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MEANINGFUL OR MEANINGLESS? THE TEMPORAL SCOPE OF THE CONSTITUTIONAL RIGHT OF ACCESS TO COURTS FOR INCARCERATED LITIGANTS

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INTRODUCTION

Michael Rivera was incarcerated at a Pennsylvania state prison when he filed a pro se lawsuit challenging the conditions of his confinement.[1] Ahead of trial in his civil rights case in 2017, he was transferred to the Restricted Housing Unit at the State Correctional Institution Retreat (SCI-Retreat) which had a small, satellite law library.[2] Rivera was granted access to the law library by two corrections officers at the facility, but upon his arrival, the library had two inoperable computers and no physical books.[3] Though Rivera asked the corrections officers to have the computers fixed, the computers remained inoperable for the entirety of his stay at SCI-Retreat.[4] When Rivera requested paper copies of the Federal Rules of Civil Procedure, the Federal Rules of Evidence, and the court rules from the main law library, the law librarian denied his request.[5] Rivera lost his civil rights suit after his testimony was deemed inadmissible on hearsay grounds.[6]

Rivera sued the two correction officers and the law librarian for violating his constitutional right to access the courts.[7] He alleged that the complete lack of access to legal materials prevented him from adequately representing himself, arguing that if he had access to the Federal Rules of Evidence, he would have been able to get his evidence admitted and change the outcome of the trial.[8] Rivera's case posed a critical question: does an incarcerated litigant's right of access to courts extend throughout litigation of post-conviction petitions and civil rights complaints, or is the right limited to the pleading stage? The district court dismissed Rivera's suit, finding that the prison official-defendants were entitled to qualified immunity because it was not clearly established that Rivera had the right to access "a law library or other legal materials *during trial*."[9] In June 2022, the Third Circuit affirmed the decision on qualified immunity grounds, but clarified that, moving forward, incarcerated individuals'

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1 Rivera v. Monko, 37 F.4th 909, 913–14 (3d Cir. 2022).

2 *Id.* at 913.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* at 914.

8 *Id.* at 913 ("He claims that when he testified at trial, he did not know he needed to provide foundational testimony about the unsworn declaration and medical records he planned to introduce as exhibits. The judge refused to admit his evidence on hearsay grounds.").

9 Rivera v. Monko, No. 19-CV-00976, 2020 WL 3441430, at *9 (M.D. Pa. June 23, 2020) (emphasis added).

right of access to courts extends through litigation and is not limited to the pleading stage.[10]

In *Rivera*, the Third Circuit majority noted that there is no robust consensus among the federal courts of appeals on the temporal scope of this right.[11] While the Seventh Circuit—and now the Third Circuit—established that the constitutional right to access legal materials extends past the pleading stage, the Ninth Circuit takes a different approach.[12] The Ninth Circuit focuses on the difference between affirmative assistance and active interference in access to court claims, finding that incarcerated litigants have no right to affirmative assistance in accessing legal materials beyond filing a complaint.[13] The disagreement among these circuit courts can be predominantly attributed to varying interpretations of the Supreme Court's 1977 decision in *Bounds v. Smith* and its subsequent limitation in the Court's 1996 decision in *Lewis v. Casey*.[14] *Bounds* established that incarcerated people have a constitutional right to access courts, and required state prisons to provide either law libraries or some other form of adequate legal assistance.[15] The Court in *Lewis* then reframed this right by establishing an actual injury requirement in right of access claims—disclaiming the principle in *Bounds* that incarcerated people have a "freestanding right to a law library or legal assistance."[16] Neither decision, however, explicitly defined the temporal scope of this right.[17]

This Note will advocate for the position taken by the Third and Seventh Circuits that incarcerated individuals' right to affirmative assistance in accessing legal materials extends past the pleading stage to all stages of civil rights claims and post-conviction criminal appeals.[18] U.S. Supreme Court precedent supports this position, and judicial clarity on this issue is required to best protect the constitutional right of access in light of significant existing barriers to incarcerated litigants' access to courts.

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10 *Rivera*, 37 F.4th at 913.

11 *Id.* at 921.

12 *Id.* at 921–22; Marshall v. Knight, 445 F.3d 965, 969 (7th Cir. 2006); *see* Silva v. Di Vittorio, 658 F.3d 1090, 1101–04 (9th Cir. 2011).

13 *Silva*, 658 F.3d at 1102–03.

14 Bounds v. Smith, 430 U.S. 817 (1977); Lewis v. Casey, 518 U.S. 343 (1996).

15 *Bounds*, 430 U.S. at 828.

16 *Lewis*, 518 U.S. at 349, 351.

17 *See id.* at 348–60; *Bounds*, 430 U.S. at 821–32.

18 Most of the cases discussed in this Note concern the right of access in civil cases. Thus, this Note often refers to the "pleading stage" of litigation to evaluate the temporal scope of this right. However, incarcerated people's right of access to courts applies to post-conviction criminal appeals and habeas corpus petitions as well. *Lewis*, 518 U.S. at 354–55.

First, this Note will analyze the Supreme Court's jurisprudence on the constitutional right of access to courts and the current circuit split.[19] By exploring the framework of this right under *Bounds* and through an analysis of its limitations in *Lewis*, this Note will show that the approach adopted by the Third and Seventh Circuits is in line with Supreme Court precedent.[20] Next, this Note will describe the need for judicial clarity on the constitutional right of access due to the qualified immunity doctrine and the *Lewis* framework.[21] This Note will then address existing barriers to incarcerated litigants' ability to vindicate their rights in court, such as the Prison Litigation Reform Act.[22] This Note will refute rationales for limiting the right of access to courts by highlighting existing safeguards for prison officials, such as judicial deference under the test announced in *Turner v. Safley*.[23] Finally, this Note will address technological changes to legal materials in prisons in the digital era to highlight that meaningful access remains a significant issue for incarcerated litigants despite these changes.[24]

I. BACKGROUND

A. *The Constitutional Right of Access to Courts: Early Case Law*

Jurisprudence on right of access claims can be traced back to the 1941 case *Ex parte Hull*, where the Supreme Court held that prison officials cannot block inmates from filing habeas corpus petitions.[25] The petitioner in *Ex parte Hull* had prepared a petition for a writ of habeas corpus and asked a prison official to notarize his papers, but the official refused and told him that the papers would not be accepted for mailing.[26] The petitioner was able to submit his papers to the court through other means and detailed his difficulties in filing them, but the warden of the prison, attempting to justify the official's actions, explained that he had published a regulation detailing the precise process for filing habeas corpus petitions.[27] The Court found that the regulation was invalid.[28] By establishing that prison officials cannot serve as a barrier between

19 *See infra* Parts I–II.

20 *See infra* Section III.A.

21 *See infra* Section III.B.

22 *See infra* Section III.C.

23 *See infra* Section III.D.

24 *See infra* Section III.E.

25 Ex parte Hull, 312 U.S. 546, 549 (1941).

26 *Id.* at 547.

27 *Id.* at 547–49.

28 *Id.* at 549.

prisoners and the court system, the Court in *Ex parte Hull* recognized for the first time that incarcerated people have a constitutional right of access to the courts.[29]

In 1969, the Court expanded on this right in *Johnson v. Avery*, holding that state prison regulations prohibiting jailhouse lawyers are unconstitutional when there are no available alternatives for assistance.[30] In *Johnson*, the petitioner was serving a life sentence in Tennessee State Penitentiary when he was transferred to a maximum security building for violating the prison's rule that inmates cannot assist other inmates in legal matters.[31] The Court recognized that state prisons need flexibility to impose regulations to perform their penological function, but that those regulations are invalid when they violate a constitutional right.[32] In *Wolff v. McDonnell*, the Court extended the holding in *Johnson* to apply to both habeas corpus petitions and civil rights actions, noting that prisoners' constitutional rights would be diluted without the ability to articulate violations of those rights in court.[33]

One of the most important pre-*Bounds* prisoner access decisions came from *Gilmore v. Lynch*, a case out of the Northern District of California.[34] In *Gilmore*, plaintiffs incarcerated in various facilities within the California Department of Corrections challenged the Department's rules and regulations on access to legal materials and prison law libraries.[35] The regulations at issue included a requirement that legal papers remain only in the possession of the individual to whom they pertain, as well as restrictions on certain law books available to the prison population.[36] The district court addressed whether states have an obligation to provide prisoners with law libraries or other legal assistance.[37] The court rejected the Department's contention that prison libraries were a privilege, not a right, and instead deemed the right of

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29 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 12:2 (5th ed. 2023); David Steinberger, Note and Comment, Lewis v. Casey*: Tightening the Boundaries of Prisoner Access to the Courts?*, 18 PACE L. REV. 377, 388–89 (1998).

30 Johnson v. Avery, 393 U.S. 483, 489–90 (1969). A "jailhouse lawyer" is a term for an incarcerated individual "who seeks release through legal procedures or who gives legal advice to other inmates." *Jailhouse Lawyer*, BLACK'S LAW DICTIONARY (11th ed. 2019).

31 *Johnson*, 393 U.S. at 484.

32 *Id.* at 486–87.

33 Wolff v. McDonnell, 418 U.S. 539, 579–80 (1974).

34 Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970); Steven D. Hinckley, *Bounds and Beyond: A Need to Reevaluate the Right of Prisoner Access to the Courts*, 22 U. RICH. L. REV. 19, 23 (1987).

35 *Gilmore*, 319 F. Supp. at 106–07.

36 *Id.* at 107.

37 *Id.* at 107–08. As the *Bounds* court later wrote, the substantive question posed in *Gilmore* was: "Does a state have an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries or, alternatively, to provide inmates with professional or quasi-professional legal assistance?" Bounds v. Smith, 430 U.S. 817, 829 (1977).

access to courts to be a "constitutional imperative."[38] It found that access to courts is a much broader concept, and that prisoners must have some form of assistance necessary to access courts.[39] The Supreme Court affirmed the district court's judgment in a per curiam decision in *Younger v. Gilmore*.[40]

B. *Prison Law Libraries and Legal Assistance:* Bounds v. Smith

It was not until 1977 in *Bounds v. Smith* that the Supreme Court fully addressed the constitutional right of access to courts, providing a rationale for its two-paragraph per curiam decision in *Younger*.[41] Respondents, individuals incarcerated in North Carolina Department of Corrections facilities, filed § 1983 claims alleging that they were denied access to the courts because the State failed to provide adequate legal research facilities.[42] The district court granted summary judgment for the inmates, finding that the prison libraries were "severely inadequate" and directed the State to propose a constitutionally sound remedy.[43] The State proposed that it would set up seven libraries in institutions across the State and provide transportation as needed—but respondents protested this remedy, arguing that each prison should contain a law library.[44]

After granting certiorari, the Supreme Court placed an affirmative obligation on prisons to provide incarcerated people with adequate law libraries or legal assistance.[45] The Court identified "meaningful access" as the touchstone of the right—framing the inquiry as whether law libraries or other forms of legal assistance were necessary to ensure that incarcerated people have a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."[46] It was careful to note, however, that this holding did not require every prison to establish a law library; rather, it encouraged "local experimentation" and explained that a law library was just one adequate approach state officials could choose to satisfy the constitutional

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38 *Gilmore*, 319 F. Supp. at 108–09 ("Reasonable access to the courts is a constitutional imperative which has been held to prevail against a variety of state interests.").

39 *Id.* at 110.

40 Younger v. Gilmore, 404 U.S. 15, 15 (1971).

41 *Bounds*, 430 U.S. 817.

42 *Id.* at 818.

43 *Id.* at 818–19.

44 *Id.* at 819–20.

45 *Id.* at 828 (holding that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law").

46 *Id.* at 824–25.

requirement that incarcerated people have meaningful access to courts.[47] The Court also stated that while economic factors could be considered in choosing the method of providing meaningful access, cost alone could not justify denying the right.[48] Beyond providing a law library, prison facilities could satisfy the constitutionally required meaningful access standard through alternatives such as training inmates as paralegal assistants, using law students, hiring lawyers on a part-time basis, or using full-time attorneys at pro bono legal services organizations.[49]

Following the *Bounds* decision, many incarcerated litigants challenged prison policies and regulations that infringed on their right to access the courts.[50] Because the *Bounds* Court granted discretion to states in choosing constitutionally acceptable programs, lower federal courts evaluated the right on a case-by-case basis.[51] Over the next several years, federal courts' right of access jurisprudence began to define "adequate" in the context of prison law libraries and legal assistance by accepting or rejecting specific policies.[52] For example, some federal courts found that certain limitations on the amount of time prisoners can access a law library are unconstitutional under *Bounds*.[53] Some also rejected policies requiring individuals to provide exact citations for materials they wished to access because it created a "Catch 22" where inmates needed access to a library in order to determine the citations they needed in the first place.[54]

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47 *Id.* at 830–32.

48 *Id.* at 825.

49 *Id.* at 831.

50 Joseph L. Gerken, *Does* Lewis v. Casey *Spell the End to Court-Ordered Improvement of Prison Law Libraries?*, 95 L. LIBR. J. 491, 494–95 (2003) ("In the years following the *Bounds* decision, prisoners filed numerous lawsuits claiming a denial of access to court"); Hinckley, *supra* note 34, at 33 ("During the ten years since the *Bounds v. Smith* decision, the federal courts have been inundated with cases testing the constitutionality of the various state-established prisoner access programs.").

51 Hinckley, *supra* note 34, at 28–29; *Bounds*, 430 U.S. at 832 ("[A] legal access program need not include any particular element we have discussed, and we encourage local experimentation. Any plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standards.").

52 Joseph A. Schouten, Note, *Not So Meaningful Anymore: Why a Law Library Is Required to Make a Prisoner's Access to the Courts Meaningful*, 45 WM. & MARY L. REV. 1195, 1216–17 (2004).

53 *See, e.g.*, Ramos v. Lamm, 639 F.2d 559, 582–85 (10th Cir. 1980) (holding that limiting inmate access to the law library to three hours every thirteen weeks is unconstitutional); Nadeau v. Helgemoe, 561 F.2d 411, 418 (1st Cir. 1977) ("When library access is as limited as it is for these prisoners, and when it could be increased at little or no cost to the state, we think the inmates' constitutional rights justify an expanded library schedule.").

54 *See, e.g.*, Corgain v. Miller, 708 F.2d 1241, 1250 (7th Cir. 1983) (agreeing with a magistrate judge's determination that requiring exact citations to obtain legal materials was inadequate "because the inmate could obtain state law materials only by providing precise citations, and could obtain precise citations only if he could refer to state law materials"); Rich v. Zitnay, 644 F.2d 41,

However, by framing the right of access to courts so broadly—without an exact framework to establish minimum requirements—the *Bounds* Court left many questions unanswered, and the requirements varied greatly state by state.[55]

C. *Limiting the Right of Access:* Lewis v. Casey

The constitutional right of access to courts under *Bounds* was drastically limited in 1996 when the Supreme Court decided *Lewis v. Casey*.[56] Respondents were incarcerated at various prisons within the Arizona Department of Corrections ("ADOC") and brought a class action suit against ADOC officials for violating their right of access to courts, alleging inadequate legal research facilities across the State.[57] Under *Bounds*, the district court found the facilities to be unconstitutionally inadequate, particularly as applied to two groups of individuals: lockdown prisoners and illiterate or non-English speaking inmates.[58] It issued an injunction requiring the ADOC to make systemwide changes to its legal libraries and assistance programs, appointing a special master to oversee the process.[59] When the Ninth Circuit affirmed, the ADOC appealed, claiming that the special master's order exceeded the constitutional requirements set forth in *Bounds* and that the alleged injury did not warrant systemwide relief.[60]

Justice Scalia, for the majority, established an actual injury requirement under Article III standing doctrine, finding that the right to access legal materials while in prison is not a freestanding right to law libraries or legal assistance.[61] Scalia framed the right of access to courts as the capability of an individual to challenge sentences and conditions of confinement before the court—not the capability of "turning pages in a law library."[62] The Court held that respondents needed to show widespread actual injury, and that with only a few isolated instances pertaining to individuals on lockdown and non-English speakers, the

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43 (1st Cir. 1981) ("[T]he requirement that plaintiffs supply precise citations . . . is obviously a Catch 22."); Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978) ("Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies he might have.").

55 Hinckley, *supra* note 34, at 29.

56 518 U.S. 343 (1996).

57 *Id.* at 346.

58 *Id.* at 346–47.

59 *Id.* at 346–48.

60 *Id.* at 346, 348.

61 *Id.* at 351.

62 *Id.* at 356–57.

injunction was invalid.[63] Under this newly articulated limitation on the right of access, an incarcerated individual cannot establish actual injury simply by alleging that a prison's law library is inadequate in theory; instead, they must show that the shortcomings impeded their ability to pursue a legal claim.[64]

The Supreme Court's approach in *Lewis* presents a detrimental paradox. Under the actual injury requirement, an incarcerated litigant must now show that a lack of meaningful access to a law library or legal assistance caused a potentially meritorious claim to fail.[65] Yet, if the lack of access caused a previous claim to fail, it could also cause the right of access claim to fail.[66] An incarcerated individual may still lack adequate access to the resources they need to litigate the right of access claim and overcome the actual injury requirement.[67] The original *Bounds* framework also suffered from this paradox because the same conditions that created a constitutional violation in the first place could have remained in place when an individual sought to bring a right of access claim.[68] However, because *Bounds* delineated an affirmative right to adequate law libraries or other legal assistance, the bar was much lower and presumably easier for a litigant to bring this type of claim, despite ongoing constitutional right of access violations.[69] Prior to *Lewis*, the inadequacy of a prison's law library, or the complete lack of legal resources, could be challenged on its own without requiring litigants to show individualized harm in bringing a legal claim.[70]

D. *The Constitutional Basis for the Right of Access to Courts*

Conflicting views on the precise constitutional basis for the right of access to courts have contributed to some of the vagueness surrounding the doctrine.[71] The arguments for its precise origin have ranged from

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63 *Id.* at 349 ("We agree that the success of respondents' systemic challenge was dependent on their ability to show widespread actual injury, and that the court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic *Bounds* violation invalid.").

64 *Id.* at 351.

65 *Id.*

66 Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171, 1206–07 (2013) ("Any inmate actually harmed by a deficient library would probably not be able to show that he had a viable claim *and* that the claim was hurt by the library's inadequacy.").

67 *Id.*

68 *See* Bounds v. Smith, 430 U.S. 817, 828 (1977).

69 *See id.*

70 *Id.* at 828–30.

71 Abel, *supra* note 66, at 1207–08; Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985) ("Perhaps because their textual footing in the Constitution is not clear, these principles suffer for lack of internal definition and prove far easier to state than to apply.").

basing the right in the Due Process and Equal Protection clauses of the Fourteenth Amendment[72] to the right to petition the government to redress grievances under the First Amendment.[73] The only constant in right of access jurisprudence is that, regardless of its exact constitutional source, the Supreme Court has consistently held that the right exists.[74] Generally, access to court claims fall into one of three categories: (1) right to assistance claims; (2) interference claims; and (3) retaliation claims.[75] Recognizing the distinction between these claims is critical to analyzing the temporal scope of the right, as the Ninth Circuit in *Silva* distinguished between assistance and interference claims in its analysis.[76]

Some justices, however, have expressed doubt about the constitutional basis for the right of access to courts. Dissenting in *Bounds*, Justice Rehnquist challenged the idea that incarcerated individuals have any affirmative right of access to the courts grounded in the Constitution.[77] According to Justice Rehnquist, the only right implicated in *Bounds* was the right to be free from interference by state officials in physical access to the courts under *Ex parte Hull*.[78] Similarly, Justice Thomas, concurring in *Lewis*, disclaimed the idea that the right of access to courts has any firm constitutional basis.[79] Much of his objection to the right is also rooted in his argument that, under principles of federalism and separation of powers, states have no affirmative obligation to foot the bill for federally-mandated law libraries or legal assistance.[80] Justice

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72 Steinberger, *supra* note 29, at 377–78; *see* Procunier v. Martinez, 416 U.S. 396, 419 (1974) ("The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights."); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) ("Nor was the equal protection guarantee of 'meaningful access' violated in this case.").

73 Knop v. Johnson, 977 F.2d 996, 1002 (6th Cir. 1992) (citing Turner v. Safley, 482 U.S. 78, 84 (1987)).

74 *See* discussion *supra* Sections I.A–I.B; Rivera v. Monko, 37 F.4th 909, 912 (3d Cir. 2022) ("Prisoners have a well-settled constitutional right to access the courts to challenge their convictions and conditions of confinement.").

75 *See Know Your Rights: Access to the Courts*, L. OFF. S. CTR. FOR HUM. RTS. 1 (Sept. 2010) https://www.schr.org/wp-content/uploads/2020/02/Know-Your-Rights-Access-to-the-Courts.pdf [https://perma.cc/7M9P-8NZ2]; JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL 230, 235, 237 (4th ed. 2010).

76 *See infra* Section II.B.2.

77 Bounds v. Smith, 430 U.S. 817, 837–841 (1977) (Rehnquist, J., dissenting) ("[T]he 'fundamental constitutional right of access to the courts' which the Court announces today is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived.")

78 *Id.* at 839–40 ("But if a prisoner incarcerated pursuant to a final judgment of conviction is not prevented from physical access to the federal courts in order that he may file therein petitions for relief which Congress has authorized those courts to grant, he has been accorded the only constitutional right of access to the courts that our cases have articulated in a reasoned way.").

79 Lewis v. Casey, 518 U.S. 343, 365–67 (1996) (Thomas, J., concurring).

80 *Id.* at 385–89.

Thomas reiterated this view in another right of access case in 2002,[81] in which a woman alleged that the government denied her right of access to courts after intentionally concealing information about her detained husband overseas.[82] While this was not a prisoner right of access case, it nonetheless illustrates Justice Thomas's perspective on the right more broadly.[83]

II. THE CIRCUIT SPLIT

Since the *Lewis* decision, a critical legal question remains: how far does the right to access legal materials in prison extend? As Judge Roth posed in *Rivera*, "[d]oes it follow litigants to the courthouse door, only to retreat as soon as their complaints have been filed? Or does it reach into the courtroom as those complaints are adjudicated?"[84] Given the actual injury requirement established in *Lewis*, the answer to this question will impact who could successfully bring a claim for a right of access to courts violation.[85] While some circuit courts addressed this issue after *Bounds*, most have yet to resolve it following the *Lewis* decision, and the few that have addressed it disagree.

A. *Pre*-Lewis *Cases*

1. The Ninth and Tenth Circuits

The circuit split on this issue existed before the *Lewis* decision as federal courts grappled with the temporal scope of the right of access under *Bounds*. The Tenth Circuit held that the right of access does not extend past the pleading stage.[86] In *Nordgren v. Milliken*, incarcerated plaintiffs in the Utah state prison system alleged they were denied meaningful access to the courts—arguing on appeal that the State had an obligation to provide access through all stages of judicial proceedings at the trial level, not just the pleading stage.[87] The State did not claim to

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81 Christopher v. Harbury, 536 U.S. 403, 422–23 (2002) (Thomas, J., concurring) ("In Lewis v. Casey, . . . after a review of the constitutional text, this Court's precedent, and tradition, I could find no basis 'for the conclusion that the constitutional right of access imposes affirmative obligations on the States to finance and support prisoner litigation.'" (quoting *Lewis*, 518 U.S. at 384–85 (Thomas, J., concurring))).

82 *Christopher*, 536 U.S. at 405.

83 *Id.* at 422–23.

84 Rivera v. Monko, 37 F.4th 909, 912 (3d Cir. 2022).

85 *See Lewis*, 518 U.S. 343.

86 Nordgren v. Milliken, 762 F.2d 851, 855 (10th Cir. 1985).

87 *Id.* at 851–53.

have adequate law libraries in its facilities, so the analysis focused on whether alternative, adequate legal assistance was available to the plaintiffs.[88] The Tenth Circuit cited several other circuit court decisions, stating that "[m]ost courts have not interpreted *Bounds* as extending the right of access to the courts so as to require special assistance to inmates further than the initial pleading stage."[89] The court followed this approach, finding that the right of access to courts required no more than legal assistance during the initial pleading stage of federal habeas corpus or civil rights actions.[90] The Tenth Circuit reached this conclusion by relying on the *Bounds* Court's statement that the primary concern is "protecting the ability of an inmate to prepare a petition or complaint."[91]

The Ninth Circuit also found that the right did not extend past the pleading stage after an analysis of both *Bounds* and *Wolff v. McDonnell*, tracking the court's later decision in *Silva v. Di Vittorio*.[92] In *Cornett v. Donovan*, the court highlighted several phrases in the text of *Bounds* that focused on "initial" pleading, finding that it was beyond its scope to extend the right any further.[93] In an earlier case before the Ninth Circuit, one judge expressed doubt about this approach.[94] Judge Wiggins, in a decision concurring in part and dissenting in part, wrote that despite the references to the initial pleading stage, nothing in *Bounds* indicated that the Supreme Court intended the right to be limited in this way.[95] He found that the reasoning in *Bounds* was equally compelling for the right to extend to any stage of legal proceedings, and that without extending the right of access to all stages of litigation, the right is no longer meaningful.[96]

2. The Eleventh and Fifth Circuits

The Eleventh Circuit took an alternative approach to the scope of the right of access to courts under *Bounds* in *Bonner v. City of Prichard*,

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88 *Id.* at 854.

89 *Id.*

90 *Id.* at 855.

91 *Id.* at 854 (citing Bounds v. Smith, 430 U.S. 817, 828 n.17 (1977)).

92 Cornett v. Donovan, 51 F.3d 894, 898 (9th Cir. 1995) ("Considering the Court's discussion in *Wolff* and *Bounds* in totality, we conclude the Supreme Court has clearly stated that the constitutional right of access requires a state to provide a law library or legal assistance only during the pleading stage of a habeas or civil rights action."); *see* Silva v. Di Vittorio, 658 F.3d 1090 (9th Cir. 2011).

93 51 F.3d at 898.

94 Toussaint v. McCarthy, 926 F.2d 800, 810 (9th Cir. 1990) (Wiggins, J., concurring in part and dissenting in part).

95 *Id.*

96 *Id.*

holding that the right extends past the pleading stage.[97] The City argued that there was no denial of access because the plaintiff had secured his right to access the court when he filed the initial complaint, and the court appropriately dismissed the action.[98] The City claimed that denial of access is unrelated to the disposition of a matter once it has been properly filed.[99] The Eleventh Circuit wrote that the right is "not drawn as precisely at the courthouse door" and found that access cannot be adequate, effective, or meaningful under *Bounds* if the right is limited to initial filing.[100] It further noted that *Bounds* referenced the right of indigent prisoners to obtain a transcript for appellate review and the right to counsel in criminal appeals—both of which are rights that extend past the pleading stage.[101]

The Fifth Circuit has also suggested that it aligns with the Eleventh Circuit's interpretation in *Morrow v. Harwell*, though its discussion on the topic was limited.[102] Thomas Morrow represented a class of inmates in McLennan County, Texas, alleging various constitutional violations including the right to access legal materials or legal assistance.[103] The Fifth Circuit interpreted *Bounds* to mean that, in right of access claims, a prisoner's ability to file a complaint is not dispositive.[104] Rather, meaningful access may include the ability to access research tools for post-filing needs such as rebutting authority in responsive pleadings.[105] The court cited the Eleventh Circuit's *Bonner* decision, but did not explicitly state whether the right would necessarily extend to all post-filing stages of litigation.[106]

The Supreme Court's decision in *Lewis* calls the significance of these cases into question. *Bounds* was not explicitly overruled, and thus remains one key source for determining the scope of the right.[107] However, in reframing the right of access, the *Lewis* Court changed the

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97 661 F.2d 1206 (11th Cir. 1981).

98 *Id.* at 1212.

99 *Id.*

100 *Id.* (writing that access is not meaningful "if it embraces no more than being permitted to file a paper that, without determination of whether it states a claim legally sufficient and within the court's jurisdiction, is subject to dismissal on grounds of convenience to court and litigants").

101 *Id.* at 1212–13.

102 *See* 768 F.2d 619, 622–23 (5th Cir. 1985).

103 *Id.* at 621.

104 *Id.* at 623.

105 *Id.* ("The inmates' ability to file is not dispositive of the access question, because the Court in *Bounds* explained that for access to be meaningful, post-filing needs, such as the research tools necessary to effectively rebut authorities cited by an adversary in responsive pleadings, should be met.").

106 *Id.*

107 Gerken, *supra* note 50, at 513.

legal landscape.[108] In *Rivera*, Judge Roth noted that prior to *Lewis*, the Third Circuit also recognized that an incarcerated litigant could state a *Bounds* claim if they were deprived of meaningful access at any stage of litigation.[109] Yet, the court in *Rivera* reevaluated this question in the wake of the *Lewis* decision.[110] Thus, the weight of these pre-*Lewis* decisions on the temporal scope remains unclear as most circuit courts have been silent on this issue following *Lewis*.[111]

B. *Post*-Lewis *Cases: The Current Landscape*

1. The Seventh Circuit: *Marshall v. Knight*

In 2006, in *Marshall v. Knight*, the Seventh Circuit found that *Lewis* does not limit access to court claims to prisoners who are unable to file a complaint or petition.[112] Kenneth Marshall alleged that, while incarcerated at an Indiana prison, prison officials implemented a restrictive library policy that negatively impacted his petition challenging the length of his incarceration and caused him to lose custodial credit time.[113] He further alleged that, after he filed a § 1983 claim, the officials removed him from his job assignment with no pay, allowed fellow inmates to charge him fees to use the prison library, and deprived him of educational opportunities, among other allegations.[114] Despite Marshall's attempt to amend his initial complaint, his case was ultimately dismissed for failure to state a claim.[115] The district court found that Marshall's right of access was not violated because he did not allege that he was prevented from filing a complaint or appeal, and under its interpretation of *Lewis*, the right is limited to initial access.[116]

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108 Karen Westwood, *"Meaningful Access to the Courts" and Law Libraries: Where Are We Now?*, 90 L. LIBR. J. 193, 193, 195 (1998).

109 Rivera v. Monko, 37 F.4th 909, 920 (3d Cir. 2022) ("We accepted that proposition wholeheartedly, holding in multiple cases that the right to access the courts extended past the initial pleading stage." (first citing Abdul-Akbar v. Watson, 4 F.3d 195, 204 (3d Cir. 1993); then citing Peterkin v. Jeffes, 855 F.2d 1021, 1042 (3d Cir. 1988); and then citing Zilich v. Lucht, 981 F.2d 694, 695–96 (3d Cir. 1992))).

110 *Id.* at 920–21.

111 *Id.* at 921 ("Only two courts since *Lewis* have directly and precedentially addressed the temporal scope of the right of access.").

112 Marshall v. Knight, 445 F.3d 965, 969 (7th Cir. 2006).

113 *Id.* at 967, 969.

114 *Id.* at 967.

115 *Id.*

116 *Id.* at 967–68.

The Seventh Circuit reversed, stating that it did not agree that *Lewis* confines access to court claims in this way.[117] The court wrote: "[a] prisoner states an access-to-courts claim when he alleges that even though he successfully got into court by filing a complaint or petition challenging his conviction, sentence, or conditions of confinement, his denial of access to legal materials caused a potentially meritorious claim to fail."[118] Based on the framing of the actual injury requirement in *Lewis*, the Seventh Circuit interpreted the Court's holding to mean that an individual has a right of access claim when a complaint prepared "*and filed*" is dismissed due to deficiencies in a prison's legal assistance program.[119] Thus, a prisoner's ability to simply file a complaint is not dispositive.[120] Ultimately, the Seventh Circuit held that Marshall's allegations sufficiently stated a cause of action for denial of access to the courts and that dismissal of his claim was improper.[121]

2. The Ninth Circuit: *Silva v. Di Vittorio*

The Ninth Circuit reached a different conclusion from the Seventh Circuit on the temporal scope issue in *Silva v. Di Vittorio* in 2011.[122] Matthew Silva was incarcerated in Washington state and filed a lawsuit alleging violations of his First and Fourteenth Amendment right to access the courts after prison officials confiscated and destroyed legal documents and materials that he was using to pursue civil rights lawsuits against them.[123] The district court found that Silva failed to state a claim on his right of access claim because the right is only protected where an individual has been prevented from filing initial pleadings and does not guarantee a right to litigate effectively beyond the pleading stage.[124]

On appeal, Silva argued that he had a right to be free from active interference by prison officials beyond the filing of an initial pleading, among other arguments.[125] The Ninth Circuit agreed, ruling in favor of Silva on the basis that his claim involved active interference by prison officials to prevent him from accessing necessary legal materials.[126] However, the court interpreted *Lewis* to limit the right to affirmative

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117 *Id.* at 969.

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 Silva v. Di Vittorio, 658 F.3d 1090 (9th Cir. 2011), *overruled on other grounds by* Coleman v. Tollefson, 575 U.S. 532 (2015).

123 *Id.* at 1095–96.

124 *Id.* at 1096–97.

125 *Id.* at 1097.

126 *Id.* at 1105.

assistance in accessing legal materials to the pleading stage, stating that "[i]n *Lewis,* the Supreme Court limited the right of access to the courts to the pleading stage in cases involving prisoners' affirmative right to assistance."[127] The district court's decision was reversed, and the case was remanded.[128]

The distinction between affirmative assistance and active interference, however, is critical. The Ninth Circuit's holding means that incarcerated litigants have no right to any form of legal materials or assistance past the pleading stage. An incarcerated litigant would only succeed on a claim for a violation of the constitutional right of access past the pleading stage where a prison guard or official stepped in and prevented that litigant from accessing those materials or assistance but not when they had never provided them in the first place.

3. The Third Circuit: *Rivera v. Monko*

In June 2022, in *Rivera v. Monko*, the Third Circuit followed the approach taken by the Seventh Circuit, holding that incarcerated individuals' right of access to legal materials or legal assistance extends throughout litigation and is not limited to the pleading stage.[129] The court found that Michael Rivera satisfied the actual injury requirement under *Lewis* by sufficiently pleading a nonfrivolous legal claim in his civil rights case and plausibly alleging that the corrections officers and law librarian denied him access to courts by refusing to provide him with hard copies of federal rules.[130] The denial of access, however, occurred after the pleading stage, during trial.[131] Thus, the fate of Rivera's access to courts claim rested entirely on whether the right extends past the pleading stage and, if so, whether that right was clearly established at the time for the purposes of qualified immunity.[132]

The Third Circuit agreed with the district court that, at the time, a prisoner's right to affirmative assistance in accessing legal materials during the trial stage of a civil rights case was not clearly established.[133] The court discussed both *Marshall* and *Silva*, finding that there was no robust consensus among the other circuit courts—and no binding

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127 *Id.* at 1103.

128 *Id.* at 1106.

129 Rivera v. Monko, 37 F.4th 909 (3d Cir. 2022); *see supra* Introduction (discussing the facts of *Rivera*).

130 *Rivera*, 37 F.4th at 916–17.

131 *Id.* at 913.

132 *Id.* at 917–21 ("Thus, the right at issue is a prisoner's right to meaningfully access the courts, through access to a law library, before and during his civil rights trial.").

133 *Id.* at 919.

authority from the Supreme Court or Third Circuit following *Lewis*.[134] The court held that the prison officials were entitled to qualified immunity and dismissed Rivera's complaint.[135] However, it held that moving forward, incarcerated litigants have a valid access to courts claim when they allege that a denial of meaningful access caused a potentially meritorious claim to fail, both before and during trial.[136] Judge Roth explained that if prisoners are denied access after they file a complaint, the right becomes illusory as the need to access legal materials is just as important once in court as it is during initial filing.[137]

The concurring judge in *Rivera* raised concerns about the majority's interpretation of the right of access to courts.[138] Judge Phipps took issue with placing a positive duty on prison officials to provide prisoners with access to legal materials or other assistance.[139] He also noted that it is particularly difficult to associate specific duties with the right of access to courts due to the varying interpretations of its precise constitutional basis.[140]

III. ANALYSIS

A. *A Closer Look at* Bounds *and* Lewis *Supports a More Expansive View of the Temporal Scope of the Right of Access*

Much of the ambiguity among federal courts in drawing the line for the constitutional right of access derives from the *Lewis* Court's analysis of the *Bounds* decision. A closer look at both *Bounds* and *Lewis* ultimately lends support to the Third and Seventh Circuits' approach interpreting the right of access to extend past the pleading stage.

First, the framing of the actual injury requirement in *Lewis* supports an approach that guarantees the right of access throughout litigation. Though *Lewis* narrowed the framework for the right of access under *Bounds*, the Court acknowledged that "meaningful" access is the touchstone of the right.[141] It is the capability to access courts that drives

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134 *Id.* at 921–22.

135 *Id.* at 923.

136 *Id.* at 922.

137 *Id.* at 913, 922–23 ("Indeed, it would be perverse if the right to access courts faded away after a prisoner successfully got into court by filing a complaint or petition.").

138 *Id.* at 923 (Phipps, J., concurring).

139 *Id.* at 923–24.

140 *Id.* at 924.

141 Lewis v. Casey, 518 U.S. 343, 351 (1996) (quoting Bounds v. Smith, 430 U.S. 817, 823 (1977)).

this right, not the capability "of turning pages in a law library."[142] While the Court used this reasoning to limit *Bounds*, restricting the right of access to the pleading stage does not guarantee meaningful access.[143] Just as handing a copy of the Federal Rules of Civil Procedure to someone who cannot read would not guarantee one's constitutional right to access the courts, denying access to the rules once a complaint is filed would not provide meaningful access either.

To justify imposing an actual injury requirement, Justice Scalia wrote in *Lewis* that the role of the courts is to provide relief to claimants who have suffered actual harm.[144] But a court cannot provide relief on a complaint alone—relief also requires the opportunity to defend a claim and move that claim toward judgment.[145] If the purpose of establishing an actual injury requirement in right of access cases was to provide relief to individuals who suffered actual harm, it would not follow to limit these claims to the pleading stage because actual harm resulting from denial of access to legal materials could occur later in litigation as well.

This framework is what the Third and Seventh Circuits relied on—and any other reading would undermine the very basis on which the Court decided *Lewis*.[146] As the Seventh Circuit explained in *Marshall*, a litigant can satisfy the actual injury requirement under *Lewis* by showing that their "denial of access to legal materials caused a potentially meritorious claim to fail" regardless of the stage of litigation.[147] The Third Circuit further highlighted the inconsistency in limiting the right to the pleading stage, calling it "ludicrous" and recognizing that most lawyers would not be able to litigate without referring to the Federal Rules of Civil Procedure or the Federal Rules of Evidence.[148]

Examining a right of access case outside of the prison context sheds light on the Supreme Court's intention in *Lewis* as well. In *Christopher v. Harbury*, which followed *Lewis*, the Supreme Court discussed denial of access to court claims, describing some as looking "backward to a time when specific litigation ended poorly, or could not have commenced, or could have produced a remedy subsequently unobtainable."[149] Though this right of access case was not a prison case, this description does not align with the interpretation that right of access cases are limited to initial

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142 *Id.* at 356–57.

143 *Id.*

144 *Id.* at 349.

145 *See* BOSTON & MANVILLE, *supra* note 75, at 233.

146 Rivera v. Monko, 37 F.4th 909, 922–23 (3d Cir. 2022); Marshall v. Knight, 445 F.3d 965, 969–70 (7th Cir. 2006).

147 Marshall, 445 F.3d at 969 (citing Lewis v. Casey, 518 U.S. 343, 351 (1996)).

148 Rivera, 37 F.4th at 915 ("We know of very few lawyers who could litigate such an action without being able to refer to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. A *pro se* prisoner is much less likely to be able to do so.").

149 Christopher v. Harbury, 536 U.S. 403, 414 (2002).

filing and suggests that the Court may not view *Lewis* as imposing this limitation.[150]

The Ninth Circuit, however, interpreted the language in *Lewis* differently.[151] In *Silva*, it relied on the following passage from Justice Scalia's majority opinion in *Lewis*:

> It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished to present. These statements appear to suggest that the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court. . . . To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.[152]

The Ninth Circuit cited this section to support the premise that the affirmative right of access to courts does not extend past the pleading stage.[153] But this is a "conservative reading" of the Supreme Court's holding in *Lewis*.[154]

A closer look at this section raises doubt as to whether this interpretation is truly what the Supreme Court intended. On one hand, a narrow analysis of pre-*Lewis* decisions, such as *Ex parte Hull*, may lead one to conclude that the right of access was originally meant to address the concern that incarcerated individuals had no meaningful way to bring their grievances to court in the first instance.[155] Yet, there is a significant gap between limiting the right of access to the pleading stage and requiring states to help incarcerated people "litigate effectively" once in court.[156] While Justice Scalia was clear that the right does not extend to a permanent provision of counsel,[157] the right of access becomes meaningless if incarcerated litigants are deprived of critical legal

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150 *See* BOSTON & MANVILLE, *supra* note 75, at 234.

151 *See supra* Section II.B.2.

152 Lewis v. Casey, 518 U.S. 343, 354 (1996) (citations omitted) (citing Ex parte Hull, 312 U.S. 546, 547–48 (1941); Griffin v. Illinois, 351 U.S. 12, 13–16 (1956); Johnson v. Avery, 393 U.S. 483, 489 (1969); Bounds v. Smith, 430 U.S. 817, 825–26 (1977)).

153 Silva v. Di Vittorio, 658 F.3d 1090, 1103 (9th Cir. 2011).

154 WILLIAM C. COLLINS, SUPERMAX PRISONS AND THE CONSTITUTION 66 (2004).

155 MUSHLIN, *supra* note 29, at § 12:7.

156 *Lewis*, 518 U.S. at 354 (emphasis omitted).

157 *Id.*

materials necessary to litigate between filing a complaint or petition and the conclusion of a case.[158]

Even if one were to accept the interpretation of *Lewis* adopted by the Ninth Circuit, some have argued that much of *Lewis* is dicta, and therefore non-binding, because the Supreme Court reached the merits after dismissing the claim for lack of standing.[159] Establishing that the right of access to legal materials extends past the pleading stage is the most logical interpretation of both *Bounds* and *Lewis* and best protects incarcerated litigants' access to courts.

B. *Judicial Clarity is Necessary to Best Protect Incarcerated Litigants' Rights*

The significance of the constitutional right of access cannot be understated. This right serves as the gateway for incarcerated people to vindicate all other constitutional rights while in prison.[160] For this reason alone, federal courts of appeals that have remained silent on this issue should acknowledge and decide the temporal scope of this right. However, two significant components of right of access litigation make judicial clarity particularly important in the prison context: qualified immunity doctrine and the actual injury requirement.

The outcome in *Rivera* demonstrates the need for judicial clarity on this issue because it relied on qualified immunity doctrine.[161] Under qualified immunity doctrine, the Supreme Court developed a two-part test to be used at the discretion of lower courts in determining whether a state or federal government official is entitled to qualified immunity: "1) the plaintiff has alleged facts showing a violation of a constitutional right, *and* 2) at the time of the challenged conduct, the right the defendant violated was clearly established."[162] Though the Third Circuit found that the plaintiff's constitutional rights in *Rivera* had been violated, it determined that the right to meaningfully access courts during a civil

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158 "It does inmates little good to give them entry to court and then deprive them of the means of pressing their claim for relief through the myriad legal proceedings that occur from commencement of a suit until its conclusion. Indeed, the *Bounds* Court implied as much when it contemplated the difficulty that an inmate would have in filing a reply brief without the assistance of a law library." MUSHLIN, *supra* note 29, at § 12:7.

159 *See* MUSHLIN, *supra* note 29, at § 12:7 ("This portion of the court's decision was not necessary to the judgment and therefore is not a binding holding on lower courts."); Steinberger, *supra* note 29, at 414 ("Regardless of whether this is the correct interpretation of the right espoused in Bounds, the Court should never have considered that issue. Because the Court decided the case based upon the plaintiffs' lack of standing, the analysis should have ended there."); *see generally* Gerken, *supra* note 50.

160 BOSTON & MANVILLE, *supra* note 75, at 228.

161 Rivera v. Monko, 37 F.4th 909 (3d Cir. 2022).

162 *Id.* at 915 (citing Pearson v. Callahan, 555 U.S. 223, 232 (2009)).

rights trial was not "clearly established" at the time of the violation for the purposes of qualified immunity.[163] Judge Roth clarified that incarcerated litigants have this right moving forward, but described "[n]o robust consensus among other Courts of Appeals," and no binding precedent from the Third Circuit or Supreme Court, which ultimately led to the failure of Rivera's claim.[164] If federal courts remain silent on this issue, other incarcerated litigants seeking damages for violations of the right of access will suffer the same fate.[165]

The actual injury requirement under *Lewis* presents similar problems. Even if a law library or legal assistance program at a prison is inadequate on its face, a litigant must show actual harm—specifically, that the shortcomings of the law library or legal assistance program impeded their ability to effectively pursue a legal claim.[166] Without clarity on the temporal scope of right of access claims, it is unclear what type of injury would satisfy this requirement under *Lewis*. In *Rivera*, Rivera lost his original case after his testimony was deemed inadmissible on hearsay grounds.[167] Rivera alleged that the lack of access to materials, such as the Federal Rules of Evidence, led to the failure of his case because he "did not know he needed to provide foundational testimony about the unsworn declaration and medical records he planned to introduce as exhibits."[168] This would appear to satisfy the actual injury requirement—or at the very least survive the pleading stage as a plausible claim—but only if the scope of the right of access extends past filing the initial complaint because the violation occurred during trial.[169]

It must be noted here, however, that the need for judicial clarity can cut both ways. The concerns about the impact of qualified immunity doctrine and the actual injury requirement in right of access cases would be resolved where courts, like the Ninth Circuit, definitively ruled that the right to affirmative assistance does not extend past the initial filing of a complaint or petition.[170] Thus, this argument must be viewed in tandem with the justifications for a more expansive interpretation of the constitutional right of access throughout this Note.[171] Federal courts of appeals should address the temporal scope of the right of access to

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163 *Id.* at 917–19.

164 *Id.* at 921.

165 However, the qualified immunity defense is not available in all right of access cases. It must be noted that if an incarcerated litigant was seeking an injunction, rather than monetary damages, qualified immunity would not present a barrier to relief. *See Pearson*, 555 U.S. at 242 (noting that qualified immunity is not available as a defense in cases where injunctive relief is sought).

166 Lewis v. Casey, 518 U.S. 343, 351 (1996).

167 *Rivera*, 37 F.4th at 913.

168 *Id.*

169 *Id.*

170 *See* Silva v. Di Vittorio, 658 F.3d 1090 (9th Cir. 2011).

171 *See supra* Section III.A; *infra* Sections III.C–III.D.

provide judicial clarity, and hold that the right extends throughout litigation to best protect incarcerated litigants' right of access to courts.

C. Existing Barriers for Incarcerated Litigants

Incarcerated litigants already face immense hurdles in filing claims from prison. Existing barriers include the Prison Litigation Reform Act, the heightened pleading standard under *Iqbal*, and the fact that most incarcerated individuals file lawsuits pro se. Once an incarcerated individual successfully files a complaint despite these restrictions, to then deny the right to access critical materials necessary for litigation would be antithetical to the "meaningful access" standard established in *Bounds* and *Lewis*.[172]

1. The Prison Litigation Reform Act

The Prison Litigation Reform Act of 1996 ("PLRA") places additional barriers on prisoners attempting to file civil rights lawsuits in federal court.[173] It requires administrative exhaustion, a showing of physical injury for monetary relief, and establishes a three-strikes rule for indigent prisoners seeking to file *in forma pauperis*.[174] Through these provisions, the PLRA has created major obstacles to incarcerated individuals' ability to hold prisons accountable, and has ultimately reduced the number of civil complaints filed by incarcerated litigants.[175] By 2001, five years after the PLRA was enacted, filings by incarcerated people were down forty-three percent from 1995.[176] Notably, the PLRA was enacted the same year the Supreme Court decided *Lewis*—and a driving force behind both was a concern about frivolous legal claims from prisoners.[177] Though Congress enacted the PLRA to counteract a rise in inmate litigation, the influx of inmate litigation in federal courts in the 1970s can largely be attributed to a rise in the prison population itself and the fact that the Constitution is one of the only meaningful sources of

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172 *See* Bounds v. Smith, 430 U.S. 817, 823–24 (1977); Lewis v. Casey, 518 U.S. 343, 354 (1996).

173 Prison Litigation Reform Act, 42 U.S.C. § 1997e.

174 *Id.* § 1997e(a), (e); 42 U.S.C. § 1915(g).

175 Tasha Hill, Comment, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act,* Casey*, and* Iqbal *Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 199 (2015).

176 Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559–60 (2003).

177 *See Lewis*, 518 U.S. at 351–53; 141 CONG. REC. S14408-01, S14413 (statement of Sen. Bob Dole) (explaining that the PLRA was initially introduced "to address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners").

protected rights.[178] As a result, the PLRA may have achieved its purpose of reducing frivolous legal claims, but it has also prevented incarcerated people from successfully filing meritorious civil rights claims.[179]

The intersection of the PLRA and the *Lewis* decision largely concerns right of access violations at the initial pleading stage. For example, an inmate who lacks meaningful access to legal materials or assistance may not possess the tools to overcome—or even know about—the barriers set by the PLRA in filing a civil rights complaint.[180] However, the statute serves as a key example of how incarcerated litigants are already discouraged from filing civil complaints from prison.

2. The Heightened Pleading Standard Under *Iqbal*

The heightened pleading standard under the Supreme Court's decision in *Ashcroft v. Iqbal* presents another barrier to inmate litigation.[181] Under *Iqbal*, to survive a motion to dismiss, plaintiffs must allege plausible factual allegations beyond mere legal conclusions.[182] To determine the plausibility of those factual allegations, reviewing courts are directed to use "judicial experience and common sense."[183] Though judges are meant to read pro se complaints liberally, after *Iqbal*, the level of subjectivity inherent in "judicial experience and common sense" opens the door for judges to characterize incarcerated litigants' allegations as mere legal conclusions and dismiss more prison claims as frivolous.[184] This poses a significant problem given that many incarcerated litigants do not have experienced attorneys to help them draft strong, factual complaints that meet the heightened pleading standard under *Iqbal*.[185]

Like the PLRA, the *Iqbal* standard presents a barrier for civil litigants at the initial pleading stage.[186] Under both interpretations of the temporal scope of the right—either extending it past or limiting it to the

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178 Hill, *supra* note 175, at 207–08.

179 *Id.* at 208–09.

180 Gerken, *supra* note 50, at 509 ("When an inmate has no means of conducting research with regard to a possible § 1983 claim, there is a significant risk that he will simply guess wrong and file a federal complaint in a situation where the claim is virtually certain to get dismissed.").

181 *Iqbal*, 556 U.S. 662 (2009).

182 *Id.* at 678–79.

183 *Id.* at 679.

184 *See id.*

185 Hill, *supra* note 175, at 212. One study published in 2012 showed that, post-*Iqbal*, constitutional civil rights claims—including prisoner petitions aside from those dismissed sua sponte under the PLRA—were 3.77 times more likely to be dismissed than they were under the previous notice pleading standard. Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 616–17, 623 (2012). In contrast, dismissal rates in general went up fifteen percent. Hill, *supra* note 175, at 213.

186 *Iqbal*, 556 U.S. 662.

pleading stage—prison officials would still shoulder an affirmative obligation to provide legal materials or other forms of assistance to help incarcerated litigants overcome *Iqbal*.[187] However, both barriers serve as mechanisms to weed out frivolous claims. Thus, once an incarcerated litigant overcomes these barriers and advances to the next stage of litigation, lack of access to adequate legal materials or assistance would hinder the litigation of meritorious claims. If incarcerated litigants are not assured meaningful access past this stage and lack the necessary tools to successfully vindicate their rights, the right of access becomes illusory.[188]

3. Pro Se Prisoner Litigation

The right of access to courts is critical to incarcerated litigants because most of these litigants are pro se. From 2000 to 2019, ninety-one percent of prisoner petitions in federal court were filed pro se, and "[p]risoner petitions constituted [sixty-nine] percent of the [federal] civil pro se caseload."[189] Generally, incarcerated people have no constitutional right to an attorney when litigating civil rights claims or post-conviction proceedings, though in some specific instances they are granted that right by statute such as when their physical liberty is at stake.[190]

The lack of access to counsel remains a significant barrier to incarcerated litigants seeking to vindicate their rights in federal court. The constitutional right of access to legal materials or assistance should, to some degree, mitigate this issue. But without a right to an attorney, incarcerated people must be afforded additional protections to ensure they have the tools to litigate their claims—even if "effective[]" litigation is not mandated by the *Lewis* court.[191] Incarcerated pro se litigants will likely rely on access to legal materials more than incarcerated litigants with representation to adequately pursue their claims. Ambiguities around the extent to which the right applies only further bar incarcerated

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187 If, for example, an incarcerated litigant alleged that they were unaware of the requirements under the PLRA or the standard under *Iqbal* due to a lack of access to legal materials, and that the lack of access caused their claim to fail, this would be sufficient to bring a right of access claim under either the Third and Seventh Circuit's approach or the Ninth Circuit's approach. *See* Rivera v. Monko, 37 F.4th 909 (3d Cir. 2022); Marshall v. Knight, 445 F.3d 965 (7th Cir. 2006); Silva v. Di Vittorio, 658 F.3d 1090 (9th Cir. 2011).

188 *Rivera*, 37 F.4th at 913.

189 *Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019*, U.S. CTS. (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019 [https://perma.cc/RN64-V5MW].

190 LYNN S. BRANHAM, THE LAW AND POLICY OF SENTENCING AND CORRECTIONS IN A NUTSHELL 312 (10th ed. 2017); Hill, *supra* note 175, at 194.

191 Lewis v. Casey, 518 U.S. 343, 354 (1996) (emphasis omitted).

people from vindicating their rights, especially considering existing barriers.

D. *Existing Safeguards for Prison Officials*

The concurring judge in *Rivera* raised concerns about extending the right to access legal materials, noting the potentially detrimental effects of placing an affirmative duty on officials to protect this right.[192] But additional safeguards are already in place to protect prison officials—including qualified immunity and the impacts of the existing barriers for incarcerated litigants addressed above.[193] In the current legal landscape, for better or worse, the actual injury requirement in *Lewis*, the flexibility granted to states under *Bounds*, and the *Turner* test all protect prison officials from liability.[194] Considering these safeguards, an affirmative obligation to furnish legal materials or legal assistance does not pose a significant threat to prison officials.

1. The Actual Injury Requirement

One protection for prison officials stems from the *Lewis* framework itself, which requires a showing of actual injury.[195] The actual injury requirement established in *Lewis* requires that a litigant show that the violation caused a potentially meritorious claim to fail.[196] This is a high bar—arguably, too high—that limits potential liability for prison officials.[197] If courts determine that the right of access extends past the initial filing of complaints and petitions, potential litigants must still show actual harm to bring a successful right of access suit.[198] This would protect prison officials because incarcerated litigants can no longer allege violations of the right of access for simply failing to furnish adequate resources without showing more.[199]

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192 *Rivera*, 37 F.4th at 923–24 (Phipps, J., concurring).

193 *See supra* Section III.C.

194 While each of these safeguards can be challenged on their own as overly stringent and providing too much deference to prison officials and administrators, that analysis is beyond the scope of this Note. Instead, this Note evaluates liability for prison officials in the context of the current landscape.

195 *Lewis*, 518 U.S. at 349, 351–52.

196 *Id.* at 351.

197 *See id.*

198 *See id.*

199 *See id.* at 350–51.

2. Flexibility for States Under *Bounds*

The flexibility provided by the *Bounds* Court survives post-*Lewis*, and allows prison administrators to choose how to satisfy the constitutionally mandated right of access.[200] Officials and administrators are not confined to a rigid standard in which one misstep exposes them to liability; they can satisfy the requirement any way they please, so long as inmates have meaningful access.[201] Prison officials also have additional options to satisfy the constitutional right of access in the digital era, with many prisons opting to transform their legal research facilities into electronic databases rather than print-based law libraries or legal assistance programs.[202] The concurring judge in *Rivera*'s concern that extending the right of access opens up prison officials to unwarranted liability is mitigated by the fact that these officials and prison administrators have many different options for securing meaningful access.[203]

3. The *Turner* Test

Lastly, the *Turner* test provides an additional safeguard for prison officials and administrators. The Supreme Court held in *Turner v. Safley* that a prison regulation which impedes prisoners' constitutional rights can stand "if it is reasonably related to . . . penological interests," and provided several factors to guide the standard of review.[204] This provides an additional layer of protection for prison administrators, balancing penological interests with constitutional rights.[205] The *Turner* test is applicable to prisoners' claims alleging violations of their constitutional right of access.[206] The Court in *Lewis* relied on *Turner*—reading it *in pari materia* with *Bounds*—to find that the district court had failed to accord

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200 *See id.* at 361–62; Bounds v. Smith, 430 U.S. 817, 830–32 (1977).

201 *Bounds*, 430 U.S. at 830–32.

202 *See infra* Section III.E.

203 *See* Rivera v. Monko, 37 F.4th 909, 923–24 (3d Cir. 2022) (Phipps, J., concurring); *Bounds*, 430 U.S. at 830–32.

204 Turner v. Safley, 482 U.S. 78, 89–90 (1987). The Court in *Turner* noted several factors to consider in determining the reasonableness of a contested regulation, including: (1) whether there is a "'rational connection' between the prison regulation and the legitimate governmental interest"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) whether an accommodation of the right will have a "ripple effect" on other inmates or prison staff; and (4) whether there are "ready alternatives." *Id.* (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

205 *Id.* at 89–91.

206 BRANHAM, *supra* note 190, at 317.

appropriate deference to the prison authorities.[207] Under this framework, courts have upheld prison rules and regulations that make litigation more difficult for incarcerated people, such as by limiting the number of legal materials one may possess.[208]

Given the considerable protections in place that speak to the concern raised in the *Rivera* concurrence,[209] there remains no plausible reason why the constitutional right to access legal materials and assistance cannot extend throughout litigation of incarcerated people's claims.

E. *The Impact of the Digital Age*

While the digital era has made legal research more convenient and accessible for most lawyers, it has not had the same impact on incarcerated litigants. The universe of legal materials has changed dramatically since the *Bounds* and *Lewis* decisions due to the rise of the digital age, as computerization has changed legal research with online accessibility to platforms like LexisNexis and Westlaw.[210] In theory, these drastic changes could benefit incarcerated litigants by making more resources available for people incarcerated in facilities that provide access to these, or similar, online platforms. As of 2018, almost all states had transitioned to some form of electronic research tool in prison facilities.[211] However, some have found that the abandonment of print materials for online materials has made it harder on some incarcerated litigants who may lack computer literacy and find these already complex databases confusing to navigate.[212] As prisons go digital, they discard print materials or legal assistance programs in favor of online systems—but incarcerated people are often only offered access to these platforms through tablets or kiosks without access to the internet and without any additional assistance.[213] Many states have adopted electronic research

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207 Lewis v. Casey, 518 U.S. 343, 361 (1996).

208 BOSTON & MANVILLE, *supra* note 75, at 235.

209 Rivera v. Monko, 37 F.4th 909, 923–24 (3d Cir. 2022) (Phipps, J., concurring).

210 Abel, *supra* note 66, at 1212–15.

211 Stephen Raher & Andrea Fenster, *A Tale of Two Technologies: Why "Digital" Doesn't Always Mean "Better" for Prison Law Libraries*, PRISON POL'Y INITIATIVE (Oct. 28, 2020), https://www.prisonpolicy.org/blog/2020/10/28/digital-law-libraries [https://perma.cc/6DXQ-6BX6].

212 Abel, *supra* note 66, at 1212–15; Camilla Tubbs, *Electronic Research in State Prisons*, 25 LEGAL REFERENCE SERVS. Q. 13, 29 (2006).

213 Adam Wisnieski, *Access Denied: The Digital Crisis in Prisons*, THE CRIME REP. (Aug. 6, 2018), https://thecrimereport.org/2018/08/06/access-denied-the-digital-crisis-in-prisons [https://perma.cc/MC8E-CC6D]; *Editorial: Prison Legal Access Shouldn't Be About Bottom Line*, ARGUS LEADER (Oct. 7, 2017, 2:17 PM), https://www.argusleader.com/story/opinion/2017/10/06/editorial-prison-legal-access-shouldnt-bottom-line/736785001 [https://perma.cc/AL7Q-DRWF].

databases in place of print legal materials simply because it is more cost-effective.[214]

Despite these technological changes, incarcerated litigants must still be provided meaningful access—and what constitutes meaningful access in the digital era will continue to evolve. However, the shift to digital legal materials in prisons does not always help incarcerated litigants seeking access to the courts, and in some cases, it may even hinder a litigant's ability to pursue a claim throughout litigation. In *Rivera*, this exact issue was on display.[215] Rivera was only given access to a broken computer—print materials or other forms of legal assistance were not available to him.[216] Today, incarcerated litigants face the same problems that they faced when *Bounds* was decided in 1977. Whether access in a particular case relates to a traditional law library, online databases, or legal assistance programs, the question remains as to whether incarcerated litigants maintain that right throughout the duration of a trial, or only to get them through the courthouse door.

CONCLUSION

Though the constitutional right of access to courts remains a crucial safeguard for incarcerated people today, the temporal scope of this right must be resolved by federal courts. The ambiguities and disagreement surrounding this right obfuscate what constitutional protections incarcerated individuals have when filing a federal lawsuit. The Third Circuit's recent decision in *Rivera* highlighted the many problems that arise from the current circuit split. Ultimately, the court opted for the best approach moving forward: incarcerated people's constitutional right to affirmative assistance in accessing the courts extends throughout all stages of litigation.[217]

The *Lewis* decision changed the legal landscape for the constitutional right of access, making it more difficult for incarcerated litigants to successfully hold prison officials accountable for denying them access to legal materials or assistance.[218] However, the Supreme Court in both *Bounds* and *Lewis* did not explicitly bar federal courts from recognizing the right past the pleading stage—and in fact, an analysis of right of access jurisprudence supports the proposition that the right must extend further.[219] Without judicial clarity on the temporal scope of right

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214 Tubbs, *supra* note 212, at 20.

215 Rivera v. Monko, 37 F.4th 909 (3d Cir. 2022).

216 *Id.* at 913.

217 *Id.* at 919–20.

218 Lewis v. Casey, 518 U.S. 343, 351 (1996).

219 *Id.* at 357–58; Bounds v. Smith, 430 U.S. 817 (1977); *see supra* Section III.A.

of access claims, incarcerated litigants are more likely to be barred from relief under qualified immunity doctrine and *Lewis*'s actual injury requirement.[220] Furthermore, existing barriers for incarcerated people filing civil rights lawsuits in prison, as well as existing safeguards for prison officials, mandate a broader temporal scope to ensure that incarcerated people can vindicate their constitutional rights.[221] As Judge Roth wrote in *Rivera*, incarcerated people must have a continued right to access the courts once they file a complaint; otherwise, the constitutional right to access courts is illusory.[222]

220 *See supra* Section III.B.

221 *See supra* Sections III.C–III.D.

222 *Rivera*, 37 F.4th at 913.