No. _____

In The
Supreme Court of the United States

JEFFREY BEARD,

Petitioner,

v.

MADERO POUNCIL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

California inmates serving life sentences are prohibited from having conjugal visits. Madero Pouncil, a life inmate, submitted an administrative grievance in 2002 requesting conjugal visits to fulfill a religious obligation to his wife. His grievance was denied because a prison regulation bars life inmates from conjugal visits. After divorcing and remarrying, Mr. Pouncil submitted a second grievance in 2008, raising the same issue, and it was denied on the same ground. Mr. Pouncil filed suit in 2009. The Ninth Circuit ruled that, because the suit takes issue with the 2008 grievance response, it falls within the four-year statute of limitations for claims under the Religious Land Use and Institutionalized Persons Act and the two-year statute of limitations for First Amendment claims.

The Question Presented is:

May a civil-rights plaintiff revive a time-barred claim by submitting a new administrative grievance?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jeffrey Beard,[1] Secretary of the California Department of Corrections and Rehabilitation, respectfully petitions for a writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 704 F.3d 568 (9th Cir. 2012). (Pet. App. 1-36.)

The order denying the petition for rehearing en banc is unreported. (Pet. App. 62.)

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its decision on November 21, 2012. (Pet. App. 1.) A petition for rehearing was timely filed, and denied on January 25, 2013. (Pet. App. 58, 62.) The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

[1] James Tilton was the originally named official, but he has retired. The current Secretary is Dr. Jeffrey Beard.

STATUTES AND REGULATION INVOLVED

Under 28 U.S.C. § 1658, the statute of limitations for a claim arising under the Religious Land Use and Institutionalized Persons Act is four years:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after [Dec. 1, 1990] may not be commenced later than 4 years after the cause of action accrues.

California's residual statute of limitations, which applies to First Amendment claims arising in California, is two years under California Code of Civil Procedure section 355.1:

> Within two years: An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another.

California Code of Regulations, title 15, section 3177 restricts life inmates from conjugal visits, otherwise available through the family-visiting program:

> Institution heads shall maintain family visiting policies and procedures. Family visits are overnight visits, provided for eligible inmates and their immediate family members as defined in Section 3000, commensurate with institution security, space availability, and pursuant to these regulations. . . .

> . . . (b)(2) "Family visits shall not be permitted for inmates who are in any of the following categories: sentenced to life without the possibility of parole;. . . ."

STATEMENT

Madero Pouncil is serving a life sentence in California without the opportunity for parole. (Pet. App. 49) California inmates serving life sentences are prohibited from having conjugal visits. Cal. Code Regs., tit. 15, § 3177(b)(2).

Pouncil submitted an administrative grievance in 2002, complaining that the prison's policy prevented him from fulfilling his religious duty to consummate his marriage. The grievance was denied. After divorcing and remarrying, Mr. Pouncil submitted a second grievance raising the same complaint in 2008, and it was again denied. (Pet. App. 54.)[2]

Pouncil filed an action under 42 U.S.C. § 1983, contending that marital sex is required by his Muslim faith, and that the prison regulation therefore interferes with his religious freedom. (Pet. App. 49-50.) The complaint seeks no damages, only injunctive

[2] Section 3177, which was in effect during Pouncil's 2008 request for conjugal visits, was numbered section 3174 when Pouncil submitted his 2002 request. There were no changes between the two iterations of the regulation. (Pet. App. 55.)

relief in the form of a change to the regulations, so that life prisoners may have conjugal visits. (Pet. App. 50.)

Secretary Beard and a dismissed defendant[3] moved to dismiss the claim, arguing that the statute of limitations had expired. In Findings and Recommendations, the Magistrate Judge noted that the regulation at issue has been in effect since 1996. (*See* Pet. App. 55.) The Magistrate Judge found that Pouncil "knew from his experience in 2002 seeking conjugal visitation with his first wife that he would not be allowed conjugal visitation with any wife so long as he remained classified as a life inmate." (Pet. App. 56.) Pouncil objected to the Findings and Recommendations, and the district court reviewed the matter de novo.

Rejecting the Findings and Recommendations, the district court concluded that the limitations period started over when Pouncil's second grievance was denied. (Pet. App. 42.) At the request of Secretary Beard's predecessor, the district court certified the statute-of-limitations issue for immediate appeal. (Pet. App. 60-61.)

The Ninth Circuit Court of Appeals granted a petition for interlocutory review under 28 U.S.C. § 1292(b), and appointed counsel for Pouncil. (Pet.

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[3] The district court dismissed non-petitioning defendant Foston. (Pet. App. 43.)

App. 59.) On November 21, 2012, the Ninth Circuit affirmed the district court's decision. (Pet. App. 1-2.) Tilton's petition for en banc review was denied on January 25, 2013. (Pet. App. 62.)

REASONS FOR GRANTING THE WRIT

The decision below holds that a civil-rights plaintiff, who long ago received notice of a regulation's application and effect, may revive a time-barred claim by submitting a new administrative grievance. The Ninth Circuit misapplied Supreme Court precedent and created a conflict with several circuits.

The question whether a limitations period can be unilaterally extended by a civil-rights plaintiff is a matter of national import. Statutes of limitation in civil-rights actions implicate fundamental principles of repose. Because the Ninth Circuit's decision creates conflicts with the Fourth, Sixth, Tenth, and Eleventh Circuits, the question should be resolved by this Court.

I. THE NINTH CIRCUIT'S DECISION DISTORTS THIS COURT'S HOLDINGS THAT CONTINUING ADVERSE EFFECTS FROM PAST ACTS DO NOT ESTABLISH NEW LIMITATIONS PERIODS.

This Court has held that, for actions arising under 42 U.S.C. § 1983, "[a]ccrual occurs when the plaintiff has 'a complete and present cause of action,'

that is, when the plaintiff can file suit and obtain relief." *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (citations omitted). *See also Gabelli v. SEC*, ___ U.S. ___, 133 S. Ct. 1216, 1220 (2013) ("standard rule" is that claim accrues when plaintiff has complete and present cause of action).

The court of appeals cited *Wallace* for the proposition that federal law governs when a claim accrues, but it completely ignored the gravamen of *Wallace*'s holding. Instead, the court relied on a contorted view of this Court's precedent in two employment discrimination cases arising under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq*.): *Delaware State College v. Ricks*, 449 U.S. 250 (1980), and *AMTRAK v. Morgan*, 536 U.S. 101 (2002). Those cases explain the statutory term "employment practice," as it is used in Title VII, 42 U.S.C. § 2000e-5(e)(1), generally refers to "a discrete act or single occurrence" that takes place at a particular point in time. *Morgan*, 536 U.S., at 110-11. This Court pointed to "termination, failure to promote, denial of transfer, [and] refusal to hire" as examples of such "discrete" acts, and it held that a Title VII plaintiff can only file a charge to cover discrete acts that occurred within the appropriate time period. *Id.*, at 114.

Five years after *Morgan*, this Court clarified, "The instruction provided by . . . *Ricks* . . . and *Morgan* is clear . . . A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that

entail adverse effects resulting from the past discrimination." *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618, 628 (2007). Hence, a new violation and new limitations period do not arise when an employer takes action "pursuant to a system that is facially nondiscriminatory and neutrally applied." *Id.,* at 637 (citing *Lorance v. AT&T Tech., Inc*., 490 U.S. 900, 911 (1989)).

Under a correct application of this Court's precedent, a new violation did not occur, and no new limitations period began, when the prison denied conjugal visits to Pouncil in 2008, applying the same neutral regulation that it had applied to him in 2002.

II. THE DECISION CREATES A CIRCUIT CONFLICT REGARDING A RULE OF NATIONWIDE APPLICATION.

Other circuits, in addressing challenges to regulations, have held that a claim accrues when a plaintiff first learns that the policy applies to him.

Fourth Circuit

In the Fourth Circuit, Pouncil's regulatory challenge would be time-barred as far back as thirty years ago. In *Ocean Acres Ltd. Partnership v. Dare County Board of Health*, 707 F.2d 103, 107 (4th Cir. 1983), a developer challenged a county moratorium on septic systems seven years after the County rejected the developer's proposed plans. The Fourth Circuit found that the developer was aware of the county's

actions at the time they were taken, and was aware of the impact those actions would have on the proposed development. The court determined that a continuing-wrong theory does not relieve a plaintiff from the duty to pursue its claims with reasonable diligence. It found that the developer's due-process claims accrued when the developer knew or had reason to know of the alleged injury that formed the basis of its action.

In another Fourth Circuit case, *National Advertising Co. v. Raleigh*, 947 F.2d 1158 (4th Cir. 1991), an advertiser challenged an ordinance restricting signage five years after it was adopted, claiming it restricted free speech and constituted a taking. The Fourth Circuit stated that "the time of accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action." The Fourth Circuit found that, immediately upon its enactment, the ordinance interfered with the plaintiff's use of its signs by mandating changed use or cessation within five years, and its anticipated effects on the plaintiff were entirely foreseeable. As a result, the statute of limitations accrued when the ordinance became law, even though its effects did not become painful to the plaintiff until five years later.

Lastly, in *Miller v. King George County*, 277 F. App'x 297, 299-300 (4th Cir. 2008), plaintiffs asserted that an ordinance regulating their well-water system was unconstitutional. The Fourth Circuit ruled that the harm occurred when the Millers were found to be in violation of the zoning ordinance. At that time, it was entirely foreseeable that the ordinance would

result in imposition of penalties. Thus, once the Millers were given notice of the effect of the ordinance, they were in a position to challenge it. Because they did not timely challenge the ordinance, their claim was time-barred.

If *Pouncil* had been decided in the Fourth Circuit, his claim would have been time-barred.

Sixth Circuit

In *Getsy v. Strickland*, 577 F.3d 309 (6th Cir. 2009), the Sixth Circuit found that a death row inmate's two-year statute of limitations for a § 1983 claim challenging a lethal injection protocol accrued in 2001, when Ohio adopted lethal injection as its exclusive method of execution. Therefore, his 2007 complaint was untimely.

In *Sharpe v. Cureton*, 319 F.3d 259 (6th Cir. 2003), the Sixth Circuit applied *Morgan* to a § 1983 action. Firefighters filed a suit alleging that city officials conspired, through discrimination and retaliation, to violate the firefighters' First Amendment rights of political belief and association. *Cureton* specifically noted that the "discrete acts" analysis in *Morgan* does not apply to challenges to an alleged discriminatory policy.

Another Sixth Circuit case, *Trzebuckowski v. City of Cleveland*, 319 F.3d 853 (6th Cir. 2001), states, "In determining when a cause of action accrues in § 1983 cases, we look to the event that should have alerted the typical lay person to protect his or her rights."

If *Pouncil* had been decided in the Sixth Circuit, his claim would have been time-barred.

Tenth Circuit

In *Jones v. Henry*, 260 F. App'x 130, 131 (10th Cir. 2008), an inmate alleged that a new law limiting his parole consideration to every three years violated the Ex Post Facto Clause. The court of appeals rejected the inmate's argument that each subsequent denial of parole caused a new statute of limitations to start.

Applying the Tenth Circuit's reasoning, Pouncil's claim would have been time-barred.

Eleventh Circuit

The Eleventh Circuit has published an opinion virtually identical to the Tenth Circuit's decision in *Jones.* In *Brown v. Georgia Board of Pardons and Paroles*, 335 F.3d 1259, 1261-62 (11th Cir. 2003), an inmate challenged a new policy that increased the time between his parole-consideration dates. The Eleventh Circuit held that the setting of new parole-consideration dates after the inmate was denied parole did not involve separate factual predicates, and therefore did not warrant separate statute-of-limitations calculations. *Id.*

Pouncil's ineligibility for conjugal visits was based on his criminal sentence and the governing regulation, both of which remained unchanged. Because the 2002 denial of visitation was based on

the same factual predicate as the 2008 denial, had *Pouncil* been decided in the Eleventh Circuit, his claim would be time-barred.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: April 25, 2013

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MADERO L. POUNCIL,

Plaintiff-Appellee,

v.

JAMES E. TILTON, Director, CDC; MATTHEW CATE, Secretary of the CDC; D. FOSTON, Facility Captain; and W. MARTEL, Warden/Acting Warden, MCSP,

Defendants-Appellants.

No. 10-16881

D.C. No.
CIV S-09-1169-
LKK-CMK-P

OPINION

Appeal from the United States District Court
for the Eastern District of California,
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
March 14, 2012 – San Francisco, California

Filed November 21, 2012

Before: Consuelo M. Callahan and Carlos T. Bea,
Circuit Judges, and Mark W. Bennett,
District Judge.*

Opinion by Judge Bennett

* The Honorable Mark W. Bennett, District Judge for the U.S. District Court for the Northern District of Iowa, sitting by designation.

SUMMARY**

Prisoner Civil Rights

The panel affirmed the district court's denial of prison officials' motion to dismiss a prisoner civil rights complaint on statute of limitation grounds.

The prisoner asserted that the denials by prison officials of his request for a conjugal visit with his wife violated the Religious Land Use and Institutionalized Persons Act and the First Amendment by interfering with his practice of a tenet of his Islamic faith requiring him to marry, consummate his marriage, and father children. The panel held that because the prisoner's claim was based on an independently wrongful, discrete act in 2008, which was the denial of his request for conjugal visits with his second wife, his claims were not time-barred, notwithstanding the denial, pursuant to the same regulation, of his prior request for conjugal visits with his first wife in 2002.

COUNSEL

Tritia M. Murata of Morrison & Foerster, Los Angeles, California, for the plaintiff-appellee.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Kamala D. Harris, Attorney General of California; Rochelle C. East, Sr. Asst. Attorney General; Vickie P. Whitney, Supervising Dep. Atty. General; Misha D. Igra, Dep. Atty. General, Sacramento, California, for defendants-appellants.

OPINION

BENNETT, District Judge:

A state prisoner asserts that denials by prison officials of his request for a conjugal visit with his wife violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the First Amendment to the United States Constitution by interfering with his practice of a tenet of his Islamic faith requiring him to marry, consummate his marriage, and father children. The immediate question, however, is not the merits of his claims, but when the limitations period began to run on them. Was it in 2008, when the prisoner's request for a conjugal visit with his second wife was denied pursuant to a prison regulation that had been in force, essentially unchanged, since 1996, or in 2002, when the prisoner's request for a conjugal visit with his first wife was denied pursuant to that regulation? The answer turns not only on the precise nature of the prisoner's claims, but on which of two apparently conflicting lines of authority is controlling on the accrual date of the prisoner's claims. Indeed, this appears to be the kind of case, forecast by the United States Supreme Court, "where it will be difficult to determine when the [limitations]

time period should begin to run." *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 115 n.7 (2002). It is symptomatic of the difficulty of the question that two district judges in the Eastern District of California reached contrary results on it, in two very similar cases, within the space of a few months. The appellant prison official contends that one of the district judges, the one in this case, got it wrong, when he denied the prison official's motion to dismiss the prisoner's claims as untimely. We affirm.

1. BACKGROUND

a. Factual Background

Plaintiff-appellee Madero L. Pouncil is a California state prisoner serving a sentence of life imprisonment without parole (LWOP) at Mule Creek State Prison (MCSP). He alleges in his *pro se* Complaint, pursuant to 42 U.S.C. § 1983, that he is a Muslim, that marriage is one of the most important institutions in Islam and is incumbent on every Muslim, and that the main duties of a Muslim to his or her spouse are to consummate their marriage to solidify the validity of the marriage and to have sexual relations as a form of worship.

Pouncil married his first wife in 1999 while Pouncil was already in prison.[1] In 2002, Pouncil

[1] Although this matter is before the court on an appeal from the denial of a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which ordinarily would limit

(Continued on following page)

requested a conjugal visit with his wife, but that request was denied. On March 26, 2002, Pouncil filed a grievance stating, in part, "I'm told, 'I can't apply for a Family visit, cause of the time I'm serving, and nature of the crime committed,'" but that the denial of a conjugal visit restricted him from complying with a duty of his religion. His grievance was denied as was his "Second Level" appeal, because a prison regulation, CAL. CODE REGS. tit. 15, § 3174, did not permit LWOP prisoners to have conjugal visits.

The parties agree that Pouncil was subsequently divorced from his first wife. The parties also agree that Pouncil remarried on July 14, 2007, and that, on or about July 21, 2008, Pouncil submitted another request for conjugal visits. That request was denied on August 1, 2008, by a counselor, who stated, "Per CCR 3177(b)(2) LWOP inmates are not permitted family visits." The regulation on which the counselor relied is essentially the same one cited in the denial of Pouncil's request for a conjugal visit in 2002, which had been recodified in 2006 as § 3177. Pouncil's administrative appeals were denied at the "Informal Level," on August 7, 2008; in a "Second Level Appeal Response," dated September 3, 2008; and in a "Director's

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this court to consideration of allegations in the Complaint, *see, e.g., Manzarek v. St. Paul Fire & Marine Ins. Co.,* 519 F.3d 1025, 1030 (9th Cir. 2008), at the defendant's request, the magistrate judge to whom the defendant's motion to dismiss was referred took judicial notice of marriage certificates indicating that Pouncil was married on September 16, 1999, and remarried on July 14, 2007.

Level Decision," dated December 9, 2008. The "Director's Level Decision" expressly stated that it "exhaust[ed] the administrative remedy available to the appellant within CDCR."

b. Procedural Background

On April 27, 2009, Pouncil signed, and on April 29, 2009, the Clerk of Court for the United States District Court for the Eastern District of California filed, Pouncil's *pro se* Complaint pursuant to the Civil Rights Act, 42 U.S.C. § 1983. The Complaint named as defendants James Tilton, identified as the Director of the California Department of Corrections and Rehabilitation (CDCR); D. Foston, identified as Facility Captain; and M. Martel, identified as the Warden or Acting Warden at MCSP. In his Complaint, Pouncil stated that he had brought the lawsuit against the CDCR "for implementing a rule to the California Code of Regulation (3177(b)(2)) that violates Petitioner['s] Constitutional right to practice his religion and be married as a Muslim under the RLUIPA act. . . . Petitioner all so [sic] claims a violation of his 14th. and 8th. amendment rights." Complaint at 4. Pouncil also alleged that "[t]his rule dose [sic] not provide intimate time (family visiting) for Muslim Inmates serving a life without parole term, wherefore making it impossible for Petitioner to consummate his marriage/have sexual relations with his wife and practice his religion and perform his duties to his wife as commanded by (ALLAH) and affirmed in the teaching of prophet Muhammad.

[A]nd by denying Petitioner the right to perform his religious duties to his wife or potential wife is to deny him his right to be married as a Muslim." Complaint at 5. Pouncil sought the following relief: "Reinstate Family Visits for Lifers, and Life without the possibility of parole Inmate so I can fulfill my duties religiously to my wife, and guide my children in my family with direct understanding of my faith." Complaint at 2.

Pouncil's Complaint makes no express mention of his applications for conjugal visits in either 2002 or 2008 or denials of those applications. It does, however, aver that Pouncil completed the administrative review process for his claims, explaining what happened at each level of administrative review. The administrative exhaustion that Pouncil cites relates entirely to his 2008 application for a conjugal visit.

The docket below reflects that Tilton and Foston filed waivers of service of the Complaint, but that Martel was never served with the Complaint. Tilton and Foston filed a motion to dismiss arguing, among other things, that Pouncil's Complaint is time-barred. The defendants argued that Pouncil's claims accrued in 2002 when he first filed an inmate grievance concerning conjugal family visitation, so that the statute of limitations had run by 2009, when Pouncil filed suit. Pouncil argued that his claims accrued only after he remarried in 2007, and that his action relates only to matters addressed in his 2008 inmate grievance, so that his lawsuit is timely.

On February 19, 2010, a magistrate judge filed Findings and Recommendations concerning the defendants' motion to dismiss. The magistrate judge found that the applicable statute of limitations for a § 1983 claim, using California's statute of limitations for personal injury actions, was two years, and that the statute of limitations was tolled while the prisoner exhausted administrative remedies. The magistrate judge dismissed any contention that an amendment of the pertinent prison regulation in 2007 affected the accrual analysis, because the portion of the regulation preventing Pouncil from having conjugal visits had been in place unchanged since 1996. The magistrate judge construed Pouncil's claims as, in essence, a constitutional challenge to the prison regulation prohibiting LWOP inmates from having conjugal family visits and concluded that this regulation remained the same and was applicable to Pouncil without regard to whom he was married at the time. In other words, the magistrate judge concluded, Pouncil's claims were not tied to a particular spouse. Thus, the magistrate judge concluded that Pouncil knew from his experience in 2002 that he would not be allowed conjugal visitation with any wife so long as he remained an LWOP inmate. The magistrate judge also dismissed application of a continuing violation theory, because the denial of Pouncil's request for a conjugal visit in 2008 was simply an effect of the regulation that Pouncil had originally challenged in 2002. Therefore, the magistrate judge recommended that the defendants' motion to dismiss be granted.

Pouncil filed objections to the magistrate judge's Findings and Recommendations on March 12, 2010, and, consequently, on March 31, 2010, a district judge[2] conducted a *de novo* review of the case. The district judge declined to adopt the magistrate judge's Findings and Recommendations. In the district judge's view, Pouncil's complaint did not allege an injury from the denial of his request for conjugal visits with his ex-wife in 2002, but an injury from the denial of his request for conjugal visits with his current wife on August 1, 2008. The district judge also concluded that the 2008 denial constituted an individual, actionable injury upon which Pouncil had standing to bring suit, so that his action did not accrue until his request was denied on August 1, 2008.

The district judge found that the two-year statute of limitations for a § 1983 claim would not run until August of 2010, and that the four-year statute of limitations for a RLUIPA claim would not run until August of 2012. Thus, he found that Pouncil's claims, filed in 2009, were timely. The district judge cited, without comment, *Henderson v. Hubbard,* 2010 WL 599886 (E.D. Cal. Feb. 18, 2010), in which another district judge in the same district adopted a different magistrate judge's findings and recommendation to dismiss a similar claim on timeliness grounds. The

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[2] The Honorable Lawrence K. Karlton, District Judge for the U.S. District Court for the Eastern District of California.

district court did, however, grant the motion to dismiss as to defendant Foston, because defendant Foston was not in any position to implement the injunctive relief that Pouncil was requesting, and substituted the current Secretary of the CDCR, Matthew Cate, for defendant Tilton, who had retired.[3]

On June 10, 2010, on defendant Tilton's motion, the district judge certified for interlocutory appeal the question of whether Pouncil's claims are barred by the statute of limitations.[4] This case was stayed in the district court until a mandate issues from this court. This court granted Tilton's subsequent petition for permission to appeal the certified question of whether Pouncil's claims are barred by the statute of limitations and directed appointment of *pro bono* counsel to represent Pouncil on appeal.

2. LEGAL ANALYSIS

a. Applicable Standards

Pouncil asserts claims pursuant to the RLUIPA and the First Amendment to the United States

[3] Like the parties, for the sake of simplicity, we will continue to identify the defendant-appellant as Tilton, rather than Cate.

[4] The district judge declined Tilton's request that he also certify for interlocutory appeal the scope of the lawsuit and who is a party.

Constitution.[5] The RLUIPA provides, in relevant part, that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability," unless the government demonstrates that the burden is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000cc-1(a). The First Amendment of the United States Constitution prohibits government restrictions on the fundamental right to freely exercise one's religious beliefs. *See* U.S. CONST. amend. I. Section 1983 of title 42 of the United States Code provides a cause of action against any person who, acting under the color of state law, abridges rights created by the laws of the United States. "[F]ederal courts must take cognizance of the valid constitutional claims of prison inmates." *Turner v. Safley,* 482 U.S. 78, 84 (1987).

The parties agree that, because there is no specified statute of limitations for an action under 42 U.S.C. § 1983, the federal courts look to the law of the state in which the cause of action arose and apply the state law of limitations governing an analogous cause

[5] Tilton argues that the only claim on which Pouncil was allowed to proceed, after initial review, was his RLUIPA claim. However, the district judge treated both Pouncil's RLUIPA claim and his First Amendment claim as viable for purposes of the statute of limitations analysis, and we will do the same, taking no position on whether Pouncil's First Amendment claim is also properly before the court.

of action. *See Wallace v. Kato,* 549 U.S. 384, 387 (2007). The parties also agree that the analogous cause of action in this case is California's personal injury action, which has a two-year statute of limitations. *See Maldonado v. Harris,* 370 F.3d 945, 954-955 (9th Cir. 2004). Similarly, they agree that the RLUIPA does not contain its own statute of limitations period, but that civil claims, such as RLUIPA claims, "arising under an Act of Congress enacted after [December 1, 1990]," have a four-year period of limitations. *See Jones v. R.R. Donnelley & Sons Co.,* 541 U.S. 369, 382 (2004).

What the parties do dispute is when the statutes of limitations on Pouncil's claims began to run. A statute of limitations begins to run on the date on which the plaintiff's claim "accrues." *Lukovsky v. City and County of San Francisco,* 535 F.3d 1044, 1048 (9th Cir. 2008). Federal law determines when a cause of action for a Section 1983 claim accrues and, hence, when the statute of limitations begins to run. *See Wallace,* 549 U.S. at 388. Under federal law, accrual occurs when the plaintiff has a complete and present cause of action and may file a suit to obtain relief. *Id.; see also Kimes v. Stone,* 84 F.3d 1121, 1128 (9th Cir. 1996) ("Under federal law, 'the limitations period accrues when a party knows or has reason to know of the injury' which is the basis of the cause of action." (quoting *Golden Gate Hotel Ass'n v. San Francisco,* 18 F.3d 1482, 1486 (9th Cir. 1994))). An action ordinarily accrues on the date of the injury. *Ward v. Westinghouse Canada, Inc.,* 32 F.3d 1405, 1407 (9th Cir.

1994). A federal claim accrues when the plaintiff knows or has reason to know of the injury that is the basis of the action. *Bagley v. CMC Real Estate Corp.,* 923 F.2d 758, 760 (9th Cir. 1991) (quoting *Trotter v. Int'l Longshoremen's and Warehousemen's Union,* 704 F.2d 1141, 1143 (9th Cir. 1983)).

When the statute of limitations begins to run for an action at law is reviewed de novo. *See Oja v. U.S. Army Corps. of Engineers,* 440 F.3d 1122, 1127 (9th Cir. 2006); *see also Orr v. Bank of Am., NT & SA,* 285 F.3d 764, 780 (9th Cir. 2002). Whether a claim is barred by the statute of limitations is also reviewed de novo. *Orr,* 285 F.3d at 780. However, "[t]he question of when a claim accrues is a fact intensive inquiry, and we have held that a district court's factual finding concerning when a claim accrues is entitled to deferential review." *Hells Canyon Pres. Council v. U.S. Forest Serv.,* 403 F.3d 683, 691 (9th Cir. 2005).

b. Arguments Of The Parties

Tilton asserts that Pouncil is now challenging a regulation that he originally challenged in 2002, when he was married to his first wife, so that his claims accrued in May 2002, when the warden of the MCSP notified him that, in accordance with provisions of the California Code of Regulations, he would not be permitted to have conjugal visitation with any spouse because of his life sentence. Tilton relies on *Knox v. Davis,* 260 F.3d 1009, 1014 (9th Cir. 2001), for the proposition that "[a]ll of the allegations in the

complaint regarding Pouncil's inability to have sex with his second wife are merely the delayed, but inevitable, consequence of the original decision that he is subject to regulations preventing LWOP inmates from participating in conjugal visits." Appellant's Brief at 16.

In contrast, Pouncil argues that he is challenging the denial of his 2008 application for a conjugal visit with his second wife. Pouncil relies on *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101, 113 (2002), to contend that the August 2008 denial of his request for a conjugal visit with his second wife was a discrete act that started a new clock running for the filing of his claims.

In reply, Tilton argues that Pouncil's argument relies on a transformation of his claims from challenges to the regulation into challenges to the denial of a specific request for a conjugal visit. Tilton points out that Pouncil's Complaint never even mentions that he had been denied a conjugal visit in 2008. Instead, it challenges "implementation" of a regulation preventing inmates serving LWOP from participating in conjugal visits.

We conclude that when Pouncil's claims accrued depends, in part, on what those claims are.

c. The Nature Of Pouncil's Claims

Pouncil filed this action *pro se.* We have repeatedly stated that "[w]e construe pro se complaints

liberally." *Silva v. Di Vittorio,* 658 F.3d 1090, 1101 (9th Cir. 2011); *Hamilton v. Brown,* 630 F.3d 889, 893 (9th Cir. 2011). This rule protects the rights of *pro se* litigants to self-representation and meaningful access to the courts, *Rand v. Rowland,* 154 F.3d 952, 957 (9th Cir. 1998), and we have recognized that it is "'particularly important in civil rights cases.'" *Johnson v. State of California,* 207 F.3d 650, 653 (9th Cir. 2000) (quoting *Ferdik v. Bonzelet,* 963 F.2d 1258, 1261 (9th Cir. 1992)).

Tilton is correct that Pouncil nowhere mentions the 2008 denial of his application for a conjugal visit in his *pro se* Complaint. On the other hand, neither does Pouncil mention the 2002 denial of his application for a conjugal visit with his first wife. The question is whether his failure to identify the 2008 denial as the specific basis for his claims is dispositive of the nature of his claims. We think it is not, giving Pouncil's *pro se* Complaint the liberal construction to which it is entitled. *See Silva,* 658 F.3d at 1101; *Johnson,* 207 F.3d at 653.

First, Tilton is correct that Pouncil stated in his Complaint that he had brought the lawsuit against the CDCR "for *implementing* a rule to the California Code of Regulation (3177(b)(2)) that violates Petitioner['s] Constitutional right to practice his religion and be married as a Muslim under the RLUIPA act." Complaint at 4 (emphasis added). Nevertheless, we do not agree with Tilton's argument that claims based on "implementing" a rule equate with claims based on "enacting" or "adopting" the rule. Appellant's Reply at

21-23. A liberal construction of Pouncil's Complaint would just as reasonably read "implementing" the rule to mean "applying" the rule to him. *See, e.g.,* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 583 (10th ed. 1995) (defining "implement," *inter alia,* as "CARRY OUT, ACCOMPLISH; *esp.* to give practical effect to and ensure of actual fulfillment by concrete measures"); ROGET'S II: THE NEW THESAURUS, www.education.yahoo.com/reference/thesaurus/?=implement (last accessed May 15, 2012) (identifying "implement" and "apply" as synonyms of "use" and identifying "implement" as a synonym of "apply"). Second, in his Complaint, Pouncil explains that he has exhausted administrative remedies by citing the levels of review and summarizing the results of those reviews in a manner that plainly matches the administrative steps of his 2008 grievance, the only grievance involving a third level of administrative review. *See* Complaint at 2. Third, Pouncil cites only the version of the rule as it was recodified in 2006 as § 3177, not as it existed in 2002, when it was codified as § 3174. Liberally construed, Pouncil's Complaint suggests that the focus of Pouncil's challenges is the application of the rule to him in 2008.

Tilton argues that, by suing the Secretary of the CDCR for injunctive relief, Pouncil has also necessarily challenged the regulation itself, not the denial of his request for a conjugal visit in 2008. Tilton points out that he was not personally involved in the specific denial of Pouncil's request. This argument is too clever by half, in the context of *pro se* pleadings,

because it relies on precisely the kind of technical requirements that liberal construction of *pro se* pleadings is intended to mitigate. *See Wyatt v. Terhune,* 315 F.3d 1108, 1119 (9th Cir. 2003).

It also is not entirely clear whether the injunctive relief that Pouncil seeks is limited to relief *for him* from the challenged regulation, or relief for *all* LWOP prisoners. In his Complaint, Pouncil sought the following relief: "Reinstate Family Visits for *Lifers,* and Life without the possibility of parole *Inmate* [sic] *so I can fulfill my duties religiously* to my wife, and guide my children in my family with direct understanding of my faith." Complaint at 2 (emphasis added). This statement ambiguously refers to all "Lifers," but only to one LWOP "Inmate," and to relief allowing Pouncil to fulfill his religious duties. When read in the context of Pouncil's requests for relief in the administrative proceedings, however, it appears that Pouncil seeks relief from application of the regulation *to him.* In his August 4, 2008, Appeal Form, Pouncil requested the following action as relief: "I would like my family visiting previlleges [sic] be reinstated and to stay as such, until I'm set free where I can continue to practice my Religious beliefs, and be an upstanding citizen." In a "Second Level Appeal Response," the warden of the MCSP characterized Pouncil's request for relief to be "to have his right to Family Visiting restored to him." The "Director's Level Response" also characterized Pouncil's request for relief to be "that his family visiting privileges be reinstated and to stay as such until the

appellant is released." Thus, the relief that Pouncil requests does not necessarily demonstrate that he has asserted challenges to the regulation itself, rather than claims based on denial of his request for a conjugal visit in 2008.

Moreover, Tilton (or his successor), as Secretary of the CDCR, is the proper defendant on a claim for prospective injunctive relief from a prison regulation, because he would be responsible for ensuring that injunctive relief was carried out, even if he was not personally involved in the decision giving rise to Pouncil's claims. *See, e.g., Gonzalez v. Feinerman,* 663 F.3d 311, 315 (7th Cir. 2011) (the prison warden was the proper defendant for a claim of injunctive relief, notwithstanding his lack of personal involvement in the challenged conduct, because he would be responsible for ensuring that the injunctive relief was carried out). Tilton cannot raise qualified immunity to such a claim. *See Vance v. Barrett,* 345 F.3d 1083, 1091 n.10 (9th Cir. 2003) (noting, "[A] defense of qualified immunity is not available for prospective injunctive relief." (citing *Presbyterian Church (U.S.A.) v. United States,* 870 F.2d 518, 527 (9th Cir. 1989))). Thus, Pouncil's prayer for injunctive relief in no way demonstrates conclusively that his claims are *not* premised on denial of his application for a conjugal visit in 2008, nor does it demonstrate that Pouncil's appellate counsel has reconfigured his claims to attempt to evade the time-bar that Tilton asserts. Rather, liberally construed, we read Pouncil's claims

to be challenges to the denial of his 2008 request for a conjugal visit.

d. Discrete Act Versus Inevitable Consequence

Once Pouncil's claims are understood as arising from the 2008 denial of his application for a conjugal visit, the question is, when did such claims accrue? What makes this question particularly daunting here is that two different lines of authority appear to lead to different conclusions. Tilton relies on one line of authority to argue that, even if Pouncil is challenging the 2008 denial of his request for a conjugal visit, that denial is simply the inevitable consequence of the 2002 denial of his first request for a conjugal visit pursuant to the same regulation. Relying on a different line of authority, Pouncil contends that the 2008 denial was a discrete act, notwithstanding a prior denial pursuant to the same regulation.

i. The Ricks/Knox *line*

Appellants rely on *Knox,* 260 F.3d at 1014, for the proposition that "all of the allegations in the complaint regarding Pouncil's inability to have sex with his second wife are merely the delayed, but inevitable, consequence of the original decision that he is subject to regulations preventing LWOP inmates from participating in conjugal visits." Appellant's Brief at 16. Tilton argues that Pouncil's cause of action, therefore, accrued on the date that he received the

denial of his first request for conjugal visits, in May of 2002. Appellant's Brief at 13.

Knox involved an attorney who, after receiving a letter on January 20, 1996, revoking all of her legal mail and visitation rights to all inmates at all penal institutions in California, continued to receive denials of these rights between January 20, 1996, and July 21, 1997, when she filed suit. *Knox,* 260 F.3d at 1011-1012. The denials subsequent to the January 20, 1996, letter, relied on the suspension implemented in that letter as the basis for denying Knox either legal visitation or correspondence privileges with inmates. *Id.* at 1012. Knox conceded that her § 1983 claim accrued on January 20, 1996. *Id.* at 1013. She argued, however, "that each time that she was denied access to one of her clients housed in a CDCR facility, a new cause of action ar[ose] under the continuing violation theory." *Id.*

This court explained that, since Knox had not alleged a system or practice of discrimination, the only way that she could hope to show a continuing violation was to "'state facts sufficient . . . [to] support[ ] a determination that the alleged discriminatory acts related closely enough to constitute a continuing violation, and that one or more of the acts falls within the limitations period.'" *Id.* (quoting *DeGrassi v. City of Glendora,* 207 F.3d 636, 645 (9th Cir. 2000)). This court rejected Knox's continuing violation argument, however, because this court had "repeatedly held that a mere continuing *impact* from past violations is not actionable." *Id.* (internal

quotation marks and citations omitted) (emphasis in the original). This court held,

> Knox's cause of action accrued when she received Tristan's permanent and complete suspension letter on January 20, 1996. The continuing violation doctrine is inapplicable because Knox has failed to establish that a new violation occurs each time she is denied her visitation or mail privileges. Rather, the CDC's subsequent and repeated denials of Knox's privileges with her clients is merely the continuing effect of the original suspension.

Knox, 260 F.3d at 1013.

This court concluded that the outcome in *Knox* was compelled by the United States Supreme Court's decision in *Delaware State College v. Ricks,* 449 U.S. 250 (1980). *See Knox,* 260 F.3d at 1013-14. In *Ricks,* the Supreme Court considered whether a college professor had timely complained under Title VII that he had been denied academic tenure because of his national origin. 449 U.S. at 252. Ricks had received a letter on June 26, 1974, informing him of the denial of tenure, but renewing his contract until the end of the 1974-75 school year. *Id.* at 253-54. The district court had held that the statute of limitations began to run on Ricks's claim on the date he had been notified that he would be offered a 1-year "terminal" contract, but the Third Circuit Court of Appeals reversed, concluding that the statute of limitations did not

begin to run until Ricks's "terminal" contract expired on June 30, 1975. *Id.* at 255.

The Supreme Court found that Ricks had not alleged any discriminatory acts that continued until, or that occurred at the time of, the actual termination of his contract. *Id.* at 257. To the contrary, the Court concluded, the "termination of employment at Delaware State [wa]s a delayed, but inevitable, consequence of the denial of tenure." *Id.* at 257-58. In short, "the only alleged discrimination occurred – and the filing limitations period therefore commenced – at the time the tenure decision was made and communicated to Ricks." *Id.* at 258. This was so, "even though one of the *effects* of the denial of tenure – the eventual loss of a teaching position – did not occur until later." *Id.* (emphasis in the original). The emphasis in the statute of limitations analysis, the Court concluded, is not on *effects,* but "is [upon] whether any present *violation* exists.'" *Id.* (quoting *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 558 (1977), with emphasis in the original).

This court explained that the attorney plaintiff in *Knox,* like the college professor plaintiff in *Ricks,* "had notice of all the wrongful acts she wished to challenge at the time of the suspension letter because the letter informed her that she was permanently denied all visitation or mail privileges." *Knox,* 260 F.3d at 1014. Similarly, Tilton argues – not without some appeal – that Pouncil also had notice of all the wrongful acts that he wished to challenge at the time that he received the 2002 notice of denial of his

request for a conjugal visit because that denial informed him that he was permanently barred from conjugal visits as an inmate serving LWOP.

ii. The Morgan/Cherosky *line*

There is, however, another line of authority that appears to lead to a conflicting result – *i.e.,* to the conclusion that Pouncil's claims arising from the denial of his request for conjugal visits in 2008 are timely, notwithstanding the prior denial of a request for conjugal visits in 2002.

Subsequent to *Knox,* the United States Supreme Court decided *Morgan,* 536 U.S. 101. In *Morgan,* which, like *Ricks,* was an employment discrimination case, the plaintiff filed a charge of discrimination and retaliation against his employer. 536 U.S. at 105. Some of the allegedly discriminatory acts about which Morgan complained occurred within 300 days of the time that he filed his charge with the EEOC – that is, within the 300-day limitations period for filing such a charge – but many took place prior to that time period. *Id.* at 106. Morgan argued that the various acts, including those that occurred prior to the 300-day time period, were part of "an unlawful employment practice" that constituted an ongoing violation. *Id.* at 110. What is instructive here, however, is not the *Morgan* Court's analysis of the continuing violation doctrine, but its explanation of what constitutes a "discrete act" that starts the running of a limitations period.

The Court derived several principles from its prior cases, including *Ricks, Evans, Electrical Workers v. Robbins & Myers, Inc.,* 429 U.S. 229 (1976), and *Bazemore v. Friday,* 478 U.S. 385 (1986) (per curiam):

> First, discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed within the 180- or 300-day time period after the discrete discriminatory act occurred. The existence of past acts and the employee's prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.

Morgan, 536 U.S. at 113. Thus, *Morgan* instructs that a court must determine whether a claim is based on an independently wrongful, discrete act, and if it is, then the claim accrues, and the statute of limitations begins to run, from the date of that discrete act, even if there was a prior, related past act.

In *Cherosky v. Henderson,* 330 F.3d 1243 (9th Cir. 2003), this Court discussed the application of *Morgan* to claims by employees of the United States Postal Service that the Postal Service had violated their rights pursuant to the Rehabilitation Act by denying

their requests for respirators. In order to bring a claim under the Rehabilitation Act, a federal employee was required to consult with an EEOC counselor within 45 days of the effective date of the action. *See Cherosky,* 330 F.3d at 1245. Failure to comply with the 45-day consultation requirement was fatal to a federal employee's claim. *Id.* The employees in *Cherosky* did not initiate contact with an EEOC officer within 45 days of the denial of their requests to wear respirators and could not point to any discrete, discriminatory act that occurred within the 45-day period. *Id.* at 1245-46. The employees argued, however, that their claims were timely under the continuing violations doctrine. *Id.* at 1246.

In *Cherosky,* this court, relying on *Morgan,* determined that discrete acts, such as the denials of the employees' requests for respirators, are only timely where such acts occurred within the limitations period, but that the postal employees had not alleged that any discriminatory acts had occurred after the initial denials, which were outside of the limitations period. *See id.* This court quoted with approval the district court's observation that the "'heart of plaintiffs' complaint does not stem from the policy regarding the use of respirators, but rather from the individualized decisions that resulted from implementation of a policy originating from OSHA.'" *Id.* at 1247. The court concluded that "these individualized decisions are best characterized as discrete acts, rather than as a pattern or practice of discrimination." *Id.*

The *Cherosky* court compared the "wrong" alleged by the postal employees, the denial of each application for a respirator, to the "wrong" in *Bazemore,* 478 U.S. at 395, the receipt of a periodic paycheck pursuant to a discriminatory salary policy. The *Cherosky* court explained, "Just as the wrong in *Bazemore* accrued each time the salary policy was implemented, the alleged wrong here occurred and accrued when the policy was invoked to deny an individual employee's request." *Cherosky,* 330 F.3d at 1247.

Thus, *Cherosky* and *Morgan* suggest that each time a policy is invoked to deny an individual plaintiff's request, an independently wrongful, discrete act occurs, a claim accrues, and the limitations period begins to run. Pouncil argues that this is precisely what occurred in 2008: The 2008 denial of his individual request for a conjugal visit was independently wrongful, and his claims accrued at that time, even though the same regulation invoked to deny the 2008 request had been invoked to deny his 2002 request for a conjugal visit.

iii. Reconciling the lines of authority

In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.,* 550 U.S. 618 (2007), *superseded by statute,* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat 5., another employment discrimination case, the Supreme Court clarified how the "discrete acts" language of *Morgan* could be reconciled with its prior

case law, including *Ricks* and *Evans.* The Court explained,

> The instruction provided by *Evans, Ricks, Lorance* [*v. AT & T Tech., Inc.,* 490 U.S. 900 (1989)], and *Morgan* is clear. The EEOC charging period is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. But of course, if an employer engages in a series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed. *See Morgan, supra,* at 113, 122 S. Ct. 2061.

Ledbetter, 550 U.S. at 628. Although the Supreme Court's decision in *Ledbetter* was later superseded by statute, that decision nevertheless clarified the distinction between Ledbetter's paycheck case and Bazemore's paycheck case, on the ground that, in order to state a "present violation," Ledbetter would have to allege a current intentionally discriminatory decision that accompanied a current action, which she had failed to do. *See Ledbetter,* 550 U.S. at 633-37 (citing *Bazemore,* 478 U.S. at 396-97).

This court has applied the "discrete act" language of *Morgan,* as explained in *Ledbetter,* in a prisoner rights case brought pursuant to § 1983. *See Ngo v. Woodford,* 539 F.3d 1108, 1109-10 (9th Cir. 2008). In *Ngo,* a prison inmate serving a life sentence was

informed, on December 22, 2000, after an administrative hearing, that he would be released from administrative segregation, but that he could not participate in "special programs." 539 F.3d at 1109. Three months later, Ngo asked the deputy warden if he could play on the prison's baseball team and whether he "was entitled to participate in any and all special programs." *Id.* The deputy warden informed Ngo that he could participate in "any recreational programs" and that the prison's community resources manager was authorized "to review [Ngo's] request to participate in any other program." *Id.* Pursuant to a prison regulation, prisoners were required to "appeal within 15 working days of the event or decision being appealed." *Id.* Ngo did not submit a formal appeal to the prison's Appeal Coordinator until approximately six months after the hearing decision and approximately three months after he received the response to his second request. *See id.*

This court rejected Ngo's argument that the December 22, 2000, order resulted in a continuing denial of his constitutional rights, so that the 15-day limitations period restarted each day that he was unable to participate in prison special programs:

> We rejected this argument in *Knox v. Davis,* 260 F.3d 1009 (9th Cir. 2001). *Knox* held that a limitations period began running on the date of a prison board's initial determination, when a prisoner "had notice of all of the wrongful acts she wished to challenge at the time of the [initial determination]." *Id.* at

> 1014. Rejecting a continuing violation theory, we explained that any continuing effects are "nothing more than the delayed, but inevitable, consequence of the [initial determination]." *Id.* And in the context of employment discrimination, the Supreme Court recently emphasized that limitations periods begin to run when the "discrete act" adverse to the plaintiff occurs – "not from the date when the effects of [that act] were felt." *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618, 127 S. Ct. 2162, 2168, 167 L. Ed. 2d 982 (2007). Here, the December 22 determination is the discrete act adverse to Ngo, so the 15-working-day limitations period began running against him on that date rather than on the date he actually felt the effects of the order.

Ngo, 539 F.3d at 1109-10 (also concluding that the December 22 order gave the prisoner "ample notice" that he would be barred from special programs and that the partial withdrawal of that restriction by the deputy warden allowing the prisoner to participate in recreation activities did not change that fact).

Thus, the apparent conflict between the *Ricks*/*Knox* line of authority and the *Morgan*/*Cherosky* line of authority is not a conflict at all; rather, the two lines of authority identify different circumstances that lead to different accrual dates for claims. The proper question, therefore, is whether, *factually,* this is a *Ricks*/*Knox* case or a *Morgan*/*Cherosky* case. Put another way, does this case involve the delayed, but

inevitable, consequence of the original 2002 decision, making Pouncil's claims arising from the 2008 decision time-barred, or an independently wrongful, discrete act in 2008, which began the running of the statute of limitations anew, notwithstanding the prior denial pursuant to essentially the same regulation in 2002? As this is a factual question, the district court's resolution is entitled to deferential review. *See Hells Canyon Pres. Council,* 403 F.3d at 691.

e. Application

We affirm the district judge's finding that the denial of Pouncil's request for a conjugal visit in 2008 is a separate, discrete act, rather than a mere effect of the 2002 denial. This is so, because Pouncil alleges, and the record supports, that the second denial is a stand-alone violation of Pouncil's First Amendment and RLUIPA rights from which the statute of limitations runs anew. *See Morgan,* 536 U.S. at 113. The 2008 denial is an independently wrongful "present violation," because Pouncil's claims do not rely on any acts that occurred before the statute of limitations period to establish a violation of his right to free exercise of religion or his rights under RLUIPA. *See Bazemore,* 478 U.S. at 396-97, n.6 (Brennan, concurring in part) (citing *Evans,* 431 U.S. at 558, for the proposition that the "critical question" is whether any "present violation" exists, and evaluating whether the plaintiff's claims of wrongfulness were "present violations" by considering whether they relied on prior acts). Unlike Ledbetter, who was unable to point

to a later act that fully established the alleged violation, *Ledbetter,* 550 U.S. at 629, Pouncil does point to a later act, the 2008 denial, that fully establishes a First Amendment and RLUIPA violation, without reaching back to the 2002 denial to establish a necessary element of his claims. To put it another way, the 2008 denial relied on a new application of the regulation to a new request for a conjugal visit, it did not rely on the 2002 denial as barring all subsequent requests for conjugal visits.

In contrast, the cases on which Tilton relies each lacked any allegation or showing of a subsequent and separately wrongful act. For example, in *Ricks,* the college professor failed to allege or show a subsequent and separately wrongful act after notice of the denial of tenure. *See Ricks,* 449 U.S. at 257-58 (determining that the only wrongful decision alleged was a wrongful denial of tenure and not an additional wrongful discharge one year later). While the Supreme Court in *Ricks* noted that the "proper focus is upon the time of the *discriminatory acts,* not upon the time at which the *consequences* of the acts became most painful," it did so based upon the finding that Ricks had pleaded only one discrete wrongful act, the denial of tenure. *See id.* at 258 (citing *Abramson v. University of Hawaii,* 594 F.2d 202, 209 (9th Cir. 1979)) (emphasis added). In contrast, Pouncil has alleged a second, discrete wrongful act – the 2008 denial.

The failure to allege a subsequent, independently wrongful act also explains the holdings in *Knox, Cherosky*, and *Ngo.* In *Knox,* each of the denials

subsequent to the January 20, 1996, letter advising Knox that her legal mail and visitation rights had been revoked relied on that letter as the basis for denying Knox either legal visitation or correspondence privileges with inmates. *Knox,* 260 F.3d at 1012. Moreover, Knox acknowledged that her claim had accrued upon receipt of the letter suspending her visitation and correspondence rights. *See id.* at 1013. Thus, the court in *Knox* was simply never asked to consider whether each subsequent denial was a separate violation of her rights, only whether each subsequent denial was part of a continuing violation. *Id.* Here, in contrast, Pouncil specifically asserts that the 2008 denial of his request for a conjugal visit was a discrete act, and the 2008 denial relied on a new application of the regulation to a new request for a conjugal visit, rather than on the 2002 denial as barring all subsequent requests for conjugal visits.

In *Cherosky,* the employees did not point to any discrete, discriminatory act that occurred within the period of limitations. *See Cherosky,* 330 F.3d at 1245. The court in *Cherosky* concluded, however, that if an employee's new request for a respirator were denied pursuant to the same policy, the time period would begin to run anew, despite an earlier denial. *See id.* at 1248. The situation contemplated in *Cherosky* is exactly the situation here: Pouncil's request for a conjugal visit with his wife in 2008 was denied pursuant to the same policy as the denial in 2002, so that the time period should be found to run anew from the later denial, despite an earlier denial. In other words,

the "heart" of Pouncil's claims, like the "heart" of the plaintiffs' complaint in *Cherosky,* "does not stem from the policy regarding the [denial of conjugal visits to LWOP prisoners], but rather from the individualized decisions that resulted from implementation of a policy originating from [the CDCR]." *Cf. id.* at 1247. As in *Cherosky,* "these individualized decisions are best characterized as discrete acts, rather than as a pattern or practice of discrimination." *Id.* The difference between Pouncil's claim and the plaintiffs' claims in *Cherosky* is that his individualized decision in 2008 fell within the limitations period.

Again, in *Ngo,* the plaintiff did not allege a second adverse decision. Instead, Ngo alleged one decision announced at the conclusion of a hearing, that he would be unable to participate in "special programs." That decision was followed by Ngo's request to participate in baseball, which was granted. Ngo's additional query about participation in other "special programs" was deferred until a further request was actually made. *See Ngo,* 539 F.3d at 1109. Thus, *Ngo* involved one adverse decision followed by one positive decision and a statement that no decision would be made regarding other matters until a specific request was made. *Id.*

In contrast to the plaintiffs in *Ricks, Knox, Cherosky*, and *Ngo,* the district judge found that Pouncil has alleged a second adverse decision that is independently wrongful within the limitations period. In addition to showing proper deference to the district court's factual finding that Pouncil had alleged a

current violation and injury, *see Hells Canyon Pres. Council,* 403 F.3d at 691, our determination that the 2008 denial of Pouncil's request for conjugal visits was a separate, discrete, and independently wrongful act is consistent with prior cases analyzing the application of *Morgan*'s "discrete act" language. *See, e.g., Cherosky,* 330 F.3d at 1245-47; *Ngo,* 539 F.3d at 1109-1110. Those cases lead to the conclusion that each wrongful act starts a new clock for filing a claim alleging that act. Such a determination also fits with *Morgan*'s rule that the existence of past acts and the claimant's prior knowledge of their occurrence does not bar a claimant from filing claims about related discrete acts, so long as the subsequent acts are independently wrongful and claims alleging those acts are themselves timely filed. *Morgan,* 536 U.S. at 113.[6]

While *Knox* may, at first blush, appear to support a finding that the second denial was merely a consequence of the first denial, upon a closer reading, it does not support or require such a finding, because it is distinguishable for the reasons stated above. Furthermore, *Knox* does not require the conclusion that multiple denials of rights pursuant to the same prison policy are necessarily just effects of the original

[6] Further, although we need not decide the issue, in those cases where the filing period is not jurisdictional, the doctrines of estoppel, waiver, and laches may still operate to ameliorate the specter of any excesses that may be raised by this opinion. *See Morgan,* 536 U.S. at 121.

discriminatory act, because *Knox* was decided before the Supreme Court's development of the discrete act analysis in *Morgan,* and also prior to this court's application of the discrete act analysis to a prisoner's § 1983 case in *Ngo.*

Finally, the district court's decision in the similar case of *Henderson v. Hubbard,* 2010 WL 599886 (E.D. Cal. Feb. 18, 2010) (slip op.) (findings and recommendations of magistrate judge), is neither binding nor persuasive. In *Henderson,* the plaintiff was a prisoner who complained in 2006 about the same regulation at issue here, which prohibited conjugal visits for him, because he was serving life sentences on which no parole date had been set by the Board of Prison Terms. *Henderson,* 2010 WL 599886 at *1 n.2. The district court concluded that the prisoner had been aware of the policy in June of 1998, when he was denied overnight visits with his wife, and that the statute of limitations began to run "when he became aware of the reason his conjugal visits were denied." *Id.* at *2. However, unlike the district court in Pouncil's case, the district court in *Henderson* did not apply or discuss *Morgan, Cherosky*, or *Ngo,* all of which, for reasons discussed above, suggest a different outcome – that is, that a later denial pursuant to the same policy is an independently wrongful

"discrete act" that starts the statute of limitations running, notwithstanding a prior denial.[7]

3. CONCLUSION

Because Pouncil's claims are based on an independently wrongful, discrete act in 2008, the denial of his request for conjugal visits with his second wife, Pouncil's claims are not time-barred, notwithstanding the denial, pursuant to the same regulation, of his prior request for conjugal visits with his first wife in 2002.

AFFIRMED.

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[7] Also, unlike Pouncil, the plaintiff in *Henderson* did not oppose the defendants' motion to dismiss. *Henderson,* 2010 WL 599886 at *1. Thus, although *Henderson* presented the same issues as this case, those issues were never considered in *Henderson* in a contested proceeding.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MADERO POUNCIL,
Plaintiff,
vs.
JAMES TILTON, et al.,
Defendants. /

No. CIV S-09-1169-LKK-CMK-P

ORDER

(Filed Mar. 31, 2010)

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action. The matter was referred to a United States Magistrate Judge pursuant to Eastern District of California Local Rules.

On February 19, 2010, the Magistrate Judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, this court declines to adopt the findings and recommendations.

Defendants move to dismiss plaintiff's claims under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Plaintiff alleges that defendants have violated RLUIPA by refusing to allow

plaintiff conjugal visits as required by his Muslim faith. This court declines to adopt the Magistrate's finding that plaintiff's RLUIPA claim accrued in 2002 and is time barred, and accordingly addresses the defendant's other arguments for dismissal.[1]

BACKGROUND

Since 1996, the California Department of Corrections and Rehabilitation ("CDCR") has implemented a regulation prohibiting family visits for specific categories of inmates, including those sentenced to life terms without the possibility of parole. 15 CCR § 3177(b)(2); *see Pro-Family Advocates v. Gomez,* 46 Cal. App. 4th 1674, 1682 (1996). In 2000, Congress enacted RLUIPA which provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability," unless the government demonstrates that the burden is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000cc-1(a). Both § 3177(b)(2) and RLUIPA were in effect at all times relevant to this case.

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[1] It appears to the court that plaintiff seeks to bring claims under the Fourteenth and Eighth Amendments. Compl. 4. Because defendants do not move to dismiss on these grounds, the court does not consider the merits of these claims.

Plaintiff is a Muslim prisoner serving a life sentence without the possibility of parole. Compl. 4. Plaintiff believes that marriage is one of the most important institutions in Islam. *Id*. According to plaintiff, it is incumbent upon members of his faith to be married, to consummate their marriage, and to have children with their spouse. *Id*.; Opp. 7. In March 2002, while plaintiff was married to his now ex-wife, plaintiff requested conjugal visits. Exh. A. A prison official denied plaintiffs' request pursuant to 15 CCR § 3177(b)(2), based on his status as a prisoner serving life without parole. Exh. A. Plaintiff filed a grievance alleging that he had been improperly denied conjugal visits. Opposition 4 ("Opp."); Defendants Motion to Dismiss 4 ("Mtd."). The grievance was denied on May 28, 2002. Exhb. A. In April 2006, defendant Tilton became the acting Secretary of the CDCR, and later assumed the position of Secretary in September, 2006. Exh. B. Tilton retired in 2008, and was replaced by Matthew Cate, the current Secretary of the CDCR.

Plaintiff subsequently divorced, and was remarried on July 14, 2007. Opp. 4; Reply 4. On July 21, 2008, plaintiff submitted a family visiting application.[2] It is unclear whether this request included a request for conjugal visits with plaintiff's wife, but defendants do not contest whether such a visit was incorporated in plaintiff's request. On August 1,

[2] The court notes that it is difficult to read the date of plaintiff's family visiting application, and provides its best estimate of the date.

2008, this request was denied because LWOP inmates are not permitted family visits pursuant to "CCR 3177(b)(2). Plaintiff subsequently challenged the application of 15 CCR § 3177(b)(2) through an administrative appeal on August 4, 2008. Mtd. 4; Opp. 3. The appeal was denied on December 9, 2009. Opp. 3. Plaintiff subsequently filed a complaint pro se on April 29, 2009 alleging violations of RLUIPA premised on the CDCR's refusal to allow him conjugal visits as required by his faith, which defendants now move to dismiss. Plaintiff labels his complaint "Civil Rights, Act 42 USC § 1983," and specifically alleges violations of RLUIPA. Compl. 1, 4. Mindful that plaintiff proceeds pro se, *see generally Erickson v. Pardus,* 551 U.S. 89, 94 (2007), this court liberally construes plaintiff's complaint as a suit under § 1983 alleging violations the First Amendment and under RLUIPA.

ANALYSIS

1. Accrual of Plaintiff's Claim

Federal law determines when a cause of action accrues, and the statute of limitations begins to run, for Section 1983 actions. *Wallace v. Kato,* 549 U.S. 384, 388 (2007). Under federal law, accrual occurs when the plaintiff has a complete and present cause of action, and may file a suit to obtain relief. *Id*. (intervening citations omitted); *see also Kimes v. Stone,* 84 F. 3d 1121, 1128 (9th Cir. 1996) ("Under federal law 'the limitations period accrues when a

party knows or has reason to know of the injury' which is the basis of the cause of action.") (quoting *Golden Gate Hotel Ass'n v. San Francisco,* 18 F. 3d 1482, 1485 (9th Cir. 1994)). RLUIPA has a four year statute of limitations. *See* 28 U.S.C. § 1658(a) (establishing a four year statute of limitations for federal civil actions enacted after 1990); 42 U.S.C. § 2000cc-2 (RLUIPA enacted in 2000 without specific statute of limitations); *see also Jones v. R.R. Donnelley & Sons Co.,* 541 U.S. 369, 382 (2004) (four-year statute of limitations applies to claims "made possible by a post-1990 enactment"). 42 U.S.C Section 1983 provides a cause of action against any person who, acting under color of state law, abridges rights created by the laws of the United States. The statute of limitations for section 1983 actions is adopted from the forum state's limitations period for personal injury actions. *Maldonado v. Harris,* 370 F. 3d 945, 954 (9th Cir. 2004). In California, a two year limitations period for personal injury actions was established on January 1, 2003. *Id*.

Here, plaintiff's complaint does not allege an injury from the denial of his request for conjugal visits with his ex-wife in 2002. Rather, plaintiff alleges an injury from the denial of his request for conjugal visits with his current wife on August 1, 2008. The Seventh Circuit has observed that the date on which a plaintiff learns that a rule might violate RLUIPA is not the date on which their claim accrues, because "[m]ere knowledge of the existence of an invalid law that might be applied to one is not an injury, and a tort claim does not arise until there is

an injury." *Petra Presbyterian Church v. Village of Northbrook,* 489 F.3d 846, 849-50 (7th Cir. 2007); *contra Henderson v. Hubbard,* 2010 WL 599886 (F&R, E.D Cal., S. Snyder) (finding that the statute of limitations for plaintiffs' RLUIPA claim accrued in 1998, when plaintiff first challenged § 3177(b)(2) and "became aware of the reason his conjugal visits were denied", and not in 2006, when he challenged the policy again) (adopted in full by O. Wanger). Plaintiff's 2008 denial constituted an individual, actionable injury upon which plaintiff has standing to bring suit. As such, plaintiff's cause of action accrued when his request was denied, August 1, 2008. The two year statute of limitations of Section 1983 will have run in August 2010; the four year statute of limitations for plaintiff's RLUIPA claim will have run in August 2012.[3] Plaintiff filed this claim on April 29, 2009. Accordingly, plaintiff's claim is not barred by the statute of limitations. California law provides tolling for the statute of limitations for up to two years based on the disability of imprisonment regardless of the sentence, *see generally Jones v. Balanas,* 393 F.3d 918, 928 n.5 (9th Cir. 2004), and while exhausting prison remedies mandated by the Prison Litigation

[3] The court notes that plaintiff is entitled to tolling while he exhausts administrative procedures. This tolling extends from the date of his appeal of the denial of his request, August 13, 2008, to the date of the director's level appeal decision, December 9, 2008. This tolling, however, is not relevant here where plaintiff has timely filed his complaint absent tolling.

Reform Act ("PLRA"). *See Brown v. Valoff,* 422 F.3d 926, 942-43 (9th Cir. 2005).

2. Proper Defendant

Defendants assert that plaintiff has not properly stated a claim against either defendant Tilton or defendant Foston. According to defendants, the plaintiff must specify which action defendants took to violate his rights. For the reasons discussed below, plaintiff has properly stated a claim against defendant Tilton. Plaintiff's claim against Foston, however, is dismissed.

In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that the conduct complained of was committed by a person acting under color of state law, and resulted in a deprivation of a person's rights, privileges, or immunities as secured by the Constitution or laws of the United States. *Parratt v. Taylor,* 451 U.S. 527, 535 (1981), overruled on other grounds, *Daniels v. Williams,* 474 U.S. 327 (1986). A suit against a state official in their official capacity is a suit against the official's office. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71 (1989). Defendants are correct in that plaintiff's complaint lacks factual allegation regarding defendants Tilton and Foston. Compl. 4. In plaintiff's Opposition, however, he specifies that Tilton, as Secretary of the CDCR, and Foston, as a captain of the CDCR, were responsible for enforcing and advancing the complained of prison rules. Opp. 4. A plaintiff seeking injunctive

relief against a state agency must do so against a person in their official capacity. *Rouse v. Washington State Dept. of Corrections,* No. C08-5620 FDB, 2009 WL 1011623, at *3-4 (F. Burgess, W.D. Wash). Plaintiff challenges a CDRC policy and requests injunctive relief. The proper defendant for plaintiff's request for injunctive relief regarding the implementation of CDRC policy would be the secretary of the CDRC, defendant Tilton, in his official capacity. *See Rouse* at *4. Since Tilton has retired, Cate is properly substituted for him. Accordingly, defendant Cate is not entitled to dismissal on these grounds. For the same reason, defendant Tilton's argument that he is entitled to dismissal because he could not have "caused" the claimed violation to plaintiff's rights lacks merit. Moreover, this argument is premised on an incorrect 2002 accrual date.

However, plaintiff cannot sate a claim against Defendant Foston for the same reasons. Defendant Foston's role was limited to the grievance process, and Foston is in no position to implement the injunctive relief requested by plaintiff. Inasmuch as plaintiff seeks to enjoin the enforcement of a CDCR policy, defendant Cate, not Foston, is the proper defendant. *See id.* Accordingly, the claim against Foston is dismissed.

3. Plaintiff's RIULPA Claim

Finally, defendants argue that plaintiff has not stated a claim under RLUIPA, because plaintiff's

own evidence demonstrates that his inability to consummate his marriage while incarcerated is not a substantial burden on his religious exercise. A plaintiff who brings a claim under RLUIPA bears the burden of showing (1) that he seeks to engage in an exercise of religion and (2) that the challenged practice substantially burdens that exercise. 42 U.S.C. § 2000cc-2(b) (2000). "Religious exercise" includes an exercise of religion, whether or not compelled by, or central to, a system of religious belief. 42 U.S.C. § 2000cc-5(7)(A) (2000). A "substantial burden" on the free exercise of religion is one that forces adherents of a religion to modify behavior, to violate beliefs, or to choose between forfeiting governmental benefits and abandoning a religious precept. *Lovelace v. Lee,* 472 F.3d 174, 187 (4th Cir. 2006).

Defendant's argue that plaintiff's assertions in his complaint that, "The consummation of the marriage can be delayed by mutual agreement and is, therefore, no issue in the validity of the marriage", Compl. 9, 26, contradicts his other allegations and entitles the defense to dismissal. The court finds no contradiction. Plaintiff, serving life without parole, alleges that his deeply held religious beliefs require him to fulfill his marital obligations to his wife through consummation and "sexual relations . . . on a regular basis." Reply 3, 6. Though plaintiff's own evidence may suggest such an obligation could be delayed, plaintiff is serving life without parole, and there is no indication that non-consummation would not call into doubt the validity of his marriage.

Few courts have been called upon to determine whether a ban on conjugal visits violates RLUIPA. *See, generally, Lindell v. Casperson,* 360 F. Supp. 2d 932 (W.D.Wis. 2005) (granting summary judgment in favor of defendants where plaintiff's alleged that as a Wiccan he had a sincerely held belief that his religion required conjugal visits). However, this court must only determine if plaintiff has stated a claim under RLUIPA. Here, plaintiff asserts a deeply held religious belief that it is imperative for a Muslim to marry, and to consummate the marriage. Compl. 4. Granting the plaintiff all permissible allowances, plaintiff claims that his marital relationship implicates the practice of his religion. Moreover, plaintiff has claimed that the policy of the CDCR substantially burdens this exercise of religion by outright forcing him to abandon this religious precept. Accordingly, plaintiff has stated a claim under RLUIPA.[4]

4. Exhaustion

In their reply brief, defendants argue that plaintiff's claim should be dismissed because he did not properly exhaust his administrative remedies. Plaintiff filed a letter after receipt of this reply concerning the new argument. The court interprets this letter as

[4] The court recognizes, however, that defendants may have strong defenses to this claim.

a sur-reply, and addresses the merits of defendant's argument.

Defendants argue that plaintiff's claim is not properly exhausted because he remarried in July 2007, but did not file his administrative appeal until August 13, 2008. Defendant contends that plaintiff must have filed his grievance within fifteen days of his marriage, and not within fifteen days of the denial of his request for a conjugal visit. However, as defendants note, plaintiffs may appeal "any departmental decision" within fifteen working days of such decision. Cal. Code Regs., tit. 15, §§ 3084.1(a), 3084.2(c), 3084.6(c). Plaintiff, here, is appealing the departmental decision denying his request for a conjugal visit. Plaintiff's exhibits demonstrate that the denial of his request for a conjugal visit occurred on August 2, 2008. These exhibits further demonstrate that plaintiff appealed this decision, and received a director's level appeal decision on December 9, 2008. Plaintiff then filed this complaint on April 29, 2009, well within the four year statute of limitations for RLUIPA and the two year statute of limitations for Section 1983. Defendants have not presented any evidence that these exhibits do not accurately reflect the dates of plaintiff's administrative appeals of their decision. For these reasons, defendants' motion to dismiss on the grounds of exhaustion is denied.

Accordingly, IT IS HEREBY ORDERED that:

1. The court declines to adopt the findings and recommendations, Doc. No. 25.

2. Defendants' motion to dismiss, Doc. No. 18, is denied as to Defendant Cate, who the court properly substitutes for named Defendant Tilton.

3. The motion to dismiss, however, is granted as to Defendant Foston. IT IS SO ORDERED.

DATED: March 30, 2010.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MADERO POUNCIL,
Plaintiff,
vs.
JAMES TILTON, et al.,
Defendants.
/

No. CIV S-09-1169-LKK-CMK-P

FINDINGS AND RECOMMENDATIONS

(Filed Feb. 19, 2010)

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action. Pending before the court are: (1) Plaintiff's "Ex Parte Motion Plaintiff for Order Directing Officials to Return Confiscated Religious Materials" (Doc. 12); (2) defendants' motion to dismiss (Doc. 18); and (3) defendants' request for judicial notice (Doc. 21).

I. BACKGROUND

Plaintiff brings this civil rights action pursuant to the Religious Land Use and Institutionalized Persons Act ("RLUIPA") alleging that defendants have instituted a policy which imposes a substantial burden on the practice of his religion. Plaintiff, who is Muslim, is serving a sentence of life without the possibility of parole. According to plaintiff, central tenets of his faith require that he marry, that he consummate the marriage, and thereafter maintain a sexual relationship with his wife. Plaintiff states that defendants have implemented a regulation which

prohibits "intimate time (family visiting) for Muslim inmates serving a life without parole term. . . ." He states that this makes it impossible for him to consummate his marriage and maintain a sexual relationship with his wife. Plaintiff seeks an injunction prohibiting enforcement of the regulation.

II. DISCUSSION

Defendants argue, among other things, that plaintiff's complaint is time-barred. For claims brought under 42 U.S.C. § 1983, the applicable statute of limitations is California's statute of limitations for personal injury actions. *See Wallace v. Kato,* 549 U.S. 384, 387-88 (2007); *Wilson v. Garcia,* 471 U.S. 261, 280 (1985); *Karim-Panahi v. Los Angeles Police Dep't,* 839 F.2d 621, 627 (9th Cir. 1988). State tolling statutes also apply to § 1983 actions. *See Elliott v. City of Union City,* 25 F.3d 800, 802 (citing *Hardin v. Straub,* 490 U.S. 536, 543-44 (1998)).

Before January 1, 2003, the statute of limitations for personal injury actions was one year. *See* Cal. Code Civ. Proc. § 340(3); *see also Fink v. Shedler,* 192 F.3d 911, 914 (9th Cir. 1999) (citing *Elliott,* 25 F.3d at 802, and applying the one-year limitation period specified in § 340(3)). The personal injury statute of limitation was extended by passage of California Code of Civil Procedure § 335.1 to two years, effective January 1, 2003. *See Canatella v. Van De Kamp,* 486 F.3d 1128, 1132 (9th Cir. 2007) (citing Cal. Code Civ. Proc. § 335.1). The extension of this statute of limitations

does not apply retroactively to claims which were already barred under the one-year limitation period specified in § 340(3), plus any statutory tolling, as of the effective date of January 1, 2003. *See Maldonado v. Harris,* 370 F.3d 945, 955 (9th Cir. 2004) (citing *Douglas Aircraft v. Cranston,* 58 Cal.2d 462 (1962)). However, the extended statute of limitations period provided for in § 335.1 is applicable to claims which are not yet barred. *See Lamke v. Sunstate Equip. Co., LLC,* 387 F. Supp. 2d 1044, 1051-52 (N.D. Cal. 2004) (citing *Douglas,* 58 Cal.2d at 465).

At the time *Elliott* was decided – 1994 – California Code of Civil Procedure § 352(a)(3) provided tolling of the statute of limitations when the plaintiff is "[i]mprisoned on a criminal charge, or in execution under sentence of a criminal court for a term of less than for life."[1] That tolling, however, only applies if the disability of incarceration existed at the time the claim accrued. *See Elliott,* 25 F.3d at 802 (citing Cal. Code Civ. Proc. § 357). Pre-conviction incarceration qualifies. *See id*. By the time *Fink* was decided – 1999 – the California tolling provision for the disability of

[1] "The California courts have read out of the statute the qualification that the period of incarceration must be 'for a term less than for life' in order for a prisoner to qualify for tolling." *Jones v. Blanas,* 393 F.3d 918, 928 n.5 (9th Cir. 2004) (citing *Grasso v. McDonough Power Equipment, Inc.,* 70 Cal. Rptr. 458, 460-61 (Cal. Ct. App. 1968) (holding that a prisoner serving a life sentence is entitled to the benefit of tolling)), *Martinez v. Gomez,* 137 F.3d 1124, 1126 (9th Cir. 1998). Thus, the length of the sentence is irrelevant.

incarceration had been amended. Specifically, California Code of Civil Procedure § 352.1, which became effective January 1, 1995, provides prisoners with only two years of tolling. *See Fink*, 192 F.3d at 914. Prior to the effective date of § 352.1, prisoners enjoyed tolling for the entire time of sentences less than life. *See id*. The Ninth Circuit in *Fink* concluded that § 352.1 applies retroactively. *See id*. at 915. Thus, for § 1983 claims which accrued before January 1, 1995, the running of the statute of limitations is tolled for two years, or until January 1, 1997, whichever is later. *See Fink*, 192 F.3d at 916.

The applicable statute of limitations is further tolled while a prisoner completes the exhaustion process mandated by the Prison Litigation Reform Act ("PLRA"). *See Brown v. Valoff,* 422 F.3d 926, 942-43 (9th Cir. 2005). In *Brown,* the Ninth Circuit observed that "a prisoner may *not* proceed to federal court while exhausting administrative remedies," and that "awaiting the completion of a staff misconduct investigation could, absent some adjustment, endanger the prisoner's ability to file his court complaint within the limitations period." *Id*. at 942. The court added:

> We also note that, again like all the other circuits that have considered the question, "we refuse to interpret the PLRA so narrowly as to . . . permit [prison officials] to exploit the exhaustion requirement through indefinite delay in responding to grievances."

> *Id*. at 943 n.18 (quoting *Lewis v. Washington,* 300 F.3d 829, 833 (7th Cir. 2002), *Jernigan v. Stuchell,* 304 F.3d 1030 (10th Cir. 2002), *Miller v. Norris,* 247 F.3d 736, 740 (8th Cir. 2001), and *Underwood v. Wilson,* 151 F.3d 292, 295 (5th Cir. 1998) (per curiam)).

In cases where the plaintiff alleges ongoing violations, claims outside the limitations period which relate to claims within the limitations period may nonetheless be actionable under the continuing violation doctrine. In an employment discrimination case, the Supreme Court stated that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113 (2002). However, where the plaintiff asserts claims resulting from an alleged ongoing policy of discrimination, the continuing violation doctrine applies. *See Gutowsky v. County of Placer,* 108 F.3d 256, 259-60 (9th Cir. 1997). In *Gutowsky,* the plaintiff had alleged "that the widespread policy and practices of discrimination of which she complains continued every day of her employment, including days that fall within the limitation period." *Id*. at 260. Thus, there needs to be an allegation that the specific acts alleged are instances of some broader policy. *See id*.; *see also Cholla Ready Mix Co. v. Civish,* 382 F.3d 969, 974-5 (9th Cir. 2004) (citing *Morgan,* 536 U.S. at 113-14).

Defendants are correct that a claim accrues for statute of limitations purposes either when the injury occurs or when the plaintiff has reason to know of the

injury forming the basis of the claim. *See Elliot*, 25 F.3d at 805. According to defendants, plaintiff's claim accrued in this case in 2002 which is when plaintiff first filed an inmate grievance concerning conjugal family visitation. Defendants have presented the court with copies of documents relating to plaintiff's 2002 grievance. Specifically, defendants' evidence indicates that plaintiff filed a grievance on March 26, 2002, complaining that he was being improperly denied conjugal family visitation. Defendants conclude that, because this action was not commenced until 2009, it is time-barred under any applicable statute of limitations.

Plaintiff argues that any claim accrued only after he re-married in 2007.[2] According to plaintiff, this action relates to matters addressed in a 2008 inmate grievance, which challenged amended regulations relating to conjugal visits. Plaintiff argues:

> Defendants attempt to mislead this Court. They intentionally cite plaintiff's administrative appeal from 2002 as if it was of any consequence or weight. . . . This claim accrued after plaintiff remarried in 2007 and exhausted the appeal . . . 2008. Plaintiff had

[2] Defendants ask the court to take judicial notice of marriage certificates indicating that plaintiff was married on September 16, 1999, and re-married on July 14, 2007. The court may take judicial notice pursuant to Federal Rule of Evidence 201 of matters of public record. *See U.S. v. 14.02 Acres of Land,* 530 F.3d 883, 894 (9th Cir. 2008). The request for judicial notice should be granted.

> no claim while he remained unmarried, and his claim arose again once he remarried.
>
> The regulation challenged in this action was amended by defendants November 15, 2007 (citation omitted). Therefore, plaintiff's claim did not run afoul of any statute of limitations.

Plaintiff concludes as follows: "Here, the cause of action arose only after defendants amended the regulation, denied the administrative appeal, and after plaintiff remarried." In their reply brief, defendants assert: (1) while the regulation at issue was amended in 2007, the policy relating to conjugal visits for life inmates has been unchanged since 1996; (2) plaintiff cannot artificially create a new accrual date by filing a new inmate grievance; and (3) the continuing violation doctrine does not apply.

Turning first to the issue of amendment of the regulation, the court agrees with defendants that the 2007 amendment referenced by plaintiff in his opposition has no bearing on the accrual analysis because the portion of the regulation which prevents plaintiff from conjugal family visitation has been in place unchanged since 1996. Because the portion of the regulation plaintiff is challenging in this action was not affected by the 2007 amendment, such amendment has no bearing on when plaintiff knew or should have known that he had a claim challenging family visitation rule for life inmates.

Next, as to plaintiff's argument that any claim could not have accrued until after he re-married, the

court is not persuaded. Plaintiff's claim, in essence, is a constitutional challenge to the prison regulation prohibiting life inmates from conjugal family visitation. This rule remains the same and applicable to plaintiff without regard to whom he is married at the time. Thus, plaintiff's claim is not tied to a particular spouse. Rather, it is tied to a particular regulation which, as discussed above, has remain unchanged since 1996. Plaintiff knew from his experience in 2002 seeking conjugal visitation with his first wife that he would not be allowed conjugal visitation with any wife so long as he remained classified as a life inmate. His remarriage did not change this fact. As defendants note:

> Here, the determination in 2002 that Plaintiff is not eligible for the privilege of conjugal visitation due to his sentence of LWOP is the discrete act adverse to him. So the limitations period began running against him at that time, rather than on the date he felt the effects of the order with regard to his most recent wife.

Finally, the court addresses applicability of the continuing violation doctrine. The court finds that any denial of conjugal visitation with plaintiff's second wife is an effect of the regulation plaintiff originally challenged in 2002 when he sought conjugal visitation with his first wife. *See Knox v. Davis,* 260 F.3d 1009 (9th Cir. 2001). There are no facts – other than denial of conjugal visitation – which could relate the two.

III. CONCLUSION

Based on the foregoing, the undersigned recommends that:

1. Defendants' request for judicial notice (Doc. 21) be granted;
2. Defendants' motion to dismiss (Doc. 18) be granted;
3. All other pending motions be denied as moot; and
4. The Clerk of the Court be directed to enter judgment and close this file.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within 15 days after being served with these findings and recommendations, any party may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal. *See Martinez v. Ylst,* 951 F.2d 1153 (9th Cir. 1991).

DATED: February 18, 2010

/s/ Craig M. Kellison
CRAIG M. KELLISON
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MADERO L. POUNCIL, Plaintiff-Appellee, v. JAMES E. TILTON, Director, CDC; MATTHEW CATE, Secretary of the CDC; D. FOSTON, Facility Captain; and W. MARTEL, Warden/Acting Warden, MCSP, Defendants-Appellants.	No. 10-16881 D.C. No. CIV S-09-1169-LKK-CMK-P ORDER (Filed Dec. 11, 2012)

Before: CALLAHAN and BEA, Circuit Judges, and BENNETT, District Judge.*

The defendants-appellants' request for a twenty-one day extension of time to file a petition for en banc review is granted.

* The Honorable Mark W. Bennett, District Judge for the U.S. District Court for the Northern District of Iowa, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MADERO L. POUNCIL, Plaintiff-Appellee, v. JAMES E. TILTON, Director, CDC; et al., Defendants-Appellants.	No. 10-80127 D.C. No. 2:09-cv-01169-LKK Eastern District of California, Sacramento ORDER (Filed Aug. 26, 2010)

Before: LEAVY and THOMAS, Circuit Judges.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 14 days after the date of this order, petitioners shall perfect the appeal in accordance with Federal Rule of Appellate Procedure 5(d).

Upon review of the record, this court has determined that the appointment of pro bono counsel would benefit the court's review. The motion for appointment of counsel is granted. The court by this order expresses no opinion as to the merits of the appeal.

When the Clerk opens a new docket for the appeal in this matter, the Clerk shall enter an order appointing pro bono counsel to represent Madero L. Pouncil for purposes of the appeal.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MADERO POUNCIL,
Plaintiff,
v.
JAMES TILTON, et al.,
Defendant.
/

NO. CIV. S-09-1169 LKK/CMK P

ORDER

(Filed Jun. 10, 2010)

On April 9, 2010, defendants requested that this court certify its order denying in part their motion to dismiss for appeal to the Ninth Circuit. On April 19, 2010, the court denied the request as to all questions except whether plaintiff's claims are barred by the statute of limitations. The court ordered plaintiff to file an opposition to defendants' request as to the remaining question within forty-five days. On May 15, 2010, plaintiff filed an opposition to defendants' request.[1] On May 24, 2010, defendants filed a reply brief in support of their request.

[1] Plaintiff states in his opposition that he is unable to review *Henderson v. Hubbard,* 2010 WL 599886, 1:08 CV 01632 OWW YNP SMS (PC) (E.D. Cal. Feb. 18, 2010), an unpublished case. The court grants defendant's request for interlocutory appeal largely due to this opinion, which is in disagreement with this court's order Under the current version of E.D. Cal. Local Rule 133(i)(3), parties are no longer required to attach unpublished decisions that are available on Westlaw or Lexis to their memoranda of law. While this amended rule is reasonable

(Continued on following page)

The court has considered the memoranda filed in this case, and CERTIFIES for interlocutory appeal the question of whether plaintiff's claims are barred by the statute of limitations to the Ninth Circuit Court of Appeals.

IT IS SO ORDERED.

DATED: June 9, 2010.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

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in the court's general civil practice, it appears to cause significant burden on pro se prisoners who lack access to Westlaw or Lexis. Because the court certifies the question for appeal in large part because of the difference of opinion on the question, the court attaches the *Henderson* opinion to this order in the interests of fairness.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MADERO L. POUNCIL, Plaintiff-Appellee, v. JAMES E. TILTON, Director, CDC; et al., Defendants-Appellants.	No. 10-16881 D.C. No. 2:09-cv-01169-LKK-CMK Eastern District of California, Sacramento ORDER (Filed Jan. 25, 2013)

Before: CALLAHAN and BEA, Circuit Judges, and BENNETT, District Judge.*

Judge Callahan and Judge Bea vote to deny the petition for rehearing en banc and Judge Bennett so recommends. The full court has been advised of the petition for rehearing en banc and no judge requested a vote for en banc consideration. Fed. R. App. P. 35. The petition for rehearing en banc is DENIED.

* The Honorable Mark W. Bennett, District Judge for the U.S. District Court for the Northern District of Iowa, sitting by designation.