his request for documents by repeatedly making the request to prison officials.

1. McNeil had a right to view all the evidence he requested.

Prisoners facing disciplinary proceedings have a right to access the evidence used against them. This right extends to *all* evidence used in the

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[4] *See* NDOC Admin. Regul. 506, https://doc.nv.gov/About/Administrative_Regulations/Administrative_Regulations__500_Series/ (last visited Dec. 6, 2024) (Classification Schedule) (detailing the process for classification and reclassification of prisoners upon disciplinary proceedings); *id.* at 507 (Restrictive Housing); *id.* at 508 (Disruptive Group Segregation); *id.* at 516 (Level System) (detailing the system by which prisoners are classified and corresponding privileges associated with good behavior).

proceeding, not just evidence that prison officials maintain is exculpatory. *Contra* Defs.' Opening Br. 44-46. An incarcerated person "could neither build a defense nor develop arguments … to contest [his] allegations at the disciplinary hearing" if there was "no access to the evidence that will be presented against him." *Melnik v. Dzurenda*, 14 F.4th 981, 985 (9th Cir. 2021). So, for an incarcerated person "to respond to evidence presented against him, … he should be allowed to know what it is and to examine it." *Id.* at 986.

This right to view all requested evidence stems from the due-process right to defend oneself in a prison disciplinary proceeding. *See Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). *Wolff* sets forth the proper standard to determine whether a prisoner received due process in a prison disciplinary proceeding. *See Sandin v. Conner*, 515 U.S. 472, 483 (1995). Defendants invoke *Hewitt v. Helms*, 459 U.S. 460 (1983), to argue that a lower due-process standard applies, Defs.' Opening Br. 35, but *Hewitt*'s test has been abrogated in the prison context, *Sandin*, 515 U.S. at 482-84; *see Myron v. Terhune*, 476 F.3d 716, 718-19 (9th Cir. 2007). To ensure a fair hearing, an incarcerated person "facing disciplinary proceedings should be allowed to … present documentary evidence in his defense when permitting him to do so will not be unduly hazardous." *Wolff*, 418 U.S. at 566. For this right "to mean anything," a prisoner needs access to all evidence against him. *Melnik*, 14 F.4th at 986.

This Court in *Melnick* recognized the right to view evidence in nearly identical circumstances to those here. There, the prison seized drug-laced envelopes addressed to Melnik and charged him with smuggling drugs into the prison. The prison did not allow him to examine the envelopes or copies of them. *Melnik*, 14 F.4th at 984. Melnik was found guilty at his disciplinary hearing based on undisclosed copy images of the envelopes and its content. *See id.* This Court held that Melnik had a due-process right to access "the envelopes or copies of them" because they were "used as evidence against him in the prison disciplinary hearing" and were relevant for his defense. *Id.* at 985-87.

Like the prison in *Melnik*, ESP here denied McNeil's request to view the evidence used against him—the mail, the positive test result, and other documents. 2-ER-143; 3-ER-331; 2-ER-265. So, like Melnik, McNeil could not "marshal all [the] facts" to meaningfully defend himself. 2-ER-265, 67. By denying him access to the evidence, the prison deprived McNeil of the process he was due.

2. Defendants improperly denied McNeil's request to view the mail and positive test result.

McNeil requested the mail and positive test result, but the prison denied him access to this evidence. 3-ER-331; 2-ER-262, Audio Recording at 2:40-2:55; 2-ER-305. Defendants argue that McNeil's requests were unclear because he asked for only the originals, not copies. Defs.' Opening Br. 46-49. That's wrong. The requests clearly included a demand for copies. And the

prison lacked any other valid reason to withhold the mail and test result evidence.

Clarity of McNeil's requests. A request for evidence "need not be extremely detailed, … but it should be sufficient to put the prison official on notice of what is sought." *Melnik v. Dzurenda*, 14 F.4th 981, 987 (9th Cir. 2021). McNeil's requests for the mail and positive test result put Defendants on notice.

Under this Court's precedent, McNeil's request to review the mail put Defendants on notice that he asked for copies. 3-ER-331. "[R]equesting the right to inspect a document should be understood to include the alternative of a copy of a document … unless the prisoner specifically indicates that only the original will do." *Melnik*, 14 F.4th at 987. This rule follows from the broader principle that requests "need not be extremely detailed" but need only "put the prison official on notice of what is sought." *Id.*

Defendants' regulations show that they were on notice that McNeil's request for evidence included a request for copies. NDOC Administrative Regulation 707.1(3)(C)(9)(b) states that "the inmate shall receive copies of any evidentiary documents" that the disciplinary hearing committee considers, with certain exceptions not applicable here. *See* 2-ER-237. Defendants therefore knew they had to provide McNeil copies of the mail.

Defendants argue that *Melnik*'s statement equating a request to review documents with a request to review copies is dicta. Defs.' Opening Br. 47. But when a point is "germane" to a case's holding, and this Court "resolves

it after reasoned consideration in a published opinion, that ruling becomes the law." *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001). As explained above, *Melnik* offered a reasoned explanation why copies are encompassed by a request for evidence. And that reasoning is germane to the Court's holding because it clarifies the prison's obligation to ensure that Melnik's request for the evidence was satisfied. Therefore, *Melnik*'s statement is binding.

Turning to the positive test result, McNeil sought the result itself. This request has nothing to do with copies. McNeil asked for the "positive test result for an intoxicant," not the tested drugs themselves. 3-ER-331. Alternatively, his request included any necessary copies, as explained above.

Defendants' inadequate response. Defendants did not provide a valid reason for withholding the mail and positive test result. Prison officials can withhold evidence only when providing it would be "unduly hazardous to institutional safety or correctional goals." *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). "Prison officials may be required to provide an explanation when they deny a prisoner access to evidence," and if they don't, due process is violated. *See Melnik*, 14 F.4th at 987. The reason for the denial must be legitimate and "may not be arbitrary." *Id.* at 986-87.

Here, Defendants did not give any valid reason for withholding the mail and positive test result. Defendants' stated rationale—that the evidence had drugs on them, 2-ER-305—applies to the original mail and positive test only

if they both contained residue of the drugs. But because McNeil's request included copies, *see supra* at 29-31, Defendants' rationale is a non sequitur.

Also, Defendant Homan suggested that a blanket rule bars inmates from viewing evidence held in ESP's vault "due to institutional safety and security issues." *See* 2-ER-305. "[W]ithout proof of any actual threat to institutional safety," such "blanket proscription[s]" do not satisfy due process. *Bartholomew v. Watson*, 665 F.2d 915, 918 (9th Cir. 1982). So, this purported rationale for withholding the evidence also is invalid.

Even if Defendants had identified a "valid penological reason" for withholding evidence, they needed to "consider whether alternative avenues are available to provide the inmate with pertinent information included in that evidence." *Lennear v. Wilson*, 937 F.3d 257, 271-72 (4th Cir. 2019). They failed to do so. Defendants themselves have acknowledged that they had an alternative way for McNeil to access the information from the evidence: They had taken "photos of [the] envelopes, contents and the presumptive positive test result." 2-ER-204.

3. This Court lacks jurisdiction to review the clarity of McNeil's request for other evidence, but, in any event, the request was sufficiently clear.

In addition to asking for the mail and test result, McNeil sought "all the evidence against" him, including the "additional evidence in the ESP vault." 2-ER-265; 3-ER-331. The district court found that a dispute of fact existed as to what other evidence McNeil sought. 1-ER-11-12. Defendants arguably

challenge this finding on appeal, contending that "McNeil had no right to any other documents because his request lacked the 'clarity' required by *Melnik*." Defs.' Opening Br. 48.

Lack of jurisdiction. To the extent that Defendants argue that McNeil's request for other documents was not sufficiently clear, they are taking sides in a factual dispute. This Court lacks jurisdiction to review this issue on an interlocutory basis.

Denials of qualified immunity are immediately appealable only when they ask a legal question: "whether or not certain given facts show[] a violation of 'clearly established' law." *Johnson v. Jones*, 515 U.S. 304, 311 (1995). But factual disputes are not immediately appealable. *See id.* at 311-13; *Est. of Anderson v. Marsh*, 985 F.3d 726, 734 (9th Cir. 2021). That is, "which facts a party may, or may not, be able to prove at trial" cannot be appealed in this interlocutory posture. *Johnson*, 515 U.S. at 313.

Insofar as Defendants appeal McNeil's request for "any other documents," *see* Defs.' Opening Br. 48-49, they are questioning the district court's finding that a factual dispute exists over the clarity of McNeil's request for the "evidence used against him," 1-ER-9-12; *see Est. of Anderson v. Marsh*, 985 F.3d 726, 734 (9th Cir. 2021). A jury will have to sift through McNeil's words and their context to decide if McNeil made a clear request for other documents. The clarity of McNeil's request is therefore an issue of fact, which is why this Court lacks jurisdiction.

Clarity of request. If this Court reaches this issue, McNeil's request put Defendants "on notice of what is sought." *Melnik*, 14 F.4th at 987. McNeil's request for other documents did not "need [to] be extremely detailed, particularly [because he] ha[d] no way of ascertaining or describing the precise form of the evidence he seeks." *Id*. The prison gave McNeil the Notice of Charges that mentioned the envelope, address label, positive test result, recorded calls, and "additional evidence" in ESP's vault. *See* 2-ER-218. After receiving these charges, McNeil asked for the evidence against him that Defendants listed in their Notice. 2-ER-265; 3-ER-331.

4. McNeil properly raised his request to prison officials.

Defendants argue that McNeil abandoned his claim to review the documents at his disciplinary hearing by not reasserting his request then. Defs.' Opening Br. 49-51. But Defendants never raised this argument before the district court, and this Court does not generally "consider arguments that are raised for the first time on appeal." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999); *see Wolf v. Life Ins. Co. of N. Am.*, 46 F.4th 979, 982 (9th Cir. 2022).

In any case, Defendants' abandonment argument is wrong on its own terms. McNeil properly raised his request before prison officials. McNeil first asked to view the evidence in his preliminary hearing. *See* 2-ER-221; 3-ER-330-31. He then asked to review the evidence in his grievance appeals. *See* 2-ER-265-67; 2-ER-269-70. Defendants were on notice of what he sought. This

case is thus unlike *Darden v. Von Blanckensee*, 804 F. App'x 820, 821 (9th Cir. 2020), on which Defendants rely, where the prisoner never asked for documents at any stage of his disciplinary proceeding.

Besides, the disciplinary committee preemptively discouraged any request for evidence that McNeil might have reasserted at the hearing. At the beginning of his disciplinary hearing, Homan told McNeil: "There's more behind it as well that you don't have access to." 2-ER-262, Audio Recording at 2:41-52. Because McNeil was told up front that he would not have access to the additional evidence, McNeil cannot be faulted for not re-requesting it.

Accepting (counterfactually) that McNeil never properly raised his request for evidence, his claim regarding the denial of evidence is still preserved. The Warden and Deputy Director denied McNeil's appeals on the substantive ground that the hearing was procedurally adequate, without suggesting McNeil forfeited this issue. *See* 2-ER-266-72. Put differently, the Warden and Deputy Director ruled on the merits. When an administrative body substantively resolves the merits of an issue not presented by the parties, the issue is preserved for appellate review. *BIA Maie v. Garland*, 7 F.4th 841, 846 (9th Cir. 2021).

C. Harmless error is not a defense.

Defendants assert that their deprivation of McNeil's due-process right is not actionable because it was harmless. Defs.' Opening Br. 51-54. That is incorrect. First, the question of harmless error is a factual inquiry, not a legal one. Courts must examine the factual evidence to decide whether the error

affected the outcome. As discussed above (at 32-33), factual questions are not appealable on interlocutory collateral-order review. *See Johnson v. Jones,* 515 U.S. 304, 313 (1995). So, this Court lacks jurisdiction to consider whether any error was harmless.

In any case, harmless-error analysis does not apply to deprivations of procedural due process in the context presented here. When a person is deprived of constitutionally required due process, "it is no answer to say that in [a] particular case[,] due process of law would have led to the same result because [the party] had no adequate defense upon the merits." *Peralta v. Heights Med. Ctr., Inc.* 485 U.S. 80, 86-87 (1988) (quoting *Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424 (1915)). In other words, "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

Following these time-honored principles, this Court has held "that subsequent … procedures, even if they include *de novo* review," cannot cure previous deprivations of procedural due process. *Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 333-34 (9th Cir. 1995) (relying on *Carey*, 435 U.S. at 266-67). Harmless error does not apply here, then, because "[o]btaining full relief on the underlying substantive claim does not remedy the initial procedural injury." *Id.* McNeil had an "absolute right" to procedural due process, and "'the law recognizes the importance to organized society that

those rights be scrupulously observed.'" *Id.* (quoting *Carey*, 435 U.S. at 266-67).

To the extent that this Court has considered harmless error in procedural due-process cases, it has not been viewed as a defense to liability but rather concerns the amount of damages that may be available. *See Floyd v. L.*, 929 F.2d 1390, 1402 (9th Cir. 1991). McNeil's damages will be sorted out in the district court, but are not at issue here.

Defendants' other arguments also fail. Defendants point to *Graves v. Knowles*, 231 F. App'x 670 (9th Cir. 2007), and *Howard v. U.S. Bureau of Prisons*, 487 F.3d 808 (10th Cir. 2007), but they are habeas decisions that apply harmless-error analysis to decide whether to overturn a conviction. The habeas framework is inapplicable here. Defendants invoke out-of-circuit precedent, *see Henderson v. Harmon*, 102 F.4th 242 (4th Cir. 2024), and *Nelson v. Stevens*, 861 F. App'x 667 (7th Cir. 2021), which, we acknowledge, apply harmless-error analysis to due-process claims. Those decisions squarely conflict with this Court's due-process precedent and run counter to foundational Supreme Court decisions on which that precedent is based. *See supra* at 35-36.

Finally, even if harmless error were an applicable defense, Defendants have not met their burden of showing that the due-process violation here was harmless. *See Chapman v. California*, 386 U.S. 18, 24 (1967). To start, Defendants failed to raise a harmless-error defense in the district court, so the issue has been forfeited. *Kaufmann v. Kijakazi*, 32 F.4th 843, 847 (9th Cir.

2022); *A-1 Ambulance Serv., Inc. v. County of Monterey*, 90 F.3d 333, 339 (9th Cir. 1996), *as amended* (July 31, 1996). And because Defendants did not even raise the issue below, they (of course) did not present any evidence regarding harmless error. Had Defendants given McNeil access to the evidence—that is, the process that he was due—there's no way of knowing the outcome of his disciplinary hearing.

III. Roman, Gittere, and Wickham each carried out or participated in affirmative acts that deprived McNeil of due process.

Defendants are liable under Section 1983 if they carried out or participated in an affirmative act that caused a constitutional violation. *Preschooler II v. Clark Cnty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1183 (9th Cir. 2007). This inquiry is "individualized and focus[es] on the duties and responsibilities" of each official whose acts caused the constitutional deprivation. *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). So, the question is whether Defendants' conduct deprived McNeil of due process.

Defendants argue that they are liable only if they personally deprived McNeil of the liberty interest underlying his due-process right. Defs.' Opening Br. 30. That's wrong. Rather, "[w]here a person is entitled to certain process, the failure to provide it can deprive the individual of a procedural due process right." *Murguia v. Langdon*, 61 F.4th 1096, 1107 (9th Cir. 2023); *see also Armstrong v. Reynolds*, 22 F.4th 1058, 1070-71 (9th Cir. 2022). Put differently, officials are liable when they participate in the deprivation of

process—even if the deprivation of the liberty interest was completed by a different official or happened separately from the deprivation of process.

Defendants violated McNeil's right to procedural due process when they failed to provide McNeil with the process he was due: the ability to view the evidence against him in his prison disciplinary hearing. Defendants—Sergeant Roman, Warden Gittere, and Deputy Director Wickham—all carried out or participated in acts that denied McNeil the ability to view the evidence against him. Roman conducted McNeil's preliminary hearing and denied him access to evidence, and Warden Gittere and Deputy Director Wickham exacerbated McNeil's injury when they denied his grievance on appeal.

Sergeant Roman. At the preliminary hearing, McNeil asked Roman for the evidence detailed in his Notice of Charges. 3-ER-330-31; 2-ER-221. As explained (at 27-32), once McNeil requested this evidence, Roman was legally required to provide it to him. But Roman didn't provide the evidence. 3-ER-330-31. Quite the contrary, he responded, "[G]ood luck with that." 3-ER-331. Three days later, when McNeil had his formal disciplinary hearing, Roman still had not given McNeil any of the evidence he requested. 2-ER-212-16; 2-ER-305.

Warden Gittere and Deputy Director Wickham. Gittere's and Wickham's denial of McNeil's appeals deprived McNeil of his due-process right to the evidence he requested. After McNeil's disciplinary hearing, he filed a first-level appeal to Gittere. 2-ER-268-70. In that appeal, McNeil

maintained that he had not been given access to the evidence against him before or during his disciplinary hearing. 2-ER-268-70. After Gittere denied the appeal, McNeil filed a second-level appeal to Wickham on the same ground, which Wickham rejected. 2-ER-265-66; 2-ER-271. As the district court observed, and Defendants do not dispute, Gittere and Wickham were empowered, through NDOC regulations, to correct any errors in disciplinary hearings that they identified. *See* 2-ER-244-45; NDOC Admin. Regul. 740.05.[5] They failed to do so.

Gittere and Wickham are liable because they were administrative officials with authority to remedy the deprivation of McNeil's right, which is sufficient to impose liability under Section 1983. *See Colwell v. Bannister*, 763 F.3d 1060, 1065, 1070-71 (9th Cir. 2014) (holding that a doctor's denial of an inmate's second-level grievance based on an administrative policy was sufficient participation to impose Section 1983 liability); *Snow v. McDaniel*, 681 F.3d 978, 989 (9th Cir. 2012) (holding a prison warden's and associate warden's failures to act was sufficient participation when they were aware, through the grievance process, that the prisoner needed surgery), *overruled on other grounds* by *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014). Though Defendants are correct that officers who deny administrative appeals sometimes may escape liability, *see* Defs.' Opening Br. 32, that is so only when the officers lack the authority to remedy the constitutional violation.

[5] https://doc.nv.gov/About/Administrative_Regulations/Administrative_Regulations__700_Series/.

Because Gittere and Wickham had the decision-making authority to remedy McNeil's due-process deprivation, they can be held liable.

IV. Defendants are not entitled to qualified immunity because McNeil's due-process right was clearly established.

The district court correctly held that Defendants are not entitled to qualified immunity on McNeil's damages claim. 1-ER-10-11. Qualified immunity applies only to damages claims. *Hydrick v. Hunter*, 669 F.3d 937, 939-40 (9th Cir. 2012). McNeil is also requesting injunctive relief by asking for the disciplinary violation at issue here to be expunged from his record. 3-ER-344. And he also seeks any other proper relief, *see* 3-ER-344, which includes requiring Defendants to provide him an adequate due-process hearing, *see* Fed. R. Civ. P. 54(c).

Turning to McNeil's claim for damages, to overcome qualified immunity, McNeil must show (1) a violation of a constitutional or statutory right, and (2) that the right was "clearly established at the time of the alleged violation." *Sandoval v. Las Vegas Metro. Police Dep't*, 756 F.3d 1154, 1160 (9th Cir. 2014). As previously explained (at 24-35), Defendants violated McNeil's due-process right.

To determine whether a right is clearly established, this Court must ask if "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Walker v. Gomez*, 370 F.3d 969, 978 (9th Cir. 2004); *see Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003). In *Melnik*, this Court held that at the time of the constitutional violation, in 2014 and 2015,

the plaintiff's right to receive all the requested evidence at a prison disciplinary hearing was already clearly established. *See Melnik v. Dzurenda*, 14 F.4th 981, 988-90 (9th Cir. 2021); *Melnik v. Dzurenda*, 2020 WL 607122, at *1 (D. Nev. Feb. 7, 2020), *aff'd and remanded*, 14 F.4th 981 (9th Cir. 2021). Clearly, by 2020, when the violations occurred here, Defendants were on notice that denying McNeil's evidence requests was unlawful.

This holding in *Melnik* was not a "newly minted assertion." *Contra* Defs.' Opening Br. 54. *Melnik* clarified the contours of the right to present evidence in disciplinary proceedings that *Wolff* had clearly established decades earlier. *See Wolff v. McDonnell*, 418 U.S. 539, 566 (1974). As explained above (at 27-29), to meaningfully present evidence for a defense, the inmate must have access to the evidence he requested. That is why courts post-*Wolff* have consistently taken the same approach that this Court took in *Melnik*. *See, e.g.*, *Smith v. Mass. Dep't of Correction*, 936 F.2d 1390, 1401 (1st Cir. 1991); *Young v. Kann*, 926 F.2d 1396, 1402 (3d Cir. 1991); *Lennear v. Wilson*, 937 F.3d 257, 268-70 (4th Cir. 2019); *Chavis v. Rowe*, 643 F.2d 1281, 1285-86 (7th Cir. 1981). *Melnik* relied on both *Wolff* and the "robust 'consensus of cases of persuasive authority,'" which clearly established the right here. *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)); *see Melnik*, 14 F.4th at 986 (collecting cases).

Conclusion

This Court should dismiss Defendants' untimely appeal for lack of jurisdiction. If this Court reaches the merits, it should affirm the district

court's grant of partial summary judgment to McNeil and remand for a trial on damages and on the question whether Defendants denied McNeil's request for other documents. After the trial, the district court may award any appropriate injunctive relief. *See* Fed. R. Civ. P. 54(c).

Respectfully submitted,

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December 6, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Attached Addendum

Ninth Circuit Collateral Appeals from District Court Denials of Qualified Immunity (June 1, 2024 – November 30, 2024)[1]

Ninth Circuit case	**District court case**	**Separate document entered?** (Time between order and notice of appeal)
Carley v. Aranas, No. 23-15271, 103 F.4th 653 (9th Cir. June 3, 2024)	*Carley v. Neven*, No. 2:17-cv-02346, 2023 WL 405029 (D. Nev. Jan. 25, 2023) (ECF 104)	No (30 days)
Reynolds v. Preston, No. 23-15504, 2024 WL 2891205 (9th Cir. June 10, 2024)	*Reynolds v. Preston*, No. 3:22-cv-08408, 2023 WL 2825932 (N.D. Cal. Mar. 15, 2023) (ECF 22)	No (20 days)
Taylor v. Neves, No. 23-15507, 2024 WL 3177803 (9th Cir. June 26, 2024)	*Taylor v. City & County of Honolulu*, No. 1:22-cv-00013, 666 F. Supp. 3d 1098 (D. Haw. Mar. 31, 2023) (ECF 143)	No (4 days)

[1] The methodology for creating this chart is as follows. We performed a Westlaw search of all Ninth Circuit cases decided between June 1, 2024, and November 30, 2024, that contained the phrase "qualified immunity." We then manually went through each case and eliminated any cases in which (1) the district court granted the defendants' request for qualified immunity; (2) a party appealed a denial of qualified immunity after a jury award and final judgment was entered; or (3) qualified immunity was never invoked or ruled on. The remaining cases all stemmed from collateral-order appeals after a district court denied qualified immunity. We then used PACER to determine whether any separate document had been entered by the district court and when the appellants filed their notices of appeal.

Lopez v. City of Mesa, No. 22-15278, 2024 WL 3250380 (9th Cir. July 1, 2024)	*Lopez v. City of Mesa*, No. 2:19-cv-04764, 2022 WL 363994 (D. Ariz. Feb. 3, 2022) (ECF 83)	No (20 days)
Rosenbaum v. City of San Jose, No. 22-16863, 107 F.4th 919 (9th Cir. July 11, 2024)	*Rosenbaum v. Dunn*, No. 5:20-cv-04777, 2022 WL 17491969 (N.D. Cal. Nov. 28, 2022) (ECF 144)	No (2 days)
Selto v. County of Clark, No. 23-2531, 2024 WL 3423717 (9th Cir. July 16, 2024)	*Selto v. Clark County*, No. 3:22-cv-05384, 2023 WL 6311284 (W.D. Wash. Sept. 28, 2023) (ECF 65)	No (1 day)
Scott v. Smith, No. 23-15480, 109 F.4th 1215 (9th Cir. July 30, 2024)	*Scott v. Smith*, No. 2:20-cv-01872, 2023 WL 22504499 (D. Nev. Mar. 14, 2023) (ECF 32)	No (15 days)
Eyre v. City of Fairbanks, No. 23-35206, 2024 WL 3688540 (9th Cir. Aug. 7, 2024)	*Eyre v. City of Fairbanks*, No. 4:19-cv-00038, 2023 WL 2188457 (D. Alaska Feb. 23, 2023) (ECF 95)	No (26 days)
Williams v. City of Sparks, No. 23-15465, 112 F.4th 635 (9th Cir. Aug. 9, 2024)	*Williams v. City of Sparks*, No. 3:22-cv-00197, 2023 WL 2634377 (D. Nev. Mar. 24, 2023) (ECF 38)	No (3 days)
Rock v. Miller, No. 23-16009, 2024 WL 3811396 (9th Cir. Aug. 14, 2024)	*Rock v. Cummings*, No. 2:20-cv-01837, 2023 WL 4315222 (D. Ariz. July 3, 2023) (ECF 84)	No (14 days)
Sanderlin v. Dwyer, No. 23-15487, 116 F.4th 905 (9th Cir. Sept. 4, 2024)	*Sanderlin v. City of San Jose*, No. 5:20-cv-04824, 2023 WL 2562400 (N.D. Cal. Mar. 16, 2023) (ECF 122)	No (13 days)

M.H. v. Hamso, No. 23-35485, 2024 WL 4100235 (9th Cir. Sept. 6, 2024)	*M.H. v. Jeppesen*, No. 1:22-cv-00409, 677 F. Supp. 3d 1175 (D. Idaho June 20, 2023) (ECF 36)	No (28 days)
Jackson v. Germono, No. 23-4408, 2024 WL 4144074 (9th Cir. Sept. 11, 2024)	*Estate of Wilson by and through Jackson v. County of San Diego*, No. 3:20-cv-00457, 2023 WL 8360718 (S.D. Cal. Dec 1, 2023) (ECF 142)	No (21 days)
Hartley ex rel. E.G. v. Hughes, No. 23-15932, 2024 WL 4234485 (9th Cir. Sept. 19, 2024)	*Hartley ex rel. E.G. v. Hughes*, No. 2:21-cv-01098 (D. Ariz. June 5, 2023) (ECF 79)	No (22 days)
Gadsden v. McGrath, No. 23-4038, 2024 WL 4441493 (9th Cir. Oct. 8, 2024)	*Gadsden v. McGrath*, No. 3:20-cv-02258, 2023 WL 11952991 (S.D. Cal. Nov. 8, 2023) (ECF 69)	No (29 days)
Anderson v. Perez, No. 23-2790, 2024 WL 4471306 (9th Cir. Oct. 11, 2024)	*Anderson v. Perez*, No. 2:21-cv-04290, 2023 WL 8881512 (C.D. Cal. Sept. 8, 2023) (ECF 92)	No (28 days)
Gorsline v. Randall, No. 23-15853, 2024 WL 4615742 (9th Cir. Oct. 30, 2024)	*Gorsline v. Daniels*, No. 3:21-cv-00019, 674 F. Supp. 3d 968 (D. Nev. May 23, 2023) (ECF 45)	No (13 days)
Cluse v. Rowden, No. 24-2045, 2024 WL 4919508 (9th Cir. Nov. 29, 2024)	*Cluse v. Coconino County*, No. 3:21-cv-08169, 2024 WL 1513105 (D. Ariz. Feb. 28, 2024) (ECF 84)	No (28 days)