No. 23-2664

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH PAUL BIRD,
Plaintiff-Appellee,
v.
JAMES DZURENDA, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Nevada
No. 2:20-cv-02093-ART-NJK

RESPONSE BRIEF OF PLAINTIFF-APPELLEE

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JURISDICTIONAL STATEMENT

Plaintiff-Appellee ("Plaintiff") agrees with Defendants-Appellants' ("Defendants") statement of the basis of the district court's subject matter jurisdiction. As required under Ninth Circuit Rule 28-2.2(a)-(b), Plaintiff additionally states: The district court had jurisdiction under 28 U.S.C. § 1331 because this case involves claims under 42 U.S.C. § 1983 and 42 U.S.C. § 2000cc-1. Defendants appeal from the district court's order denying their motion for summary judgment on the basis of qualified immunity. ER-14–15. This Court has jurisdiction under 28 U.S.C. § 1291, but that "jurisdiction [i]s limited to reviewing 'whether [Defendants] would be entitled to qualified immunity as a matter of law, assuming all factual disputes are resolved, and all reasonable inferences are drawn, in [Plaintiff's] favor.'" *Peck v. Montoya*, 51 F.4th 877, 885 (9th Cir. 2022) (citation omitted); *see also* p. 10, *infra*.

INTRODUCTION

This interlocutory appeal is about an incarcerated person who needed protection from his cellmate and prison officials who retaliated against him for seeking relief. Defendants Taylor Paryga and Mark Atherton have complicated this appeal by filing a brief replete with factual disputes that ignore the summary judgment standard and this Court's limited jurisdiction. Before this Court is the narrow question of whether Defendants violated clearly established law, assuming

all factual disputes are resolved and all reasonable inferences are drawn in favor of Plaintiff Keith Bird.

Bird, who is incarcerated in the Nevada Department of Corrections ("NDOC"), relies on prison staff for his physical safety. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (it is the "duty" of prison officials "to protect prisoners from violence at the hands of other prisoners" (citation omitted)). Fearful that his assigned cellmate might harm him, Bird orally requested that prison staff move him to a new cell. Instead of simply addressing that request, Paryga responded by threatening to fight Bird himself, and—together with Atherton—confiscating Bird's personal property.

The district court correctly concluded that Defendants are not entitled to qualified immunity. A reasonable trier of fact could easily find their misconduct unconstitutional: it is well-settled that prison officials may not retaliate against incarcerated persons who—consistent with their First Amendment right to petition the government for redress of grievances—raise concerns about the conditions of their confinement. This Court has made clear that grievances like Bird's are protected under the Petition Clause. This Court has made equally clear that threats of harm and confiscation of property are prohibited retaliatory actions. And, because the cases establishing as much were decided before 2018, when the conduct at issue here occurred, any reasonable prison official in Defendants' position would have

known that their conduct violated the First Amendment. This Court should affirm the district court's denial of qualified immunity.

STATEMENT OF THE ISSUE

Whether the district court correctly concluded that Defendants are not entitled to qualified immunity because clearly established law would have put reasonable prison officials on notice that physically threatening and confiscating the property of an incarcerated person for raising a grievance violates the First Amendment.

STATEMENT OF THE CASE

A. Defendants threaten Bird and confiscate his property in response to his grievance.

At all times relevant to this appeal, Bird was incarcerated at High Desert State Prison ("HDSP") in Nevada. ER-224.[1] In November 2018, Bird was assigned to a new cell in HDSP. ER-133, 224, 285. Within three days, it became apparent that his cellmate presented an imminent risk to his physical safety. *See* ER-133, 224. Bird hoped to change cells again, as he did not want to "break" "institutional rules to defend himself from assault." ER-229–230.

[1] The facts here are drawn from prison records filed as exhibits in the summary judgment record and from Bird's second amended complaint. *See Lopez v. Smith*, 203 F.3d 1122, 1132 n.14 (9th Cir. 2000) (en banc) ("A plaintiff's verified complaint may be considered as an affidavit in opposition to summary judgment if it is based on personal knowledge and sets forth specific facts admissible in evidence."); *Schroeder v. McDonald*, 55 F.3d 454, 460 n.10 (9th Cir. 1995) (complaint verified when it is signed under penalty of perjury); ER-239 (Bird's complaint signed under penalty of perjury).

For such a concern "relating to conditions of confinement," NDOC's administrative regulations employed a multi-step process for incarcerated persons to "resolve addressable grievances." ER-175. At the first step, known as informal resolution, individuals were "expected to resolve grievable issues through discussion with staff whose duties fall within the issue prior to initiating the [written] informal grievance process." ER-180.[2]

Following that protocol, Bird approached Officer Bruce Huinker at the control post assigned to Bird's cell. ER-224. Bird asked for a cell reassignment, telling Huinker he was worried about "issues with his current cellmate that if left unaddressed would lead to a fight." ER-224.

Huinker asked Defendants to get involved, and Bird repeated his fears about an imminent fight with his cellmate to them. ER-224. Instead of addressing the risk of harm, Paryga threatened, "Fight him or fight me." ER-224, 229.

Bird was then instructed to "go roll up" his belongings, ER-224—that is, to pack his belongings so that he could be moved to a different cell, *see* ER-226. Bird began to comply with that order. ER-224. But, as he did so, Huinker gave a different direction over the in-cell speaker system, announcing "You['re] staying in that cell."

[2] The regulations provide two exceptions to this rule: (1) situations in which "resolution is not possible, such as disciplinary appeals," and (2) "AR 740.03, number 2," an administrative regulation which covers allegations of abuse by prison staff. ER-177-78, 180. Neither exception is at issue in this case.

ER-224. Responding to that whipsaw, Bird "pushed his plastic tub into the door[,] preventing it from closing and responded, '[N]o sir I am not.'" ER-224, 226. After all, Bird had been told to pack up his belongings, and Defendants concede (Br. 4) this order was issued so that Bird could be transferred out of his cell.

Bird continued to comply with the order to gather his property, pushing it out of his cell to prepare to move. ER-230. But Defendants reappeared and ordered Bird to return his belongings to his cell and wait in one of the prison's classrooms. ER-226, 230. The officers then entered Bird's cell and stuffed into trash bags what little personal property Bird could claim while incarcerated, including "religious books, legal papers, personal mail, [and] food." ER-226. Missing his Quran and prayer rug, Bird, a practicing Muslim, was deprived of the ability to perform "even his basic daily Prayers." ER-232.

HDSP records indicate that Bird was ultimately moved to a new cell that same day, ER-133, but he never received his property back. ER-231–232. Instead, Bird received a disciplinary charge "for refus[al] to cell as assigned," causing him to lose canteen privileges for a week. ER-138, 261.

B. Procedural history

After exhausting the prison grievance process without satisfying remedy, Bird filed a complaint in federal district court, alleging, as relevant, that Defendants violated his First Amendment right to petition the government for redress of

grievances. ER-224. Until this appeal, Bird has proceeded pro se. *See Blaisdell v. Frappiea*, 729 F.3d 1237, 1241 (9th Cir. 2013) ("Courts in this circuit have an obligation to give a liberal construction to the filings of pro se litigants, especially when they are civil rights claims by inmates.").

Defendants moved for summary judgment and raised the defense of qualified immunity. ER-110–125. The district court denied summary judgment, concluding that a reasonable factfinder could find that Defendants violated the First Amendment's Petition Clause. *See* ER-5–6, 8–15. The court also concluded that Defendants are not entitled to qualified immunity because the declaration that "Paryga and Atherton searched [Bird's] cell and removed items, including those of a religious nature, in retaliation for requesting a cell change because of security concerns clearly falls within Ninth Circuit established law." ER-14–15.

Defendants brought this interlocutory appeal to challenge the district court's denial of qualified immunity. ER-288.

SUMMARY OF ARGUMENT

To determine whether a public official is entitled to qualified immunity, courts apply a "two-part inquiry" that asks (1) whether "the official's conduct violated a constitutional right," and (2) whether "the violated right was 'clearly established'" at the time of the violation. *Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009)

(quoting *Saucier v. Katz*, 533 U.S. 194, 200 (2001)). The district court correctly concluded that Defendants are not entitled to qualified immunity.

1. A reasonable factfinder could—and probably would—find that Defendants violated Bird's First Amendment right to be free from retaliation for filing prison grievances. Defendants do nothing to cast doubt on the district court's conclusion that Bird satisfied each element of a First Amendment retaliation claim.

First, Bird engaged in constitutionally protected speech when he asked prison officials to move him to a different cell due to issues with his cellmate that, if left unresolved, could lead to a physical fight. Defendants' arguments that Bird's grievance was not protected because it was not sufficiently specific and was insubordinate have no support in this case's factual record or in the case law.

Second, as this Court has made clear, physical threats and property confiscation constitute prohibited retaliatory conduct. Defendants make a passing effort to argue that threats are not adverse actions, but they rely on decisions (*e.g.*, about workplace threats) that do not apply here. Defendants' principal argument is, instead, that they did not threaten Bird or confiscate his property. But Defendants' factual disputes are improper in this procedural posture.

Third, Bird's grievance was the substantial motivating factor for both of the retaliatory actions. Both actions came in rapid succession after Bird's grievance, and

Defendants offer no reasonable explanation for the cause of their conduct apart from Bird's complaint.

Fourth, as this Court has made clear, physical threats and property confiscation have chilling effects on speech. Arguing that they did not threaten Bird, Defendants' again dispute the facts, but that factual dispute is improper here. Defendants further argue that Bird's speech was not chilled because he received the relief he requested and filed a grievance against Defendants for their conduct. Neither argument finds support in the law.

Fifth, there was no legitimate penological purpose for Defendants' conduct. Threatening Bird for lodging a grievance served to stifle his safety concerns—concerns that prison officials should be encouraging incarcerated persons to raise to promote institutional security. Defendants' only response is to dispute that any threat was made; that factual dispute is, again, not proper in this posture. As for confiscating Bird's property, Defendants say that they acted appropriately because they were merely removing property that was not listed on Bird's property card. But there is no record evidence that Defendants had even seen Bird's property card before confiscating his belongings. What the record does show is that property cards do not accurately reflect an incarcerated individual's belongings, meaning that, even if Defendants had been relying on Bird's property card, a reasonable factfinder could

conclude that confiscating possessions on that card would not promote any legitimate penological goal.

2. At the time of events at issue here, the law clearly established the unconstitutionality of physically threatening and confiscating the property of an incarcerated individual in retaliation for raising a grievance. The case law, pitched at exactly that level of generality, was sufficiently clear to put reasonable officers on notice that such misconduct violates the Petition Clause of the First Amendment. In challenging the argument that the law is clearly established, Defendants misstate not only the appropriate level of generality to conduct the inquiry, but also the factual record that this Court must accept for purposes of this appeal.

3. Finally, contrary to Defendants' novel assertion, this Court is not obligated to accept the factual findings of NDOC's internal grievance processes as true. Defendants' legal argument to the contrary is groundless. Time and again, this Court has explained that, in reviewing denials of summary judgment that turn on qualified immunity, it will assume all facts and draw all reasonable inferences in favor of the non-moving party—Bird, not Defendants.

Because this Court's decisions clearly established that Defendants' misconduct was unconstitutional, this Court should affirm the district court's denial of qualified immunity.

STANDARD OF REVIEW

The denial of summary judgment is ordinarily "not immediately appealable." *Plumhoff v. Rickard*, 572 U.S. 765, 771 (2014). But "pretrial orders denying qualified immunity generally fall within the collateral order doctrine," which permits interlocutory appeals from a denial of summary judgment that turn on a claim of qualified immunity. *Id.* at 771-72.

"The scope of [appellate] review in this context, however, is circumscribed." *Estate of Anderson v. Marsh*, 985 F.3d 726, 730 (9th Cir. 2021) (internal quotations omitted). "A public official may not immediately appeal 'a *fact*-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial.'" *Foster v. City of Indio*, 908 F.3d 1204, 1210 (9th Cir. 2018) (quoting *Johnson v. Jones*, 515 U.S. 304, 307 (1995) (emphasis in original)). Rather, the Court's jurisdiction on an interlocutory appeal is limited to resolving a defendant's "purely legal . . . contention that [his] conduct 'did not violate the [Constitution] and, in any event, did not violate clearly established law.'" *Foster*, 908 F.3d at 1210 (quoting *Plumhoff*, 572 U.S. at 773). "Where disputed issues of material fact exist," this Court must "assume the version of the material facts asserted by [Bird as] the non-moving party" and "draw all reasonable inferences in favor of [Bird as] the non-moving party." *Mattos v. Agarano*, 661 F.3d 433, 439 (9th Cir. 2011) (en banc). This Court's review is de novo. *Id.*

ARGUMENT

I. DEFENDANTS VIOLATED THE FIRST AMENDMENT.

The First Amendment protects "the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. This constitutional guarantee extends to incarcerated individuals, protecting "their First Amendment 'rights to file prison grievances.'" *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005) (quoting *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003)); *see also Pell v. Procunier*, 417 U.S. 817, 822 (1974). When prison officials retaliate against incarcerated persons for exercising their First Amendment right to file grievances, they "violate the Constitution." *Rhodes*, 408 F.3d at 567; *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995) (retaliatory conduct by prison officials actionable under Section 1983).

"[A] viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes*, 408 F.3d at 567-68 (footnote omitted). Defendants challenge each element, largely by proffering their version of the material disputed facts. But assuming all facts and drawing all

reasonable inferences in Bird's favor, as this Court must in this posture, *Mattos*, 661 F.3d at 439, Defendants' arguments fail on each element.

A. A factfinder could reasonably conclude that Bird engaged in constitutionally protected conduct when, fearing for his physical safety, he requested a cell change.

1. A jury could readily conclude that Bird's request for a cell change—made because he feared that "issues with his current cellmate," "if left unaddressed would lead to a fight," that could threaten his physical safety—constituted constitutionally protected speech. ER-224. It is axiomatic that incarcerated persons have a constitutionally protected right to file prison grievances. *Rhodes*, 408 F.3d at 567. As this Court has explained, a complaint that is "part of the grievance process" is "protected activity." *Brodheim v. Cry*, 584 F.3d 1262, 1271 n.4 (9th Cir. 2009). Here, NDOC's regulations required incarcerated persons to first raise "grievable issues through discussion with staff" before filing a written grievance. ER-180. Bird's oral complaint, then, was "part of the grievance process" and thus "protected activity." *Brodheim*, 584 F.3d 1271 n.4.

Indeed, Bird's grievance about his physical safety in the face of a potentially violent cellmate is at the core of the speech that the Petition Clause must protect in the prison context. As the Supreme Court has explained, "prison officials have a duty to protect prisoners from violence at the hands of other prisoners" because they have "stripped [incarcerated persons] of virtually every means of self-protection and

foreclosed their access to outside aid." *Farmer*, 511 U.S. at 833. Grievances like Bird's alert prison officials to safety risks, allowing them to carry out that fundamental duty. This Court has repeatedly held that less weighty grievances are protected. *See, e.g.*, *Rhodes*, 408 F.3d at 563-64, 568-70 (holding that prison grievance criticizing the careless handling of the plaintiff's typewriter and the speed with which the typewriter was returned to him after being sent out for repairs was protected First Amendment conduct); *Entler v. Gregoire*, 872 F.3d 1031, 1036-37, 1041 (9th Cir. 2017) (concluding grievances disputing charges to the plaintiff's prison account, criticizing an alleged failure to provide copies of legal documents, and objecting to the denial of an art curio permit were constitutionally protected). Bird's grievance about his physical safety—"[c]entral to all other corrections goals"—is plainly protected speech. *Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979) (discussing "institutional consideration of internal security within the corrections facilities themselves").

2. At no point do Defendants dispute that raising a safety concern is protected conduct. Instead, they argue that Bird did not actually report a safety concern and that, even if he did, he did so in an "insubordinate" and therefore unprotected fashion. Neither argument has merit.

First, Defendants are incorrect to insist that "Bird was not reporting safety concerns" because he "never indicated what [the] issues [with his cellmate] were,

did not indicate that the fight would be started by Bird or his cellmate, and certainly did not indicate that his cellmate threatened Bird in any way." Opening Br. 12-13. Indeed, the record evidence suggests the opposite.

To start, Defendants offer no evidence in support of their assertion that Bird did not include those details in his oral grievance. Defendants cite the descriptions of the interactions between Bird and the officers from the complaint and a grievance report, apparently taking the view that because those sources do not include those details, Bird did not include them in reporting his concerns. *See* Opening Br. 12-13. But the fact that, *e.g.*, the complaint stated that Bird "requested" a move "due to issues with his current cellmate" without going into detail about what those issues were in no way indicates that Bird did not, at the time, actually tell Officer Huinker what those issues were. ER-224. Tellingly, Defendants' declarations say nothing about any lack of detail in Bird's report. ER-153–157. And if anything, Defendants' argument that Bird was insufficiently clear that he was in an unsafe situation is undermined by their own concession that, immediately after lodging his grievance, Bird was instructed to pack up his belongings "so that he could be transferred." Opening Br. 4. The obvious—and at least reasonable—inference to be drawn from that decision is that Bird provided sufficient information about the risks of harm to allow officers to conclude that a cell change was appropriate. *See Mattos*, 661 F.3d at 439 (court must draw reasonable inferences in favor of non-moving party).

In any event, Defendants' legal argument is baseless. They cite no authority for their claim that a grievance must contain any of the details they claim are lacking before the grievance becomes protected conduct. *See* Opening Br. 12. To the contrary, raising a concern about an imminent fight stemming from tension with a cellmate was plainly "part of the grievance process" and therefore "protected activity," *Brodheim*, 584 F.3d at 1271 n.4—regardless of whether Bird identified the exact source of that tension or the anticipated first mover in a fight.

Second, Defendants' argument (Br. 13-16) that Bird's grievance was insubordinate and therefore unprotected because he gave an "ultimatum" and refused to stay in his cell is wrong at every turn. As a preliminary matter, Defendants never presented this argument below and it is accordingly forfeited. *See Orr v. Plumb*, 884 F.3d 923, 932 (9th Cir. 2018); ER-115–118 (summary judgment motion). Even if the Court were to consider it, the argument misses the mark.

On the facts, Defendants' contention (Br. 14) that Bird made an "ultimatum of immediate transfer or there will be a fight" rests on a distorted reading of the record that fails to appreciate this case's procedural posture. Bird's request for an immediate cell change because he feared that "issues with his current cellmate . . . if left unaddressed would lead to a fight" conveyed the seriousness of the situation with his cellmate, the imminence of a physical altercation, and thus the urgency of his request. ER-224. Defendants' contrary view (Br. 21-22) that Bird was effectively

saying "if you don't grant my cell change request, I will fight my cellmate," misconstrues Bird's grievance. The precipitating cause of any fight would have been the ongoing issues between Bird and his cellmate, not Bird's reaction to the denial of a cell change.

Nor are Defendants correct that Bird was "disobedient to a direct order." Opening Br. 14. As explained, Bird requested a cell change out of concern for his safety, was ordered to pack up his cell to prepare for his cell change, began to comply with that order, was then told "you['re] staying in that cell," and responded by preventing the door from closing and replying "no sir I am not." ER-224, 226. Construing the record in the light most favorable to Bird, that series of events shows (polite, ER-224 ("no sir")) confusion in response to directly contradictory directions—not any disobedience.

In any event, even if Bird's response at the end of that chain—stating that he would not be staying in his cell—was deemed "disobedient," Defendants do not explain how that would transform the protected status of Bird's earlier request to be transferred.[3] *See Adams v. Trustees of the University of N.C.-Wilmington*, 640 F.3d

[3] As Defendants appear to acknowledge, Bird's admission in prison disciplinary hearings to a charge of "Fail/Refuse to Cell as Assigned" was related to "his refusal to remain in his cell" when directed to do so after being told to pack his belongings, not his initial request to transfer cells. *See* Opening Br. 4. Indeed, given that NDOC's regulations directed incarcerated individuals to "resolve" issues "through discussion with staff," ER-180, it would be untenable for the prison to have disciplined Bird for

550 (4th Cir. 2011) (explaining why protected speech did not lose its First Amendment protected status based on after-the-fact conduct). The core speech at issue here is Bird's protected oral grievance. The record does not in any way show that that grievance was insubordinate. To the contrary, Bird's grievance followed established protocol. *See* ER-180 (prison grievance procedures required incarcerated persons to first raise issues through discussion with staff before filing a written grievance); *Brodheim*, 584 F.3d at 1271 n.4 (speech that is "part of the grievance process" is "protected activity").

Defendants' lengthy string cite (Br. 14-16) to mostly unpublished district court orders and out-of-circuit decisions does not compel a contrary result. Most of the cases involve speech that was hostile, disrespectful, disruptive, or confrontational. *See Kervin v. Barnes*, 787 F.3d 833, 835 (7th Cir. 2015) (involving "backtalk"); *Smith v. Mosley*, 532 F.3d 1270, 1277 (11th Cir. 2008) (involving "false and insubordinate remarks"); *Smith v. Campbell*, 250 F.3d 1032, 1037 (6th Cir. 2001) (involving "aggressive attitudes" and "attempts to intimidate staff"); *Cass v.*

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doing just that. *See Mack v. Warden Loretto FCI*, 839 F.3d 286 (3d Cir. 2016) ("illogical" to allow prison officials to retaliate in response to oral complaints if prison encourages that type of informal resolution). Moreover, any violation of prison regulations has only limited relevance to the constitutional question at issue here. *See Bradley v. Hall*, 64 F.3d 1276, 1280-81 (9th Cir. 1995), *overruled on other grounds by Shaw v. Murphy*, 532 U.S. 223, 230 n.2 (2001) (prison regulations alone do not define the contours of First Amendment rights).

Yousefpoor, 2022 WL 21825820, at *1 (E.D. Cal. Jan. 14, 2022); *Caliz v. Los Angeles*, 2017 WL 8186293 at *5 (C.D. Cal. Nov. 3, 2017); *Johnson v. Caroll*, 2012 WL 2069561, at *33 (E.D. Cal. June 7, 2012). Those cases are inapposite as nothing in the record suggests that Bird's oral grievance requesting a cell change was disrespectful or otherwise inappropriately expressed. Defendants' remaining case states that "[p]risoners have no constitutionally protected right to confront staff and discuss issues with them," *Martin v. Hurley*, 2014 WL 7157336, at *2 (E.D. Mo. Dec. 15, 2014)—a proposition that is directly in conflict with this Court's direction that speech that is "part of the grievance process" is "protected activity," *Brodheim*, 584 F.3d at 1271 n.4, and with NDOC's published regulations requiring incarcerated persons to first raise issues "through discussion with staff." ER-180.

Bird's request for a cell change was plainly protected First Amendment speech.

B. Threats of physical harm and confiscation of property are adverse actions, and a reasonable jury could find that Bird was a victim of both.

This Court has held that threats and property confiscation constitute adverse actions for purposes of a First Amendment retaliation claim like Bird's. *See Brodheim*, 584 F.3d at 1269-70; *Rhodes*, 408 F.3d at 568; *see also Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) ("adverse action need not be an independent constitutional violation"). Here, Bird experienced both.

1. Threatening physical harm is an adverse action.

As this Court has held, "the mere *threat* of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect." *Brodheim*, 584 F.3d at 1270; *see also Watison*, 668 F.3d at 1115-16 (threatening to hit incarcerated grievant is adverse action). On a defendant's motion for summary judgment, the question is whether "the record, taken in the light most favorable to the plaintiff, reveals statements by the defendant that a reasonable factfinder could . . . interpret as intimating that some form of punishment or adverse regulatory action would follow." *Brodheim*, 584 F.3d at 1270 (citation omitted). Such a statement is certainly present here.

Bird explained that, when he first requested a cell change out of fear that he and his cellmate might get into a fight, Paryga "made the inflammatory remark 'Fight him or fight me.'" ER-224. A reasonable inference to be drawn from that remark is that Paryga offered Bird two options: Bird could either back down from his grievance and fight his cellmate or keep pressing the cell change request and fight Paryga. Indeed, as Bird explained, he interpreted that comment as a "direct threat," and part of an attempt to "harass" and "shame" him "into abandoning his reporting of the issue." ER-224, 229. Threatening to physically harm Bird for raising a grievance is plainly an adverse action. *Brodheim*, 584 F.3d at 1270.

Seeking to defend that misconduct, Defendants argue both that a "mere threat" does not constitute an adverse action and that they did not make such a threat. Neither argument holds water.

Defendants' contention that a threat cannot constitute an adverse action relies principally on *Mulligan v. Nichols*, 835 F.3d 983 (9th Cir. 2016)—a case that is not only inapposite, but also unhelpful for Defendants. Although Defendants' carefully placed ellipses attempt to hide the fact, *Mulligan* is about retaliation in the *employment*, not prison, context. *Compare id.* at 989 ("an adverse employment action"), *with* Opening Br. 16 ("an adverse . . . action") (quoting *Mulligan*, 835 F.3d at 989). That context is critical. *See Doe v. Pasadena Unified Sch. Dist.*, 810 Fed. Appx. 500, 503 (9th Cir. 2020) (explaining that "[w]hether a threat can support a First Amendment retaliation claim depends on the individual circumstances of the case" and distinguishing between the employment and prison contexts). Prison officials, like Defendants, "control all aspects of life" for incarcerated individuals. *Chess v. Dovey* 790 F.3d 961, 976 (9th Cir. 2015). That extraordinary authority means that threats from prison officials are vastly more coercive than threats in non-carceral contexts, like employment. *See Doe*, 810 Fed. Appx. at 503 (explaining that a case involving threats in prison context "does not control" in a case with "a school principal [who] does not have the same authority . . . that a prison guard has over an inmate"). Even were *Mulligan* applicable, that case recognizes a distinction between

"mere speech," which does not violate the First Amendment, and "a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow," which does. *Mulligan*, 835 F.3d at 989-90. Paryga's threat of bodily harm if Bird continued to press his grievance falls in the latter category.

Defendants' other cases are even farther afield. Several address whether threats are actionable for other claims, not whether they satisfy the adverse action requirement of a First Amendment retaliation claim. *See Gaut v. Sunn*, 810 F.2d 923 (9th Cir. 1987) (addressing whether threat constituted Eighth Amendment violation or a deprivation of access to courts); *Collins v. Cundy*, 603 F.2d 825, 827 (10th Cir. 1979) (not discussing First Amendment retaliation); *McDowell v. Jones*, 990 F.2d 433, 434 (8th Cir. 1993) (same); *see also, e.g.*, *Castle v. Gomez*, 2022 WL 4540523, at *6 n.7 (C.D. Cal. Aug. 9, 2022), *report and recommendation adopted*, 2022 WL 4537862 (C.D. Cal. Sept. 27, 2022) (*Gaut* does not "deal[ ] with a First Amendment retaliation claim"). Defendants' other cases involve impolite speech—not the sort of threat of physical violence Paryga made here. *See Davis v. Goord*, 320 F.3d 346, 353 (2d Cir. 2003) (official spoke in "hostile manner"); *Requena v. Roberts*, 893 F.3d 1195, 1211 (10th Cir. 2018) (considering "unprofessional and unpleasant" actions).

Defendants also argue that the statement "fight him or fight me" was not a threat of "any physical harm," but something more innocuous. Opening Br. 17.

Again, however, the question in this procedural posture is whether, construing the record in Bird's favor, Paryga's statement could be interpreted as a threat that Bird could either stay in his cell ("fight him") or continue to press the matter and face physical violence from Paryga himself ("fight me"). Defendants fail to even acknowledge that interpretation—much less explain why it is not reasonable. In light of this Court's limited jurisdiction, that failure dooms their argument.

Indeed, it is Defendants who have offered an unreasonable (and inconsistent) reading of the record. Defendants first suggest that Paryga's "fight him or fight me" was an attempt to discern whether "Bird was making threats to his cellmate or if Bird's cellmate made threats against Bird." Opening Br. 4. Not everyone is a poet, but it is unclear how Paryga's statement "fight *him* or fight *me*" is about whether Bird (*i.e.*, "you") or Bird's cellmate (*i.e.*, not "me") would be the first aggressor. ER-224, 229. Implicitly acknowledging that this interpretation is untenable, Defendants switch gears midway through their brief, arguing that if Paryga made the statement, he was merely "informing Bird that his failure to follow lawful orders to remain in his cell could require staff to enforce the order by means [of] force." Opening Br. 17. Defendants do not explain how they draw that from "fight him or fight me" and, respectfully, it does not make sense. Moreover, Paryga made this statement before Huinker told Bird to remain in his cell, ER-224, 229, making Defendants' unsupported assertion (Br. 17) that Paryga was focused on "lawful orders to remain

in his cell" even less tenable. Defendants' efforts to contort Paryga's statement only serve to highlight how clear his threat was.

2. Confiscation of property is an adverse action.

Defendants' confiscation of Bird's property independently constitutes an adverse action sufficient for his First Amendment claim. Shortly after Bird requested a cell change, Defendants entered his cell and seized his "religious books, legal papers, personal mail, [and] food." ER-226. And because the officers "failed to issue any unauthorized property forms," Bird could not appeal "their action/misconduct." *Id.* This Court has described this sort of seizure of an incarcerated person's personal property as part of "the very archetype of a cognizable First Amendment retaliation claim." *Rhodes*, 408 F.3d at 568 (plaintiff alleged, *inter alia*, that defendant prison guards "arbitrarily confiscated, withheld, and eventually destroyed his property" in response to the plaintiff's filing of grievances); *Smith v. Mendoza*, 2021 WL 930706, at *17 (N.D. Cal. Mar. 10, 2021) (noting that because *Rhodes* was decided in 2005, it is "well-settled" in the Ninth Circuit that an officer cannot "steal or damage a prisoner's property").

Defendants do not argue that property seizure is not an adverse action, but instead insist that there is no evidence that Bird's property was seized. *See* Opening Br. 18-19. Put differently, Defendants "contest[ ] 'whether there is enough evidence in the record for a jury to conclude that certain facts favorable to [Bird] are true.'"

Marsh, 985 F.3d at 734 (alteration accepted). This Court does not "have jurisdiction to consider" that challenge. *Id.*

Even setting aside that jurisdictional bar, Defendants' arguments are meritless. As for their claim (at 18) that Bird "admits that he was in 'Class room A' at the time of the alleged cell search, and therefore could not see [Defendants] take anything," nothing in the record suggests that Bird was in that classroom for the entire duration of the cell search and property seizure, or that Bird could not see Defendants through, for example, a window or an open door. Indeed, Bird's declaration that Defendants took his property away "in large clear trash bags," ER-226, provides detail sufficient to draw the inference that Bird saw Defendants take the property first-hand. Even if Bird had not seen the confiscation take place, he could rely on circumstantial evidence—*i.e.*, that his property was in his cell before Defendants arrived to order him away and missing when he returned—to establish that fact. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003); *cf. United States v. Newhoff*, 627 F.3d 1164, 1170 (9th Cir. 2010) (relying on circumstantial evidence of theft).

Defendants' additional argument (Br. 19-20) that the items taken were not listed on Bird's property card and therefore were "contraband" fails to account for the record evidence—which Defendants did not contest—that property cards "are often not accurate as they are rarely updated on a regular basis when prisoners are

transferred, or lose items or have items taken," ER-19. *See also* ER-18-19 (explaining that certain items that Defendants took, like food and religious books, are never listed on property cards).[4] When all inferences are drawn in Bird's favor, property cards do not, at least in practice in NDOC facilities, contain an authoritative and comprehensive list of an incarcerated person's property. Accordingly, it is not reasonable to conclude that all unlisted property is contraband. Bird provided sufficient evidence that he lawfully possessed property that Defendants confiscated, and this Court's precedent makes clear that is an adverse action.

C. A reasonable factfinder could conclude that Bird's grievance caused Defendants' retaliatory misconduct.

A reasonable factfinder could easily conclude that Defendants took adverse actions "because of" Bird's protected speech. *Rhodes*, 408 F.3d at 567; ER-10–11 (district court holding Bird established causation). To establish causation, "a plaintiff must show that his protected conduct was 'the substantial' or 'motivating' factor

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[4] As NDOC regulations put prison officials in charge of updating property cards, Defendants' argument would mean that lawfully acquired and possessed property becomes contraband whenever prison officials neglect their responsibilities. NDOC AR 711.01(4)(A) (property acquired by incarcerated persons to be recorded on the property card "by the property officer"). That cannot be the rule.

This Court may take judicial notice of NDOC's Administrative Regulations because they are not subject to reasonable dispute. *See United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003); NDOC Administrative Regulations, *available at* https://doc.nv.gov/About/Administrative_Regulations/Administrative_Regulations__700_Series/ (NDOC public website, posting Administrative Regulations); Opening Br. 6, 19, 23 (citing Administrative Regulations).

behind the defendant's conduct." *Brodheim*, 584 F.3d at 1271 (quoting *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989)). "[T]iming can properly be considered as circumstantial evidence of retaliatory intent." *Pratt v. Rowland*, 65 F.3d 802, 808 (9th Cir. 1995).

The record shows a direct link between Bird's protected speech and Defendants' misconduct. Bird attested to a tight temporal nexus between his grievance and Paryga's threat: Paryga threatened "fight him or fight me" in direct response to Bird's request for a cell change. ER-226. There was no intervening interaction or event that could have caused that statement. Likewise, Defendants searched Bird's cell and confiscated his property shortly after his grievance, and the record is devoid of any reason that the officers would have been concerned about contraband, property theft, or any other violation that would justify searching a cell and removing property. ER-224, 226. The (at the least) "suspect timing" of that property seizure—"coming soon after" Bird's grievance—"tends to show" that the seizure was motivated a retaliatory aim. *Bruce*, 351 F.3d at 1288.

Defendants' responses, again, improperly invite this Court to adopt their version of the facts. Defendants say that Paryga's threat was "made due to Bird's admitted refusal to follow orders, not to retaliate against Bird." Opening Br. 21. That is just a rehash of their argument that the threat did not constitute adverse action and it fails for similar reasons: (1) it does nothing to show that Bird's interpretation—

that the statement was made in response to Bird's requested cell transfer—is unreasonable; and (2) it makes no sense to interpret "fight him or fight me" as Defendants do. *See* pp. 21-23, *supra*.

Defendants next say that any seizure of property was carried out because the property was not listed on Bird's property card, not because of his protected conduct. Opening Br. 21. But there is no record evidence that Defendants had that property card at the time they conducted their search and removed Bird's property. *See* ER-152, 154 (Defendants' declarations, failing to state that they were in possession of or had viewed Bird's property card prior to search); *see also* NDOC AR 711.01(4)(I)(3), 711.01(1)(A) (NDOC regulations requiring property cards to be stored and secured in a property room with restricted access). Even if there were such evidence, and at the risk of sounding like a broken record, the Court must interpret the record in the light most favorable to Bird, not Defendants. Because it is a reasonable interpretation that Defendants searched Bird's cell and took his property in retaliation for him complaining about his cellmate, the Court must draw that inference.

D. A jury could easily find that Defendants' misconduct chilled Bird's speech.

Bird satisfied the chilling effect element of a First Amendment retaliation claim. When a plaintiff, has shown significantly more than de minimis harm, he need not separately allege any chilling effect. *Brodheim*, 584 F.3d at 1270; *Rhodes*, 408

F.3d at 567 n.11 ("Alleging harm *and* alleging the chilling effect would seem under the circumstances to be no more than a nicety." (emphasis in original)). Bird has done that here: he explained that Paryga threatened him with physical violence and, together with Atherton, confiscated his personal possessions, including items critical to his religious worship. *See* pp. 19-25, *supra*. This Court need go no further.

Even if the Court were to inquire further, Bird has met this Court's test for a chilling effect. A plaintiff need show only that, as an objective matter, an official's actions "would chill or silence a person of ordinary firmness from future First Amendment activities." *Brodheim*, 584 F.3d at 1271 (emphasis omitted) (quoting *Rhodes*, 408 F.3d at 565-69). This Court has routinely recognized that the sort of physical threat and property confiscation that Bird experienced meets this standard. *See Brodheim*, 584 F.3d at 1270 ("mere threat of harm" "can have a chilling effect" (emphasis omitted)); *Rhodes*, 408 F.3d at 568-69 (arbitrary confiscation and destruction of property have chilling effect); *Packnett v. Wingo*, 471 Fed. Appx. 577 (9th Cir. 2012) (dismissal of claim improper where plaintiff alleged his First Amendment rights were chilled when defendants searched his cell and seized his property).

Defendants make several responses, none persuasive. First, they say that they were simply "reminding [Bird that] he would have a fight on his hands if he refused to follow orders" and "enforcing prison regulations." Opening Br. 21. As already

addressed, that Defendant-friendly reading of the record ignores Bird's reasonable reading that Defendants were physically threatening Bird and confiscating his property for raising a safety concern. *See* pp. 19-25, *supra*. It is untenable in this posture.

Second, Defendants contend that Bird was assigned to a new cell the same day—arguing, without any supporting authority, that giving Bird the relief he requested cured any chilling effect. Opening Br. 21-22. The law is clear, however, that prison authorities may not penalize an incarcerated person for exercising First Amendment petition rights. *Bradley*, 64 F.3d at 1279. That remains true whether or not those authorities also give the requested relief. It is not relevant that Bird was moved to a new cell. If a person asks for help and receives both help and ten slaps on the wrist, he is likely to be wary to ask for help again.

Finally, Defendants say that "Bird's speech was certainly not chilled as he submitted a grievance" against Defendants regarding his confiscated property. Opening Br. 22. But this Court has squarely rejected that sort of argument, explaining that the chilling inquiry is an objective one that asks about whether conduct "would chill or silence a person of ordinary firmness," not whether the conduct *did* chill the particular plaintiff. *Brodheim*, 584 F.3d at 1271 (citation omitted). Any other rule "'would be unjust' as it would 'allow a defendant to escape liability for a First Amendment violation merely because an unusually determined

plaintiff persists in his protected activity.'" *Id.* (quoting *Rhodes*, 408 F.3d at 569). Indeed, Defendants' arguments would obviate the First Amendment retaliation claim entirely as anyone choosing to press one would have shown that they were insufficiently chilled to bring it. *See Rhodes*, 408 F.3d at 569 (treating administrative grievance as fatal to suit "would establish a rule dictating that, by virtue of an inmate's having fulfilled the requirements necessary to pursue his cause of action in federal court, he would be precluded from prosecuting the very claim he was forced to exhaust").

Defendants ignore this binding law. Instead, they provide a string cite to out-of-circuit cases that are factually distinguishable. *See, e.g.*, *Hyberg v. Enslow*, 801 Fed. Appx. 647, 648, 651 (10th Cir. 2020) (no chilling from "isolated comment" telling plaintiff to enter a booth for a search "in a very demeaning and derogatory way" that did not amount to a physical threat). Defendants also rely on unpublished decisions that are out of step with this Court's binding precedent. *Compare Smith v. Israel*, 619 Fed. Appx. 839, 842 (11th Cir. 2015) (no chilling because plaintiff made a grievance after the alleged adverse action), *with Brodheim*, 584 F.3d at 1271 (a focus on whether a particular plaintiff was actually chilled is "incorrect" because chilling effect is an objective inquiry); *compare Huertas v. Sobina*, 476 Fed. Appx. 981, 984 (3d Cir. 2012) (confiscating property is not adverse action), *with Rhodes*,

408 F.3d at 568 (confiscating property is an adverse action). Applying binding and applicable law, Defendants' conduct had a chilling effect.

E. A reasonable factfinder could conclude there was no legitimate penological purpose for Defendants' misconduct.

A plaintiff must show that the prison official's "retaliatory action did not advance legitimate goals of the correctional institution." *Watison*, 668 F.3d at 1114 (quoting *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir.1985)). In the First Amendment retaliation context, prison officials may not articulate a "general justification for a neutral process." *Shepard v. Quillen*, 840 F.3d 686, 692 (9th Cir. 2016). The relevant question is whether the adverse action taken by prison officials under the circumstances "reasonably advanced" legitimate correctional goals. *Id.* at 691-92. A reasonable factfinder could (and likely would) find that Defendants were not advancing any legitimate goal in physically threatening Bird and confiscating his belongings.

1. There was no legitimate penological purpose for physically threatening Bird.

As a threshold matter, Defendants did not argue that there was a legitimate penological purpose for Paryga's "fight him or fight me" statement before the district court, so any such argument to that effect is forfeited. *Orr*, 884 F.3d at 932. But the argument also fails on the merits. Responding to an incarcerated individual's concern about physical safety with a threat of physical violence self-evidently does

not advance any legitimate penological goal. As this Court has recognized, a physical fight—such as the one Bird feared imminent—can "threaten th[e] safety" of not only those involved in the fight, but also of other incarcerated persons and prison staff. *Simmons v. G. Arnett*, 47 F.4th 927, 933 (9th Cir. 2022). Prisons thus have a strong interest in *encouraging* incarcerated persons to voice concerns about safety risks. Indeed, the "institutional consideration of internal security within the corrections facilities themselves" is "[c]entral to all other corrections goals." *Bell*, 441 U.S. at 546-47. Responding as Paryga did impedes that aim.

In an unsurprising refrain, Defendants argue that "[r]eminding Bird that he would have a fight on his hands if he did not follow orders, advances the legitimate penological goal of establishing discipline and order." Opening Br. 23. As already explained, Defendants' interpretation of that statement is unreasonable and improper in this procedural posture. *See* pp. 21-23, *supra*. Defendants offer no legitimate penological purpose for Paryga's action when the record is construed, as the Court must, in the light most favorable to Bird.

2. There was no legitimate penological purpose for confiscating Bird's property.

There is also no legitimate reason to conduct a cell search and confiscate religious books, legal papers, personal mail, and food in response to a grievance about safety. ER-226.

Defendants respond that "NDOC has a legitimate correctional goal to require inmates to list their property on property cards in order to prevent inmates from stealing property." Opening Br. 23. That may well be but, as the district court noted, such a goal "does not appear relevant to the given case." ER-13. There is no evidence that Defendants viewed Bird's property card before they searched his cell and confiscated his belongings; nor is there any evidence that either Defendant was concerned that Bird had stolen any property. *See* ER-152, 154 (Defendant declarations, containing no such explanation); *Shepard*, 840 F.3d at 692 (prison officials may not articulate a "general justification for a neutral process" but rather must show that the action they took under the circumstances "reasonably advanced [legitimate penological] goals"). Again, drawing all reasonable inferences in Bird's favor, Defendants confiscated Bird's property not because they were enforcing a prison rule about property cards, but instead because they were responding (improperly) to his legitimate grievance.

Even if Defendants' actions were taken to enforce a "confiscate-all-non-listed-property" policy, the record creates a genuine dispute as to whether that policy appropriately advances the prison's interest in preventing theft. As the Supreme Court has explained, "[i]f the connection between the regulation" (here, confiscation of non-listed property) "and the asserted goal" (here, preventing theft) "is 'arbitrary or irrational,'" then the regulation cannot be deemed "reasonably related to

legitimate penological interests." *Shaw*, 532 U.S. at 229 (citation omitted); *see also Brodheim*, 584 F.3d at 1272. Here, the record establishes that it is not reasonable to infer that all unlisted property is stolen or otherwise contraband. As Bird declared, property cards "are often not accurate as they are rarely updated" and some kinds of property—including food and religious books that Defendants took from Bird—are never listed on property cards. ER-19. Accepting that evidence as true—as this Court must do here—confiscating all property not listed on property cards will frequently lead to the confiscation of lawfully held property. Put differently, such a policy is an "arbitrary" and "irrational" way of preventing theft. Defendants' effort to show that they were advancing legitimate penological goals through such a policy, accordingly, fails.

* * *

The record shows that Bird voiced a safety concern and officials responded by threatening him with physical violence and taking his property. A reasonable factfinder could conclude that Defendants violated Bird's First Amendment right to petition the Government for redress of grievances.

II. BIRD'S RIGHT TO BE FREE FROM RETALIATION FOR RAISING A GRIEVANCE WAS CLEARLY ESTABLISHED.

Government officials are entitled to qualified immunity only if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231

(2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A right can be clearly established by either "controlling authority" or "a robust 'consensus of cases of persuasive authority.'" *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011)).

For a right to be clearly established, there need not be "a case directly on point." *Wesby*, 583 U.S. at 64. It is enough that the right's "contours are sufficiently clear that 'a reasonable official would understand that what he is doing violates that right.'" *Carroll v. Carman*, 574 U.S. 13, 16 (2014) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The inquiry's "focus is on whether the officer had fair notice that her conduct was unlawful." *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (per curiam) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

The conduct at issue here occurred in November 2018. At that time—and indeed, long before—case law established that officials could not physically threaten or confiscate the property of an incarcerated person for raising a grievance about the conditions of his confinement. Any reasonable official would have known that doing so violates the Constitution.

A. A reasonable officer would have known that he could not physically threaten an incarcerated person or confiscate his property in retaliation for raising a grievance.

1. By 2018, it was clearly established that threats of physical violence in response to an incarcerated person's grievance violate the First Amendment. *See,*

e.g., *Watison*, 668 F.3d at 1115-16 (prison officer cannot threaten to hit incarcerated person for filing a grievance). Indeed, even more vague threats have been found violative of the Petition Clause. *See Brodheim*, 584 F.3d at 1266, 1270 (officer's warning—"I'd also like to warn you to be careful what you write"—to grievant constitutes adverse action with a chilling effect). As courts have recognized, by 2018, no reasonable officer could have believed he could threaten to fight an incarcerated person for filing a grievance. *See Gleason v. Franklin*, 2017 WL 3203404, at *6 (C.D. Cal. May 16, 2017), *report and recommendation adopted*, 2017 WL 3197226 (C.D. Cal. July 26, 2017) ("[A] reasonable correctional officer . . . would have understood that it was unlawful to threaten an inmate with physical harm . . . in order to deter the inmate's filing of prison grievances."); *Barfield v. Lewis*, 2022 WL 18927426, at *5 (W.D. Wash. Nov. 16, 2022), *report and recommendation adopted*, 2023 WL 2330189 (W.D. Wash. Mar. 1, 2023) (citing *Watison* and concluding that "the law is clearly established that a prison official violates the First Amendment by threatening physical harm in response to a grievance"); *Owens v. Fugate*, 2022 WL 484997, at *5 (N.D. Cal. Feb. 16, 2022) (noting that *Shepard* decided in 2016 and *Brodheim* decided in 2009 "clearly established that the threat of harm" launched in response to a grievance violates the First Amendment).

That a law is clearly established can be shown not only by this Court's cases, but also by the law in other jurisdictions. *Shooter v. Arizona*, 4 F.4th 955, 963 (9th Cir. 2021) (citing *al-Kidd*, 563 U.S. at 742) (a robust consensus of persuasive authority can clearly establish the law). Not only does this Court's binding authority clearly establish that threatening physical harm constitutes adverse action, but a robust consensus of other circuits agree, and did so before 2018. *See Santiago v. Blair*, 707 F.3d 984, 992 (8th Cir. 2013) (threats to incarcerated person's physical safety support a retaliation claim); *Thaddeus-X v. Blatter*, 175 F.3d 378, 398 (6th Cir. 1999) (en banc) (per curiam), *abrogated on other grounds by Jones v. Bock*, 549 U.S. 199 (2007) (responding to speech with threats of physical harm constitutes adverse action); *see also Hutchins v. Clarke*, 661 F.3d 947, 956-57 (7th Cir. 2011) (public official's threat in response to speech is actionable retaliation); *Suarez Corp. v. McGraw*, 202 F.3d 676, 687 (4th Cir. 2000) (same).

2. It has also long been clearly established that confiscating a grievant's property is unconstitutional retaliation. This Court held in *Rhodes* that a plaintiff alleged an "archetype of a cognizable First Amendment retaliation claim" when he alleged, *inter alia*, that defendant prison guards "arbitrarily confiscated, withheld, and eventually destroyed his property" in response to the plaintiff's filing of grievances. *Rhodes*, 408 F.3d at 568. Courts in this Circuit have correctly recognized that *Rhodes* clearly established the principle that an officer cannot "steal or damage

a prisoner's property" in retaliation for filing a grievance. *Smith*, 2021 WL 930706, at *17 (treating this principle as "well-settled"); *see also, e.g.*, *Ahmed v. Ringler*, 2015 WL 502855, at *3 (E.D. Cal. Feb. 5, 2015), *report and recommendation adopted*, 2015 WL 1119675 (E.D. Cal. Mar. 11, 2015) (citing *Rhodes* for premise that breaking plaintiff's radio constitutes adverse action); *Saenz v. Chavez*, 2016 WL 739528, at *9 (E.D. Cal. Feb. 24, 2016), *report and recommendation adopted sub nom. Sanez v. Chavez*, 2016 WL 8731159 (E.D. Cal. Mar. 25, 2016) (similar).

Oher circuits have also recognized that responding to protected speech with property confiscation violates clearly established law. *See Bell v. Johnson*, 308 F.3d 594, 602 (6th Cir. 2002) (deeming law clearly established that searching a cell and confiscating legal papers and medical diet snacks in retaliation for incarcerated person's exercise of right of access to the courts could give rise First Amendment retaliation claim); *Penrod v. Zavaras*, 94 F.3d 1399, 1404 (10th Cir. 1996) (reversing grant of qualified immunity because it was clearly established that confiscating incarcerated person's hygiene items and legal materials violated the First Amendment).

B. Defendants' arguments that the law is not clearly established are unavailing.

Defendants' cursory arguments that the law is not clearly established misunderstand the appropriate level of specificity in the qualified immunity inquiry and (again) the posture of this case.

First, Defendants say that Bird has not shown clearly established law because he has not identified "binding authority that he has a protected right to immediately demand a bed move, or else a fight with his cellmate would ensue." Opening Br. 25. As explained, *see* pp. 15-16, *supra*, this mischaracterizes the record and would require drawing inferences in Defendants' favor, which this Court may not do. And in any event, the qualified immunity inquiry does not demand "a case directly on point." *Wesby*, 583 U.S. at 64 (quoting *al-Kidd*, 563 U.S. at 741). Instead, it is sufficient that the "unlawfulness of the officer's conduct" "follow immediately from the conclusion that the rule was firmly established." *Id.* (quoting *Anderson*, 483 U.S. at 641). This Court has regularly found it clearly established that a grievance was protected without identifying any precedent that confronted the precise subject matter of the grievance under consideration. *See, e.g.*, *Entler*, 872 F.3d at 1041 (clearly established that grievant had the right to complain about charges to his prison account, delay in receipt of legal documents, and denial of a permit without pointing to cases involving grievances about the same subjects); *Bruce*, 351 F.3d at 1286-87, 1290 (clearly established that grievant had the right to file complaints about inadequate prison conditions in administrative segregation, without pointing to cases involving grievances about the same issue); *Shepard*, 840 F.3d at 693 (clearly established that grievant had the right to report a prison official for misconduct without pointing to any cases involving a similar misconduct report). Defendants'

demand for a case involving a precisely identical grievance misstates the law of qualified immunity.

Second, making a now familiar argument, Defendants contend that, to show clearly established law, Bird would "have to point to binding authority that inmates have a right to disobey orders, without consequence, and need not follow NDOC regulations with respect to property ownership." Opening Br. 25. But, as explained, those are facts that accept Defendants' version of events as true, which the Court may not do in this posture. *See* p. 10, *supra*.

In short, Defendants ran afoul of clearly, specifically, and consistently articulated First Amendment law. They had more than "fair" notice that their conduct was unconstitutional. *Kisela*, 584 U.S. at 104. They are not entitled to qualified immunity.

III. THIS COURT DOES NOT ACCEPT NDOC FACTUAL FINDINGS AS TRUE.

Defendants close their brief by making a remarkable argument that this Court must accept as true any NDOC factual findings that are supported by substantial evidence. *See* Opening Br. 26-31. As a threshold matter, this is another argument that Defendants did not raise before the district court and that is thus forfeited here. *See Orr*, 884 F.3d at 932. The Court's analysis need proceed no further.

The argument is also wrong. Defendants start (Br. 26-28) by, correctly, noting that an incarcerated individual who does not properly exhaust the administrative

grievance process (*e.g.*, one who files an untimely grievance) cannot satisfy the exhaustion requirement of the Prison Litigation Reform Act ("PLRA"). *See Woodford v. Ngo*, 548 U.S. 81, 93 (2006). But Defendants extrapolate from that narrow, well-settled principle a broad, unsupported conclusion that the PLRA adopted *all* "jurisprudence of administrative law," including the principle that courts review agency action under an "arbitrary and capricious standard," and accept as true all agency findings that are supported by "substantial evidence." Opening Br. 28-29. That is not the law: a federal court addressing a summary judgment motion brought by defendant prison officials asks whether the officials are entitled to summary judgment, viewing the facts in the light most favorable to the plaintiff and drawing all reasonable inferences in the plaintiff's favor. *See Lowry v. City of San Diego*, 858 F.3d 1248, 1254 (9th Cir. 2017). The court does not apply an "arbitrary and capricious" standard or defer to factual findings made by state prison authorities.

The cases on which Defendants rely are inapposite. Their lead case, *Woodford*, holds only that the PLRA requires proper exhaustion at the administrative level, *see* 548 U.S. at 83-84; it in no way implies that the PLRA somehow bound federal courts to follow state prison officials' factual findings. Defendants' remaining cases all involve Article III review of disputes initially resolved by state commissions with regulatory jurisdiction over the intrastate operation of communications carriers under the Telecommunications Act of 1996 ("the Act").

See 47 U.S.C. § 153(48) (defining state commissions under the Act); 47 U.S.C. § 252 (setting out procedures for negotiation, arbitration, and approval of agreements regulated under the Act, including use of state commissions); *U.S. West Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1116-17 (9th Cir. 1999) (reviewing decision of state commission that decided, through arbitration, a dispute between two competing local communications carriers); *Centennial Puerto Rico License Corp. v. Telecomms. Regul. Bd. of Puerto Rico*, 634 F.3d 17, 20-25 (1st Cir. 2011) (similar); *MCI Worldcom Commc'ns, Inc. v. BellSouth Telecomms., Inc.*, 446 F.3d 1164, 1165-66 (11th Cir. 2006) (similar). That Defendants rely on so many cases about an area of law so far afield is a telling indication that they are wrong.

Nor is there any merit to Defendants' concern that failing to defer to NDOC findings somehow undermines the PLRA. *See* Opening Br. 30. The purpose of requiring exhaustion of internal prison grievance procedures is not to develop an irrefutable record for a federal court to rubber stamp. Rather, exhaustion "afford[s] corrections officials time and opportunity to address complaints internally" which can "improve prison administration and satisfy the inmate, thereby obviating the need for litigation." *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). Achieving that goal in no way requires deference to prison administrative findings on appeal.

To the contrary, it is Defendants' approach that would turn prison litigation on its head. In Defendants' view, whenever a prison grievance evaluator credits an

official's denial of misconduct, the findings of the grievance evaluator win upon judicial review—even if the evidence is simply one person's word against another's. If that rule were true, then virtually no Section 1983 prison litigation would ever survive the summary judgment stage. That is not the rule of this Court. *Johnson v. Ryan*, 55 F.4th 1167, 1201 (9th Cir. 2022) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)) (genuine factual disputes preclude summary judgment when a reasonable factfinder could return a jury verdict for the non-moving party).

This is far from the first case to seek interlocutory review of the denial on summary judgment of qualified immunity to prison officials. In reviewing such a denial, this Court considers the legal question of whether a defendant is entitled to qualified immunity "taking all facts and inferences therefrom in favor of the plaintiff." *Jeffers v. Gomez*, 267 F.3d 895, 905-06 (9th Cir. 2001) (citing *Behrens v. Pelletier*, 516 U.S. 299, 312-313 (1996)); *see also Schwenk v. Hartford*, 204 F.3d 1187, 1195 (9th Cir. 2000). Under that standard, Bird prevails.

CONCLUSION

This Court should affirm the district court's order denying qualified immunity for Defendants and remand the case for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2024, I electronically filed the foregoing document with the United States Court of Appeals for the Ninth Circuit by using the ACMS system. I certify that all parties or their counsel of record are registered as ACMS Filers and that they will be served by the ACMS system.

DATED: May 15, 2024

/s/ Lyndsey Franklin
Lyndsey Franklin
Counsel for Plaintiff-Appellee
Keith Paul Bird

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 10,269 words.

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DATED: May 15, 2024

/s/ Lyndsey Franklin
Lyndsey Franklin
Counsel for Plaintiff-Appellee
Keith Paul Bird

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiff-Appellee states that he does not know of any related case pending in this Court.

DATED: May 15, 2024

/s/ Lyndsey Franklin
Lyndsey Franklin
Counsel for Plaintiff-Appellee
Keith Paul Bird