No. 19-6655

United States Court of Appeals

FOR THE FOURTH CIRCUIT

VERNON EARLE,
Appellant,

v.

SHREVES, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of West Virginia

BRIEF FOR APPELLANT

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because Mr. Earle's claims arose under the U.S. Constitution. The district court granted summary judgment to defendants and entered a final order dismissing Mr. Earle's complaint on April 23, 2019. J.A. 240. Mr. Earle timely filed his notice of appeal on May 6, 2019. J.A. 242; *see* Fed. R. App. P. 4(a)(1). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether Mr. Earle can recover damages under *Bivens* for a claim that prison officials violated his First Amendment rights by retaliating against him for filing grievances.

II. Whether the district court improperly granted summary judgment on Mr. Earle's First Amendment retaliation claim when there was a genuine dispute of fact regarding the causal relationship between the grievances he filed and the adverse actions defendants took against him.

III. Whether the district court abused its discretion by granting summary judgment in favor of defendants without allowing discovery.

STATEMENT OF THE CASE

I. Statement of Facts

Appellant Vernon Earle, convicted in D.C. Superior Court of D.C. Code violations, is serving his sentence in federal prison. *See* D.C. Code § 24-101; J.A. 88. When the events in this lawsuit occurred, he was incarcerated at Federal Correctional Institution (FCI) Hazelton in Bruceton Mills, West Virginia. Mr. Earle alleges Bureau of Prisons (BOP) officials at FCI Hazelton violated his First Amendment rights by retaliating against him—putting him in restrictive housing for thirty days, transferring him to another housing unit, stripping him of his job, and increasing his custody classification points—all because he filed prison grievances.

A. Mr. Earle files grievances after his housing unit is placed on lockdown.

On November 24, 2015, Mr. Earle's housing unit (M-Unit) was placed on lockdown after a physical altercation between defendant Correctional Counselor Shreves and another M-Unit inmate. J.A. 20, 62. Mr. Earle describes in his sworn complaint "an incident with [defendant] Shreves in which se[ver]al [correctional officers] beat-up an Inmate." J.A. 20. Shreves states the inmate punched him in the mouth, requiring

stitches. J.A. 172. As a result of the lockdown, M-Unit was denied hot meals, visitation, and recreation for nine days. J.A. 20; *see* J.A. 62–63.

On December 2, 2015, Mr. Earle initiated a BOP grievance process by delivering to defendant Unit Manager Rivera two BP-8½ forms (the grievances) based on the November 24, 2015 incident and lockdown. J.A. 20. Submitting a BP-8½ form is the first, informal stage in the grievance process; if the issue is not resolved informally, the prisoner may then file a formal Request for Administrative Remedy on a BP-9 form. 28 C.F.R. §§ 542.13(a), 542.14. Mr. Earle's grievances explained that after the physical altercation involving Shreves and another prisoner, the consequent lockdown was unfairly applied to all of M-Unit, including Mr. Earle. *See* J.A. 20.

The parties agree Shreves eventually received the grievances but dispute how he received them. Mr. Earle alleges he gave the grievances to Unit Manager Rivera, who was being trained by defendant Unit Manager Domas. J.A. 20. Domas then instructed Rivera to deliver the grievances to Shreves.[1] J.A. 20. Defendants contend Mr. Earle gave the

[1] According to BOP policy, "[m]atters in which specific staff involvement is alleged may not be investigated by either staff alleged to be involved

grievances to Shreves directly. J.A. 63. Shreves's declaration states only that he found the grievances on his desk. J.A. 173. In any event, the parties agree Shreves read the grievances in early December 2015. J.A. 20, 63, 173.

The content of those grievances—which are not in the record—is also disputed. Mr. Earle attests that his grievances were "[c]oncerning the fact that on 11/24/2015, M-Unit was placed on lockdow[n] following an incident with C/O Shreves; in which se[ver]al C/O's beat-up an Inmate" and "thereafter; [Mr. Earle] was denied [h]ot meals, visits, [and recreation]" while the rest of the prison received those privileges. J.A. 20. Shreves says the grievances' tone and substance were "threatening" and that the grievances accused him of deserving the assault and being responsible for the resulting lockdown. J.A. 173.

B. Defendants place Mr. Earle in the Special Housing Unit.

What happened after Shreves read the grievances is disputed. Mr. Earle alleges Shreves brought the grievances to defendant Lieutenant

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or by staff under their supervision." BOP, *Administrative Remedy Program Statement*, OPI No. 1330.18 at 10 (2014), https://www.bop.gov/policy/progstat/1330_018.pdf.

Washington, Shreves's longtime friend, and instructed Washington to place Mr. Earle in the Special Housing Unit (SHU) as retaliation for filing them. J.A. 20. Shreves contends he referred the grievances to the Special Investigative Agent (SIA) and Special Investigative Services (SIS) for resolution.[2] J.A. 173.

The parties agree that on December 7, 2015, Lieutenant Washington sent a letter to the SHU Officer, notifying the officer Mr. Earle was being "placed on Administrative Detention [in the SHU] pending an SIS investigation." J.A. 28, 63. Mr. Earle was placed in the SHU that same day, as was another prisoner who had filed a grievance related to the November 24 lockdown. J.A. 20; *see* J.A. 63.

While in the SHU, Mr. Earle filed requests with SIA and SIS asking why he was there, what rule he was suspected of violating, and the status of any investigation into his supposed misconduct. J.A. 20. He received

[2] Lieutenant Washington claims he typically places someone in the SHU pending SIS investigation only at the request of an SIS staff member. J.A. 178. He recalls nothing about this particular incident but denies retaliating against Mr. Earle. J.A. 176–80.

no reply.[3] J.A. 20. During Mr. Earle's thirty days in the SHU, both defendant Captain Kelly, who oversees SHU placements, and defendant Assistant Warden of Operations Breckon, told him he was in the SHU for filing the December 2015 grievances. J.A. 20; *see* J.A. 12, 13. SIS officials told Mr. Earle after his release from the SHU that he was never under investigation while confined there. J.A. 20.

C. After Mr. Earle leaves the SHU, defendants strip him of his job, increase his custody classification points, and transfer him to another unit "so there [won't] be any further retaliatory actions."

Defendants released Mr. Earle from the SHU on January 6, 2016. J.A. 63. After Mr. Earle's release, defendant Warden Saad told him he had been placed in the SHU for filing the December 2015 grievances. J.A. 21. The Warden also told him she was stripping him of his prison job and placing him and the other prisoner who had filed a grievance in a different housing unit. J.A. 21. The housing transfer was necessary, she explained, "so there [wouldn't] be any further retaliatory actions." J.A. 21.

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[3] Those investigating suspected rule violations must inform the prisoner of the charges against him and provide him a copy of the incident report and an opportunity to make a statement. 28 C.F.R. § 541.5(a), (b).

Along with his housing transfer, Mr. Earle was assigned a new case manager, defendant Gyorko. Mr. Earle alleges Gyorko increased his custody classification points, which affect a prisoner's housing assignment, level of security, and staff supervision. J.A. 21; *see* BOP, *Inmate Security Designation and Custody Classification Program Statement*, OPI No. 5100.08, CN-1 (2019), https://www.bop.gov/policy/progstat/5100_008cn.pdf.

Mr. Earle alleges Gyorko told him that because he "love[d] to file," she was going to "send him bac[k] to the pen[itentiary][4] so [he] can file all [he] want[s]." J.A. 21. Mr. Earle complained to Gyorko's supervisor, defendant Pulice, who told Mr. Earle he would not revise the custody classification and Mr. Earle would have to "take it to the courts." J.A. 21. In her declaration, Gyorko admits that she "updated" Mr. Earle's custody classification points. J.A. 185. She denies she did it "strictly to result" in his transfer to the penitentiary or with retaliatory intent. J.A. 185–86. She claims that "upon independent review," she was instructed to

[4] FCI Hazelton is a medium-security institution in the Federal Correctional Complex (FCC) Hazelton. FCC Hazelton also includes the high-security U.S. Penitentiary (USP) Hazelton.

revise his custody classification again, "such that he would remain at FCI Hazelton." J.A. 186. Mr. Earle was transferred to the penitentiary, USP Hazelton, in July of 2017, six months after he filed his complaint in district court. J.A. 88.

II. Procedural History

Mr. Earle, proceeding pro se, filed a sworn complaint in the United States District Court for the Northern District of West Virginia. J.A. 8, 23–24. The complaint alleged defendants violated his First, Fifth, and Eighth Amendment rights by placing him in the SHU, transferring him to another housing unit, increasing his custody classification points, and stripping him of his job in retaliation for filing grievances. J.A. 20–21. He sought monetary damages pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and injunctive relief. J.A. 25.

Defendants moved to dismiss, or in the alternative, for summary judgment.[5] J.A. 59. They challenged the sufficiency of Mr. Earle's allegations as to each defendant's involvement, denied the availability of

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[5] While he was awaiting defendants' response to his complaint, Mr. Earle filed a motion seeking appointed counsel, explaining that professional assistance would help him obtain evidence needed to prove his case. J.A. 54–55. The motion was denied. J.A. 57.

a *Bivens* remedy, and contested Mr. Earle's allegation of retaliatory motive by declaring his initial grievances—not in the record—contained threatening language. *See* J.A. 68, 71–73, 79. Defendants supported their motion with declarations from defendants Shreves, Washington, and Gyorko, each denying retaliation. J.A. 171, 176, 184.

Mr. Earle filed an objection to defendants' motion, arguing it was premature and disputing several of their factual assertions, including their claim that the grievances were threatening. J.A. 200. He attached copies of grievances from a prior incident documenting Shreves's alleged past misconduct and threats to retaliate against him. *See* J.A. 220 (explaining that Shreves had once told Mr. Earle he would "raise your points up" and "find something to write you up for"); J.A. 221–30.

The district court granted summary judgment to defendants and dismissed the case with prejudice. The court rejected Mr. Earle's First Amendment retaliation claim, holding "there is no First Amendment right to file grievances," without addressing whether a *Bivens* remedy was available.[6] J.A. 238. It also held Mr. Earle had not provided evidence

[6] The court also rejected Mr. Earle's Fifth and Eighth Amendment claims, which are not the subject of this appeal.

that defendants Rivera, Domas, Shreves, Washington, and Gyorko "had the requisite involvement." *See* J.A. 236–37. And the court held that Mr. Earle did not establish the other defendants' involvement beyond being supervisors. *See* J.A. 236. Mr. Earle filed a timely notice of appeal, and this Court appointed undersigned counsel.

SUMMARY OF ARGUMENT

I. A *Bivens* remedy is available for Mr. Earle's First Amendment retaliation claim. The Supreme Court has recognized a *Bivens* remedy against federal prison officials for violating a prisoner's Eighth Amendment rights. *See Carlson v. Green*, 446 U.S. 14, 19 (1980). A *Bivens* remedy is appropriate because applying *Carlson* to Mr. Earle's retaliation claim implicates no separation-of-powers principles. Mr. Earle does not challenge a broad policy question entrusted to a coordinate branch, nor are there allegations against high-level officials exercising Executive branch authority in sensitive functions like military affairs, foreign policy, national security, or immigration. The judiciary is "well suited" to "consider and weigh the costs of allowing a damages action" for Mr. Earle's First Amendment retaliation claim to proceed because it is exactly the sort of claim necessary to protect access to the courts and, absent a *Bivens* remedy, Mr. Earle has no avenue for relief. *See Hernandez v. Mesa*, 140 S. Ct. 735, 743, 750 (2020).

II. A reasonable juror could conclude defendants violated Mr. Earle's First Amendment rights by retaliating against him for engaging in constitutionally protected activity. Days after he filed two grievances

based on a physical altercation between a prisoner and staff, defendants placed him in restrictive housing for thirty days, then transferred him to another housing unit, increased his custody classification points, and stripped him of his job. Defendants do not dispute Mr. Earle filed those grievances or that those grievances shortly preceded their actions against him.

Defendants dispute only whether their motives were retaliatory. They claim Mr. Earle was under investigation because his grievances threatened defendant Shreves. But record evidence undermines their version of events. Prison officials informed Mr. Earle he was never under investigation for his grievances. And defendants neither documented nor informed Mr. Earle about any investigation—steps BOP policy would have required them to take if there had indeed been an investigation. Similarly, defendants claim Mr. Earle's custody classification points were increased for non-retaliatory reasons. But Mr. Earle attests that the prison official told him she did so because of grievances he filed. Together, this evidence creates a genuine dispute of fact regarding defendants' motives, rendering summary judgment inappropriate.

III. Summary judgment was improper even if the record does not create a genuine dispute of material fact because Mr. Earle received no opportunity for discovery. Mr. Earle's objection to defendants' motion notified the district court of his need for discovery, serving as the functional equivalent of an affidavit under Rule 56(d). That need is particularly acute here because this case is about motive and defendants exclusively control the key evidence—including the grievances which they claim contain threatening language—and records supporting individual defendants' involvement in the retaliation. Mr. Earle is entitled to have that evidence in the record so he can establish his case and disprove defendants' claimed motivations.

ARGUMENT

Mr. Earle seeks a *Bivens* remedy for his First Amendment retaliation claim. Because he filed prison grievances, federal prison officials placed him in restrictive housing for thirty days, then transferred him to another housing unit, stripped him of his job, and increased his custody classification points.

This Court reviews the district court's grant of summary judgment de novo. *Brooks v. Johnson*, 924 F.3d 104, 111 (4th Cir. 2019). It cannot affirm unless, taking the facts in the light most favorable to Mr. Earle, there is no genuine dispute of material fact and defendants are entitled to judgment as a matter of law. *See id.* This Court should vacate the district court's grant of summary judgment and remand for further proceedings.

I. A *Bivens* remedy is available to Mr. Earle.

Bivens provides an implied private right of action under the Constitution for damages against federal officers who violate an individual's constitutional rights. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971). The *Bivens* remedy serves not only to redress past harm but also to deter future wrongdoing by federal officers. *See*

Ziglar v. Abbasi, 137 S. Ct. 1843, 1858 (2017). A *Bivens* action is allowed unless the case presents a "new context"—that is, unless the case is "different in a meaningful way" from previous *Bivens* cases decided by the Supreme Court. *Id.* at 1859. And even in a new context, a *Bivens* remedy remains available where, as in Mr. Earle's case, implying a private right of action implicates no separation-of-powers principles, *see id.*, or in other words, presents no "special factors counseling hesitation," *id.* at 1857.

The Supreme Court has held a *Bivens* remedy is available where federal prison officials violate a prisoner's constitutional rights. *See Carlson v. Green*, 446 U.S. 14, 19 (1980). In *Carlson*, the Court concluded that a prisoner's estate could recover damages against BOP officials who failed to give the prisoner adequate medical care, resulting in his death. *Id.* at 16 & n.1. The Eighth Amendment claim could go forward, the Court reasoned, because BOP officials "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Id.* at 19.

Mr. Earle's case is on all fours with *Carlson*—the same rationale that justified a *Bivens* remedy against BOP officials in that case calls for

a remedy here. The only difference is that Mr. Earle's challenge arises under the First Amendment rather than the Eighth Amendment. While this difference satisfies the Court's expansive conception of a "new context," *Abbasi*, 137 S. Ct. at 1859, a *Bivens* remedy remains appropriate because applying *Carlson* to Mr. Earle's retaliation claim implicates no separation-of-powers principles.

A. No "special factors" counsel hesitation against applying *Carlson* here.

Separation-of-powers principles are "central to the analysis" of whether a *Bivens* remedy is available. *Abbasi*, 137 S. Ct. at 1857. In that analysis, courts "consider the risk of interfering with the authority of the other branches" and ask whether the judiciary is "well suited, absent congressional inaction or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020). As long as that inquiry reveals no "special factors counseling hesitation in the absence of affirmative action by Congress," a *Bivens* remedy is available. *Id.*

As the Supreme Court held, the fact that a *Bivens* remedy would allow for damages against federal prison officials does not itself counsel hesitation. *Carlson*, 446 U.S. at 19; *cf. Farmer v. Brennan*, 511 U.S. 825,

830 (1994).[7] *Carlson* involved a challenge to BOP officials' decisions about medical treatment and facility placement for a prisoner with chronic asthma. 446 U.S. at 16 n.1. The Court concluded no special factors counseled hesitation because prison officials do not hold sufficiently independent status under the Constitution. *See Carlson*, 446 U.S. at 19. And even if requiring prison officials to "defend [a] suit might inhibit their efforts to perform their official duties," a *Bivens* remedy was still appropriate because qualified immunity would "provid[e] adequate protection." *Id.* The bottom line for the *Carlson* Court was that claims involving prisoner mistreatment, without more, did not implicate the separation-of-powers principles central to the special factors analysis.

This is in stark contrast to the separation-of-powers principles present in cases that *do* present special factors counseling hesitation.

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[7] The Supreme Court in *Farmer* may have recognized a *Bivens* action against prison officials who failed to protect a prisoner from abuse and rape by other prisoners—an alleged Eighth Amendment violation. *See Attkisson v. Holder*, 925 F.3d 606, 621 n.6 (4th Cir. 2019) (acknowledging without deciding that *Farmer* may have recognized a new *Bivens* action); *see also Bistrian v. Levi*, 912 F.3d 79, 91 (3d Cir. 2018) (recognizing *Farmer* as a *Bivens* cause of action). *Farmer*, like *Carlson*, thus demonstrates the absence of special factors when challenging unconstitutional behavior by correctional officers.

Those separation-of-powers principles exist where allowing a damages remedy would "require courts to interfere in an intrusive way with sensitive functions of the Executive Branch." *Abbasi*, 137 S. Ct. at 1861. Such sensitive functions include military service, national security, foreign policy, and immigration. *See Hernandez*, 140 S. Ct. at 744; *Abbasi*, 137 S. Ct. at 1861; *Chappell v. Wallace*, 462, U.S. 296, 298 (1983); *Tun-Cos v. Perrotte*, 922 F.3d 514, 526 (4th Cir. 2019). But they do not include prison administration. Otherwise, *Carlson* could not have authorized a *Bivens* remedy.

Nor does allowing a *Bivens* remedy for Mr. Earle's First Amendment retaliation claim require "intrusive" interference with Executive branch functioning. *See Abbasi*, 137 S. Ct. at 1861. Mr. Earle seeks damages for mistreatment by individual prison officials performing routine functions. Just like each of the previously recognized *Bivens* actions, including *Carlson*, defendants are not high-level officials exercising Executive branch authority and Mr. Earle is not challenging a broad policy question entrusted to a coordinate branch. *Id.* at 1857–58. Confirming a remedy for Mr. Earle's claim does not require this Court to "impair another [branch] in the performance of its constitutional duties"

any more than *Carlson* does. *See Abbasi*, 137 S. Ct. at 1861; *see also Carlson*, 446 U.S. at 19. So even though the constitutional provision implicated here differs from the one in *Carlson*, that distinction makes no difference for the special factor analysis because Mr. Earle's claim implicates no separation-of-powers principles.

Concluding otherwise, as the Third Circuit did, flouts *Carlson*. *See Bistrian v. Levi*, 912 F.3d 79, 95 (3d Cir. 2018). That court reasoned that First Amendment retaliation claims are "grounded in administrative detention decisions" entrusted to prison officials and that implying a damages remedy may cause unwarranted interference with prison administration. *See id.* But that fails to account for *Carlson*, which expressly authorized a judicially crafted damages remedy against prison officials. Nor does it acknowledge that courts regularly hear claims of unconstitutional action in *state*-run prison environments under 42 U.S.C. § 1983—including First Amendment retaliation claims.

In fact, the judiciary is "well suited" to "consider and weigh the costs of allowing" damages for Mr. Earle's First Amendment retaliation claim because such a remedy is necessary to ensure other meritorious claims reach the courts. To file suit seeking a recognized *Bivens* remedy—like

an Eighth Amendment *Carlson* claim—a prisoner must first exhaust administrative remedies by filing grievances. *See* 42 U.S.C. § 1997e(a). It would be an odd doctrine that would provide a private right of action for a claim but permit prison officials to retaliate against a prisoner so he is chilled in filing grievances necessary to bring that claim to the courts for review. If there is no *Bivens* remedy here, federal prison officials' unconstitutional retaliatory behavior will effectively prevent other meritorious *Bivens* claims from reaching the courts, undermining *Bivens*' core purposes of "redress[ing] past harm and deter[ring] future violations." *See Abbasi*, 137 S. Ct. at 1858.

B. As in *Carlson*, no alternative remedies can vindicate Mr. Earle's constitutional injury.

Mr. Earle has no alternative remedy to protect his constitutional right, a fact of "central importance" to the special factors analysis. *See Abbasi*, 136 S. Ct. at 1858, 1862. When no equally effective remedy exists for a constitutional violation, the balance of factors weighs in favor of a *Bivens* action because a plaintiff is left with "damages or nothing." *See id.* at 1862 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)). Retaliation claims like Mr. Earle's, where a prisoner is temporarily put in restrictive housing to chill exercise of his First Amendment rights, do

not involve ongoing violations susceptible to equitable relief. A damages remedy after the fact is the only form of redress. *See id.* at 1862. And neither the Federal Tort Claims Act (FTCA) nor the BOP grievance process provide an alternative to *Bivens*. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68, 74 (2001); *see Carlson*, 446 U.S. at 25.

Carlson stated it emphatically: the "FTCA is not a sufficient protector of the citizens' constitutional rights, and without a clear congressional mandate we cannot hold that Congress relegated [prisoners] exclusively to the FTCA remedy." 446 U.S. at 23; *see Malesko*, 534 U.S. at 68 (noting that the FTCA "[i]s insufficient to deter the unconstitutional acts of individuals" covered by *Bivens*).

The BOP grievance process is not an adequate alternative remedy either—and for proof, this Court need look no further than this case. The basis of Mr. Earle's claim is that he was retaliated against for trying to use that very process. Even if prison officials had not punished Mr. Earle for trying to use the grievance process, it would still be inadequate because it does not provide for money damages or any particular kind of relief. *See* 28 C.F.R. §§ 542.10 to .19. At best, the grievance procedure is "a means through which allegedly unconstitutional actions and policies

can be brought to the attention of the BOP and prevented from recurring." *Malesko*, 534 U.S. at 74. Because Mr. Earle's injury is no longer occurring, he can find no relief through the grievance process for his constitutional injury.

For Mr. Earle, it is "damages or nothing." Had Mr. Earle been convicted under state law anywhere other than Washington, D.C., he would be in state custody and could bring a First Amendment retaliation claim against state prison officials under 42 U.S.C. § 1983. Instead, because he was convicted for D.C. Code violations, a *Bivens* action is the only vehicle Mr. Earle can use to seek redress for the unconstitutional conduct of his custodians.

II. Mr. Earle presented evidence sufficient to establish a First Amendment retaliation claim.

Mr. Earle raises a classic First Amendment retaliation claim. He has demonstrated: (1) he engaged in a constitutionally protected activity; (2) the defendants' actions would likely adversely affect a prisoner's exercise of that activity; and (3) the protected activity and the defendants' conduct are causally related. *See Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 499–500 (4th Cir. 2005).

The facts in Mr. Earle's sworn, verified complaint easily establish the first two elements. *See World Fuel Servs. Trading, DMCC v. Hebei Prince Shipping Co.*, 783 F.3d 507, 516 (4th Cir. 2015) (verified complaints can serve as Rule 56(c) affidavits for the purpose of opposing summary judgment). He engaged in constitutionally protected activity—petitioning the government by filing prison grievances. J.A. 20. And defendants adversely affected engagement in that activity by placing him in restrictive housing for thirty days, transferring him to another housing unit, increasing his custody classification points, and stripping him of his job. J.A. 20; *see* J.A. 63.

There is a factual dispute with respect to the third element: *why* defendants took these actions. Defendants contend they transferred Mr. Earle to the SHU because he was under investigation due to the threatening tone and substance of his grievances. J.A. 173. And they claim the increase in his custody classification points was unrelated to the grievances he filed. J.A. 186. But Mr. Earle has marshalled facts to show defendants' true motives were retaliatory. *See* J.A. 20–21. Because a genuine factual dispute remains concerning defendants' motivations for

taking adverse action against Mr. Earle, summary judgment was improper.

A. Mr. Earle engaged in protected First Amendment activity by filing prison grievances.

The First Amendment protects Mr. Earle's right to petition the government by filing prison grievances. Mr. Earle attests he filed two grievances consistent with BOP policy on December 2, 2015. J.A. 20; *see* J.A. 63. Defendants concede those grievances were duly filed and received by prison officials. J.A. 63, 173. These undisputed facts establish Mr. Earle engaged in protected First Amendment activity. *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 540–41 (4th Cir. 2017) (holding that filing grievances under prison procedure is a protected First Amendment activity); *Martin v. Duffy*, 858 F.3d 239, 249–50 (4th Cir. 2017) (same).

The district court failed to acknowledge *Booker's* holding. Instead, relying on *Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994), it held Mr. Earle's First Amendment claim non-cognizable because "there is no First Amendment right to file grievances." J.A. 238. That was wrong, as *Booker* itself recognized. *Booker* explained *Adams* only held a prisoner has no due process liberty interest in *access* to a particular grievance

procedure. 855 F.3d at 541. But *Booker* holds that filing a grievance under an existing procedure *is* a constitutionally protected First Amendment activity that a prisoner has a right to engage in without fear of retaliation. *Id.* at 540–41.

B. Defendants' actions would likely adversely affect a prisoner's exercise of First Amendment rights.

Defendants' actions increasing the harshness of Mr. Earle's confinement conditions "would likely deter a person of ordinary firmness from the exercise of First Amendment rights." *See Martin*, 858 F.3d at 249–50 (citations and internal quotation marks omitted); *see also Russell v. Oliver*, 552 F.2d 115, 116 (4th Cir. 1977) (holding a court must consider defendants' actions in the aggregate, not as isolated incidents).

Defendants placed Mr. Earle in the SHU shortly after he filed two grievances. J.A. 20, 63. This action alone is sufficient to adversely affect the exercise of First Amendment rights. *Martin*, 858 F.3d at 250. But defendants did more. They transferred Mr. Earle to a different housing unit, increased his custody classification points, and stripped him of his prison job after his release from the SHU. J.A. 20–21; *see* J.A. 63. Each of these actions could adversely affect a prisoner's exercise of First Amendment rights. *See Gregg-El v. Doe*, 746 F. App'x 274, 275 (4th Cir.

2019) (denial of an institutional job); *Savoy v. Bishop*, 706 F. App'x 786, 789 (4th Cir. 2017) (housing transfer). And an increase in custody classification points, which could affect an inmate's housing, level of security, and staff supervision, is more than a "de minimis inconvenience" to the exercise of First Amendment rights. *Constantine*, 511 F.3d at 500.

C. A genuine factual dispute exists over why defendants took these actions against Mr. Earle.

Finally, Mr. Earle has raised a genuine factual dispute as to the third element—but-for his protected activity, he would not have been subjected to adverse action. *See Savoy*, 706 F. App'x at 790. A plaintiff can establish a causal nexus from circumstantial evidence by showing: (1) the defendant was aware of the plaintiff "engaging in protected activity," and (2) there was "some degree of temporal proximity" between that protected activity and the defendant's adverse action. *Constantine*, 411 F.3d at 501. Seven defendants—Domas, Rivera, Shreves, Washington, Kelly, Saad, and Gyorko—took direct action against Mr. Earle. Four defendants—Breckon, Kelly, Pulice, and Saad—were aware of the retaliation and caused his injury by tacitly authorizing it.

Mr. Earle alleges in his verified complaint that defendant Rivera conferred with defendant Domas before delivering Mr. Earle's grievances to defendant Shreves. J.A. 20. Five days after Mr. Earle filed those grievances, Shreves read them and presented them to defendant Washington. J.A. 20. Washington ordered Mr. Earle to the SHU that same day on the pretext that he was under investigation for threatening Shreves. J.A. 20, 28. And defendant Kelly approved all SHU placements at that time. J.A. 20. That those five defendants were (1) aware of Mr. Earle's grievances and (2) acted shortly after learning of them shows a causal nexus. *See Constantine*, 411 F.3d at 501 (finding roughly four months between defendants learning of the constitutional activity and retaliation sufficient for causation).

Defendants Saad and Gyorko also took direct action against Mr. Earle. Shortly after Mr. Earle left the SHU, Warden Saad stripped him of his prison job and told him that he and another inmate who had filed grievances related to the same incident were being transferred to another housing unit "so there [wouldn't] be any further retaliatory actions." J.A. 21. Then Mr. Earle's new case manager, defendant Gyorko, increased his

custody classification points, telling him she would "send [him] bac[k] to the pen[itentiary]" because Mr. Earle "love[d] to file." J.A. 21.

Defendants Breckon, Kelly, and Saad are also liable as supervisors because Mr. Earle showed they (1) knew he and another inmate were in the SHU for filing grievances related to the same incident and (2) tacitly authorized Mr. Earle's (and the other inmate's) continued retaliatory confinement (3) through their inaction. *See* J.A. 20; *Wilkins v. Montgomery*, 751 F.3d 214, 226 (4th Cir. 2014) (acknowledging doctrine of supervisory liability). A week before Mr. Earle's release from the SHU, defendants Breckon and Kelly told him he was in the SHU because of filing grievances and they failed to rectify the situation. J.A. 20. And shortly after defendants released Mr. Earle from the SHU, defendant Saad told him that he and another inmate had been placed there for filing grievances. J.A. 21.

Mr. Earle also alleges that defendant Pulice, Gyorko's supervisor, (1) knew defendant Gyorko erroneously increased Mr. Earle's custody classification points and (2) tacitly authorized it (3) through his inaction. *See* J.A. 21. After Mr. Earle complained, Pulice told Mr. Earle he would not correct his custody classification. J.A. 21.

To be sure, defendants dispute causation. Relying solely on Shreves's word, they claim Mr. Earle was placed in the SHU because he was under investigation for the "threatening" tone and substance of his grievances, not as retaliation. J.A. 173. Mr. Earle, though, has introduced facts that cast doubt on defendants' alleged non-retaliatory motivations. First, he attests his grievances described the physical altercation between Shreves and the inmate that resulted in the M-Unit lockdown and complained that he was denied privileges during that lockdown. J.A. 20; *see* J.A. 216 (arguing that defendants retaliated against him for speaking up about Shreves's "unnecessary use of force"). Even the timeline supports that the grievances were not threatening. Mr. Earle states he delivered his grievances to defendant Rivera five days before he was placed in the SHU. J.A. 20. Such a delay is inconsistent with defendants' contention that the grievances were threatening on their face.

Second, the prison officials allegedly investigating Mr. Earle for the "threatening" grievances told him he was *not* under investigation. J.A. 20. And defendants put forward no evidence that such an investigation occurred. *See* 28 C.F.R. § 541.5(b)(1)(A), (B); BOP, *Inmate Discipline*

Program Statement, OPI No. 5270.09 at 18 (2011), https://www.bop.gov/policy/progstat/5270_009.pdf (requiring those investigating suspected prisoner rule violations to document all steps in the investigation). Despite several attempts while in the SHU to find out which rule he was suspected of violating, Mr. Earle was never told. J.A. 20; *see* 28 C.F.R. § 541.5(a) (requiring such notification).

As to the increase of Mr. Earle's custody classification points, defendants claim—again with defendant Gyorko's word as sole evidence—they were increased for a non-retaliatory reason. J.A. 185 (claiming Mr. Earle "had a non-immigration detainer on file"). But Mr. Earle attests she told him she would send him to the penitentiary because he loved to file grievances. J.A. 21. And Gyorko admits she was subsequently instructed to "revise" Mr. Earle's custody classification "such that he would remain at FCI Hazelton." J.A. 168.

Thus, the facts and circumstances around Mr. Earle's SHU placement, transfer to another housing unit, increased custody classification points, and loss of his job create a genuine factual dispute about *why* defendants took these actions against him. *See Savoy*, 706 F. App'x at 790 (vacating summary judgment where the district court failed

to examine the legitimacy of defendants' stated reason for taking adverse action against a prisoner plaintiff). This Court cannot choose between Mr. Earle's and defendant's versions of events at this stage, particularly without the allegedly threatening grievances in the record. Weighing the evidence and making credibility determinations are inappropriate at summary judgment. *See United States v. Turner Constr. Co.*, 946 F.3d 201, 206 (4th Cir. 2019). Summary judgment was improper, and this Court should remand for further proceedings.

III. The district court abused its discretion by granting summary judgment before Mr. Earle could pursue discovery.

Even if the record evidence does not raise a genuine factual dispute, this Court should remand because the district court abused its discretion by granting summary judgment without providing Mr. Earle any reasonable opportunity for discovery. *See Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002). Mr. Earle explained his need for discovery and sought it at the first possible opportunity. J.A. 200, 207, 208, 211, 216. That need was particularly acute because key evidence about motive, possessed exclusively by defendants, was not included in the record. Despite this, the district court granted

defendants' motion before any discovery. Such an abuse of discretion requires remand. *Greater Balt. Center for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 721 F.3d 264, 282 (4th Cir. 2013).

Ordinarily, a party opposing summary judgment on the ground that more time is needed for discovery submits an affidavit containing "specified reasons" why the party "cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d); *Harrods*, 302 F.3d at 244. But such an affidavit is not required, especially when the nonmoving party is proceeding pro se. *Putney v. Likin*, 656 F. App'x 632, 638 (4th Cir. 2016). Instead, courts accept the "functional equivalent" of a Rule 56(d) affidavit where the nonmovant "was not lax in pursuing discovery." *Harrods*, 302 F.3d at 245. Objections to summary judgment serve as the functional equivalent so long as the party "clearly 'made an attempt to oppose the motion on the grounds that more time was needed for discovery.'" *Putney*, 656 F. App'x at 638 (quoting *Evans v. Tech. Applications & Serv. Co.*, 80 F.3d 954, 961(4th Cir. 1996)).

Mr. Earle's objection to summary judgment met this standard. Its title described the summary judgment motion as "PREMATURE AT THIS EARLY STAGE." J.A. 200. Mr. Earle pressed this point repeatedly

throughout the objection, writing that he had set forth sufficient facts "to go to the discovery stage," J.A. 207, and requesting that the court "order limited Discovery," J.A. 219. He further asserted that "Summary Judgment without any chance of discovery would omi[t] the needed facts to hand down a just judgment." J.A. 208.

Mr. Earle backed up these requests by identifying specific evidence needed or facts in dispute. First, he contested defendants' claim about motive, the core factual issue in this case. While defendants insist they placed Mr. Earle in the SHU because his grievances contained threatening language, Mr. Earle disputed this, arguing in his opposition that "there was nothing [in] the two [grievances] that could be construed as being threatening." J.A. 216. Mr. Earle maintained that the grievances he and the other inmate filed "should be in the recor[d] because it's alleged to be cause for an SIS investigation." J.A. 216. Second, Mr. Earle contradicted defendants' assertion that he was placed in the SHU "pending an SIS investigation." J.A. 81. Mr. Earle stated that "there was never any SIS investigation conducted." J.A. 217.

Finally, he sought additional evidence clarifying that defendants tacitly authorized or personally contributed to the decision to place him

in the SHU. *See* J.A. 208. Mr. Earle noted specifically that the evidence he attached to his response, "along with other discovery," would show that "all defendants" were "well aware" of Shreves' "p[o]tential for the violation." J.A. 208. Mr. Earle also noted that the prison administration was "well aware" of defendant Gyorko's retaliatory behavior, citing a federal court case where Gyorko had been accused by a different prisoner of retaliation and explaining that the court "is vested with the power to order limited discovery." J.A. 208; *see Townsend v. Gyorko*, No. 1:16-cv-180, 2018 WL 3069189, at *1 (N.D.W. Va. Jan. 16, 2018).

The nature of these disputes show summary judgment was indeed "premature." J.A. 200, 203, 219. "[S]ummary judgment prior to discovery can be particularly inappropriate when a case involves complex factual questions about intent and motive." *Harrods*, 302 F.3d at 247. And discovery is especially important where, as here, evidence is exclusively within the defendants' control. *Tate v. Parks*, 791 F. App'x 387, 392 (4th Cir. 2019).

Mr. Earle's repeated assertions that summary judgment was premature, combined with his identification of specific factual issues about which discovery was needed, are functionally equivalent to a Rule

56(d) affidavit. And he was not lax in pursuing discovery. Indeed, he sought it at the first available opportunity—defendants' motion was their first response to the complaint. *See* J.A. 2–5.

Relying in part on a lack of "evidence provided" by Mr. Earle, the district court improperly granted summary judgment without affording him any discovery. *See* J.A. 237. Given the importance of defendants' motives to Mr. Earle's claim, and the difficulty of opposing summary judgment without essential evidence, that was an abuse of discretion. *See McCray v. Maryland Dep't of Transp., Maryland Transit Admin.*, 741 F.3d 480, 484, 487 (4th Cir. 2014).

CONCLUSION

For the foregoing reasons, the Court should vacate the district court's grant of summary judgment and remand for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Earle respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fourth Circuit Rule 34(a). Oral argument will provide this Court an opportunity to ensure the proper application of Supreme Court and Fourth Circuit precedent regarding *Bivens* remedies against prison officials for constitutional violations. Oral argument is especially important here, where the Court must consider whether to recognize a right of action where prison officials allegedly retaliated against a prisoner for exercise of a well-established First Amendment right.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,654 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Marcella Coburn, certify that on March 30, 2020, a copy of Appellant's Brief and Joint Appendix was served on counsel for Appellees via the Court's ECF system.

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