**No. 24-1461**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

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CHRISTIAN JAMES LAURIA,

*Plaintiff-Appellant,*

v.

C.O. LIEB; C.O. FORSICKA; and C.O. RICH GERBER,

*Defendants-Appellees.*

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On Appeal from the United States District Court for the
Western District of Pennsylvania, No. 2:22-cv-486
Before Hon. Maureen P. Kelly, Magistrate Judge

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# REPLY BRIEF OF APPELLANT

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Devi. M. Rao
Christine A. Monta
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3308
christine.monta@macarthurjustice.org

*Counsel for Plaintiff-Appellant*

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Mr. Lauria has consistently maintained—and informed the district court three times in his pleadings—that he submitted a grievance concerning Defendants' "admittedly 'substantial' use of force" against him, ECF 35 at 2, but never received a response. *See* AA23 (Compl., at 7); AA39 (Am. Compl., at 7); AA42, AA45 (Pl.'s Brief in Opp., at 1, 4). When Defendants asserted for the first time at summary judgment that they had no record of receiving such a grievance, Mr. Lauria explained that he submitted the grievance the only way he could—by placing it in his solitary cell door slot for a corrections officer to retrieve and place in the grievance box—and that he did not know what happened to it after that. *See* AA42, AA45 (Pl.'s Brief in Opp., at 1, 4). The district court acknowledged this uncontested explanation but nevertheless dismissed Mr. Lauria's lawsuit on non-exhaustion grounds solely because he did not sign his pleadings under penalty of perjury. *See* AA14-15 (Memo. Op., at 10-11). Yet, the district court never advised Mr. Lauria that his explanation had to be made under penalty of perjury nor gave him an opportunity to correct the technical defect in the form of his evidence.

Defendants do not dispute, and therefore concede, that Mr. Lauria's explanation—that he submitted a grievance that was either lost or misplaced by jail officials—constitutes a textbook case of administrative remedies being "unavailable" for purposes of the Prison Litigation Reform Act. *See Ross v. Blake*, 578 U.S. 632, 642 (2016) (plaintiffs need not exhaust *unavailable* remedies); Opening Br. 20-24; Response Br. 14-15. That concession narrows this case to one principal question: did the district court err in granting summary judgment against Mr. Lauria, a *pro se* prisoner-plaintiff, for failing to comply with Rule 56's evidentiary requirements without first giving him either notice that his explanation needed to be under penalty of perjury or a meaningful opportunity to correct the technical form of his pleadings?

This Court has already recognized that such notice is required when a district court converts a motion to dismiss a *pro se* prisoner's complaint into a motion for summary judgment. *Renchenski v. Williams*, 622 F.3d 315 (3d Cir. 2010). Defendants urge this Court to cabin *Renchenski* to that situation but provide no good reason to do so. Indeed, seven other circuits require such notice regardless of how the summary judgment decision arose, and *Renchenski* expressly "agree[d] with" and

relied on their reasoning. *Id.* at 340. Defendants do not grapple with the rationales underlying these rules nor explain why those rationales would mandate notice in the conversion context but not when defendants move for summary judgment. And Defendants offer no response whatsoever to Mr. Lauria's argument that, even if *ex ante* notice were not required, the district court still should have provided him a meaningful opportunity to correct the form of his materials, as two other circuits require. In effect, Defendants ask this Court to break with every other circuit that has expressly considered the issue here, yet they fail to engage with the very caselaw they reject.

Defendants' alternative arguments for affirmance are similarly meritless. Defendants suggest that Mr. Lauria already had notice of Rule 56's requirements, citing an online self-representation manual, an affidavit Defendants submitted, and Rule 56 itself. But none of those sources alerted him to the key piece of information he needed: that his factual assertions had to be under penalty of perjury to be considered "evidence" at summary judgment.

Defendants also claim that any error was harmless because Mr. Lauria did not submit a "pink copy" of the grievance to corroborate his

explanation. But this Court has made clear that a prisoner-plaintiff is not required to submit physical evidence of exhaustion to survive summary judgment; a sworn affidavit attesting that he submitted a grievance is sufficient to raise a genuine issue of fact. Regardless, Mr. Lauria did in fact retain a "pink copy" of his grievance form and can submit it to the district court at the appropriate time on remand. It is the role of the district court, not this Court, to "resolve factual disputes regarding exhaustion" in the first instance. *Paladino v. Newsome*, 885 F.3d 203, 211 (3d Cir. 2018).

## ARGUMENT

### I. The District Court Erred By Granting Summary Judgment Against Mr. Lauria on the Ground that His Factual Assertions Were Not Signed Under Penalty of Perjury, Without Having Given Him Either Notice of that Requirement or an Opportunity to Correct the Technical Defect in His Summary Judgment Materials.

#### A. Defendants provide no good reason to depart from the majority of circuits and not apply *Renchenski*'s Rule 56 notice requirement to cases like Mr. Lauria's.

As Mr. Lauria explained in his opening brief, the vast majority of circuits—seven total—have held that, before ruling on a motion for summary judgment against a *pro se* prisoner-plaintiff, a district court must inform the *pro se* prisoner of Federal Rule of Civil Procedure 56's

evidentiary requirements, including the necessity of supporting factual positions with sworn affidavits. Opening Br. 25. In *Renchenski v. Williams*, 622 F.3d 315, 340 (3d Cir. 2010), this Court "agree[d] with the majority of [its] sister circuits" and held that district courts must "inform *pro se* prisoner-plaintiffs of the contours of Rule 56 and of the specific consequences for failure to submit an opposing affidavit" when converting a motion to dismiss into a motion for summary judgment.

Mr. Lauria explained in his opening brief why, although *Renchenski* specifically arose in the conversion context, its notice requirement for *pro se* prisoners cannot be cabined to that context, as the rationales underlying the requirement apply whenever a *pro se* prisoner faces a summary judgment decision, regardless of how that decision originated. Opening Br. 26-27. Indeed, only one of the cases *Renchenski* relied upon even involved the more unique situation of a district court converting a motion to dismiss into a motion for summary judgment, but even that Circuit understood the rule to be broader, as it had previously adopted a notice rule that applied to *any* motion resulting in summary judgment. *See Renchenski*, 622 F.3d at 339-40 (discussing *Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992)); *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C.

Cir. 1968) (adopting notice requirement where defendants moved for summary judgment).

Defendants acknowledge that the overwhelming weight of circuit court authority—upon which *Renchenski* relied—requires district courts to provide notice of Rule 56's evidentiary requirements in the circumstances here. *See* Response Br. 11 (admitting that the Second, Fourth, Sixth, Seventh, Ninth, Eleventh, and D.C. circuits have all adopted a notice requirement).[1] Defendants nevertheless urge this Court

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[1] Contrary to Defendants' claim, Response Br. 11, the Eighth and Tenth Circuits have not rejected the Rule 56 notice rule for *pro se* prisoners. While the Eighth Circuit has held that a district court did not err in failing to give "*particularized* instructions" to a "frequent litigator" who partially survived summary judgment and sought not to cure defects in the *form* of his summary judgment response but to add "specific factual support" to his unsuccessful claims, *Beck v. Skon*, 253 F.3d 330, 333 (8th Cir. 2001) (emphasis added), it has expressly declined to reach the more basic question whether a *pro se* prisoner-plaintiff is entitled to notice that affidavits are required to survive summary judgment. *See Roberson v. Hayti Police Dept.*, 241 F.3d 992, 994 (8th Cir. 2001) (recognizing the notice rule in other circuits but declining to reach whether to adopt it because plaintiff's verified complaint created a genuine issue of fact). Likewise, while the Tenth Circuit has, in an unpublished case, rejected a claim that district courts must "provide *specific notice* to a pro se prisoner litigant that he needs an affidavit from a medical expert," it was not asked to—and did not—decide whether to adopt the other circuits' more basic rule that district courts must provide, in plain language, "notice to a pro se prisoner litigant of the general requirements of summary (cont'd)

to break with the majority of circuits and limit *Renchenski*'s notice requirement solely to cases in which the district court converts a motion to dismiss into a motion for summary judgment. Defendants offer no compelling reason to do so.

First—and most tellingly—Defendants do not make any attempt to engage with the rationales given by the other circuits in adopting the notice rule. Mr. Lauria discussed these rationales in depth in his opening brief, explaining that the notice rule for *pro se* prisoners is grounded in a recognition of both the unintuitive nature of summary judgment practice combined with the "twin infirmities of imprisonment and proceeding

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judgment." *Halpin v. Simmons*, 234 F. App'x 818, 820-21 (10th Cir. 2007) (emphasis added).

Thus, as Mr. Lauria explained in his opening brief, only the Fifth Circuit has expressly rejected the notice rule, and it did so based on a misreading of the Sixth and Ninth Circuits' cases—which even the treatise Defendants rely on acknowledges. *Summary Judgment: Federal Law and Practice* § 9:10 ("[I]n *Martin v. Harrison County Jail*, the Fifth Circuit incorrectly asserted that it was joining the Sixth and Ninth Circuits."); *see* Opening Br. 32-34. As such, the "split in authority" Defendants assert, Response Br. 11, breaks down to seven other circuits requiring district courts to give Rule 56 notice to *pro se* prisoners in all circumstances and a single poorly reasoned Fifth Circuit decision rejecting the requirement. As explained herein and in Mr. Lauria's opening brief, however, even the Fifth Circuit requires district courts to provide *pro se* plaintiffs an opportunity to correct obvious defects in their summary judgment materials. *See* Opening Br. 34-35; *infra* p.15.

without counsel." *Rand v. Rowland*, 154 F.3d 952, 958 (9th Cir. 1998) (en banc); *see* Opening Br. 26-30. As these courts explain, it would be "inequitable . . . to expect an incarcerated pro se [plaintiff] to know that in response to the State's motion for summary judgment he cannot rely upon the papers already filed" but must reassert his factual claims in the form of affidavits. *Graham v. Lewinski*, 848 F.2d 342, 344 (2d Cir. 1988).

Defendants do not even acknowledge these rationales, much less attempt to refute Mr. Lauria's argument—recognized by the majority of circuits—that such rationales "apply with equal force" whenever a *pro se* prisoner faces a summary judgment decision, regardless of how that decision arose. Opening Br. 28. Instead, Defendants offer two arguments for breaking from the majority of circuit courts and limiting *Renchenski*'s notice rule to the conversion context, neither of which holds water.

First, Defendants suggest that this Court has already drawn that limitation, citing dicta from *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239 (3d Cir. 2013). Response Br. 11. But *Mala* does not foreclose this Court from applying *Renchenski*'s notice rule here.

*Mala* did not address the question whether a *pro se* prisoner-plaintiff facing a summary judgment decision is entitled to notice of Rule

56's evidentiary requirements. Rather, the question was whether a "seasoned," non-incarcerated *pro se* litigant who took his case all the way to trial and lost was entitled to reversal on the ground that the district court should have provided him a "how-to legal manual[]." 704 F.3d at 242, 246. This Court held that the district court "did not abuse its discretion by failing to provide a manual" and that, even if it had, any error was harmless because the plaintiff was "well acquainted with" civil litigation, had ready access to an online *pro se* manual at his local library, and "never identified anything that he would have done differently if" he had received such a manual from the court. *Id.* at 243, 246 n.5.

That unremarkable holding, concerning a distinct legal question in vastly different factual circumstances, has no bearing on the question here. Mr. Lauria—a *pro se* prisoner—is not asking for a "how-to legal manual" but notice that his factual assertions had to be under penalty of perjury, and the failure to give him such notice was dispositive, as he would have survived summary judgment had he submitted the exact same facts he did under penalty of perjury. And as explained below, Defendants have presented no evidence that Mr. Lauria had access to an online legal manual in prison, much less that any such manual gave him

notice that his factual assertions needed to be sworn to be considered at summary judgment. *See infra* pp.16-18.

Defendants quote dicta from *Mala* in which the Court characterized *Renchenski*'s "underlying principle" as being that, when a court "acts on its own in a way that significantly alters a pro se litigant's rights" such as "by converting one type of motion into a different type of motion," the court "should inform the pro se party of the legal consequences." Response Br. 11 (quoting *Mala*, 704 F.3d at 245). But again, *Mala* did not concern the circumstances in which a *pro se* prisoner is entitled to Rule 56 notice, so *Mala*'s discussion of *Renchenski* is only dicta and cannot be read to opine on—much less resolve—the question here.

Regardless, *Mala*'s assumptions about *Renchenski*'s rationale find no support in *Renchenski* itself. *Renchenski* was not grounded in concerns that a court "alters a pro se litigant's rights" by converting a Rule 12(b)(6) motion, *Mala*, 704 F.3d at 245, but on broader fairness concerns that a court "cannot properly act on a motion for summary judgment without giving the opposing party an opportunity to submit affidavits," and that for a *pro se* prisoner, a "reasonable opportunity

presupposes notice" and "knowledge of the consequences of not" filing affidavits, *Renchenski*, 622 F.3d at 340 (quoting *Neal*, 963 F.2d at 456).

That concern is not specific to the conversion context but exists whenever a court must "act on a motion for summary judgment." *Id.* Indeed, *Renchenski* relied on the out-of-circuit cases requiring notice in the more common situation where the defendant seeks summary judgment in the first instance. *Id.* And the Court seemed to contemplate that its notice rule would apply in that context, as it expressed an expectation that "governmental defendants" would "assist district courts" by including such notice "in their motions for summary judgment."[2] *Id.*

[2] Indeed, district courts within the Third Circuit have, since *Renchenski*, routinely provided *pro se* prisoners notice or an opportunity to remedy technical defects in their summary judgment papers even in the more typical summary judgment motion context. *See e.g.*, *Goodman v. Wood*, No. CV 20-1259, 2022 WL 20540336, at *2 n.3 (W.D. Pa. July 25, 2022), *report and recommendation adopted sub nom. Goodman v. Miceli*, No. 2:20-CV-01259, 2022 WL 3370169 (W.D. Pa. Aug. 16, 2022) (notice); *Tustin v. Strawn*, No. 2:18-505, 2020 WL 3084064, at *1-*2 (W.D. Pa. June 10, 2020) (notice); *Henderson v. Kerns-Barr*, No. 1:07-CV-0936, 2008 WL 2156357, at *2 n.5 (M.D. Pa. May 21, 2008), *aff'd*, 313 F. App'x 451 (3d Cir. 2008) (notice); *Lawrence v. Netzlof*, No. 10-433, 2012 WL 4498834, at *4 (W.D. Pa. Sept. 28, 2012) (opportunity to remedy).

This Court should rely on the actual reasoning within *Renchenski*, not on *Mala*'s dicta interpreting it in a wholly different factual situation.[3]

Second, Defendants argue that applying *Renchenski*'s notice requirement in all cases in which a *pro se* prisoner faces a summary judgment decision, not just in the conversion context, would transform the district court from a "neutral arbiter" into a "pro se litigant's advisor." Response Br. 14. That argument is misplaced. Mr. Lauria is not requesting—nor do the notice cases require—that the district judge provide "detailed instructions about how to oppose a motion for summary judgment," *id.*, but simply notice that his factual assertions had to be sworn to be considered. Even in *Mala*, where the plaintiff requested a much more extensive "how-to legal manual," the court held that while judges are not required to provide *pro se* litigants such a manual, doing so would not impair "judicial impartiality." 704 F.3d at 246; *see also*

[3] Defendants also cite an unpublished case, *Williams v. Office of Dist. Att'y Erie Cnty.*, 751 F. App'x 196, 199 (3d Cir. 2018), which relied on *Mala* to reject an argument that the district court erred by not providing Rule 56 notice outside the conversion context. Response Br. 10. Beyond being nonbinding, *Williams* is factually inapposite to Mr. Lauria's case. Unlike here, there was no indication in *Williams* of what difference notice would have made to the plaintiff nor any suggestion of a technical defect in his *pro se* pleadings, and the Court found "no indication that Williams was confused." *Williams*, 751 F. App'x at 199.

*Barker*, 651 F.2d at 1129 n.26 (giving a *pro se* litigant an opportunity to remedy technical defects in the form of his summary judgment materials does not turn the district court into "counsel for any party").

Nor is Mr. Lauria asking that he not be "held to the local rules surrounding summary judgment motion practice," *Mearin v. Folino*, 654 F. App'x 58, 61 (3d Cir. 2016), or be allowed to "flout procedural rules," *Vogt v. Wetzel*, 8 F.4th 182, 185 (3d Cir. 2021); *see* Response Br. 10, 14 (citing *Mearin* and *Vogt*). Rather, all Mr. Lauria argues is that the court should have provided him notice of what Rule 56 required so that he could have complied with it. In other words, Mr. Lauria is not seeking "special treatment" as a *pro se* prisoner, Response Br. 10 (citing *Mearin*, 654 F. App'x at 61), but simply an even playing field that would "tak[e] the sporting element out of litigat[ing]" against his counseled opponents, *Martin v. Reynolds Metals Corp.*, 297 F.2d 49, 56 (9th Cir. 1961) (holding that this was the purpose of the Federal Rules of Civil Procedure).

For this reason, providing notice to Mr. Lauria is consistent with the Federal Rules' "general policy" that "the merits rather than the technicalities of procedure and form . . . determine the rights of litigants." *Victory v. Manning*, 128 F.2d 415, 417 (3d Cir. 1942); *see also* Fed. R. Civ.

P. 1 (Rules "should be construed, administered, and employed by the court and the parties to secure the just . . . determination of every action and proceeding"). After all, "[s]ummary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial." *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940). Providing Rule 56 notice to *pro se* prisoner-plaintiffs serves to "eliminate 'procedural booby traps' which could prevent 'unsophisticated litigants from ever having their day in court.'" *Rowland*, 154 F.3d at 958-59 (quoting *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966)) (adopting the notice rule). There can thus be no argument that requiring notice here—as seven other circuits do—would impinge on judicial impartiality.

### B. Defendants do not defend the district court's failure to permit Mr. Lauria an opportunity to correct the technical defect in the form of his summary judgment materials.

Even if the district court were not required to provide Mr. Lauria *ex ante* notice of Rule 56's evidentiary requirements, once the court became aware that Mr. Lauria did not understand that his factual assertions needed to be in the form of sworn affidavits, it should have provided him an opportunity to correct the form of his materials.

As explained in Mr. Lauria's opening brief, even the Fifth Circuit—the only circuit to have rejected an *ex ante* notice requirement, *see supra* n.1—still requires that *pro se* prisoner-plaintiffs be afforded a meaningful *post hoc* opportunity to remedy technical defects in their summary judgment papers. Opening Br. 34-37 (discussing *Barker v. Norman*, 651 F.2d 1107, 1128-29 (5th Cir. 1981) (holding that the district court abused its discretion by not offering a chance to remedy where *pro se* plaintiff submitted specific and nonconclusory allegations but did not put them in a verified affidavit)). The Tenth Circuit has held the same. *See* Opening Br. 35-36 (discussing *Jaxon v. Circle K Corp.*, 773 F.2d 1138, 1140 (10th Cir. 1985), and *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990)).

Defendants do not address these cases, nor do they offer any argument in support of denying Mr. Lauria, a *pro se* prisoner-plaintiff, a "meaningful opportunity to remedy the obvious defects in his summary judgment materials" by presenting his factual assertions in a "properly verified affidavit." *Barker*, 651 F.2d 1129; *see Reynoldson*, 907 F.2d at 126 (courts must allow *pro se* plaintiffs to "remedy defects potentially attributable to their ignorance of federal law and motions practice").

Defendants' waiver of any argument on this point is reason alone to remand Mr. Lauria's case to allow him to correct the form of his materials. *See Reynolds v. Wagner*, 128 F.3d 166, 178 (3d Cir. 1997) ("[A]n argument consisting of no more than a conclusory assertion . . . will be deemed waived.").

### C. Neither the district court nor Defendants provided Mr. Lauria notice that his factual assertions had to be under penalty of perjury.

Defendants appear to suggest that Mr. Lauria in fact had notice that his factual assertions had to be in the form of sworn affidavits, citing an online Western District of Pennsylvania Guide to Self-Representation, an affidavit Defendants submitted in support of their summary judgment motion, and Rule 56 itself. Response Br. 12. None of these sources provided the requisite notice.

For starters, Defendants have not provided any evidence that Mr. Lauria in fact had access to the district court's online self-representation handbook. They provide a link to the document on the court website, Response Br. 12 n.4, but nowhere do Defendants state, much less offer facts to establish, either that Mr. Lauria was able to access the website online as an incarcerated prisoner or that the Pennsylvania Department

of Corrections or the district court provided the handbook to Mr. Lauria in prison. The mere existence of this manual online does not prove that Mr. Lauria ever actually saw it.

Regardless, even if Mr. Lauria had access to the online manual, that manual does not actually provide the notice that *Renchenski* and the other circuits require for *pro se* prisoners facing a summary judgment motion—*i.e.*, notice of the need "to submit an opposing affidavit" and the "specific consequences" of failing to do so. 622 F.3d at 340. While the manual states that a motion for summary judgment "must include a statement of undisputed facts . . . supported by admissible evidence, such as deposition testimony, affidavits, or relevant documents," nowhere does the manual advise that a party *opposing* a summary judgment motion must submit similar documents to have their factual assertions considered.[4] And even if a *pro se* prisoner-litigant could somehow divine that this language applied to parties opposing summary judgment as well as those seeking it, it would be unreasonable to expect *pro se* prisoner-

[4] U.S. Dist. Ct. Western Dist. Pa., *Representing Yourself in Federal District Court: A Guide to Self-Representation* (May 2021), at 40, https://www.pawd.uscourts.gov/sites/pawd/files/Pro_Se_handbook__May_2021.pdf.

plaintiffs to realize that papers *already filed*, such as Mr. Lauria's complaint, amended complaint, and summary judgment opposition, do not constitute such "relevant documents." As the Second Circuit has emphasized, it would be "inequitable, without a more explicit warning," to expect a *pro se* prisoner-plaintiff to know that "he cannot rely upon the *papers already filed*." *Graham*, 848 F.2d at 344 (emphasis added).

Defendants' claim that "Rule 56 itself" provides the requisite notice, Response Br. 12, fails for the same reason. Contrary to Defendants' contention, Rule 56 does not provide notice that a party disputing an issue of fact "must do so using an affidavit or declaration." *Id.* Rather, Rule 56 states only that factual positions must be supported by citing to "particular *materials in the record*, including depositions, *documents*, electronically stored information, affidavits or declarations . . . or *other materials*." Fed. R. Civ. P. 56(c)(1)(A) (emphasis added). But like with the self-representation handbook, Mr. Lauria had no reason to understand that his prior legal filings did not constitute such "materials in the record." *Id.* Indeed, Mr. Lauria even alerted the district court in his two requests for appointment of counsel that he did not understand

"legal jargin." AA28 (Motion to Appoint Counsel); AA46 (Renewed Motion to Appoint Counsel, at 1).

It is for precisely this reason that *Renchenski* and the notice cases on which it relied require district courts to provide prisoner-plaintiffs not just the bare *text* of Rule 56 but also a "short summary explaining its import that highlights the utility of" filing an opposing affidavit and the consequences of failing to do so. *Renchenski*, 622 F.3d at 340; s*ee also Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982) (requiring a "short and plain statement that any factual assertions in the movant's affidavits will be accepted . . . as true unless the plaintiff submits his own affidavits . . . contradicting the assertion"); *Neal*, 963 F.2d at 456-57 (same). The very premise of these cases is that Rule 56, by itself, does *not* provide *pro se* prisoners sufficient notice that summary judgment is, "contrary to lay intuition," essentially a "trial in miniature" such that "not submitting counter affidavits is the equivalent of not presenting any evidence at trial." *Lewis*, 689 F.2d at 102.

Finally, Defendants argue that Mr. Lauria had Defendants' declarations to "refer to as a form." Response Br. 12. Mr. Lauria's argument, however, is not that he did not know how to write an affidavit

but that he did not realize he needed to submit one in the first place. As other courts have held, it would "not be realistic to impute to a" *pro se* prisoner an "instinctual awareness" that the fact that counseled Defendants filed an affidavit meant that he too would need to do so for his factual assertions to be considered evidence. *Lewis*, 689 F.2d at 102.

Defendants' observation that Mr. Lauria declined more time to respond to their summary judgment motion, Response Br. 13, is similarly beside the point. Mr. Lauria did not suffer from lack of time but from an unawareness that his factual assertions had to be made under penalty of perjury. No amount of "additional time," *id.*, was going to help him cure the technical deficiency in his materials without notice that they were, in fact, deficient. "Mere time is not enough, if knowledge of the consequences of not making use of it is wanting." *Renchenski*, 622 F.3d at 340 (quoting *Neal*, 963 F.2d at 456) (cleaned up).

## II. The District Court's Failure To Give Mr. Lauria Either Notice of Rule 56's Requirements Or an Opportunity To Correct the Technical Deficiency in his Summary Judgment Materials Was Not Harmless.

There can be no question that the district court's failure to give Mr. Lauria either notice that his factual assertions had to be under penalty of perjury, or an opportunity to resubmit them under penalty of perjury,

was harmful to him. Had the district court done either, Mr. Lauria would have resubmitted his plausible and uncontested explanation about having submitted a grievance through his cell door slot in a "properly verified affidavit," *Barker*, 651 F.2d at 1129, and thereby created a genuine issue of material fact as to whether the Allegheny County Jail's administrative process was unavailable to him.[5]

Defendants contend, nevertheless, that the district court's error was harmless because Mr. Lauria "proffered insufficient evidence" that he in fact filed a grievance. Response Br. 1; *see id.* at 14-15. Specifically, Defendants point to the fact that Mr. Lauria did not submit a "pink copy" of his grievance form to corroborate his assertion that he submitted a grievance, and argue, without citation to any authority, that such corroborating physical evidence was necessary for Mr. Lauria to survive summary judgment. *Id.* at 15. This argument fails on multiple counts.

First, neither Rule 56 nor the PLRA requires a prisoner-plaintiff to provide physical proof of exhaustion to create a genuine issue of fact at

[5] As noted above, *supra* p.2, Defendants do not dispute that, if Mr. Lauria submitted a grievance that was subsequently lost or misplaced (whether intentionally or accidentally), that would constitute unavailability of administrative remedies under *Ross v. Blake*, 578 U.S. 632, 642 (2016); *see also* Opening Br. 20-24.

summary judgment. To the contrary, this Court has held that a prisoner-plaintiff's "single, non-conclusory affidavit" attesting that he submitted a grievance form "is sufficient to defeat summary judgment" on exhaustion grounds. *Paladino v. Newsome*, 885 F.3d 203, 209-10 (3d Cir. 2018). That is true even where, as here, the prison claims to have no record of the grievance; after all, this Court recognized, "it is not unheard of for a grievance form to be lost." *Id.* at 210.

*Paladino* makes clear that, had Mr. Lauria presented the explanation he provided below in a sworn affidavit or verified complaint, that evidence would have been sufficient to raise a genuine issue of fact as to whether he submitted the grievance. A reasonable factfinder could credit Mr. Lauria's plausible and uncontested assertion that he did, in fact, submit a grievance to a corrections officer through the door slot of his cell and draw the reasonable inference that it was simply lost, misplaced, or even intentionally mishandled. *See id.* (on summary judgment, the non-movant's evidence "is to be believed and all justifiable inferences are to be drawn in his favor" (cleaned up)). Defendants' unsupported suggestion that Mr. Lauria needed to submit additional,

physical proof to corroborate his explanation is contrary to *Paladino* and general summary judgment principles.[6]

To the extent Defendants' argument is that Mr. Lauria's explanation that he submitted a grievance is not *credible* because he did not corroborate his assertion by attaching a pink slip to his pleadings below, that argument is both premature and directed at the wrong tribunal. Whether Mr. Lauria's assertion that he submitted a grievance is credible is a factual determination for the district court to make, should it choose to, post-summary judgment; this Court does not make credibility determinations and certainly cannot do so at the summary judgment stage. *See Paladino*, 885 F.3d at 209-10.

As explained in Mr. Lauria's opening brief, because PLRA exhaustion is a "threshold" issue, once a district court has determined that genuine issues of fact exist as to exhaustion, it may, in its discretion, "elect[] to resolve factual disputes regarding exhaustion" without the

[6] Defendants express concern that "accepting an unsupported oral declaration" without requiring physical corroboration would permit a prisoner to "game the administrative remedy system" by falsely claiming to have filed a grievance and "taking the chance that he will be believed." Response Br. 15. But our system entrusts factfinders to make precisely those sorts of credibility determinations.

participation of a jury. *Id.* at 211; *see also Small v. Camden County*, 728 F.3d 265, 271 (3d Cir. 2013); Opening Br. 14 n.6.[7] To do so, the court must first provide "notice to the parties and an opportunity to respond," which could entail a full-scale evidentiary hearing but must, at a minimum, include "an opportunity to submit material relevant to exhaustion that are not already before it." *Paladino*, 885 F.3d at 210-11. Here, because the district court granted summary judgment against Mr. Lauria, it never reached the stage of making factual findings on exhaustion. Should it elect to do so on remand, it must, under *Paladino*, provide Mr. Lauria an opportunity to submit additional materials relevant to exhaustion.

While the pink copy of the grievance would certainly be evidence "relevant to exhaustion," *id.*, it is not the only possible evidence a prisoner could submit, nor would the lack of a pink slip necessarily mean the

[7] The Supreme Court has granted certiorari on the question whether prisoners "have a right to a jury trial concerning their exhaustion of administrates remedies where disputed facts regarding exhaustion are intertwined with the underlying merits of their claim." Petition for Writ of Certiorari at i, *Perttu v. Brandon*, No. 23-1324 (U.S. June 17, 2024). That case has no bearing here, however, as the fact of whether ACJ lost Mr. Lauria's grievance is not intertwined with the merits of his excessive-force or deliberate indifference claims.

prisoner is lying about having submitted a grievance. Indeed, there could be any number of reasons an incarcerated plaintiff cannot produce a pink copy of a grievance he submitted years earlier. It could have gotten lost or destroyed in the intervening years. It could have been confiscated by a correctional officer. Or he may not even have received a pink copy to begin with—after all, the fact that the jail's written policy refers to pink copies does not mean that the system is infallible or always functioning as it should. In such circumstance, a plaintiff could submit an affidavit explaining why he does not have a pink slip. He could also submit other evidence, such as an affidavit from a third party attesting that he personally witnessed the prisoner submit a grievance.

Here, in fact, Mr. Lauria did receive and retain the pink copy of his grievance form and can submit it to the district court on remand.[8] This

[8] Mr. Lauria was not in physical possession of the pink copy when litigating this case below: It is undersigned counsel's understanding that Mr. Lauria mailed the pink copy to his home approximately ten months before filing this lawsuit, after an ACJ officer informed him that he could not bring the pink copy with him when he was transferred from ACJ to a Pennsylvania Department of Corrections facility. Mr. Lauria cannot be faulted for failing to explain this series of events below as a *pro se* litigant; Defendants did not even mention the pink copy in their summary judgment papers below much less argue that Mr. Lauria "should have (cont'd)

Court should remand to allow Mr. Lauria an opportunity to present this evidence, which Defendants concede will constitute "evidence sufficient to defeat the Defendants' [exhaustion] defense." Response Br. 15.

* * *

The district court threw out Mr. Lauria's *pro se* prisoner civil-rights claims solely on the ground that he did not sign his factual allegations under penalty of perjury, without giving him either notice that his allegations needed to be under penalty of perjury or a meaningful opportunity to resubmit them as such. The court's failure to give Mr. Lauria either notice of Rule 56's requirements or a meaningful opportunity to remedy the defect in his materials was dispositive; had Mr. Lauria submitted his assertions under penalty of perjury, he would have raised a genuine issue of fact on PLRA exhaustion sufficient to survive summary judgment. Because affirming the district court's decision would force this Court to break with all its sister circuits and

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the pink copy" if he had indeed "submitted a grievance." Response Br. 15; *see* ECF 72 at 1. Had they done so, Mr. Lauria would have been on notice of the pink slip's relevance and provided this explanation about its whereabouts in his *pro se* briefing to the district court. Regardless, Mr. Lauria was recently released on parole and has recovered the pink copy from his home and provided it to undersigned counsel.

contravene the purposes of the Federal Rules of Civil Procedure, this Court should hold that the district court erred in granting summary judgment against Mr. Lauria without giving him either the notice *Renchenski* and seven other circuits require or a meaningful opportunity to bring his materials into compliance with Rule 56's requirements.

## CONCLUSION

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

Respectfully submitted,

*/s/ Christine A. Monta*
Devi M. Rao
Christine A. Monta
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3308
christine.monta@macarthurjustice.org

*Counsel for Plaintiff-Appellant*

## CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,921 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Dated: October 31, 2024

*/s/ Christine A. Monta*
Christine A. Monta

## CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2024, I electronically filed the foregoing *Reply Brief of Appellant* with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 31, 2024

*/s/ Christine A. Monta*
Christine A. Monta

## CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.

Dated: October 31, 2024

*/s/ Christine A. Monta*
Christine A. Monta

## CERTIFICATE OF VIRUS CHECK

Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was performed on this electronic brief/file using Sophos Endpoint Security, version 2024.2.4.1.0, last updated October 30, 2024 and that no virus was detected.

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*/s/ Christine A. Monta*
Christine A. Monta