APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TINA CATES, *Plaintiff-Appellant*, v. BRUCE D. STROUD; BRIAN WILLIAMS, SR.; JAMES DZURENDA; ARTHUR EMLING, JR.; MYRA LAURIAN, *Defendants-Appellees.*	No. 18-17026 D.C. No. 2:17-cv-01080-GMN-PAL OPINION

Appeal from the United States District Court
for the District of Nevada
Gloria M. Navarro, District Judge, Presiding

Argued and Submitted May 29, 2020
San Francisco, California

Filed September 25, 2020

Before: William A. Fletcher, Jay S. Bybee, and Paul J. Watford, Circuit Judges.

Opinion by Judge W. Fletcher

COUNSEL

Travis Barrick (argued), Gallian Welker Beckstrom, Las Vegas, Nevada, for Plaintiff-Appellant.

D. Randall Gilmer (argued), Chief Deputy Attorney General; Frank A. Toddre II, Senior Deputy Attorney General; Aaron D. Ford, Attorney General; Office of the Attorney General, Las Vegas, Nevada; for Defendants-Appellees.

OPINION

W. FLETCHER, Circuit Judge:

On February 19, 2017, Tina Cates went to visit her boyfriend, Daniel Gonzales, who was incarcerated at High Desert State Prison in Nevada. Prison officials believed Cates intended to smuggle drugs to Gonzales. A female officer took Cates to a bathroom and instructed her to disrobe and remove her tampon. Cates complied, believing that she had no choice, and the officer performed a visual body cavity strip search. Another officer searched her car. He asked permission to search the contents of Cates's phone, and Cates refused to grant permission. No contraband was found. Cates was not allowed to visit Gonzales, and her visiting privileges at the prison were terminated. Cates brought suit against several prison officials under 42 U.S.C. §1983. The district court granted summary judgment to all defendants.

We hold that the defendant who performed the strip search violated Cates's rights under the Fourth Amendment, but that the defendant is protected by qualified immunity.

I. Background

Because this case comes before the panel on an appeal of a grant of summary judgment for defendants, we draw all reasonable factual inferences in favor of Cates. *Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014). We recount the facts viewed through that lens.

At the time of the episode in question, Cates had been dating Gonzales for almost three years. She had known him for almost twenty years. Gonzales had been incarcerated at High Desert State Prison ("HDSP") since sometime in 2015 or early 2016. Cates submitted an application to visit Gonzales, which was approved in approximately August or September of 2016. After that approval, Cates visited Gonzales weekly.

On February 19, 2017, Cates arrived at HDSP around 11:30 a.m. for her regular visit. Signs on the premises of the prison alerted visitors that all persons and vehicles on the property were subject to search. As she had done at the beginning of every previous visit, Cates signed a consent form reading:

> I, the undersigned, being free from coercion, duress, threats or force of any kind, do hereby freely and voluntarily consent to the search of my person, vehicle and other property which I have brought onto prison grounds. I agree

> that the search maybe [sic] conducted by duly authorized Correctional Officers of the Department of Corrections or by other law enforcement officers specifically authorized by the Warden. I understand that if I do not consent to the search of my person, vehicle or other property, I will be denied visitation on this date and may also be denied future visits pursuant to Administrative Regulation 719.

Unbeknownst to her, an investigation of Cates had been initiated by a non-party correctional officer of HDSP. Defendant Arthur Emling, Jr., a criminal investigator with the Nevada Office of the Inspector General, stated in his deposition that the investigation was prompted by a tip received from "two confidential credible sources" that Cates might try to bring drugs into the prison. Other than Emling's statement, the record contains no information about the origin or reliability of the tip.

On the day of Cates's visit, Emling had applied for and received a warrant to search Cates's "person," to search "any vehicles used and registered by Cates to transport herself to High Desert State Prison," and to seize "[a]ny and all [i]llegal [c]ontrolled [s]ubstances/[n]arcotics." The warrant did not specifically authorize a visual body cavity strip search of Cates's "person." The warrant was never executed. Defendants do not argue to us that, even if executed, the search warrant authorized a strip search.

After Cates signed the consent form, Emling and Myra Laurian ("Laurian"), a female criminal

investigator for the Office of the Inspector General, approached Cates, confirmed her identity, and told her, without explanation, to follow them. Cates believed that Emling and Laurian were "cops" or prison officials, and that she was in their custody. Cates did not feel free to leave. She stated in her deposition that neither Emling nor Laurian informed her that she was free to leave. Emling and Laurian led Cates to the prison administration building.

Laurian took Cates into a bathroom. Laurian told her to remove her clothing, including her bra and underwear, and to remove her tampon. According to Cates, Laurian "ordered [ ], and didn't ask" her to bend over and spread her cheeks. Cates complied. She stated in her deposition, "I didn't know if I could [object]. I don't know what the laws are. I was complying to an authority." Laurian found no drugs or other contraband on Cates's person. Despite her prior assurances that she would do so, Laurian did not supply a replacement tampon. Rather, she provided, in Cates's words, "toilet paper to shove down there."

Cates stated in her deposition that she did not consent to the strip search. Rather, she stated that, in signing the consent form she had signed on every prior visit to the prison, she understood that she was consenting only to a "normal search." She understood that she had consented to "[a] search that is a pat-down that they normally do when you go through the prison."

Cates stated that after the strip search Emling told Laurian, "I need you to watch [Cates] while I go search her car." Emling stated in his deposition that "Cates was not detained," and "could leave at any time." However, defendants acknowledge in their brief to our court that "Cates was detained in HDSP administration during the search" of her car. While Laurian detained Cates, Emling took Cates's car keys from a locker and searched her car. Emling found no drugs or other contraband in Cates's car.

Emling took Cates's phone out of her car and asked for permission to search its contents. Emling then told Cates for the first time that he had a search warrant. He told her that the warrant did not authorize a search of her phone. Cates denied permission to search the contents of her phone. She stated in her deposition that she denied permission because of the personal nature of some of the photographs in her phone.

After Cates refused the search of her phone, prison officials terminated her visit to the prison. Cates left HDSP and drove home. On the way home, she bled through her clothes. Cates did not stop on the way home to buy another tampon because, she stated, "I just wanted to get home and clean myself up and – like, I felt violated. And the fastest thing I wanted to is just get home and – it's an embarrassing thing for a female. You just want to go clean yourself up. It's gross."

On her way home, Cates spoke to Gonzales on the phone. Because Gonzales was incarcerated, the call was recorded. Cates told Gonzales what happened and

said that she "fe[lt] violated." Cates told Gonzales that "I told her that she could because, I mean, I'm not bringing drugs in, you know what I mean."

Cates stated in her deposition that the search at HDSP "traumatized me. . . . I've never experienced anything like that in my life. . . . I'm still in shock over it." She stated that she rushed home to clean "[t]he blood, and the violation that I felt from the – having to take my clothes off and spread my cheeks open and all that for the lady." Cates stated, "I have a clean record. I take pride in that. I'm a law-abiding citizen." Cates took off work and did not leave her house for several days because, she stated: "I was emotionally messed up in the head from the situation that I had gone through at the prison." Cates also increased the dosage of anxiety medication that she had previously been prescribed.

II. NDOC Guidelines

Nevada Department of Corrections ("NDOC") guidelines, applicable to both inmates and visitors, mandate that "[s]earches [ ] be conducted in a manner that causes the least disruption and affords respect and privacy for the property or person searched. Staff will avoid unnecessary force or embarrassment." "Whenever practical and where there is no undue risk to the officers or employees conducting the search, the person or inmate to be searched will remain within view of the property being searched."

NDOC provides guidance specifically regarding searches of visitors. "Every visitor . . . will be subject to

pat down, frisk and personal property searches and may be subject to strip searches. Prior to the search, the visitor will be informed of the type of search to be performed and of the visitor's option to refuse to be searched." "If the planned search is to be a strip search, the visitor must give consent in writing to be strip searched, unless a search warrant has been obtained and a peace officer is present." "Strip searches may only be conducted [if] . . . [t]he person is notified of the right to refuse to be searched and gives written approval," "[t]he search is conducted by two staff members trained in conducting searches and of the same gender as the person being searched," and "[t]he search is conducted in a private area as near the perimeter entrance as possible."

III. Procedural History

Cates alleged nine causes of action against five different defendants for violation of the First, Fourth, Eighth, and Fourteenth Amendments of the United States Constitution. Cates sought damages as well as injunctive and declaratory relief.

Cates also alleged causes of action under the Nevada state constitution. However, she mentions the Nevada constitution only once in her brief to us, and she cites no Nevada case. She has therefore waived any causes of action under the state constitution. *See Brown v. Rawson-Neal Psychiatric Hosp.*, 840 F.3d 1146, 1148 (9th Cir. 2016).

The district court granted summary judgment to all defendants on all causes of action.

IV. Standard of Review

We review a district court's grant of summary judgment de novo. *See Zetwick v. Cty. of Yolo*, 850 F.3d 436, 440 (9th Cir. 2017). "Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact." *Id.* (internal quotation marks and citation omitted). In other words, a plaintiff survives a defendant's motion if she produces "evidence such that a reasonable juror drawing all inferences in [her] favor . . . could return a verdict in [her] favor." *Id.* at 441 (internal quotation marks and citation omitted).

V. Discussion

A. Fourth Amendment

Cates's only viable cause of action is her claim that the unconsented strip search violated her rights under the Fourth Amendment. For the reasons that follow, we hold that the strip search violated the Fourth Amendment. However, we also hold that Laurian, who conducted the strip search, is protected from a damages suit by qualified immunity. Because there is little to no likelihood that Cates might again be subjected to a strip search under comparable circumstances, prospective declaratory and injunctive relief are unavailable.

Qualified immunity protects government officials acting in good faith and under the color of state law from suit under § 1983. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity bars suits against government officials when either (1) no deprivation of constitutional rights was alleged or (2) the law dictating that specific constitutional right was not yet clearly established. *Id.* at 236. Courts may begin with either prong of the analysis. *Id.*

If a constitutional violation is established, satisfying the first prong, the second prong of a qualified immunity analysis asks whether the law prohibiting the action was "clearly established" at the time of the incident in question. *Id.* The function of the inquiry under the second prong is to ensure that officials are subject to suit only for actions that they knew or should have known violated the law. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Law is "clearly established" for the purposes of qualified immunity analysis if "every reasonable official would have understood that what he is doing violates that right." *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) (internal quotations and citations omitted). An official can be on notice that his conduct constitutes a violation of clearly established law even without a prior case that had "fundamentally similar" or "materially similar" facts. *Hope*, 536 U.S. at 741. In the analysis that follows, we address both prongs.

1. Fourth Amendment Violation

The Fourth Amendment prohibits unreasonable searches. U.S. Const. Amend. W; *Bell v. Wolfish*, 441 U.S. 520, 558 (1979). To determine whether a particular search is unreasonable, the intrusion on the individual's privacy interests must be balanced against "its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). A prison "is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence." *Bell*, 441 U.S. at 559. In determining whether a prison search is reasonable under the Fourth Amendment, the prison's "significant and legitimate security interests" must be balanced against the privacy interests of those who enter, or seek to enter, the prison. *Id.* at 560.

It is well-established that prisoners do not shed all constitutional rights at the prison gate, though these rights may be limited or restricted. *See id.* at 545–546; *Sandin v. Conner*, 515 U.S. 472, 485 (1995); *see also Gerber v. Hickman*, 291 F.3d 617, 620 (9th Cir. 2002) (noting that while "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," "it is also clear that imprisonment carries with it the . . . loss of many significant rights" (citations and quotations omitted)). "Prisoners retain only those rights 'not inconsistent with their status as . . . prisoners or with the legitimate penological objectives of the corrections system.'" *Gerber*, 291 F.3d at 620 (citing *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (alterations omitted)).

Like prisoners, prison visitors retain only those rights that are consistent with the prison's significant and legitimate security interests. But visitors' privacy interests, and their threats to prison security, are distinct from those of inmates and detainees. *See*, *e.g.*, *Boren v. Deland*, 958 F.2d 987, 988 (10th Cir. 1992); *Daugherty v. Campbell*, 935 F.2d 780, 786 (6th Cir. 1991); *see also Blackburn v. Snow*, 771 F.2d 556, 563 (1st Cir. 1985) (recognizing that "free citizens entering a prison, as visitors, retain a legitimate expectation of privacy, albeit one diminished by the exigencies of prison security"). Any constraints on visitors' rights must be "justified by the considerations underlying our penal system" and their curtailment necessary to the institution's needs. *Hudson*, 468 U.S. at 524 (internal citation omitted).

As we have recognized, "[A]son officials . . . have a strong interest in preventing visitors from smuggling drugs into the prison." *Mendoza v. Blodgett*, 960 F.2d 1425, 1433 (9th Cir. 1992). Concerns about smuggling drugs and other contraband, such as weapons, into the facility may justify a variety of security screening measures. The nature of permissible screening measures will vary depending on the nature of the threat. "Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell*, 441 U.S. at 559.

While "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," *United States v. Martinez-Fuerte*, 428 U.S.

543, 560 (1976), the unique context of the prison facility does not always require individualized suspicion. Some searches of visitors to "sensitive facilities," like courthouses or prisons, require no individualized suspicion provided that the searches are both limited and necessary. *See McMorris v. Alioto*, 567 F.2d 897, 899 (9th Cir. 1978). Pat-down searches and metal detector screenings of visitors may be conducted as a prerequisite to visitation without any individualized suspicion, given the weighty institutional safety concerns. Such searches are "relatively inoffensive" and "less intrusive than alternative methods," and they may be avoided by the simple expedient of not visiting the prison. *Id.* at 900–01.

Visual body cavity searches, such as the search to which Cates was subjected, are at the other end of the spectrum. "Strip searches involving the visual exploration of body cavities [are] dehumanizing and humiliating." *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 711 (9th Cir. 1990), *abrogated on other grounds by Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam); *see also Bell*, 441 U.S. at 576–77, (Marshall, J., dissenting) (stating that "body-cavity searches . . . represent one of the most grievous offenses against personal dignity and common decency"). "The intrusiveness of a body cavity search cannot be overstated." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1445 (9th Cir. 1991) (alteration and citation omitted). The Fourth Amendment permits these searches, even of inmates, only in limited circumstances. *See Bell*, 441 U.S. 520, 558–60 (upholding policy of visual body cavity strip searches of inmates after

contact visits); *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 566 U.S. 318 (2012) (upholding similar searches of detainees before they are introduced into the general population of a facility); *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc) (upholding policy of strip searches of arrestees before introduction into the general jail population); *see also Edgerly v. City and County of San Francisco*, 599 F.3d 946, 957 (9th Cir. 2010) (strip search of an arrestee never placed in the general jail population requires reasonable suspicion).

Prisoners may be subjected to visual body cavity strip searches based on "reasonable suspicion" in order "to protect prisons and jails from smuggled weapons, drugs or other contraband which pose a threat to the safety and security of penal institutions." *Fuller*, 950 F.2d at 1447; *see also Kennedy*, 901 F.2d at 715. However, such searches "are valid only when justified by institutional security concerns." *Fuller*, 950 F.2d at 1447. In circumstances where they threaten prison security, prison *visitors* may be strip searched when based on reasonable and individualized suspicion. *See Burgess v. Lowery*, 201 F.3d 942, 945 (7th Cir. 2000) (recognizing "a long and unbroken series of decisions by our sister circuits" finding "strip searches of prison visitors . . . unconstitutional in the absence of reasonable suspicion that the visitor was carrying contraband"); *see*, *e.g.*, *Blackburn*, 771 F.2d at 566–67 (rejecting "appellants' attempt to impute or casually transfer to free citizens visiting a prison the same circumscription of rights suffered by inmates"); *Calloway*

v. Lokey, 948 F.3d 194, 202 (4th Cir. 2020) (stating that "the standard under the Fourth Amendment for conducting a strip search of a prison visitor—an exceedingly personal invasion of privacy—is whether the prison officials have a reasonable suspicion, based on particularized and individualized information, that such a search will uncover contraband on the visitor's person on that occasion").

However, even where there is reasonable suspicion that a prison visitor is carrying contraband, a strip search is permissible only if it can be justified by a legitimate security concern. *See Fuller*, 950 F.2d at 1447. That justification does not exist when the visitor is not in a position to introduce contraband into the prison. For example, there is no legitimate security justification when a visitor is still in an administrative building of the prison with no possibility of contact with a prisoner. Only when a visitor could introduce contraband into the prison is the risk comparable to that posed by a prisoner who returns to the general prison environment after contact with a visitor, or a detainee who is placed with the general prison population after booking. *See Bell*, 441 U.S. 520; *Florence*, 566 U.S. 318.

A critical distinction between a visitor, on the one hand, and a prisoner or detainee, on the other, is that a visitor can leave the administrative area of a prison without ever coming into contact with a prisoner. The Sixth Circuit relied on this distinction in *Spear v. Sowders*, 71 F.3d 626 (6th Cir. 1995) (en banc), to hold that a prison visitor could be compelled to submit to a digital body cavity strip search based solely on

reasonable suspicion only if the visitor was given the opportunity to terminate her visit and depart instead. Kentucky prison officials believed Spear was bringing drugs to an inmate during her visits. They refused to allow her into the prison proper, where she would have had contact with prisoners, and they refused to allow her to leave the administrative area of the prison without submitting to a body cavity strip search. *Id.* at 628–29. The search "embarrassed, humiliated, and demeaned her." *Id.* at 629. The court held that "the residual privacy interests of visitors in being free from such an invasive search requires that prison authorities have at least a reasonable suspicion that the visitor is bearing contraband before conducting such a search." *Id.* at 630. The court held further that even if there was reasonable suspicion that Spear was carrying drugs, she had a "right not to be searched for administrative reasons without having a chance to refuse the search and depart." *Id.* at 632. The court noted that "the same logic that dictates that such a search may be conducted only when there is reasonable suspicion also demands that the person to be subjected to such an invasive search be given the opportunity to depart." *Id.*

The Seventh Circuit has endorsed the reasoning of *Spear*: "[I]f a visitor showed up at the gates of the prison and was told that anyone who visits an inmate has to submit to a strip search, and replied that in that event she would not visit him, the guards would not seize her and subject her to the strip search anyway—or if they did, they would be violating the Fourth Amendment. . . . The visitor thus always had the legal

option of avoiding the strip search by forgoing the visit." *Burgess*, 201 F.3d at 945. *See also Stephen v. MacKinnon*, No. CIV.A. 94-3651-B, 1997 WL 426972, at *6 (Mass. 1997) (finding "[t]he portion of the search which occurred after Ms. Stephen expressed her wish to leave . . . unreasonable and in violation of [her] constitutional right to be free of an unreasonable search"); *Shields v. State*, 16 So. 85, 86 (Ala. 1894) (describing "[t]he examination or search must be voluntary on the part of [visitors]. If they do not consent, admission to the jail or access to the prisoners may be refused").

Using a similar analysis, the Eighth Circuit found a Fourth Amendment violation when a visitor—who had already finished her visit to the jail and was therefore "no longer in a position to smuggle contraband" and "no longer posed a threat to prison security"—was subjected to a visual body cavity strip search. *Marriott By and Through Marriott v. Smith*, 931 F.2d 517, 518, 520 (8th Cir. 1991). In *Hunter v. Auger*, 672 F.2d 668, 675 (8th Cir. 1982), the Eighth Circuit had previously held that visitors may be subjected to strip searches if there are "reasonable grounds . . . to believe that a particular visitor will attempt to smuggle contraband" into the prison. The court wrote in *Marriott* that "[t]he mere fact that this case and *Hunter* involved people who had gone to visit prisoners is a superficial similarity. That similarity does not justify an officer relying on *Hunter* when the purpose for the *Hunter* rule does not exist." 931 F.2d at 521.

We agree with the Sixth, Seventh and Eighth Circuits. Our agreement with our sister circuits follows

naturally from our precedent on prison searches and on screening measures in sensitive facilities more generally. In upholding a blanket policy requiring strip searches of admittees to the county jail in *Bull*, we specifically noted that we were not "disturb[ing] our prior opinions considering searches of arrestees who were not classified for housing in the general jail or prison population." 595 F.3d at 981. Our rationale in *Bull*, like the Supreme Court's rationale in *Bell*, 441 U.S. 520, was based on the jail's security interests *within* the jail. *See Bull*, 595 F.3d at 981 n.17 ("The strip search policy at issue in this case, and our holding today, applies *only* to detainees classified to enter the general corrections facility population." (emphasis added)); *see also Bell*, 441 U.S. at 558 (upholding searches of "[i]nmates at all Bureau of Prison facilities . . . after every contact visit with a person from outside the institution"). We specifically noted in *Bull* that "searches of arrestees at the place of arrest, searches at the stationhouse prior to booking, and searches pursuant to an evidentiary investigation must be analyzed under different principles than those at issue today." *Id.* at 981.

Because the ability of prison officials to conduct strip searches of visitors based on reasonable suspicion is premised on the need to prevent introduction of contraband into the prison, a search of a visitor who no longer intends to enter the portion of the prison where contact with a prisoner is possible, or who was leaving the prison, must rely on another justification. Ordinarily, a visitor cannot introduce contraband into the

prison simply by appearing in the administrative area of the prison. If prison officials have reasonable suspicion that such a visitor is carrying contraband, the prison's security needs would justify a strip search only if the visitor insists on access to a part of the prison where transfer of contraband to a prisoner would be possible. If the visitor would prefer to leave the prison without such access, the prison's security needs can be satisfied by simply letting the visitor depart.

NDOC's own guidelines support this analysis. As we noted above, they provide:

> Prior to the search, the visitor will be informed of the type of search to be performed and of the visitor's option to refuse to be searched. If the planned search is to be a strip search, the visitor must give consent in writing to be strip searched, unless a search warrant has been obtained and a peace officer is present. In the absence of a search warrant, any person not giving permission to search upon request will be required to leave the institution/facility grounds.

The guidelines continue: "Strip searches may only be conducted [when] [t]he person is notified of the right to refuse to be searched and gives written approval to be searched per the 'Consent to Search' form." The NDOC's guidelines are of course based on the security needs of the prison. Notably, the guidelines in no way suggest that it is necessary for institutional security to conduct a search of a visitor who prefers to leave the

prison rather than subject herself to a strip search. Prison regulations in many states are similar *See*, *e.g.*, Ill. Admin. Code § 2501.220(a)(3) (permitting strip searches of visitors only if there is "reasonable suspicion that the visitor may be in possession of contraband or be attempting to transport contraband into the facility" *and* "[t]he visitor [is] informed that he may refuse to submit to the search . . . and may be denied the visit unless he specifically consents in writing to a strip search"); N.Y. Admin. Code § 200.2(f) (describing a "visitor must be informed that he/she has the option to submit . . . or to refuse"); Miss. Admin. Code Pt. 2, R. 2.1.5(4) ("When any visitor is believed, upon reasonable suspicion, to be carrying contraband, they will be asked to consent to a strip search and/or body cavity search.").

In other circumstances or settings, a refusal to allow someone to depart rather than submit to a search may be justified by legitimate security needs. For example, we held in *U.S. v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007) (en banc), that a would-be airplane passenger could be subjected to a pat-down, empty-your-pockets search once he had entered the security area, even though he expressed a desire to leave rather than be subjected to the search. We held that a rule allowing the would-be passenger to depart in such a circumstance would "make[ ] little sense in a post-9/11 world." *Id.* Rather, such a rule

> would afford terrorists multiple opportunities to attempt to penetrate airport security by `electing not to fly' on the cusp of detection

> until a vulnerable portal is found. This rule would also allow terrorists a low-cost method of detecting systematic vulnerabilities in airport security, knowledge that could be extremely valuable in planning future attacks.

Id. at 960–61.

Our decision in *Aukai* is entirely consistent with a holding that a prison visitor who does not insist on access to the prison proper must be allowed to leave rather than be subjected to a strip search. First, prisons are not faced with the same sort of security threats as airports. Our rationale in *Aukai* made perfect sense in the context of airport screening, where a terrorist is intent on bringing down an airplane—any large passenger airplane—and needs to find a soft spot at only one airport—any significant airport—to do enormous damage. By contrast, a prison visitor intent on bringing contraband into a prison is typically interested in bringing contraband to a particular person or group of people in *that* prison. Second, the search in *Aukai* was not intrusive. The would-be passenger was only wanded, patted down, and asked to empty his pockets. An entirely different case would have been presented in *Aukai* if an unconsented strip search had been at issue.

We are aware that in *U.S. v. Prevo*, 435 F.3d 1343 (11th Cir. 2006), the Eleventh Circuit relied on airport search cases to reject an argument that a person should have been allowed to leave a prison parking lot rather than have her car searched. The court wrote that an option to leave

> would constitute a one-way street for the benefit of a party planning airport mischief, since there is no guarantee that if he were allowed to leave he might not return and be more successful. As we observed, established search procedures are more valuable for what they discourage than what they discover. Any policy that reduces the likelihood of a successful search will decrease the risk to the wrongdoer. A policy allowing the wrongdoer to back out on the brink of discovery reduces the risk to zero, leaving her free reign to probe the security measures until an opening is found.

Id. at 1348–49 (citations and alterations omitted). The Eleventh Circuit's concerns are not compelling when applied to an unconsented strip search of a visitor who would prefer to leave rather than be searched. A strip search is humiliating and intrusive. Moreover, in *Prevo* some prisoners had access to the parking lots at the prison. *See Prevo*, 435 F.3d at 1347 (noting that the pistol on the front seat of a visitor's car would be "accessible to prisoners passing by who were inclined to wrongdoing," and concluding that "[a]t least where inmates have access to cars parked in prison facility parking lots, a search of the vehicle is reasonable"); *see also Neumeyer v. Beard*, 421 F.3d 210, 211 (3rd Cir. 2005) ("Notably, some inmates have outside work details and such inmates may have access to visitors' vehicles parked at the prison.") (quotation omitted); *McDonell v. Hunter*, 809 F.2d 1302, 1309 (8th Cir. 1987) (finding "it is not unreasonable to search [employee]

vehicles that are parked within the institution's confines where they are accessible to inmates").

The court in *Spear* drew a similar distinction between strip searches and vehicle searches. *See Spear*, 71 F.3d at 633. While holding that Spear should have been given an opportunity to leave before being subjected to a body cavity strip search based on reasonable suspicion, the court refused to hold that the search of her car located on prison grounds was unreasonable. It noted that "while unpleasant, the nature of an automobile search is far less intrusive than a strip and body cavity search, and the interest in preventing the introduction of contraband remains as great." *Id.*; *see also Romo v. Champion*, 46 F.3d 1013, 1019 (10th Cir. 1995) (stating that a "strip search is a far cry from the routine, rather nonintrusive search initially conducted by defendants at the roadblock . . . the strip search of an individual by government officials, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience") (quotation omitted). It further distinguished the two searches based on the fact that contraband hidden on or inside a person would only be transferred to a prisoner through contact with the prisoner while "an object secreted in a car, to which prisoners may have access, is a potential threat at all times after the car enters the grounds." *Spear*, 71 F.3d at 633.

Even if there was reasonable suspicion that Cates was seeking to bring drugs into the prison (a question we do not reach), Laurian violated her rights under the Fourth Amendment by subjecting her to a strip search

without giving her the option of leaving the prison rather than being subjected to the search.

2. Qualified Immunity

We have concluded, in agreement with three of our sister circuits, that Laurian violated Cates's rights under the Fourth Amendment by subjecting her to a strip search without giving her an opportunity to leave rather than be subjected to the search. We hold, however, that prior to our decision in this case the contours of the right in this circuit were not "sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right," and accordingly extend qualified immunity. *Jessop v. City of Fresno*, 936 F.3d 937, 940–41 (9th Cir. 2019) (en banc) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The Supreme Court and our court have addressed strip searches of detainees. But when Cates was subject to the strip search at issue in this case, there was no case in this circuit where we had held that a prison visitor has a right to leave the prison rather than undergo a strip search conducted on the basis of reasonable suspicion. While we "do not require a case directly on point, . . . existing precedent must have placed the . . . question beyond debate." *Al-Kidd*, 563 U.S. at 741. Cases allowing strip searches of detainees support a holding that Cates's rights under the Fourth Amendment were violated primarily based on their differences from, rather than their similarities to, Cates's case. Additionally, while "in a sufficiently 'obvious' case

of constitutional misconduct, we do not require a precise factual analogue in our judicial precedents," we have noted that this "exception . . . is especially problematic in the Fourth-Amendment context" where officers are confronted with "endless permutations of outcomes and responses." *Sharp v. County of Orange*, 871 F.3d 901, 911–12 (9th Cir. 2017).

Existing case law has already clearly established that a strip search of a prison visitor conducted without reasonable suspicion is unconstitutional. We do not reach the question whether there actually was reasonable suspicion that Cates was carrying drugs on her person. But, for purposes of a qualified immunity analysis, it was not unreasonable for Laurian to have believed that there was reasonable suspicion, given that a search warrant (though unexecuted) had been issued for a search of Cates's "person" for drugs. However, prior to our decision in this case, there has been no controlling precedent in this circuit, or a sufficiently robust consensus of persuasive authority in other circuits, holding that prior to a strip search a prison visitor—even a visitor as to whom there is reasonable suspicion—must be given an opportunity to leave the prison rather than be subjected to the strip search.

B. Other Causes of Action

We hold that Cates's other alleged causes of action all fail. Cates alleges two additional Fourth Amendment causes of action: that Emling and Laurian violated the Fourth Amendment when they detained her

while searching her car, and again when they took her phone. Neither allegation states a constitutional violation. Some form of temporary detention while they searched Cates's car was permissible because officers' "authority to detain incident to a search is categorical." *Muehler v. Mena*, 544 U.S. 93, 98 (2005). Cates's detention during the search of her car lasted for only a few minutes and did not involve serious physical restriction. The brief moment when Defendant Emling was holding Cates's phone and asking her for the passcode (which Cates refused to provide) did not "meaningful[ly] interfere[ ] with [her] possessory interests in" her phone. *United States v. Brown*, 884 F.2d 1309, 1311 (9th Cir. 1989).

Cates alleges three due process causes of action: she contends that her due process rights were violated when (1) Emling and Laurian failed to give her a copy of the search warrant; (2) a prison official denied her access to the prison on February 17 without reasoning or appeal; and (3) other prison officials indefinitely suspended her permission to visit the prison. Cates's first due process cause of action fails because the warrant was never executed, and she cites no law requiring the production of an unexecuted warrant. *See United States v. Silva*, 247 F.3d 1051, 1058 n.4 (9th Cir. 2001). Cates also cites no caselaw supporting her second and third due process causes of action.

Cates alleges other causes of action, including that (1) "she was retaliated against under the First Amendment" after "she reasonably refused to provide [Emling] the password to her cell phone, something she

had a protected [First] Amendment right to do"; (2) her Eighth Amendment right to be free from cruel and unusual punishment was violated; and (3) prison officials violated her right to equal protection by terminating her visitation while not doing the same to other, similarly situated individuals. None of these other causes of actions has merit.

Conclusion

The unconsented strip search to which Cates was subjected, without giving her the option of leaving the prison rather than being subjected to the search, was unreasonable under the Fourth Amendment. However, because at the time of the violation Cates did not have a clearly established Fourth Amendment right to leave without being subjected to the search, Laurian is entitled to qualified immunity Cates's other causes of action fail. We affirm the district court's award of summary judgment to defendants.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

TINA CATES, Plaintiff, vs. BRUCE D. STROUD, *et al.*, Defendants.	Case No.: 2:17-cv-01080-GMN-PAL **ORDER** (Filed Sep. 24, 2018)

Pending before the Court is Defendants Brian Williams, Sr.; James Dzurenda; Arthur Emling, Jr.; and Myra Laurian's (collectively "Defendants'") Motion for Summary Judgment, (ECF No. 25). Plaintiff Tina Cates ("Plaintiff") filed a Response, (ECF No. 27), and Defendants filed a Reply, (ECF No. 29). For the following reasons, Defendants' Motion for Summary Judgment is **GRANTED**.

I. BACKGROUND

This case arises from Plaintiff's visit to High Desert State Prison ("HDSP") to see inmate Daniel Gonzales on February 19, 2017. (Am. Compl., ECF No. 18). Prior to February 19, 2017, an investigation of Plaintiff was initiated by a non-party correctional officer of HDSP because he received information from two confidential credible sources that Plaintiff might bring drugs or contraband into the prison. (Emling's Resp. to Pl.'s Interrog. 4:2–13, Ex. 5 to MSJ, ECF No. 25-5). This

information from the officer was passed along to a criminal investigator for the Office of the Inspector General, Arthur Emling, Jr. ("Emling"), who applied for a warrant on the basis that he had probable cause to believe Plaintiff's person or vehicles likely contained illegal controlled substances. (*Id.* 4:4–6); (Aff. of Search Warrant at 1, Ex. 4 to Resp., ECF No. 27). On February 19, 2017, a search warrant was issued that authorized the search of Plaintiff's person and any vehicles used to transport her to HDSP. (*See* Search and Seizure Warrant, Ex. 4 to MSJ, ECF No. 25-4). However, the search warrant was never executed on Plaintiff. (*See* Return on Search Warrant, Ex. 6 to Resp., ECF No. 27).

When Plaintiff arrived at HDSP on the morning of February 19,2017, she signed a form consenting to a search of her person, vehicle, and other property that she brought onto prison grounds and was given a locker to hold her possessions. (Dep. of Plaintiff 21:15–22:1, Ex. 3 to Mot. Summ. J. ("MSJ"), ECF No. 25-3); (*see* Consent to Search Form, Ex. 1 to MSJ, ECF No. 25-1). While Plaintiff was waiting in the prison lobby Emling and Myra Laurian ("Laurian") asked her to step outside of the building. (Dep. of Pl. 22:2–25, Ex. 3 to MSJ). Emling informed Plaintiff there was reason to believe she was attempting to bring illegal drugs onto the premises. (*Id.* 23:5–9, 106:2–3). Subsequently, Laurian took Plaintiff into the bathroom to perform a strip search. (*Id.* 25:2–25). During the strip search, Plaintiff was asked to remove her tampon and was not given a replacement. (*Id.* 27:1–7). Instead, Plaintiff was provided with toilet paper, and on her drive home

from the prison Plaintiff bled through her clothes. (*Id.* 27:5–7,39:21–23).

Once the strip search was complete, Emling took Plaintiff's car keys from her locker and conducted a search of Plaintiff's vehicle, located in the prison parking lot, while Plaintiff waited inside with Laurian. (*Id.* 43:7–14, 88:1–17). Emling removed Plaintiff's cell phone from her vehicle and asked Plaintiff if he could search the contents of her phone. (*Id.* 46:16–21, 47:1–5). Plaintiff denied his request to search the information on her phone. (*Id.*). However, Plaintiff did not revoke her consent provided by the consent to search form. (*Id.* 108:16–23).

After Plaintiff denied the request to search her phone, Emling told Plaintiff that her visitation was being terminated, and Plaintiff was asked to leave the prison. (*Id.* 94:8–12). On February 22,2017, Plaintiff received a letter from the HDSP Associate Warden advising her that her visiting privileges had been suspended indefinitely and she was not permitted to return to the facility without written request and permission from the Warden. (Nevada Department of Corrections ("NDOC") Letter, Ex. 7 to Resp., ECF No. 27).

On April 19, 2017, Plaintiff filed her initial Complaint pursuant to 42 U.S.C. § 1983. (Compl., ECF No. 1). On October 26, 2017, Plaintiff filed an Amended Complaint alleging nine causes of action: (1) Due Process violation pursuant to the Fourteenth Amendment and Article 1 § 8 of the Nevada Constitution; (2) Cruel and Unusual Punishment pursuant to the Eighth

Amendment and Article 1 § 6 of the Nevada Constitution; (3) Unreasonable Search and Seizure pursuant to the Fourth Amendment and Article 1 § 18 of the Nevada Constitution; (4) Unreasonable Search and Seizure pursuant to the Fourth Amendment and Article 1 § 18 of the Nevada Constitution; (5) Unreasonable Search and Seizure pursuant to the Fourth Amendment and Article 1 § 18 of the Nevada Constitution; (6) Retaliation pursuant to the First Amendment and Article 1 § 9 of the Nevada Constitution; (7) Due Process violation pursuant to the Fourteenth Amendment and Article 1 § 8 of the Nevada Constitution; (8) Due Process violation pursuant to the Fourteenth Amendment and Article 1 § 8 of the Nevada Constitution; and (9) Equal Protection pursuant to the Fourteenth Amendment. (Am. Compl. ¶¶ 50–88).

In the instant Motion Defendants request summary judgment on all nine causes of action on the basis that "there are no genuine issues of material fact, and Defendants are entitled to judgment as a matter of law." (MSJ 23:3–4, ECF No. 25).

II. LEGAL STANDARD

A. Summary Judgment

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* "Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to

establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 32324. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T. W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences

are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

B. Qualified Immunity

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In applying the two-part qualified immunity analysis, courts must determine: (1) whether, taken in the light most favorable to the plaintiff, the defendant's conduct amounted to a constitutional violation, and (2) whether or not the right was clearly established at the time of the violation. *Bull v. City & Cty. of San Francisco*, 595 F.3d 964, 971 (9th Cir. 2010) (quoting *McSherry v. City of Long Beach*, 560 F.3d 1125, 1129–30 (9th Cir.2009)). Courts can decide which of the prongs should be addressed first. *Id.* "Where the officers' entitlement to qualified immunity depends on the resolution of disputed issues of fact in their favor, and against the non-moving party, summary judgment is not appropriate." *Wilkins v. City of Oakland*, 350 F.3d 949, 956 (9th Cir. 2003).

III. DISCUSSION

A. Fourth Amendment Claims

1. Third Cause of Action – Search of Plaintiff's Person

Plaintiff's third cause of action alleges that she was deprived of her rights against unreasonable search and seizure when Laurian "made [Plaintiff] remove her menstrual tampon and then failed to provide [Plaintiff] an alternative tampon after witnessing that [Plaintiff] was in fact menstruating." (Am. Compl. ¶ 60, ECF No. 18). Defendants argue that they had verbal and written consent to perform a search of Plaintiff's person, a search warrant was obtained to search Plaintiff and her vehicle, and they had reasonable suspicion to conduct a strip search. (MSJ 5:18–25, 6:1–2, 6:11–12, ECF No. 25). For these reasons, Defendants assert that "there can be no question that the search of Plaintiff did not violate the Fourth Amendment . . . Therefore, there are no genuine issues of material fact related to Plaintiff's Third Cause of Action, and Defendants are entitled to judgment as a matter of law." (*Id.* 8:1–5).

Plaintiff argues that it "cannot be said that [Plaintiff] consented to the strip search, the search of her vehicle, or the search of the contents of her phone." (Resp. 9:17–18, 9:10, ECF No. 27). Specifically, Plaintiff claims that the search exceeded the scope of consent because she signed a consent to search form that authorized "NDOC officials to conduct [a] clothed pat down type body" search, not a strip search. (*Id.* 5:5–6).

Additionally, Plaintiff claims Defendants "failed to comply with the provisions of established prison regulations regarding strip searches and the search of [Plaintiff's] vehicle." (*Id.* 9:13–15). Finally, Plaintiff contends that "Defendants are not entitled to any protections that may have been afforded them by execution of the search warrant" because "they did not execute the search warrant in carrying out their searches of [Plaintiff]." (*Id.* 9:2–6).

The Fourth Amendment guarantees freedom from unreasonable search and seizure. U.S. Const. amend. IV. The test for unreasonableness "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). However, "the Fourth Amendment does not afford a person seeking to enter a penal institution the same rights that a person would have on public streets or in a home." *Spear v. Sowders*, 71 F.3d 626, 629–30 (6th Cir. 1995). "Visitors can be subjected to some searches, such as a pat-down or a metal detector sweep, merely as a condition of visitation, absent any suspicion. However, because a strip and body cavity search is the most intrusive search possible, courts have attempted to balance the need for institutional security against the remaining privacy interests of visitors." *Id.* "Although not yet addressed by the Ninth Circuit in a published opinion, many other Courts of Appeals have concluded that . . . a

visitor may only be subjected to a strip search if the search is supported by reasonable suspicion" that evidence or contraband will be uncovered. *O'Con v. Katavich*, No. 1:13-cv-1321-AWI-SKO, 2013 WL 6185212, at *5 (E.D. Cal. Nov. 26, 2013); *see Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982) (applying reasonable suspicion standard for strip searches of prison visitors).

The Court finds that that there are no material facts at issue that provide sufficient evidence for a reasonable jury to return a verdict in favor of Plaintiff as to her third cause of action. In assessing the facts in the light most favorable to Plaintiff, it appears as though the scope of the consent to search form extended only to a pat down of Plaintiff's outer clothing, and Plaintiff did not sign a separate consent to search form related specifically to a strip search. (Tina Cates Aff. ¶ 8 at 34, Ex. 1 to Resp., EFC No. 27); (*see* Consent to Search Form, Ex. 1 to MSJ, ECF No. 25-1) ("the undersigned . . . freely and voluntarily consents to the search of my person"); (*see also* Administrative Regulation ("AR") 719 ¶ 6(f), Ex. 2 to Resp., ECF No. 27) ("visitors shall submit to a search of their person (i.e., clothes body search and metal detector inspection)); (*see also* AR 422.05 at 6, Ex. 3 to Resp., ECF No. 27) ("Every visitor entering the grounds of an institution/facility will be subject to pat down, frisk, and personal property searches and may be subject to strip searches . . . [for] a strip search, the visitor must give consent in writing to be strip searched, unless a search warrant has been obtained and a peace officer is present."). However, consent is not necessary to perform a strip

search, Defendants only needed reasonable suspicion that Plaintiff possessed contraband. *See Katavich*, 2013 WL 6185212, at *5.

Plaintiff does not dispute that Defendants had reasonable suspicion to perform the strip search. Instead, Plaintiff argues that Defendants violated the provisions and guidelines of AR 422. However, Defendants' violations of prison administrative regulations do not amount to a federal constitutional violation. *See Phillips v. Norris*, 320 F.3d 844, 847 (8th Cir. 2003) ("[T]here is no federal constitutional liberty interest in having state officers follow state law or prison officials follow prison regulations."); *see also Hovater v. Robinson*, 1 F.3d 1063, 1068 n. 4 (10th Cir. 1993) ("[A] failure to adhere to administrative regulations does not equate to a constitutional violation."); *see also Padilla v. Nevada*, No. 3:07-cv-00442-RAM, 2010 WL 3463617, at *4 (D. Nev. Aug. 25, 2010), *aff'd sub nom. Padilla v. Brooks*, 540 F. App'x 805 (9th Cir. 2013) ("Although it may be desirable for a prison to adhere to its own regulations, such adherence is not an independent constitutional mandate. Prison regulations are not a proxy for the substantive protections conferred under the U.S. Constitution."). Because searches of prison visitors must be supported by reasonable suspicion, and Plaintiff does not dispute that reasonable suspicion existed, there are no genuine issues for trial on this claim.

Furthermore, the Court's finding is supported by the search warrant that was issued which states that there was probable cause for Defendants to believe

that illegal controlled substances would be found either on Plaintiff's person or in her vehicles. (*See* Search and Seizure Warrant, Ex. 4 to MSJ, ECF No. 25-4). Regardless of whether the warrant was executed, it was determined that probable cause for the search existed, and all that is necessary for a strip search of Plaintiff was the lesser standard of reasonable suspicion. Accordingly, Defendants are entitled to summary judgment on Plaintiff's third cause of action.

2. Fourth Cause of Action – Plaintiff's Detainment

Plaintiff's fourth cause of action alleges that she was unlawfully detained while Emling searched her vehicle out of her view and without her express consent. (Am. Compl. ¶ 65). Defendants argue they are entitled to judgment as a matter of law on Plaintiff's fourth cause of action because Plaintiff consented to the search of her vehicle, and the search was reasonable because it was based on the legitimate governmental interest in keeping contraband out of the prison. (MSJ 8:10–9:6). Additionally, Defendants assert that they are entitled to qualified immunity. (*Id.* 22:22).

In response, Plaintiff states that she "concedes that she consented to the possible search of her vehicle in signing the [consent to search] form on the morning of February 19,2017. [Plaintiff] contends she did not, however, consent to being detained and prevented from viewing the possible search of her vehicle." (Resp. 10:17–21). Plaintiff cites to rule AR 422 which states

"any search of the personal property of staff, inmate, or visitor must be done in their presence unless security concerns or circumstances dictate otherwise." (*Id.* 10:24–27).

As Plaintiff concedes that she consented to the search of her vehicle, there is no genuine dispute of material fact that the search of her vehicle was reasonable under the Fourth Amendment. In regard to Plaintiff's argument that she was detained in violation of the Fourth Amendment, the Court finds that qualified immunity applies. At issue is whether an officer would know that detaining Plaintiff for a period of time while a search of her property was performed would have violated her right to be free from unreasonable search and seizure.

The Court agrees with Defendants that "Plaintiff failed to provide this Court with any case that would have put Defendants on 'clear notice' that their actions in this case violated Plaintiff's constitutional rights." (Reply 15:3–4, ECF No. 29); *see Moran v. State of Washington*, 147 F.3d 839,844 (9th Cir. 1998) (plaintiff "bears the burden of proving that the rights she claims were 'clearly established' at the time of the alleged violation"). Further, "the allowable length of the detention is not clearly established." *Jones v. California Dep't of Corr.*, No. 1:08-cv-01383-LJO, 2011 WL 902103, at *6 (E.D. Cal. Mar. 15, 2011), *subsequently aff'd*, 473 F. App'x 741 (9th Cir. 2012) (finding that qualified immunity applied when an officer detained a plaintiff for more than fifteen minutes in order to question the plaintiff and conduct a search of her property

upon her entry into the prison). Because Plaintiff fails to present the Court with caselaw that would give Defendants notice that detaining Plaintiff while she waited for her property to be searched would violate Plaintiff's constitutional rights, Defendants are entitled to qualified immunity. Accordingly, the Court grants summary judgment as to Plaintiff's fourth cause of action.

3. Fifth Cause of Action – Seizure of Plaintiff's Phone

Plaintiff's fifth cause of action alleges that an unreasonable search and seizure occurred when Emling seized Plaintiff's phone from her vehicle with no lawful purpose. (Am. Compl. ¶69). Defendants argue that "[n]one of the [D]efendants searched Plaintiff's phone; thus, an illegal search could not have occurred." (MSJ 10:15–16). Defendants contend that "bringing Plaintiff her phone and asking to search it is not a meaningful interference with Plaintiff's possessory interests in the phone, as Defendants had every right to ask to search the phone, and no unreasonable seizure occurred." (*Id.* 10:16–19). Additionally, Defendants argue that qualified immunity applies because Plaintiff is unable to provide caselaw that put Defendants on notice that their actions violated the Constitution. (*Id.* 22:15–17).

Plaintiff argues that the "seizure of [Plaintiff's] phone by Defendant Emling was totally unreasonable under the circumstances" because it "interfered with her ownership and possessory interest in the phone

and triggered a refusal by [Plaintiff] to give him her password." (Resp. 15:9–16). Additionally, Plaintiff cites to *Riley v. California*, 134 S. Ct. 2473 (2014) and *United States v. Lara*, 815 F.3d 605, 613 (9th Cir. 2016) claiming that "[t]he law was clearly established at the time of the events giving rise to this case, of which a reasonable official would have known, that absent consent, reasonable suspicion, and/or probable cause, that a warrantless seizure and/or search of an individual's cell phone for purposes of searching or viewing stored data violates the 4th Amendment." (*Id.* 29:5–11).

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Id.* (citation omitted). While this analysis does not require a case directly on point for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). In *White*, the Supreme Court reiterated that "clearly established law" should not be "defined at a high level of generality," but rather must be "particularized to the facts of the case." *White*, 137 S. Ct. at 552. (internal quotation marks omitted). Before denying qualified immunity, the Court must "identify a case where an officer acting under similar circumstances

. . . was held to have violated the Fourth Amendment." *Estate of Lopez*, 871 F.3d at 1018 (quoting *White*, 137 S. Ct. at 552). A plaintiff carries the burden of proving the right was clearly established at the time of the violation. *Estate of Lopez*, 871 F.3d at 102 (citing *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002)). If a plaintiff successfully shows the right was clearly established, the burden shifts to the defendant who must show the official reasonably believed the conduct was lawful. *Id.*

Here, Plaintiff has provided no authority to clearly establish that Emling would have known that the seizure of Plaintiff's phone when he took it from Plaintiff's vehicle to her person was a violation of Plaintiff's constitutional rights. In *Lara*, the first case cited by Plaintiff, the Ninth Circuit analyzed the warrantless search of a defendant's phone by probation officers, it did not analyze the physical seizure of the phone itself. *See United States v. Lara*, 815 F.3d 605,614 (9th Cir. 2016) ("We conclude that the initial search of Lara's cell phone data was unlawful and . . . Because the second search of Lara's cell phone was itself the product of the initial unlawful search, the evidence from that search should also have been excluded."). Similarly, in the second case cited by Plaintiff the Supreme Court analyzed "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested." *Riley*, 134 S. Ct. at 2480. Plaintiff has not identified a case that is particular to the facts of this case involving a brief seizure of a phone, the contents of which were not searched,

that was returned to Plaintiff. Consequently, Plaintiff has not successfully shown it was clearly established that a seizure under the undisputed facts in this case was unreasonable under the Fourth Amendment. Accordingly, Plaintiff has failed to meet her burden of proving that Defendants were on fair notice that their conduct was unlawful, and thus, qualified immunity applies.

B. Eighth Amendment Claim

Plaintiff avers that her right to be free from cruel and unusual punishment was violated when Laurian required her to remove her menstrual tampon and failed to provide a new one, which caused Plaintiff the embarrassment of bleeding through her clothes until she arrived home an hour later. (*see* Am. Compl. ¶¶ 55–57, ECF No. 18). Defendants argue that they are entitled to judgment as a matter of law on Plaintiff's second cause of action asserting "[i]t is well established that the Eighth Amendment does not apply to Plaintiff in this case because she is not a convicted prisoner." (*Id.* 11:20–22). In her Response, Plaintiff requests that the Court "convert or treat [Plaintiff's] 8th Amendment claim in her Second Cause of Action as a 14th Amendment due process claim and deny Defendants summary judgment on said claim." (*Id.* 16:19–21).

"Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *City of Revere v. Massachusetts Gen.*

Hosp., 463 U.S. 239, 244 (1983) (citation omitted). "[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." *Id.*; *see Bell v. Wolfish*, 441 U.S. 520, 535 n. 16 (1979) ("Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.").

The Court agrees with Defendants that the Eighth Amendment does not apply in this case because Plaintiff is not a convicted prisoner. Furthermore, the Court declines to convert Plaintiff's second cause of action into a Fourteenth Amendment Due Process claim. *See Beckwith v. Pool*, No. 2:13-cv-125 JCM NJK, 2015 WL 1988788, at *6 (D. Nev. May 1, 2015), *aff'd sub nom. Beckwith v. City of Henderson*, 687 F. App'x 665 (9th Cir. 2017) ("Federal Rule of Civil Procedure 8(a) . . . does not afford plaintiffs with an opportunity to raise new claims at the summary judgment stage . . . A plaintiff may not amend her complaint through argument in a brief opposing summary judgment." (quotation and citation omitted)). For these reasons, Plaintiff's second cause of action is factually unsupported, and the Court finds that there is no genuine dispute as to any material fact. Accordingly, summary judgment is granted as to Plaintiff's second cause of action.

C. First Amendment Cause of Action

Defendants seek summary judgment on Plaintiff's sixth cause of action claiming she was retaliated against under the First Amendment when Emling allegedly denied Plaintiff visiting privileges because she refused to allow him to search the information on her phone. (MSJ 13:9–10); (Am. Compl. ¶ 73). Defendants claim that "Plaintiff's visitation would have been denied despite her refusal to grant access to her phone, based on the confidential information received and the prison's legitimate correctional goal of preventing the introduction of contraband into the facility." (Reply 9:15–17).

Plaintiff argues that "the routine [consent to search] form signed by [Plaintiff] in no way required [Plaintiff] to consent to give her password to prison officials so that they might search the contents or data of her phone." (Resp. 17:7–9). Further, Plaintiff contends that she has a First Amendment right "to not relay the password to her phone to Defendant Emling under the circumstances of this case, and to be free from any adverse action for electing not to do so, [thus,] Defendants are not entitled to summary judgment on [Plaintiff's] retaliation claim in her Sixth Cause of Action." (*Id.* 18:4–8).

The Court looks to the elements of a viable claim of First Amendment retaliation in the prison context: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled

the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal. *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009) (citing *Rhodes v. Robinson*, 408 F.3d 559, 568 (9th Cir. 2005)). The instant matter involves a prison visitor, however, the need for motive to retaliate against the plaintiff still applies. *See Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) (explaining that an element of retaliation for a non-prisoner plaintiff is that "the protected activity was a substantial motivating factor in the defendant's conduct—i.e., that there was a nexus between the defendant's actions and an intent to chill speech").

Here, Defendants present two pieces of evidence to show that Emling's adverse action was not caused by Plaintiff's choice to deny the search of her phone. First, Defendants provide the consent to search form signed by Plaintiff that states that "if [Plaintiff does] not consent to the search of [her] person, vehicle, or other property, [she] will be denied visitation on this date and may also be denied future visits pursuant to Administrative Regulation 719." (Consent to Search Form, Ex. 1 to MSJ). Second, Defendants provide Emling's responses to interrogatories, in which he explains that even though no contraband was found during the search, the conspiracy to introduce drugs into the prison "is enough for an indefinite suspension." (Emling's Resp. to Pl.'s Interrog. 8:10–11, Ex. 5 to MSJ). Further, Emling explained his concern that Plaintiff "may have gotten cold feet, something went

wrong leading up to [the prison visit], etc. or the drugs may have been so far up in either one of her orifices that Laurian may have not detected it without a more intrusive search – i.e x-ray, doctors, etc." (*Id.* 8:11–14).

Regardless of whether the consent to search form extended to the information on Plaintiff's phone, it is likely that the execution of the form itself and the language in the form led Emling to believe that Plaintiff's refusal of any search of her property would warrant the termination of a visit. Therefore, the existence of the consent to search form gave Emling a reason to commit the adverse action apart from retaliating or purposefully intending to chill Plaintiff's speech. Furthermore, Emling's responses to the interrogatories that he believed Plaintiff still presented a threat to the safety of the prison is evidence that breaks the causal chain between Plaintiff's refusal of the search and her loss of visitation privileges.

In light of Defendants' evidence, Plaintiff's conclusory statement that "Emling had not demonstrated an intent to deny [Plaintiff's] visitation until after she exercised her 1st Amendment right to retain the password to the contents of her phone" does not withstand Defendants' Motion for Summary Judgment. (Resp. 17:22–26). Plaintiff has not come forth with sufficient evidence that Emling took this action without a legitimate correctional goal, or that Plaintiff's refusal of the search was the substantial motivating factor to deny her visitation. The Court finds that Plaintiff has failed to present evidence of retaliatory motive. *Paulino v. Todd*, 338 F. App'x 720,722 (9th Cir. 2009).

Because Plaintiff has failed to present evidence to establish that her refusal of the search of her phone was the causative factor resulting in the loss of her visitation privileges, the Court grants summary judgment on Plaintiff's sixth cause of action. *See Brodheim*, 584 F.3d at 1269 n. 3. ("On summary judgment, the plaintiff must demonstrate there is a triable issue of material fact on each element of his claim, as opposed to merely alleging facts sufficient to state a claim."); *see also Wright v. Vitale*, 937 F.2d 604 (4th Cir. 1991).

D. Fourteenth Amendment Causes of Action

1. Due Process

i. First cause of Action

Defendants argue that Plaintiff's due process rights were not violated when Defendants failed to provide Plaintiff a copy of the search warrant because Plaintiff signed a consent to search form and orally consented to the search. (MSJ 13:22–14:4). Plaintiff argues that she did not consent to the strip search, that "it clearly appears [as though] Defendants fully executed the terms of the search warrant against [Plaintiff]," and that Emling "chose to falsely inform or mislead the judge upon the Return [of the warrant] by stating that the search warrant had not been executed" rather than admit his search for illegal drugs was unsuccessful. (Resp. 18:26–27,19:11–20). Defendants reply that "Plaintiff is unable to demonstrate that the search warrant was executed, requiring Defendants to provide her with a copy." (Reply 29:15–16).

The Court agrees with Defendants that there is no dispute of material fact as to whether the search warrant was returned unexecuted. (*See* Emling's Resp. to Pl.'s Interrog. 5:19–22, Ex. 5 to MSJ, ECF No. 25-5) ("the search warrant was not executed on [Plaintiff] because she was consenting and cooperative regarding all the searches"); (*see also* Return on Search Warrant, Ex. 6 to Resp., ECF No. 27) ("no property was seized as the warrant was not executed"). Plaintiff provides only assumptions and the conclusion that Emling would have executed the warrant if he had found contraband. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (explaining that the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data). Further, Plaintiff provides no authority establishing that Defendants are required to give notice of the terms and parameters of the search warrant when a search is conducted and the search warrant is returned unexecuted. Thus, Plaintiff has failed to demonstrate that Defendants were required to serve Plaintiff a copy of an unexecuted search warrant. Accordingly, summary judgment in favor of Defendants is granted as to Plaintiff's first cause of action.

ii. Seventh Cause of Action

Defendants argue that summary judgment is appropriate on Plaintiff's seventh cause of action alleging that she was denied due process when she was not given a clear reason for the suspension of her visitation, when she was not provided instructions on how to

appeal the suspension, and as a result the Warden abused his discretion. (MSJ 16:1–2). Defendants claim that "Plaintiff cannot point to any administrative regulations that make her believe that she has a liberty interest in visiting Danial [sic] Gonzalez," and that "[t]he right to visit a prisoner is in the sound discretion of the NDOC." (*Id.* 15:22–27).

Plaintiff contends "she had a protected liberty interest in her NDOC visiting privileges once she had been approved," and that "NDOC regulations do not allow for arbitrary suspension or termination of visitors' visiting privileges, and such suspension or termination must meet certain procedural requirements." (Resp. 20:15–17, 20:21–23). Plaintiff argues that the documentation she received regarding her suspension or termination did not meet the requirements of AR 719, and is therefore, "an abuse of official discretion in violation of [Plaintiff's] due process rights." (*Id.* 21:9–11, 21:20–21).

"The denial of prison access to a particular visitor 'is well within the terms of confinement ordinarily contemplated by a prison sentence, and therefore is not independently protected by the Due Process Clause." *Kentucky Dep't of Corr. v. Thompson*, 490 U.S. 454, 461, (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 468, (1983)). "[P]risoners do not have an absolute right to visitation, as such privileges are necessarily subject to the prison authorities' discretion, provided their administrative decisions are tied to legitimate penological objectives." *Dunn v. Castro*, 621 F.3d 1196, 1205 (9th Cir. 2010). "Whether any procedural protections

under the Fourteenth Amendment are due depends on the existence of a liberty interest and the extent to which an individual has suffered a grievous loss of liberty, even taking into account the nature of imprisonment." *Egberto v. McDaniel*, No. 3:08-cv-00312-HDM, 2011 WL 1233358, at *8 (D. Nev. Mar. 28, 2011), *aff'd*, 565 F. App'x 663 (9th Cir. 2014). "Certain prison regulations may create liberty interests protected by the Fourteenth Amendment. [] However, most prison regulations are designed to guide prison officials in the administration of the prison, not confer rights on inmates." *Id.* (internal citation omitted).

Here, Plaintiff does not provide any legal authority to support her conclusion that she has a protected interest in her visiting privileges once she was approved. Additionally, Plaintiff does not point to any substantive predicates or mandatory language in the NDOC administrative regulations that would remove a prison official's ability to make discretionary decisions regarding prison visitation policies and create a liberty interest in prison visiting privileges. Further, Plaintiff has failed to demonstrate that the language requiring specific documentation and instructions for appeal of visitation suspension in AR 719 conferred a right to the documentation as opposed to the regulation functioning as a guideline for prison officials. (*See* AR 719 ¶ 7(d) at 11, Ex. 2 to Resp.) (stating that suspension documentation shall include the name of the official ordering the action, shall explain the reason for the action, the length of time it applies, circumstances that allow reconsideration, and instructions

for appeal). Therefore, Plaintiff has not shown that the regulation at issue establishes a liberty interest entitled to the protections of the Due Process Clause.

Additionally, Defendants have provided evidence that the administrative decision to suspend visitation was tied to a legitimate penological objective. Specifically, Defendants have provided a search warrant demonstrating that probable cause to believe that Plaintiff would introduce illegal substances into the prison existed, and pursuant to AR 719 possible suspension offenses include possession of contraband. (*See* AR 719 ¶ 7(c) at 11, Ex. 2 to Resp., ECF No. 27). Because Plaintiff posed a reasonable risk of introducing contraband into the prison, a penological reason to terminate visitation existed regardless of whether contraband was found during the search. (*See* Williams' Resp. to Pl.'s Interrog. 5:16–17, Ex. 7 to MSJ, ECF No. 25-7) ("We do not actually have to find contraband to suspend a visitor's visitation privileges. The safety and security of this institution comes first."). Apart from identifying AR 719, Plaintiff has failed to demonstrate a genuine issue of material fact. Furthermore, Plaintiff does not argue, under the qualified immunity analysis, that it is clearly established that the conduct of failing to provide a reason for suspension, failing to provide instructions for appeal, and making the duration of the suspension indefinite was unlawful. Accordingly, summary judgment on Plaintiff's seventh cause of action is appropriate.

iii. Eighth Cause of Action

Defendants seek summary judgment on Plaintiff's eighth cause of action alleging that Defendants violated her right to due process by abusing their discretion in upholding and maintaining the indefinite termination or suspension of Plaintiff's visiting privileges without just cause. Defendants argue that "Plaintiff's visiting privileges were suspended, and the suspension upheld, due to the confidential information received implicating Plaintiff in the introduction of contraband into the prison." (Reply 11:25–28). Specifically, Defendants argue that the indefinite suspension resulted from "[c]onfidential information received regarding her introducing contraband into the facility and her failure to cooperate with [the Inspector General's] office regarding searches." (MSJ 17:1–3). Additionally, Defendants contend that "Defendant Williams 'conducted a review of the suspension' and found the 'suspension is still warranted based on confidential information received, which determined [Plaintiff] jeopardizes the safety and security of the NDOC.'" (*Id.* 17:4–7).

Plaintiff argues that "Defendants Williams and Dzurenda upheld the arbitrary suspension/termination of [Plaintiff's] NDOC visiting privileges by Defendant Stroud with full knowledge that [Plaintiff] had not been afforded the procedural requirements of AR 719." (Resp. 22:4–8). Therefore, Plaintiff claims that "the actions of the Defendants Williams and Dzurenda in upholding the suspension/termination of [Plaintiff's] NDOC visiting privileges were totally arbitrary and an

abuse of official discretion in violation of [Plaintiff's] due process rights." (*Id.* 22:9–11).

Plaintiff does not dispute that Defendants received confidential information regarding her introducing contraband into the prison. Plaintiff instead claims that the suspension was arbitrary and an abuse of discretion without providing evidence that visitation was terminated without just cause. Plaintiff points to the letter she received from Defendants which does not provide a reason for her suspension, however she does not provide evidence to dispute the interrogatory responses explaining that Plaintiff's suspension was implemented in the interest of ensuring the safety and security of the institution. (*See* Williams' Resp. to Pl.'s Interrog. 5:16–17, Ex. 7 to MSJ). Therefore, the facts alleged in this case do not reveal that the restriction on Plaintiff's visitation privileges was imposed arbitrarily or irrationally.

Additionally, Plaintiff has provided no legal authority to persuade the Court that she has a legitimate liberty interest in visitation, thus her due process rights were not violated as a result of the suspension. *See Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454,461 (1989) ("The denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence, and therefore is not independently protected by the Due Process Clause."). Alternatively, even if Plaintiff suffered a due process violation, Defendants are immune. Given the confidential information Defendants received, they "could have believed [their] actions lawful

at the time they were undertaken," and therefore Defendants are entitled to qualified immunity. *Friedman v. Boucher*, 580 F.3d 847, 858 (9th Cir. 2009). Accordingly, Defendants' request for summary judgment on Plaintiff's eighth cause of action is granted.

2. Equal Protection

In Plaintiff's ninth cause of action she asserts a class of one theory of equal protection alleging that Defendants "indefinitely terminated, and/or upheld or maintained the indefinite termination, of [Plaintiff's] visiting privileges while allowing others similarly situated visitors to maintain [their visiting privileges]." (Am. Compl. ¶ 86). Defendants assert they "had a valid, rational response to preventing the introduction of drugs and contraband to the prison. Accordingly, there are no genuine issues of material fact related to Plaintiff's Ninth Cause of Action, and Defendants are entitled to judgment as a matter of law." (MSJ 18:20–23).

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Or.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). "[T]o state an equal protection claim, plaintiffs must show they were intentionally and purposefully 'treated differently [by the defendants] . . . because

[they] belonged to a protected class.'" *Egberto*, 2011 WL 1233358, at *12 (quoting *Hill v. Washington State Dep't of Corr.*, 628 F. Supp. 2d 1250, 1263 (W.D. Wash. 2009)). "Showing that different persons are treated differently is not enough to show a violation of equal protection." *Id.*

Here, Plaintiff has not shown that she is a member of a protected class. Further, Plaintiff has presented insufficient evidence that she has been intentionally treated differently from similarly situated visitors. In her Response, Plaintiff makes conclusory statements that other unidentified visitors retain their visitation privileges after they are searched and no contraband is found. However, Plaintiff has not presented evidence that (1) these other visitors were implicated in introducing contraband through confidential information, or (2) that these other visitors had search warrants issued establishing that probable cause existed that they would introduce contraband into the prison. Plaintiff's conclusory statement that she was treated differently is not enough to show a violation of the Equal Protection Clause.

Additionally, as evidenced by the search warrant, Defendants' indefinite suspension of Plaintiff's visitation was a rational response to the perceived threat of the introduction of contraband into the prison. *See Robinson v. Palmer*, 841 F.2d 1151, 1156–57 (D.C. Cir. 1988) (holding that the permanent denial of face-to-face communications between inmate and his wife was not an "exaggerated response" to the perceived threat of visitors introducing drugs into the prison); *see also*

Egberto, 2011 WL 1233358, at *12 ("Where a 'plaintiff does not allege a violation of a fundamental right or the existence of a suspect classification, prison officials need only show that their policies bear a rational relationship to a legitimate penological interest in order to satisfy the equal protection clause.' ") (quoting *Daniel v. Rolfs*, 29 F. Supp. 2d 1184, 1188 (E.D. Wash. 1998)). Accordingly, Defendants are entitled to judgment as a matter of law on Plaintiff's ninth cause of action because there is no genuine dispute as to any material fact.

IV. CONCLUSION

IT IS HEREBY ORDERED that Defendants' Motion for Summary Judgment, (ECF No. 25), is **GRANTED**.

The Clerk of the Court shall enter judgment accordingly.

DATED this 24 day of September, 2018.

/s/ Gloria M. Navarro
Gloria M. Navarro,
Chief Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TINA CATES, Plaintiff-Appellant, v. BRUCE D. STROUD; BRIAN WILLIAMS, Sr.; JAMES DZURENDA; ARTHUR EMLING, Jr.; MYRA LAURIAN, Defendants-Appellees.	No. 18-17026 D.C. No. 2:17-cv-01080-GMN-PAL District of Nevada, Las Vegas ORDER (Filed Nov. 13, 2020)

Before: W. FLETCHER, BYBEE, and WATFORD, Circuit Judges.

Plaintiff-Appellant Tina Cates filed a petition for panel rehearing with a suggestion for rehearing en banc on October 8, 2020 (Mt. Entry 38). The panel has voted to deny the petition for rehearing. Judges W. Fletcher and Watford have voted to deny the petition for rehearing en banc, and Judge Bybee so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing or rehearing en banc is **DENIED**.