IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KEVIN JOHNSON,

Plaintiff,

v.

VIRGINIA DEPARTMENT OF CORRECTIONS, DIRECTOR CHADWICK S. DOTSON, in his official capacity; CHIEF OF CORRECTIONS OPERATIONS A. DAVID ROBINSON, in his official and individual capacities; BETH CABELL, in her official and individual capacities; WARDEN KEMSY BOWLES, in his official capacities; WARDEN KEVIN MCCOY, in his individual capacity; SGT. MATTHEW BLAHA, in his individual capacity; SGT. BROOKS WALLACE, in his individual capacity; OFFICER SMITH, in his individual capacity; WARDEN RICK WHITE, in his official and individual capacity; HEALTH SERVICES ADMINISTRATOR D. TRENT, in his official and individual capacity; SENIOR MENTAL HEALTH CLINICIAN E. CREECH, in his official and individual capacity; MENTAL HEALTH CLINICIAN J. MONIHAN, in his official and individual capacity; and CHIEF OF SECURITY MAJOR JOHNNY HALL, in his official and individual capacity,

Defendants.

Civil Case No. 3:24-cv-00080
The Honorable Henry E. Hudson

Plaintiff's Memorandum in Support of Motion for Preliminary Injunction

Plaintiff Kevin Rashid Johnson, in support of his Motion for a Preliminary Injunction to prevent the Defendants from transferring him out of the Eastern or Central Region (ECF Doc. No. 22), states as follows:

Facts

I. Background

Mr. Johnson is an incarcerated activist and acclaimed journalist. ECF Doc. No. 1 (Complaint), ¶ 1. His work has been featured in The Guardian and on PBS, and he has produced two books. *Id*. His work focuses on the inhumane conditions of some prisons in which he has been detained and the brutal conduct of certain prison officials and guards. *Id*. This activity is critical, especially since the public hears very little from the prisoner population. Prisons are often a black box for the public, with all that goes on behind the prison doors escaping scrutiny. Mr. Johnson plays a pivotal role in trying to fix this problem. For this important activity, Mr. Johnson has been the target of frequent unconstitutional retaliation perpetrated by individual guards and prison authorities. *Id*. at ¶ 2.

Since July 1991, Mr. Johnson has been detained primarily by the Virginia Department of Corrections. *Id*. at ¶ 32. As a result, much of his writing has focused on raising awareness about the unconstitutional conditions in VADOC prisons. *Id*. at ¶ 35. In response, in 2009, VADOC officials improperly labeled Mr. Johnson a domestic terrorist because, according to VADOC, his writing about the abuses in prisons allegedly turned the public against prison officials and other law enforcement. *Id*. at ¶ 34. Because of this, VADOC officials cut off his access to phone calls and stopped his mail. *Id*. In 2012, VADOC shipped Mr. Johnson out of Virginia to limit his ability to continue his activism and journalism. *Id*. At ¶ 35. Over the next nine years, Mr. Johnson was moved from Oregon to Texas to Florida to Virginia to Indiana to Ohio and, finally, back to Virginia in attempts to silence him. *Id*.

II. Transfer back to Virginia and denial of medical care.

In October 2021, Mr. Johnson was transferred back to Virginia. ECF Doc. No. 13.5, ¶ 13. VADOC officials placed Mr. Johnson in general population at Nottaway Correctional Center, a medium security prison. *See* Kevin Rashid Johnson, *My Return to Virginia: A Tribute to People Power*, Dec. 5, 2021, RASHIDMOD, https://rashidmod.com/?p=3128. Upon his arrival back in Virginia, it was clear that he faced numerous medical issues. But it was not until July 1, 2022 that Mr. Johnson was informed by a doctor at Nottaway that he had tested positive for prostate cancer. *See* Kevin Rashid Johnson, *My Cancer Diagnosis and the Disease of Denied Prison Medical Care*, July 6, 2022, RASHIDMOD, https://rashidmod.com/?p=3213; *see also* Excerpts of Mr. Johnson's Medical Records, attached as Exhibit A, at 1-4 (showing concerns as early as March 2022).[1]

In July 2022, after finally receiving this diagnosis, friends of Mr. Johnson put out a public request for aid in getting VADOC to give him treatment. *See Demand Appropriate Cancer Treatment for Rashid!*, July 6, 2022, RASHIDMOD, https://rashidmod.com/?p=3210. On September 6, 2022, Mr. Johnson published an article thanking people for the outpouring of love and support he had received, but noting that he still had not received any medical treatment. *See* Kevin Rashid Johnson, *Prisons by Medical Neglect: My Continued Denial of Cancer Care*, Sept. 6, 2022, RASHIDMOD, https://rashidmod.com/?p=3222; *cf.* Ex. A, Medical Records Excerpts, at 13, 14-21, 22 (noting a rescheduled August appointment, new patient records dated October 4, 2022, and a missed PET scan on October 25, 2022). This included efforts by Nottaway guards to deliberately miss Mr. Johnson's critical radiology appointments. *See* Kevin Rashid Johnson, *Medical Update*, Sept. 26, 2022, PRISONRADIO, https://www.prisonradio.org/commentary/medical-update/; Ex. A,

[1] This represents the earliest medical records currently available to Plaintiff's counsel. Plaintiff's counsel is in the process of obtaining further medical records from VADOC and VCU.

Medical Records Excerpts, at 12. Mr. Johnson later noted that the outpouring of public support in favor of his cancer treatment led him to suffer minor disciplinary tickets, pressure to withdraw his grievances for medical care, and threats of a transfer in an effort to stop these public complaints. *Id.* These coercive efforts culminated on September 23, 2022, when, without warning, Mr. Johnson was transferred from Nottaway to Sussex I State Prison and placed in solitary confinement without any of his property, including his legal property concerning his ongoing cases. *Id*.

Mr. Johnson's loved ones and members of the public continued to contact VADOC officials seeking appropriate medical care for Mr. Johnson, including then-Warden of Sussex I, Defendant Beth Cabell. *See* Kevin Rashid Johnson, *Rashid Has Been Transferred! In Solitary, with no Medical Care*, Sept. 29, 2022, RASHIDMOD, https://rashidmod.com/?p=3228. This support had an effect, as Mr. Johnson finally saw a radiologist on October 4, 2022. *See* Kevin Rashid Johnson, *Why Would Medical Professionals Lie? My Denied Cancer Treatment Becomes More Sinister*, Nov. 15, 2022, RASHIDMOD, https://rashidmod.com/?p=3255; Ex. A, Medical Records Excerpts, at 14-21 (New Patient Note dated October 4, 2022). The radiologist ordered a PET scan to determine if Mr. Johnson's cancer had spread. *See* Kevin Rashid Johnson, *Why Would Medical Professionals Lie? My Denied Cancer Treatment Becomes More Sinister*, Nov. 15, 2022, RASHIDMOD, https://rashidmod.com/?p=3255. However, the guards were late taking Mr. Johnson to this testing appointment, causing him to miss it. *Id*.; *see* Ex. A, Medical Records Excerpts, at 22. The guards then lied to Mr. Johnson about why he missed the appointment for the PET scan and whether it had been rescheduled. He did not receive this PET scan until December 16, 2022. *See id*., at 23-24. Medical records into January 2023 show continuing unprovided tests for his ongoing medical conditions due to VADOC's actions. *Id.* at 25 ("still hasn't had CXR"). He did not receive his first cancer treatment until March 2023, more than a year after Mr. Johnson's

medical records raised concerns about prostate cancer and closer to two years after he began experiencing symptoms.

As Mr. Johnson aptly summarized in April 2023: "[t]hroughout the year and a half that I have been known to have cancer the hospital visits and acts of initiating treatment that did happen were solely the result of persistent outside protests against my denied treatment." Kevin Rashid Johnson, *From My Denied and Delayed Cancer Care to the Worst Possible Treatment*, April 14, 2023, RASHIDMOD, https://rashidmod.com/?p=3426. On June 29, 2023, however, Mr. Johnson was moved to restrictive housing at Sussex I, further impeding his ability to receive cancer care. *See* Kevin Rashid Johnson, *Officials Devise to Stop my Cancer Treatment and Block my Court Access*, July 7, 2023, RASHIDMOD, https://rashidmod.com/?p=3429. Mr. Johnson had been receiving daily radiation treatments since April of that year, but on June 30, the day after being placed in restrictive housing, VADOC officials refused to allow him to attend his cancer treatments. *Id*. He asked the public to reach out on his behalf. After a public outcry, his treatment did resume weeks later and some of his property was also returned, though not his critical legal property. *See* Kevin Rashid Johnson, *Treatment has Resumed*, July 15, 2023, RASHIDMOD, https://rashidmod.com/?p=3433. He asked the public to again reach out on his behalf and make sure he received the medical treatment he needed and was treated humanely. *Id*.

III. Planting of knife at Sussex I.

In October 2023, Mr. Johnson remained imprisoned at Sussex I in the restrictive housing unit. ECF Doc. No. 8.1 (Declaration of Kevin Rashid Johnson), ¶ 7. On October 18, 2023, he was transferred to a new cell that had previously been vacant for approximately six months. *Id*. That cell had been empty for so long because of problems with the functioning of the door. *Id*. Despite that, no guards inspected the cell for contraband before placing Mr. Johnson in the cell. *Id*. He was

placed in the cell at 6 PM. At 3:30 in the morning, a Strike Force team comprised of guards that had been brought to Sussex from across the Commonwealth burst into Mr. Johnson's cell, woke him up, strip searched and handcuffed him, and dumped his property on the floor to search through. *Id*. at ¶¶ 7-10.

Apparently unhappy with the fruits of their search, the Investigator in charge told the team to "find something" and keep searching until they found something. *Id*. at ¶ 10. The Strike Force claimed to find a Kershaw brand pocketknife affixed to the underside of the cell door—not a shiv that could be fashioned in prison, but a knife that would have been smuggled in from the outside. *Id*. at ¶ 11; ECF Doc. No. 13.2 (Declaration of Sussex I Warden Kemsy Bowles), at 4. A knife that Mr. Johnson, according to VADOC, had kept in his previous cell and taken with him from the previous cell with no guard noticing, before putting it under the door. Mr. Johnson vehemently denied and continues to deny that the knife belongs to him. As he wrote in an article published several days later:

> At that time and afterward I questioned the obvious foul play behind the claimed discovery of a street knife inside a cell I was just moved into that had been empty for months, and after staff had violated their own rules by not conducting a documented inspection of the cell before moving anyone into it. These inspections are required by staff to ensure they are free of contraband and all fixtures are in good working order before a new occupant is placed into the cell.

Kevin Rashid Johnson, *Sussex I State Prison Officials Plant a Street Weapon in a Vacant Cell Then Move Me Into It*, RASHIDMOD, Oct. 22, 2023, https://rashidmod.com/?p=3519.

The Strike Force team left Mr. Johnson in his cell for several hours before moving him to restrictive housing. ECF Doc. No. 8.1, ¶¶ 11-12. While in restrictive housing, Sergeant Hall told Mr. Johnson that officials at Sussex I had planted the knife as part of their plan to transfer Mr. Johnson out of Sussex I. *Id*. at ¶ 13. According to Sergeant Hall, officials at Sussex I were tired of Mr. Johnson's efforts at drawing public attention to the issues in the prison, including their inability

to provide him proper medical care. *Id*.

IV. Mr. Johnson's attempt to publicize what happened to him.

In response, Mr. Johnson wrote and published an article asserting that Sussex I guards had planted a knife in his cell. *Id*. at ¶ 14. That article, published October 22, 2023, specifically named VADOC officials and Defendants Beth Cabell, Chadwick Dotson, and Kevin McCoy as people the public should reach out to about the treatment of Mr. Johnson. *Id*. And people did reach out to those officials. *Id*. at ¶ 16. Shortly after the publication of the article but before people began contacting VADOC officials in earnest, Sussex I officials removed Mr. Johnson from restrictive housing and put him on what is called SD1 status, a form of general population housing. *Id*. at ¶ 15.

At the same time, Mr. Johnson began to write complaints about the retaliation and efforts to transfer him. *Id*. at ¶ 17. He wrote nine grievances in total, gave them all to Sergeant Celi,[2] and had the Sergeant confirm on body camera that they were received. *Id*.

V. Transfer to Red Onion and placement in restrictive housing.

On October 30, 2023, Mr. Johnson was transferred to Red Onion State Prison ("Red Onion"). *Id*. at ¶ 21. Plaintiff avers that the Wardens of Red Onion and Sussex I, as well as VADOC Central Region Director, Beth Cabell,[3] or some combination thereof, had to organize to approve this transfer. *Id*. Other VADOC officials, including Chadwick Dotson, were likely aware of the transfer as well due to the public attention focused on Mr. Johnson.

Emergency transfers such as the type used for Mr. Johnson apply to only two types of

[2] At one point in the Complaint and Mr. Johnson's affidavit, Sergeant Celi's name is misspelled as Sergeant Sealey.

[3] Defendant Cabell is mistakenly identified as the Eastern Region Director in the Complaint, Plaintiff has since learned she runs the Central Region.

prisoners. *See* VADOC Operating Procedure 830.5(E), attached as Exhibit B. One type, prisoners "whose health care needs require immediate transfer," did not apply to Mr. Johnson at that time. *Id*. at 830.5(E)(2).[4] The other type, prisoners "who cannot be safely controlled at their current institution while awaiting standard reclassification due to their disruptive or violent/aggressive infractions," could also not apply to Mr. Johnson because prisoners eligible for this kind of transfer "should **not** be assigned to a general population status at the time of the transfer." *Id*. at 830.5(E)(1) (emphasis added). VADOC officials at Sussex I had already stepped Mr. Johnson down to a general population status several days before this transfer. ECF Doc. No. 8.1, ¶ 15. This transfer therefore violated VADOC's own written procedures. Mr. Johnson also did not receive the required hearings at either Sussex I or Red Onion to effectuate this transfer. *Id*. at ¶¶ 18, 23; Ex. B, at 830.5(H)(1)(c), 830.5(H)(2)(b).

In addition, the transfer was carried out in an especially painful and cruel way. When the special task force arrived to transfer Mr. Johnson, he calmly informed them that he had an order for oversized handcuffs due to chronic edema in his wrists. ECF Doc. No. 8.1, ¶ 19. In response, one of the task force members, Sergeant Blaha, told Mr. Johnson he did not care and then pepper sprayed Mr. Johnson after Mr. Johnson asked once more for his required oversized cuffs. *Id*. Sgt. Blaha did not stop there, but went to the booth, got another, larger canister of pepper spray, and doused Mr. Johnson again. *Id*. The other strike force members just watched. Sussex I staff finally stepped in and brought the oversized cuffs for Mr. Johnson. *Id*. at ¶ 20. He never received an opportunity to decontaminate from the spray, *id*., which further contravened standard practices

[4] And even if that were the reason proffered by VADOC, such health transfers are done "to an institution with 24 hr. medical coverage, specialized medical equipment, or proximity to a major medical facility." Ex. B, at 830.5(E)(2). None of those apply to a transfer to the remote Red Onion, which was detrimental to Mr. Johnson's health care treatment for cancer, not helpful to it.

around chemical agents and caused Mr. Johnson immense discomfort.[5]

Mr. Johnson had previously been housed at Red Onion and faced racialized physical assaults along with other abuse there, including an assault that involved his dreadlocks being violently torn from his head. ECF Doc. No. 8.1, ¶ 22. Upon arriving at Red Onion, both Warden Rick While and Assistant Warden Dwayne Turner attempted to convince Mr. Johnson to keep quiet and to decline to exercise his First Amendment rights to speak out about bad conditions and treatment in the prison in exchange for better treatment and a better housing placement. *Id*. at ¶ 25. When he refused, Red Onion officials began to bring retaliatory disciplinary charges against him, including for disobeying an order when he asked for the handcuff accommodations to which he was entitled during his transportation across the state. *Id*. at ¶ 26. They also cut off his access to visitation and electronic messaging to prevent him from speaking out about the horrific conditions and shocking efforts to silence him at Red Onion. *Id*. at ¶ 24. VADOC then began the process of moving Mr. Johnson to long-term restrictive housing because he refused to stay silent. *Id*. at ¶ 29. Mr. Johnson thereafter, along with other prisoners held in restrictive housing, commenced a hunger strike to challenge the use of solitary confinement at Red Onion and Mr. Johnson's punitive transfer to that supermax facility. *Id*. at ¶ 30.

VI. Abuses during hunger strike.

In further retaliation for his public activism and refusal to stop his writing—and in an effort to "break him"—Red Onion officials cut off Mr. Johnson's water during his hunger strike. *Id*. at ¶ 34. He could not drink water, clean his cell, or clean himself. *Id*. His toothpaste, soap, deodorant,

[5] The inability to clean yourself after being sprayed with pepper spray (to decontaminate) is not a small matter. The Fourth Circuit has long held that such a denial can state a claim under the Eighth Amendment. *Mann v. Failey*, 578 Fed. App'x 267, 273 (4th Cir. 2014) (unpublished); *Williams v. Benjamin*, 77 F.3d 756, 768 (4th Cir. 1996).

and religious items were also removed. *Id*. No valid penological purpose exists for denying a person their Bible, toothpaste, or access to clean drinking water.

On January 3, 2024, Red Onion staff moved Mr. Johnson to the prison's medical unit, but conditions did not improve for him. *Id*. at ¶ 35. Red Onion guards confiscated the rest of Mr. Johnson's property, leaving him with only a few papers and the clothing he was wearing at the time. *Id*. at ¶ 36. The medical cell, where he stayed in solitary confinement-like conditions, also had no water, preventing Mr. Johnson from drinking, bathing, or cleaning his cell. *Id*. at ¶¶ 37-38. Mr. Johnson asked guards for water when they walked by his cell, but they did not bring him any. *Id*. at ¶ 39. The forced restriction of water dehydrated Mr. Johnson to the point that he had to be admitted to the emergency room of a local hospital on January 4, 2024. *Id*. at ¶ 40. Upon his return to Red Onion, Mr. Johnson continued to be denied water, *id*. at ¶ 41, and he began to pass blood in his urine. *Id*. at ¶ 42. On January 19, 2024, Mr. Johnson had to be rushed to the hospital again for severe dehydration. *Id*. at ¶ 43.

Back at Red Onion, despite being hospitalized twice now for dehydration, VADOC officials continued to deny Mr. Johnson water. *Id*. at ¶ 45. They left him in a cold cell living in the same dirty clothes he had no ability to wash. *Id*. at ¶¶ 46-48. They deprived him of his prescribed medications, including muscle salves for edema and hemorrhoid cream to treat side effects from his cancer care. *Id*. at ¶ 54. VADOC denied him access to a telephone or tablet. *Id*. at ¶ 56. During his time in the medical unit, he received approximately only three legal calls and three showers over an entire month. *Id*. at ¶ 35. Currently, Mr. Johnson has been scrubbed from VADOC's online prisoner locator tool, preventing the public from knowing where he is located. *See* VADOC Inmate Locator Search Results for Prisoner Number 1007485 (Mr. Johnson's number), attached as Exhibit C.

While on his hunger strike, several VADOC officials made it clear to Mr. Johnson that he would receive better treatment if he stopped his First Amendment activities. One official, Kyle Rosch, tried to convince Mr. Johnson to accept a transfer out of state and to stop his First Amendment activity in whatever state he would agree to be transferred to. ECF Doc. No. 8.1, ¶ 58. Assistant Warden Turner told Mr. Johnson he could return to general population if he agreed to VADOC's request to stop his First Amendment activity. *Id*. at ¶ 59. Red Onion's Warden, Defendant Rick White, made similar comments to Mr. Johnson. *Id*. at ¶ 60. These officials made it clear that VADOC would stop the horrendous treatment of Mr. Johnson if and only if he stopped drawing attention to the abuses and problems within the Commonwealth's prisons. Mr. Johnson bravely refused to do so and continues to suffer the consequences of that bravery.

On January 26, 2024, VADOC took Mr. Johnson to court in Wise County to attempt an order to involuntarily "medicate" Mr. Johnson with a feeding tube. *Id.* at ¶ 61. The judge denied the order, holding that Mr. Johnson was competent and that he had a First Amendment right to engage in his hunger strike. *Id.* He was then taken to VCU Medical Center for a psychiatric evaluation, which determined the same about Mr. Johnson's competency. *Id.* at ¶ 62.

VADOC then chose to transfer Mr. Johnson to the State Farm Infirmary (formerly known as Powhatan Medical Unit), a prison medical facility in the Central Region of the Commonwealth just west of Richmond, where they placed him in a previously closed mental health unit alone. *Id.* at ¶ 62. He is guarded around the clock by members of the Strike Force, including three of the same guards who raided his cell in Sussex I and including at times Sgt. Blaha, who improperly deployed chemical agents on Mr. Johnson. *Id.* He was rushed to VCU Medical Center at least six more times over the next three weeks and was informed that his medical situation has become dire. *Id.* at ¶ 64. Mr. Johnson can no longer keep down any liquids, despite his best efforts—a likely

side effect of being denied water at Red Onion for so long. *See* Declaration of David P. Milzman, MD, FACEP, attached as Exhibit D, at ¶ 17 (observing that "[d]enial of fluid, or even limiting fluid intake, the simplest element being water, resets the brain-hydration centers and has early impacts on health and mental functioning. Days with limited or full denial of fluid intake have immediate risks for injury to a person's kidneys and deficiently affect sleep cycle and ability to normally function."). Mr. Johnson is now down to around 204 lbs., from approximately 263 lbs. in late December 2023. He still has not had access to hygiene items or writing materials for correspondence with loved ones or courts. He continues to fear that ending his hunger strike will mean that he is sent immediately back to Red Onion, where—in addition to his recent treatment—he was previously subjected to 14 years of solitary confinement and racialized assaults and violence.

Argument

Mr. Johnson seeks a preliminary injunction to protect his life and constitutional rights pursuant to Federal Rule of Civil Procedure 65(a). Specifically, he seeks an injunction preventing the Defendants from transferring him to any prison in the Western Region of the Commonwealth during the pendency of this litigation. VADOC is currently keeping Mr. Johnson in the Central Region.

A four-part test established by the Supreme Court governs whether a preliminary injunction is warranted: (1) the likelihood of the movant's success on the merits, (2) whether the movant will face irreparable harm in the absence of preliminary relief, (3) whether the balance of equities favors preliminary relief, and (4) whether an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009). A prohibitory preliminary injunction, seeking to maintain the

status quo[6] while a lawsuit is pending, is a less demanding standard than that for a mandatory preliminary injunction, which seeks to change it. *See, e.g.*, *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014). All four *Winter* factors merit injunctive relief here.

I. Mr. Johnson is likely to succeed on the merits of his First Amendment retaliation claim.[7]

Mr. Johnson was transferred to Red Onion, a supermax facility, and placed in solitary confinement in retaliation for his attempts to highlight the abuses he has faced while in prison. He is likely to succeed in proving that Defendants retaliated against him in response to his protected First Amendment activity. While Mr. Johnson needs to demonstrate a likelihood of success, he "need not establish a certainty of success." *Di Biase v. SPX Corp*., 872 F.3d 224, 230 (4th Cir. 2017). Moreover, he does not need to prove the entirety of his case at this stage. *Univ. of Tex. V. Camenisch*, 451 U.S. 390, 395 (1981). He must merely show a likelihood that he will succeed on the merits of his claim after completing discovery.

To succeed on his retaliation claim, Mr. Johnson needs to show that: (1) he "engaged in protected First Amendment activity," (2) VADOC took actions that "adversely affected" him and would "likely deter a person of ordinary firmness from the exercise of First Amendment rights," (3) VADOC took those actions because of Mr. Johnson's First Amendment conduct, and (4) VADOC's actions "generate[d] more than a de minimis inconvenience." *Snoeyenbos v. Curtis*, 60

[6] The status quo is not the status at the time of the filing of the preliminary injunction, but rather "the last uncontested status between the parties which preceded the controversy." *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) (quoting *Aggarao v. MOL Ship Mgmt. Co., Ltd*., 675 F.3d 355, 378 (4th Cir. 2012)).

[7] The Prison Litigation Reform Act requires that prisoners exhaust available administrative remedies before filing suit, but remedies are not available when prison officials thwart the prisoner's ability to successfully exhaust their administrative remedies, as occurred here. *See Ross v. Blake*, 578 U.S. 632, 643 (2016); ECF Doc. No. 8.1, ¶¶ 17, 56.

F.4th 723, 729–31 (4th Cir. 2023).

Courts cabin the normal deference provided to prison officials on these critical constitutional claims "when failing to do so would 'unfairly tempt corrections officers to enrobe themselves and their colleagues in what would be an absolute shield against retaliation claims.'" *Martin v. Duffy*, 977 F.3d 294, 306 (4th Cir. 2020) (quoting *Maben v. Thelen*, 887 F.3d 252, 263 (6th Cir. 2018)). This is one of those cases.

A. Mr. Johnson engaged in multiple forms of protected First Amendment activity.

Mr. Johnson's publication of articles highlighting the poor conditions within VADOC's prisons and the treatment of prisoners in that system constitutes classic First Amendment activity. The use of the prison grievance procedure and legal system to "petition for the redress of grievances" is also protected First Amendment activity. *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 544 (4th Cir. 2017).[8] And that right is not extinguished by imprisonment. *Martin v. Duffy*, 858 F.3d 239, 249 (4th Cir. 2017) (citing *Turner v. Safley*, 482 U.S. 78, 84 (1987)). Mr. Johnson's publication of articles highlighting the abuses he was facing within VADOC facilities and filing of grievances about the same abuses constitute protected First Amendment activity.

B. VADOC undertook adverse actions against Mr. Johnson.

VADOC officials' decision to transfer Mr. Johnson to the most restrictive prison in the Commonwealth, place him in restrictive housing, cut off his water, house him in a cold cell, and deny him the ability to be hygienic—as well as their efforts to plant a knife in a cell to which they moved him—constitute sufficient adverse actions for the purposes of a First Amendment retaliation claim.

[8] Verbal complaints to correctional officers qualify as well. *Booker*, 855 F.3d at 542; *Patton v. Kimble*, 717 F. App'x 271, 272 (4th Cir. 2018) (unpublished).

The Fourth Circuit has long held that placement in "administrative segregation 'could deter a person of ordinary firmness from exercising their First Amendment rights.'" *Martin v. Duffy*, 858 F.3d 239, 249 (4th Cir. 2017) (quoting *Herron v. Harrison*, 203 F.3d 410, 416 (6th Cir. 2000)). Similarly, while transfers between prisons are normally not "adverse action[s] upon which a retaliation claim may be based," a transfer "'can be an adverse action if that transfer would result in foreseeable, negative consequences to the particular prisoner.'" *Johnson-El v. Beck*, No. 3:11-cv-115, 2011 U.S. Dist. LEXIS 37582, *11 (W.D.N.C. March 25, 2011) (quoting *Smith v. Yarrow*, 78 F. App'x 529, 543 (6th Cir. 2003) (unpublished), and *Hill v. Lappin*, 630 F.3d 468, 475 (6th Cir. 2010)). Other circuits have adopted this position as well. *See Gee v. Pacheco*, 627 F.3d 1178, 1189 (10th Cir. 2010) (transfer to out-of-state supermax counts as an adverse action); *Wildberger v. Bracknell*, 869 F.2d 1467, 1468 (11th Cir. 1989) (transfer for retaliatory purposes qualifies as an adverse action); *Rizzo v. Dawson*, 778 F.2d 527, 531 (9th Cir. 1985) (same).

VADOC officials have engaged in numerous adverse actions against Mr. Johnson. First, they planted a knife on him at Sussex I to provide cover for the decision to transfer him to Red Onion and keep him in restrictive housing. The planting of the knife, which, according to VADOC, led to his transfer, constitutes an adverse action in and of itself. The fear of having contraband falsely attributed to you and facing the punishments for having that contraband would surely deter a person of ordinary firmness from exercising their First Amendment rights.

Further, the fact that Mr. Johnson was transferred across the state, to a higher-security prison with its attendant restrictions on liberty and its history of harmful conduct to him, and away from his medical providers and family makes his transfer an adverse action. VADOC has conceded this fact in a similar case. In *Shaw v. Foreman*, the plaintiff had been placed in restrictive housing and transferred to Red Onion for what he alleged were retaliatory reasons. 59 F.4th 121, 125-26

(4th Cir. 2023). VADOC officials did not dispute that those actions qualified as adverse actions under the First Amendment retaliation test. *Id*. at 130. A transfer to a harsher and more restrictive prison would have foreseeable, negative consequences for any prisoner. For Mr. Johnson, who has significant health issues and who faced abuses at that more restrictive facility in the past, those consequences were even greater and easier to foresee. And harm did befall him after his transfer.

Lastly, the continued retaliation against Mr. Johnson during the transfer and his hunger strike constitute adverse actions. During his transfer, VADOC staff gassed Mr. Johnson, did not let him decontaminate, and inexplicably ignored medical orders in his file. ECF Doc. No. 8.1, ¶¶ 19-20. He received disciplinary charges based on his attempt to have VADOC's own orders in his file followed. *Id*. at ¶ 23. Mr. Johnson was then sent to solitary confinement, denied water, prevented from cleaning himself or his clothing, and all but banned from contacting the outside world. *Id*. at ¶¶ 23-51. A person with ordinary firmness, or even one with far more than that, would be deterred from exercising their First Amendment rights in the face of this sustained abuse.

C. VADOC's actions were taken in retaliation for Mr. Johnson's First Amendment activity and to prevent him from speaking out further.

The causation element "asks whether the considerations which animated the defendant's conduct were permissible or impermissible." *Martin v. Duffy*, 977 F.3d 294, 300 (4th Cir. 2020). To carry his prima facie burden of causation, Mr. Johnson must show "'(1) that the defendants were aware of his engaging in protected activity' and (2) 'some degree of temporal proximity to suggest a causal connection.'" *Shaw v. Foreman*, 59 F.4th 121, 17 (4th Cir. 2023) (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 501 (4th Cir. 2005)) (cleaned up). If Mr. Johnson meets his burden, then the burden shifts to VADOC to "prove, by a preponderance of the evidence, that they 'would have reached the same decision . . . in the absence of the protected conduct.'" *Martin v. Duffy*, 977 F.3d 294, 299 (4th Cir. 2020) (quoting *Mt. Healthy*

City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283 (1977)).

Mr. Johnson can easily carry his initial burden. As detailed above, VADOC officials were well aware of Mr. Johnson's First Amendment activity. Recently, they had been consistently contacted by members of the public after Mr. Johnson published articles about his mistreatment at Sussex I from April through July and again in October 2023. And if there was any doubt, Sergeant Hall told Mr. Johnson that he was being transferred because of his speaking out, demonstrating that VADOC officials knew of his activity. ECF Doc. No. 8.1, ¶ 13. This was followed up by the Warden and Assistant Warden at Red Onion, as well as another VADOC headquarters official, making it clear to Mr. Johnson that his punishment would stop if he would agree to stop his First Amendment activity. *Id*. at ¶¶ 25, 58. In addition, Mr. Johnson's communication with the outside world—VADOC's primary point of contention with him—was all but eliminated. *Id*. at ¶ 24.

Regarding temporal proximity, Mr. Johnson had a knife planted on him and was transferred after constant efforts by Mr. Johnson to draw public attention to his plight at Sussex I. Every further restriction he faced came after he in those moments refused to stop engaging in First Amendment activity or to agree to stop in the future. The temporal proximity prong is not a demanding standard. *See, e.g.*, *Shaw v. Foreman*, 59 F.4th 121, 131 (4th Cir. 2023) (noting that a week or two between the protected activity and adverse action constitutes "extremely close temporal proximity"); *Foster v. Univ. Of Md.-E. Shore*, 787 F.3d 243, 253 (4th Cir. 2015) (one month); *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994) (six weeks). It is satisfied here, as each of the retaliatory acts occurred within weeks, at most, of Mr. Johnson's protected conduct.

Mr. Johnson more than meets his initial burden on causation. VADOC's actions against him continue to follow a similar pattern. Whenever Mr. Johnson brings more public attention to the treatment VADOC officials subject him to, those officials attempt to silence him. Those efforts

have culminated in Mr. Johnson being framed, sent to Red Onion, and placed in restrictive housing. If there was any doubt as to why those actions occurred, Mr. Johnson's access to kiosks and other ways of communicating with the outside world were cut off. VADOC is retaliating against Mr. Johnson for his speech and attempting to prevent him from speaking more.

1. The *Mt. Healthy* standard.

Because Mr. Johnson has established a prima facie case of retaliation, VADOC "is appropriately tasked with explaining why [its] decision was not animated by retaliatory motives." *Martin v. Duffy*, 977 F.3d 294, 301 (4th Cir. 2020). In other words, VADOC must show that they absolutely would have transferred Mr. Johnson to Red Onion even if he had engaged in no First Amendment protected conduct. This must be demonstrated by a preponderance of the evidence. *Id*. at 299. Before turning to why VADOC cannot meet this burden—assuming they attempt to do so—a note on the deference given to correctional officials is in order.

It is not sufficient for prisons officials to merely aver that they took the challenged action for proper purposes. The Fourth Circuit confirmed this in its second decision in *Martin v. Duffy*. In *Martin*, the district court reviewed an affidavit from a defendant correctional officer asserting barely that the officer acted for proper purposes. The district court accepted that affidavit, without any further evidence, and granted summary judgment to the officer under this burden-shifting framework. The Fourth Circuit reversed this decision, pointing out that, among other things, the affidavit "failed to identify any specific threats" that caused the officer to place the plaintiff in segregation. 977 F.3d 294, 305 (4th Cir. 2020). While prison officials receive due deference, they need to provide more than just a bare assertion.

2. VADOC cannot meet their burden under *Mt. Healthy*.

The Fourth Circuit applies "the well-settled principle that '[a]n action motivated by

retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate.'" *Martin v. Duffy*, 977 F.3d 294, 306 (4th Cir. 2020) (quoting *Woods v. Smith*, 60 F.3d 1161, 1165 (5th Cir. 1995)) (alterations in original); *see also Watson v. Rozum*, 834 F.3d 417, 426 (3d Cir. 2016) (noting that "a plaintiff can make out a retaliation claim even though the charge against him may have been factually supported"). As the Ninth Circuit has accurately described the test, VADOC must show "by a preponderance of the evidence that it *would* have reached the same decision [absent the protected conduct]; it is insufficient to show merely that it *could* have reached the same decision." *CarePartners, LLC v. Lashway*, 545 F.3d 867, 877 (9th Cir. 2008) (citing *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1315 (9th Cir. 1989)) (emphasis in original). Indeed, that is the language from *Mt. Healthy* itself. 429 U.S. 274, 287 (1977) (requiring the defendant to show "that it *would* have reached the same decision.") (emphasis added).

Numerous VADOC officials have told Mr. Johnson that he is being punished for his efforts to speak out under the First Amendment and/or that he would receive better treatment if he stopped speaking out. Sergeant Hall told Mr. Johnson that the knife had been planted on him to get him transferred out of Sussex I. ECF Doc. No. 8.1, ¶ 13. Warden Rick White visited Mr. Johnson on his first day at Red Onion and told him he would be accommodating of him if he did not speak out against the prison. *Id*. at ¶ 25. Assistant Warden Dwayne Turner came the next day with the same message. *Id*. This demonstrates—under the lower evidentiary burden applicable at the preliminary injunction stage, *see, e.g.*, *Di Biase v. SPX Corp*., 872 F.3d 224, 230 (4th Cir. 2017)—that even if a factual basis existed for his transfer and the other restrictions he has faced, Mr. Johnson's treatment has occurred for retaliatory purposes, and he is likely to succeed on the merits of that claim.

VADOC's proffered reasons for why they transferred Mr. Johnson are set out in the affidavit of Sussex I Warden Kemsy Bowles, attached to VADOC's Opposition to Mr. Johnson's Motion for a Temporary Restraining Order. Those reasons focused on the knife allegedly found in Mr. Johnson's room and other small non-violent infractions from the previous months. ECF Doc. No. 13.2, 4. Those arguments do not meet the *Mt. Healthy* burden for three reasons.

First, the knife was likely planted as a pretense to get rid of Mr. Johnson because of his First Amendment activity at Sussex I. He had been publicizing the conditions at Sussex I in a way that painted VADOC in a poor light. On Tuesday, October 17, 2023, VADOC had their opportunity to get rid of Mr. Johnson. That evening, VADOC investigators arrested a nurse attempting to bring contraband into Sussex I.[9] The opportunity therefore existed to plant something on Mr. Johnson and tie him to that arrest. ECF Doc. No. 8.1, ¶ 13. And, as was told to Mr. Johnson by a Sergeant at Sussex I, that is exactly what happened. *Id*. Circumstantial evidence supports this as well. The knife is not a prison-made shiv or other device more commonly found in secure facilities, but rather a pocketknife that would have to be smuggled in from outside the facility. Further, it was not found among Mr. Johnson's property, but under the door of a cell he had just been moved into after the VADOC investigator told the Strike Force team to "find something" in their cell search. Not to mention that the cell had not been searched prior to placing Mr. Johnson in it, and—one should assume for reasons of prison safety and protocol—Mr. Johnson was searched before his transfer. If VADOC officials truly thought that the knife had been Mr. Johnson's and thus he should be considered dangerous, they would not have placed him back on general population status days

[9] Tannock Blair, *Virginia Department of Corrections employee arrested for allegedly trying to smuggle cigarettes, cell phones into prison*, ABC 8 NEWS, Oct. 20, 2023, https://www.wric.com/news/virginia-news/virginia-department-of-corrections-employee-arrested-for-allegedly-trying-to-smuggle-cigarettes-cell-phones-into-prison/.

later. *Id*. at ¶ 15; ECF Doc. No. 13.2, at 22. They obviously did not view him as a threat.

Second, Red Onion is a supermax facility meant for the prisoners VADOC deems the most aggressive or violent. *See Thorpe v. Clarke*, 37 F.4th 926, 931-33 (4th Cir. 2022). Sussex I is a lower security prison. *See id*. at 932 (describing Red Onion and Wallens Ridge as the only two supermax facilities in Virginia). From the time Mr. Johnson arrived at Sussex I through the day he was transferred to Red Onion, he committed no violent infractions. *See* ECF Doc. No. 13.2. The only major infraction he allegedly committed involved the outside knife Strike Force guards claimed to find in Mr. Johnson's previously vacant and uninspected cell. That knife formed the primary basis of VADOC's alleged reasons for transferring Mr. Johnson. ECF Doc. No. 13.2, ¶ 9. But, as noted above, Mr. Johnson meets his burden at this stage in the proceedings of demonstrating that the knife was likely planted as a pretense to get Mr. Johnson out of Sussex I so he would stop publishing information about the abuses in the prison.

Third, even if the knife is accepted as being Mr. Johnson's (which Plaintiff vigorously disputes), VADOC's numerous violations of its own procedures undermines this explanation as well. Approximately a week after placing him in general population status, VADOC commenced an emergency transfer sending Mr. Johnson from Sussex I to Red Onion. Contrary to their own operating procedures, Mr. Johnson did not receive a hearing at either Sussex I or Red Onion regarding this transfer or his placement in restrictive housing at Red Onion. More tellingly, as a prisoner on general population status, Mr. Johnson did not meet the criteria for an emergency transfer. Without the motivation of his First Amendment activity, VADOC had no valid reason to transfer Mr. Johnson to Red Onion, even given the past knife incident.

Even if a potentially non-retaliatory reason existed in theory, the evidence at this stage in the proceedings shows a likelihood that VADOC transferred Mr. Johnson and inflicted other

punishments on him for one reason—to silence him. That violates the First Amendment.

D. VADOC's actions greatly harmed Mr. Johnson.

As explained by the Fourth Circuit in *Snoeyenbos v. Curtis*, the mere-inconvenience prong of the retaliation standard goes hand-in-hand with the adverse-impact prong. *See* 60 F.4th 723, 729-31 (4th Cir. 2023). As the *Snoeyenbos* court summarized, "we ask, from an objective standpoint, whether the challenged conduct would 'likely deter a person of ordinary firmness from the exercise of First Amendment rights.'" *Id*. at 731 (quoting *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005)). And that challenged conduct must "generate more than a de minimis inconvenience." *Id*. That inquiry is performed "on a case-by-case basis, considering the actors involved and their relationship." *Id*. (citing *The Baltimore Sun v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006)).

It goes without saying that a transfer to a supermax prison eight hours away from his family and medical providers caused Mr. Johnson more than minor inconvenience. The placement in restrictive housing, with all its attendant deprivations, is also more than a minor inconvenience. Those harms, combined with the damages suffered in the raid of his cell, more than clear the harm element for this claim. Moreover, as discussed above, a retaliatory transfer to a higher-security prison and placement in restrictive housing count as adverse actions. And they did adversely affect Mr. Johnson.

* * *

For the reasons stated above, Mr. Johnson is likely to succeed on his retaliation claims, and this Court should find that he readily meets that element of the preliminary injunction standard.

II. Mr. Johnson will suffer irreparable harm without an injunction.

Mr. Johnson need only demonstrate that irreparable harm "is likely in the absence of an

injunction." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008). Harm need not be inevitable or have already happened for it to be irreparable; rather, imminent harm is also cognizable harm that merits an injunction. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993). Should he be returned to Red Onion, officials there have already demonstrated that they are willing to treat him unconstitutionally because of his First Amendment activities, including by putting him in restrictive housing, denying him running water in his cell, denying him access to the outside world, denying him hygiene or other basic necessities of life such as warmth in the winter, and denying him access to appropriate medical care for his ongoing acute and chronic conditions.[10] Sending him back to these conditions would certainly constitute irreparable harm and could very likely lead to his death. Indeed, in his declaration, Dr. Milzman observes, "Mr. Johnson's apparent fear to return to the setting of purported water denial is certainly understandable. Avoiding this locale, at a minimum during Mr. Johnson's re-eating period, discussed below, will likely aid materially in Mr. Johnson's recovery." Ex. D, Declaration of Dr. Milzman, at ¶ 18.[11]

Mr. Johnson has already been greatly harmed by the retaliatory actions VADOC took against him. *See O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) ("past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury"). The conditions he faced at

[10] Red Onion is notorious throughout the state as a place incapable of providing humane conditions of confinement to the individuals detained therein. Westlaw contains over 1,000 case files involving challenges to conduct at Red Onion, and news stories covering the concerns at this facility are myriad. *See, e.g.*, Laurence Hammack, *Inmates in solitary confinement allowed to join class-action lawsuit against Southwest Virginia prison*, The Roanoke Times, Apr. 13, 2023, available at https://roanoke.com/news/local/solitary-class-action-lawsuit-expanded-southwest-virginia-red-onion/article_0daa01f6-da3b-11ed-beb7-9b81efbbdbc4.html (last visited Feb. 22, 2024) (describing Red Onion as "the state's toughest prison").

[11] Dr. Milzman also notes that "[r]e-feeding efforts for Mr. Johnson will also prove challenging for the same reasons. During his inpatient stay at VCU Hospital, feeding proved extremely challenging for Mr. Johnson. The fact that this important bodily function was difficult in a hospital setting indicates that it will be even more difficult anywhere else." Ex. D, at ¶ 19.

Red Onion were shocking, as demonstrated throughout this memorandum. The lack of water, contact with the outside world, and ability to maintain basic hygiene took its toll on Mr. Johnson. A return to those conditions would cause him further irreparable harm, satisfying the third *Winter* prong. *See* Ex. D, at ¶ 18 (discussed above), ¶ 22 (opining that "[t]he foregoing circumstances place him at risk of imminent harm.").

Defendants' violations of Mr. Johnson's First Amendment rights also constitute irreparable harm aside from the specific physical harms that their actions caused. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *see also Miranda v. Garland*, 34 F.4th 338 (4th Cir. 2022) (same). As the Fourth Circuit has explained, "in the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment claim." *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013). Because Mr. Johnson is likely to succeed on the merits of his First Amendment retaliation claim, he has also demonstrated that irreparable harm is likely in the absence of an injunction. Here, Mr. Johnson has both already suffered harm and will face imminent harm as long as a return to Red Onion is permissible.

III. The balance of the equities is decisively in Mr. Johnson's favor, and a preliminary injunction serves the public interest.

The balance of equities is decisively in favor of Mr. Johnson, and a preliminary injunction is in the public interest. When the defendants are governmental actors, these two factors merge and are properly considered together. *Roe v. Dep't of Defense*, 947 F.3d 207, 230 (4th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

Mr. Johnson has an interest in exercising his First Amendment rights without fear of severe reprisal. *See Elrod*, 427 U.S. at 373 (explaining this principle when the reprisal was threatened

firing from a public job). By contrast, VADOC has no interest in engaging in unconstitutional conduct. *See Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002). The opposite is in fact true— "upholding constitutional rights surely serves the public interest." *Centro Tepeyac*, 722 F.3d at 191 (quoting *Giovani Carandola, Ltd*., 303 F.3d at 521).

The public interest is also served by prisoners being able to exercise their free speech rights, however limited by the fact of incarceration, without threat of punishment. Members of the general public, the judiciary, policy makers, and VADOC officials themselves all rely on the ability of incarcerated people to exercise their constitutionally protected rights to speak, file grievances, and file lawsuits. *See Woodford v. Ngo*, 548 U.S. 81, 102 (2006) ("Corrections officials concerned about maintaining order in their institutions have a reason for creating and retaining grievance systems that provide—and that are perceived by prisoners as providing—a meaningful opportunity for prisoners to raise meritorious grievances"). The Supreme Court has long recognized that "speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991); *see also Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (noting that "information relating to alleged governmental misconduct…has traditionally been recognized as lying at the core of the First Amendment").

Information on what is occurring inside Virginia's prisons, otherwise difficult to obtain given their status as inherently closed environments, is necessary for democratic accountability mechanisms to function. This information is becoming even more necessary as the Commonwealth of Virginia's legislative and executive branches discuss ways to implement the changes required by the *Thorpe* lawsuit. *See Thorpe v. Clarke*, 37 F.4th 926 (4th Cir. 2022) (holding, in part, that plaintiffs had adequately alleged an Eighth Amendment claim based on long-term solitary confinement and that VADOC officials were not entitled to qualified immunity); *see also* Va.

Code. § 53.1-39.1 (requiring VADOC to create a yearly report on the use of restrictive housing). Retaliation against prisoners for the constitutionally protected action of informing the public about the conditions behind bars—threatening the wellbeing, health, and even lives of those prisoners—undermines their ability to raise these critical concerns and harms the public. An injunction from this Court would go a long way towards remedying that issue.

CONCLUSION

Mr. Johnson respectfully requests that this Court grant Mr. Johnson a Preliminary Injunction as detailed in his Motion and Proposed Order.

Dated: February 23, 2024

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 23rd day of February 2024, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send notification of such filing (NEF) to all counsel of record.

By: */s/ Danny Zemel*
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