No. 13-56152

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM ROUSER,

Plaintiff-Appellant,

v.

THEO WHITE, ET AL,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
2:11-cv-09123-RGK-JEM

APPELLANT'S OPENING BRIEF

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***APPOINTED THROUGH THE PRO BONO PROGRAM**

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Mr. Rouser respectfully requests oral argument, which will aid the Court's decisional process. This case presents detailed factual and procedural considerations as well as novel legal questions involving consent decrees. Mr. Rouser submits that oral argument in this proceeding—in which his counsel was appointed through the Pro Bono Program—will assist the Court in addressing the issues presented and in reviewing the lengthy proceedings in this case.

INTRODUCTION

A deal is a deal, even when a prison strikes it. Mr. Rouser, the appellant, has been fighting for decades for the right to practice his religion in the California prison system on equal footing with other faiths. He *thought* he had finally won his battle in 2011 when a federal district court adopted a carefully negotiated settlement between Mr. Rouser and officials at the California Department of Corrections and Rehabilitation ("Department of Corrections" or "Department") as a judicially enforceable consent decree. But despite agreeing to the wide-ranging obligations in that decree, the Department of Corrections has been backpedaling ever since. The Department's consistent evasion of its agreement culminated in the Department's cursory request that the Consent Decree be dissolved—a request the district court summarily granted. That decision should be reversed.

The district court that oversaw the bulk of Mr. Rouser's litigation—a different court than that which dissolved the decree—has held from the beginning that Mr. Rouser, a devout Wiccan, has a right to practice his religion and to have his religion recognized on equal terms during his incarceration. That court has also found that the Department of Corrections consistently obstructed Mr. Rouser's religious practice through abusive practices with no penological justification. For example, the Department denied Mr. Rouser access to the Witches Bible, his primary religious text, while similarly situated Christian and Muslim prisoners were allowed access to the

Bible and the Qur'an. Defendants interrupted Mr. Rouser's religious ceremonies by blaring Christian rock music. Defendants limited Mr. Rouser's access to religious items such as religious texts, chalices, and candles, creating roadblocks that members of other religious faiths did not encounter when requesting similar items.

These are not isolated events. Rather, they are typical of how the Department of Corrections has treated Mr. Rouser at each prison in which it has confined him. California-wide policies and prison-specific practices have consistently treated Wicca as a second-class faith. Moreover, Mr. Rouser repeatedly lost whatever religious accommodations he had managed to secure from one prison every time the Department transferred him to another one. At one point, prison officials informing Mr. Rouser that he would be transferred actually warned him that he would not be able to practice his religion *at all* at his new institution.

Often representing himself pro se, Mr. Rouser secured a series of impressive victories. Recognizing the seriousness of his allegations, the district court granted Mr. Rouser an extensive preliminary injunction protecting his religious rights in 2010. When Defendants appealed that order, the parties entered mediation. A year later they returned to the district court with a settlement agreement (the "Settlement Agreement" or "Agreement") that Mr. Rouser believed would finally provide him the religious rights for which he had fought so hard. The district court approved that agreement as a consent decree under the Prison Litigation Reform Act (the "Consent

Decree" or "Decree"), giving the agreement the force of a judicial decree, and transferred the case to the Central District of California due to Mr. Rouser's transfer to a prison within that judicial district.

Despite striking this deal with Mr. Rouser—a deal that spared the Department from the grant of injunctive relief and the need to appeal that grant to this Court—the Department has abjectly failed to live up to the Decree. The Department's employees continue to limit Mr. Rouser's access to religious artifacts and religious services in clear contravention of the Decree. The Department then compounded these violations by obstructing Mr. Rouser's attempts to enforce his rights through the Decree's expedited appeals process.

The district court nonetheless terminated the Consent Decree and dismissed all of Mr. Rouser's claims in a 2013 minute order. Even though the district court had found that Defendants failed to comply with the Consent Decree in a November 2012 order, it concluded—in a single paragraph that cites no legal authorities—that Defendants were in "substantial compliance" with the Consent Decree. The district court brushed aside Mr. Rouser's sworn attestations and documentary evidence of noncompliance, declined to conduct Mr. Rouser's requested evidentiary hearing, and generally neglected to conduct a meaningful review of the factual record. This cursory analysis gave short shrift to the decisions of this Court and the California courts. It should be reversed.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this proceeding under 28 U.S.C. § 1331. The district court's decision granted Defendants' motion to vacate and enter a final judgment, and was thus a final order. This Court has jurisdiction over the district court's grant of Defendants' motion to vacate and enter a final judgment under 28 U.S.C. § 1291. The district court entered judgment on March 13, 2013, and Mr. Rouser filed a notice of appeal on April 12, 2013. ER 11 ("I do seek leave to appeal."); *see also Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978) ("[D]ocuments which are not denominated notices of appeal will be so treated when they serve the essential purpose of showing that the party intended to appeal, are served upon the other parties to the litigation, and are filed in court within the time period otherwise provided by Rule 4(a).").[1] The appeal is thus timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), (c).

Moreover, Mr. Rouser's June 16, 2013 filing, ER 5, titled "Notice of Appeal" satisfies the exception outlined in Federal Rule of Appellate Procedure 4(a)(6), which allows a party to reopen the time for filing an appeal when he did not receive timely notice of the entry of judgment. *United States v. Withers*, 638 F.3d 1055, 1061 (9th Cir. 2011) (explaining that the Ninth Circuit "must construe a *pro se* appellant's notice of

[1] The district court's June 7, 2013 order denying Mr. Rouser's April 12, 2013 request for an extension of time did not address Mr. Rouser's notice of appeal, and is thus not relevant to this Court's jurisdictional inquiry. ER 9.

appeal as a motion to reopen the time for filing an appeal when he alleges that he did not receive timely notice of the entry of the order or judgment from which he seeks to appeal"). As Mr. Rouser explained in his filings, *see* ER 5, 10-11, and as is borne out by numerous entries on the docket, *see, e.g.*, ER 9,[2] Mr. Rouser did not receive notice of the March 13, 2013 entry of final judgment as defined under Federal Rule of Appellate Procedure 4(a)(6)(A) until June 10, 2013. Under this Court's precedent, "[w]here a moving party makes an unchallenged assertion that he did not receive timely notice of judgment, and the other Rule 4(a)(6) conditions are not at issue, a district court errs in denying the motion to reopen based solely on the party's failure to learn independently of the entry of judgment." *Withers*, 638 F.3d at 1061-62.

[2] Indeed, instead of mailing the district court's orders to Mr. Rouser, who at that time was proceeding pro se, the Clerk of the Court had been sending them to Richard Bates, a former attorney of Mr. Rouser who was terminated from the case in January 2006. *See, e.g.*, ER 38-51, 67-133, 186-89, 222-24.

STATEMENT OF THE ISSUES

1. Whether the district court erred in concluding that Defendants established substantial compliance with the Consent Decree, where Defendants presented facially insufficient evidence of their compliance and Mr. Rouser set forth numerous uncontroverted examples of their noncompliance.

2. Whether the district court erred in denying Mr. Rouser an evidentiary hearing before terminating the Consent Decree, where Mr. Rouser specifically requested an evidentiary hearing and presented evidence in support of his allegations of noncompliance.

STATUTORY ADDENDUM

Pertinent statutes and rules are set forth in an addendum to this brief.

STATEMENT OF THE CASE

In 1993, William Rouser, an inmate in the Department of Corrections system, filed suit in the U.S. District Court for the Eastern District of California against prison officials, claiming a denial of his right to practice his religion while incarcerated. ER 927-30. A devout Wiccan, Mr. Rouser brought this suit because of his struggle against institutional indifference to, as well as institutional interference with, his ability to worship according to the tenets of his religion.

Throughout the course of this twenty-year litigation, the district court has recognized that Mr. Rouser possesses a right to practice his religion while he is incarcerated and that this right has been violated on multiple occasions by all of the Department of Corrections institutions where he has been housed. Thus, over the course of this litigation, the district court granted Mr. Rouser an extensive preliminary injunction, approved a private settlement agreement in 1997 affirming Mr. Rouser's right to practice Wicca, and denied numerous motions to dismiss and motions for summary judgment brought by Defendants in an attempt to terminate Mr. Rouser's suit. *See, e.g.*, ER 227, 377, 576, 734, 832, 880.

In 2011, Mr. Rouser and Defendants Cate and Cash reached the Settlement Agreement that is the focus of this appeal. ER 208. This Agreement memorialized the rights that the district court had recognized in its preliminary injunction, including the right to access to personal religious items and the right to participate in group

religious services, among others. ER 208-19. On October 18, 2011, the district court approved the agreement and entered a consent decree for prospective relief under the Prison Litigation Reform Act ("PLRA"). ER 206. At this time, by the terms of the Decree, the case was transferred from the Eastern District of California, where it had been litigated since its inception, to the Central District of California. ER 204.

According to the terms of the Consent Decree, the district court retained jurisdiction over the Decree for at least one year, and until Defendants could show substantial compliance with its terms. ER 218. While the district court retained jurisdiction, however, Mr. Rouser could petition the district court for an order to enforce the Decree, ER 217-18, and in the fall of 2012, Mr. Rouser filed such notices outlining Defendants' noncompliance with the terms of the Decree. ER 145, 171, 190. In a November 2012 order, the district court granted in part Mr. Rouser's requests upon finding that Defendants had violated certain terms of the Decree when prison officials desecrated and stole Mr. Rouser's religious items and blocked his internal grievances from the appropriate review process. ER 140.

Less than three months later, Defendants filed a motion to vacate the October 18, 2011 order entering the Consent Decree, dismiss the action with prejudice, and enter final judgment in favor of Defendants. ER 58. In this two-page motion, Defendants asserted that they were fully compliant, and attached a two-page declaration in support. *Id.* Mr. Rouser filed an opposition to the motion, outlining

specific instances of Defendants' noncompliance with the terms of the Decree, as well as additional notices documenting further instances of noncompliance. ER 22, 52, 56. In these filings, Mr. Rouser specifically requested an evidentiary hearing so that he could present supplemental evidence in support of his position. ER 22-23, 54.

Despite the bare record in support of Defendants' conclusory statement of compliance, the district court rejected Mr. Rouser's request for an evidentiary hearing and entered a minute order vacating the October 18, 2011 order, dismissing the action, and granting final judgment in favor of Defendants. ER 2. The district court's minute order is the basis of the instant appeal.

STATEMENT OF FACTS

On May 7, 1993, Mr. Rouser filed a complaint against prison officials seeking to have Wicca "recognized and respected as a religion" in Department of Corrections institutions. ER 929. Alleging that prison officials denied him access to religious artifacts as well as an opportunity to practice Wicca, Mr. Rouser desired that his religion be given "all the rights of other religions." *Id.* These rights, he alleged, include the allowance of religious items and "a place to worship." *Id.* At bottom, Mr. Rouser sought fair treatment of his religion and his right to exercise that religion. Two years later, both the magistrate judge and the district court validated each of these principles, recognizing that Wicca is a religion and that Mr. Rouser is entitled to practice this religion while incarcerated. ER 896-901, 884-86. These initial decisions

shaped the course of the ensuing litigation, which then turned to defining the parameters of Mr. Rouser's right to practice his religion.

At all times relevant to the events at issue in this appeal, Mr. Rouser was an inmate incarcerated in Department of Corrections institutions, most recently at California State Prison – Los Angeles County ("LAC"). ER 2. Defendants White, Gomez, Yates, Ortiz, Flores, Haws, Cash, and Cate were, at times relevant to the events at issue in this appeal, officials employed by the Department of Corrections in various capacities.[3] ER 209, 227-28. The parties to the Agreement at issue in this case are Mr. Rouser, Defendant Cate, Secretary of the Department of Corrections, and Defendant Cash, Warden of LAC. ER 209.

A. Defendants' Violation Of The Parties' 1997 Settlement Agreement And Subsequent Reopening Of Mr. Rouser's Litigation.

Two years after the district court recognized Mr. Rouser's right to practice Wicca in prison, Mr. Rouser reached his first settlement agreement with Defendants. ER 822. The settlement agreement provided Mr. Rouser access to religious items, as well as the ability to participate in religious services. ER 780-81. Under the terms of this private settlement agreement, the district court dismissed Mr. Rouser's claims

[3] Certain additional Defendants were terminated from the case on December 15, 2009, when Mr. Rouser filed a Fourth Amended Complaint that did not name them as Defendants. ER 453. These individuals are not involved in the instant appeal.

without prejudice, ER 822-23, and "retained jurisdiction to enforce the agreement only through reinstatement of the original action." ER 779.

But by 2002, it was clear that Defendants were unwilling to honor the terms of the agreement, and Mr. Rouser had no choice but to petition the district court to reinstate his case. ER 798. In support of his petition, Mr. Rouser averred that prison officials denied him the ability to participate in weekly religious services, failed to process his request to conduct a religious service for the 2002 Yule Sabbat, and refused to deliver religious artifacts that he ordered through prison mail. ER 780-81.

In 2004, the district court reopened Mr. Rouser's case, reversing the magistrate judge's contrary findings and recommendations. The district court reasoned that a review of Defendants' actions was necessary because Mr. Rouser's allegations were sufficient to raise a genuine issue as to whether the prison officials breached the settlement agreement. ER 790. In holding for Mr. Rouser, the district court rejected Defendants' claim that they were in compliance with the settlement agreement, which rested on the argument that Mr. Rouser had only shown isolated instances of noncompliance, and concluded that "a hearing is warranted to determine whether there in fact was a breach." ER 785-87.

Over the next seven years, Defendants attempted to block Mr. Rouser from exercising his religious rights through both judicial and extrajudicial means. Not only did they deny any wrongdoing and seek to have his claims dismissed or decided

against him, but they also retaliated against Mr. Rouser for seeking to enforce his religious rights. Examples of the retaliation Mr. Rouser faced include: transferring him to a new prison facility to avoid a court teleconference for which the district court had ordered Defendants to make Mr. Rouser available, ER 765, 767-68, 769, denying Mr. Rouser access to the prison law library, ER 760, and placing him in Administrative Segregation on the pretext that he had engaged in objectionable conduct over two years prior and at a different institution, during which time prison officials destroyed Mr. Rouser's religious materials, ER 479-80.

Despite Defendants' best efforts, they could not convince the district court to accept their assurances that Mr. Rouser's religious rights were safe. Their failure is unsurprising, given the extensive record of ongoing constitutional violations that Mr. Rouser developed from 2004 to 2010. Often on his own and without representation, Mr. Rouser explained that not only did Defendants continue to deny him access to religious items and the opportunity to participate in group worship, but they also instituted policies and practices that treated the Wiccan faith as a second-class religion. Prison guards would "forget" to release Mr. Rouser and other Wiccans for group worship. ER 303-04, 483-84, 490-91. Defendants would cancel major Wiccan celebrations without rescheduling them. ER 657-58. Every time Mr. Rouser was transferred to a new prison, prison officials would initially deny him the right to order religious items such as those that the district court had found he was entitled to. ER

486, 514. In advance of one of these transfers, Defendants told Mr. Rouser that he would not be able to practice Wicca at the new facility because there was not a Wiccan program there, and upon arrival, he was told that he needed a court order to practice his religion. ER 247-48.

Mr. Rouser also introduced evidence of unconstitutional religious favoritism by Defendants. For example, Wiccan priests approved to minister to Wiccan prisoners could not approve religious order forms, deliver religious items that their followers order through prison mail, or make sure that Wiccan prisoners were released for group services, but priests of other faiths could perform such tasks. ER 575-76, 581-82, 591, 594-95, 630. Additionally, while Defendants stored Wiccan religious objects necessary for group worship in a locked compartment, Defendants stored the religious objects of other faiths in compartments with combination locks that prisoners knew how to open or in unlocked compartments. ER 579-80, 622, 630. Wiccan prisoners were not given the key to their locker, and were often denied access to the compartment during the time designated for group worship. ER 579, 590, 622.

On the strength of this record, Mr. Rouser secured an extensive preliminary injunction in 2010 that would have required Defendants to allow Mr. Rouser to worship according to the tenets of his religion, without interference from prison

officials.[4] ER 258-59. When Defendants indicated that they intended to appeal the district court's order, the parties agreed to mediation of the case in its entirety. ER 225-26.

B. Mr. Rouser Enters Into A Settlement Agreement With Defendants Cate And Cash.

In September 2011, Mr. Rouser and Defendants Cate and Cash reached a joint settlement agreement, which they presented to the district court (the "Agreement" or "Settlement Agreement"). ER 208-221. On October 18, 2011, the district court approved the Agreement and entered a consent decree subject to the Court's enforcement ("Consent Decree" or "Decree"). ER 206. According to its terms, the district court would retain jurisdiction to enforce the Consent Decree for at least one year *and* until Defendants could establish substantial compliance with its terms: "One year after the order approving this Agreement is filed, defendants may move to vacate the order, dismiss this action with prejudice, and enter judgment on the ground that a preponderance of the evidence shows that they have substantially complied with the terms of this Agreement." ER 218.

[4] The preliminary injunction required Defendants (1) to "allow Mr. Rouser to keep and maintain religious texts"; (2) to "allow Mr. Rouser to obtain the group Wiccan items prior to Wiccan group services"; (3) to refrain from taking and/or destroying Mr. Rouser's approved religious artifacts; (4) to "provide a means for Mr. Rouser to order and receive religious items"; (5) to "announce Wiccan services to the same extent they announce services for the main stream faiths"; (6) to "allow Mr. Rouser to access the outdoor, nature-based religious area for group services for the entire scheduled time"; and (7) to "grant Mr. Rouser access to the fire pit adjacent to the Native American sweat lodge during religious services." ER 258-59.

The terms of the Decree, which overlap substantially with the first settlement agreement and the district court's preliminary injunction, guarantee Mr. Rouser a wide range of rights. Although the Decree is wide-ranging, the terms that are directly relevant to the issues presented on appeal are as follows:

As an initial matter, the Decree sets forth the religious items that Defendants must allow Mr. Rouser to order and access, both for his personal use and for group religious services. Mr. Rouser may keep in his possession "approved personal religious items" for personal religious use, such as A Witches Bible Compleat, oil, herbs, stones, and a religious necklace. ER 210-11. As is the case for other religions, Mr. Rouser retains the right to possess his primary religious text, the Wiccan Bible, even when confined in Administrative Segregation. ER 211. The Decree also allows Mr. Rouser access to a different set of items for the group religious services, such as candles and candleholders, incense and incense holders, a chalice or ritual cup, water, an altar and altar cloth, and a small picture or statue of deities. ER 214-18. Unlike the personal religious items, prison officials maintain custody of the group religious items in between the services and are thus charged with keeping them secure. ER 215.

Another significant term in the Decree is Mr. Rouser's ability to attend religious group gatherings, including weekly services (Esbats), weekly religious study groups, and special religious services (Sabbats). Sabbats are held eight times a year, and prison officials are required to "use their reasonable efforts to schedule the

Sabbats on the dates identified." ER 211-12. In light of past grievances, the parties agreed that "[p]rison officials shall use reasonable efforts to ensure that Wiccan religious services and study groups are not shortened or cancelled more often than those for inmates of other religious faiths." ER 213.

The Decree further requires prison officials to make available to Mr. Rouser facilities for these religious services. Specifically, Esbats and Sabbats "shall be held on the outdoor religious activity area designated by the institution for outdoor religious activity," and on Sabbats, Mr. Rouser's access shall include access to an outdoor fire pit that is required for Sabbat services. ER 213. Recognizing that the outdoor area was not completed at the time of the Decree, the parties determined that "[p]rison officials shall have a reasonable time, no longer than sixty days from the date this Agreement is approved by the Court, to make necessary arrangements to provide access." *Id.*

Finally, the Decree's expedited appeals process allows Mr. Rouser's inmate appeals relating to noncompliance with the Decree to skip the "informal, formal, and first levels of appeal," and instead immediately "be processed at the second level by the Warden or his or her designee." ER 217. The expedited-appeals provision serves a critical purpose in light of the obstruction and retaliation that Mr. Rouser has faced throughout the litigation. *Id.*

After the Decree was entered by the district court, the case was transferred from the Eastern District of California, where it had been litigated since its inception, to the Central District of California. This transfer of venue was a condition of the Decree. ER 219.

C. The District Court Holds That Defendants Violated The Consent Decree.

Nine months after the Decree went into force, Defendants still had not complied with a majority of its terms. On July 26, 2012, Mr. Rouser filed a sworn motion to enforce the Consent Decree, as well as a declaration in support, outlining the numerous ways in which prison officials were intentionally interfering with his right to practice his religion. ER 190-93. Indeed, Mr. Rouser averred that prison officials had destroyed religious items kept in the locked closet where group religious items were stored; that the December 2011 Yule Sabbat was unduly cancelled, but the Christian services were not; that the group religious services were terminated indefinitely in May 2012; that prison officials desecrated religious items, taunted Mr. Rouser about his faith, and interrupted group services; that prison officials stole his spiritual bag when he filed a grievance about the destroyed religious items; and that he was denied a Summer Solstice Sabbat in June 2012. *Id.* Prior to receiving Defendants' opposition brief, the district court issued a minute order submitting Mr. Rouser's motion for review and cancelling the scheduled hearing. ER 185.

On August 31, 2012, Defendants filed an opposition brief, as well as exhibits in support, arguing that they were in compliance with the Decree. ER 174-81. On September 12, 2012, Mr. Rouser filed a sworn notice of further violations of the Consent Decree, contending that prison officials told him that he could not order incense or incense holders and prevented him from ordering candles. ER 171-72. As a result of their actions, Mr. Rouser was forced to attend two consecutive Sabbat services without the religious artifacts that he required and was due. *Id.* Mr. Rouser also indicated that the prison officials continued their campaign of intimidation by restricting his ability to work on the outdoor religious area and refusing him access to medical treatment. *Id.*

A month after filing his notice of further violations, Mr. Rouser filed a sworn request for an evidentiary hearing and a reply to Defendants' opposition brief on the motion to enforce the consent decree, each outlining violations that had occurred in the interim. In the request for an evidentiary hearing, Mr. Rouser asserted that prison officials had: placed him in Administrative Segregation as retaliation for his recent filings and denied him his Bible while there; cancelled his Autumn Equinox Feast of the Harvest Sabbat; continued to prevent him from ordering candles and incense; and would not allow him to finish the outdoor religious area or utilize or acquire wood for the fire pit. ER 160-61.

Mr. Rouser's response to Defendants' reply brief also provided additional evidence in the form of declarations from himself and other inmates, a letter, and an incident report. ER 145-57. This evidence confirmed the delay in building the nature-based religious area and corroborated Mr. Rouser's contention that the Yule Sabbat was unduly cancelled. *Id.* On October 15, 2012, Mr. Rouser filed another motion requesting an injunction and an evidentiary hearing. ER 141-43. In support of this request, Mr. Rouser averred that prison officials continued to keep him in Administrative Segregation in retaliation for the grievances that he filed and his religious activities. He also reiterated that the prison officials were denying him access to his Bible, the law library, and his legal property, as well as access to religious services. *Id.*

The district court validated many of Mr. Rouser's challenges to the prison officials' conduct by granting in part Mr. Rouser's initial motion to enforce the Consent Decree. ER 140. The district court found that Defendants had violated the Decree by damaging and stealing the group religious items and "order[ed] Defendants to adhere to the terms of the Decree and maintain group religious items such that Plaintiff's access is not inhibited." ER 137. The district court also recognized that Mr. Rouser's appeals were "not being heard according to the procedures in the Decree" and "order[ed] Defendants to adhere to the appeals process set forth in the Decree." ER 138.

D. The District Court Vacates The Consent Decree And Enters Final Judgment In Favor of Defendants.

Less than three months after the district court entered an order confirming the existence of ongoing violations, Defendants filed a motion to vacate the district court's October 18, 2011 order entering the Consent Decree, dismiss the action with prejudice, and enter final judgment in favor of Defendants. ER 58-59. Defendants argued in a two-page motion that the requested relief was warranted because "Defendants have fully complied with the terms of the Joint Settlement Agreement." ER 60. In support of this motion, Defendants submitted a single declaration—that of Nathan Wilcox, a correctional counselor and the litigation coordinator at LAC. ER 62-63.

In his two-page declaration, Wilcox makes a series of conclusory statements asserting that the prison had complied with the terms of the Decree. Notably, this declaration does not address numerous terms relating to Mr. Rouser's ability to practice his religion, nor does it acknowledge that Mr. Rouser must be allowed to use an expedited appeals process. *Id.* Rather, Wilcox attached an October 18, 2012 memorandum to his declaration that, by its own terms, does not comply with the procedures outlined in the Decree. ER 65-66.

Beginning in 2013, Mr. Rouser filed a series of documents responding to Defendants' motion, all of which outlined further violations of the Consent Decree. ER 22, 52, 56. In his sworn opposition brief, for example, he referenced past

violations and reiterated his inability to order candles, candle holders, incense, and incense holders, and highlighted the cancelled group services. ER 52-53. Mr. Rouser also twice requested an evidentiary hearing so that he could present additional information demonstrating Defendants' lack of compliance. *Id.* Mr. Rouser further indicated in these documents that Defendants continued to keep him in Administrative Segregation in retaliation for his actions related to this lawsuit and that Defendants were not complying with the expedited appeals process outlined in the Decree. ER 22-33. In response, Defendants filed a three-paragraph reply brief that ignored all of this evidence and attempted to shift the burden onto Mr. Rouser. ER 35-36.

In a minute order on March 13, 2013, the district court denied granted Defendants' motion to vacate the October 18, 2011 order and dismiss the action with prejudice. ER 2-4. In its single-paragraph analysis, the district court reasoned that "Defendants have demonstrated by a preponderance of the evidence that they have substantially complied with the terms of the settlement agreement" by providing the declaration and the internal prison procedures. ER 3. Five days later, the court denied Mr. Rouser's request for an evidentiary hearing as moot. ER 1. Mr. Rouser filed a timely Notice of Appeal. ER 11.

SUMMARY OF THE ARGUMENT

After a decades-long struggle, Mr. Rouser believed that he had succeeded in securing an agreement with Defendants that would permit him to exercise his constitutional right to practice his religion. Unfortunately, Defendants proved unable or unwilling to live up to their end of the deal, and Mr. Rouser quickly found himself back in a defensive position. In an effort to force Defendants to honor the terms of the Decree, Mr. Rouser submitted evidence of their noncompliance to the district court, who agreed with Mr. Rouser. Only a few months later, however, Defendants submitted a two-page request that the Decree be terminated on the grounds that they had substantially complied with its terms.

The district court's minute order granting that request was incorrect and should be reversed for two, independent reasons. *First*, the district court applied the wrong standard. Rather than hold the defendants to the demanding substantial compliance standard that California law and this Court's precedent require, the district court essentially placed the burden on Mr. Rouser to show that the Defendants were *not* fully compliant with the Decree. That is not how the dissolution of consent decrees works. Under well-settled legal principles, it is the responsibility of the party who seeks to evade its legal obligations to show that it has fully discharged those obligations. The district court's inversion of the burden and distortion of the standard was mistaken and warrants reversal. *Second*, when considered against the

correct legal standard, there is no question that Defendants failed to demonstrate substantial compliance with the Decree. Rather than provide the detailed evidence and argument this demanding standard requires, Defendants filed a two-page motion with a few attachments, including a brief declaration and an expired prison policy. That thimble of evidence was insufficient to support a finding by the district court that Defendants have substantially complied with the Decree. For both of those reasons, this Court should reverse the district court and reinstate the decree.

At the very least, however, this Court should remand to the district court for an evidentiary hearing. Mr. Rouser requested an evidentiary hearing in the district court and filed numerous sworn declarations in support of that request. The district court nonetheless declined to conduct the requested hearing, instead ruling for Defendants on the papers. That decision, too, was error. Should this Court decline to reverse outright, it should thus remand for a complete evidentiary hearing on whether the Defendants have substantially complied with the decree.

STANDARD OF REVIEW

This Court reviews a district court's decision to vacate a consent decree and to deny an evidentiary hearing for an abuse of discretion. *Jeff D. v. Otter*, 643 F.3d 278, 283 (9th Cir. 2011); *Stewart v. Cate*, 734 F.3d 995, 999 (9th Cir. 2013). "A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." *Otter*, 643 F.3d at 283 (quoting *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004)). The Court reviews interpretations of a consent decree *de novo*. *United States v. FMC Corp.*, 531 F.3d 813, 818-19 (9th Cir. 2008).

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT DEFENDANTS SUBSTANTIALLY COMPLIED WITH THE CONSENT DECREE.

In February 2012, Defendants filed a two-page motion seeking termination of the Consent Decree governing Mr. Rouser's right to practice his religion while incarcerated and on equal terms as those inmates of other religions. In support of their argument that they fully complied with the Decree's terms, Defendants attached two pieces of evidence: a cursory and incomplete declaration and an outdated internal prison memorandum. In response, Mr. Rouser submitted uncontroverted evidence that Defendants remained noncompliant with critical terms of the Decree. The district court submitted the matter for consideration without a hearing and ultimately granted Defendants' motion to terminate the Decree in a minute order.

In addition to raising significant procedural issues, discussed in detail below, the district court's holding disregards the terms of the Decree and ignores clear precedent of this Court. When Mr. Rouser and Defendants agreed to enter into the Consent Decree at issue in this appeal, they chose the rigorous substantial compliance standard to govern its termination. So exacting is this standard that under this Court's controlling precedent, the only way to terminate a Consent Decree that has incorporated this standard is to demonstrate near literal compliance with the terms of the Decree. In light of Defendants' paltry motion and the undisputed evidence set

forth by Mr. Rouser, the district court abused its discretion in concluding that Defendants had satisfied their burden. For these reasons and those detailed below, this Court should reverse the district court's erroneous holding and reinstate the Consent Decree.

A. The District Court Failed to Apply the Substantial Compliance Standard as Required Under Controlling Precedent.

A consent decree "has attributes of a contract and a judicial act." *Nehmer v. VA*, 494 F.3d 846, 861 (9th Cir. 2007) (internal quotation marks omitted). Although a decree "embodies an agreement of the parties and thus in some respects is contractual in nature[, it also] is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992). To the extent that the terms of the underlying agreement are at issue, however, these terms are "construed with reference to ordinary contract principles." *Nehmer*, 494 F.3d at 861 (internal quotation marks omitted). Because the terms of the Decree are "governed by and . . . construed according to California law," California contract principles apply. ER 216.

The agreement at issue was entered into as a consent decree for prospective relief pursuant to 18 U.S.C. § 3626(c)(1), a provision of the Prison Litigation Reform Act ("PLRA"). ER 218. Pursuant to § 3626(b)(1)(B) of the PLRA,[5] the parties agreed

[5] Under the PLRA, after an initial two-year period, consent decrees providing prospective relief with respect to prison conditions are "terminable upon the motion

that their Consent Decree would be terminable after one year had passed if Defendants could show by a preponderance of the evidence "that they [had] substantially complied with the terms of [the] Agreement." *Id.*

This Court recently addressed the application of a state substantial compliance standard to the termination of a Consent Decree in *Jeff D. v. Otter*, 643 F.3d 278 (9th Cir. 2011). There, in the context of applying the Idaho substantial compliance standard (near identical to California's), this Court reiterated its long-held principle that "substantial compliance" is a rigorous standard with both procedural and substantive components. Substantively, while substantial compliance implies "something less than a strict and literal compliance with the contract provisions[,] fundamentally it means that the deviation is unintentional and so minor or trivial as not 'substantially to defeat the object which the parties intend to accomplish.'" *Otter*, 643 F.3d at 284 (quoting *Wells Benz, Inc. v. United States*, 333 F.2d 89, 92 (9th Cir. 1964)). As the movants, Defendants bore the burden of establishing substantial

(continued…)

of any party or intervener," 18 U.S.C. § 3626 (b)(1)(A), subject to written judicial findings that "prospective relief remains necessary to correct a current and ongoing violation of the Federal right." *Id.* § 3626 (b)(3). However, the PLRA also provides that "[n]othing in [§ 3626] shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A)," which the parties did here by providing that the defendants could move to terminate the Consent Decree after only one year. *Id.* § 3626 (b)(1)(B).

compliance with the terms of the Decree. *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010); *Gilmore v. California*, 220 F.3d 987, 1007 (9th Cir. 2000).

California has long applied the substantial compliance standard in a variety of contexts, such as whether a party has substantially complied with a statute: "Substantial compliance, as the phrase is used in the decisions, means *actual* compliance in respect to the substance essential to every reasonable objective of the statute." *Stasher v. Harger-Haldeman*, 58 Cal. 2d 23, 29 (Cal. 1962). Likewise, California has employed the near identical substantial performance doctrine to contract matters. Substantial performance is satisfied when there is "no wilful departure from the terms of the contract, and that the defects be such as may be easily remedied or compensated, so that the promisee may get practically what the contract calls for." *Posner v. Grunwald-Marx, Inc.*, 56 Cal. 2d 169, 187 (Cal. 1961); *see also Connell v. Higgins*, 170 Cal. 541, 556 (Cal. 1915) (same); *Murray's Iron Works, Inc. v. Boyce*, 158 Cal. App. 4th 1279, 1291 (Cal. Ct. App. 2008) (same); *Angotti & Reilly v. Alexander Grp.*, Nos. A127917, A128743, 2011 Cal. App. Unpub. LEXIS 8917, at *27 (Cal. Ct. App. Nov. 21, 2011) (same); WITKIN, SUMMARY OF CONTRACTS § 818 (10th ed. 2012) (same). Under California law, and as this Court explained in *Connell*, substantial compliance does not require "a literal compliance as to the details that are unimportant." *Connell*, 170 Cal. at 556. Rather, the critical inquiry is whether the purpose of the agreement has been fulfilled—"the defects of performance must not pervade the whole or be so

essential as substantially to defeat the object which the parties intend to accomplish." *Id.*

Despite the clarity with which this Court and the California Supreme Court have spoken on this issue, the district court failed to define substantial compliance, let alone apply the correct definition. In its one-paragraph analysis, the district court instead rested upon the conclusory assertion that "Defendants have substantially complied with the settlement agreement." ER 3. That decision, however, did not comply with the standard that this Court and the California Supreme Court have instructed courts to employ when reviewing a defendant's motion to vacate a consent decree under the substantial compliance doctrine.

The district court's analysis likewise falls short of the procedures that this Court has generally required in decree terminations. As this Court has explained, "'[a] court faced with a motion to terminate . . . a consent decree *must* begin by determining the basic purposes of the decree.'" *Otter*, 643 F.3d at 288 (quoting *United States v. City of Miami*, 2 F.3d 1497, 1505 (11th Cir. 1993)) (emphasis added). This inquiry is critical because "[a] court considering termination of a consent decree in light of performance of its specific terms 'must also consider the more general goals of the decree which the terms were designed to accomplish.'" *Id.* (quoting *Youngblood v. Dalzell*, 925 F.2d 954, 960 (6th Cir. 1991)); *see also Joseph A. v. N.M. Dep't of Human Servs.*, 69 F.3d 1081, 1086 (10th Cir. 1995) ("[T]he touchstone of the substantial compliance inquiry is

whether Defendants frustrated the purpose of the consent decree—i.e., its essential requirements.").

Without a finding on the purpose of a decree, however, it is impossible to determine whether a defendant's conduct has satisfied that purpose. And as this Court has explained, "there can be no 'substantial performance' where the part unperformed touches the fundamental purpose of the contract and defeats the object of the parties entering into the contract." *Otter*, 643 F.3d at 288 (quoting *Ujdur v. Thompson*, 878 P.2d 180, 183 (Ct. App. 1994)); *see also Connell*, 170 Cal. at 556 (same). Once the purpose has been identified, the court must thus consider whether Defendants have deviated from the terms of the Decree and if so, whether "any deviation from literal compliance . . . defeat[ed] the essential purposes of the decrees." *Otter*, 643 F.3d at 284. When making this determination, a court must not ignore "Defendants' record of compliance." *Id.* at 288 (internal quotation marks omitted). This Court has held, moreover, that failure to make these findings, especially those on the purpose of the consent decree, is reversible error. *Id.* at 290.

The district court's one-paragraph analysis failed to make these required findings. The district court likewise did not take into account the overwhelming record of Defendants' failure to abide by the Constitution or their contractual obligations, *infra* Section I(C)(3), which includes countless deviations from the Decree. The district court should therefore be reversed.

Indeed, the sheer sparseness of the district court's minute order dissolving the Decree dispels any doubt about the need for reversal. As this Court has explained, "meaningful appellate review for abuse of discretion is foreclosed when the district court fails to articulate its reasoning." *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007) (quoting *United Nat'l Ins. Co. v. R & D Latex Corp.*, 141 F.3d 916, 919 (9th Cir. 1998)). Furthermore, where the law dictates courts' method of analysis in answering a particular legal question, an appellate court cannot conclude that the district court did not abuse its discretion in answering that question unless it knows that the district court employed the required mode of analysis. *See Traxler v. Multnomah Cnty.*, 596 F.3d 1007, 1016 (9th Cir. 2010) (where the Family Medical Leave Act required an employer to pay liquidated damages unless it proved "good faith" and "reasonable grounds for believing that [its action] was not a violation," it could not meaningfully review a district court opinion that did not discuss those factors).

In a similar case where a district court terminated a prison's consent decree in two paragraphs without an evidentiary hearing, the Eighth Circuit observed that the "district judge's order [did] not give [it] enough information to determine whether he ignored the evidence of past and present violations or whether he considered any violations inconsequential in the context of substantial compliance." *Cody v. Hillard*, 139 F.3d 1197, 1199 (8th Cir. 1998). As a result, the district court's order was "simply

too cryptic" to be affirmed, and the court remanded for further review. *Id.* at 1200. The district court's opinion here presents the same problems, further requiring reversal.

B. Defendants Failed to Demonstrate Substantial Compliance with the Decree.

The district court also abused its discretion by finding that Defendants set forth sufficient evidence to demonstrate substantial compliance. Defendants' motion and supporting evidence—a two-page motion, a single declaration, and an outdated internal memorandum—are deficient on their face. The Defendants not only failed to *even address* every term of their binding Decree, they offered no explanation as to *how* they had substantially complied with that Decree. Moreover, nothing that the Defendants filed addressed the fact that the district court had found that Defendants violated at least two critical terms of the Decree just three months before the Defendants' moved to vacate that Decree *in toto*. Because Defendants failed to supply sufficient evidence of substantial compliance, the district court abused its discretion in determining that they had substantially complied.

1. Defendants' Motion Lacked any Argument or Explanation Supporting its Position that it Fully Complied with the Terms of the Decree.

As an initial matter, Defendants filed a two-page motion devoid of substantive argument in support of their request that the district court vacate the Consent Decree and enter a final judgment. Despite bearing the burden to demonstrate substantial

compliance, Defendants relied only on the unadorned assertion that they "have fully complied with the terms of the Joint Settlement Agreement." ER 60. The motion did not supply any evidence in support of Defendants' request, nor did it contain any explanation or analysis of the Decree itself. Although the motion referenced "the supporting declaration of Nathan Wilcox," Defendants did not articulate how Wilcox's averments actually supported a finding of substantial compliance. In short, Defendants' motion offered *no* basis for a finding that the Department of Corrections has substantially complied with the Consent Decree.

Perhaps this failure can be explained by Defendants' incorrect belief that, because the parties chose to contract around default PLRA rules and allow Defendants to terminate the Consent Decree after only one year, it was Mr. Rouser who bore the burden on a motion to vacate. Indeed, Defendants' reply brief—all of three paragraphs—relied exclusively upon this incorrect belief. Yet, nothing in the Consent Decree purported to shift any burden. As a result, Defendants' argument that "Plaintiff fails to articulate any legitimate basis for extending this Court's October 18, 2011 Order" completely ignores the posture of the case. ER 36. As Defendants should have known, even under the Consent Decree's early termination provision, *they* were the ones seeking affirmative relief via a motion to vacate and this Court's precedent makes clear that the party seeking such relief that bears the burden. *Gilmore*, 220 F.3d at 1007.

2. Defendants' Evidence Failed to Demonstrate Substantial Compliance.

The only evidence that Defendants proffered in support of their motion was the two-page Wilcox declaration, which was far too sparse to support the district court's finding of substantial compliance. As an initial matter, the declaration does not even address at least half the terms in the Decree. And for the few provisions the declaration *does* address, it does so in an entirely conclusory fashion. As with Defendants' motion, the declaration offers no insight into the mechanisms that the prison established to comply with the Decree and does not point to any additional evidence documenting Defendants' compliance. Instead, Wilcox simply asserts, "I have ensured that LAC has fully complied with the terms of the Joint Settlement Agreement." ER 63.

Relying on Wilcox's conclusory assertions and nothing more to find substantial compliance would make that exacting standard a meaningless formality; one that would permit defendants to simply certify their way into vacatur. Such a result is particularly nonsensical here, where Defendants have spent the better part of two decades in active noncompliance with settlement agreements and court orders. Under this Court's precedent, the district court's acceptance of a conclusory assertion of "compliance" as demonstrating substantial compliance—without making factual findings concerning Defendants' compliance with any specific terms—is reversible error. *See, e.g.*, *Otter*, 643 F.3d at 289 ("Explicit consideration of the goals of the

decrees and Implementation Plan, and whether those goals have been adequately served, must be part of the determination to vacate the consent decrees. Because that consideration was lacking . . . , we reverse the order vacating the decrees."); *Cleveland Firefighters for Fair Hiring Practices v. City of Cleveland*, 669 F.3d 737, 741 (6th Cir. 2012) ("With due respect, those requirements were not met here: to the extent the court made factual findings in its order terminating the decree, they were largely conclusory; and the court otherwise did not make findings regarding the City's compliance with important aspects of the decree.").

3. The Wilcox Declaration Fails To Address Nearly Half of the Terms in the Decree.

The district court's abuse of discretion is especially problematic here, where the evidence it relied on in its order failed to address compliance with multiple material terms from the Consent Decree that, in certain instances, were the subject of previous court orders mandating compliance. For example, Wilcox's Declaration failed to address the issue of Mr. Rouser's participation in religious study groups—a right that multiple provisions in the Decree expressly grant to Mr. Rouser.[6] Indeed, the terms of the Decree require that prison officials "provide [Mr.] Rouser reasonable

[6] Defendants' omissions are many, and include the following terms of the Agreement: participation in religious study groups, access to food items, prohibition on desecration and theft of religious items, ability to order personal religious items, use of an expedited appeals process, procedures for cancelling group sessions, timing and scheduling of group services, the ability to store excess religious items in a secure location, and the right to retain religious items when in Administrative Segregation. ER 208-21.

opportunities . . . to attend religious study groups that are comparable to group religious services and study provided inmates of other religions." ER 211; *see also* ER 212 ("Rouser shall also be provided the opportunity, comparable to that afforded inmates of other religious faiths, to attend a Wiccan religious study group for one hour, once a week."); ER 213 ("Rouser will be allowed to attend a Wiccan study group on either the facility's outdoor religious activity area, or in the facility's non-denominational chapel."). The declaration includes no discussion of compliance with any of these terms.

Similarly, the declaration does not confirm whether Defendants have instituted the expedited appeals process that the Decree requires. As explained in Paragraph 45, Mr. Rouser has the right to submit an inmate appeal if he "believes that defendants have not complied with the terms of the Agreement." ER 217. In accordance with this provision, Mr. Rouser shall bypass the "informal, formal, and first levels of appeal," and "the appeal will be processed at the second level by the Warden." *Id.* Once Mr. Rouser exhausts his remedies at the Director's level, he may seek relief from the district court by filing a motion. *Id.*

Without access to this expedited review process, Mr. Rouser cannot effectively raise noncompliance to the warden or the courts, a right that has been central to this litigation. The district court entered orders throughout Mr. Rouser's suit requiring that Defendants provide him access to the courts and the internal grievance

procedure due to repeated attempts by Defendants to interfere with those rights—such as by transferring Mr. Rouser to a new prison facility to avoid a court teleconference at which the court had ordered Defendants to make Mr. Rouser available, ER 765-69, and denying Mr. Rouser access to the prison law library, ER 760-61. *See also, e.g.*, *Silva v. Di Vittorio*, 658 F.3d 1090, 1101-02 (9th Cir. 2011) ("Under the First Amendment, a prisoner has both a right to meaningful access to the courts and a broader right to petition the government for a redress of his grievances."). Given this history, Mr. Rouser's ability to have his appeals heard promptly is plainly a central feature of the Decree.

The district court's determination in November 2012 that the Department was not complying with the expedited-appeals requirement compounds Wilcox's failure to address that issue in his Declaration. ER 138. That determination arose from Defendants dismissing Mr. Rouser's grievances at the first levels of appeal and blocking any review at the second level by the Warden. The district court recognized that the terms of the Decree entitled Mr. Rouser to have his grievances heard immediately by the Warden and it therefore ordered Defendants to comply with that requirement. *Id.* Yet the Defendants simply ignored this issue in seeking vacatur less than three months later, a failure that is enough on its own to defeat the Department's attempt to show substantial compliance.

4. Defendants Rely on Outdated and Insufficient Documents.

Rather than providing detailed factual allegations to support the assertion that he had ensured "full compliance," Wilcox focuses on an October 18, 2012 memorandum attached to his declaration that outlines the procedures for outdoor religious activity and Wiccan services at the prison that currently houses Mr. Rouser. ER 65-66. Specifically, this memorandum outlines the regulations and procedures for "Outdoor Religious Activity Area—Wiccan Services." *Id.* Like the declaration, however, these regulations do not carry the Department's heavy burden. To begin, the procedures purport to list the items allowed for use during Esbats and Sabbats, but do not include numerous items specifically allowed for in the Decree, such as anointing oils, water, salt, tarot cards, feathers, herbs, stone, a wood wand, and seashells. *Id.* Additionally, the memorandum does not allow for access to a fire pit on the Sabbats or outline the frequency, timing, or duration of the outdoor religious services. *Id.* Nor does the memorandum recognize Mr. Rouser's right to participate in religious study groups in the outdoor religious activity area. In other words, the prison has not presented any evidence of compliance with critical terms governing the outdoor religious worship area.

More importantly, the Department wrote this memorandum *prior* to the district court's November 15, 2012 order, which found that Defendants had violated the terms of the Decree when they desecrated Mr. Rouser's religious necklace and stole

the religious items stored by prison officials. ER 137-38. Significantly, those violations occurred while the memorandum—which purports to protect Mr. Rouser's religious items—was in effect. Nevertheless, Defendants simply filed that memorandum without any evidence demonstrating how, if at all, Defendants had remedied these violations or ensured that the memorandum would actually have force within the prison. ER 60-61.

The final bit of evidence the Department proffered was an outdated declaration prepared in response to Mr. Rouser's notice of further violations. ER 168-69. This declaration, also sworn by Wilcox, reflected Defendants' position on October 3, 2012; it thus does not address—and could not have addressed—any of the violations that Mr. Rouser describes in his 2013 filings. Because of its timing, this declaration likewise cannot demonstrate any remedy to the violations that the district court found in its November 2012 order.

Defendants' evidence thus did not support the district court's finding that Defendants substantially complied with the terms of the Decree. Because Defendants omitted any discussion or evidence of critical terms from their motion and supporting documentation, including those that they had recently violated, the district court's determination that Defendants satisfied the heavy burden associated with termination of Consent Decrees was an abuse of discretion.

C. The District Court Disregarded Record Evidence Showing Defendants' Noncompliance with the Settlement Decree.

In addition to improperly concluding that Defendants satisfied their exacting burden, the district court erred by overlooking critical evidence that Mr. Rouser submitted in opposition to the motion to vacate. Mr. Rouser's evidence, in the form of sworn declarations and prior court orders, confirmed the existence of ongoing violations that interfered with the fundamental purposes of the Decree. The district court, however, disregarded this specific evidence, choosing instead to characterize Mr. Rouser's evidence as mere contentions that "Defendants have not complied with the settlement agreement in a handful of instances." ER 3. Based on that depiction of Mr. Rouser's filings, the district court reasoned that "[e]ven assuming these are true, these alleged examples are insufficient to render Defendants substantially non-complaint [sic]." *Id.* The district court's conclusion was reached in error, as it failed to account for the specific evidence that Mr. Rouser filed in support of his motion, relied on the improper characterization of sworn declarations as allegations, and ignored its prior finding that Defendants had violated the Consent Decree.

1. Mr. Rouser's Sworn Opposition Brief Highlighted Numerous Instances of Defendants' Noncompliance.

In response to the motion to vacate, Mr. Rouser filed a sworn opposition brief attesting that Defendants continued to violate the Consent Decree. In the Ninth Circuit, sworn briefs are given the same weight as declarations, especially where, as

here, the declarant is a pro se prisoner. *See, e.g.*, *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010) ("We have, therefore, held consistently that courts should construe liberally motion papers and pleadings filed by *pro se* inmates."); *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004) ("[B]ecause Jones is pro se, we must consider as evidence . . . all of Jones's contentions offered in motions and pleadings, where such contentions are based on personal knowledge and set forth facts that would be admissible in evidence, and where Jones attested under penalty of perjury that the contents of the motions or pleadings are true and correct."); *Johnson v. Meltzer*, 134 F.3d 1393, 1400 (9th Cir. 1998) ("Like a verified complaint, a verified motion functions as an affidavit."). The district court's characterization of the assertions in Mr. Rouser's filings as mere contentions, as well as its refusal to grant credence to those statements, was thus in direct contravention of this Court's precedent.

Mr. Rouser's sworn opposition brief included obvious examples of Consent Decree violations and stated clearly that Mr. Rouser had additional evidence to present. For example, Mr. Rouser averred that Defendants continued to prevent him from ordering candles, candle holders, incense, and incense holders for his religious group services. ER 52. Mr. Rouser further asserted that he had specifically requested access to seven candles, as is required under the Decree, but prison officials allowed him to obtain and use just one candle in his group religious services. *Id.* Mr. Rouser's ability to order these items, as outlined in Paragraph 35 of the Decree, is a critical

prerequisite to his ability to worship in accordance with his faith and traditions. *See* ER 215-16. Mr. Rouser also averred in his sworn opposition brief that Defendants had only allowed one group service to occur since the grounds were completed in October, eight months past the deadline.[7] ER 52.

These inquiries—whether the grounds were completed to the specifications of Paragraph 21 in a timely fashion and whether Defendants allowed Mr. Rouser to participate in Esbats and Sabbats as required under Paragraphs 14-18—go to the heart of Mr. Rouser's ability to practice his religion. Preventing an inmate from participating in religious services and obstructing the construction of an area in which he may worship are actions that cannot be considered, as the district court did, "insufficient to render Defendants substantially non-compliant." ER 3. Such deviations would, in effect, prevent Mr. Rouser from any engaging in any meaningful exercise of his religion. The district court's decision to the contrary was an abuse of discretion.

[7] Wilcox's declaration admits the prison's noncompliance on this front. Despite the December 2011 deadline imposed by the Agreement, Wilcox asserted that "[c]onstruction of the fire pit and outdoor religious worship area was completed on August 21, 2012," more than eight months late. ER 62-63. Wilcox made no effort to explain why Defendants failed to comply with this provision, which resulted in disabling Mr. Rouser from exercising his rights under the Agreement for nearly a year after its approval in district court.

2. Mr. Rouser's Additional Documentation Further Confirmed Defendants' Noncompliance.

Mr. Rouser also filed additional sworn documents outlining further violations of the Consent Decree. ER 22, 56. Mr. Rouser indicated in these documents that, in retaliation for his efforts to practice his religion under the terms of the Decree, Defendants placed him in Administrative Segregation, where he cannot access his personal religious items or attend group religious services. ER 22. Placing an inmate in Administrative Segregation so that he may not access personal religious items or participate in group services necessarily frustrates the Decree's guarantee of access to those items. *Joseph A.*, 69 F.3d at 1086. And as Mr. Rouser has repeatedly attested, prison officials deny him access to his Wiccan Bible while he is in Administrative Segregation, in direct contravention of the Consent Decree. Preventing the exercise of religion by intentionally obstructing access to religious articles and services is a clear-cut "wilful departure from the terms of the contract." *Posner*, 56 Cal. 2d at 187.

In these filings, Mr. Rouser also reiterated the fact that Defendants were not complying with the expedited appeals process outlined in the Decree and provided specific, documentary evidence of that noncompliance. ER 22-34. Indeed, Mr. Rouser attached a letter from the Appeals Coordinator at the prison rejecting his appeal for failure to "resolve [his] issue at the lowest level." *Id.* As the district court made clear in its November order, however, Defendants must make available to Mr. Rouser the expedited appeals process as outlined in the Consent Decree. Despite this

uncontroverted evidence that Defendants continued to thwart Mr. Rouser's access to the Warden and the courts, the district court determined that Defendants were substantially compliant. This determination was an abuse of discretion.

3. Defendants' Record of Noncompliance Directly Contradicts their Position of Full Compliance.

Finally, the district court failed to consider Defendants' record of repeatedly violating Mr. Rouser's constitutional rights, a critical factor under this Court's decisions. ER 2-4. As discussed in detail above, Mr. Rouser has been waging his legal fight for over a decade. Despite Defendants' best efforts to downplay their violations of Mr. Rouser's rights and characterize him as a troublemaker, *see, e.g.*, ER 406-07, Mr. Rouser continued to amass victories because, time and time again, when the district court examined the record, it found that Mr. Rouser had alleged or shown that prison officials had denied him privileges that other religions were afforded and interfered with his religious practice. *See, e.g.,* ER 839 (denying motion to dismiss), 567 (denying motion for summary judgment), 227 (granting preliminary injunction). In fact, summarizing the record in 2009, the district court observed that Mr. Rouser's evidence of the violations he had suffered since 1993 suggested "a pattern of Constitutional violations sufficient to call into question" Defendants' assurance that their new policies adequately protected Mr. Rouser. ER 640. Coupled with the evidence set forth in Defendants' motion and Mr. Rouser's filings in opposition,

Defendants' record of noncompliance underscores the need for the Consent Decree to remain intact.

In sum, the record before the district court at the time it vacated the Consent Decree did not support a finding of substantial compliance. Defendants set forth incomplete and conclusory evidence, whereas Mr. Rouser provided uncontroverted evidence of specific violations of the Consent Decree. The district court's cursory analysis of this evidence and determination that Defendants substantially complied was an abuse of discretion. This Court should therefore reverse the district court and reinstate the Consent Decree.

II. THE DISTRICT COURT ERRED IN REJECTING MR. ROUSER'S REQUEST FOR AN EVIDENTIARY HEARING.

As detailed above, the district court contravened relevant law and concluded that Defendants had substantially complied with the terms of the Consent Decree despite both the long-standing pattern of violations of Mr. Rouser's constitutional rights and evidence of recent Consent Decree violations. The district court further erred by conducting only a cursory inquiry into the current conditions of Mr. Rouser's incarceration. Despite contrary Ninth Circuit precedent, the district court denied Mr. Rouser's request for an evidentiary hearing on whether Defendants had achieved substantial compliance, even though Mr. Rouser proffered sworn allegations demonstrating that Defendants continued to violate the consent decree. Furthermore, in denying Mr. Rouser's request for the hearing, the district court failed to consider

any evidence outside of Mr. Rouser's opposition, despite the constitutional necessity that courts engage in a thorough review of the factual record before terminating a consent decree governing prison conditions. *See Miller v. French*, 530 U.S. 327, 350 (2000).

The consent decree in this case was granted under the PLRA, which instructs that prospective relief with respect to prison conditions, like the relief Mr. Rouser won under the Consent Decree, "shall not terminate if the court makes written findings based on the record" that the prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation, and is narrowly drawn. 18 U.S.C. § 3626(b)(3). Such written findings require a "record reflecting conditions as of the time termination is sought." *Gilmore*, 220 F.3d at 1010 (quoting *Benjamin v. Jacobson*, 172 F.3d 144, 166 (2d Cir. 1999)).

Given the importance of the rights at issue, it is unsurprising that the PLRA would require that courts must compile and review a complete record before terminating a consent decree. Under the PLRA, the only relief that a prison-condition consent decree can provide is relief from violations of prisoners' constitutional and federal rights. 18 U.S.C. § 3626(a)(1), (c)(1). In addition, in correcting such violations, prison-condition consent decrees must be narrowly tailored to go no further than is necessary to correct those violations. *Id.* Thus, if defendants do not comply with a

consent decree, then constitutional or statutory violations necessarily continue. Additionally, this Court has recognized that parties have a liberty interest in the terms of consent decrees they enter into with the State—such as the Decree at issue here. *Smith v. Sumner*, 994 F.2d 1401, 1405 (9th Cir. 1993). If a court does not engage in a meaningful inquiry into whether a consent decree has been complied with before terminating it, plaintiffs' due process rights are threatened. *See Miller*, 530 U.S. at 350 (leaving open the question whether a time limit in the PLRA provides adequate time to review the factual record or whether the time limit, "particularly in a complex case, may implicate due process concerns").

This Court's decision in *Gilmore* is particularly instructive here. There, this Court was confronted an almost identical situation and instructed district courts to compile and consider complete factual records, including through evidentiary hearings, before terminating PLRA consent decrees. The defendants there moved to terminate a consent decree intended to correct, among other things, an unconstitutional prisoner classification system. *Gilmore,* 220 F.3d at 995. Despite the plaintiffs' contention that "serious problems" remained with the classification system, the district court denied the plaintiffs' request for an evidentiary hearing and terminated the consent decree. *Id.* at 1010. On review, this Court found the district court had erred because the plaintiffs "did not concede that defendants were in compliance" and the court had not "take[n] evidence on the current circumstances at the prison as

plaintiffs requested." *Id.* As a result, this Court reversed the termination of prospective relief, and remanded for further proceedings. *Id.*

Here, Mr. Rouser's opposition to Defendants' motion made clear that the violation of his Constitutional rights continued. Among other averments, he explained that he had been permitted only one service at the grounds that the prison had been required to construct for him and that Defendants continued to deny him access to the religious materials that he needed to conduct services. ER 52-53. These assertions directly contradict statements in the Wilcox declaration. ER 62-63. Thus, as in *Gilmore*, compliance was at issue. Accordingly, Ninth Circuit precedent establishes that it was an abuse of the district court's discretion to deny Mr. Rouser's request for an evidentiary hearing.

Moreover, to the extent that Defendants may ask this Court to deviate from its binding precedent and uphold the district court's decision, it would be asking the Court to disagree with its sister circuits. The majority of circuits that have addressed the issue have concluded that where a plaintiff has placed compliance at issue, the district court must hold an evidentiary hearing before terminating a consent decree. Thus, the Second Circuit has held that prisoners are "entitled to an evidentiary hearing on their allegations of current and ongoing violations of federal rights" before a district court rules on a motion to terminate prospective relief. *Benjamin v. Jacobson*, 124 F.3d 162, 180 (2d Cir. 1997), *vacated on other grounds*, 124 F.3d 162 (2d Cir. 1997).

In cases where the plaintiffs, unlike Mr. Rouser, did not allege ongoing violations, the Fifth and Fourth Circuits still recognized that "[a]t a minimum," a district court must hold a pre-termination evidentiary hearing "when the party opposing the termination alleges specific facts which, if true, would amount to a current and ongoing constitutional violation." *Cagle v. Hutto*, 177 F.3d 253, 258 (4th Cir. 1999); *see also Guajardo v. Tex. Dep't of Criminal Justice*, 363 F.3d 392, 397 (5th Cir. 2004) (citing *Cagle*).

Emphasizing the PLRA's requirement that district courts make specific findings on current prison conditions before terminating a consent decree, the Seventh Circuit placed a slightly heavier burden on plaintiffs, but still held that "if there are disputed issues of material fact," the district court must "hold a new hearing and receive testimony." *Berwanger v. Cottey*, 178 F.3d 834, 840 (7th Cir. 1999). Mr. Rouser's sworn opposition along with the previous district court orders suggesting that violations of Mr. Rouser's rights continued despite the Consent Decree—including the district court's November 15, 2012 noncompliance findings—are sufficient to place compliance as of March 13, 2013, at issue. *See also* ER 604, 630, 632, 637 (denying Defendants' motion for summary judgment and repeatedly finding that Mr. Rouser's sworn opposition created a question of material fact).

In *Berwanger*, the Seventh Circuit also observed that, in some cases, a district court might be able to make the required findings without holding a hearing if the court had appointed a monitor to oversee compliance with a consent decree and if

parties were also permitted to supplement the monitor's information with their own documents. *Berwanger,* 178 F.3d at 840. The monitor's reports might supply a sufficiently detailed factual record, and the parties' opportunity to supplement the reports would provide a sufficient opportunity for them to be heard. *Id.* No such monitor, though, was appointed here, and the district court did not invite Mr. Rouser to submit additional evidence of ongoing violations and did not consider any of his previous submissions in its termination order.

For similar reasons, even in the few circuits that have not found a right to an evidentiary hearing before termination, the district court's summary procedure would still be inadequate. Echoing the Seventh Circuit's suggestion that an opportunity to submit documentary evidence may sometimes provide an adequate substitute for a hearing, those circuits have been willing to allow that district courts may, instead of holding an evidentiary hearing, afford plaintiffs "the opportunity to submit additional evidence in an effort to show current and ongoing constitutional violations." *Hadix v. Johnson*, 228 F.3d 662, 671 (6th Cir. 2000); *see also Laaman v. Warden*, 238 F.3d 14, 19 (1st Cir. 2001). The district court here, though, did not invite Mr. Rouser to supplement the record as necessary to prove ongoing violations. Thus, even in those circuits that grant district courts greater discretion in termination proceedings, the district court's failure to hold an evidentiary hearing would constitute error.

For the reasons explained above, should this Court reject Mr. Rouser's argument that the district court abused its discretion in finding substantial compliance based on the record before it, it must remand for an evidentiary hearing on the question of noncompliance.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the Consent Decree reinstated. In the alternative, this action should be remanded to the district court for further proceedings.

Dated: June 27, 2014

Respectfully submitted,

/s/ James M. Burnham

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CERTIFICATION OF COMPLIANCE

1. I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,422 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. I hereby certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word in a 14-point Garamond, a proportionally spaced font.

Dated: June 27, 2014

/s/ James M. Burnham
James M. Burnham

STATEMENT OF RELATED CASES

Counsel is not aware of any related cases pending before this Court within the meaning of Ninth Circuit Rule 28-2.6.

Dated: June 27, 2014

/s/ James M. Burnham
James M. Burnham

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 27, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 27, 2014

/s/ James M. Burnham
James M. Burnham

STATUTORY ADDENDUM

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18 U.S.C. § 3626—Appropriate Remedies with Respect to Prison Conditions

(a) Requirements for relief.

(1) Prospective relief.

(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--

(i) Federal law requires such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) Preliminary injunctive relief. In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

(3) Prisoner release order.

(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order

unless--

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and (ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that--

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) Termination of relief.

(1) Termination of prospective relief.

(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener--

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act [enacted April 26, 1996], 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

(2) Immediate termination of prospective relief. In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation. Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

(4) Termination or modification of relief. Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

(c) Settlements.

(1) Consent decrees. In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

(2) Private settlement agreements.

(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies. The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.

(1) Generally. The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

(2) Automatic stay. Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period--

(A)

(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

(3) Postponement of automatic stay. The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

(4) Order blocking the automatic stay. Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

(f) Special masters.

(1) In general.

(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

(2) Appointment.

(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

(3) Interlocutory appeal. Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

(4) Compensation. The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A [18 USCS § 3006A] for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

(5) Regular review of appointment. In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

(6) Limitations on powers and duties. A special master appointed under this subsection--

(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

(B) shall not make any findings or communications ex parte;

(C) may be authorized by a court to assist in the development of remedial plans; and

(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

(g) Definitions. As used in this section--

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.