No. 23-1725

In the United States Court of Appeals
for the Seventh Circuit

ROBERT K. DECKER,

Plaintiff-Appellant,

v.

KATHERINE SIREVELD, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Illinois, Case No. 19-cv-00233-JPG
The Honorable J. Phil Gilbert

BRIEF OF PLAINTIFF-APPELLANT IN SUPPORT OF APPEAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-1725

Short Caption: Robert Decker v. Katherine Sireveld, et al

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
Robert K. Decker

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Robinson, Bradshaw & Hinson, P.A.

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ H. Hunter Bruton Date: 11/27/2023

Attorney's Printed Name: Hampton Hunter Bruton

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Erik R. Zimmerman Date: 01/02/2024

Attorney's Printed Name: Erik R. Zimmerman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Zachary A. Johnson Date: 01/02/2024

Attorney's Printed Name: Zachary A. Johnson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Regulations

Statutes

Rules

Other Authorities

REQUEST FOR ORAL ARGUMENT

This Court has twice appointed pro-bono counsel in this important case implicating questions about prisoners' exercise of fundamental First Amendment rights and the law on recruitment of counsel. In accordance with Federal Rule of Appellate Procedure 34(a) and Circuit Rule 34(f), Plaintiff-Appellant Robert K. Decker respectfully requests oral argument, which would substantially aid the Court in its analysis of this case.

INTRODUCTION

Plaintiff-Appellant Robert Decker is incarcerated by the federal government and has been unable to exercise his fundamental First Amendment rights to read about proposed rules in the Federal Register as well as speak on, and petition the government about, these crucial matters of public importance. All he asks is that the Bureau of Prisons (BOP) click three links to download the free, government-published, publicly available version of the Federal Register and post it to an electronic bulletin board that the BOP already updates and makes available to prisoners.

After denying multiple motions for recruitment of counsel explaining that Mr. Decker could not litigate his case while incarcerated, the district court granted summary judgment for Defendants-Appellees, concluding that it was too much of a burden for the BOP to provide the free electronic version of the Federal Register to inmates. The only basis for this conclusion was a bare-bones affidavit making rote assertions and failing to engage with the reasonable alternative provided by Mr. Decker below. This constitutes reversible error.

And to the extent there is any question remaining about the feasibility of providing the Federal Register to inmates in electronic format, it was reversible error for the district court to deny Mr. Decker's multiple motions for recruitment of counsel. Mr. Decker explained that he had roughly forty-five minutes a week to do research on nine ongoing cases. His prison cell lacked the basic resources—legal-research materials, word-processing equipment, even envelopes—required to

litigate against the federal government. Without the BOP providing basic materials for inmates, Mr. Decker could not timely complete discovery and litigate motions for summary judgment. He could not even attend a settlement conference, conduct required written discovery, or depose the BOP officials on whose assertions the district court based its summary-judgment order. Counsel, in contrast, could have pursued relevant discovery and then moved for summary judgment on Mr. Decker's behalf, ending this case.

With a few clicks once a week, the BOP could provide what the First Amendment demands. This Court should reverse the district court's order granting summary judgment and order entry of summary judgment for Mr. Decker. Alternatively, this Court should reverse the district court's orders denying Mr. Decker's recruitment motions and remand for recruitment of counsel for any limited further proceedings.

JURISDICTIONAL STATEMENT

District Court Jurisdiction: This is an appeal from a decision and order issued by the United States District Court for the Southern District of Illinois. There, Mr. Decker requested relief under the Administrative Procedure Act, the Declaratory Judgment Act, and the United States Constitution. The district court had subject-matter jurisdiction over this civil action arising under the laws of the United States. 28 U.S.C. § 1331.

Appellate Jurisdiction: On March 31, 2023, the district court entered judgment. RSA 20. Mr. Decker timely filed a notice of appeal on April 17, 2023. *See* SA 312; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction to review the district court's final decision. 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by granting summary judgment to Defendants when no record evidence justifies Defendants' infringement of Mr. Decker's First Amendment rights.

2. Whether the district court erred by denying Mr. Decker's motions for recruitment of counsel without addressing the procedural and substantive difficulty of his case and despite his inability to handle complicated discovery and summary-judgment proceedings on his own.

STATEMENT OF THE CASE

A. Factual Background

This case arises from Mr. Decker's efforts to obtain information about proposed federal regulations. RSA 7. Mr. Decker is a federal prisoner who, for almost five years, has been asking the BOP for access to the Federal Register. *See* RSA 6-7.

The Federal Register is a daily journal published online and in print by the federal government. RSA 8 (district court taking judicial notice of the Federal Register's government website); Qureshi Aff. ¶ 7 n.1, SA 208. It contains proposed rules, final rules, and notices issued by federal agencies. RSA 8.

Mr. Decker wants to exercise his rights under the First Amendment and the Administrative Procedure Act (APA) to read the Federal Register and comment on proposed rules that affect him and others like him. RSA 7. But he lacks access to the Federal Register. RSA 7; Qureshi Aff. ¶ 10, SA 209. Long shipping times and delays in the prison-mail system make it difficult, if not impossible, for a prisoner to obtain a print edition in time to comment on proposed rules with short comment periods. *See* SA 167-68; *infra* pp. 32-33.

The government, however, created an alternative to bulky, expensive, slow-arriving print editions. To allow interested persons to easily read and comment on material in the Federal Register, the government posts the publication's daily editions online at www.federalregister.gov. RSA 8; Qureshi Aff. ¶ 7 n.1, SA 208; Defs.' Screenshot of Federal Register Website 1, SA 255 (showing option to click on

"Current Issue"). On that government website, anyone can download a full daily edition of the Federal Register as a single PDF file—for free.

The BOP gives prisoners access to PDFs of certain Federal Register materials. Qureshi Aff. ¶¶ 8-9, SA 208; *id.* Attachment 2, SA 243-254. Pursuant to a BOP program statement, the agency gives prisoners access to final rules, proposed rules, interim rules, and certain notices—when those materials relate to the BOP. Federal BOP, Program Statement 1315.07, at 8 (Nov. 5, 1999), SA 217. The BOP posts PDFs of the BOP-related materials to an "electronic bulletin board," and all inmates can access that bulletin board using computers in the prison law library. Qureshi Aff. ¶ 6, SA 207.

The BOP does not, however, give prisoners access to the PDFs of the full Federal Register. That remains true even when the PDFs contain proposed rules, final rules, or notices that affect prisoners, such as rules and notices on prison phone calls, low-income public housing, or insurance for addiction and mental-health problems. *See* Qureshi Aff. ¶ 10, SA 209. The BOP has asserted that providing electronic access to the full PDFs would be "highly burdensome" on its resources. Qureshi Aff. ¶ 7, SA 207.

B. Procedural Background

1. Initial Proceedings and First Appeal

Mr. Decker filed this lawsuit in February 2019. SA 1. His fourth amended complaint alleges that the BOP is violating the Constitution and the APA by refusing to give him access to the Federal Register. SA 24.

The district court dismissed Mr. Decker's complaint at the screening stage under the Prison Litigation Reform Act (PLRA), 28 U.S.C. § 1915A. SA 57-61. After this Court appointed counsel for Mr. Decker, Defendants conceded that a remand was appropriate. SA 84-85.

This Court agreed. SA 88. It held that the district court erred in two ways. SA 88-89.

First, the district court wrongly used the PLRA's screening procedures to resolve a factual dispute (whether Mr. Decker had access to the BOP's proposed rules). SA 88-89.

Second, the district court's dismissal erroneously relied on a response given by the BOP to one of Mr. Decker's administrative complaints. SA 89. The response said that inmates had access to the BOP's proposed rules. SA 89. Even if that were true, that response would provide no basis to dismiss Mr. Decker's broader claim about his lack of access to Federal Register materials that concern other agencies. SA 89; *cf. infra* p. 19 n.2 (noting that the BOP has not provided full access to BOP regulations).

Given these errors, this Court vacated the district court's order and remanded for further proceedings. SA 89.

2. Remand Proceedings and this Appeal

On remand, proceedings progressed from the pleading phase, through discovery, to the summary-judgment stage.

During discovery, Mr. Decker asked the district court five times for help recruiting counsel. SA 104, 148, 166, 171, 175. Mr. Decker told the court that he had no money; his time in the law library was severely limited; and he was struggling to obtain evidence through discovery. SA 166, 171-72. He also detailed his poor logistics: he had few envelopes, no copier, and his mail was arriving late, sometimes thirty days behind. SA 104, 166-67, 175.

In several short orders, the district court denied Mr. Decker's multiple requests for counsel. RSA 1, 2, 3, 4, 5. It also denied a motion to compel that he filed. SA 191. Thus, by the end of discovery, Mr. Decker had received some basic admissions about the Attorney General's authority and the fact that the BOP refuses to provide the entire Federal Register to prisoners. SA 110-11. But he had not propounded interrogatories, accomplished extensive document discovery, or deposed witnesses. *See* SA 171 (Mr. Decker telling the district court, "I can't get the discover[y] needed to litigate this matter.").

The district court granted summary judgment to Defendants. RSA 6. Relying on screenshots attached to Defendants' summary-judgment motion, the court concluded that the BOP is providing BOP-related Federal Register materials to inmates. RSA 12. As for the provision of Federal Register materials related to other agencies, the court said that, since the BOP has an interest in avoiding burdensome and cost-prohibitive actions, it was not violating the Constitution by denying Mr. Decker access to these materials. RSA 14, 17.

Mr. Decker timely appealed on April 17, 2023. *See* SA 312; Fed. R. App. P. 4(a)(1)(B). This Court, citing the Seventh Circuit's leading case on the recruitment of counsel, *Pruitt v. Mote*, 503 F.3d 647 (7th Cir. 2007) (en banc), again appointed counsel for Mr. Decker. SA 329.

SUMMARY OF ARGUMENT

Mr. Decker did not lose his First Amendment rights when the BOP incarcerated him. He retains his rights to read about, and petition on, matters of public concern. *Turner v. Safley*, 482 U.S. 78, 84 (1987); *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 638 (7th Cir. 2005). Yet the BOP denies him access to the Federal Register, even though it could easily provide him access by downloading a free PDF from a government website and then posting that PDF to an electronic bulletin board that the BOP already maintains for prisoners. Defendants are impermissibly infringing on Mr. Decker's rights to read about, and petition on, federal administrative rulemaking—a matter of supreme public importance.

Defendants have not justified their action with competent record evidence. After Mr. Decker identified an easy way that the BOP could accommodate his First Amendment rights—by giving him access to the free electronic PDF version of the Federal Register—the BOP waved that alternative away with an insufficient conclusory statement in an affidavit.

The district court reversibly erred in granting summary judgment to Defendants without addressing record evidence on the easy alternative to infringing Mr. Decker's rights. It also summarily determined that Mr. Decker could import expensive, hefty print editions of the Federal Register into his prison cell. It did not explain how Mr. Decker could afford the print editions or clarify how he could store multiple hundred-page publications in his cell. It did not address how he could obtain paper copies in time to comment on proposed rules that have short comment

periods, especially given delays in the prison-mail system. Without any record evidence, the district court just declared that he could somehow make it all work.

The court also erred when it denied Mr. Decker's requests for counsel. The district court denied Mr. Decker's recruitment motions without addressing the difficulty of his case. And it did not sufficiently address his competence to litigate the complex discovery and summary-judgment phases on his own and from prison. It thus failed to apply this Circuit's legal standard. *Pruitt v. Mote*, 503 F.3d 647, 649 (7th Cir. 2007) (en banc); *James v. Eli*, 889 F.3d 320, 330 (7th Cir. 2018). By blocking Mr. Decker's efforts to seek help, the district court prejudiced him. He was unable to bolster his case with evidence that counsel could have obtained and then used to move for summary judgment.

The district court erred when it granted Defendants summary judgment on a record devoid of evidence in their favor. It also erred when it failed to apply this Circuit's legal standard to Mr. Decker's requests for counsel. This Court should reverse the district court for both reasons.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, "taking the facts in the light most favorable to the non-moving part[y]." *Beardsall v. CVS Pharmacy, Inc.*, 953 F.3d 969, 972 (7th Cir. 2020). Summary judgment can be granted only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "bears the burden of showing that summary judgment is appropriate." *Weaver v. Champion*

Petfoods USA Inc., 3 F.4th 927, 934 (7th Cir. 2021). A district court may not use a summary-judgment motion as "a vehicle for resolving factual disputes." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994).

While this Court reviews a district court's recruitment decisions for abuse of discretion, a district court abuses its discretion when it fails to apply the correct legal standard, such as when it "fail[s] to undertake [a] necessary inquiry." *Pruitt*, 503 F.3d at 660.

ARGUMENT

I. The BOP is violating Mr. Decker's First Amendment rights to read about, and petition on, matters of public concern.

Mr. Decker retains his First Amendment right to speak on matters of public concern, which includes reading about, and petitioning on, matters of administrative rulemaking. There is no evidentiary basis to grant summary judgment to Defendants and conclude that the BOP has a legitimate penological interest in denying Mr. Decker access to the electronic version of the Federal Register. This Court should reverse and remand with instructions to enter summary judgment for Mr. Decker.

A. Mr. Decker retains his First Amendment rights to read about, and petition on, matters of public concern.

Prisoners retain their fundamental rights to read about public affairs and petition the government. U.S. Const. Amd. I. Of the civil liberties enshrined in the Constitution by our Founders, these rights are the first among equals and integral to a functioning democratic government. The protection given to these rights

reaches its apex when prisoners seek to read about, and petition on, matters of public concern, such as issues related to federal regulations.

"Freedom of speech is not merely freedom to speak; it is also freedom to read." *King v. Fed. Bureau of Prisons*, 415 F.3d 634, 638 (7th Cir. 2005). Infringing on an inmate's right to read and stay informed "shut[s] him out of the marketplace of ideas and opinions that it is the purpose of the free-speech clause to protect." *Id.*

Likewise, prisoners retain their right to petition the government. *Turner v. Safley*, 482 U.S. 78, 84 (1987); *Hudson v. Palmer*, 468 U.S. 517, 523 (1984); *Ogurek v. Gabor*, 827 F.3d 567, 568 (7th Cir. 2016). The right to petition is the foundation of a "government, republican in form." *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 525 (2002); 3 Joseph Story, *Commentaries on the Constitution* §§ 1886-87 (1833).

The First Amendment protects the people's right to access information and petition the government because it is vital to the healthy functioning of our representative democracy. As James Madison explained, "[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter from James Madison to W. T. Barry (August 4, 1822), *reprinted in* 9 Writings of James Madison 103 (G. Hunt ed., 1910), available at https://www.loc.gov/resource/mjm.20_0155_0159/?sp=1&st=text. "[A] people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *Id.* The Founders understood that "the people" should have "full information of [public and government] affairs thro' the channel of the public papers." Letter from Thomas Jefferson to Edward Carrington ¶ 4 (Jan. 16,

1787), *reprinted in* The Life and Selected Writings of Thomas Jefferson (Adrienne Koch & William Parden eds., 1972), available at https://founders.archives.gov/documents/Jefferson/01-11-02-0047; *id.* (arguing that "every man should receive those papers and be capable of reading them").

And the right to acquire public information would be meaningless if the populace could not voice its ideas and concerns by petitioning the government. Letter from Thomas Jefferson to David Humphreys ¶ 3 (Mar. 18, 1789), *reprinted in* The Works of Thomas Jefferson (Fed. Ed. 1904), available at https://founders.archives.gov/documents/Jefferson/01-14-02-0422 (describing Americans' right to "publish[] our thoughts by speaking or writing"); From George Washington to Officers of the Army ¶ 7 (Mar. 15, 1783), available at https://founders.archives.gov/documents/Washington/99-01-02-10840 (arguing against "preclud[ing] [people] from offering their sentiments on a matter").

Protection of these rights is particularly important when it relates to matters of public concern because such speech is "the essence of self-government." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011). And the need to speak and be heard on matters of public importance is all the more important when it comes to the wide-ranging activities of the administrative state, which consists of unelected administrators performing legislative, judicial, and executive functions. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Brennan v. Dickson*, 45 F.4th 48, 66 (D.C. Cir. 2022); *Home Box Off., Inc. v. F.C.C.*, 567 F.2d 9, 35 (D.C. Cir. 1977). Administrative agencies are meant to "act on behalf of the people." *Cal. Motor*

Transp., 404 U.S. at 510. Their authority is tempered by "the ability of the people to make their wishes known." *Id.*; *see also* Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), available at https://press-pubs.uchicago.edu/founders/documents/amendI_speechs8.html (stating that "the opinion of the people" is "[t]he basis of our governments").

The APA facilitates the exercise of First Amendment rights by obligating the federal government to make certain information publicly available and requiring agencies to follow certain procedures when exercising administrative authority. Relevant here, the government must both publish proposed rulemakings in the Federal Register and allow interested persons an opportunity to comment on these rulemakings. 5 U.S.C. §§ 552-553.

Agencies cannot propose generally applicable rules without making them available through the Federal Register or otherwise personally providing notice to individuals about such rulemakings. 5 U.S.C. § 553(b); *cf. id.* § 553(b)(3)(B) (noting limited exceptions); *Util. Solid Waste Activities Grp. v. E.P.A.*, 236 F.3d 749, 754 (D.C. Cir. 2001) ("The exception is not an escape clause; its use should be limited to emergency situations." (internal quotation marks omitted)). Congress created the Federal Register as "the established organ whereby information is conveyed to the public." 79th Cong., *Legislative History of the Administrative Procedure Act*, at 16 (1946), available at https://heinonline.org/HOL/Page?handle=hein.leghis/apa0001&id=1&collection=leghis&index. An inability to access information published in the Federal Register

"will in most cases leave parties without any practical recourse to the information." *Id.*

"After notice," agencies must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). Additionally, agencies must give such individuals "the right to petition" for the "issuance, amendment, or repeal of a rule." *Id.* § 553(e). In requiring agencies to address citizens' petitions, Congress emphasized that "[e]ven Congress, under the Bill of Rights, is required to accord the right of petition to any citizen." 79th Cong., *Legislative History of the Administrative Procedure Act*, at 21 (1946), available at https://heinonline.org/HOL/Page?handle=hein.leghis/apa0001&id=1&collection=leghis&index.

These requirements do "not simply erect arbitrary hoops through which federal agencies must jump without reason." *Sprint Corp. v. F.C.C.*, 315 F.3d 369, 373 (D.C. Cir. 2003). They actualize the First Amendment rights discussed above by ensuring that interested persons have a chance to speak on important matters and by exposing "regulations to diverse public comment." *Id.*; *see* James T. O'Reilly, *Administrative Rulemaking* § 2:12 (2023 ed.). These requirements "infuse[] the administrative process" with "openness, explanation, and participatory democracy." *State of N. J., Dep't of Env't Prot. v. U.S. Env't Prot. Agency*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). When people are deprived of their access to the Federal Register

and the APA's notice-and-comment procedures, they lose their First Amendment rights to read proposed rules and petition the government about them.

Incarceration does not divest prisoners of their First Amendment rights to stay informed and participate in our government. *Turner*, 482 U.S. at 84. Prisoners retain their rights to read about, and petition on, matters of public concern. *See id.*; *Snyder*, 562 U.S. at 451-52; *Aikens v. Jenkins*, 534 F.2d 751, 755 & n.2 (7th Cir. 1976). And under the APA, "[t]he prisoners directly affected by a regulation are clearly 'interested persons.'" *Royer v. Fed. Bureau of Prisons*, 934 F. Supp. 2d 92, 101 (D.D.C. 2013).[1] But because the BOP has "placed [prisoners] in restrictive confinement," *id.*, prisoners have no way to learn about regulations that are affecting them without the BOP's help. Prisoners are "stripped . . . of virtually every means of self-protection and foreclosed [from] access to outside aid." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). Consequently, as the common law put it, "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)).

Here, Mr. Decker retains his right to read about, and petition on, matters of public importance, including proposed administrative rulemakings. But Mr. Decker has not been able to read and comment on many non-BOP proposed rules. The BOP purports to give prisoners access to Federal Register materials only when they

[1] *Royer* involved rulemaking by the BOP itself. The opinion's reasoning applies to rulemaking by other agencies too.

relate to the BOP itself. Federal BOP, Program Statement 1315.07, at 8 (Nov. 5, 1999), SA 217.[2] It does so to "ensure that inmates have the opportunity to participate in the rulemaking process." *Id.* But the BOP does not give inmates access to proposed rules, interim rules, or final rules promulgated by other agencies—even when those rules affect prisoners.

In order to effectuate the APA and afford prisoners their First Amendment rights, the BOP must give "timely" notice of the contents of the Federal Register that "provide[s] the prisoner a genuine opportunity to research the rule and draft comments." *Royer*, 934 F. Supp. 2d at 102. Likewise, that access to the Federal Register must be afforded in a way that gives "prisoners an opportunity to comment" on proposed regulations. *Id.*

Plenty of non-BOP rules affect prisoners (most of whom will reenter society), along with their families and friends. Hundreds or thousands of proposed rules are published every year. *See* Congressional Research Service, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the* Federal Register 1 (updated Sept. 3, 2019), available at https://sgp.fas.org/crs/misc/R43056.pdf (reporting that "the number of final rules

[2] Judging by Defendants' own documents, they have not posted all BOP materials to the bulletin board. Comparing the screenshots to the Federal Register shows that at least three BOP proposed rules were not posted to the electronic bulletin board: Infectious Disease Management: Voluntary and Involuntary Testing, 80 Fed. Reg. 73153 (Nov. 24, 2015); Use of Chemical Agents or Other Less-Than-Lethal Force in Immediate Use of Force Situations, 81 Fed. Reg. 10153 (Feb. 29, 2016); Compassionate Release, 81 Fed. Reg. 36485 (June 7, 2016). *See* Qureshi Aff. ¶¶ 8-9, SA 208; *id.* Attachment 2, SA 243-254. This failure also violates the First Amendment.

published each year is generally in the range of 3,000-4,500"). In the past year alone, agencies other than the BOP proposed important rules on:

- Inmate calling services. *See* 88 Fed. Reg. 20804 (April 7, 2023).
- Section 8 housing. *See* 88 Fed. Reg. 9600 (Feb. 14, 2023).
- Insurance for mental-health and addiction issues. *See* 88 Fed. Reg. 51552 (Aug. 3, 2023).
- Student loans. *See* 88 Fed. Reg. 1894 (Jan. 11, 2023).

Because of the BOP's policies, Mr. Decker is unable to read about or comment on hundreds of important rules like these.

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In sum, Mr. Decker has the First Amendment right to read about and comment on the materials in the Federal Register. The district court did not conclude that Mr. Decker does not possess these First Amendment rights. It instead concluded that his rights were not infringed because "the BOP has a legitimate penological interest in not providing him a complete copy of the Federal Register, and he [is] able to obtain it through alternative means." RSA 19. But this conclusion rests on a faulty application of the governing standard articulated in *Turner v. Safley*, 482 U.S. 78 (1987), as well as the summary-judgment standard.

B. Failing to give access to non-BOP Federal Register materials unconstitutionally infringes on Mr. Decker's constitutional rights.

A prison can infringe on an inmate's First Amendment rights only if the infringement is "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. Courts evaluate this fit largely through the four *Turner* factors.

First, the court must evaluate alternatives to the prison's action, with "the existence of obvious, easy alternatives" that would accommodate the prisoner's rights serving as "evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* at 90. Specifically, when a prisoner "can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests," a court "may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91; *see also Riker v. Lemmon*, 798 F.3d 546, 557-58 (7th Cir. 2015).

Under a second factor, when other avenues remain available to the prisoner "for the exercise of the asserted right," a court may be more deferential to the prison's action. *Turner*, 482 U.S. at 90.

Still, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest proffered to justify it. *Id.* at 89. A regulation is invalid if "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 89-90. And the Supreme Court has found it "important to inquire whether prison

regulations restricting inmates' First Amendment rights operate[] in a neutral fashion, without regard to the content of the expression." *Id.* at 90.

Finally, courts must also gauge the "impact" that "accommodation of the asserted constitutional right will have on guards and other inmates." *Id.* That is, courts must assess whether an accommodation would produce an adverse and "significant ripple effect" on fellow inmates or prison staff. *Id.*

Turner's standard is "not toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989); *Riker*, 798 F.3d at 552 n.22. Under *Turner*, prison officials must "articulate their legitimate governmental interest" and back that up with "*credible evidence* to support their stated penological goals." *Riker*, 798 F.3d at 553 (emphasis in original). Prison officials "cannot avoid court scrutiny by reflexive, rote assertions." *Shimer v. Washington*, 100 F.3d 506, 510 (7th Cir. 1996). This Court has "cautioned prison officials that they 'cannot rely on the mere incantation of a penal interest but must come forward with record evidence that substantiates that the interest is truly at risk.'" *Emad v. Dodge County*, 71 F.4th 649, 654 (7th Cir. 2023) (quoting *Neely-Bey Tarik-El v. Conley*, 912 F.3d 989, 1004 (7th Cir. 2019)).

Under this standard, bare-bones affidavits will not suffice. *See Shimer*, 100 F.3d at 510; *Brown v. Phillips*, 801 F.3d 849, 854-55 (7th Cir. 2015) (reversing summary judgment when the defendants relied on two conclusory affidavits because "a bare assertion . . . is insufficient to justify summary judgment on a First Amendment claim"). Affidavits must go beyond conclusions and "set out *facts* that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4) (emphasis added).

When prison officials fail to provide sufficient record evidence under the *Turner* factors, this Court reverses grants of summary judgment in their favor. *See, e.g.*, *Riker*, 798 F.3d at 557-58; *Shimer*, 100 F.3d at 509-10; *Brown*, 801 F.3d at 854-55.

Here, no record evidence shows that following the *de minimis* alternative of providing electronic access to the Federal Register would impose *any* cost, much less disserve a legitimate penological interest. That is reason enough to reverse the district court. *See Turner*, 482 U.S. at 97-98 (striking down prison policy because there were "obvious, easy alternatives" and there was "no place in the record where prison officials testified that such ready alternatives would not fully satisfy their [proffered] concerns"); *Riker*, 798 F.3d at 557-58 (same).

In any case, the court also disregarded the summary-judgment standard when it analyzed a different *Turner* factor and concluded that Mr. Decker has alternative ways to access the Federal Register. And the remaining *Turner* factors support the exercise of Mr. Decker's First Amendment rights through provision of an electronic version of the Federal Register. For all these reasons, the district court's order warrants reversal.

1. Mr. Decker provided a clear alternative to denying him access to the Federal Register—providing electronic access using existing prison platforms—and the district court did not address this *de minimis* alternative.

Mr. Decker provided a clear alternative to denying him access to the Federal Register—provide electronic access as the prison already does with BOP materials. As Mr. Decker explained below, *see* SA 279, 282, the Federal Register is freely available on a government website: www.federalregister.gov.

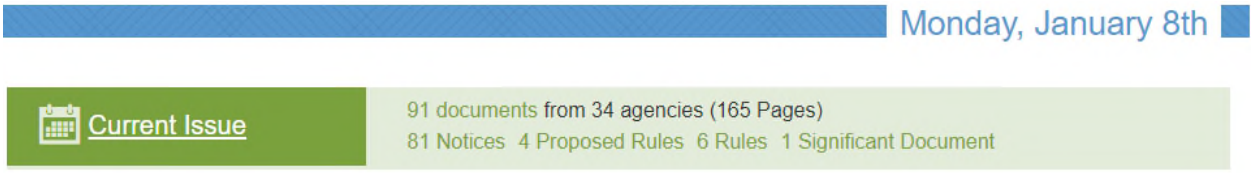
The full daily edition of the Federal Register can be easily downloaded for free as a single PDF file. Defendants and the district court acknowledged the availability of the Federal Register electronically. An affidavit submitted by Defendants below states that "[t]he Federal Register is available to the public at www.federalregister.gov." Qureshi Aff. ¶ 7 n.1, SA 208. And the district court's actions are telling: the court took judicial notice of information about the Federal Register via the website, rather than through print versions of the Federal Register. RSA 8 n.2 (citing Fed. R. Evid. 201).

The Federal Register's website offers the BOP an obvious, easy alternative that would allow it to accommodate Mr. Decker's First Amendment rights at *de minimis* cost. The BOP could easily download the PDF file from the Federal Register's website because the PDF is free and "available to the public." Qureshi Aff. ¶ 7 n.1, SA 208.

It takes just three clicks, as shown on the next page.

1. Go to the home page of the website, www.federalregister.gov.

2. Click the link at the top titled "Current Issue."



3. Click "Download Issue PDF."[3]

Screenshots from https://www.federalregister.gov/ and https://www.federalregister.gov/documents/current (screenshot, Jan. 8, 2024; last visited Jan. 22, 2024).[4]

The BOP asserts that taking these steps would be too burdensome. Qureshi Aff. ¶ 7, SA 208. That assertion clashes with the BOP's own practices because it *already* gives inmates electronic access to the PDF versions of some legal-research documents—such as the materials in the Federal Register that pertain to the BOP.

[3] Defendants submitted screenshots of the homepage of the Federal Register's website, SA 255-258 (showing option to click on "Current Issue"), and the district court took judicial notice of the information on that website. The illustrations on this page are current screenshots from the same website. Mr. Decker does not have access to the internet or the Federal Register's website, but he pointed out that the website is an available alternative, and Defendants acknowledged that the website makes the Federal Register "available to the public." Qureshi Aff. ¶ 7 n.1, SA 208. These illustrations show how.

[4] Like the district court, this Court can take judicial notice of a government website. *See Laborers' Pension Fund v. Blackmore Sewer Const., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002); *Dennis v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003).

See Qureshi Aff. ¶¶ 8-9, SA 208; *id.* Attachment 2, SA 243-254 (attaching screenshots showing that many PDFs of Federal Register materials are easy to post to the electronic bulletin board); *cf. supra* p. 19 n.2 (explaining that the BOP has not posted all BOP rules). The BOP posts these PDFs to an "electronic bulletin board," which all inmates can access on computers in the prison law library. Qureshi Aff. ¶ 6, SA 207-08. The BOP could post the full PDF from the Federal Register's website to the electronic bulletin board just like it posts other PDFs there.

Such postings would not even require a daily obligation. The BOP could, for example, choose one day out of the week to post the Federal Register PDFs published the week before. And the collection of PDFs would be small because the Federal Register is published only on federal workdays. RSA 8 (citing the Federal Register's website); *see* https://www.federalregister.gov/agencies/federal-register-office#:~:text=Each%20Federal%20workday%2C%20the%20OFR,by%20statute%20to%20be%20published.

What's more, these postings would eliminate other work that the BOP is already doing. By posting the full Federal Register PDF to the bulletin board, BOP employees would no longer have to spend time identifying BOP-specific materials in the Federal Register to post on the electronic bulletin board. Mr. Decker's proffered alternative may *save* the BOP time and resources.

When Mr. Decker "point[ed] to an alternative that fully accommodates [his] rights at *de minimis* cost," he offered "evidence that the regulation does not satisfy the reasonable relationship standard." *Turner*, 482 U.S. at 91. After Mr. Decker

pointed out the free online version of the Federal Register, Defendants offered no neutral reason to exclude certain materials based on their non-BOP content. *Cf. id.* at 90 (explaining that First Amendment restrictions must operate in a neutral fashion, "without regard to the content of the expression"). Nor did Defendants produce competent evidence showing that posting the Federal Register PDF to the electronic bulletin board would impose any cost, much less one that is more than *de minimis*.

Instead, Defendants offered rote assertions in bare-bones affidavits: one from BOP employee Sarah Qureshi, *see* SA 206, and another from Timothy Rodrigues, *see* SA 259. These unsupported assertions are insufficient. *See Brown*, 801 F.3d at 854-55; *Foster v. PNC Bank, Nat'l Ass'n*, 52 F.4th 315, 320 (7th Cir. 2022); *Cadena v. El Paso Cnty*, 946 F.3d 717, 725 (5th Cir. 2020).[5]

Qureshi's affidavit contains the conclusory assertion that it would be "impractical and highly burdensome on limited BOP staffing resources to devote staff time and expense to post the entire Federal Register to the Electronic Bulletin Board each day." Qureshi Aff. ¶ 7, SA 208 (underlining omitted). But Qureshi nowhere explains *why* or *how* it would be "impractical and highly burdensome" for the BOP to post freely downloadable PDFs to the electronic bulletin board when the BOP *already* posts BOP-related PDF materials.

[5] Rodrigues's affidavit provides no independent substantive information; it just asserts that the procedures described by Qureshi's affidavit remain in place. Rodrigues Aff. ¶ 3, SA 260.

As noted above, to provide competent evidence, an affidavit must "set out *facts* that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4) (emphasis added). These "specific concrete facts [must] establish[] the existence of the truth of the matter asserted." *Fanslow v. Chicago Mfg. Ctr., Inc.*, 384 F.3d 469, 483 (7th Cir. 2004) (internal quotation marks omitted). If an affidavit offers only conclusions, it fails to provide competent evidence. *See Foster*, 52 F.4th at 320; *Brown*, 801 F.3d at 854-55; *Cadena*, 946 F.3d at 725 ("[A]ffidavits setting forth ultimate or conclusory facts and conclusions of law are insufficient to either support or defeat a motion for summary judgment.").

The Qureshi affidavit sets out *no* facts relevant to the BOP's ability to post the Federal Register PDF to the electronic bulletin board. It fails to address even the two most basic factual issues: how much it would cost the BOP to post the PDF and how long it would take to do so. The affidavit therefore provides no competent evidence on the BOP's ability to accommodate Mr. Decker's rights using the Federal Register's website.

The district court here reversibly erred by failing to engage with Mr. Decker's *de minimis* alternative and by resting its grant of summary judgment on a single conclusory affidavit. *Cf.* SA 279, 282.[6] Defendants' failure to produce

[6] The district court discussed *Thelen v. Cross*, 656 F. App'x 778 (7th Cir. 2016), though the court recognized that it is an unpublished, nonbinding decision. RSA 13. The plaintiff there did not bring a First Amendment claim. 656 F. App'x at 780. Under the *Turner* test, as explained in this Section, the BOP has an obligation to follow the *de minimis*, three-click process to give Mr. Decker access to the Federal Register PDF.

evidence overcoming this *Turner* factor is sufficient on its own to reverse the grant of summary judgment. *See Turner*, 482 U.S. at 96-99; *Riker*, 798 F.3d at 557-58.

Even so, Defendants also failed to produce evidence that would satisfy *Turner*'s other factors.

2. Obtaining a paper copy of the Federal Register through prison mail is not an available alternative means to exercise First Amendment rights.

In assessing the reasonableness of a prison's action, courts must consider "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. Without the BOP's help, Mr. Decker has no other way to obtain the Federal Register. Consequently, there are no viable alternative means for Mr. Decker to exercise his asserted First Amendment rights. And with no basis in the record to conclude otherwise, the district court erred by concluding that Mr. Decker could obtain hard copies of the Federal Register from outside sources through the prison-mail system in a way that protects his First Amendment rights.

A district court cannot grant summary judgment when its assessment of the plaintiff's claim is "rooted itself in facts unsupported by the summary judgment record." *Miller v. Downey*, 915 F.3d 460, 464 (7th Cir. 2019). The district court impermissibly resolved a material issue of disputed fact when it summarily concluded that Mr. Decker could ask "people outside the institution for Federal

Register materials," RSA 16, despite the record and realities detailed below. *See Miller*, 915 F.3d at 464.[7]

Mr. Decker cannot keep print copies of the Federal Register. The BOP holds Mr. Decker in a prison cell, and he would breach the BOP's storage rules if he tried to collect bulky paper copies of the Federal Register. BOP regulations instruct BOP staff that they "may not allow an inmate to accumulate materials to the point where the materials become a fire, sanitation, security, or housekeeping hazard." 28 C.F.R. § 553.11(b). And the Federal Register normally publishes between 65,000 and 85,000 pages each year. Congressional Research Service, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the* Federal Register 18-19 (updated Sept. 3, 2019), available at https://sgp.fas.org/crs/misc/R43056.pdf. The Federal Register's individual print editions are large, each comprising hundreds of pages.

[7] For these reasons, the district court was wrong to rely on *Pell v. Procunier*, 417 U.S. 817 (1974). *See* RSA 18. *Pell* held that prison regulations comply with the First Amendment "[s]o long as reasonable and effective means of communication remain open." 417 U.S. at 826; *see id.* at 826-28. Here, the BOP's policy leaves Decker with no reasonable or effective way to obtain the Federal Register.

A portion of the Federal Register collection to be digitized.

Screenshot from *Digitizing the Federal Register*, https://www.federalregister.gov/reader-aids/office-of-the-federal-register-blog/2015/10/digitizing-the-federal-register (last visited Jan. 22, 2024) (caption included on webpage); *see also, e.g.*, Defs.' Screenshot of Federal Register Website 1, SA 255 (showing an edition of the Federal Register containing 308 pages); *supra* p. 25 n.4. Making matters even harder, Mr. Decker cannot retain a large collection of makeshift binding materials, like paper clips or staples. *See* 28 C.F.R. § 553.12(b)(2).

Even if Mr. Decker were allowed to keep daily editions of the Federal Register, he and other incarcerated individuals could not afford them. The price of one print edition of the Federal Register—which covers one day of administrative activity—is $33.00. *See, e.g.*, U.S. Government Bookstore, https://bookstore.gpo.gov/products/vol-89-no-1-010224-federal-register-complete. A

one-year print subscription is $929.00. U.S. Government Bookstore, https://bookstore.gpo.gov/products/federal-register-complete-complete-paper-subscription-service-indexes. That is unaffordable to many Americans. It is hopelessly expensive for prisoners, including Mr. Decker, who informed the district court that he had "Ø in [his] account." SA 172. An outside source would have to shoulder this cost weekly or personally print off hundreds of pages and ship them through the prison-mail system. Mr. Decker explained that no one would shoulder these burdens for him. SA 282. Indeed, his motions for appointment of counsel specified that he had no hope of finding help outside of court-appointed counsel. *See infra* Section II.C.3; *see also* SA 282 ("Mr. Decker has no-one to obtain the Federal Register as the defense suggests.").

Furthermore, Mr. Decker would be unable to exercise his First Amendment rights via an imported version of the Federal Register because of the delays in the prison-mail system that Mr. Decker pointed out below. *See* SA 167-68. For example, even Mr. Decker's legal mail—which the BOP purportedly prioritizes and provides to inmates immediately upon receipt—was "just sitting . . . [f]or 30 days before it [was] delivered to [him]." SA 167-68; Federal BOP, Program Statement 5800.16, pt. 3.9, at 21 (April 5, 2011), https://www.bop.gov/policy/progstat/5800_016.pdf ("[L]egal mail is afforded priority.").

Likewise, processing mail leaving the prison also takes substantial time. The district court's docket confirms the problem. For instance, one of Mr. Decker's

motions for extension was dated December 9, 2022, but it was not delivered to the court and filed until January 3, 2023. SA 273, 275.

And unlike legal mail, no "priority" would be given to deliveries of the Federal Register or petitions and comments sent to agencies. *See Ray v. Clements*, 700 F.3d 993, 1002 (7th Cir. 2012) (explaining that "a pro se prisoner must almost blindly rely on 'vagaries of the mail'"). Thus, given Mr. Decker's incarceration, his mail would risk delays of thirty-plus days. And the district court did not address that this delay would be on top of the standard shipping time for a print copy of the Federal Register, which already takes seven to fourteen business days for non-incarcerated individuals. U.S. Government Bookstore, https://bookstore.gpo.gov/help-and-contact (*see* Shipping Rates).

This delay would prevent Mr. Decker from exercising his First Amendment rights. A comment period can end thirty days after a proposed rule is published in the Federal Register. 5 U.S.C. § 553(d) (stating that the "required publication" of a rule may not be less than thirty days before its effective date); *see, e.g.*, Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program, 88 Fed. Reg. 1894 (proposed by the Department of Education on January 11, 2023 with a comment period ending on February 10, 2023). So even positing that Mr. Decker could somehow obtain a paper copy of the Federal Register—which the record established he could not—Mr. Decker would not have an opportunity to comment on many proposed rules before their comment periods end.

In short, Mr. Decker put forth evidence showing that he "has no[] one to obtain the Federal Register" for him. SA 282. And the district court did not explain the basis for its contrary conclusion or explain how the prison-mail system could offer an available alternative for Mr. Decker to exercise his First Amendment rights. Nor did Defendants offer an evidentiary basis to show that buying and mailing a print copy was an available alternative to preserve those rights. There is no basis to conclude that an alternative exists to protect Mr. Decker's First Amendment rights.

3. Defendants offered no evidence to support a valid penological interest in denying Mr. Decker access to an electronic version of the Federal Register.

And Defendants offered no evidentiary basis to connect their asserted interest with their policy. A regulation is invalid if "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. That is the case here.

The district court accepted Defendants' asserted penological interests in "avoid[ing] burdensome and cost prohibitive actions" when it concluded that the BOP would have to devote undue daily resources to post the Federal Register electronically. RSA 14-16. The court based this conclusion on a single conclusory assertion from Qureshi and "defer[red]" to her "expertise and professional judgment." RSA 16.

But "to warrant deference, prison officials *must present credible evidence* to support their stated penological goals." *Riker*, 798 F.3d at 552 (emphasis in

original) (quoting *Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002)). The court cannot grant summary judgment based on a bare assertion that an alternative could cost time or money. *See, e.g.*, *id.* at 550-51, 557-58 (reversing grant of summary judgment where district court declined to "second guess" prison officials, who failed to support their contentions with evidence); *Kikumura v. Turner*, 28 F.3d 592, 599 (7th Cir. 1994) (stating that a prisoner's rights may not be restricted "without even looking to see how the rights might be accommodated and estimating the expense entailed by doing so"); *Emad*, 71 F.4th at 654 (explaining that prison officials "cannot rely on the mere incantation of a penal interest but must come forward with record evidence").

Defendants offered no evidence justifying their decision to single out non-BOP Federal Register materials for exclusion from the electronic bulletin board. They *already* devote resources to posting PDFs of Federal Register and other legal-research materials to the electronic bulletin board. *See* Qureshi Aff. ¶¶ 8-9, SA 208; *id.* Attachment 2, SA 243-254. With no evidence indicating that posting the Federal Register PDF would impose *any* additional cost, the district court could not conclude that the BOP had *any* penological interest in denying Mr. Decker access to the Federal Register, much less a reasonable penological interest. And as explained above, the actual evidence shows that posting a PDF to the electronic bulletin board is not burdensome or cost prohibitive.

4. Providing the electronic version of the Federal Register would not produce a significant ripple effect harming guards or other inmates.

Relatedly, *Turner* instructs courts to evaluate whether there would be an "impact" on "guards and other inmates," amounting to a "significant ripple effect," if the prisoner's rights were accommodated. *Turner*, 482 U.S. at 90 (internal quotation marks omitted). The district court did not analyze this factor, and Defendants offered no evidence showing that such a ripple effect would occur.

If the district court had addressed this factor, there would have been no basis to conclude that providing electronic access to the Federal Register would cause a significant adverse ripple effect. At best, the district court constructed a straw man when it stated that the BOP was not required to provide a print "copy of the entire Federal Register." RSA 17. As Mr. Decker clarified below, he was "not seeking for the Federal Register to be provided to him and the inmate population in paper form." SA 282. Accommodating his request would not require the BOP to deal with print subscriptions and their attendant costs. *See supra* pp. 30-32. Rather, the BOP could simply post the PDF from the Federal Register's website to the electronic bulletin board.

No evidence in the record suggests that a "significant ripple effect" would occur if the BOP posted a PDF. *Turner*, 482 U.S. at 90 (internal quotation marks omitted). The BOP is already posting other PDFs. And as explained above, no evidence shows that "the allocation of prison resources generally" would be materially affected if the BOP posted the PDF of the Federal Register, which can be

downloaded for free. *Id.* As detailed above, the BOP might even *save* time and resources by posting PDFs of the entire Federal Register rather than sifting through the Federal Register to identify the BOP materials that should be added to the bulletin board. *See supra* p. 26.

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Mr. Decker has no way to access the Federal Register on his own. He is at the mercy of his federal agency custodian, which refuses to download the free online version of the Federal Register and then post it using a system already in place and used for the same purpose. Ironically, the BOP will likely save resources when it adopts Mr. Decker's alternative. Defendants are infringing Mr. Decker's First Amendment rights and can remedy that by adopting Mr. Decker's proposed alternative.

Given the record before this Court, Mr. Decker asks that this Court not only reverse the district court's grant of summary judgment for Defendants but also remand with instructions to grant summary judgment for Mr. Decker. This Court has broad appellate authority to "direct the entry" of any "appropriate judgment, decree, or order." 28 U.S.C. § 2106. This includes ordering the entry of summary judgment for a party that did not move for it below. 10A Mary Kay Kane, *Federal Practice and Procedure (Wright & Miller)* § 2716 (4th ed., September 2023 update) ("Summary judgment at the appellate level is proper even though the prevailing party on the appeal did not move under Rule 56."); *see Swaback v. Am. Info. Techs. Corp.*, 103 F.3d 535, 543-44 & n.24 (7th Cir. 1996).

Mr. Decker is entitled to summary judgment on the current record. Thus, the only remaining proceedings should focus on the scope of injunctive and declaratory relief to accommodate the exercise of Mr. Decker's First Amendment rights.

Mr. Decker also preserved a due-process argument that would afford him the same relief requested under the First Amendment. This Court need not reach that argument since the First Amendment provides all necessary relief.

II. The district court failed to apply the proper legal standard to Mr. Decker's multiple motions for recruitment of counsel.

Even if the existing record does not support summary judgment in Mr. Decker's favor, that is because he lacked counsel. The district court independently reversibly erred when it refused to recruit counsel for Mr. Decker, forcing an incarcerated individual to litigate a case that required outside help.

Mr. Decker asked the district court to recruit counsel five times. He filed three recruitment motions and two motions for reconsideration. In every filing, he explained the difficulty of his situation, listing concrete details.

The district court erroneously "denied each of these motions with a brief, conclusory order." *Pruitt*, 503 F.3d at 649. In doing so, it acknowledged that Mr. Decker satisfied the first step of this Circuit's two-step test, but the court failed to apply the proper legal standard at the second step and appoint counsel.

That abuse of discretion prejudiced Mr. Decker. It thus warrants reversal.

A. The district court agreed that Mr. Decker met the first step in warranting recruitment of counsel.

District courts must conduct a two-step analysis when ruling on requests for the recruitment of counsel. *Pruitt*, 503 F.3d at 654.

At the first step, the district court must assess whether the plaintiff has made a reasonable attempt to obtain counsel or has been precluded from doing so. *Id.*

Here, Mr. Decker sent seven letters to lawyers requesting assistance. None of the lawyers could take on this procedurally and substantively complicated case. The district court correctly concluded that these efforts to obtain counsel were reasonable. RSA 2, 5; *see James v. Eli*, 889 F.3d 320, 326 (7th Cir. 2018). Thus, the first step is not at issue.

B. The second step requires district courts to evaluate both the difficulty of the case and the plaintiff's competence to litigate at every stage of the proceeding.

At the second step, the district court must evaluate whether, "given the difficulty of the case," the plaintiff "appear[s] competent to litigate it himself." *Pruitt*, 503 F.3d at 654. This step itself calls for a multi-part inquiry: the district court must analyze the procedural difficulty of the case, the substantive difficulty of the plaintiff's claims, and the plaintiff's competence to litigate on his own. *Id.* at 655; *Walker v. Price*, 900 F.3d 933, 938 (7th Cir. 2018). While the issues of difficulty and competence can overlap, the district court must still address each element in a detailed and particularized manner. *McCaa v. Hamilton*, 893 F.3d 1027, 1032 (7th Cir. 2018); *see also Pruitt*, 503 F.3d at 649.

1. District courts must address procedural difficulty.

When assessing the difficulty of a case, district courts must address the procedural difficulty presented by the stage of litigation that the case is in or entering into.

Procedural difficulty increases as a case advances, so the need for counsel grows as the case proceeds. As this Court has explained, post-pleading proceedings are inherently more difficult for pro se prisoners. Accordingly, this Court has "emphasized that the assistance of counsel becomes increasingly important as litigation enters its later stages." *Walker*, 900 F.3d at 938. Most discovery, "[t]aking depositions, conducting witness examinations, applying the rules of evidence, and making opening statements are beyond the ability of most pro se litigants to successfully carry out." *Eagan v. Dempsey*, 987 F.3d 667, 683 (7th Cir. 2021). That is even more true for incarcerated individuals. *Pruitt*, 503 F.3d at 660; *see also id.* at 664 (Royner, J., concurring).

Discovery proceedings are particularly difficult because "most" pro se prisoners are "unfamiliar with the requirements and techniques of discovery." *Pruitt*, 503 F.3d at 660; *see also id.* at 664 (Royner, J., concurring) ("An incarcerated plaintiff . . . will have unique difficulties conducting even rudimentary discovery."). They are similarly unfamiliar with the mechanics of summary-judgment motions. *See Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982) (recognizing that "few prisoners have a legal background" and that the details of summary judgment are not "obvious to a layman"). Therefore, district courts abuse their discretion when

they "fail to consider the complexities of advanced-stage litigation activities and whether a litigant is capable of handling them." *James*, 889 F.3d at 327; *see also Pennewell v. Parish*, 923 F.3d 486, 491 (7th Cir. 2019).

For example, in *McCaa*, this Court concluded that the district court abused its discretion by failing to "specifically address" the procedural difficulty faced by a pro se prisoner as his case "advanced to a more sophisticated stage of litigation." 893 F.3d at 1032-33. The prisoner brought his third motion for counsel as his case entered discovery. *Id.* at 1032. At that stage, he "face[d] an increasingly complex set of demands." *Id.* Yet the court did not "specifically address" whether the prisoner could "identify, collect, and present the right type of evidence." *Id.* Nor did it "respond to [the prisoner's] argument that, now that the case had advanced, he would have difficulty engaging in discovery." *Id.* at 1032-33. The district court's failure to address the difficulty of the case as it "proceeded into advanced-stage litigation" was a "methodological lapse" that amounted to an abuse of discretion. *Id.* at 1033.

2. District courts must also address the substantive difficulty of the plaintiff's claims.

This Court has recognized that some claims are more substantively difficult than others. Therefore, in addition to addressing procedural difficulty, a district court must conduct a "particularized" analysis of a case's substantive difficulty. *Pruitt*, 503 F.3d at 656. If a district court fails to address the substantive difficulty presented by a plaintiff's claims, it abuses its discretion. *Pennewell*, 923 F.3d at 491.

3. After addressing case difficulty, district courts must address the plaintiff's competence.

Finally, the district court must address the plaintiff's competence to litigate his case given the degree of difficulty confronting him. *Pruitt*, 503 F.3d at 655. In evaluating a plaintiff's competence, the district court should conduct a particularized review of all information "submitted in support of the request for counsel." *Id.*

A district court does not discharge its obligation to analyze a plaintiff's competence when it makes only "cursory reference[s]" to a plaintiff's basic abilities, like his "awareness of the facts," "comprehensible filings," or "use of the court's processes." *James*, 889 F.3d at 330. Rather, when analyzing a plaintiff's competence, a district court must "explain its reasoning" by "delving into" the plaintiff's "personal characteristics." *Dewitt v. Corizon, Inc.*, 760 F.3d 654, 658 (7th Cir. 2014).

For instance, in *Dewitt*, the district court abused its discretion when it failed to "identify" the "personal characteristics" of the plaintiff that led it to conclude that the plaintiff was competent to litigate his own case. *Id.* The district court held that the plaintiff would have "a meaningful opportunity to present his claim," that he had "demonstrated familiarity with his claims," and that he had shown "the ability to present them." *Id.*

This Court reversed. It explained that the district court erred when it denied the plaintiff's recruitment motion "without delving into any of [the plaintiff's]

personal characteristics" and without "specifically examin[ing]" the plaintiff's "personal ability to litigate the case." *Id.*

Indeed, failure to engage in a particularized analysis on competence is a frequent reason for reversal. *See, e.g.*, *Eagan*, 987 F.3d at 686 (holding that the district court abused its discretion when it "treat[ed] [the plaintiff] and his capabilities in a stereotypical and non-particularized way"); *Navejar v. Iyiola*, 718 F.3d 692, 696 (7th Cir. 2013) (stating that the district court erred when it used "boilerplate language that . . . ignores the plaintiff's abilities").[8]

4. A district court's analysis must be fact-specific.

As reflected by the authority surveyed above, a district court must "specifically address" the factors relevant to case difficulty and plaintiff competence. *McCaa*, 893 F.3d at 1032; *see Dewitt*, 760 F.3d at 658. A district court's assessment is legally deficient if the court offers only "cursory" assertions. *James*, 889 F.3d at 330. In other words, a district court abuses its discretion when it "fail[s] to give full consideration to each factor" that is relevant to the difficulty of the case and the plaintiff's competence. *Santiago v. Walls*, 599 F.3d 749, 765 (7th Cir. 2010).

[8] *See also Pennewell*, 923 F.3d at 490 (holding that the district court abused its discretion when it "failed to provide particularized analysis regarding [the plaintiff's] ability to litigate this case"); *James*, 889 F.3d at 330 (reversing where the district court made "cursory reference" to the plaintiff's basic abilities "without delving into any of plaintiff's personal characteristics" (cleaned up)); *Santiago v. Walls*, 599 F.3d 749, 764 (7th Cir. 2010) (abuse of discretion where the district court failed to address whether the plaintiff's "litigation capabilities" were "sufficient for conducting the sort of discovery that was necessary"); *McCaa*, 893 F.3d at 1032 (concluding that the district court failed to "specifically examine[] [the plaintiff's] personal ability to litigate the case" when the district court "simply reasserted" that the plaintiff "ha[d] been ably litigating the matter from its inception").

C. The district court committed reversible legal error by failing to apply the proper legal standard at step two of this Court's recruitment standard.

The district court abused its discretion by failing to conduct the proper inquiries on both difficulty and competence.

It did not address the elements of procedural and substantive difficulty.

The court also did not sufficiently address the factors bearing on Mr. Decker's competence. The district court expressly excluded one factor from consideration—the number of cases that Mr. Decker was litigating simultaneously. Several factors went unaddressed. And the factors that were mentioned were given only cursory treatment.

The district court thus abused its discretion by failing to apply the proper legal standard.

1. The district court abused its discretion by failing to address the procedural difficulty of Mr. Decker's case.

First, Mr. Decker's case was procedurally difficult. By the time Mr. Decker asked for help recruiting counsel, his case had "progressed beyond the pleadings," and he "was facing increasingly complex demands of discovery and dispositive motions." *James*, 889 F.3d at 330 (internal quotation marks omitted).

During discovery, litigants confront new complex tasks that require them to extract relevant evidence from opposing parties. Many of these tasks, like depositions and extensive document review, cannot be accomplished while incarcerated.

To move for or oppose summary judgment, litigants must weave a web of evidence into a cogent legal picture—quickly. The federal rules provide thirty days to move for summary judgment after the close of discovery. Fed. R. Civ. P. 56(b). The district court's local rules required responses within thirty days. Civ. R. 7.1(b)(1)(A). These deadlines are often daunting for seasoned litigators, to say nothing of pro se prisoners.

As in *McCaa*, the district court never acknowledged that Mr. Decker's case was becoming increasingly complicated as it progressed beyond its opening phase. *See* 893 F.3d at 1033. The district court's failure to address the difficulty of Mr. Decker's case as it "proceeded into advanced-stage litigation" was a "methodological lapse" that constitutes an abuse of discretion. *Id.*

2. The district court abused its discretion by failing to address the substantive difficulty of Mr. Decker's case.

On top of procedural difficulty, Mr. Decker's claims were substantively difficult.

Mr. Decker's case primarily centers on First Amendment issues. "Contemporary free speech doctrines are extraordinarily detailed and often confusing." 1 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 2:13 (Oct. 2023 update). The "sheer number of different doctrines, and their tendency toward complexity," make it difficult for a layperson to even know where to start, especially given how "[m]odern First Amendment law abounds in three-part and four-part tests of various kinds." *Id.* Reflecting these realities, this Court has specifically recognized that "prisoner . . . free speech" is a "doctrinally complex

area[]." *Santiago*, 599 F.3d at 761 (quoting *Merritt v. Faulkner*, 697 F.2d 761, 764 (7th Cir. 1983)).

Moreover, administrative law is notoriously complex. As even the treatise writers admit, administrative law "consistently leaks out of any formal structure," so it "defies coherent and comprehensive treatment." 7 Charles H. Koch, Jr., *West's Federal Administrative Practice*, pt. 19, § 7282 (July 2023 update). "Coming to grips with the breadth and diversity of administrative law then presents a daunting challenge." *Id.* Because of this, "Administrative Law is widely and justly regarded as one of the most difficult subjects." Gary Lawson, *Fed. Admin. Law*, at v (8th ed. 2019). As with First Amendment law, the "sheer scope" of administrative law, combined with the "technical complexity of many of the doctrines," confounds even the most well versed. *Id.*

This Court had already signaled that this case is complex. It appointed counsel in Mr. Decker's first appeal. Then, in the current appeal, this Court appointed counsel for Mr. Decker again. SA 329 (citing *Pruitt*).

This Court's first appointment of counsel should have prompted the district court at least to analyze whether Mr. Decker's claims were complex enough to merit professional assistance. But the district court never discussed the case's substantive difficulty.

In short, the district court abused its discretion by not acknowledging the procedural and substantive difficulties posed by Mr. Decker's case. *Eagan*, 987 F.3d at 683 ("[F]ailing to consider the complexities of advanced-stage litigation activities

and whether a litigant is capable of handling them is an abuse of discretion." (cleaned up)); *Pennewell*, 923 F.3d at 491 (concluding that the district court abused its discretion when it "failed to address the difficulty presented by [the plaintiff's] claims").

3. The district court also abused its discretion by failing to adequately address competence.

What's more, the district court did not sufficiently evaluate Mr. Decker's competence to litigate this procedurally and substantively difficult case.

As discussed below, Mr. Decker alerted the district court to eight difficulties that compromised his ability to litigate this case from prison:

- His time in the law library was severely limited.
- He was being transferred to another facility.
- He was being housed in restrictive confinement pending transfer.
- He lacked adequate supplies.
- His mail deliveries were delayed.
- His limited time and resources were split among nine cases.
- He could not attend a settlement conference without an attorney.
- And he could not get the discovery he sought.

Defendants never disputed these difficulties.

Yet the district court did not sufficiently address any of them. One of Mr. Decker's struggles was expressly excluded from the court's consideration. Three others went completely unaddressed by the court. The other four were mentioned, but only in a cursory way.

***The district court expressly refused to address the number of cases that Mr. Decker was litigating simultaneously*:** Mr. Decker had to split his already sparse time in the law library among nine cases, one of which was an upcoming parental-rights trial in family court. SA 166-67, 175-76.

The district court disregarded that fact. It said that the "more than a half-dozen cases" that Mr. Decker was litigating had "no bearing on th[e] Court's analysis." RSA 3. The district court did not explain why it refused to consider Mr. Decker's caseload, which should have factored into its analysis. *See Pruitt*, 503 F.3d at 655; *Eagan*, 987 F.3d at 684 ("Because the district court ignored the substance of [the plaintiff's] submissions, its . . . denial constituted an abuse of discretion.").

***The district court failed to address three of Mr. Decker's other struggles*:** his struggles with discovery, his inability to attend a settlement conference, and his struggles with the prison-mail system.

First, the district court never addressed Mr. Decker's personal struggles with the procedurally difficult discovery process. In his third recruitment motion, filed in the midst of discovery, Mr. Decker told the court that Defendants repeatedly "claimed 'objections'" when he "asked [f]or discovery." SA 171. He pleaded, "I can't get the discover[y] needed to litigate this matter." SA 171.

Mr. Decker's second recruitment motion included letters that he had written to seven law firms in an attempt to obtain counsel. In each letter, he explained, "I am presently in the discovery process. The A.U.S.A. has been giving me a lot of problems with providing me with discovery requests." SA 150.

In another letter filed with the court, Mr. Decker said, "I am presently in the discovery stage and I am . . . unable to litigate it due to being housed in the Special Housing Unit pending transfer." SA 183.

The district court did not address these struggles with discovery. It failed to address whether Mr. Decker could conduct the sort of discovery that was necessary in this particular case. *See Santiago*, 599 F.3d at 764.

Another factor that went unaddressed by the district court was Mr. Decker's inability to attend a settlement conference without an attorney. Mr. Decker drew the court's attention to his exclusion from settlement conferences. SA 172. And he told the court that he "believe[d] that this matter [could] be settled." SA 105. He wanted to recruit counsel who could help him settle this case so that "th[e] court [could] use its resources for other pressing matters." SA 105.

But the court never addressed Mr. Decker's exclusion from settlement conferences. This exclusion prevented him from pursuing possible avenues to settlement and from complying with meet-and-confer requirements on discovery.

As referenced above, Mr. Decker also notified the court that his mail was being delayed. He said his "legal mail" was "just sitting . . . [f]or 30 days before it [was] delivered to [him]." SA 167-68. The district court's own docket reveals an example of that delay: Mr. Decker mailed a motion for extension that did not arrive until almost a month after it was sent. *See* SA 273, 275; *supra* pp. 32-33. While Mr. Decker's motion was still in transit, the district court entered a show-cause order

against him because, as far as the court was aware, he had missed the deadline without requesting an extension. SA 266.

The district court never addressed the mail delays that Mr. Decker reported. Mr. Decker needed counsel because he was unable to timely communicate with the court and opposing counsel.

The district court referenced four of Mr. Decker's struggles in only a cursory manner: When the court did mention certain struggles that Mr. Decker identified in his motions, it did not give sound explanations for discounting them.

First, Mr. Decker explained that the cap on time he was given in the law library was thirty minutes three days per week, but that he also had to take a shower during those thirty minutes. Therefore, he told the district court that he had only forty-five minutes of study time per week. SA 166, 175.

The district court noted in passing that Mr. Decker's time in the library was limited, but it failed to explain how Mr. Decker could competently litigate his case when he had only forty-five minutes of study time per week to split among multiple cases. RSA 1, 2.

Mr. Decker also told the district court that he was placed "in the SHU pending transfer." SA 176. Special Housing Units (SHUs) are "housing units . . . where inmates are securely separated from the general inmate population." 28 C.F.R. § 541.21. An inmate can be placed in the SHU while he is "in holdover status during transfer to a designated institution or other destination." *Id.* § 541.23(b).

On weekdays, Mr. Decker was confined to the SHU for twenty-three hours a day. SA 166. On Saturday and Sunday, he was kept in the SHU for the full twenty-four hours. SA 166. While in the SHU, an inmate's "personal property may be limited for reasons of fire safety or sanitation." 28 C.F.R. § 541.31(h). Mr. Decker said that his confinement in the SHU impacted his ability to retain his personal property, such as his legal documents. SA 176. He explained that he did "not have access to many legal materials while [he was] pending transfer." SA 177.

The district court acknowledged Mr. Decker's confinement in the SHU only by stating that Mr. Decker could seek to extend discovery deadlines. RSA 1, 2.[9] But the court never addressed his lack of access to legal materials while he was pending transfer.

Similarly, the district court acknowledged that Mr. Decker "anticipate[d] transferring," RSA 2, but it failed to analyze the effect that a transfer in the middle of discovery would have on his ability to litigate his case. This Court has recognized that a transfer may pose "a significant obstacle to effective litigation," yet the district court never inquired if that was the case for Mr. Decker. *McCaa*, 893 F.3d at 1033; *see also id.* at 1035 (Hamilton, J., concurring in the judgment) ("[A]

[9] The district court referenced Mr. Decker's confinement in the "CMU," but it never referenced the SHU. RSA 1, 2. In his first recruitment motion, Mr. Decker said he was being housed in the Communications Management Unit (CMU) and the SHU pending transfer. SA 104. The two are not the same. CMUs are inmate housing units that allow BOP staff to "more effectively monitor communication between inmates . . . and persons in the community." 28 C.F.R. § 540.200(c). A CMU is "a general population housing unit." *Id.* § 540.200(b). But when in the SHU, "inmates are securely separated from the general inmate population." *Id.* § 541.21.

transfer poses major obstacles for a prisoner trying to litigate a federal civil rights case.").

Additionally, Mr. Decker described the dearth of litigation-related materials and equipment in his cell. He told the district court that he lacked envelopes, had no copier, could not always use a typewriter or a pen, and had inadequate access to legal-research materials. SA 104, 175. He had "Ø in [his] account," SA 172, and he was "unable to utilize . . . [the] commissary to purchase anything to litigate this matter," SA 104. All five of his requests for counsel were handwritten.

The district court acknowledged Mr. Decker's "claim[] to lack access to writing instruments, paper, etc." RSA 1. But it never analyzed how Mr. Decker's competence was affected by his lack of supplies.

***The district court relied on inaccurate reasoning*:** The *only* reason the district court gave for concluding that Mr. Decker was competent was that he had survived the pleading phase. The court said that Mr. Decker had "demonstrated his ability to competently litigate this matter from start to finish, through an appeal, and on remand." RSA 1. But, for five reasons, Mr. Decker's survival of the pleading phase did not show that he was competent to litigate the discovery and summary-judgment stages on his own.

First, Mr. Decker's case survived the district court's initial dismissal *only after this Court appointed counsel for him on appeal*. The district court first dismissed Mr. Decker's complaint as "frivolous" and "meritless" under the PLRA. SA 58; *see* 28 U.S.C. § 1915A(b)(1). After Mr. Decker appealed, this Court

appointed counsel for him, and his case was later remanded to the district court after the federal government acquiesced to a remand. Mr. Decker's success on appeal *with counsel* is irrelevant to *his* competence to litigate this case alone. If anything, it shows that he would benefit from counsel.

As this Court has explained, district courts err when they fail to acknowledge a plaintiff's earlier reliance on counsel. For example, in *Eagan v. Dempsey*, the district court concluded that a pro se prisoner was competent to litigate on his own because his "pleadings had been 'cogent' and 'responsive.'" 987 F.3d 667, 685 (7th Cir. 2021). But the district court "never recognized" that "those pleadings had been [drafted] with the assistance of a jailhouse lawyer" who, since then, had stopped helping the plaintiff. *Id.* The district court there, like the district court here, "failed to address [the plaintiff's] *personal ability* to litigate his case." *Id.*; *see also Dewitt*, 760 F.3d at 658 (stating that "[t]he analysis should be of the *plaintiff's* ability to litigate *his own* claims"); *Walker*, 900 F.3d at 940-41.

Second, while the district court was wrong to dismiss Mr. Decker's complaint (as this Court explained in the first appeal), the district court's impression that Mr. Decker's pleadings were insufficient should have cut in favor of appointing counsel. *See Armstrong v. Krupiczowicz*, 874 F.3d 1004, 1008 (7th Cir. 2017) ("In fact a litigant's difficulty stating a claim, where the facts suggest a possible basis for relief, may weigh *in favor* of recruiting counsel."); *Thomas v. Wardell*, 951 F.3d 854, 861-62 (7th Cir. 2020).

Third, as explained above, "complexity increases and competence decreases as a case proceeds to the advanced phases of litigation." *James*, 889 F.3d at 327. That Mr. Decker survived the simpler pleading phase did not indicate that he was competent to litigate the more demanding discovery and summary-judgment stages. *See Walker*, 900 F.3d at 935. By only looking backward, the district court failed to address Mr. Decker's ability to "handle adequately the litigation tasks *ahead* of him." *Eagan*, 987 F.3d at 686.

Fourth, and similarly, this Court appointed counsel during the *pleading* phase. The district court should have realized that counsel would be even more necessary at the harder discovery and summary-judgment stages.

Fifth, as this Court held in *Dewitt* and *James*, conclusory statements about a plaintiff's basic abilities are insufficient. The district court generally stated that Mr. Decker had "demonstrated his ability to competently litigate this matter from start to finish, through an appeal, and on remand." RSA 1. But the district court offered no support for that conclusion, which was contradicted by the fact that Mr. Decker did not litigate the case by himself.

The district court's conclusion did not emerge from any fact-specific analysis; it clashed with the facts. The district court never conducted "a *particularized* assessment" of Mr. Decker's "individual abilities." *Eagan*, 987 F.3d at 686.

By "failing to give full consideration" to all of these relevant factors, the district court failed to apply the proper legal standard and abused its discretion. *James*, 889 F.3d at 330.

D. Mr. Decker was prejudiced by his lack of counsel.

These errors prejudiced Mr. Decker by depriving him of the opportunity to engage in effective discovery and by hindering his ability to move for summary judgment. The district court's abuse of discretion therefore calls for reversal.

Once this Court determines that the district court abused its discretion, it will reverse upon a showing of prejudice. *Pruitt*, 503 F.3d at 654.

To make that showing, a plaintiff "need only show that there is a reasonable likelihood that the presence of counsel would have made a difference in the outcome of the litigation." *Walker*, 900 F.3d at 941 (internal quotation marks and emphasis omitted). A plaintiff need not show that he would have won his case had counsel been recruited. *Pruitt*, 503 F.3d at 659.

Prejudice may be shown by the plaintiff's lack of success in the district court. *Santiago*, 599 F.3d at 765-66. It may also be shown by the plaintiff's difficulty keeping up with the demands of litigation or his inability to conduct discovery. *Id.*

Mr. Decker was prejudiced by the district court's abuse of discretion because counsel could have swung the proceedings in Mr. Decker's favor in at least two material ways. First, counsel could have performed discovery tasks impossible for incarcerated individuals to complete, like conducting depositions, settlement conferences, and document discovery. Second, with this discovery in hand, counsel could have moved for summary judgment on Mr. Decker's behalf.

1. Counsel could have deployed discovery devices that Mr. Decker could not.

First, an attorney could have completed several discovery tasks that incarcerated individuals cannot. For example, counsel could have engaged in extensive written discovery. For several reasons, Mr. Decker could not.

As explained above, Mr. Decker had supply problems. He lacked access to a copier, and he did not have the paper, word-processing, and writing materials necessary to send out substantial amounts of written discovery. SA 104, 175.

Discovery costs money, which Mr. Decker lacked. If Mr. Decker requested a production of documents, for example, he would have to pay for the copies produced. *See* Fed. R. Civ. P. 34, advisory committee's note to 1970 amendment (stating that "courts have ample power . . . [to] requir[e] that the discovering party pay costs" when requesting copies of documents). But Mr. Decker had "Ø in [his] account." SA 172.

Beyond supply problems and financial constraints, Mr. Decker lacked some necessary legal know-how. He tried to obtain information through written discovery, but he was repeatedly met with objections that he could not overcome. In support of his requests for counsel, he told the district court that Defendants "claimed 'objections'" when he "asked [f]or discovery." SA 171. He could not sort out those objections, leading him to tell the court: "I can't get the discover[y] needed to litigate this matter." SA 171.

He also lacked some technical know-how due in part to his inability to access the unrestricted internet. The district court itself acknowledged that Mr. Decker

did not have the resources at his disposal to explain the "design" of an electronic program that could accommodate his First Amendment rights. RSA 15. Without that knowledge, he could not use discovery devices to thoroughly explore such alternatives. And without internet, he could not provide in-depth explanations about how easy it is to obtain an electronic PDF of the daily Federal Register.

Mr. Decker's ability to engage in written discovery was also compromised by his confinement in restrictive housing. In a letter filed with the district court, he said, "I am presently in the discovery stage and I am . . . unable to litigate it due to being housed in the Special Housing Unit pending transfer." SA 183.

On top of all this, Mr. Decker had problems with his mail. Written discovery takes time, and it cannot be conducted effectively with the slow-moving prison-mail system. For example, because of the thirty-day delays that Mr. Decker reported, he would not get written discovery back within the usual thirty-day time limit required by the federal rules. *See* Fed. R. Civ. P. 33(b)(2), 34(b)(2)(A), 36(a)(3).

An attorney would not have been impaired by any of these difficulties. So counsel for Mr. Decker could have effectively engaged in comprehensive written discovery—a necessary task in a case about the BOP's capabilities.

Additionally, an attorney could have deposed Defendants and related parties to answer any lingering remedial questions before moving for summary judgment. For example, in a deposition, counsel for Mr. Decker could have challenged BOP officials on their failure to use a three-click, probably costless process to accommodate Mr. Decker's rights. And counsel could have directly refuted the

BOP's unsubstantiated assertion that Mr. Decker can ship paper copies of the Federal Register into his cell.

But, left on his own, Mr. Decker "had not taken any depositions" by the close of discovery. *Santiago*, 599 F.3d at 765. He lacked the ability to do so. This Court has recognized that taking depositions is "beyond the ability of most pro se litigants." *Eagan*, 987 F.3d at 683. And since Mr. Decker was imprisoned, he had no ability to conduct depositions. *See Montgomery v. Pinchak*, 294 F.3d 492, 496 n.4 (3d Cir. 2002) ("Because he was incarcerated and proceeding *pro se*, Montgomery was unable to take deposition testimony from any defendant.").

Yet depositions are critical sources of evidence. *See Eagan*, 987 F.3d at 693 (finding prejudice where "[t]he key element missing from the summary judgment record" was a deposition that was never taken by the plaintiff, a pro se prisoner). That is especially true here, where the *Turner* analysis turns on the cost and feasibility of giving Mr. Decker access to the Federal Register electronically. To flesh out those issues, counsel could have deposed Defendants on their processes, budgets, technological capabilities, and staff resources. Counsel could have also asked detailed follow-up questions about any proposed alternatives offered by Defendants.

For example, Mr. Decker's appointed counsel could have deposed Sarah Qureshi, the BOP official who provided an affidavit in support of Defendants' summary-judgment motion. In that deposition, counsel for Mr. Decker could have confirmed that, far from being "impractical and highly burdensome" for the BOP to

give Mr. Decker electronic access to the Federal Register, Qureshi Aff. ¶ 7, SA 208, it would require just three clicks for the BOP to download a PDF that it could post to the electronic bulletin board—something it was already doing. Counsel could have also questioned Ms. Qureshi about the low costs of posting the Federal Register PDF to the electronic bulletin board, the minimal staff resources required to do so, and the technological feasibility of giving Mr. Decker access to that PDF.

Because Mr. Decker never obtained this evidence, he was prejudiced. *See Henderson v. Ghosh*, 755 F.3d 559, 567 (7th Cir. 2014) (finding prejudice where counsel, if recruited, "could have deposed the Defendants" and "obtained . . . evidence that [the plaintiff] could not").

2. With this discovery in hand, counsel could have moved for summary judgment for Mr. Decker.

Such evidence would have not only bolstered Mr. Decker's meritorious case *against* Defendants' summary-judgment motion but would have also given him a basis to move *for* summary judgment.

Indeed, on the record before the district court, Mr. Decker was already entitled to summary judgment. *See* Fed. R. Civ. P. 56(f) (authorizing courts to enter summary judgment for a nonmoving party). As shown above, when a prisoner identifies an alternative that would fully accommodate his rights at *de minimis* cost, he offers evidence that the prison's infringement of his rights does not satisfy the *Turner* test. *Turner*, 482 U.S. at 91; *supra* p. 21. Mr. Decker did that here. And Defendants produced no competent evidence showing that his alternative

would impose more than a *de minimis* cost. Counsel for Mr. Decker would have been able to capitalize on this and end the case.

On this record, the district court could have granted Mr. Decker summary judgment. But, without counsel, he lacked the time and resources to bolster his discovery and move for summary judgment. He was thus prejudiced by his lack of counsel.

CONCLUSION

This Court should reverse the district court's order granting summary judgment and remand with instructions to enter summary judgment for Mr. Decker on the First Amendment issue. It should also reverse the district court's orders denying Mr. Decker's recruitment motions and remand for recruitment of counsel for any limited further proceedings consistent with the Court's opinion. *See Pruitt*, 503 F.3d at 661.

Dated: January 22, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Plaintiff-Appellant, Robert K. Decker, furnishes the following in compliance with Fed. R. App. P. 32(a)(7):

I hereby certify that this brief conforms to the rules contained in Federal Rule of Appellate Procedure 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 13,918 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

Signature: s/ H. Hunter Bruton **Date:** January 22, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January, 2024, I electronically filed the foregoing Brief of Plaintiff-Appellant in Support of Appeal with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ H. Hunter Bruton
H. Hunter Bruton

Counsel for Plaintiff-Appellant, Robert K. Decker

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), I hereby certify that this short appendix includes all the materials required by Circuit Rules 30(a) and 30(b).

s/ H. Hunter Bruton
H. Hunter Bruton

Counsel for Plaintiff-Appellant, Robert K. Decker

REQUIRED SHORT APPENDIX

TABLE OF CONTENTS

Full docket text for document 83:
ORDER DENYING [80] Motion for Recruitment of Counsel without prejudice. See Pruitt v. Mote, 503 F.3d 647, 654 (7th Cir. 2007) (articulating factors court considers when evaluating motions for counsel). An indigent plaintiff seeking representation by court-recruited counsel must demonstrate: (a) reasonable efforts to locate counsel on his own; and (b) an inability to litigate the matter without representation. Plaintiff has not demonstrated sufficient efforts to find counsel. He allegedly "wrote" to seven attorneys who declined to represent him in this matter. Setting aside the fact that he also claims to lack access to writing instruments, paper, etc., Plaintiff does not provide copies of any correspondence, the names of attorneys or law firms he contacted, the dates of any contacts, or a summary of the services he requested, and responses he received. In the meantime, Plaintiff has demonstrated his ability to competently litigate this matter from start to finish, through an appeal, and on remand, despite being house in the CMU with law library access that is limited to once or twice per week. In fact, Plaintiff has shown that he is quite capable of litigating this matter pro se. If that changes, Plaintiff may renew his request for court-recruited counsel, by filing a new motion and attaching a summary or copies of correspondence with at least three attorneys or law firms who have received and denied his request for representation in this case. Signed by Judge J. Phil Gilbert on 4/14/2022. (jsy) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED.

PACER Service Center			
Transaction Receipt			
01/10/2024 14:50:21			
PACER Login:	RB_PACER01	**Client Code:**	95440.00011.amb
Description:	History/Documents	**Search Criteria:**	3:19-cv-00233-JPG
Billable Pages:	1	**Cost:**	0.10

Full docket text for document 86:
ORDER DENYING [85] Motion for Recruitment of Counsel. Plaintiff provided copies of letters to attorneys or law firms dated 5/2/2022 seeking assistance in this matter. He has only received a response to one, and he anticipates transferring from FCI-Terre Haute soon. An indigent plaintiff seeking representation by court-recruited counsel must demonstrate: (a) reasonable efforts to locate counsel on his own; and (b) an inability to litigate the matter without representation. Although Plaintiff has now shown reasonable efforts to find counsel, he has not explained why he requires an attorney to represent him. At the same time, he has demonstrated his ability to competently represent himself by litigating the underlying action from start to finish, through an appeal, and on remand, despite being housed in the CMU with law library access that is limited to once or twice per week. His placement may cause certain delays during discovery, and, if it does, he should contact opposing counsel to request extensions of discovery deadlines by consent. If he cannot reach an agreement with the defendant(s), Plaintiff may file a motion seeking an extension with the court. Absent any other impediments to self-representation, the Court declines to recruit counsel for Plaintiff at this time. The motion is denied without prejudice. Signed by Judge J. Phil Gilbert on 6/16/2022. (jsy) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED.

PACER Service Center			
Transaction Receipt			
01/10/2024 14:51:35			
PACER Login:	RB_PACER01	**Client Code:**	95440.00011.amb
Description:	History/Documents	**Search Criteria:**	3:19-cv-00233-JPG
Billable Pages:	1	**Cost:**	0.10

Full docket text for document 91:
ORDER DENYING [88] Motion for Reconsideration of [86] Order Denying Motion for Recruitment of Counsel. Plaintiff cites more than a half-dozen cases he has pending in four states as the reason for seeking court-recruited counsel here. However, the number of other pending cases has no bearing on this Court's analysis of whether he has made sufficient efforts to find an attorney to represent him in this particular case or whether he has demonstrated his ability to litigate this matter so pro se. The Court remains convinced that court-recruited counsel is still not necessary at this time, for each of the reasons already set forth at Doc. 86. Signed by Judge J. Phil Gilbert on 7/11/2022. (jsy). THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED.

PACER Service Center			
Transaction Receipt			
01/10/2024 14:52:13			
PACER Login:	RB_PACER01	**Client Code:**	95440.00011.amb
Description:	History/Documents	**Search Criteria:**	3:19-cv-00233-JPG
Billable Pages:	1	**Cost:**	0.10

Full docket text for document 93:
ORDER DENYING [92] Motion for Recruitment of Counsel on the same grounds Plaintiff's Motions at Docs. 85 and 88 were denied. Plaintiff filed the instant motion on the same date the Court denied his last motion at Doc. 88, and he offers no new reason for filing it. The motion is DENIED without prejudice. Signed by Judge J. Phil Gilbert on 7/12/2022. (jsy) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED.

PACER Service Center			
Transaction Receipt			
01/10/2024 14:53:23			
PACER Login:	RB_PACER01	**Client Code:**	95440.00011.amb
Description:	History/Documents	**Search Criteria:**	3:19-cv-00233-JPG
Billable Pages:	1	**Cost:**	0.10

Full docket text for document 95:
ORDER DENYING [94] Plaintiff's Motion for Reconsideration of [93] Order on Motion for Recruitment of Counsel. The Court denied Plaintiff's [85] Motion for Recruitment of Counsel in an [86] Order dated June 16, 2022 and denied Plaintiff's three motions renewing his request for counsel since then. (See Docs. 88, 89, and 91-93). The latest motion (Doc. 94) is denied on the same grounds. Although Plaintiff has demonstrated reasonable efforts to find an attorney on his own, he has not demonstrated the need for an attorney to represent him in this remanded matter. Plaintiff has competently represented himself to date. To the extent he is unable to meet any court-imposed deadline caused by his current incarceration, Plaintiff may request an extension by filing a motion prior to the expiration of the deadline. Signed by Judge J. Phil Gilbert on 8/2/2022. (jsy)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED.

PACER Service Center			
Transaction Receipt			
01/10/2024 14:55:22			
PACER Login:	RB_PACER01	**Client Code:**	95440.00011.amb
Description:	History/Documents	**Search Criteria:**	3:19-cv-00233-JPG
Billable Pages:	1	**Cost:**	0.10

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT DECKER,

Plaintiff,

v.

MERRICK B. GARLAND, WARDEN SPROUL, ANDRE MATEVOUSIAN, MICHAEL CARVAJAL, WARDEN RULE, and KATHERINE SIREVELD,

Defendants.

Case No. 19-cv-233-JPG

MEMORANDUM AND ORDER

GILBERT, District Judge:

This matter is before the Court for consideration of a Motion for Summary Judgment filed by Defendants, in their official capacities Katherine Sireveld, Merrick B. Garland, Michael Carvajal, Warden Sproul, Andre Matevousian, and Warden Rule (collectively, "Defendants") (Doc 98). Plaintiff Robert Decker ("Plaintiff" or "Decker"), proceeding *pro se* opposes the motion.[1] (Doc. 107). Defendants have filed a reply. (Doc. 110). For the reasons set forth below, the motion shall be **GRANTED**.

BACKGROUND

Decker, proceeding *pro se*, filed this suit under the Administrative Procedures Act ("APA") 5 U.S.C. §§ 551-59, 701-06. On February 22, 2019, Decker filed this action against certain defendants. After dismissing the case, on remand from the Seventh Circuit Court of Appeals, the Court reconsidered the case consistent with the Seventh Circuit's Order. (Doc. 46). Therefore, the

[1] [1] While Decker's response was not timely, he contemporaneously filed a motion for extension of time because he did not receive the motion until December 8, 2022, which the Court will accept and consider his response to Defendants' Motion for Summary Judgment on the merits.

Court designated the following two counts in Decker's Fourth Amended Complaint. In the first count, Decker alleges BOP officials violated the APA by denying Plaintiff access to BOP's proposed regulatory rule changes and thereby depriving him of the opportunity to engage in public comment of the BOP's proposed rulemaking. *Id*. at 2. Second, he alleges Defendants violated his First, Fifth, and/or Fourteenth Amendment rights by denying Plaintiff access to the Federal Register, thereby depriving him of the opportunity to engage in public comment on proposed rulemaking by other agencies. *Id*.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants argue that Decker cannot recover on his claims because there is no genuine material dispute over the fact Decker has access to the BOP's proposed rules and regulations via inmate electronic bulletin board, and that BOP's decision not to publish the complete Federal Register for every inmate does not violate Decker's constitutional rights. (Doc. 98).

PLAINTIFF'S RESPONSE

Decker responds and states Defendants have acted in an arbitrary and capricious manner in making the Federal Register unavailable to the inmate population. Decker argues that he has a liberty interest, and is being deprived by not providing the Federal Register "in real time."

FACTS

Decker is a federal inmate currently incarcerated at a federal prison in Marion, Illinois ("Marion, USP"). He is set to be released on April 2, 2027. https://www.bop.gov/inmateloc/ (last visited March 14, 2023). On February 14, 2017, Robert Decker was sentenced to 140 months imprisonment for violation of 21 U.S.C. § 846 (conspiracy to distribute a mixture of a detectable amount of hydromorphone, hydrocodone, and oxycodone; and 18 U.S.C. § 1956 (conspiracy to commit money laundering).

This case involves the Federal Register, a publication of the federal government containing "current Presidential proclamations and Executive orders, Federal agency regulations having general applicability and legal effect, proposed agency rules, and documents required by statute to be published." Federal Register Office, https://www.federalregister.gov/agencies/ federal-register-office (last visited March 14, 2023).[2] The Federal Register is updated each work day. *Id*. Defendants submit the affidavit of Sarah Qureshi, a Supervisory Attorney in the Bureau of Prisons ("BOP") Program Review Division. (Doc. 98-1 at ¶ 1). From September 1999 to April 2022, Qureshi was Associate General Counsel in the Legislative and Correctional Issues Branch of BOP's Office of General Counsel where she was responsible for BOP regulatory development. *Id*.

According to Qureshi, the BOP allows inmates access written materials maintained in the electronic law libraries to assist in preparation for legal defense in criminal cases. *Id*. at ¶ 4. BOP Program Statement 1351.07 states that Federal Register documents (final rules, proposed rules, interim rules, and certain notices) *pertaining to the BOP* are maintained in the institution's inmate law libraries. The Federal Register "promulgated" by the BOP are available to inmates via an "electronic bulletin board," which is a computer-based system in the electronic law library available to all BOP inmates. *Id*. at ¶¶ 5-6. This bulletin board system has been in place since 2012. *Id*. at ¶ 8.

There are a relatively low number of BOP documents published in the Federal Register, i.e., between September 2012 and August 2021, there were approximately fourteen proposed BOP regulations, ten final rules, two interim rules, and six notices published in the Federal Register and posted on the electronic bulletin board. *Id*. at ¶ 8.

[2] Pursuant to Federal Rule of Evidence 201, the Court takes judicial notice of information on a government website.

ANALYSIS

a. Standard

Normally, a district court "shall grant" summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." See Fed. R. Civ. P. 56(a). But in a case involving review of a final agency action under the APA, "summary judgment instead serves as a 'mechanism for deciding, as a matter of law, whether the agency action is ... consistent with the APA standard of review." *Star Way Lines v. Walsh*, 596 F. Supp. 3d 1142, 1149 (N.D. Ill. 2022) (internal citations omitted).

Courts can only set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence in the case, or not in accordance with law." *Fliger v. Nielsen*, 743 F. App'x 684, 687 (7th Cir. 2018) (*quoting Little Co. of Mary Hosp. v. Sebelius*, 587 F.3d 849, 853 (7th Cir. 2009)). Judicial review is "confined to the administrative record." *Little Co. of Mary Hosp.*, 587 F.3d at 856.

So, "[t]o survive summary judgment under the APA, the plaintiffs must point to facts or factual failings in the administrative record that indicate that the [agency's] decision is arbitrary, capricious, an abuse of discretion, [unsupported by substantial evidence,] or otherwise not in accordance with law." *Star Way Lines*, 596 F. Supp. 3d at 1149. "To determine whether an agency's decision was arbitrary or capricious, [courts] ask if it was 'based on a consideration of the relevant factors and whether there has been clear error of judgment.' " *Boutte v. Duncan*, 348 F. App'x 151, 154 (7th Cir. 2009). Even when the agency decision isn't clear, courts will uphold the decision if "the agency's path may be reasonably discerned." *See Boutte*, 348 F. App'x at 154 (quotation marks omitted). In reviewing an agency's decision, courts do not substitute their own judgment for that

of the agency. *Id.*; *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

Courts must affirm administrative decisions that are supported by "substantial evidence" if there is a "rational connection between the facts found and choice made." *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962); *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856. "Substantial evidence" is merely relevant evidence that a reasonable person might accept as adequate to support a conclusion. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951). Additionally, because Decker is proceeding *pro se*, the Court construes his filings liberally. *Shaw v. Kemper*, 52 F.4th 331, 334 (7th Cir. 2022).

The Court determines whether there is a material factual dispute as to whether (1) Decker has access to the BOP rules and the ability to publicly comment on them; (2) Defendants violated Decker's constitutional rights for denying him access to the complete Federal Register.

b. Whether Decker has access to BOP-Federal Register (Count 1)

First, Defendants argue that Decker indeed has access to the BOP rules and the ability to publicly comment on them. (Doc. 98 at 6). Defendants indicate that screenshots provided by Qureshi demonstrate that Federal Register documents are made available to the inmate population via electronic bulletin board, which all inmates can access on the same computer used for legal research in the law library. *Id.*; (Doc. 98-1 at ¶ 6). Defendants point to Qureshi's affidavit, who formerly was Associate General Counsel in the Legislative and Correctional Issues Branch at the BOP Office of General Counsel's affidavit, and Electronic Bulletin Board screenshots that show that Federal Register documents pertaining to the BOP are made available through the electronic bulletin board. *Id*.

Decker responds and indicates that the BOP has modified the FSA "repeatedly without seeking comments from the public or the inmate population." (Doc. 107 at 4). Specifically, Decker states that the Defendants have violated the notice and comment requirements of 5 U.S.C. § 553. Section 553 requires agencies to publish proposed rule changes in the Federal Register and solicit comments from the public. In support he attaches a "memo" from the "TRULINCS Bulletin Board" and refers to the Sentencing Guidelines. Specifically, Decker points to a rule in the C.F.R. where the disciplinary hearing officer issues hearing results within ten days from the hearing. (Doc. 107 at 3). Decker argues that this rule was "redacted from the C.F.R. without placing it first in the Federal Register for public comment." *Id*.

First, this argument is not before this Court. What is at issue is Decker's *access* to the BOP-related Federal Register, not a suit against the BOP for modifying rules without seeking public comment. *See also In Re: Answers in Pro Se Prisoner and Detainee Cases Subject to Merit Review*, Administrative Order No. 244 (S.D. Ill. Jun. 10, 2019) (noting that, in *pro se* prisoner cases, the "answer and subsequent pleadings will be to the issues stated in the Merit Review Order"). Defendants argue that Decker has not exhausted this claim related to improper rulemaking. Without reaching the merits of whether the BOP has indeed modified the FSA without seeking comments from the public or inmate population, the Court does not consider this argument because Decker has not exhausted this claim. *Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006). In a reply, Defendants additionally argue that Decker has no standing to bring this claim because he must have suffered an "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Because Decker has not exhausted this claim, the Court need not address whether Decker has standing to pursue this claim.

However, Decker does not state how or why the memo is relevant in defeating summary judgment on Count 1. Defendants, in their reply, indicate Decker does not provide any "explanation as to the significance of the report, its contents, or how he reached his conclusions regarding the report." (Doc. 110 at n. 2). The Court agrees. It is unclear from reviewing the memo how it demonstrates he has not been able to comment on the FSA, or how it indicates Decker does not have access to BOP-related Federal Register materials.

To the extent that Decker's argument that "rules that are implemented in the BOP are not published in the Federal Register" attempts to respond that he does not have access to the Federal Register, this argument is without basis or evidence. "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Consolino v. Towne*, 872 F.3d 825, 831 (7th Cir. 2017) ("[S]peculation will not defeat a summary judgment motion[.]"). Decker does not provide evidence that disputes Defendants' evidence that the BOP-related Federal Register materials are available to Decker through the electronic bulletin board.

Next, Decker argues that "no BOP related docs published in the Federal Register between 7-20-2016 and 4-30-2018 on the grounds that the BOP were shirking their duties to notify." (Doc. 107 at 6). However, Qureshi and Defendants indicate that there were "no BOP related documents published in the Federal Register between July 20, 2016 and April 30, 2018), (Doc. 98 at n. 2). The Court finds that the affidavit of Qureshi, and screenshots provide show that Decker does have access to the BOP's proposed regulatory rule changes.

c. Whether Decker Entitled To Relief In Count 2 In Failing To Provide Entire Federal Register

Defendants next argue that they are entitled to summary judgment on Count 2 because failing to provide inmates with a complete up-to-date copy of the entire Federal Register is not arbitrary and capricious, and does not violate Decker's constitutional rights. The Seventh Circuit has been clear – courts cannot substitute its own judgment for that of the agency, and courts will uphold the decision if "the agency's path may be reasonably discerned." *Boutte*, 348 F. App'x at 154.

Defendants argue the APA does not require the BOP to provide Federal Register materials originating from other federal agencies. (Doc. 98 at 7). Defendants point to the Seventh Circuit decision in *Thelen v. Cross*, 656 Fed.Appx. 778 (7th Cir. 2016), where the Seventh Circuit found that the APA "does not obligate one agency [Sentencing Commission] to give notice of the proposed rule changes of another agency [BOP]; notice by the promulgating agency suffices." *Id.* at 780. Decker disagrees that *Thelen* is applicable. He states that it is a *Bivens* case, where plaintiff was seeking money damages, and was "seeking to get out of jail earlier." (Doc. 107 at 6-7). The Court agrees that *Thelen* is an unpublished opinion, and therefore is not mandatory authority. Unpublished opinions are still given persuasive weight. The Court, therefore, will provide Decker all reasonable inferences, and will still evaluate whether a failure to provide the *entire* Federal Register is arbitrary and capricious, and a violation of Decker's constitutional rights.

Defendants argue that Decker's constitutional claims under the APA fail because inmates do not have the same liberties as members of the general public. (Doc. 98 at 8). Defendants argue that Decker's rights may be impinged if the prison action is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). To determine reasonableness,

courts consider whether there is a valid, rational connection between the prison's objective and the regulation, whether alternative means of exercising the right are available, whether accommodating the asserted right unduly impacts the prison's resources, and whether obvious, easy alternatives exist to accommodate the prisoner's rights. *Turner*, 482 U.S. at 89–90, 107 S.Ct. 2254. Defendants argue that the BOP's decision to provide inmates with BOP-related Federal Register documents in lieu of providing a "complete up-to-date copy of the entire Federal Register" meets the test laid out in *Turner*.

Specifically, Defendants note that the penological interest in not providing a complete copy of the Federal Register is to avoid burdensome and cost prohibitive actions. They point to Qureshi, who states in her affidavit that it would be "highly impractical and highly burdensome on BOP staffing resources to devote time and expense to post the entire publication electronically on the electronic bulletin board daily." (Doc. 98 at 9). Defendants state that Plaintiff can obtain Federal Register documents on his own from "authorized outside sources." *Id*. Defendants further indicate that Decker's request to provide the Federal Register daily in paper form would "exceed the BOP's limited budget, and to provide a copy electronically would be highly burdensome to BOP staffing." *Id*. at 10.

In response, Decker states that pursuant to *Turner*, denying the Federal Register is not reasonable. (Doc. 107 at 4). Decker states that the BOP should develop the Federal Register on the internet, that the Federal Register could therefore update on its own, and "a program could be developed as in Public Libraries across America." *Id*. Therefore, Decker argues that it "is crucial that the Federal Register availability be implemented in the BOP." TRULINCS[3] can supply the

[3] TRULINCS are reports which Defendants attach to their motion. See (Doc. 98-1 at 38-49). The Court is unclear how the references to TRULINCS support Decker's argument, and Decker does not explain. Defendants, in their reply, also indicate Decker does not provide any "explanation as

Federal Register and State laws but the BOP arbitrarily and capriciously refuses to supply either." *Id*. at 4-5. Decker suggests that the BOP "solicit the LEXUS NEXUS company to supply the Federal Register and State laws[4]." (Doc. 107 at 5). Decker provides no evidence regarding a design of a program, nor does he have experience in suggesting the costs or expense required to build such a program within the entire Bureau of Prisons system. Decker additionally states that it is unreasonable for Decker to ask people outside of BOP to provide him with Federal Register materials. *Id*. at 7.

Decker's broad and vague suggestions regarding institutional, business, policy, and financial[5] decisions are not sufficient to support, let alone create, an issue of material fact, a finding BOP's actions are arbitrary and capricious. The Court finds that Defendants have a legitimate penological interest in not supplying the complete up-to-date Federal Register to inmates. *See Jackson v. Frank*, 509 F.3d 389, 391 (7th Cir. 2007) (concluding that a prison's economic interest in saving staff resources is legitimate under *Turner*). The directive of this Court is clear - courts do not substitute their own judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of the U.S.*, 463 U.S. at 43, 103 S.Ct. 2856. Here, the Court finds that Defendants decisions are supported by "substantial evidence" and finds that there is a rational connection between providing only BOP-related Federal Register materials and the choice in not providing a complete copy of the Federal Register to inmates. *State Farm*, 463 U.S. at 43, 103 S.Ct. 2856. A reasonable person may accept

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to the significance of the report, its contents, or how he reached his conclusions regarding the report." (Doc. 110 at n. 2). The Court agrees.

[4] Decker references his inability to access state law materials while incarcerated multiple times throughout his brief. However, for the same reasons stated above, the Court cannot consider this argument because Decker has failed to exhaust this claim. His claim specifically pertains to Federal Register materials, and not state law materials.

[5] Decker cites a FOIA request that result that states TRULINCS sold from July 1, 2021 to July 31, 2022 amounts to $47,540,005.95. (Doc. 107 at 8). Even giving Decker all reasonable inferences, the Court has nothing in the record determine the budget of the BOP for materials. The Court

Defendants conclusions in limiting the Federal Register to BOP inmates, and therefore the Court finds that Defendants actions are not arbitrary and capricious. *Universal Camera Corp. v. NLRB*, 340 U.S. at, 477, 71 S.Ct. 456. Specifically, the Court defers to the Defendants expertise and professional judgment regarding its penological objectives. *Beard v. Banks*, 548 U.S. 521, ——, 126 S.Ct. 2572, 2578, 165 L.Ed.2d 697 (2006) (plurality opinion) (reiterating that "courts owe substantial deference to the professional judgment of prison administrators"); *Procunier v. Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (observing that problems related to prison administration require "expertise" "peculiarly within the province of the legislative and executive branches of government").

Additionally, Decker's proposals of soliciting Lexus Nexus and utilizing an internet system similar to public libraries are not sufficient to find a material factual dispute. Just because BOP has not allegedly instituted the most "ideal" policy for its penological objectives, failing to follow the most "ideal" policy does not render the actions unconstitutional. *Van den Bosch v. Raemisch*, 658 F.3d 778, 790 (7th Cir. 2011) ("While the DOC's asserted penological objectives—maintaining prison security, order and rehabilitation—might very well be achieved with a narrower policy, the absence of an ideal policy does not render the policy that officials have adopted unconstitutional."). The Seventh Circuit has noted that determination of penological goals, and which actions to constitute are "at bottom" a decision prison administrators are uniquely situated to make." *Id.* Even though Decker's proposals may be conceptually available, that is not enough to support an arbitrary and capricious finding for failing to provide inmates with internet access for the Federal Register.

While Decker argues it is not ideal for him to ask people outside the institution for Federal Register materials, the law is clear that such alternatives need not be ideal, only available. *Turner*,

482 U.S. at 90, 107 S.Ct. at 2262 ("Where 'other avenues' remain available for the exercise of the asserted right ..., courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials ... in gauging the validity of the regulation.' ") (*quoting Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 131, 97 S.Ct. 2532, 2540, 53 L.Ed.2d 629 (1977); *Pell v. Procunier*, 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974); *see also Overton*, 539 U.S. at 135, 123 S.Ct. at 2169) ("Alternatives ... need not be ideal ... they need only be available.").

The Court finds, based on the factors enumerated in *Turner*, that a failure to provide inmates with a copy complete of the Federal Register in paper form, or via the Internet, is rationally related to the legitimate penological interests of the institution. Further, the Court finds that Decker was not denied alternative means of accessing the Federal Register through outside sources. Additionally, Decker does have access to BOP-related Federal Register materials. It is not arbitrary and capricious for the BOP to not provide a copy of the entire Federal Register.

d. Whether Decker's constitutional rights have been violated

Even though the Court has held that not providing Decker with the entire Federal Register is valid since it is reasonably related to legitimate penological interests pursuant to *Turner,* the Court is not convinced that Decker's claims implicate the constitution. Decker alleged that Defendants have violated his rights under the First, Fifth, and/or Fourteenth Amendments. (Doc. 46 at 2). Defendants argue that Decker cannot recover on a claim that his constitutional rights have been violated by not receiving the complete Federal Register in "real time." (Doc. 110 at 5). The Court will take each in turn.

First, Defendants argue that Decker cannot demonstrate his First Amendments rights have been violated because BOP does not prevent Decker from obtaining a complete copy of the Federal

register; it simply does not provide him with a complete copy. (Doc. 98 at 10-11). Therefore, Defendants argue that the fact Decker can obtain the Federal Register from outside sources without running afoul to any prison regulation. indicates Defendants are not violating his First Amendment rights. *Id*. at 11.

Defendants cites the case of *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). In *Pell*, the Supreme Court upheld a prison regulation preventing face-to-face interviews between the media and individual prisoners. *Id*. The Supreme Court noted "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Id*. at 822, 94 S.Ct. 2800. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, ... in drawing such lines, 'prison officials must be accorded latitude.' " *Id*. at 826, 94 S.Ct. 2800. Here, similarly, the prison has not discriminated the content of Federal Register materials, and the fact that Decker may still possess and obtain a copy of the Federal Register from outside sources does not implicate or violate the First Amendment.

Decker argues that his substantive due process rights have been violated by not having access to the Federal Register. (Doc. 107 at 5). Such a right must be "deeply rooted in this Nation's history and tradition." *Hayden ex rel. A.H. v. Greensburg Comm. Sch. Corp*., 743 F.3d 569, 575 (7th Cir. 2014) and there is no case indicating that a complete copy of the Federal Register is deeply rooted. However, as stated above, inmates retain those rights that are *not* inconsistent with his status as a prisoner or within the penological objectives of the corrections system. The Defendants have cited a legitimate penological interest, and the Court will not strike the Defendants policy of not providing the entire Federal Register.

The Court finds that the Fifth and Fourteenth Amendments are also not implicated. Decker does not demonstrate a deprivation of a property interest, which is integral to both a Fifth and Fourteenth Amendment violation. In *Thelen v. Cross*, the Seventh Circuit found that Thelen "suffered no loss of liberty" under his due process theory. *Thelen*, 656 F. App'x at 780; *see also Dillon v. United States*, 560 U.S. 817, 828, 130 S.Ct. 2683, 177 L.Ed.2d 271 (2010) (no constitutional right to reduced punishment for past crime). Decker argues that inmates are left knowing "what laws are enacted" in the United States of BOP. First, the Court has determined that Decker has not been able to show that he does not have access to the BOP-related Federal Register materials. And second, he is not able to show what deprivation of a property interest that he has suffered as a result of the BOP not providing him a copy of the complete Federal Register. And even if Decker were able to show a constitutional right in any of the rights enumerated above regarding the complete Federal Register, the BOP has a legitimate penological interest in not providing him a complete copy of the Federal Register, and he able to obtain it through alternative means.

CONCLUSION

For these reasons, the Court hereby:

- **GRANTS** Decker's Motion for Extension of Time to file his response (Doc. 106);
- **GRANTS** Defendants' Motion for Summary Judgment on Counts 1 and 2 of Decker's Complaint;
- **DISMISSES** Decker's Complaint with Prejudice;
- **DIRECTS** the Clerk of the Court to enter judgment accordingly**.**

IT IS SO ORDERED.
DATED: March 31, 2023

/s J. Phil Gilbert
J. PHIL GILBERT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

ROBERT DECKER, Plaintiff, v. MERRICK B. GARLAND, WARDEN SPROUL, ANDRE MATEVOUSIAN, MICHAEL CARVAJAL, WARDEN RULE, and KATHERINE SIREVELD, Defendants.	Case No. 19-cv-233-JPG

JUDGMENT

This matter having come before the Court, and the Court granting summary judgment in favor of Defendants Katherine Sireveld, Merrick B. Garland, Michael Carvajal, Warden Sproul, Andre Matevousian, and Warden Rule,

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff Robert Decker's Complaint against Defendants Katherine Sireveld, Merrick B. Garland, Michael Carvajal, Warden Sproul, Andre Matevousian, and Warden Rule is **DISMISSED WITH PREJUDICE** and without costs**.**

DATED: March 31, 2023

MONICA A. STUMP, Clerk of Court
s/Tina Gray, Deputy Clerk

Approved: **s/ J. Phil Gilbert**
J. PHIL GILBERT
DISTRICT JUDGE