

No. 17-635

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IN THE  
**Supreme Court of the United States**

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KEVIN SNODGRASS, JR.,  
*Petitioner,*

v.

S.L. MESSER; M.L. COUNTS; C. BISHOP;  
E.R. BARKSDALE; J. BENTLEY; JOE FANIN;  
TORI RAIFORD; GARRY A. ADAMS; HAROLD CLARK,  
*Respondents.*

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**On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Fourth Circuit**

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**BRIEF OF PRISONERS' RIGHTS GROUPS AS  
AMICI CURIAE IN SUPPORT OF PETITIONER**

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### **QUESTIONS PRESENTED**

1. Whether the First Amendment protects the speech of a prisoner who tells an officer that she intends to file a grievance regarding the officer's misconduct?
2. Whether labeling a prisoner a "snitch" in a prison setting constitutes an adverse action for purposes of a First Amendment retaliation claim?

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<i>Smith v. Mosley</i> , 532 F.3d 1270 (11th Cir. 2008) .....	12
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 OTHER AUTHORITIES	
Alaska Dep’t of Corr. Policies & Procedures, <i>Prisoner Grievances</i> (Oct. 13, 2006), <a href="http://bit.ly/2kGyOH4">http://bit.ly/2kGyOH4</a> .....	13

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Jeff Bingman, N.M. Att’y Gen., <i>Report of the Attorney General on the February 2 and 3, 1980 Riot at the Penitentiary of New Mexico</i> (June 1980), <a href="http://bit.ly/2Bt7YtZ">http://bit.ly/2Bt7YtZ</a> .....	20
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Joe Davidson, <i>At Prison Bureau, a Fear To Speak Up</i> , Wash. Post (July 14, 2011) .....	18, 19
D.C. Dep’t of Corr., <i>Inmate Grievance Procedure (IGP)</i> (Oct. 4, 2014), <a href="http://bit.ly/2BuGrbu">http://bit.ly/2BuGrbu</a> .....	13
Del. Dep’t of Corr., <i>Medical Grievance Process</i> (Nov. 7, 2004, rev. Sept. 2, 2015), <a href="http://bit.ly/2kGqYx2">http://bit.ly/2kGqYx2</a> .....	13
Fed. Bureau of Prisons, <i>Inmate Information Handbook</i> (Nov. 2012), <a href="http://bit.ly/2kexADx">http://bit.ly/2kexADx</a> .....	15
Fed. Judicial Ctr., <i>Survey of Harm to Cooperators: Final Report</i> (2016), <a href="http://bit.ly/2kg36Ry">http://bit.ly/2kg36Ry</a> .....	8, 21
Ga. Dep’t of Corr., <i>Statewide Grievance Procedure</i> (Dec. 10, 2012), <a href="http://bit.ly/2BFhSbN">http://bit.ly/2BFhSbN</a> .....	15
Jacob Gershman, <i>Why Life for ‘Snitches’ Has Never Been More Dangerous</i> , Wall St. J. (June 20, 2017) .....	21
John J. Gibbons & Nicholas De B. Katzenbach, <i>Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons</i> , 22 Wash. U. J.L. & Pol’y 385 (2006).....	7, 10
Samuel Gilbert, <i>How a Bloody Prison Massacre Became a Tourist Hotspot</i> , The Daily Beast (Aug. 10, 2015).....	20



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	Page(s)
Haw. Dep't of Pub. Safety, <i>Informal Resolution Procedure</i> (July 1, 2015), <a href="http://bit.ly/2CZmvOr">http://bit.ly/2CZmvOr</a> .....	15
Jessica A. Hinman, <i>Sexual Assault of Male Inmates: Prevalence, Characteristics, and Inmate Perceptions</i> (Dec. 5, 2008) <a href="http://bit.ly/2Btz6Zz">http://bit.ly/2Btz6Zz</a> .....	19
Human Rights Watch, <i>No Escape: Male Rape in U.S. Prisons</i> , <a href="http://bit.ly/2kJETm1">http://bit.ly/2kJETm1</a> .....	18
Idaho Dep't of Corr., <i>Grievance &amp; Informal Resolution Procedure</i> (Sept. 1, 1995), <a href="http://bit.ly/2jdXh6a">http://bit.ly/2jdXh6a</a> .....	13
Ill. Dep't of Corr., <i>DR 504 Grievance Procedures</i> (Sept. 30, 2003), <a href="http://bit.ly/2l8Mfxs">http://bit.ly/2l8Mfxs</a> .....	13
Ind. Dep't of Corr., <i>Offender Grievance Process</i> (Jan. 1, 2010), <a href="http://bit.ly/2kdYQIB">http://bit.ly/2kdYQIB</a> .....	13
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Jeremy Kahn, <i>The Story of a Snitch</i> , <i>The Atlantic</i> (Apr. 2007) .....	17
Kan. Dep't of Corr., <i>Disciplinary Reports &amp; Grievances</i> , (Jan. 8, 2014), <a href="http://bit.ly/2Czvncu">http://bit.ly/2Czvncu</a> .....	13
Priyah Kaul, <i>et al.</i> , Michigan Law Prison Information Project, <i>Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey</i> (Oct. 18, 2015), <a href="http://bit.ly/2oOVQRg">http://bit.ly/2oOVQRg</a> .....	13

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	Page(s)
Raymond G. Kessler & Julian B. Roebuck, <i>Snitch</i> , in <i>Encyclopedia of American Prisons</i> (Marilyn D. McShane & Frank D. Williams III eds., 1996) .....	18
La. Dep't of Pub. Safety & Corr., <i>Administrative Remedy Procedure/Disciplinary Process Administrative Remedy Procedure</i> (July 10, 2013), <a href="http://bit.ly/2ktgX6S">http://bit.ly/2ktgX6S</a> .....	13
Mass. Dep't of Corr., <i>Inmate Grievances</i> (May 5, 2017), <a href="http://bit.ly/2Bviy3o">http://bit.ly/2Bviy3o</a> .....	15
Md. Dep't of Pub. Safety & Corr. Servs., <i>Informal Resolution Procedure</i> (Apr. 1, 1993), <a href="http://bit.ly/2BniWUP">http://bit.ly/2BniWUP</a> .....	15
Me. Dep't of Corr., <i>Prisoner Grievance Process, General</i> (Jan. 13, 2003, rev. Aug. 15, 2012), <a href="http://bit.ly/2yTQ9RL">http://bit.ly/2yTQ9RL</a> .....	14
Mich. Dep't of Corr., <i>Prisoner/Parolee Grievances</i> (July 9, 2007), <a href="http://bit.ly/2kHq5nT">http://bit.ly/2kHq5nT</a> .....	14
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Miss. Dep't of Corr., <i>Grievances</i> , <a href="http://bit.ly/2CzEKIZ">http://bit.ly/2CzEKIZ</a> .....	14
Mo. Dep't of Corr., <i>D5-3.2 Corr., D5-3.2 Offender Grievance</i> (Jan. 2, 2009), <a href="http://bit.ly/2BIVm25">http://bit.ly/2BIVm25</a> .....	14
Mont. Dep't of Corr., <i>Inmate Grievance Program</i> (Apr. 1, 1997, rev. Feb. 27, 2013), <a href="http://bit.ly/2BFJzkM">http://bit.ly/2BFJzkM</a> .....	15

## TABLE OF AUTHORITIES—Continued

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N.C. Dep’t of Pub. Safety, <i>Administrative Remedy Procedure</i> (Aug. 1, 2013), <a href="http://bit.ly/2AXBqHr">http://bit.ly/2AXBqHr</a> .....	15
N.D. Dep’t of Corr. & Rehab., <i>Inmate Handbook</i> (Feb. 2015) <a href="http://bit.ly/2BIWIMz">http://bit.ly/2BIWIMz</a> ; .....	14
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Nev. Dep’t of Corr., <i>Inmate Grievance Procedure AR740.04-.05</i> (Mar. 7, 2017), <a href="http://bit.ly/2CW85OO">http://bit.ly/2CW85OO</a> .....	14
N.J. Dep’t of Corr., <i>Inmate Handbook</i> (2014), <a href="http://bit.ly/2kQ6kL7">http://bit.ly/2kQ6kL7</a> .....	14
N.M. Corr. Dep’t, <i>Inmate Grievances</i> (Sept. 1, 1990, rev. July 12, 2017), <a href="http://bit.ly/2CzygKd">http://bit.ly/2CzygKd</a> ; .....	15
N.Y. State Corr. & Cmty. Supervision, <i>Inmate Grievance Program</i> (Jan. 20, 2016), <a href="http://on.ny.gov/2Bvt2jg">http://on.ny.gov/2Bvt2jg</a> .....	15
Okla. Dep’t of Corr., <i>Inmate/Offender Grievance Process</i> (Oct. 11, 2005), <a href="http://bit.ly/2DgFIen">http://bit.ly/2DgFIen</a> .....	14
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Antonieta Pimienta, Note, <i>Overcoming Administrative Silence in Prisoner Litigation: Grievance Specificity and the “Object Intelligibly” Standard</i> , 114 Colum. L. Rev. 1209 (2014) .....	4
R.I. Dep’t of Corr., <i>Inmate Handbook</i> (May 2007), <a href="http://bit.ly/2AVTNMK">http://bit.ly/2AVTNMK</a> .....	14

## TABLE OF AUTHORITIES—Continued

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James E. Robertson, <i>A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison</i> , 81 N.C. L. Rev. 433 (2003).....	18
James E. Robertson, “ <i>One of the Dirty Secrets of American Corrections</i> ”: <i>Retaliation, Surplus Power, and Whistleblowing Inmates</i> , 42 U. Mich. J.L. Reform 611 (2009) .....	18
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S.C. Dep’t of Corr., <i>Inmate Grievance System</i> (May 12, 2014), <a href="http://bit.ly/2Dgxp2l">http://bit.ly/2Dgxp2l</a> .....	14
S.D. Dep’t of Corr., <i>Administrative Remedy for Inmates</i> (Oct. 19, 2017), <a href="http://bit.ly/2BG1cDx">http://bit.ly/2BG1cDx</a> .....	14
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Tex. Dep’t of Criminal Justice, <i>Offender Grievance Operations Manual</i> (Jan. 2012), <a href="http://bit.ly/2BTrJ0a">http://bit.ly/2BTrJ0a</a> .....	14
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Wash. State Dep't of Corr., <i>Grievance Hearings Program</i> , <a href="http://bit.ly/2ke0hAr">http://bit.ly/2ke0hAr</a> .....	14
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## INTEREST OF AMICI CURIAE<sup>1</sup>

Amici are several of the Nation's leading prisoners' rights organizations. Each has substantial experience with prisoner civil rights claims, including retaliation claims.

The Florida Justice Institute, Inc. ("FJI") is a private, not-for-profit public interest law firm founded in 1978 by leaders of the private bar to, in part, represent institutionalized persons in prisons and jails to improve conditions of confinement. It is primarily funded by the Florida Bar Foundation and attorneys' fees recovered in meritorious cases. FJI accepts only those cases which either involve very significant injury to a single inmate or which, if successful, will benefit large numbers of inmates. FJI frequently seeks prospective injunctive relief on behalf of its clients, and often in the First Amendment context. FJI has participated as amicus curiae in a variety of cases in state and federal courts, including this Court.

The Human Rights Defense Center ("HRDC") is a not-for-profit charitable corporation headquartered in Florida that advocates for the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing two monthly publications: *Prison Legal News*, which covers national and international news and litigation concerning

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<sup>1</sup> No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than amici, their members, and their counsel made such a contribution. The parties' letters consenting to the filing of this brief upon timely notice have been filed with the Clerk.

prisons and jails, and *Criminal Legal News*, which focuses on criminal law and procedure, as well as policing issues. HRDC also publishes and distributes self-help reference books for prisoners and litigates in state and federal courts on prisoner rights issues, including wrongful death, public records access, class actions, and § 1983 civil rights litigation concerning the First Amendment rights of prisoners.

The Uptown People's Law Center ("UPLC") is a not-for-profit legal clinic located in Chicago. UPLC has represented Illinois prisoners in civil rights cases relating to their conditions of confinement for over 35 years. UPLC is currently involved in seven pending class action cases relating to the treatment of Illinois prisoners and parolees. UPLC receives over 100 letters from prisoners every week and provides advice and referrals to hundreds of Illinois prisoners every year—many of whom complain of retaliation against them for filing grievances in an attempt to exhaust their administrative remedies. Alan Mills, Executive Director of UPLC, assists in the training and support of attorneys appointed to represent prisoners by the District Courts for the Northern and Southern Districts of Illinois.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("WLC") is a not-for-profit civil rights organization established in 1968 to help eradicate discrimination and poverty by enforcing civil rights laws and constitutional provisions through litigation and other means. In furtherance of this mission, WLC has a dedicated D.C. Prisoners' Rights Project, established in 2006, which advocates for the humane treatment and dignity of all persons convicted of or charged with a criminal offense under D.C. law, and represents prisoners in litigation across the country. WLC has extensive experience

in advocating and litigating on behalf of prisoners who file grievances, as they are required to do under the Prison Litigation Reform Act of 1995, and has a strong interest in ensuring that prisoners have effective access to grievance processes without retaliation.

### STATEMENT

Mr. Snodgrass’s petition raises two issues of significant importance to amici and their constituents: (1) “Whether the First Amendment protects the speech of a prisoner who tells an officer that she intends to file a grievance regarding the officer’s misconduct,” and (2) “Whether labeling a prisoner a ‘snitch’ in a prison setting constitutes an adverse action for purposes of a First Amendment retaliation claim.” Pet. i.

#### I. LEGAL FRAMEWORK

Under the Prison Litigation Reform Act of 1995 (“PLRA”), 42 U.S.C. § 1997e *et seq.*, prisoners must exhaust their administrative remedies before filing § 1983 suits against corrections officers. Typically, administrative exhaustion requires prisoners to file formal grievances against corrections officers. All but a few States require prisoners to attempt to informally resolve their disputes before filing formal grievances.

##### A. The Prison Litigation Reform Act of 1995

A “centerpiece” of the PLRA “is an ‘invigorated’ exhaustion provision.” *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). Section 1997e(a) of that statute provides that “[n]o action shall be brought with respect to prison conditions under section 1983 \* \* \* by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a).



Compliance with the PLRA’s exhaustion requirement is “mandatory.” *Woodford*, 548 U.S. at 85; see, e.g., *Booth v. Churner*, 532 U.S. 731, 739 (2001) (exhaustion required where administrative process could not grant relief sought). If administrative remedies are “available,” “the PLRA’s text suggests no limits on an inmate’s obligation to exhaust—irrespective of any ‘special circumstances.’” *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Thus, to the extent a grievance process is available, prisoners must proceed through it fully before seeking relief in the courts.

## **B. Grievance Processes in State Prisons**

State prison grievance processes typically require prisoners to complete several steps before administratively exhausting their claims: (1) attempting informal resolution; (2) filing a formal grievance; (3) filing an appeal; and, in some prison systems, (4) filing a second level of appeal. See Antonieta Pimienta, Note, *Overcoming Administrative Silence in Prisoner Litigation: Grievance Specificity and the “Object Intelligibly” Standard*, 114 Colum. L. Rev. 1209, 1211 n.12 (2014).

The Virginia Department of Corrections, for example, permits prisoners to file suits on “[g]rievable issues,” including, as relevant here, “[a]ctions of individual employees \* \* \* which affect the grievant personally, including any denial of access to the grievance procedure,” and “[r]eprisals against the grievant for filing a grievance or appeal.” Va. Dep’t of Corr., *Virginia Department of Corrections Offender Grievance Procedure Notification* (July 1, 2016), <http://bit.ly/2yUF82K>. A prisoner who has suffered a “grievable issue” must first attempt “to informally resolve the issue prior to filing a regular grievance” and that attempt must be documented. *Ibid.* An informal resolution attempt could consist of, for example,

speaking to the offending corrections officer and informing the officer of the prisoner's intent to file a grievance unless the misconduct ceases or other corrective measures are taken.

### C. First Amendment Retaliation Claims

It is well established that “the First Amendment bars retaliation for protected speech.” *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). That is no less true in prisons. After all, “prisoners do not shed all constitutional rights at the prison gate.” *Sandin v. Conner*, 515 U.S. 472, 485 (1995). The Courts of Appeals thus unanimously permit prisoners to bring §1983 claims against corrections officers for retaliating against them for exercising their First Amendment rights.

“To prove a First Amendment retaliation claim under Section 1983, a prisoner must show \* \* \* ‘(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action.’” *Espinal v. Goord*, 558 F.3d 119, 128 (2d Cir. 2009); see Pet. 2 n.1 (collecting cases). This case concerns only the first and second prongs of that test.

## II. PROCEEDINGS BELOW

This case arises out of threats of physical and sexual violence by a corrections officer against a prisoner, that prisoner's statements that he intended to pursue a grievance regarding the officer's harassment, and the officer's retaliatory response—labeling the prisoner a “snitch” in front of other prisoners.

On August 20, 2015, Officer Messer, a corrections officer at Red Onion State Prison, where Mr. Snodgrass is housed, approached Mr. Snodgrass's cell “in an aggres-

sive manner and began to verbally harass and threaten him with sexual comments.’” Pet. App. 5a-6a (quoting Complaint) (alterations omitted). Officer Messer threatened: “I’m going to knock you the fuck out and fuck you in the ass to wake you back up.” *Id.* at 27a. Officer Messer then ordered Mr. Snodgrass to “strip,” and to “pull your pants down so I can see that black [a]ss.” *Ibid.* Mr. Snodgrass responded by stating that he intended to report Officer Messer to the authorities by filing a Prison Rape Elimination Act complaint—*i.e.*, a formal grievance—against him. *Id.* at 28a. In response, and in earshot of other prisoners, Officer Messer yelled “that’s cause you’re a Fuck’n SNITCH.” *Ibid.* Other prisoners averred that they heard Officer Messer label Mr. Snodgrass a snitch. *Id.* at 7a.

Mr. Snodgrass made good on his statement, ultimately filing a Prison Rape Elimination Act complaint against Officer Messer. Pet App. 8a. No relief was granted because the investigating officers claimed they were unable to verify Officer Messer’s threats. *Ibid.*

After exhausting his administrative remedies, Mr. Snodgrass filed a pro se § 1983 complaint against Officer Messer and other individuals. Pet. App. 8a. Mr. Snodgrass alleged, as relevant here, that Officer Messer “retaliated against [him] for exercising his free speech rights” to state his intent to file a grievance. *Id.* at 9a.

The District Court for the Western District of Virginia (Dillon, J.) dismissed Mr. Snodgrass’s complaint, finding that Mr. Snodgrass’s statements regarding his intent to file a grievance were “mere expressions of dissatisfaction.” Pet. App. 14a. The district court also found that Officer Messer’s labeling Mr. Snodgrass a snitch in front of other prisoners was not an adverse action because it was nothing “more than [an] undesirable comment[.]

\* \* \* and did not impede his exercise of his right to seek redress.” *Id.* at 14a-15a.

In a single paragraph, the Fourth Circuit affirmed “for the reasons stated by the district court.” Pet. App. 2a.

### SUMMARY OF ARGUMENT

I. It is well established that the First Amendment protects prisoners who actually file grievances against corrections officers. An officer thus cannot retaliate against a prisoner for filing a grievance. But the Fourth Circuit held that the First Amendment does not protect prisoners who state that they *intend* to file grievances. That ruling not only creates a division among the Circuits, it threatens to significantly curtail prisoners’ access to the courts. Retaliating against a prisoner for voicing her intent to do something that is not only allowed, but is *required by statute* if she wants to have her claims heard in court—*i.e.*, filing a formal grievance—should be just as unlawful as retaliating against a prisoner for actually filing that grievance in the first place.

Corrections officers control nearly all aspects of prison life. Due to the significant power they wield, opportunities abound for corrections officers to abuse or retaliate against prisoners. And they often take advantage of those opportunities: issuing spurious disciplinary charges, tossing prisoners’ cells, denying them privileges, keeping prisoners in segregated housing units, or, in the worst cases, physically or sexually assaulting them. See John J. Gibbons & Nicholas De B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons*, 22 Wash. U. J.L. & Pol’y 385, 515 (2006); Jeffrey Ian Ross, *Deconstructing Correctional Officer Deviance: Toward Typologies of Actions and Controls*, 38 Crim. Just. Rev. 110, 114 (2013).

Prisoners' only recourse is to follow the prison grievance system and, if that fails, to seek relief in court.

The catch-22 of the Fourth Circuit's ruling is that the Federal Bureau of Prisons and all but a small handful of States require that prisoners attempt to resolve their complaints against corrections officers "informally" before they can file a formal grievance. The prisoner thus has a right to file the grievance, but, according to the Fourth Circuit, no right to tell the officer as much to informally resolve the issue—even though the prisoner must communicate that to the officer, either orally or in writing, before filing the formal grievance. This backwards interpretation of the First Amendment leaves prisoners defenseless to retaliation from corrections officers seeking to deter them from filing grievances.

II. The Fourth Circuit's ruling that a corrections officer labeling a prisoner a "snitch" in earshot of other prisoners does not constitute an adverse action reflects a real misunderstanding of the significance the "snitch" label carries in prisons.

Snitches "occupy the lowest rung in the prison hierarchy." *Dale v. Poston*, 548 F.3d 563, 571 (7th Cir. 2008). As a result, snitches are commonly the victims of physical, sexual, and other abuse. See Fed. Judicial Ctr., *Survey of Harm to Cooperators: Final Report* 8 (2016), <http://bit.ly/2kg36Ry>. Stories of prisoners who were labeled "snitches" being tortured and killed are all too common. In that context, identifying a prisoner as a snitch is the equivalent of marking that prisoner as a target for violence. See *Adames v. Perez*, 331 F.3d 508, 515 (5th Cir. 2003).

## ARGUMENT

### I. PROTECTING PRISONERS' STATEMENTS OF INTENT TO FILE GRIEVANCES IS ESSENTIAL TO PROTECT THEIR ACCESS TO THE COURTS

“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner v. Safley*, 482 U.S. 78, 84 (1987). Prisoners thus “retain the constitutional right to petition the government for the redress of grievances.” *Ibid.* Because “[p]risoners, like non-prisoners, have a constitutional right of access to the courts and to petition the government for the redress of grievances,” it is undisputed that “prison officials may not retaliate against prisoners for the exercise of that right.” *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995). But the circuits are split regarding whether prison officials may retaliate against prisoners who *tell* them they intend to exercise that right. Recognizing that those statements are also protected speech is essential to protect prisoners’ access to grievance processes and, ultimately, to the courts.

#### A. Corrections Officers Frequently Deter Prisoners from Filing Grievances

There is “‘a recurrent pattern in American prisons of threats and retaliation against prisoners who file grievances and complaints.’” John J. Gibbons & Nicholas De B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America’s Prisons*, 22 Wash. U. J.L. & Pol’y 385, 514 (2006) (quoting John Boston, director of the Prisoners’ Rights Project of the New York City Legal Aid Society). While those threats sometimes come from fellow prisoners, corrections officers commonly retaliate against prisoners who have filed, or intend to file, grievances.

“[A] survey of prisoners by the Correctional Association of New York suggest[s] that *more than half* of prisoners who file grievances report experiencing retaliation for making a complaint against staff.” Gibbons & Katzenbach, *supra*, at 515 (emphasis added). In another study, 61% of prisoners reported that their concerns about retaliation by corrections officers deterred them from filing grievances. Kitty Calavita & Valerie Jenness, *Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic* 68 (2015).

Corrections officers “have a considerable amount of power while on the job,” and, as a result, myriad ways in which they can deter prisoners from filing grievances. Jeffrey Ian Ross, *Deconstructing Correctional Officer Deviance: Toward Typologies of Actions and Controls*, 38 *Crim. Just. Rev.* 110, 114 (2013). “They can write up (submit negative reports about) inmates they do not like, or they can humiliate convicts in front of others.” *Ibid.* They can also engage in “[o]ther kinds of abuse,” including “confiscating inmates’ possessions, destroying their belongings, playing with the thermostat settings, arbitrarily denying privileges, placing inmates who hate each other in the same cell, repeatedly tossing (searching) cells, repetitively strip-searching inmates, and frequently transferring inmates to different correctional facilities.” *Ibid.* Other retaliatory acts include “segregation for longer periods of time, \* \* \* physical retribution, \* \* \* and should the grievance be denied, \* \* \* discipline for filing a false grievance.” Gibbons & Katzenbach, *supra*, at 515. As Mr. Snodgrass experienced first-hand, corrections officers often subject prisoners to needless strip searches as a “form of intimidation and violence.” Ross, *supra*, at 115.

Sexual harassment and abuse, specifically, are very common ways corrections officers deter prisoners from filing grievances and retaliate against those who do. See Cheryl Bell, *et al.*, *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secrets*, 18 Yale L. & Pol'y Rev. 195, 210 (1999) ("Retaliation against prisoners who report sexual abuse is all too common and can sometimes result in prisoners having to serve longer terms."). One study of women prisoners in Michigan found that, when they complained of sexual harassment or abuse, corrections officers would "writ[e] up disciplinary 'tickets' for specious violations of prison rules or regulations"; "force a confrontation to occur in order to create a minor violation for which [the officer] can write a ticket"; "ask a colleague to write up a ticket, whether for a false violation or for a minor one, so that the retaliation cannot be traced back to [the officer]"; or deny them "visitation rights with their children." *Ibid.*

These forms of retaliation and abuse are realities of prison life. As one prisoner explained, when a prisoner files a grievance, corrections officers "take it out on you one way or another \* \* \*. They'll get real vindictive \* \* \* they'll get back at you." Calavita & Jenness, *supra*, at 68 (alterations in original). Another prisoner stated: "[T]here's always consequences." *Ibid.* And a third explained, after a prisoner files a grievance, "they transfer them somewhere and all of a sudden, their property's missing \* \* \* they never see it again." *Ibid.* Many prisoners explained that they "often endure abuse by guards in order not to jeopardize their release date." *Id.* at 69.

The harassing and violent acts described above are only a few of the ways that corrections officers can deter prisoners from exercising their constitutional rights to



file grievances and, ultimately, from seeking relief in the courts. The Fourth Circuit’s decision—holding that a prisoner cannot base a retaliation claim on a statement that she intends to file a grievance—essentially provides corrections officers *carte blanche* to retaliate against prisoners who tell them they intend to file grievances.

### **B. Protecting Informal Resolution of Grievances Is Essential To Provide Prisoners Access to the Courts**

There is no real dispute that filing a grievance is protected speech and that retaliation against a prisoner for filing a grievance can violate the First Amendment. See, e.g., *Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017) (“The most fundamental of the constitutional protections that prisoners retain are the First Amendment rights to file prison grievances and to pursue civil rights litigation in the courts, for without those bedrock constitutional guarantees, inmates would be left with no viable mechanism to remedy prison injustices.” (alterations and quotation marks omitted)); *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008) (“It is an established principle of constitutional law that an inmate is considered to be exercising his First Amendment right of freedom of speech when he complains to the prison’s administrators about the conditions of his confinement.”); *Pearson v. Welborn*, 471 F.3d 732, 742 (7th Cir. 2006) (“[R]etaliating against a prisoner on the basis of his complaints about prison conditions is unlawful.”); *Davis v. Goord*, 320 F.3d 346, 352-353 (2d Cir. 2003) (“[T]he filing of prison grievances is a constitutionally protected activity.”).

Like grievances, statements reflecting a prisoner’s *intent* to file a grievance should be protected by the First Amendment. Those statements are an integral part of the grievance process in most prisons because informal

resolution of grievances is a near-universal precondition to filing a formal grievance. It is hard to imagine an informal attempt to resolve a dispute that does not at least *mention* that the prisoner intends to file a grievance if the officer’s misconduct doesn’t stop.

“Most jurisdictions’ grievance procedures begin with a requirement that the prisoner seek ‘informal resolution.’” Priyah Kaul, *et al.*, Michigan Law Prison Information Project, *Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey* 11 (Oct. 18, 2015), <http://bit.ly/2oOVQRg>.<sup>2</sup> The Virginia Department of

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<sup>2</sup> All but a handful of States require an attempt at informal resolution before a prisoner can file a grievance. See, *e.g.*, Alaska Dep’t of Corr. Policies & Procedures, *Prisoner Grievances* ¶ IV.D, at 3 (Oct. 13, 2006), <http://bit.ly/2kGyOH4>; Ark. Dep’t of Corr., *Administrative Directive Inmate Grievance Procedure* ¶ III.A., at 1-2 (May 28, 2012), <http://bit.ly/2Byu9i9>; Ariz. Dep’t of Corr., *Department Order: 802, Inmate Grievance Procedure* ch. 802.02, at 2-3 (Dec. 12, 2013), <http://bit.ly/2oFpIQ5>; Jean Casella & James Ridgeway, *Prisoner Grievances: “The System for Going Up Against the System,”* Solitary Watch (Mar. 24, 2011), <http://bit.ly/2CACIZp> (California); Colo. Dep’t of Corr., *Grievance Procedure* ¶ IV.B, at 2-3 (Dec. 15, 2012), <http://bit.ly/2B7Kvxl>; Conn. Dep’t of Corr., *Inmate Administrative Remedies* ¶ 6.A, at 5 (Aug. 15, 2013), <http://bit.ly/2CzJ5MI>; Del. Dep’t of Corr., *Medical Grievance Process* ¶ VI.A-B, at 1-2 (Nov. 7, 2004, rev. Sept. 2, 2015), <http://bit.ly/2kGqYx2> (addressing healthcare-related grievances); D.C. Dep’t of Corr., *Inmate Grievance Procedure (IGP)* ¶ 19, at 11-12 (Oct. 4, 2014), <http://bit.ly/2BuGrbu>; Fla. Admin. Code r. 33-103.005; Idaho Dep’t of Corr., *Grievance & Informal Resolution Procedure* 8 (Sept. 1, 1995), <http://bit.ly/2jdXh6a>; Ill. Dep’t of Corr., *DR 504 Grievance Procedures* subpt. F § 504.810, at 5 (Sept. 30, 2003), <http://bit.ly/2l8Mfxs>; Ind. Dep’t of Corr., *Offender Grievance Process* ¶ XIII, at 14-16 (Jan. 1, 2010), <http://bit.ly/2kdYQlB>; Iowa Dep’t of Corr., *Grievance Resolution Process* ¶ V.A., at 4 (Mar. 1983, rev. Jan. 2005), <http://bit.ly/2z6vsCd>; Kan. Dep’t of Corr., *Disciplinary Reports & Grievances* (Jan. 8, 2014), <http://bit.ly/2Czvneuc>; La. Dep’t of Pub. Safety & Corr., *Administrative Remedy Procedure/Disciplinary Process Adminis-*

Corrections, for example, which operates the facility where Mr. Snodgrass is housed, requires that prisoners “try to informally resolve the issue prior to filing a regular grievance.” Va. Dep’t of Corr., *Offender Grievance Procedure Notification* 1 (July 1, 2016), <http://bit.ly/2yUF82K>. Similarly, in Texas, prisoners “shall pursue an informal resolution with staff, when possible, prior to filing a formal grievance. When an attempt to informally resolve an issue is not documented on the grievance form, the unit grievance investigator may return the grievance to the offender without an investigation.” Tex. Dep’t of Criminal Justice, *Offender Grievance Operations Manual* 5 (Jan. 2012), <http://bit.ly/2BTrJ0a>. And the Federal

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*trative Remedy Procedure* 9 (July 10, 2013), <http://bit.ly/2ktgX6S>; Me. Dep’t of Corr., *Prisoner Grievance Process, General* 4-5 (Jan. 13, 2003, rev. Aug. 15, 2012), <http://bit.ly/2yTQ9RL>; Mich. Dep’t of Corr., *Prisoner/Parolee Grievances* ¶P, at 3 (July 9, 2007), <http://bit.ly/2kHq5nT>; Minn. Dep’t of Corr., *Grievance Procedure*, (Oct. 17, 2017), <http://bit.ly/2yTmCYi>; Mo. Dep’t of Corr., *D5-3.2 Offender Grievance* ¶III.K, at 9-14 (Jan. 2, 2009), <http://bit.ly/2BIVm25>; Neb. Dep’t of Corr. Servs., *Inmate Rule Book* ch. 2.005 <http://bit.ly/2kHlq5e>; Nev. Dep’t of Corr., *Inmate Grievance Procedure* AR740.04-.05, at 6-9 (Mar. 7, 2017), <http://bit.ly/2CW8500>; N.J. Dep’t of Corr., *Inmate Handbook* 21 (2014), <http://bit.ly/2kQ6kL7>; N.D. Dep’t of Corr. & Rehab., *Inmate Handbook* 32 (Feb. 2015), <http://bit.ly/2BIWIMz>; Ohio Admin. Code 5120-9-31(K); Okla. Dep’t of Corr., *Inmate/Offender Grievance Process* ¶IV, at 5-6 (Oct. 11, 2005), <http://bit.ly/2DgFIen>; R.I. Dep’t of Corr., *Inmate Handbook* ch. 11, at 31 (May 2007), <http://bit.ly/2AVTNMK>; S.C. Dep’t of Corr., *Inmate Grievance System* ¶13.2 (May 12, 2014), <http://bit.ly/2Dgxp2l>; S.D. Dep’t of Corr., *Administrative Remedy for Inmates* ¶IV.4, at 6-7 (Oct. 19, 2017), <http://bit.ly/2BG1cDx>; Vt. Dep’t of Corr., *Offender Grievance System for Field and Facilities* ¶7, at 6-7 (Jan. 1, 2007), <http://bit.ly/2keT7Mi>; Wash. State Dep’t of Corr., *Grievance Hearings Program*, <http://bit.ly/2ke0hAr>; Wyo. Dep’t of Corr., *Inmate Communication and Grievance Procedure* ¶IV.D.1, at 8 (Dec. 15, 2012), <http://bit.ly/2BNCpxF>.

Bureau of Prisons permits prisoners to file “formal complaint[s]” only “[w]hen informal resolution is not successful.” Fed. Bureau of Prisons, *Inmate Information Handbook* 35 (Nov. 2012), <http://bit.ly/2kexADx>.<sup>3</sup>

Other jurisdictions merely “encourage[ ]” prisoners to attempt to resolve issues informally prior to filing a formal grievance. See, e.g., Miss. Dep’t of Corr., *Grievances*, <http://bit.ly/2CzEKIZ>. However, that may be a distinction without a difference. In New York, for example, informal resolution attempts are not required, but, nonetheless, “the failure of an inmate to attempt to resolve a problem on his or her own may result in the dismissal and closing of a grievance.” N.Y. State Corr. & Cmty. Supervision, *Inmate Grievance Program* §701.3(a), at 2 (Jan. 20, 2016), <http://on.ny.gov/2Bvt2jg>.<sup>4</sup>

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<sup>3</sup> Some jurisdictions recognize exceptions for emergency grievances, permitting the prisoner to file a formal grievance without attempting informal resolution. See, e.g., Mass. Dep’t of Corr., *Inmate Grievances* §491.18(3), at 13 (May 5, 2017), <http://bit.ly/2Bviy3o>; Mont. Dep’t of Corr., *Inmate Grievance Program* ¶III.L.1, at 6 (Apr. 1, 1997, rev. Feb. 27, 2013), <http://bit.ly/2BFJzkM>. And others exempt Prison Rape Elimination Act complaints or those regarding physical or sexual abuse. See, e.g., N.M. Corr. Dep’t, *Inmate Grievances* CD-150500, ¶F, at 6 (Sept. 1, 1990, rev. July 12, 2017), <http://bit.ly/2CzygKd>; Pa. Dep’t of Corr., *Inmate Grievance System* §1.A.3, at 1-1 (May 1, 2015), <http://bit.ly/2oYX1xF>.

<sup>4</sup> See also, e.g., Ga. Dep’t of Corr., *Statewide Grievance Procedure* ¶VI.A.4, at 4 (Dec. 10, 2012), <http://bit.ly/2BFhSbN>; Haw. Dep’t of Pub. Safety, *Informal Resolution Procedure* ¶7.0, at 4 (July 1, 2015), <http://bit.ly/2CZmvOr>; Md. Dep’t of Pub. Safety & Corr. Servs., *Informal Resolution Procedure* DCD 185-203 (Apr. 1, 1993), <http://bit.ly/2BniWUP>; N.C. Dep’t of Pub. Safety, *Administrative Remedy Procedure* ch. G. §.0301(a), at 1 (Aug. 1, 2013), <http://bit.ly/2AXBqHr>; Or. Admin. R. 291-109-0100(3)(a); Tenn. Dep’t of Corr., *Inmate Grievance Procedures* 6 (Oct. 1, 2012), <http://bit.ly/2kusS4B>.

The Fourth Circuit’s holding that the First Amendment does not prohibit retaliation against prisoners for stating their intent to file a grievance—even though the First Amendment prohibits retaliation for actually filing that grievance—permits an end-run around prisoners’ well-recognized “constitutional right to petition the government for the redress of grievances.” *Turner*, 482 U.S. at 84. As the Third Circuit recognized in ruling on this issue, there is no “substantive distinction between retaliation for informing prison officials of an intent to file a grievance or requesting the necessary forms to do so on the one hand, and actually filing such a grievance on the other.” *Watson v. Rozum*, 834 F.3d 417, 423 (3d Cir. 2016), cert. denied, 137 S. Ct. 2295 (2017); see Pet. 6-10 (weight of authority agreeing with the Third Circuit). Both are steps in the process of administratively exhausting claims against corrections officers. And both should be protected by the First Amendment.

In practice, the Fourth Circuit’s ruling incentivizes corrections officers to retaliate against prisoners before they can file formal grievances. For all but a small handful of prisoners, attempting informal resolution of grievances is the first step to seeking redress in the courts for violations of their civil rights. A prisoner who faces retaliation for expressing her intent to file a grievance may ultimately *never* file it for fear of further reprisals. And, in almost all jurisdictions, unless a prisoner files a grievance, she cannot bring a claim in the courts. “[W]hat is at stake is a prisoner’s right of access to an existing grievance procedure without fear of being subjected to a retaliatory disciplinary action. \* \* \* [I]f such disciplinary actions were allowed, the purpose of the grievance procedure—to provide an administrative forum for the airing

of prisoner complaints—would be defeated.” *Sprouse v. Babcock*, 870 F.2d 450, 452 (8th Cir. 1989).

## II. THE “SNITCH” LABEL DETERS PRISONERS FROM FILING GRIEVANCES AND MARKS THEM AS TARGETS FOR VIOLENCE

The majority of Circuits agree that being labeled a snitch in prison in front of other prisoners is an adverse action for purposes of a First Amendment retaliation claim. Pet. 12. However, the Fourth Circuit in the decision below, and the Second Circuit before it, reached the opposite conclusion, in decisions that completely misunderstand the violent consequences that await snitches in prisons. Being labeled a “snitch” places a target on a prisoner’s back: To “label an inmate a snitch is to unreasonably subject that inmate to the threat of a substantial risk of serious harm at the hands of his fellow inmates.” *Irving v. Dormire*, 519 F.3d 441, 451 (8th Cir. 2008).

Prisoners who are labeled snitches in prison are routinely beaten and killed. They are the lowest members of the prison hierarchy. Because being labeled a snitch can have dire consequences, one of the most effective ways a corrections officer can deter a prisoner from filing a grievance is by threatening to label—or actually labeling—that prisoner a “snitch.”

### A. The “Snitch” Label Has a Unique Connotation in Prisons

“[S]nitch is a negative slang term offenders use to describe an informant.” *United States v. Galaviz*, 687 F.3d 1042, 1044 n.1 (8th Cir. 2012) (Smith, J., dissenting). It is a term that represents a code of silence, one that runs across cultures “from organized crime to the population at large.” Jeremy Kahn, *The Story of a Snitch*, *The Atlantic* (Apr. 2007).

“Snitch” is not just a label; it is a call to action. “It’s no secret that jailhouse thugs retaliate against other inmates who are considered snitches.” Joe Davidson, *At Prison Bureau, a Fear To Speak Up*, Wash. Post (July 14, 2011). “The inmate code condemns snitching. Indeed, as an act of betrayal, it merits assault, sodomy, and even murder.” James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. Rev. 433, 461 (2003). Snitches are “hated and despised \* \* \* and may be the object of violent reprisal.” Raymond G. Kessler & Julian B. Roebuck, *Snitch*, in *Encyclopedia of American Prisons* 449, 449 (Marilyn D. McShane & Frank D. Williams III eds., 1996). In prison, snitches “occupy the lowest rung in the prison hierarchy.” *Dale v. Poston*, 548 F.3d 563, 571 (7th Cir. 2008); see also Human Rights Watch, *No Escape: Male Rape in U.S. Prisons*, <http://bit.ly/2kJETm1> (similar).

Corrections officers are well aware of the violent consequences that labeling a prisoner a snitch can portend. In *Northington v. Marin*, 102 F.3d 1564 (10th Cir. 1996), for example, a prisoner brought a successful § 1983 claim against a corrections officer who “spread a rumor among inmates that [the prisoner] was a snitch,” which resulted in the prisoner being “assaulted several times by inmates who accused him of being a snitch.” *Id.* at 1567. The officer himself “testified that an inmate labeled a snitch would most likely be beaten.” *Ibid.*

Indeed, a similar attitude often prevails among corrections officers. A central “tenet[] of the correctional officer code [is] ‘don’t rat.’” James E. Robertson, “*One of the Dirty Secrets of American Corrections*”: *Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. Mich. J.L. Reform 611, 618-619 (2009). A recent study by

the Equal Employment Opportunity Commission found that there is “rampant retaliation” against officers who snitch on their colleagues. Davidson, *supra*. Many guards “bully and ostracize any guard who plays by the rules; these strong-arm tactics organize and protect guards who beat inmates at whim and then lie about their activities to their superiors, criminal investigators, and judges in any suits that the prisoners may file.” *Fairley v. Fermaint*, 482 F.3d 897, 899 (7th Cir. 2007).

### **B. Snitches Are Often Killed, Beaten, or Otherwise Retaliated Against in Prisons**

Incidents of snitches being abused, assaulted, or raped are all too common. “[Y]ou can’t snitch and live,” one prisoner stated. Jessica A. Hinman, *Sexual Assault of Male Inmates: Prevalence, Characteristics, and Inmate Perceptions* 32 (Dec. 5, 2008), <http://bit.ly/2Btz6Zz>. Many prisoners do not report rape because they fear being labeled “snitches.” *Ibid*. In one study, fear of reprisal against snitches was the most common response to the question of why, when prisoners must choose between reporting sexual assault to authorities (*i.e.*, snitching) or suffering rape in silence, they choose silence. *Ibid*.

One so-called snitch, Ricky Martin, was found lying in a pool of his own blood, naked from the waist down, below a wall smeared with bloody handprints. Julie K. Brown, *Was Killing Behind Bars a Set-Up?*, Miami Herald (Jan. 10, 2015). Before he was beaten to death, Mr. Martin had “filed a grievance asking the department’s inspector general to place him under protection because his life was being threatened” due to the fact that “he was labeled a ‘snitch’ because he had reported to prison officials that guards \* \* \* had been running a ‘fight club’” in the prison cafeteria. *Ibid*. As Mr. Martin explained: “The corrections officers whose names are in the [grievance], ‘told



me that I was a snitch and told inmates about the incident; now I have inmates and officers after me.’” *Ibid.* Shortly after Mr. Martin filed the grievance, the Florida Department of Corrections made one of the self-proclaimed “most vicious and violent prisoners in the entire state of Florida” Mr. Martin’s roommate. *Ibid.* That new roommate beat Mr. Martin to death. *Ibid.*

Mr. Martin’s story is not an anomaly. Guards often enlist prisoners to violently punish fellow prisoners. For example, among other things, a “snitch game” played by corrections officers ignited a notorious prison riot in New Mexico. See generally Jeff Bingman, N.M. Att’y Gen., *Report of the Attorney General on the February 2 and 3, 1980 Riot at the Penitentiary of New Mexico* (June 1980), <http://bit.ly/2Bt7YtZ>. The “snitch game” was “a system that use[d] the threat of disciplinary action to obtain information” and to exact retribution. *Id.* at 25. Officers would label prisoners snitches “to get even.” Samuel Gilbert, *How a Bloody Prison Massacre Became a Tourist Hotspot*, *The Daily Beast* (Aug. 10, 2015).

The 36-hour riot left 33 prisoners dead, with snitches receiving the worst treatment. Bingman, *supra*, at 43. When the rioters broke into the informants’ cellblock, they shouted: “Kill the snitches.” *Id.* at 26. The rioters “threw flammable liquids into locked cells and onto inmates marked for destruction, and then ignited them.” *Ibid.* Once the cells opened, “the rampaging inmates dragged many of their \* \* \* victims out and stabbed, tortured, bludgeoned, burned, hanged and hacked them apart.” *Ibid.* Snitches were “thrown from upstairs tiers to the basement floor.” *Ibid.* In 2017, hatchet marks still mar that floor. Gilbert, *supra*.

Today, violence against snitches remains widespread. A 2015 survey of federal judges identified nearly 600 in-

stances of snitches being threatened, wounded, or killed. Fed. Judicial Ctr., *Survey of Harm to Cooperators: Final Report* 8 (2016), <http://bit.ly/2kg36Ry>. The same survey revealed that sixty-one snitches had been murdered. Jacob Gershman, *Why Life for ‘Snitches’ Has Never Been More Dangerous*, Wall St. J. (June 20, 2017). As one judge testified, the urgency and seriousness of the problem cannot be ignored: “‘While this is not Colombia, it is really, really bad.’” Fed. Judicial Ctr., *supra*, at 8.

Those numbers likely understate the amount of violence snitches experience in prison. Violence in prisons often goes unreported; indeed, the very purpose of violence against snitches is to deter them from reporting misconduct in the first place. That may be one reason why guards choose to label prisoners “snitches” and let the violence be meted out by other prisoners.

Because of the violence that attends the “snitch” label, a guard identifying a prisoner as a snitch is by definition an adverse action; it is the equivalent of marking that prisoner as a target for violence. Court after court has recognized as much. See, e.g., *Adames v. Perez*, 331 F.3d 508, 515 (5th Cir. 2003) (snitch label would “create a risk to an inmate’s health or safety”); *Benefield v. McDowall*, 241 F.3d 1267, 1271 (10th Cir. 2001) (“[L]abeling an inmate a snitch \* \* \* constitutes deliberate indifference to the safety of that inmate.”); *Reece v. Groose*, 60 F.3d 487, 488 (8th Cir. 1995) (snitch “at substantial risk of injury”); *Valandingham v. Bojorquez*, 866 F.2d 1135, 1138 (9th Cir. 1989) (labeling an inmate a snitch in retaliation for filing a grievance may give rise to “a claim \* \* \* for violation of [the] right to be protected from violence while in custody” and the “right of access to the courts”); *Harmon v. Berry*, 728 F.2d 1407, 1409 (11th Cir. 1984) (per

curiam) (“snitch” label exposed prisoner to threat of assault).

The courts that have reached a different conclusion, including the Fourth Circuit, have simply failed to recognize the realities of prison life and the violence that awaits prisoners who are labeled “snitches.”

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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