23-6557

IN THE

United States Court of Appeals for the Second Circuit

CARLTON WALKER

Plaintiff-Appellant,

v.

OFFICER RICHARD SENECAL, OFFICER BRIAN BENWARE,

Defendants-Appellees,

ANDREW M. CUOMO, LETITIA JAMES, HON. JANET M. DEFIORE, HON. JENNEY RIVERA, LESLIE E. STEIN, HON. EUGENE M. FAHEY, HON. MICHAEL J. GARCIA, HON. ROWAN WILSON, ANTHONY J. ANNUCCI, CARL J. KOENIGSMANN, BRUCE S. YELICH, S. BARTON, JANE DOES 1-3, D. RANNEY,

Defendants.

On Appeal from the United States District Court for the Northern District of New York, No. 9:20-cv-00082-AMN-CFH
District Judge Anne M. Nardacci

REPLY BRIEF OF PLAINTIFF-APPELLANT CARLTON WALKER

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INTRODUCTION

When Mr. Walker attempted to exercise his First Amendment rights to seek redress from the courts and prison officials—rights that the Supreme Court has emphasized are "among the most precious of liberties safeguarded," *See United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1976)—Defendant Officer Senecal launched a months-long course of retaliation against him. To carry out the campaign intended to silence Mr. Walker, Officer Senecal recruited other correctional personnel, including Defendant Officer Benware, to intimidate, harass, and harm Mr. Walker.

It began when Officer Senecal discovered that Mr. Walker was suing him and other correctional officers in federal court. He berated Mr. Walker, destroyed his complaint, and told Mr. Walker he shouldn't be complaining about prison conditions and suing prison personnel. Shortly thereafter, Officer Senecal threatened to murder Mr. Walker or throw him into solitary confinement if he grieved the complaint destruction. One day later, two officers attacked Mr. Walker and reminded him that he could get killed for lodging grievances against Officer Senecal. Days later, at Officer Senecal's behest, Officer Benware fired Mr. Walker from his law library job and fabricated a misbehavior report that landed Mr. Walker in restrictive housing—just as Officer Senecal had threatened. For months thereafter, Officer Senecal and others continued to attack and intimidate Mr. Walker. Remarkably, this case contains

express admissions of retaliation. Officer Senecal expressly stated he destroyed Mr. Walker's complaint *because* Mr. Walker was filing a lawsuit against prison personnel, and Officer Benware went so far as to apologize to Mr. Walker for retaliating against him at Officer Senecal's behest.

Defendants' responses to this damning record miss the mark. To start, their handling of the facts is entirely improper. In many places defendants simply make large-scale omissions to argue that certain allegations are de minimis or conclusory. They also misapply the appropriate pleading and summary judgment standards. And, they misstate the adverse action and causation requirements while disregarding on-point caselaw.

ARGUMENT

I. The District Court Erred In "Narrowing" Mr. Walker's Retaliation Claim.

The district court was correct to partially deny Officer Senecal's motion to dismiss Mr. Walker's First Amendment retaliation claim. Officer Senecal concedes this and does not dispute the district court's partial denial of the motion to dismiss on this basis. AB at 23.[1] Mr. Walker's allegations— that Officer Senecal destroyed his draft amended complaint and threatened to murder or throw him into restrictive housing if he complained about it—state a textbook retaliation claim. Officer

[1] This brief will refer to the Opening Brief as "OB" and the Answering Brief as "AB," followed by the appropriate page number.

Senecal also appears to concede that analyzing a course of retaliation piecemeal is improper under the law of this circuit. *See* AB at 34.

Nonetheless, Officer Senecal argues that the district court was correct to "narrow" Mr. Walker's retaliation claim by excluding the course of retaliation that followed Officer Senecal's threats. AB at 23. As Officer Senecal sees it, the excluded retaliatory conduct did not amount to adverse action and the district court was therefore correct to exclude the bulk of violence and intimidation directed at Mr. Walker. AB at 24-27. Officer Senecal is wrong.

Start with the conduct the district court excluded from its analysis: it was generally known by Officer Senecal's colleagues that Mr. Walker filed grievances against him, OB at 55; Officer Senecal's colleagues warned Mr. Walker against filing additional grievances against Officer Senecal, *id.*; just one day after Officer Senecal threatened to murder Mr. Walker or sanction him with solitary confinement, two of Officer Senecal's colleagues physically attacked Mr. Walker and reminded him that he could get killed for filing grievances against Officer Senecal, *id.*; Officer Senecal himself violently assaulted Mr. Walker, OB at 10; Officer Senecal ordered others to violently assault Mr. Walker, OB at 9-11; Officer Senecal's threat to send Mr. Walker to solitary confinement was consummated, OB at 13; and all of these acts occurred during a short window of time that followed Mr. Walker's protected conduct, OB at 46-49.

The district court erred in excluding these allegations at the pleading stage because doing so violates the heart of the adverse action inquiry. The objective of the adverse action inquiry is to ascertain whether a prisoner of ordinary firmness would be deterred from exercising their constitutional rights based on the entire course of retaliation. *See Kotler v. Boley*, No. 21-1630, 2022 WL 4589678, at *2 (2d Cir. Sept. 30, 2022). Therefore, the entire context and the entire course of retaliation is necessary to answer the question. *Id.*; *Hayes v. Dahlke*, 976 F.3d 259, 272 (2d Cir. 2020); *Ford v. Palmer*, 539 Fed. App'x 5, 7 (2d Cir. 2013) (internal citation omitted).

The question is *not* whether each act alleged *alone* in a course of retaliation would deter an ordinary prisoner from exercising his rights. Rather, the court must ask whether the allegedly retaliatory conduct—which includes every act alleged, whether a single act or multiple acts in a course of retaliation—would deter a prisoner of ordinary firmness from exercising their rights. Here, the answer is yes. OB at 29-32. Indeed, this Court has previously held that some of the excluded facts—even when considered in isolation—satisfy the elements of a First Amendment retaliation claim. OB at 34-42.

Because the district court inappropriately excluded these allegations, and Officer Senecal offers no convincing defense of that decision, this Court should reverse the partial grant of Officer Senecal's motion to dismiss.

II. A Reasonable Jury Could Find That Officer Senecal's Months-Long Course of Retaliation Constituted Adverse Action.

By the time the district court reached summary judgment, Officer Senecal's long course of retaliation was whittled down to two acts. That was error. *See supra* at I. And the full course of events which the district court should have considered at summary judgment establish a textbook case of retaliation under this Court's precedent. OB at 29-49.

Officer Senecal concedes that the only allegations considered by the district court at summary judgment—the complaint destruction and the threat to murder Mr. Walker or throw him into solitary confinement—satisfied the protected activity and causation elements of a First Amendment retaliation claim. AB at 35. Officer Senecal's sole argument, therefore, is that Mr. Walker failed to establish adverse action based on three reasons. *Id*.

First, Officer Senecal argues that the complaint destruction would not deter an ordinary prisoner because it was a de minimis act that did not harm or deter Mr. Walker. AB at 30-31. Second, Officer Senecal argues that his threats to murder and torture Mr. Walker were not followed by subsequent action and therefore could not constitute adverse action. AB at 31. And, third, Officer Senecal argues that such threats would not deter an ordinary prisoner from exercising his constitutional rights. AB at 35. Taken in turn, all three arguments fail.

A. Officer Senecal's destruction of Mr. Walker's complaint would deter an ordinary prisoner from exercising his constitutional rights.

First, Officer Senecal argues that the complaint destruction would not deter an ordinary prisoner from exercising his rights because it was a de minimis act and purportedly did not deter *Mr. Walker* from filing another amended complaint later. AB at 30-31. This line of argument is steeped in error. First, Officer Senecal erroneously applies a subjective standard when there is no question that an objective standard applies. *Gill v. Pidlypchak,* 389 F.3d 379, 381 (2d Cir. 2004) (reiterating that an objective standard applies in the prison context, and that the "objective test applies even where a particular plaintiff was not himself subjectively deterred; that is, where he continued to file grievances and lawsuits."). Thus, it is wholly irrelevant to the adverse action inquiry whether Mr. Walker himself eventually filed an amended complaint or not.

Second, Officer Senecal is wrong that ripping apart a prisoner's draft civil rights complaint in an ongoing federal case is de minimis. Physically destroying a prisoner's draft legal complaint to intentionally obstruct them from accessing their First Amendment rights to the court is in and of itself a substantial harm—one that this Court has held is "precisely the sort of oppression that" Section 1983 claim's

"are intended to remedy." *Morello v. James*, 810 F.2d 344, 347 (2d Cir. 1987).[2] This is especially true when a plaintiff alleges that the complaint destruction was specifically designed to deter a plaintiff from exercising his constitutional rights—which we know to be true because Officer Senecal said so multiple times. OB at 39-40; *Green v. Johnson*, 977 F.2d 1383, 1389 (10th Cir. 1992) (explaining that a prisoner's First Amendment right requires the prison to allow and assist inmates with preparation and filing of legal materials, and thus prison officials are not permitted to affirmatively hinder, impede, or delay access to courts) (internal citations omitted).

B. Officer Senecal's threats to murder Mr. Walker and throw him into solitary confinement amounted to adverse action.

Second, Officer Senecal argues that Mr. Walker fails to establish adverse action because a threat without subsequent action cannot constitute adverse action. AB at 31. But Officer Senecal's threat *was* followed by a lengthy list of subsequent actions from physical violence to consummating his threat to throw Mr. Walker into restrictive housing. OB at 9-11. Based on these facts alone, a reasonable jury could find that a prisoner of ordinary firmness would be deterred from exercising his constitutional rights. *Gill*, 389 F.3d at 384; OB at 28-42. Add to it that Officer

[2] And, as noted in the opening brief, multiple appellate courts agree on this point and have explicitly held that destruction of legal materials can deter an ordinary prisoner from exercising his constitutional rights. OB at 39-40.

Benware, who fabricated the misbehavior report that sent Mr. Walker to restrictive housing, admitted to and apologized for retaliating against Mr. Walker on Officer Senecal's behalf, and it is even more likely that a reasonable jury would find the retaliation sufficient to deter an ordinary prisoner from exercising his rights. And that is all Mr. Walker needs to establish the adverse action element. But, as explained in painstaking detail in the opening brief there is more—much more. *See supra* at I; *see also* OB at 28-33.

The cases that Officer Senecal relies on—*Counterman v. Colorado*, 600 U.S. 66, 74 (2023); *Hayes*, 976 F.3d 259; *Hill v. Chalanor*, 128 F. App'x 187, 189 (2d Cir. 2005); *Dorsey v. Fisher*, 468 F. App'x 25, 27 (2d Cir. 2012); *Benjamin v. Pillai*, 794 F. App'x 8, 13 (2d Cir. 2019)—do nothing to advance his position. To start, *Counterman*, which concerns the dividing line between protected speech and criminal rhetoric, is inapposite—Officer Senecal is not a criminal defendant. Officer Senecal's citation to a statement from *Hayes* that "maybe all of this would go away," AB at 31-32, is no more helpful. Whatever that vague suggestion means, it cannot be equated to Officer Senecal's specific threat to murder Mr. Walker and throw him into restrictive housing for filing grievances. Restrictive housing is among the most dreaded punishments for prisoners for many reasons, including its corrosive psychological impacts that have driven many prisoners to suicide and self-harm and

its deplorable physical conditions.[3] The opaque statement from *Hayes* doesn't threaten anyone with life threatening harm, whereas Officer Senecal's threats to murder Mr. Walker or throw him into solitary confinement do implicate such harm and were partially consummated. *Hill v. Chalanor* also offers no help. There, the court dismissed a retaliation claim because there were no allegations that defendants carried out the threats. 128 F. App'x at 189. But, Mr. Walker *did* allege that Officer Senecal's threat was carried out because he languished in restrictive housing for an entire month. OB at 13. And, of course, that was not the only threat that was consummated—as Mr. Walker alleged, Officer Senecal's words were followed by months of intimidation, harassment, and physical abuse. OB at 9-14.

Dorsey v. Fisher is also inapposite because the plaintiff in that case didn't allege physical harm, 468 F. App'x at 27, whereas Mr. Walker alleged many such examples. OB at 9-11. Finally, *Benjamin v. Pillai* misses the mark completely. There, the Court held that the plaintiff's allegation that a doctor called him "a pain in the ass" and threatened to refuse medical treatment was not adverse action because, notwithstanding the threat, the doctor was actually prescribing him

[3] Mr. Walker explained that the restrictive housing threat horrified him, amounting to "psychological torture" because restrictive housing is a "most severe punishment." JA243, JA246; *see also Davis v. Ayala*, 576 U.S. 257, 288 (2015) (Kennedy, J., concurring) (noting that "…the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.").

treatment. 794 Fed. App'x at 13. That name-calling and poor bedside manner would not deter an ordinary prisoner from exercising his constitutional rights has no bearing on this case.

C. Officer Senecal's threats were credible and thus would deter an ordinary prisoner.

Officer Senecal also argues that his threats to murder Mr. Walker or throw him in restrictive housing were so severe and disproportionate that no ordinary prisoner would believe them. AB at 35.

That argument disregards many of Mr. Walker's allegations and the realities of prison.[4] For example, upon overhearing Officer Senecal's threats, another officer warned Mr. Walker that Officer Senecal had a reputation for being violent and "crazy" and *would in fact* throw Mr. Walker into restrictive housing or kill him if he continued complaining. OB at 31. And still other officers attacked Mr. Walker and reminded him how easily he could get killed for filing grievances against Officer Senecal.[5]

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[4] Multiple cases, including *Hayes* and *Gill*, include fact patterns where prison personnel retaliate against inmates or otherwise punish them by throwing them into restrictive housing. *Hayes*, 976 F.3d 259 at 265-266; *Gill*, 389 F.3d 379 at 384.

[5] Officer Senecal argues that Mr. Walker also fails to establish adverse action because he "did not introduce evidence of any prior use of force by Officer Senecal." AB at 35. But Officer Senecal provides no citation to suggest that such an allegation is necessary. In any event, Mr. Walker did introduce evidence of Officer Senecal's violent conduct. *Supra* at I.

What's more, an ordinary prisoner on the receiving end of Officer Senecal's threat who was actually sent to restrictive housing for a full month would certainly regard the threat as genuine precisely because it was carried out. The consummation of that threat would also leave an ordinary prisoner in fear for his life waiting for the other shoe to drop. Surely, that would deter one from exercising their constitutional rights.

Notably, the weight of authority is against Officer Senecal because this Court has held that less extreme threats amounted to adverse action. OB at 30-46. Officer Senecal attempts to distinguish one such case, *Ford*, 539 Fed. App'x 5, where this Court held that "vague" threats can actually enhance their effectiveness, by citing to district court cases that predate *Ford*. AB at 34. But beyond the fact that they are district court cases, they are a factual mismatch—the vague statements alleged in those cases, such as, "your day is coming," and "one day he and I will party," are distinguishable for two reasons. First, they are far less specific than Officer Senecal's threats and don't indicate the harm that is being threatened. Second, Mr. Walker's adverse action claim does not rest on the singular existence of an isolated threat; Officer Senecal orchestrated and instigated an entire campaign of retaliation on the heels of his threat.

III. Mr. Walker Plausibly Stated a First Amendment Retaliation Claim against Officer Benware.

Officer Benware's retaliation fits neatly into a tight timeline of textbook retaliation: at Officer Senecal's behest, and in the midst of his campaign against Mr. Walker, Officer Benware sought Officer Senecal's counsel, OB at 53; fired Mr. Walker from a coveted law library job for the most inconsequential of transgressions, OB at 52-53; and fabricated a misbehavior report that landed Mr. Walker in restrictive housing for an entire month, the very punishment that Officer Senecal threatened Mr. Walker with, *id*. This Court has long held such a course of conduct sufficient to state a claim for retaliation at the pleading stage. *Davis v. Goord*, 320 F.3d 346, 354 (2d Cir. 2003); *Kotler*, 2022 WL 4589678, at *2; *Gill*, 389 F.3d at 381.

Officer Benware rightly concedes that those allegations satisfy the protected activity and adverse action thresholds. AB at 18-19. He only argues that Mr. Walker did not adequately allege causation. AB at 19-22. Officer Benware's response boils down to three arguments. First, he argues that Mr. Walker's allegations are too conclusory. Second, he argues that Mr. Walker failed to show Officer Benware knew about the protected activity. And, third, that Mr. Walker failed to plausibly allege the misbehavior report was fabricated. None are convincing.

A. Mr. Walker plausibly alleged that Officer Senecal recruited Officer Benware.

First, Mr. Walker's allegations that Officer Senecal recruited Officer Benware to join his retaliatory campaign are not conclusory. They are supported by factual allegations and the reasonable inferences that flow therefrom—which must be taken as true at the pleading stage. It is simply not true, as Officer Benware argues, that Mr. Walker "only" alleged that Officer Benware went to the same area where Officer Senecal was. AB at 20. Mr. Walker alleged *much* more than that to show that Officers Benware and Senecal worked together to retaliate against him. OB at 28-32, 43-49, 51-55.

What's more, Officer Benware's habit of cherry-picking allegations and then calling them conclusory violates this Circuit's guidance to view retaliation claims within the entire context that they arise. *Kotler*, 2022 WL 4589678, at *2; *Hayes*, 976 F.3d 259 at 272. This means the entire course of retaliation, which included retaliation by multiple individuals, must all be viewed together and not broken apart piecemeal. For example, in *Kotler*, this Court analyzed the First Amendment retaliation claim against multiple officers, which was comprised of three separate events, together—it did not parse the course of retaliation and ask which officer was involved in which event. 2022 WL 4589678 at *1.

Mr. Walker's complaint's robust factual basis, including an extremely tight timeline, and the reasonable inferences that flow therefrom, plausibly allege

coordination. For example, Mr. Walker worked in the law library for approximately eight months without any issues with Officer Benware. OB at 53. Then, one day after Officer Senecal threatened to murder Mr. Walker or throw him into restrictive housing if Mr. Walker ever complained about him, two officers physically attacked Mr. Walker. OB at 52. Eight days after Officer Senecal's threat, Mr. Walker went to the law library and asked Officer Benware to make copies of his legal materials. OB at 12. Officer Benware closely examined Mr. Walker's materials and then physically left the law library to go consult with Officer Senecal about Mr. Walker. *Id.* Suddenly, after returning, Officer Benware ordered Mr. Walker to sit outside. JA109.

Then, Officer Benware returned and abruptly ordered Mr. Walker to return to his cell. *Id.* Hours later, Officer Benware suddenly fired Mr. Walker from his coveted job in the law library and was reluctant to answer Mr. Walker's questions about why he was being fired. OB at 12. Officer Benware tried to deflect by saying "he didn't want to speak about" why Mr. Walker was getting fired because "the situation [w]as above him" and "out of his hand[s]." *Id.* On this same day, again, eight days after Officer Senecal's threat to murder Mr. Walker or throw him into restrictive housing, Officer Benware also fabricated the misbehavior report that consummated Officer Senecal's exact threat and landed Mr. Walker in restrictive housing for an entire month. OB at 13. Many reasonable inferences flow from these allegations.

First, Mr. Walker alleged an extremely tight timeline of temporal proximity—Officer Benware fired Mr. Walker and fabricated the misbehavior report a mere eight days after Officer Senecal launched his retaliatory campaign. OB at 9-13. The timing was no coincidence. The passing of only eight days between a retaliatory threat and executed retaliation gives rise to the reasonable inference that both officers were working together. And, this Court has held that this kind of inference is not only a reasonable inference but one that independently satisfies the causation element. *Bennett v. Goord*, 343 F.3d 133, 138 (2d Cir. 2003).

The timing of events is one of Mr. Walker's key allegations and an independent basis to satisfy causation. Mr. Walker alleged only a few days between the threat and onslaught of retaliation. OB at 9-13. As to that, defendants have no response. Defendants simply disregard all of Mr. Walker's allegations about the timeline of events and its impact on causation and adverse action. And, another significant fact that establishes the plausibility of causation is that Mr. Walker worked in the law library for eight months without incident, and then was suddenly fired from his job and slapped with a fabricated misbehavior report eight days after Officer Senecal threatened to retaliate against Mr. Walker. OB at 52-53.

Second, the alleged sequence of events on October 10 also gives rise to a reasonable inference that Officers Senecal and Benware were working together. Officer Benware examined Mr. Walker's legal materials and then went to consult

with Officer Senecal about them. OB at 12. These facts give rise to multiple reasonable inferences. It's reasonable to infer that Mr. Walker's legal materials might have included complaints about the prison, perhaps even materials related to the complaint Officer Senecal destroyed, given that he had an ongoing federal case complaining about prison conditions. It's also reasonable to infer that both defendants discussed Mr. Walker, his legal cases possibly complaining about prison conditions, and his grievances against the prison because Mr. Walker was only fired from his job hours later—after working in the law library for eight months without incident. Defendants completely ignore this.

Third, there is a reasonable inference that both officers worked together because Officer Benware executed Officer Senecal's threat. Officer Senecal threatened Mr. Walker with a very specific punishment, and then eight days later Officer Benware fabricated the misbehavior report that subjected Mr. Walker to the very same punishment—Mr. Walker languished in restrictive housing for an entire month. OB at 9-13. To carry out the exact same threat so soon after it was made was no coincidence. Simply put, there's a reasonable inference that Officers Senecal and Benware were working together because Officer Benware carried out Officer

Senecal's threat—the record clearly shows it and defendants don't dispute that Mr. Walker received this punishment.[6]

Fourth, Officer Benware's statements also give rise to reasonable inferences that he was acting on someone else's behalf and that the decision to fire Mr. Walker originated elsewhere. Officer Benware said that "he did not want to speak about" the decision to fire Mr. Walker from the law library because "the situation" was "above him" and "out of his hands." OB at 12. Officer Benware's statements communicate some reluctance to fire Mr. Walker and give rise to a few plausible inferences, including that Officer Benware fired Mr. Walker to carry out an order from someone else, or was heavily influenced by someone else—such as Officer Senecal.

B. Mr. Walker was not required to show Officer Benware was aware of his protected activity.

Officer Benware argues that Mr. Walker failed to show that he knew about Mr. Walker's protected activity. AB at 20. But, this Court doesn't require Mr. Walker to do so at the pleading stage. In fact, this Court has considered and rejected

[6] Defendants do not meaningfully contest that Mr. Walker was subjected to restrictive housing for an entire month, and merely parse words to try to specify that Mr. Walker's punishment confined him to his cell for 30 days. But that is what restrictive housing is. Mr. Walker was subjected to "cube confinement", OB at 12, which is a form of restrictive housing that is "equivalent of keeplock" at the Bare Hill facility where Mr. Walker was residing. *Waters v. Gallagher*, No. 9:15-cv-804-LEK-DEP, 2017 WL 9511163, at *6 (N.D.N.Y. Aug. 7, 2017), *report and recommendation adopted in part*, No. 9:15-cv-804- LEK-DEP, 2017 WL 3913282 (N.D.N.Y. Sept. 7, 2017).

defendant's argument—that causation fails because there isn't enough evidence that the defendant was aware of the plaintiff's protected activity. *Espinal v. Goord*, 558 F.3d 119, 129 (2d Cir. 2009). In *Espinal*, this Court found that it was a "legitimate inference" that the defendant learned about the lawsuit from another officer that he interacted with who *was* aware of the lawsuit. *Id.* at 130. And, this principle was reiterated by this Court just last year when it held that causation was satisfied when a record contains evidence that there were officers in the facility who knew the plaintiff as someone who filed grievances. *Gunn v. Beschler*, No. 22-971, 2023 WL 2781295, at 3 (2d Cir. 2023).

The same legitimate inferences apply here. Mr. Walker alleged that multiple officers around the prison knew that he filed grievances against Officer Senecal and warned him against doing so—the same circumstances this Court held were sufficient in *Gunn*. OB at 54-55. Defendant simply ignores Mr. Walker's detailed allegations and the reasonable inferences that flow therefrom on this point that were carefully laid out in the opening brief. *See id*.[7] But, Mr. Walker alleged even more

[7] Defendant also disregards whole swaths of Mr. Walker's allegations that he was known around the prison as someone who filed grievances against Officer Senecal: (1) that two unnamed officers, who knew about Mr. Walker's grievances against Officer Senecal, physically beat Mr. Walker for filing such grievances, (2) that Mr. Walker was known around the prison for having filed grievances against Officer Senecal, as evidenced by the aforementioned bathroom assault on October 2, (3) that on October 9, another officer told Mr. Walker that he couldn't file grievances against Officer Senecal and warned him against doing so, (4) that in front of Mr. Walker, Officer Senecal instructed multiple officers to physically assault Mr. Walker,

than the plaintiff in *Gunn.* Mr. Walker alleged that Officer Benware took Mr. Walker's legal materials and consulted Officer Senecal about them in the hallway. Then, Officer Benware returned and immediately ordered Mr. Walker to return to his cell. Hours later, Mr. Walker was fired and slapped with a fabricated misbehavior report. OB at 12-13. Thus, Mr. Walker is also entitled to the legitimate inference that Officers Benware and Senecal discussed Mr. Walker's lawsuit and grievances that day.

C. Mr. Walker plausibly alleged the misbehavior report was fabricated.

Defendant next tries to argue that Mr. Walker fails to satisfy causation by challenging the truthfulness of Mr. Walker's allegations that the misconduct report for failing to mop was fabricated. AB at 20. But that is improper at this stage of litigation. At the pleading stage, the allegations of a *pro se* prisoner must be taken as true and liberally construed "to raise the strongest arguments they suggest." *See Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). Specifically, defendant argues that if a person "actually committed" a charged action, they cannot state a retaliation claim based on those charges. AB at 22. But Mr. Walker alleges that he did not refuse

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presumably for filing grievances against him, and that these officers obeyed Officer Senecal, (5) that another officer, who overheard Officer Senecal threatening to murder Mr. Walker or throw him into restrictive housing if he ever filed a grievance against him, warned Mr. Walker against filing grievances, explaining that Officer Senecal was serious about his threat and would actually kill Mr. Walker if he complained. OB at 9-13.

to mop, and a determination of whether Mr. Walker "actually committed" the charge is a question for summary judgment. That order of operations makes sense since the burden-shifting question for this Court is whether defendant managed to "show by a preponderance of the evidence that they would have disciplined the plaintiff 'even in the absence of the protected conduct.'" *Hynes v. Squillace*, 143 F.3d 653, 657 (2d Cir. 1998) (quoting *Mt. Healthy City School Dist. v. Doyle,* 429 U.S. 274, 287 (1977)). In fact, the sole case defendant cites for the proposition—*Hayes v. Dahlke*, AB at 22—survived the pleading stage and was resolved at summary judgment.

And, defendant is wrong on this point because Mr. Walker *did* plausibly allege that the misbehavior report was fabricated. For one, Mr. Walker specifically alleged that the misbehavior report was fabricated, and Mr. Walker's allegations must be taken as true at the pleading stage. *Chambers v. Time Warner, Inc*., 282 F.3d 147, 152 (2d Cir. 2002). Furthermore, there is substantial inferential evidence that it was fabricated. Take for example the fact that Mr. Walker worked with Officer Benware for months without incident, and then, suddenly, the same day he gets fired from the law library he is slapped with a misbehavior report accusing him of doing something he claims that he didn't do. And, add to it that only eight days earlier Officer Senecal threatened to throw Mr. Walker into restrictive housing. To top it all off, this misbehavior report subjects Mr. Walker to the exact punishment Officer Senecal threatened him with if Mr. Walker ever dared to complain about him. It's also no

coincidence that the fabricated misbehavior report and Mr. Walker's firing both occurred on the same day—after eight months of smooth sailing with Officer Benware and eight days after Officer Senecal threatened Mr. Walker with vicious retaliation.

Defendant is, of course, free to dispute Mr. Walker's allegation and submit evidence to prove that the misbehavior report was not fabricated at summary judgment. And, if at summary judgment defendant presents convincing evidence that Mr. Walker *did* commit the infraction in question that could harm Mr. Walker's chances of prevailing on the merits of his claim. But, that is only assuming that a singular allegation of a fabricated misbehavior report constitutes the totality of Mr. Walker's support to satisfy the causation element—and that is far from the truth in Mr. Walker's case.

As to defendant's argument that a fabricated misbehavior report shouldn't form the basis of allowing a plaintiff to proceed to discovery—this Court disagreed in *Gill* and *Hayes* where it reversed denials of plaintiff's retaliation claims that included fabricated misbehavior reports. *Gill*, 389 F.3d at 384; *Hayes*, 976 F.3d at 273-84.

Defendant's responses do not meaningfully challenge Mr. Walker's claim against Officer Benware on causation. Mr. Walker's allegations and the reasonable inferences that flow therefrom, including an independent basis for causation with

tight temporal proximity, easily clear this Circuit's requirements at the pleading stage. This Court should reverse the district court's grant of Officer Benware's motion to dismiss.

* * *

To reiterate, viewed under the appropriate pleading standards, Mr. Walker's factual allegations satisfy this Court's causation requirements. This Court must liberally construe *pro se* pleadings to state the strongest claims they allege. *See Burgos*, 14 F.3d at 790. And, it must view Mr. Walker's retaliation claim against Officer Benware in the entire context in which it arose, as part of Officer Senecal's retaliatory campaign. *Kotler*, 2022 WL 4589678, at *2; *Hayes*, 976 F.3d at 272. It bears emphasis that Mr. Walker was a *pro se* litigant, and this Court has emphatically held that "dismissal of a *pro se* claim as insufficiently pleaded is appropriate in only the most unsustainable of cases." *Boykin v. KeyCorp,* 521 F.3d 202, 216 (2d Cir. 2008).[8]

[8] Defendant's argument that Mr. Walker's failed to carry his burden at the pleading stage under *Boddie v. Schnieder*, 105 F.3d 857, 862 (2d Cir. 1997), borders on the frivolous. In *Boddie*, the sum total of plaintiff's allegation was: "because Petitioner refused Officer B. Schnieder pass on March 4, 1993[,] [s]he conspired with Officer D. DeWald to retaliate." *Boddie v. DeWald*, No. 94 CIV. 2538 (LAP), 1996 WL 164681, at *2 (S.D.N.Y. Apr. 9, 1996), *aff'd sub nom. Boddie v. Schnieder*, 105 F.3d 857 (2d Cir. 1997). That this Court considered such allegations "unsupported, speculative, and conclusory," *Boddie*, 105 F.3d at 862, does little to undermine Mr. Walker's well-supported claim against Officer Benware. *See supra* at II.C.

Mr. Walker's factual allegations, which include murder and consummated restrictive housing threats that were followed by additional retaliatory abuse and violence, comfortably clear this Circuit's causation bar. *See* OB at 50-56. This Court has found causation to be satisfied on lesser facts and temporal proximity than Mr. Walker has alleged. *See Hayes,* 976 F.3d at 273; *Espinal v. Goord*, 558 F.3d at 129-130; *Brandon v. Kinter*, 938 F.3d 21, 43 (2d Cir. 2019).

Mr. Walker's direct and circumstantial evidence easily clears this Court's causation requirements. As to direct evidence, Mr. Walker alleged that Officer Benware retaliated against him by firing him from the law library and fabricating a misbehavior report against him that landed him in an entire month of restrictive housing. And, Mr. Walker's circumstantial evidence of temporal proximity alone, a mere eight days between a murder and torture threat and Officer Benware's retaliation which executed said threat, is more than sufficient for a *pro se* plaintiff to establish causation at the pleading stage based on this Circuit's caselaw. *Bennett*, 343 F.3d at 138; *Espinal*, 558 F.3d at 130; *Hayes*, 976 F.3d at 273; OB at 50-55.

IV. Defendants Are Not Entitled To Qualified Immunity.

Defendants are not entitled to qualified immunity. The district court failed to reach this question below, and this Court has emphasized that it is not a court of first review. When a district court fails to reach an issue, it is proper to leave it for the district courts to decide in the first instance on remand. *Tanvir v. Tanzin*, 894 F.3d

449, 472 (2d Cir. 2018) ("Here, the district court decision below did not address whether Defendants were entitled to qualified immunity… We remand to the district court to make such determination in the first instance."). Specifically, this Court has a well-established practice of not reaching qualified immunity when the district court does not reach it.[9] And Mr. Walker's case presents no reason to violate this settled practice.

Officer Benware did not claim qualified immunity, and thus has forfeited it at the pleading stage, but he is entitled to move for summary judgment based on qualified immunity. *Blissett v. Coughlin*, 66 F.3d 531, 538 (2d Cir. 1995).

Officer Senecal's claim to qualified immunity, both in the district court and here on appeal, amounts to no more than an afterthought and his arguments are not well-developed in either court which is another reason for this Court not to reach the issue. *See Francis v. Coughlin*, 849 F.2d 778, 780 (2d Cir. 1988). And, Mr. Walker's First Amendment retaliation claim against Officer Senecal has raised sufficient issues of fact to preclude summary judgement for Officer Senecal. *Eng*, 858 F.2d at 895 (remanding qualified immunity claims to the district court because the district

[9] *Eng v. Coughlin*, 858 F.2d 889, 895 (2d Cir. 1988) (citing *Francis v. Coughlin*, 849 F.2d 778, 780 (2d Cir. 1988)) ("[I]t is our practice in this Circuit when a district court fails to address the qualified immunity defense to remand for such a ruling."); *Musso v. Hourigan*, 836 F.2d 736, 742 (2d Cir. 1988) (same); *Jackler v. Byrne*, 658 F.3d 225, 243 (2d Cir. 2011) (same); *Holland*, 758 F.3d at 223 (same); *Tanvir*, 894 F.3d at 472 (same).

court did not consider qualified immunity in the first instance and because the plaintiff raised sufficient issues of fact to preclude summary judgment.).

In the alternative, Officer Senecal's qualified immunity claim should be denied. Mr. Walker has established every element of a First Amendment retaliation claim against both defendants. *See* OB at 27-51.

And, it has long-been clearly established within this Circuit that retaliating against a prisoner for engaging in protected conduct like petitioning a court or filing grievances is unlawful. *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996); *Franco v. Kelly*, 854 F.2d 584, 588-89 (2d Cir. 1988). For example, *Graham* stated that "[t]his Court has held that retaliation against a prisoner for pursuing a grievance violates the right to petition government for the redress of grievances guaranteed by the First and Fourteenth Amendments…". 89 F.3d at 80; *See also Espinal*, 558 F.3d at 129 (quoting *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995), *abrogated on other grounds by Tangreti v. Bachman*, 983 F.3d 609 (2d Cir. 2020)) (holding that prison officials are prohibited from retaliating against prisoners who exercise the right to petition for redress and grievance).[10] This Court takes that a step further by saying that the "intentional obstruction of a prisoner's right to seek redress of grievances—in both judicial *and* administrative forums—is 'precisely the sort of oppression that…section 1983 [is] intended to remedy." *Franco*, 854 F.2d 588

[10] *Gill*, 389 F.3d at 384; *Hayes*, 976 F.3d at 273.

(alterations in original) (quoting *Morello v. James*, 810 F.2d 344, 347 (2d Cir. 1987)); *see United Mine Workers*, 389 U.S. at 222. There can be no serious question about whether the right was clearly established in this case, and defendants were clearly on notice of the unlawfulness of their conduct at the time they committed the violation.

The cases above involve prisoners with allegations analogous to Mr. Walker, but Mr. Walker doesn't even need highly analogous caselaw to defeat qualified immunity because the misconduct at issue—threatening to kill a prisoner and throw him in solitary confinement to punish him for exercising his First Amendment rights to file lawsuits or grievances and deter additional complaints—is obviously unconstitutional. *Graham*, 89 F.3d at 90; *Franco*, 854 F.2d at 588; *Morello*, 810 F.2d at 347. The Supreme Court has long held that in "obvious cases," such as Mr. Walker's case, general principles provide the necessary fair warning to government officials that their actions are unlawful. *See*, *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741-46 (2002). In fact, the Supreme Court has reiterated this principle twice in the last couple of years. *See Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020); *McCoy v. Alamu,* 141 S. Ct. 1364 (2021) (Mem). The general principles at play here are that First Amendment rights are bedrock constitutional rights, and that even prisoners are entitled to petition the courts and administrative bodies for redress and to be free from retaliation for it. *Franco*, 854 F.2d at 588-89. Thus, it is obvious that

threatening to kill someone or throw them into solitary confinement for exercising these essential constitutional rights, let alone consummating them, violates the First Amendment.

Finally, the last reason to deny qualified immunity is that Mr. Walker alleges an intentional violation of the First Amendment in that both defendants admitted to retaliating against Mr. Walker. *See* OB at 12-13. But intentional violations of the law are not shielded by qualified immunity. *Thorpe v. Clarke*, 37 F.4th 926, 930-931 (4th Cir. 2022). Defendants were on notice that their conduct was unconstitutional. Officer Benware apologized for it and Officer Senecal explained that he was retaliating against Mr. Walker to get him to stop complaining. That is the sort of knowing violation of the law that qualified immunity does not shield. *Id*.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's orders partially granting Officer Senecal's motion to dismiss, granting Officer Benware's motion to dismiss in full, and granting Officer Senecal's motion for summary judgment.

Dated: January 25, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(4)(B) because this brief contains 6,565 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

Dated: January 25, 2024

/s/ Mehwish Shaukat
Mehwish Shaukat

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2024, I electronically filed the foregoing Reply Brief of Plaintiff-Appellant Carlton Walker with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 25, 2024

/s/ Mehwish Shaukat
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