No. 13-7239

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ZACHARY ADAM CHESSER,

Plaintiff-Appellant,

v.

BARBARA KATENBRINK CHESSER, STACY ANDERSON, LORI BATTISTONI, MARYSE C. ALLEN,

Defendants-Appellees,

and

PAULA MENGES, SEAN KIRGAN, GEORGE PIRO,

Parties-in-Interest,

Appeal from the United States District Court
for the Eastern District of Virginia
in Case No. 1:13-cv-00129-LO-IDD (O'Grady, J.)

APPELLANT'S OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

No. 13-7239 Caption: Chesser v. Chesser

Pursuant to FRAP 26.1 and Local Rule 26.1,

Zachary Adam Chesser who is appellant makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

☐YES ☒NO

2. Does party/amicus have any parent corporations? ☐YES ☒NO

   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☒NO

   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?

☐YES ☒NO

   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)

☐YES ☒NO

If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☒NO

If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jason R. LaFond Date: October 29, 2014

Counsel for: Zachary Adam Chesser

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INTRODUCTION

This case arises from the entanglement of federal defendants—two FBI agents, a Secret Service agent, and other unknown federal officers, all acting under color of federal law—in a matter that could not be farther from an area of legitimate federal interest: an intra-family custody dispute. Appellant Zachary Adam Chesser ("Chesser"), an inmate in federal prison, was and continues to be the subject of surveillance because of his ties to suspected terrorists. Defendants,[1] utilizing information obtained through surveillance of Chesser's communications, intentionally and repeatedly meddled in a dispute among Chesser, his wife, and his mother concerning

[1] These officers—Paula Menges, Sean Kirgan, George Piro, as well as other unknown persons—although not listed as defendants in the caption of Chesser's complaint, *see* JA22 (referring to body of the complaint for "Additional Defendant(s)"), are listed as "Defendant[s]" in the body of Chesser's complaint, *see, e.g.*, JA29–34 (Compl. ¶¶ 13–33). They are, therefore, referred to as defendants throughout this brief. *See Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1243–44 (10th Cir. 2007) ("[I]n a pro se case *** when the identity of the defendants is unclear from the caption, courts may look to the body of the complaint to determine who the intended and proper defendants are."). In addition, as discussed *infra*, n.10, Chesser is no longer pursuing claims in this action against the non-governmental parties named in his complaint or against Virginia state officials. Accordingly, the only defendants relevant to this appeal are the federal officers and agencies named in his complaint.

custody of his infant son. Defendants did so by improperly disclosing private facts about Chesser and by obstructing Chesser and his wife in their parental decisions about their son. These officers' actions violated Chesser's rights to privacy under the Due Process clause of the Fifth Amendment—specifically, his rights to confidentiality of private facts and autonomy in his familial relations—and under the Privacy Act, 5 U.S.C. § 552a, which governs the handling of personal information held by government agencies.[2]

Chesser, proceeding *pro se* in the district court, sued these officers in their official and individual capacities, as well as the agencies for which they work,[3] seeking monetary damages for and equitable relief from their illegal conduct. Two weeks after Chesser filed his complaint, the district court *sua sponte* dismissed it with prejudice pursuant to the screening provision of the Prison Litigation Reform Act ("PLRA"), 28 U.S.C.

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[2] Chesser's claims arising from these violations will be referred to as his "privacy claims" unless otherwise noted.

[3] The Privacy Act provides for relief against the United States Government, not individual federal officers. *See* 5 U.S.C. § 552a(g)(4).

§ 1915A(b)(1). The district court concluded, without analysis, that Chesser's allegations were "'fanciful'" and his complaint "frivolous." JA4–7.[4]

Chesser, assuming the district court's objection was to the length and tone of his original complaint, proposed a shorter and more focused amended complaint and moved the district court to reconsider its dismissal with prejudice. Focusing on Chesser's proposed amended complaint, the district court denied Chesser's motion for reconsideration. Despite containing the same substantive allegations as the original complaint, the district court this time did not deem Chesser's proposed amended complaint "frivolous"; instead, the district court held that the allegations in the proposed amended complaint failed to state a claim against defendants on which relief could be granted. The district court concluded that Chesser's constitutional claim for a violation of his right to autonomy in his familial relations was "moot" because, following defendants' alleged misconduct,

[4] Coincidentally, Chesser's civil case was assigned to the same judge who presided over his criminal case. *See United States v. Chesser*, No. 1:10-cr-395-LO (E.D. Va.).

Chesser "lost the right to have an interest in [his son]'s upbringing when" his "parental rights" were "terminated," JA15. The district court further concluded that Chesser could not maintain a Privacy Act claim or a constitutional claim for a violation of his right to confidentiality because "Chesser had no expectation of privacy in his communications while confined at a Federal Bureau of Prisons facility." JA17.

The district court erred in three respects:

First, the district court should not have dismissed Chesser's privacy claims as frivolous, or at all for that matter. In failing to even analyze Chesser's complaint, the district court abdicated its responsibility to construe all *pro se* complaints liberally and to apply "'special judicial solicitude'" to "civil rights complaints, particularly those brought *pro se*." *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 390 (4th Cir. 1990) (quoting *Harrison v. United States Postal Service*, 840 F.2d 1149, 1152 (4th Cir. 1988)). Had the district court properly analyzed Chesser's complaint, it would have concluded that the factual allegations supporting his privacy claims are far from "'fanciful,'" JA6; Chesser's factual allegations are not only rational and rea-

sonable, they are supported by *documentary evidence* attached to and incorporated into his complaint. Nor do his privacy claims—arising from the Constitution and federal statute—lack an arguable basis in law; they are supported by ample authority as well as the facts alleged in his complaint.

Second, the district court was wrong to conclude that the eventual termination of Chesser's parental rights mooted his claim based on defendants' interference in his familial relations, which occurred prior to such termination. If Chesser were seeking merely an injunction against *further* violation of his privacy right to autonomy by defendants, the loss of his parental interest may indeed have mooted his claim. But Chesser is seeking *redress*—in the form of monetary damages—for the violation of a right he indisputably possessed at the time of the defendants' conduct. Unless and until his claim for redress is fully satisfied, the federal courts have subject-matter jurisdiction to hear that claim.

Finally, the district court acted contrary to well established precedent when it concluded that prisoners lose their rights to privacy upon their detention or incarceration. For while federal prisoners lose their Fourth

Amendment "expectation of privacy," JA17, from government snooping, they nonetheless "retain certain fundamental rights of privacy," *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978) (plurality)—including their right to non-disclosure—contained in the Fifth Amendment's guarantee of due process. And "[t]he continuing guarantee of these substantial rights to prison inmates is testimony to a belief that the way a society treats those who have transgressed against it is evidence of the essential character of that society." *Hudson v. Palmer*, 468 U.S. 517, 523–24 (1984). Critically, then, while prisoners largely lose the right to keep secrets from *the government*, they retain the right to keep those secrets from those *outside the government*. Prisoners "are not," after all, "like animals in a zoo." *Houchins*, 438 U.S. 1, 5 n.2. And there is nothing in the Privacy Act, which governs all federal agencies' handling of personal information, exempting the personal information of prisoners from its prohibition of disclosure.

For these reasons, this Court should reverse the district court.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1367(a). It entered judgment on February 14, 2013, JA7, and denied Chesser's motion for reconsideration on July 24, 2013, JA19. Chesser timely filed a notice of appeal on March 11, 2013, JA8, and an amended notice of appeal on August 20, 2013, JA20. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The district court dismissed as frivolous Chesser's claims that federal officers violated his constitutional right to privacy, and violated the Privacy Act, when they (1) disclosed to non-governmental parties information obtained through surveillance of Chesser's communications, and (2) otherwise interfered in the custody dispute concerning Chesser's infant son. The question presented is: Did the district court abuse its discretion in dismissing Chesser's privacy claims and denying reconsideration?

STATEMENT OF THE CASE

A. Factual Background

This case arises from the involvement of federal officers in an intra-family custody dispute. On one side of the custody dispute was Chesser and his wife, Proscovia Nzabanita. On the other side of the custody dispute was Chesser's mother. During the dispute, Chesser and his wife were the subjects of investigation and surveillance by federal officers, including defendants, due to their involvement with Islamic extremist groups and Chesser's status as a federal detainee and, later, inmate. Chesser's mother, meanwhile, was and is a fellow member of law enforcement.[5] The subject of the custody dispute was Chesser and his wife's infant son. Throughout the custody dispute, defendants illegally disclosed to Chesser's mother and her legal team confidential information—obtained through the government's surveillance of Chesser—about him and about his and his wife's plans for their son, and at one point physically obstructed the legal and pa-

[5] Chesser's mother was at all relevant times the Assistant Section Chief for Papering of the Juvenile Section of the Public Safety Division of the Office of the Attorney General for the District of Columbia. *See* JA4.

rentally approved travel of Chesser's son.

This subsection first describes the alleged circumstances of defendants' surveillance of Chesser, then the alleged facts surrounding the custody dispute concerning Chesser's son, and finally how defendants allegedly used their surveillance of Chesser to interfere in that custody dispute.[6]

1. Defendants' monitoring of Chesser's communications

Chesser, currently serving a prison sentence for attempting to provide material support to terrorists, was no stranger to defendants prior to their involvement in the custody dispute over his son. During the events underlying Chesser's claims, defendants Paula Menges and George Piro

[6] The district court placed Chesser's complaint and proposed amended complaint under seal. *See* Order Granting In Part Barbara Chesser's Motion for a Protective Order Sealing the Complaint and Exhibits and Governing Future Filings Containing Confidential Materials, *Chesser v. Chesser*, No. 1:13-cv-129 (E.D. Va. Feb. 19, 2013) (DE 8); JA18. The only reasoning provided by the district court supporting these orders is that some documents "contain[] the full name of Mr. Chesser and Ms. Nzabanita's minor child." JA18. The district court described the contents of and quoted from these documents in orders on its public docket. *See* JA5, 10–13. Thus, it appears the district court sealed the documents pursuant to Federal Rule of Civil Procedure 5.2(a), (d), in order to protect the identity of Chesser's minor child. This brief omits any information identifying Chesser's minor child, but otherwise—like the district court—describes and quotes from Chesser's complaint and amended complaint.

were FBI agents focusing on counterterrorism, operating out of the FBI's Washington, D.C. field office. JA29–30 (Compl. ¶¶ 13–14). Defendant Sean Kirgan was an agent with United States Secret Service, JA30 (Compl. ¶ 16), and, like agents Menges and Piro, was a member of the National Joint Terrorism Taskforce, s*ee* JA40, 98–99 (Compl. ¶¶ 50, 150).

Agents Menges and Kirgan participated in the investigation that culminated in Chesser's arrest and conviction for, among other misdeeds, attempting to provide material support to terrorists. *See* Aff. of Special Agent Mary Brandt Kinder In Support of Criminal Complaint ¶¶ 6–25, *United States v. Chesser*, No. 1:10-cr-395 (E.D. Va. July 21, 2010) (DE 2).[7] As part of this investigation, federal officers—including Agents Menges, Piro, and Kirgan—monitored Chesser's communications. *See id.* ¶ 20; Notice of Intent to Use Foreign Intelligence Surveillance Act Information by USA as to Zachary Adam Chesser, *United States v. Chesser* (July 23, 2010) (DE 12);

[7] Agent Menges was also the complainant in a criminal case brought against Chesser's wife. *See* Criminal Case Cover Sheet, *United States v. Nzabanita*, No. 1:10-cr-00394 (Oct. 18, 2010) (DE 1). Chesser's wife was convicted for making false statements to Agent Menges during the government's investigation of Chesser. *See* Criminal Information, *id.* (Nov. 8, 2010) (DE 3).

JA40, 65, 98–99 (Compl. ¶¶ 50–51, 98, 100, 150). This surveillance continued after Chesser's arrest, both while he was in custody prior to being sentenced and following his imprisonment. *See* JA98–99 (Compl. ¶ 150).

2. The custody dispute concerning Chesser's son

Neither Chesser nor his wife had ever been accused of abusing or neglecting their son. Nonetheless, in late 2010, with her son facing a long prison sentence and her daughter-in-law soon to leave the country with her grandson, Chesser's mother began proceedings to take custody of Chesser's son. Chesser pleaded guilty to his criminal charges on October 20, 2010. *See* JA33 (Compl. ¶ 36); Minute entry, *United States v. Chesser* (Oct. 20, 2010) (DE 30). He faced decades in prison upon his sentencing, which was scheduled for February 24, 2011. *See* JA98 (Compl. ¶ 150). On November 8, 2010, Chesser's wife pleaded guilty to making false statements to federal officials regarding her husband. JA34 (Compl. ¶ 37). As part of her plea, Nzabanita, a Ugandan national, agreed to relinquish her lawful status in the United States and leave the country within 120 days—by March 8, 2011. *Id.*

On December 28, 2010, Chesser's mother filed in Virginia state court a petition for custody *pendente lite*, with a hearing scheduled for January 26, 2011. JA36 (Compl. ¶ 44). At the conclusion of that hearing, the state court granted Chesser's mother visitation rights to her grandson and granted joint legal custody of Chesser's son to Chesser's wife and the boy's maternal grandmother, who also resided in the United States. JA46–47, 180 (Compl. ¶ 60, Ex. A13). The order further provided that once Chesser's wife had safely settled in another country, their son would join her there. JA181 (Compl. Ex. A13).

Having obtained visas from the country of Jordan for herself and their son, Chesser's wife relocated to Jordan in February 2011, leaving their son in the United States under the care of his maternal grandmother. JA47 (Compl. ¶ 61). On July 13, 2011, Chesser's mother filed an *ex parte* emergency application with the Virginia court seeking temporary visitation with her grandson. JA54, 198 (Compl. ¶ 74, Ex. A23). In her application, Chesser's mother claimed that her grandson was in imminent danger of being permanently removed to Jordan to join his mother in purported viola-

tion of the court's January 26 order. JA199 (Compl. Ex. A24). Chesser denies that he or his wife had any plan to permanently remove their son from the country at that time. JA53 (Compl. ¶ 72). At the conclusion of an *ex parte* hearing two days later, the Virginia court granted legal custody of Chesser's son jointly to Chesser's mother and the boy's maternal grandmother. JA54, 199–200 (Compl. ¶ 74, Ex. A24). The court further ordered that Chesser's son was not to leave the country without court approval. *Id.*

On October 5, 2011, the Virginia court returned joint legal custody of Chesser's son to his wife. JA54, 202 (Compl. ¶ 75, Ex. A25). That same day, however, Chesser's mother petitioned the court for sole legal and physical custody of his son. JA206–214 (Compl. Ex. A26). The court held a hearing on that petition on January 5, 2012, and thereafter declared Chesser and his wife unfit, terminated their parental rights, and awarded sole legal custody to Chesser's mother. JA243 (Compl. Ex. A31). A trial *de novo* on the issue of custody was held in November 2012, and the previous result was affirmed. JA57, 64 (Compl. ¶¶ 80, 96).

3. Defendants' interference in the custody dispute concerning Chesser's son

Throughout the two-year-long battle for custody of Chesser's son, defendants chose to support one side of the dispute, repeatedly disclosing confidential information about Chesser to his mother and her legal team. In myriad ways, these federal agents enmeshed themselves in the custody dispute in violation of Chesser's constitutional rights and the Privacy Act.

a. The January 2011 release of confidential information and interference in familial decision-making

In January 2011, prior to the hearing on the *pendant lite* petition, defendants learned that Chesser and his wife had jointly decided that it would be best for their son to travel with a family friend—Jaime Smith—to Jordan ahead of his mother and stay with Smith's extended family living there. JA38 (Compl. ¶ 48). Smith was to pick up Chesser's son from Chesser's wife and escort him to Jordan. JA39 (Compl. ¶ 49).

At this point, no court had ruled on Chesser and his wife's fitness as parents or regarding custody of their son; they thus maintained full parental rights and interests with regard to their son. To Chesser and his wife,

the plan to send their son to Jordan early served two purposes. First, it would place their son with close family friends whom they trusted to care for their son as they deemed appropriate while Chesser's wife found a stable living situation. JA38–39 (Compl. ¶¶ 48–49). That choice was important to them: they opposed placing the young boy with his grandparents, who did not share Chesser and his wife's conservative Islamic beliefs. *Id.* Second, it would help them demonstrate to a court that Chesser's son would be safe in Jordan. JA38 (Compl. ¶ 48).

Having learned about the planned trip through surveillance of Chesser, defendants illegally disclosed the information to Chesser's mother in the lead-up to her grandson's departure. This illegal disclosure occurred in two ways. The first disclosure occurred when Agent Menges emailed the lawyer representing Chesser's mother in the custody dispute. JA41 (Compl. ¶ 52). The subject of the email was "Travel notification letter." JA316 (Am. Compl. Ex. 2). Attached to the email was a letter from Agent Piro to the federal prosecutor handling Chesser's criminal case. *See* JA40 (Compl. ¶ 51); JA315 (Am. Compl. Ex. 1). In the letter, Agent Piro detailed

Chesser and his wife's plans to send their son to Jordan, and explained that although the FBI could not find anything illegal about the planned trip, it nonetheless wished to bring the plan to the prosecutor's attention in case such actions threatened Chesser's plea agreement. *See id*. The second disclosure occurred when, as Chesser's mother later confirmed, an unknown FBI agent called her on January 19, 2011 to alert her to her son and daughter-in-law's plans for her grandson. JA41, 157 (Compl. ¶ 52, Ex. A2).

Following this illegal disclosure by the FBI, Agent Kirgan—who was copied on Agent Menges's email, *see* JA316 (Am. Compl. Ex. 2)—gathered a group of government officers to intercept Smith and Chesser's son at JFK Airport and prevent Chesser's son from traveling to Jordan as his parents wished. JA41–42 (Compl. ¶¶ 53–55).[8] These other officers participated in this obstruction as "a personal favor" to Kirgan. JA43 (Comp. ¶ 56). Despite receiving the FBI's letter concluding that the relocation of Chesser's son was legal, Agent Kirgan informed Smith that it would be illegal for her

[8] Meanwhile, the partner of Chesser's mother contacted the Jordanian government in an attempt to have the visas for Chesser's wife and son revoked. JA44–45, 164–165 (Compl. ¶ 58; Exs. A7, A8).

to take Chesser's son to Jordan. JA41 (Compl. ¶ 54). While Agent Kirgan detained Smith and Chesser's son, Chesser's mother and other government agents pressured Chesser and his wife to cancel the trip. JA42 (Compl. ¶ 55). "[B]ased on a desire to prevent *** Smith from facing any legal repercussions *** and out of fear stemming from the massive response of the federal government," Chesser and his wife cancelled their son's trip. *Id.*

b. The July 2011 communication with Chesser's mother

A phone call from an unknown FBI agent on July 12, 2011 prompted the July 13 emergency *ex parte* application filed by Chesser's mother. *See* JA53, 105, 157, 208, 215 (Compl. ¶¶ 72, 162; Exs. A2, A26, A27). In the call, the FBI agent informed Chesser's mother that Chesser and his wife were planning to remove their son from the country and to reunite him with his mother in Jordan. *Id.* Chesser's mother, as well as his son's guardian *ad litem*, confirmed that this call was made. *See id.* This conjecture by the FBI agent was based upon information that he or she had obtained through surveillance of Chesser's communications with his wife. JA53 (Compl. ¶ 72).

c. The 2012 release of information pursuant to a discovery request by counsel representing Chesser's mother

At some point between July and November 2012, the FBI released confidential information about Chesser to his mother's attorney for use in his mother's pursuit of custody of his son. On July 12, 2012, counsel for Chesser's mother requested various categories of information from the United States Attorney for the Eastern District of Virginia concerning, among other confidential information, Chesser and his wife's plans for their son. *See* JA61–62, 130–131 (Compl. ¶¶ 90–91, 210–211). In a letter dated November 26, 2012, the FBI informed Chesser that "[t]he United States Attorney's Office for the Eastern District of Virginia recently received a request made pursuant to 28 Code of Federal Regulations §§ 16.21, *et*[] *seq.*" JA257 (Compl. Ex. A32); *see* JA61–62 (Compl. ¶¶ 90–91). The referenced regulations promulgate the procedure to be followed by the Department of Justice in responding to requests for production in third-party litigation. The letter goes on to inform Chesser that:

> Information pertaining to you that was responsive to the request was located in the Federal Bureau of Investigation's sys-

> tem of records. Such responsive information was thereafter released to the requestor for intended use in a civil judicial proceeding pursuant to and in accordance with the Privacy Act, 5 United States Code §§ 552a, *et*[] *seq.*, including, but not limited to, section 552(b)(8) (compelling circumstances affecting the health or safety of any individual).

JA257 (Compl. Ex. A32); *see* JA61–62 (Compl. ¶¶ 90–91).[9] This improperly released material was later used by Chesser's mother in the November 2012 trial *de novo* for custody of her grandson. *See* JA131–132 (Compl. ¶ 211).

B. Proceedings Below

On January 30, 2013, Chesser sued defendants, seeking monetary damages for and equitable relief from their illegal conduct, and alleging the facts described above. Chesser brought his claims pursuant to the Constitution and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), as well as the Privacy Act. *See* JA120–121, 127–129 (Compl. ¶¶ 191–194, 203–206). Chesser also brought other claims against defendants, various Virginia officials, and non-governmental actors; those claims are not at issue on this

[9] As discussed below, this letter, by itself, suggests a plausible Privacy Act violation. *See infra*, pp. 38–40 & n.17.

appeal.[10]

On February 14, 2013, the district court *sua sponte* dismissed with prejudice Chesser's complaint pursuant to the screening provision of the PLRA. JA4–7. The district court's order devoted one sentence to (incompletely) summarizing Chesser's allegations: "Chesser *** allege[s] that, after Chesser's arrest, Chesser's mother conspired with federal agents to wrongfully obtain custody of his son." JA5. The district court purported to set forth Chesser's legal theories, *id.*, but failed to identify Chesser's privacy claims. Next, the district court set forth some criteria for finding a complaint "frivolous." JA6. Then, without analysis, the district court declared that it "finds that plaintiff's allegations in this action satisfy those criteria; therefore, the complaint will be dismissed." *Id.*

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[10] Chesser now abandons these claims, acknowledging that (a) he is unable to sue on his wife's or son's behalf, (b) his challenge to the Virginia court's disposition of his parental rights is barred by the *Rooker-Feldman* doctrine, (c) the non-governmental defendants were not acting under color of federal or state law, (d) he has not exhausted administrative remedies for his claims concerning his prison conditions and legal mail, and (e) he is unable to recover under the Foreign Intelligence Surveillance Act as he does not challenge in this action that he was a proper subject of surveillance under the Act.

On March 11, 2013, Chesser, still *pro se*, moved the district court to reconsider its order and to allow Chesser to file the proposed amended complaint attached to his motion. Chesser's proposed amended complaint, prepared without guidance from the district court, was far shorter and more focused than his original complaint. *See* JA288–311. But, as evidenced by the district court's brief summary of the amended complaint's allegations, *see* JA10–15, the substantive allegations in Chesser's proposed amended complaint were the same as those described in the preceding subsection. *See also* JA299–303, 310–311 (Am. Compl. ¶¶ 45–62, 74–79, 88–92). The district court denied Chesser's motion but did not conclude that Chesser's allegations remained frivolous. Instead, the district court concluded that Chesser's proposed amended complaint was futile because its allegations failed to state a claim on which relief could be granted. JA15–16, 19.[11]

[11] As explained below, *infra*, pp. 28, 41, the difference in conclusions available under § 1915A(b)(1)—"frivolous" versus "fails to state a claim"—is important, as the facts of the complaint are not taken as true in examining the former conclusion, but are taken as true in examining the latter.

As relevant to this appeal, the district court's futility determination was based upon its conclusion that (1) Chesser's claim regarding defendants' interference in the custody, care, and management of his son was moot because Chesser no longer possessed any parental rights, JA15, and (2) Chesser's other privacy claims could not proceed because—as a federal detainee and prisoner—Chesser did not have a reasonable expectation of privacy, JA17–18.

Chesser timely appealed both decisions to this Court.

SUMMARY OF ARGUMENT

The district court's *sua sponte* decision to dismiss with prejudice Chesser's complaint in its entirety as "frivolous" is insupportable. Had the district court engaged in the attentive review required of it in evaluating *pro se* civil rights claims, it would have determined that Chesser's privacy-based claims—which the district court failed to even identify—were supported by law and fact. The district court's failure to do so requires reversal.

The district court again abused its discretion when it denied Chesser's motion for reconsideration. The district court's denial of Chesser's motion was based on its erroneous conclusion that Chesser's proposed amended complaint failed to state a claim for relief because Chesser no longer had an interest in the custody, care, and management of his son, and, as a federal inmate, had no expectation of privacy. But the current absence of Chesser's interest in the upbringing of his son is irrelevant to his claim that, at the time he did have such an interest, defendants illegally encroached on it. And Chesser's expectation of privacy while in federal custody is a Fourth Amendment concept that is irrelevant to his privacy claims, which arise under the Due Process Clause of the Fifth Amendment and the Privacy Act. The privacy claims in Chesser's proposed amended complaint, like those in his original complaint, are viable and meritorious.

Each of the district court's errors independently requires reversal.

STANDARDS OF REVIEW

This Court reviews both the district court's dismissal of Chesser's complaint as frivolous under the PLRA and its denial of reconsideration for an abuse of discretion. *See Nagy v. FMC Butner*, 376 F.3d 252, 255 n.* (4th Cir. 2004); *Nat'l Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 265 (4th Cir. 1993). "A district court abuses its discretion when it acts arbitrarily or irrationally, fails to consider judicially recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law." *United States v. Delfino*, 510 F.3d 468, 470 (4th Cir. 2007). In other words, "[a] district court 'abuses' or 'exceeds' the discretion accorded to it when *** its decision *** cannot be located within the range of permissible decisions." *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 250 (2d Cir. 2011); *accord Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 322 (4th Cir. 2008).

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING *SUA SPONTE* CHESSER'S COMPLAINT AS "FRIVOLOUS."

When a prison inmate files suit against the government or government actors, the PLRA instructs the district court to screen the complaint prior to service and "identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint *** is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(b). The district court dismissed all of Chesser's claims as frivolous. That was an abuse of discretion.

The purpose of § 1915A is "to ensure that the targets of frivolous or malicious suits need not bear the expense of responding." *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012). "The purpose of the PLRA was *not*, however, to impose indiscriminate restrictions on prisoners' access to the federal courts." *McLean v. United States*, 566 F.3d 391, 397 (4th Cir. 2009) (emphasis added). Thus, courts must be careful not to prejudge prisoner complaints based upon the identity of the plaintiff, be-

cause "[o]ur legal system[] *** remains committed to guaranteeing that prisoner claims *** are fairly handled according to law." *Jones v. Bock*, 549 U.S. 199, 203 (2007); *see also id.* at 214 (PLRA does not alter "usual procedural practice beyond the departures specified in the PLRA itself"). Especially when reviewing civil rights claims. *See Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 248 (4th Cir. 2005). "The challenge lies in ensuring that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones*, 549 U.S. at 203.

Unfortunately, the district court did not manage this challenge appropriately in this case. Chesser's *pro se* complaint is prolix and poorly organized, and (he concedes, *see supra*, n.10) includes nonmeritorious claims. But these deficiencies do not render it frivolous; indeed, such flaws are to expected given "the limited legal knowledge and resources available to" Chesser as a *pro se* plaintiff. *McEachin v. McGuinnis*, 357 F.3d 197, 201 (2d Cir. 2004). And notwithstanding the complaint's lack of sophistication, even a modest review reveals that it contains claims showing substantial merit. In dismissing Chesser's *pro se* complaint with prejudice in its entire-

ty rather than just its non-meritorious "portion[s]," 28 U.SC. § 1915A(b), the district court abused its discretion by using an impermissible "meat-axe approach" where it should have used a scalpel. *McLean*, 566 F.3d at 398.[12] Had the district court properly reviewed Chesser's complaint, it would have identified and carved out his privacy claims, which are anything but frivolous. Its failure to do constitutes an abuse of discretion.

In dismissing Chesser's complaint, the district court recognized that a claim may be factually frivolous, legally frivolous, or both. JA6. But the district court, in addition to failing to identify Chesser's privacy claims, did not make clear the category of frivolousness on which it relied. Under either category, however, the district court's conclusion is indefensible as to Chesser's privacy claims.

[12] Chesser's "meritorious but inartfully pleaded [privacy] claim[s]"—which the district court failed to even identify—should have, at worst, been "dismissed *without* prejudice," *McLean*, 566 F.3d at 397 (emphasis added), with instructions to Chesser on what was necessary to survive dismissal, *see Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978).

A. Chesser's Privacy Claims Are Not Factually Frivolous.

A claim is factually frivolous "when the facts alleged rise to the level of the irrational or the wholly incredible." *Denton v. Hernandez*, 504 U.S. 25, 33 (1992); *see also McLean*, 566 F.3d at 399. When Chesser's complaint is reviewed for factual frivolousness, Chesser's allegations, while not accepted as true, "must be weighted in [his] favor." *Denton*, 504 U.S. at 32. Additional factors to consider in reviewing a finding of frivolousness include:

> whether the plaintiff was proceeding *pro se,* whether the court inappropriately resolved genuine issues of disputed fact, whether the court applied erroneous legal conclusions, whether the court has provided a statement explaining the dismissal that facilitates intelligent appellate review, and whether the dismissal was with or without prejudice.

Id. at 34 (internal quotation marks and citations omitted).[13]

Nothing alleged by Chesser is irrational or incredible. Chesser's complaint alleges that government agents misused confidential information they had gathered about him. While the actions of defendants de-

[13] The district court's slapdash review of Chesser's *pro se* complaint and lack of reasoning in its order of dismissal with prejudice, along with Chesser's *pro se* status, provide further support for the conclusion that the district court abused its discretion. *See Denton*, 504 U.S. at 34.

tailed in Chesser's complaint may be shocking to some, they are not the product of "fantas[y] or delusion[]," *Denton*, 504 U.S. at 32; to the contrary, they are, unfortunately, somewhat routine in the annals of government abuse, *see, e.g.*, Kevin Poulson, *12 True Tales of Creepy NSA Cyberstalking*, Wired (Sept. 26, 2013), http://www.wired.com/2013/09/nsa-stalking; Tom Hays, *NYC cases show crooked cops' abuse of FBI database*, Associated Press (July 7, 2013), http://bigstory.ap.org/article/nyc-cases-show-crooked-cops-abuse-fbi-database; Matt Hardigree, *Woman Sues Ticketing Cop After He Stalked Her For A Date*, Jalopnik (Jan. 5, 2012), http://jalopnik.com/5873314/woman-sues-ticketing-cop-after-he-stalked-her-for-a-date.[14]

Moreover, even if one were suspicious of Chesser's factual allegations standing alone, such suspicion cannot withstand a review of the *documentary evidence* attached and incorporated into Chesser's complaint. Chesser included, for example, a letter from the FBI acknowledging that it had dis-

[14] *See also, e.g.*, Joel Seidman, *Plame was 'covert' agent at time of name leak*, NBC News (May 29, 2007), http://www.nbcnews.com/id/18924679/#.VDaob_ldXJY; *Hearings Before the S. Select Comm. To Study Governmental Operations With Respect to Intelligence Activities: Internal Revenue Service*, 95th Cong. (1975) (detailing the misuse by the executive branch of political opponents' tax information).

closed confidential information about him. *See* JA257 (Compl. Ex. A32). Chesser also attached and referred to multiple documents from the custody litigation demonstrating the government's involvement. In an interrogatory, Chesser's mother stated that a member of the FBI contacted her on January 19 and July 12, 2011, just as Chesser alleges. *See* JA157 (Compl. Ex. A2). Chesser's mother again acknowledged this contact in her petition for custody. *See* JA208 (Compl. Ex. A26). Chesser's mother later testified during the custody litigation that the FBI worked to keep Chesser's son from leaving the country in January 2011, just as Chesser alleged. *See* JA168 (Compl. Ex. A9).[15] And the child's guardian *ad litem* testified that "[a]n FBI agent" informed her, among things, that Chesser's son was "being taken to a mosque" by his maternal grandmother. JA216 (Compl. Ex. A27).

As these examples show, Chesser's factual allegations are not "'fanciful,'" JA6; they are reality. There was no basis for the district court to conclude that Chesser's factual allegations are frivolous. Accordingly, to the

[15] And this information had a demonstrable effect in the custody proceedings. *See, e.g.*, JA245 (Compl. Ex. A31) ("I am very concerned about continuing efforts of the parents to get this child out of the United States. As a result, I'm going to award sole legal custody to the paternal grandmother.").

extent the district court based its dismissal on such a conclusion, it abused its discretion. *See Delfino*, 510 F.3d at 470.

B. Chesser's Privacy Claims Are Not Legally Frivolous.

"[A] claim may be properly characterized as legally frivolous" only "if it lacks an arguable basis in law or is based on an indisputably meritless legal theory." *Edwards v. Snyder*, 478 F.3d 827, 830 (7th Cir. 2007) (citing *Neitzke v. Williams*, 490 U.S. 319, 325, 327 (1989)). Not only do Chesser's privacy claims—arising from the Constitution and the Privacy Act—have an *in*arguable basis in law, they are, in fact, meritorious. If the district court based its dismissal on a contrary conclusion, it was an error of law, and, "by definition," an abuse of discretion. *Koon v. United States*, 518 U.S. 81, 100 (1996).

1. Chesser may seek relief for defendants' violations of his constitutional right to privacy.

Chesser's theory of recovery on his constitutional claims is as follows: Chesser has a constitutional right—the right to privacy—guaranteeing him confidentiality in his private affairs and autonomy in his familial relations. Defendants, in revealing confidential information about him to his adver-

sary in a custody dispute concerning his son and otherwise interfering with his parental relationship, violated this right. Defendants' violation of his right entitles Chesser to all available remedies. Each part of Chesser's theory of recovery is legally viable.

a. Taking the remedy first, Chesser has sought both monetary damages for past conduct and equitable relief from future conduct. It is well settled that one whose constitutional rights have been violated may seek monetary damages from the perpetrators, *see Bivens*, 403 U.S. 388, and equitable relief against the government, *see* 5 U.S.C. § 702; *Shields v. Utah Idaho Cent. R.R.*, 305 U.S. 177, 183–84 (1938).

b. Turning to Chesser's right to privacy, ample precedent supports the right as Chesser has conceived it. An individual's right to privacy has long included both "the individual interest in avoiding disclosure of personal matters" (*i.e.*, *confidentiality*) and "the interest in independence in making certain kinds of important decisions" *(i.e.*, *autonomy*). *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977). That right to autonomy includes "the fundamental right of parents to make decisions concerning the care, custo-

dy, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Numerous cases from this Court and others confirm the existence of these rights. *See, e.g. Ferguson v. City of Charleston*, 186 F.3d 469, 482 (4th Cir. 1999) (confidentiality), *rev'd and remanded on other grounds*, 532 U.S. 67 (2001); *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 342–43 (4th Cir. 1994) (autonomy); *Hodge v. Jones*, 31 F.3d 157, 163 (4th Cir. 1994) (autonomy); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (both); *see also Martin v. Saint Mary's Dep't Soc. Servs.*, 346 F.3d 502, 511 (4th Cir. 2003) (Traxler, J., dissenting) (autonomy); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (both); *Plante v. Gonzalez*, 575 F.2d 1119, 1130–32 (5th Cir. 1978) (Wisdom, J.) (both).

c. Ample authority also supports the conclusion that defendants' actions violated Chesser's right to privacy. On multiple occasions defendants released private information about Chesser without his permission and on one occasion they physically obstructed the parentally approved travel of his son, all with the purpose of interfering with Chesser and his wife's ability to maintain custody of their child. These actions impeded Chesser's au-

tonomy and confidentiality interests. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651–58 (1972) (autonomy interest violated by state's erecting of obstacle to unwed father's maintenance of custody of his children); *United States v. Huckaby*, 43 F.3d 135, 138 (5th Cir. 1995) ("the defendant has a privacy interest in the presentence report because it reveals *** details of *** the defendant's *** family ties"); *Doe*, 15 F.3d at 267 (release of medical information violated confidentiality right); *Fakoya v. Cnty. of Clark*, 2014 WL 5020592, at *5 (D. Nev. Oct. 8, 2014) ("[T]aking the facts pled as true, it could be implied that County officials interfered with Mr. Fakoya's right to oversee his daughters' care and upbringing, and he thus states a plausible substantive-due-process claim."); *Senior Execs. Ass'n v. United States*, 891 F. Supp. 2d 745 (D. Md. 2012) (release of financial information would violate confidentiality right).

Having impeded on Chesser's constitutionally protected interests, defendants have to show that their actions were justified by a "compelling governmental interest." *Ferguson*, 186 F.3d at 482; *accord Whalen*, 429 U.S. at 606 (Brennan, J., concurring); *Walls*, 895 F.2d at 192. There is nothing in

Chesser's complaint—the only pleading before the district court at that time—to support such a conclusion. Needless to say, there is no *federal* interest in the outcome of child custody disputes. To the contrary, "the area of domestic relations *** has been left to the States from time immemorial, and not without good reason." *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting); *accord Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

Nor is any other interest apparent. Whatever penological or law enforcement interest the government may have had in *monitoring* Chesser's communications, *see Hudson*, 468 U.S. at 523, it had no conceivable interest—let alone a compelling one—in *disclosing* that information to Chesser's mother, a private party, or her lawyers in the context of an ongoing custody dispute or in acting on that information to obstruct Chesser and his wife's decisions concerning their son. Nor does Chesser's complaint suggest that defendants had any information that Chesser's son was in danger or that

his travel violated the law.[16] But even if they did, there would still be no legitimate reason to involve *Chesser's mother*. Defendants surely could have acted to prevent a crime or keep Chesser's son safe without disclosing confidential information to a private party for use in a custody proceeding. There is simply no legitimate justification for the conduct of defendants.

2. Chesser may seek relief for defendants' violation of the Privacy Act.

The Privacy Act provides that, "[s]ubject to certain exceptions, the Government may not disclose records pertaining to an individual without that individual's written consent." *Nat'l Aeronautics & Space Admin. v. Nelson*, 131 S. Ct. 746, 753–54 (2011). The Privacy Act is the bulwark against public disclosure that allows the government to collect sensitive information from millions of Americans. *See id.* at 755–57. As part of its regulation of agencies' handling of personal information, the Act provides a monetary damages remedy against any agency whose personnel "intention-

[16] Notably, until Chesser and his wife were declared "unfit" in January 2012, well after defendants' illegal conduct, there was "a presumption that" Chesser and his wife were "act[ing] in the best interests of their" son. *Troxel*, 530 U.S. at 68.

al[ly] or willful[ly]" disclose an individual's personal information in violation of the Act. 5 U.S.C. § 552a(g)(4).

Chesser's allegations and documentation, *see supra*, pp. 14–19, plausibly suggest that members of the FBI as well as the Secret Service intentionally and willfully violated the Privacy Act when, on multiple occasions, they disclosed from their investigational records personal information about him to his mother and others. *See Pilon v. United States Dep't of Justice*, 73 F.3d 1111, 1126 (D.C. Cir. 1996) (allowing Privacy Act claim to proceed where plaintiff alleged that DOJ employee disclosed to a nongovernmental party information from investigation of plaintiff); *Stafford v. Soc. Sec. Admin.*, 437 F. Supp. 2d 1113, 1118 (N.D. Cal. 2006) (disclosure by a Social Security Administration employee of confidential information about the subject of a child abuse investigation violated Privacy Act); *DePlanche v. Califano*, 549 F. Supp. 685, 692–93 (W.D. Mich. 1982) (rejecting the release of confidential personal information for use in an "intrafamily custody battle"); *see also Quinn v. Stone*, 978 F.2d 126, 128–31 (3d Cir. 1992); *South v. FBI*, 508 F. Supp. 1104, 1105, 1107–08 (N.D. Ill. 1981).

The letter to Chesser from the FBI attached to and described in his complaint by itself plausibly suggests a violation of the Privacy Act. In the letter, the FBI acknowledged that it had disclosed personal information concerning Chesser to a third party without his consent. JA62, 257 (Compl. ¶ 91, Ex. A32). Accordingly, if no exception applies, this disclosure would violate the Act. *See* 5 U.S.C. § 552a(b).

The letter says the information was disclosed "for intended use in a civil judicial proceeding pursuant to and in accordance with the Privacy Act, 5 United States Code §§ 552a, *et*[] *seq.*, including, but not limited to, section 552(b)(8) (compelling circumstances affecting the health or safety of any individual)." JA257 (Compl. Ex. A32). But the § 552a(b)(8) "health and safety" exception is inapplicable to the release of information for use in litigation. This exception "was meant to encompass disclosures only in *emergency* situations, involving matters of life and death." *DePlanche*, 549 F. Supp. at 704 (emphasis added). Guidance from the Office of Management and Budget—the agency charged with overseeing the implementation of the Privacy Act—confirms that this exception applies only where time is of

the essence, such that "the time required to obtain the consent of the individual to whom the record pertains might result in a delay which could impair the health or safety of an individual; as in the release of medical records on a patient undergoing emergency treatment." *See* Privacy Act Guidelines, 40 Fed. Reg. 28948, 28955 (July 9, 1975). As the FBI has previously conceded, litigation, by its very nature, is not an emergency situation. *See Andrews v. FBI*, 2013 WL 101608, at *10 (E.D. Cal. Jan. 8, 2013) ("[t]he FBI is correct" in "not[ing] that section 552a(b)(8) applies to the health or safety of a third party, not the evidentiary wants of" a litigant) (internal quotation marks omitted).

The FBI's release of Chesser's information and the inapplicability of the health and safety exception strongly suggest that the Privacy Act was violated. And the erroneous invocation of that exception,[17] combined with

[17] Notably, the FBI did not invoke the most obvious possible disclosure exception in the given circumstances, which allows disclosure for use in litigation "pursuant to the *order* of a court." 5 U.S.C. § 552a(b)(11) (emphasis added). *See* Department of Justice, Overview of the Privacy Act of 1974 at 59–60 (2012) ("An agency in receipt of [a discovery] request must object on the ground the Privacy Act prohibits disclosure. *** The most appropriate method of disclosure in this situation is pursuant to a subsection (b)(11)

the earlier conduct by FBI agents, suggests the improper release was intentional and willful.

* * *

Chesser's complaint brings civil rights claims based upon reasonable factual allegations and meritorious legal theories. The district court's conclusion, without reasoning, that these claims are frivolous "cannot be located within the range of permissible decisions," and was, therefore, an abuse of discretion. *Shahriar*, 659 F.3d at 250 (internal quotation marks omitted).

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING CHESSER'S MOTION FOR RECONSIDERATION.

The district court also abused its discretion when it denied Chesser's motion for reconsideration. Importantly, the district court rested its denial of Chesser's motion on its conclusion that the proposed amended complaint included with his motion was futile—*not* because its allegations were *frivolous*, but because they *failed to state a claim*. JA15–19. The district

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court order."), *available at* http://www.justice.gov/sites/default/files/opcl/docs/1974privacyact-2012.pdf. There is nothing in the pleadings to suggest that the information released was subject to such an order, and the FBI's reliance on a different, inapplicable section, suggests there was no such order.

court's disposition is important for two reasons.

First, while a court need not accept the truth of a plaintiff's factual allegations in making a frivolousness determination under the PLRA, *see supra*, p. 28, it must do so in evaluating whether a complaint fails to state a claim. *De'Lonta v. Angelone*, 330 F.3d 630, 631 n.1 (4th Cir. 2003).

Second, when, as here, a district court's denial of a motion for reconsideration is premised upon its evaluation of the merits of a proposed amended complaint, "[a] conclusion that the district court abused its discretion in denying a motion to amend *** is sufficient grounds on which to reverse the district court's denial of a *** motion" for reconsideration. *Laber v. Harvey*, 438 F.3d 404, 427–28 (4th Cir. 2006) (en banc).[18]

Chesser's proposed amended complaint stated claims and therefore should have been accepted. Accordingly, the district court abused its discretion in denying Chesser's motion for reconsideration.

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[18] Thus, the fact that Chesser's request to amend was made subsequent to the district court's entry of judgment does not affect this Court's review, because "a post-judgment motion to amend is evaluated under the same legal standard as a similar motion filed before judgment was entered—for prejudice, bad faith, or futility." *Laber*, 438 F.3d at 427.

The relevant allegations in Chesser's proposed amended complaint were the same as those in his original complaint. Chesser alleged that he was and is the subject of government surveillance. JA299, 302 (Am. Compl. ¶¶ 46, 54, 58). Chesser alleged that in January 2011, defendants illegally disclosed to Chesser's mother and her lawyer information concerning Chesser and his wife's plans for their child to travel to Jordan and physically obstructed that travel. *See* JA299–303 (Am. Compl. ¶¶ 46–62). Chesser alleged that in July 2011, defendants again illegally disclosed information to his mother about him, his wife, and his child. *See* JA307–308 (Am. Compl. ¶¶ 74–79). Chesser alleged that at some point in 2012, the FBI improperly disclosed his personal information in response to a discovery request by his mother's lawyer. *See* JA309–311 (Am. Compl. ¶¶ 83–92).

In its order denying Chesser's motion, the district court recognized his claims against defendants for their violations of his constitutional rights to confidentiality and autonomy and the Privacy Act. *See* JA15–18. As demonstrated *supra* in Part I, these claims in Chesser's original complaint have substantial merit. The same claims based upon the same factual alle-

gations in Chesser's proposed amended complaint are equally meritorious. The district court's contrary conclusion is based on legal error and thus an abuse of discretion: First, the district court erroneously concluded that Chesser's autonomy claim was mooted when his parental rights were terminated. Second, the district court erroneously concluded that Chesser's status as an inmate precluded his confidentiality and Privacy Act claims.

A. The Current Status Of Chesser's Parental Rights Is Irrelevant To His Autonomy-Based Privacy Claim.

As the basis for his autonomy claim, Chesser alleged that the defendants interfered with his interest as a parent by meddling in the custody dispute concerning his son and by physically obstructing his son's legal and parentally approved travel to Jordan. *See* JA299–303, 307–308 (Am. Compl. ¶¶ 44–61, 74–79). The district court concluded that this claim was mooted by Chesser's loss of parental rights in "January 2012," because upon that occurrence, Chesser lost "a continuing interest in [his son]'s upbringing." JA15. The district court was incorrect.

"[F]or a controversy to be moot, it must lack at least one of the three required elements of Article III standing: (1) injury in fact, (2) causation, or

(3) redressability." *Townes v. Jarvis*, 577 F.3d 543, 546–47 (4th Cir. 2009). All of these elements remain in Chesser's autonomy claim. First, Chesser has alleged an injury-in-fact: violation of his "fundamental" right "to retain custody over and care for [his] children, and to rear [his] children as [he] deem[s] appropriate." *Jordan*, 15 F.3d at 342. Second, Chesser has alleged that defendants' actions in revealing private facts about him and otherwise interfering in his familial relations caused this violation. Third, if Chesser "does establish a constitutional violation, it is likely that [the district] court would be able to redress his injury by awarding damages," both "compensatory" and "punitive." *Neuberger v. Gordon*, 567 F. Supp. 2d 622, 629 (D. Del. 2008); *accord Bivens*, 403 U.S. at 395–97; *see* JA361 (Am. Compl. § VI.e) (seeking "compensatory and punitive damages"). Defendants have not "offered [Chesser] the full amount of damages *** to which []he claim[s] *** to be entitled," and therefore his "personal stake in the outcome" of his autonomy claim remains. *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986).

The district court's focus on the termination of Chesser's parental rights was misplaced. It may well be true that the Virginia court's declaring

Chesser unfit as a parent in "January 2012," JA15, extinguished going forward the particular autonomy interest he relies on. But three of defendants' violations—the January 19, 2011 release of information; the January 19, 2011 obstruction of travel; and the July 12, 2011 release of information—occurred *before* Chesser was declared unfit. There is nothing in the mootness doctrine or the structure of parental rights that prevents Chesser from seeking redress under an autonomy theory for defendants' conduct prior to his loss of parental rights.

In concluding otherwise, the district court appears to have elided Chesser's legal and equitable claims. Although Chesser's loss of parental rights could eliminate the need for an injunction preventing *future* violation of those rights, it has no effect on Chesser's claim for monetary damages in redress of *past* violations. *See Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991) (transfer of prisoner to new prison mooted request for "declaratory and injunctive relief" arising from the conditions of previous prison, but not his request for "monetary damages"). Regardless of its genesis, the district court's error requires reversal.

B. Chesser's Expectation Of Privacy Under The Fourth Amendment Is Irrelevant To His Right To Privacy Under the Fifth Amendment And The Government's Obligations Under The Privacy Act.

In rejecting Chesser's claims for violations of his constitutional right to confidentiality and the Privacy Act, the district court incorrectly focused on Chesser's "expectation of privacy," or lack thereof, as a federal detainee and prisoner. JA17.

The "expectation of privacy" is a Fourth Amendment concept used to delineate the circumstances in which a person is protected from government searches and seizures: "[t]he protections of the Fourth Amendment are triggered when an individual seeking refuge under the Fourth Amendment has a legitimate *expectation of privacy* in the *invaded* place or the item *seized*." *Doe v. Broderick*, 225 F.3d 440, 450 (4th Cir. 2000) (emphasis added) (internal quotation marks omitted). But one's "*expectation* of privacy" as used in Fourth Amendment jurisprudence must not be confused with one's *right* to privacy guaranteed by the Fifth and Fourteenth Amendments. The two are "completely different." *Doe v. Delie*, 257 F.3d 309, 316 (3d Cir. 2001); *accord Powell v. Schriver*, 175 F.3d 107, 112 n.3 (2d Cir.

1999).[19] "The right to nondisclosure *** emanates from a different source and protects different interests than the right to be free from unreasonable searches and seizures." *Delie*, 257 F.3d at 316; *cf. Whalen*, 429 U.S. at 599 n.24 (distinguishing between "the right of the individual to be free in his private affairs from governmental surveillance and intrusion" found in "the Fourth Amendment" and "the right of an individual not to have his private affairs made public by the government" found elsewhere) (internal quotation marks omitted). While prisoners may categorically lose their Fourth Amendment rights in prison, they retain their due process rights to privacy. *See Delie*, 257 F.3d at 316; *Powell*, 175 F.3d at 112; *Woods v. White*, 689 F. Supp. 874, 876–77 (W.D. Wis. 1988), *aff'd*, 899 F.2d 17 (7th Cir. 1990); *cf. Houchins*, 438 U.S. at 5 n.2 ("Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy").[20] In confusing these

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[19] The two cases relied on by the district court, JA9–10, apply the Fourth Amendment, rather than the Fifth or Fourteenth. *See United States v. Willoughby*, 860 F.2d 15, 20 (2d Cir. 1988); *Akers v. Watts*, 740 F. Supp. 2d 83, 97 (D.D.C. 2010).

[20] Prisoners lose their expectation of privacy under the Fourth Amendment because such an expectation is inconsistent "with the legitimate penological objectives of the corrections system"; *i.e.*, it "is fundamentally

concepts, the district court committed legal error.

The district court again committed the same kind of error when it concluded that Chesser's lack of an expectation of privacy was relevant to his Privacy Act claim.[21] The Privacy Act is the source of Chesser's rights and remedies and it says nothing about one's expectation of privacy. The Privacy Act does not exempt prisoners' information from its requirements and does not except prisoners from its remedies, and therefore Chesser's status as prisoner is irrelevant to his claim. *See, e.g.*, *Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 583–84 (D.C. Cir. 2002); *Perry v. Bureau of Prisons*, 371 F.3d 1304, 1305 (11th Cir. 2004) (per curiam); *cf. Pa. Dep't of Corr. v.*

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incompatible with the close and continual surveillance of inmates *** required to ensure institutional security and internal order." *Hudson*, 468 U.S. at 523, 527–28 (1984) (internal quotation marks omitted). The district court did not suggest that defendants' disclosure of Chesser's personal information to his mother and her lawyers served any "legitimate penological objective," nor would any suggestion of the sort be correct. *See supra*, p. 35–36.

[21] The district court did not explicitly recognize or evaluate Chesser's Privacy Act claim. *See* JA4–7; *cf.* JA293–295 (Am. Compl. ¶ 29) (citing Privacy Act). To the extent the district court elided Chesser's Privacy Act claim and his confidentiality claim, such would also be a legal error requiring reversal.

Yeskey, 524 U.S. 206 (1998) (holding that Americans with Disabilities Act applies to prison inmates).

* * *

The district court's denial of reconsideration, like its original dismissal, was an abuse of discretion requiring reversal.

CONCLUSION

The district court's judgment dismissing Chesser's complaint with prejudice and denying his motion for reconsideration should be reversed.

STATEMENT REGARDING ORAL ARGUMENT

Chesser believes that the Court's decisional process would be aided by oral argument. *See* Fed. R. App. P. 34(a)(2)(C).

Dated: October 29, 2014

Respectfully submitted,

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ADDENDUM

5 U.S.C. § 552a provides in pertinent part:

§552a. Records maintained on individuals

* * *

(b) Conditions of disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

* * *

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

* * *

(11) pursuant to the order of a court of competent jurisdiction

* * *

(g)(1) Civil remedies.--Whenever any agency

* * *

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

* * *

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court. * * *

28 U.S.C. § 1915A provides in pertinent part:

§1915A. Screening

(a) Screening.--The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal.--On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--

> **(1)** is frivolous, malicious, or fails to state a claim upon which relief may be granted * * *

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-2739 Caption: Chesser v. Chesser

CERTIFICATE OF COMPLIANCE WITH 32(a)

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief and Appellee's Response Brief may not exceed 14,000 words or 1,300 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

   This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because:

   ☒ this brief contains 9,403 [*state number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

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(s) Jason R. LaFond

Attorney for Zachary Adam Chesser

Dated: October 29, 2014

CERTIFICATE OF SERVICE

I certify that, on this 29th day of October, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ *Jason R. LaFond*
Jason R. LaFond
Counsel for Plaintiff-Appellant
Zachary Adam Chesser