No. 21-1714

United States Court of Appeals for the Fourth Circuit

WILLIAM THORPE, ET AL.,

Plaintiffs-Appellees,

-v.-

HAROLD CLARKE, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLEES

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2. Whether the district court properly held that Defendants were not entitled to qualified immunity at the motion-to-dismiss stage as to Plaintiffs' Due Process claim, when (i) Defendants do not dispute the Step-Down Program gave Plaintiffs a basis for a liberty interest, (ii) it was clearly established that prisoners had a liberty interest in being released from long-term solitary confinement conditions materially indistinguishable from those alleged by Plaintiffs, and (iii) it was clearly established that providing prisoners with pretextual and meaningless review of their long-term solitary confinement would violate the Due Process Clause?

STATEMENT OF THE CASE

A. Defendants Violated Plaintiffs' Eighth and Fourteenth Amendment Rights

Plaintiffs are prisoners classified as security level "S" or "SL-6" and subject to long-term solitary confinement at Red Onion State Prison ("Red Onion") and/or Wallens Ridge State Prison ("Wallens Ridge"). J.A.-37-43, 106.[1] Red Onion and Wallens Ridge are twin, high-security, "supermax" prisons designed to isolate and control prisoners separate from the general prison population. J.A.-32, 63-67. Plaintiffs have suffered severe physical and mental health damage due to their long-term solitary confinement.

Plaintiffs seek to represent a class of prisoners assigned Level S or Level SL-6 from 2012 to the present who were originally sentenced to confinement in the general population and are not serving a death sentence. J.A.-37, 106-107. Plaintiffs have each spent between two and twenty-four years in solitary confinement. J.A.-38-43. Plaintiffs allege Defendants maintain Plaintiffs and class members in long-term solitary confinement indefinitely, with no legitimate penological purpose and without meaningful review, in violation of their constitutional rights under the Eighth and Fourteenth Amendments. J.A.-115, 118.

[1] Defendants inexplicably assert that Plaintiffs only bring this action on behalf of "Level S" prisoners and offer statistics outside the Complaint and unrelated to the issue on appeal regarding the Level S population only. *See* Opening Br. at 2 & n.1.

The Complaint, 97 pages long and supported by 1,164 pages of exhibits, details Virginia's misuse of long-term solitary confinement, starting at Mecklenburg Correctional Center ("Mecklenburg") and continuing at Red Onion and Wallens Ridge. As to Mecklenburg (which closed in 2012), the Virginia Board of Corrections concluded in a 1984 report that the Virginia Department of Corrections ("VDOC") had used its solitary-confinement program to fill empty beds for economic reasons. J.A.-57-58. The Board's report documented that in administering Mecklenburg's "Phase Program," purportedly designed to allow prisoners to earn their way to a lower security status, VDOC purposely used imprecise criteria for placing prisoners in solitary confinement, used ambiguous and subjective standards for prisoner advancement, and gave guards excessive discretion to deny prisoners progression through the Program. J.A.-30-31, 52-57. As a result, prisoners remained in long-term solitary confinement indefinitely. J.A.-31, 53-54, 56-59.

The Complaint also details how in the 1990s VDOC built two new supermax prisons with an even greater capacity than Mecklenburg—Red Onion and Wallens Ridge—without conducting any study of actual need for so many long-term solitary confinement beds. J.A.-32, 63-65. As a result, VDOC had the incentive to, and did in fact, continue to "warehouse" prisoners in indefinite long-term solitary confinement. J.A.-76; *see also* J.A.-32-33, 64-67. VDOC also loosened

the criteria for assignment to the supermax prisons and imported prisoners from other states. J.A.-66-67. Under public pressure, in the mid-2000s VDOC introduced a second Phase Program similar to that at Mecklenburg. J.A.-32-33, 66-67. For failures similar to those at Mecklenburg, this second program faced criticism and scrutiny from non-governmental entities, legislators, and the U.S. Department of Justice, which threatened an investigation in 2012. J.A.-32-33, 74-77.

That same year, VDOC introduced the "Step-Down Program" ("Step-Down"). Step-Down purports to: (1) implement a system for the periodic review of prisoners' risk and release to the general population and (2) provide incentives or "privileges" for desired behavior. J.A.-136, 232, 302. Successful completion of Step-Down is the only way prisoners may earn a lower security level (i.e. release from long-term solitary confinement). J.A.-150 (2017 Operations Manual) ("Those who do not choose to participate will be assigned to IM 0 or SM0 which are non-privilege statuses where offenders merely serve their time.") (emphasis in original). The Complaint details the ongoing economic motives to maintain prisoners in long-term solitary confinement at Red Onion and Wallens Ridge, the sometimes nearly-identical features that the Step-Down Program shares with the two prior Phase Programs, and the unsurprising deficiencies Step-Down shares with those prior programs. J.A.-33, 65-67, 74-79, 88-89, 91, 95, 100-101.

Specifically, Plaintiffs allege that—contrary to Defendants' rosy portrayals in public reports and in their opening brief—Step-Down, like its predecessors, maintains prisoners in the harsh conditions of solitary confinement, uses vague, arbitrary, and subjective criteria to classify and progress prisoners in the Program, and provides illusory and inadequate review of each prisoner's individual status. J.A.-67-74, 79-98.

1. Harsh Conditions

For prisoners held in solitary confinement at Red Onion and Wallens Ridge, life is marked by extreme isolation and deprivations. During their time in solitary:

- Plaintiffs are confined alone for 22-24 hours per day in a cell smaller than a parking space, where they eat their meals alone, urinate, defecate, and sleep. Their solid steel cell doors have a tray for food and a small window covered with opaque film preventing them from seeing out. J.A.-68.
- Plaintiffs' cells are lined with solid strips along their sides and bottoms designed to prevent communication with others. J.A.-69.
- Plaintiffs are bombarded by noises at all hours, including the sounds of prisoners crying, screaming, and beating on their metal doors. J.A.-68.
- Plaintiffs are forced to sleep under bright lights that stay on at all hours. J.A.-68.
- Plaintiffs' interactions with guards and mental health professionals mostly consist of cursory questions or cursory greetings through their cell door food slot so they can check for "living, breathing, moving flesh" inside. J.A.-69.

- If Plaintiffs threaten self-harm, they are placed alone in a bare "strip cell" with no clothes or bedding, strapped to a gurney, and fed a liquid diet until they say they no longer intend self-harm. J.A.-69-70.

- Plaintiffs are permitted only one hour of non-contact visitation per week through thick Plexiglass walls. J.A.-70.

- Before leaving their cells, Plaintiffs must endure dehumanizing, daily cavity searches in which they are forced to strip naked, turn around, raise their penis and testicles, and spread their buttocks and bend over so guards can inspect their anus. J.A.-71.

- Plaintiffs may only leave their cells for a shower three times per week that may not exceed 15 minutes and for one hour of "outdoor recreation" per day in a small outdoor "cage" resembling a dog kennel and lacking any recreation equipment. J.A.-71-72.[2]

- Plaintiffs are prohibited recreation on "off days," and showers and outdoor recreation are often denied at guards' discretion. As a result, they often must spend 24-48 hours continuously in their cells. Instead of outdoor recreation, they may have to roll sporks and salt-and-pepper packets into a napkin while shackled to a chair, or clean showers while shackled. J.A.-71-73.

- The outdoor recreation space is unsuitable for use in winter, as it is unheated and Plaintiffs are not provided suitable winter clothing. J.A.-72.

- Plaintiffs are not permitted to talk to other prisoners during outdoor recreation. J.A.-72.

- Plaintiffs are denied all "productive activities," such as art and writing programs and voluntary work opportunities. J.A.-72-73.

[2] In 2017, VDOC increased the exercise limit to two hours. J.A.-71. Defendants refer to changes made July 22, 2021 but these unexplained, uncited, and self-serving propositions are outside of the Complaint and may not be taken as true. *See* Opening Br. at 1.

- Plaintiffs are blocked from earning "good time credit" toward a reduction in their sentence or earn credit at a much-reduced rate compared to prisoners in general population. J.A.-73.
- Plaintiffs are denied parole while in solitary, even if otherwise parole-eligible. J.A.-73.

These conditions deprive prisoners of basic human needs, including meaningful social contact, environmental stimuli, sleep, exercise, and mental and physical health. J.A.-104. The harshness of these conditions far exceeds what the general prison population experiences. J.A.-67-73.

2. Serious Mental and Physiological Harm

As a result of their prolonged solitary confinement, Plaintiffs have suffered severe physical and mental health damage and symptoms known to be associated with long-term solitary confinement such as neurological damage, schizoaffective disorder, psychosis, post-traumatic stress disorder, depression, auditory and visual hallucinations, severe sensory deprivation, suicidal acts and thoughts, anxiety, agitation, disorientation, weight loss, rapid heartbeat, sweating, shortness of breath, digestive problems, restlessness, and insomnia. J.A.-38-43, 102-104.

Plaintiffs allege that Step-Down creates an indefinite regime that exacerbates risks by punishing behavior recognized as symptomatic of the very harms it causes. J.A.-104-106. For example, VDOC policy requires ongoing solitary confinement of prisoners who exhibit symptoms of apathy, lethargy, attention deficits, "poor grooming," failure to maintain an orderly cell, or failure to complete the *Challenge*

Series workbook. J.A.-105. Yet these behaviors are manifestations of the grave psychological injuries caused by solitary confinement. And when prisoners fail to meet Step-Down's requirements, they are forced to re-start the Program or are regressed in Phase level and remain in solitary confinement even longer, further exacerbating their mental and physical harms. J.A.-105.

VDOC has not attempted to assess the impact of VDOC's solitary confinement practices on the health of its prisoners, does not keep doctors or psychiatrists on staff at Red Onion or Wallens Ridge, and has not sought to prevent or ameliorate the above harms of solitary confinement. J.A.-43.

3. Arbitrary Criteria

Plaintiffs allege that Step-Down is unscientific and based on criteria that lack penological purpose. J.A.-79, 82, 87-91, 98-102 104-105.

Upon arrival at Red Onion or Wallens Ridge, a "Dual Treatment Team" ("DDT") assigns prisoners to one of two pathways, either Special Management ("SM") or Intensive Management ("IM"), based on their "identified risk level." J.A.-80. The assignment criteria are highly subjective, including vague directions dictating that prisoners with "repeated" disruptive behavior should be assigned to the SM pathway while those with "routinely" disruptive behavior belong on the IM pathway. J.A.-82. Plaintiffs allege that prisoners have been assigned to the more-

restrictive IM pathway based on conduct from long ago or prior to incarceration—including non-violent crimes. J.A.-83-84.

The IM and SM pathways are largely identical in terms of housing and privileges. JA.-86-87, 183-85, 191-93. A prisoner may earn the "privilege" of advancing through the Phases of Step-Down, which consists of Phases 0, 1, 2, and SL-6 (which is itself divided into two parts). J.A.-86, 94. A prisoner may not advance before a minimum period in each Phase. Prisoners on the SM pathway must spend at least fifteen months in Step-Down, and prisoners on the IM pathway must spend at least thirty. J.A.-87. SM pathway prisoners who achieve Level SL-6 may further progress to pods designed for re-entry to general population or to special mental-health pods. J.A.-86. IM pathway prisoners who achieve Level SL-6 are kept in a pod with no pathway to general population. J.A.-96.

While VDOC classifies the Level SL-6 pods as "general population," the conditions do not meaningfully differ from those in IM Phases 0 through 2, and amount to solitary confinement, including features that are harsh and atypical compared to normal prison conditions, such as segregated recreation, out-of-cell restraints, eating meals within cells, and near-daily cavity searches. J.A.-84-85, 96. The Program contains no maximum length of time a prisoner may spend in long-term solitary confinement. J.A.-74, 87-90, 95-96, 150, 203.

Under both pathways, a prisoner may advance through the levels and earn greater privileges by completing workbooks, remaining free of disciplinary violations, and exhibiting so-called "responsible behavioral goals" defined as "personal hygiene," standing for count, maintaining orderly cells, and "satisfactory rapport" with staff and others. J.A.-87-88.

Step-Down affords lower-level staff discretion to assess and determine prisoners' progression through the program and eventual release from long-term solitary confinement. Supervised by the Unit Manager, staff compile a weekly "Status Rating Chart." J.A.-88. Prisoners who do not satisfactorily complete the level criteria may be kept at their current level or regressed to earlier levels. J.A.-88-91. Guards have described the "behavior" category as "very subjective," allowing them to retain a prisoner in solitary confinement indefinitely based on irrelevant criteria like hygiene, rapport with guards, and "respect." J.A.-90-91. Moreover, the Unit Manager has the discretion to require prisoners to re-start Step-Down at Level 0, even if the reason behind the decision is found to have been unwarranted or false. J.A.-88-89, 91. In this way, prisoners often must complete Step-Down repeatedly before even becoming eligible to be considered for a lower security classification. *Id.*

The Step-Down operating manual acknowledges these criteria are not based on any scientific findings or citable evidence. *See* J.A.-157 (2017 Operations

Manual) (stating "no reliable assessment instrument or set of criteria has been found" to determine the continuing dangerousness of prisoners with a history of violence while incarcerated, and that "the safest strategy" is to assume "that past behavior is one predictor of the likelihood of future behavior"). VDOC has also refused to apply scientific tools in Step-Down such as the COMPAS recidivism assessment used in the general population. J.A.-99-101. VDOC has expressly ceased any attempt to develop a scientific assessment tool for the Program. J.A.-101.

4. Inadequate Reviews

On paper, a "Building Management Committee" ("BMC") reviews the Unit Manager's determinations of a prisoner's progression through Step-Down. The BMC however often consists of a single individual and can be the same Unit Manager responsible for the initial determination. J.A.-92-93. By policy, VDOC refuses to provide prisoners with Status Rating Charts or the form the BMC uses to review their status. J.A.-93. Moreover, because these reviews concern prisoners' "internal status" or phase level within their pathway, VDOC considers them "non-grievable," meaning prisoners cannot appeal or overturn these decisions. J.A.-93-94.

Defendants point to hearings before the Institutional Classification Authority ("ICA"), which meets every 90 days ostensibly to decide whether prisoners'

"external status"—their assignment to a maximum-security prison versus a lower-level facility—is appropriate. *See* Opening Br. at 10, 61; J.A.-94. But the ICA holds hearings lasting only moments and issues pre-filled forms that merely document (rather than review) Plaintiffs' previously-determined progress through Step-Down, providing only a conclusory "rationale" such as "Remain Segregation" or "needs longer period of stable adjustment." J.A.-94-95. In other words, the ICA necessarily defers to Step-Down, which by policy is the only means by which Plaintiffs may earn a lower security level. J.A.-87, 91, 94-95, 150.

Step-Down suffers from additional procedural deficiencies. VDOC has instituted an External Review Team ("ERT") to review prisoners' assignments to the IM pathway every six months. J.A.-96, 97-98. Plaintiffs allege that the ERT, though tasked with providing an independent check on the review decisions of the Unit Manager, ICA, BMC, and DTT, "in fact, does not perform an independent check on these review decisions" or "review whether there is a continuing reason for retaining an IM prisoner in long-term solitary confinement," but instead only "examines whether the *original* decision to place the prisoner on the IM Pathway was justified based on offenses that the prisoner committed years prior." J.A.-96-97. The ERT provides prisoners no written explanation of its decisions, which are not subject to appeal or grievance. J.A.-98. Plaintiffs further allege that "the ERT has not provided many IM prisoners with a review, despite years of solitary

confinement," and "[m]any IM prisoners have never seen or heard of the ERT." J.A.-98.

5. Defendants

The Complaint alleges that during the relevant period each Defendant participated in creating, administering, or implementing Step-Down and/or failed to properly diagnose or treat Plaintiffs suffering the harms above, despite knowing Step-Down causes such harms and authorizes long-term solitary confinement with no legitimate penological purpose. J.A.-44-52, 105-106. In particular:

- Harold Clarke, Director of VDOC, implemented, oversaw, created, and updated Step-Down. J.A.-44-45.
- Randall Mathena, Security Operations Manager and ERT chairperson, performed bi-annual reviews of prisoner classifications and pathway assignments in Step-Down and was involved in developing and implementing Step-Down until 2015. J.A.-45-46.
- H. Scott Richeson, Deputy Director of Reentry and Programs and ERT member, performed bi-annual reviews of prisoner classifications and pathway assignments in Step-Down and was involved in reviewing and approving updates to Step-Down. J.A.-46.
- A. David Robinson, Chair of Corrections Operations and ERT member, performed bi-annual reviews of prisoner classifications and pathway assignments in Step-Down, and was involved in reviewing and updating Step-Down. J.A.-46-47.
- Henry Ponton, Regional Operations Chief for the Western Region and ERT member, performed bi-annual reviews of prisoner classifications and pathway assignments in Step-Down, had authority over all decisions made by the DTT regarding whether a prisoner should advance through Step-Down, and was involved in developing, reviewing, and updating Step-Down. J.A.-47.

- Marcus Elam, Regional Administrator for the Western Region and ERT member, performed bi-annual reviews of prisoner classifications and Step-Down pathway assignments and reviews determinations by the wardens of Red Onion and Wallens Ridge to assign prisoners from the Level S security classification. J.A.-48.

- Denise Malone, Chief of Mental Health Services and ERT member, was responsible for the mental-health treatment of VDOC prisoners and policies for the assessment of their mental-health needs, for ensuring that Step-Down minimizes psychiatric deterioration of VDOC prisoners, and for performing bi-annual reviews of prisoner classifications and pathway assignments in Step-Down. J.A.-48-49.

- Steve Herrick, Health Services Director, supervises all VDOC health care personnel and formerly oversaw all VDOC mental-health services, including the mental-health assessment of prisoners. J.A.-49-50.

- Tori Raiford, Statewide Restrictive Housing Coordinator, designs, plans, implements, and oversees VDOC's solitary confinement program. As a former Unit Manager and DTT and ERT member, she also performed bi-annual reviews of prisoner classifications and pathway assignments in Step-Down, supervised weekly and monthly informal reviews of prisoners' progress through Step-Down, had authority over all decisions made by the DTT regarding whether a prisoner should advance through Step-Down, and reviewed ICA reports. J.A.-50.

- Jeffrey Kiser, Warden of Red Onion, is responsible for care and custody of Red Onion prisoners, for supervising daily operational activities, and for ensuring staff compliance with and administration of Step-Down; has authority over DTT decisions regarding a prisoner's progress through Step-Down; and was involved in developing and updating Step-Down. J.A.-50-51.

- Carl Manis, Warden of Wallens Ridge, is responsible for the care and custody of Wallens Ridge prisoners, for supervising daily operational activities, and for ensuring staff compliance with and administration of Step-Down; has authority over DTT, BMC, and Unit Manager decisions regarding a prisoner's progress through Step-Down; and was involved in developing and updating Step-Down. J.A.-51-52.

Plaintiffs allege Defendants purposely designed Step-Down, like the Mecklenburg and Phase Programs before it, to retain prisoners in long-term solitary confinement for reasons unrelated to their current institutional risk. J.A.-53, 62-67, 100-101. Plaintiffs moreover allege that, by the time they instituted Step-Down in 2012 and during subsequent updates, Defendants were aware of the medical and scientific consensus that conditions like the ones Defendants imposed on Plaintiffs caused severe and often permanent mental and physiological harms. J.A.-29-30, 44-52, 102-103, 106.

B. Procedural History

This appeal arises from the district court's order on Defendants' motion to dismiss under Fed. R. Civ. P. 12(b)(6) on the basis of qualified immunity. J.A.-917.[3]

Contrary to Defendants' repeated characterization, Opening Br. at 4-5, the district court did not "reject" Defendants' defense of qualified immunity. Rather, it found that Defendants were not entitled to dismissal of Plaintiffs' Eighth Amendment and Fourteenth Amendment claims on the basis of qualified immunity *at the motion-to-dismiss stage*. J.A.-911.

[3] Plaintiffs' claims against Defendants for which a defense of qualified immunity is available are currently stayed by the district court pending this appeal. Ord., ECF No. 117 (W.D. Va. July 23, 2021). Plaintiffs' remaining claims are not part of this appeal and are proceeding in the district court.

On September 4, 2020, Magistrate Judge Sargent submitted her report and recommendation, providing a detailed analysis of the parties' thoroughly briefed arguments. J.A.-604-692. The R&R:

- found Plaintiffs sufficiently stated a Due Process claim, J.A.-674-677;
- found Plaintiffs sufficiently stated an Eighth Amendment claim, J.A.-679-681;
- found the Eighth Amendment and Due Process rights alleged to be violated were clearly established, J.A.-681-684; and
- recommended the district court deny Defendants' motion to dismiss as to Plaintiffs' Due Process and Eighth Amendment claims against Defendants in their individual capacities, including on the ground of qualified immunity, J.A.-684, 690-691.

As to qualified immunity, the magistrate found that *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019) clearly established that solitary confinement conditions similar to those alleged by Plaintiffs violated the Eighth Amendment, but that it had been clearly established even before *Porter* that a prisoner had a right to humane conditions of confinement and to avoid deprivations that were not motivated by any legitimate penological justifications. J.A.-683. She also found that *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983) recognized that the Due Process Clause prohibited prison officials from using administrative segregation as pretext for indefinite confinement of prisoners and required them to engage in periodic review of prisoners' administrative segregations status, and that *Incumaa v. Stirling*, 791 F.3d 517 (4th Cir. 2015) recognized that prisoners have a protected

constitutional right in avoiding indefinite solitary confinement under conditions similar to those alleged by Plaintiffs. J.A.-684.

On June 15, 2021, Judge James P. Jones, like the magistrate, concluded that Plaintiffs sufficiently stated a Due Process claim, J.A.-897-900, sufficiently stated an Eighth Amendment claim, J.A.-903-08, and plausibly alleged violations of clearly established rights under the Due Process Clause and Eighth Amendment, J.A.-909-11. As to the Eighth Amendment claim, the district court found that "when this suit was filed in May 2019, caselaw had clearly established that the Eighth Amendment prohibited prison officials from depriving inmates of 'the basic human need for meaningful social interaction and positive environmental stimulation' without a legitimate penological interest and despite well-documented attendant psychological and emotional harms." J.A.-910 (*citing Porter*, 923 F.3d at 368). Noting that the court was required to take Plaintiffs' "well-pled allegation that VDOC has no legitimate penological purpose" as true, the district court found that "[a]t this juncture, plaintiffs have plausibly alleged the violation of a clearly established Eighth Amendment right." J.A.-910-11 (further noting that the court could "properly consider the defendants' asserted penological justification and any evidence in support at the summary judgment stage."). The district court similarly found that Plaintiffs' allegations that review of their segregation status was not

"meaningful" plausibly alleged the violation of clearly established Due Process rights "at the motion to dismiss stage." J.A.-911. This appeal followed.

SUMMARY OF THE ARGUMENT

The district court correctly held that Plaintiffs adequately allege facts showing Defendants violated their clearly established Eighth Amendment rights. It is undisputed that the Complaint plausibly alleges Eighth Amendment violations. Defendants argue, incorrectly, that until this Court's decision in *Porter* it was not clearly established that the exact conditions to which Plaintiffs were subjected deprived them of a basic life necessity or that solitary confinement conditions inherently violated the Eighth Amendment. However, it was clearly established long before *Porter* that Defendants could not place Plaintiffs in prison conditions they knew to cause serious psychological and physical harms. Similarly, it has long been clearly established that subjecting prisoners to harmful conditions for no legitimate penological purpose violates the Eighth Amendment.

The district court also correctly held that the Complaint adequately alleges facts showing that Defendants violated Plaintiffs' clearly established rights under the Due Process Clause. It is undisputed that Step-Down provided Plaintiffs a basis for a liberty interest. Contrary to Defendants' arguments, Plaintiffs also had a clearly-established liberty interest in being released from long-term solitary confinement, because their conditions of solitary confinement are materially

indistinguishable from conditions that the Supreme Court in *Wilkinson*, and this Court in *Incumaa*, recognized were sufficiently harsh to trigger a protected liberty interest. Defendants argue prisoners do not have a clearly established right to more review than Step-Down provides. However, this argument ignores that Plaintiffs adequately allege that Defendants violated their clearly established right to non-pretextual and meaningful periodic review of their long-term solitary confinement, including notice of the factual basis supporting their ongoing solitary confinement, an opportunity for rebuttal, and review based on their continued security risk or other valid criteria.

STANDARD OF REVIEW

The district court's ruling as to qualified immunity is reviewed *de novo*. *See Mays v. Sprinkle*, 992 F.3d 295, 299-300 (4th Cir. 2021). This Court must accept as true all factual allegations in the Complaint and draw all reasonable inferences in Plaintiffs' favor. *See Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020). This Court is "not limited to evaluation of the grounds offered by the district court to support its decision, but may affirm on any grounds apparent from the record." *United States v. Smith*, 395 F.3d 516, 519 (4th Cir. 2005).

At the motion-to-dismiss stage, qualified immunity is an affirmative defense on which Defendants bear the burden of proof and persuasion. *See Henry v. Purnell*, 501 F.3d 374, 378 (4th Cir. 2007). Dismissal is only appropriate "when

the face of the complaint clearly reveals the existence of a meritorious immunity defense." *Columbia v. Haley*, 738 F.3d 107, 123 (4th Cir. 2013) (citation omitted).[4]

ARGUMENT

A. Defendants Wrongly Frame the Qualified Immunity Issues in This Case

Defendants argue that qualified immunity is proper as to both the Eighth Amendment and Due Process claims if there is no case holding that the exact "conditions alleged in this case" or "procedures established by the Step-Down Program" violated the Constitution. Opening Br. at 25, 32, 36, 61-62. These arguments misapprehend the applicable standard.

So long as (i) the Complaint's allegations, if true, substantiate a violation of a constitutional right and (ii) that right was "clearly established" at the time of their conduct, Defendants are not entitled to qualified immunity. *See Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 170 (4th Cir. 2016). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be

[4] "[S]tatements by counsel that raise new facts constitute matters beyond the pleadings and cannot be considered on a Rule 12(b)(6) motion." *E. I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 449, 454 (4th Cir. 2011). As observed by the magistrate, because all factual inferences at the motion-to-dismiss stage are taken in the plaintiff's favor, "'[m]ost often, [] qualified immunity is tested at the summary judgment stage after the facts have been developed through discovery.'" J.A.-683 (quoting *Latson v. Clarke*, 249 F. Supp. 3d 838, 867 (W.D. Va. 2017)).

clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

The "very action in question" need not have "previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *see also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("We do not require a case directly on point.") (citation omitted). "[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Pelzer*, 536 U.S. at 741 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). Previous case law need not encompass facts that are "materially similar" to the conduct at issue, and officials "can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.*

While qualified immunity generally turns on "the objective legal reasonableness of an official's acts," *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), it "does not protect government officials when they act to violate the law with actual knowledge, deliberate ignorance, or reckless disregard of a risk to a constitutional or statutory right." *U.S. ex rel. Citynet, LLC v. Gianato*, 962 F.3d 154, 160 (4th Cir. 2020). Thus, this Circuit recognizes the "special problem" raised when the objective qualified immunity standard is applied to claims requiring proof of wrongful intent, including in the form of "deliberate indifference," and acknowledges that an official "who acts with [a] culpable state

of mind reasonably should know that she is violating the law." *Brooks v. Johnson*, 924 F.3d 104, 119 & n.6 (4th Cir. 2019) (rejecting that defendants lacked "fair notice" for qualified immunity purposes where underlying claims had wrongful intent as an element); *Dean v. Jones*, 984 F.3d 295, 310 (4th Cir. 2021) (same); *Thompson v. Commonwealth*, 878 F.3d 89, 106 (4th Cir. 2017) (*Harlow* does not preclude consideration of intent, because "[f]or claims where intent is an element, an official's state of mind is a reference point by which she can reasonably assess conformity to the law").

For these reasons, Defendants are wrong to assert the law was not clearly established until "three days before plaintiffs filed their complaint" as to the Eighth Amendment claims or "after the filing of th[e] complaint" for the Due Process claims. Opening Br. at 2-3, 48 (discussing *Porter*, 923 F.3d at 348 and *Smith v. Collins*, 964 F.3d 266 (4th Cir. 2020)). As discussed below, Plaintiffs' rights in this case were established long before the cited authorities. And Defendants' argument concedes that they lack qualified immunity, at a minimum for conduct following the decisions in *Porter* and/or *Smith* until the present.[5] Nor should Defendants be granted qualified immunity where the rights at issue were clearly established during the continuation of the alleged violations. *See Williamson v.*

[5] Plaintiffs allege conduct beginning in 2012 and continuing to the present. J.A.-107-109.

Stirling, 912 F.3d 154, 189 (4th Cir. 2018) (denying qualified immunity as to conduct after the filing of the complaint because the defendants "could not be entitled to qualified immunity on the procedural due process claim during the nearly two-year period in which they ignored" this Court's decision in *Incumaa*); *Skinner v. Liller*, No. TDC-17-3262, 2021 U.S. Dist. LEXIS 52261, at *27 (D. Md. Mar. 19, 2021) (denying qualified immunity where rights at issue were clearly established "at the outset of, *or during the continuation of*" plaintiff's stay in segregation) (emphasis added).

B. The District Court Correctly Held That The Complaint Adequately Alleged Facts Showing That Defendants Violated Plaintiffs' Clearly-Established Eighth Amendment Rights

1. Defendants Do Not Challenge the District's Court Holding That the Complaint Plausibly Alleges Eighth Amendment Violations

As the district court correctly concluded, Plaintiffs have alleged adequate facts to show that Defendants violated the Eighth Amendment's cruel and unusual punishment clause under two distinct theories of relief. J.A.-903. First, Plaintiffs adequately alleged the objective and subjective prongs of an Eighth Amendment conditions of confinement claim by asserting that Defendants' Step-Down program deprived Plaintiffs of basic human needs—including meaningful social contact, environmental stimuli, adequate sleep and exercise, mental health, and physical health—and did so with deliberate indifference to the resulting harms Plaintiffs

would endure (the "deprivation theory" of relief). J.A.-903-906. Second, Plaintiffs adequately alleged Defendants kept them in such conditions without any legitimate penological justification, thereby inflicting on them wanton and unnecessary pain (the "infliction theory" of relief). J.A.-908; *see also* J.A.-767-778.

Defendants do not challenge either finding. Opening Br. at 24, 28. They argue only that, at the time of the alleged violations, it had not been clearly established that these conditions deprived Plaintiffs of a "basic life necessity," as required to satisfy the objective prong of the first theory of relief, because solitary confinement had not been established as unconstitutional by virtue of its inherent isolation alone, nor under circumstances where "inmates were provided with adequate food, clothing, shelter, and medical care." Opening Br. at 24, 28-30, 35. But Defendants' argument ignores Plaintiffs' well-pleaded allegations of serious deprivations caused by such isolation and misconstrues Fourth Circuit case law.

2. It Was Clearly Established That Officials Could Not Place Prisoners in Conditions They Knew to Cause Serious Psychological and Physical Harms, Such As Those Known to be Associated With Long-Term Solitary Confinement

a. This Circuit Established Decades Before *Porter* That The Serious Injuries Alleged By Plaintiffs Satisfy The Objective Prong Of An Eighth Amendment Conditions Of Confinement Claim

Defendants incorrectly argue that until *Porter* the kinds of harms Plaintiffs allege here were not sufficient to satisfy the objective prong of an Eighth Amendment conditions of confinement claim. They suggest that the serious deprivations alleged by Plaintiffs—which include deterioration of physical and mental health to a degree far exceeding the discomforts associated with ordinary life in prison, J.A.-102-104—do not constitute deprivations of the kinds of "basic life necessities, such as food, clothing, exercise, and shelter" that in their view are sufficiently serious to satisfy the objective prong. But Defendants' articulation of the kinds of life necessities that satisfy the standard is far narrower than what this Circuit has long established.[6]

In fact, it was clearly established for decades before *Porter* that physical and mental health were basic human needs such that evidence of "serious or significant

[6] Defendants fail to acknowledge that prison officials violate the Eighth Amendment if they knowingly disregard "a serious or significant physical or emotional injury resulting from the challenged conditions or a substantial risk thereof," though they had done so below. J.A.-392 (quoting *De'lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013)).

physical or emotional injury resulting from the challenged conditions" could satisfy the objective prong of a conditions of confinement claim. *See Strickler v. Waters*, 989 F.2d 1375, 1381 & n.3 (4th Cir. 1993) (granting defendants summary defendants because plaintiff had provided "no evidence" that overcrowding and excessive temperatures caused him any serious injury).[7] Thus, the *Strickler* court pointed out that a single affidavit claiming "mental stress" from inadequate ventilation was insufficient to create a genuine issue as to whether plaintiffs had suffered sufficiently serious "medical and emotional deterioration," and evidence of "simple anxiety" based upon fear of assault from other prisoners was insufficient to show that the condition "result[ed] in significant mental pain," as was required to satisfy the objective prong. *Id.* at 1380 n.4 (citing *Lopez v. Robinson*, 914 F.2d 486, 491-92 (4th Cir. 1990); *Schrader v. White*, 761 F.2d 975, 979 (4th Cir. 1985)). Conversely, plaintiffs who *have* alleged or provided evidence of significant psychological/emotional or physical harms in the decades and years leading up to *Porter* have been found to establish deprivations of serious human needs and satisfy the objective prong. *See Williams v. Griffin*, 952 F.2d 820, 825 (4th Cir. 1991) (finding a genuine dispute for trial as to whether overcrowding and unsanitary conditions created psychological harm and increased risk of violence

[7] *See also Mickle*, 174 F.3d at 472 (requiring evidence of "serious or significant physical or emotional injury").

and illness sufficient to satisfy objective prong); *Johnson v. Levine*, 588 F.2d 1378, 1380 (4th Cir. 1978) (finding that overcrowding resulting in a "high level of violence and psychological injury to some prisoners" can make out an Eighth Amendment claim); *Scarborough v. Austin*, No. 91-6754, 1992 U.S. App. LEXIS 16319, at *11-12 (4th Cir. 1992) (reversing grant of summary judgment to defendant jail officials because genuine issue existed as to whether conditions including lack of exercise and overcrowding combined to work a deprivation of an identifiable human need); *Farmer v. Kavanagh*, 494 F. Supp. 2d 345, 366-67 (D. Md. 2007) (noting in a solitary confinement case that mental health and sanity are human needs, the deprivation of which can constitute an Eighth Amendment violation, but finding no deliberate indifference); *King v. Rubenstein*, 825 F.3d 206, 218 & n.3 (4th Cir. 2016) (mental and physical injuries, including depression and mental anguish, resulting from being compelled to remove penile implants upon threat of segregation, were sufficient to satisfy objective prong, and defendants were not entitled to qualified immunity).

Plaintiffs' alleged injuries, which include severe psychological and physical harms known to be associated with long-term solitary confinement and to be often permanent, far exceed this threshold. *See* J.A.-29, 38-43, 102-104 (alleging that prolonged solitary confinement has caused plaintiffs neurological damage, schizoaffective disorder, psychosis, post-traumatic stress disorder, depression,

auditory and visual hallucinations, severe sensory deprivation, suicidal acts or ideation, anxiety, agitation, disorientation, weight loss, rapid heartbeat, sweating, shortness of breath, digestive problems, restlessness, and insomnia). To the extent Defendants assert that Plaintiffs' injuries are not as serious as alleged, they will have the opportunity to so demonstrate through discovery, but this Court should decline Defendants' invitation to resolve as a matter of law that the variety of harms alleged cannot rise to the level of "serious or significant physical or emotional injuries" that have been deemed to satisfy the objective prong decades before *Porter*.

b. No Reasonable Official Would Have Believed It Was Lawful to Subject Plaintiffs to Conditions They Knew to Cause the Serious Injuries Alleged

Taking as true that the severe harms resulting from Step-Down alleged in the Complaint were obvious and well-known to Defendants, it was objectively unreasonable in light of clearly established law for Defendants to knowingly and intentionally subject Plaintiffs to them. Plaintiffs allege that Defendants were fully aware that, by the time they instituted Step-Down in 2012, medical and scientific literature had consistently documented the severe and often permanent mental and physiological harms caused by long-term solitary confinement conditions like the ones to which they subject Plaintiffs. J.A.-29, 67-70, 102-104; *see also Porter*, 923 F.3d at 356–57 (noting that the literature published no later than 2003 and

2004 had established that solitary or supermax-like confinement leads to "psychological deterioration," and had "establish[ed] the risks and serious adverse psychological and emotional effects of prolonged solitary confinement"). Further, Defendants knew the program they designed to house people in long-term solitary confinement exacerbated those risks by punishing behavior recognized as symptomatic of the very harms solitary confinement causes, and furthermore bears no relationship to penological goals. J.A.-104-06.

While Defendants may dispute both that the conditions caused severe harms and that they *knew* this to be true when they implemented Step-Down, this Court is required to take these well-pleaded allegations as true. Given those allegations, the obviousness of the violation for qualified immunity purposes is evident, lest we "assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense." *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019).

c. Defendants Rely on Authorities That, At Most, Stand for the Proposition that Solitary-Like Conditions Do Not *Inherently* Violate the Eighth Amendment, Without Regard To What Plaintiffs Can Demonstrate Regarding The Seriousness And Obviousness Of The Harms Inflicted

Much of the authority on which Defendants rely stands for the inapposite proposition that this Circuit has not clearly established that solitary confinement conditions are *inherently* unconstitutional. However, Plaintiffs do not challenge

solitary confinement in the abstract, without regard to the harms inflicted. Indeed, this Court concluded in *Sweet* that "isolation from companionship, [and] restriction on intellectual stimulation and prolonged inactivity . . . will not render segregated confinement unconstitutional *absent other illegitimate deprivations*." *Sweet v. South Carolina Dep't of Corr.*, 529 F.2d 854, 861 (4th Cir. 1975) (emphasis added). Similarly, in two other cases from the 1970s cited by Defendants, this Court dismissed prisoners' Eighth Amendment claims because they made no allegations of "mental abuse," physical injuries, or other serious deprivations. *Breeden v. Jackson*, 457 F.2d 578, 579, 581 (4th Cir. 1972) (noting that "[s]olitary confinement *in and of itself* does not violate Eighth Amendment prohibitions" (emphasis added)); *Crowe v. Leek*, 540 F.2d 740, 742 (4th Cir. 1976) (plaintiff complaining of overcrowded cell did not assert harms beyond unpleasant conditions). These cases, like *Mickle* and *Strickler* after them, stood only for the proposition that restrictive prison conditions by themselves could not make out an Eighth Amendment claim absent serious deprivations of the kind alleged here. Thus, even as the *Sweet* court declined to declare solitary confinement *per se* unconstitutional without evidence of harms, it remanded to the district court to determine whether prolonged and indefinite restrictions on exercise—to two one-hour periods each week—might "be harmful to a prisoner's health, and, if so, would amount to" an Eighth Amendment violation. *Sweet*, 529 F.2d at 866; *see*

also Strickler, 989 F.2d at 1381 ("Though such conditions could rise to the level of constitutional violations were they to produce serious deprivations of identifiable human needs, Strickler has come forward with no evidence that he has sustained any serious or significant physical or emotional injury as a result of these conditions."). [8]

Similarly, several of the cases cited by Defendants were resolved after discovery based on the inadequate records in those cases, as plaintiffs were unable to muster evidence to support the requisite factual showing of harm or deliberate indifference. [9] *See Shrader v. White*, 761 F.2d 975, 979 (4th Cir. 1985) (concluding after trial that magistrate correctly required that "fear of attack result in significant mental pain to be of constitutional dimensions"); *Allgood v. Morris*, 724 F.2d 1098, 1101 (4th Cir. 1984) (affirming at summary judgment that plaintiff's loss of recreation and canteen privileges upon placement in protective custody after an attack did not make out Eighth Amendment claim); *Ross v. Reed*, 719 F.2d 689, 698-99 (4th Cir. 1983) (directing verdict after trial that plaintiff's three-month

[8] Notably, the exercise restriction the *Sweet* court believed could by itself implicate Eighth Amendment rights in 1975 was arguably less restrictive than the exercise restrictions alleged by Plaintiffs here. *See* J.A.-71-72.

[9] The sole exception is *Williams v. Branker*, an unpublished decision decided on the pleadings that held that the plaintiff's allegations that his conditions of confinement "aggravated" his existing mental illness were insufficient. 462 Fed. Appx. 348, 354 (4th Cir. 2012).

segregation due to his protective custody request did not violate the Eighth Amendment where no evidence indicated defendants were on notice about poor in-cell lighting or excessive air conditioning); *Lopez*, 914 F.2d at 491-93 (assuming plaintiffs had *alleged* violations of clearly established law based on inadequate ventilation and overcrowding but finding at summary judgment that record did not support harm of any constitutional magnitude, and there was no evidence of deliberate indifference related to a brief water stoppage).

Mickle v. Moore, 174 F.3d 464 (1999), is no different. In rejecting at summary judgment an Eighth Amendment claim based on plaintiffs' maximum-security confinement and segregation, this Court reaffirmed the *Strickler* standard but concluded that plaintiffs' claim of a "depressed mental state," supported only by their own affidavits asserting stress and emotional and physical suffering, did not adequately demonstrate a serious or significant physical or emotional injury sufficient to withstand summary judgment, nor had they marshalled evidence of any deliberate indifference by officials. *Id.* at 472. Thus, neither *Mickle* nor *Strickler* (which noted that conditions less severe than those alleged here "could rise to the level of constitutional violations were they to produce serious deprivations of identifiable needs," 989 F.2d at 1381) stand for the proposition that the Eighth Amendment permitted all forms of solitary confinement regardless of the seriousness or obviousness of actually-inflicted harms. Far from supporting a

reversal here, these cases further establish that it has long been the law to permit plaintiffs with well-pleaded allegations an opportunity to demonstrate that their prison conditions alone or in combination with one another imposed an unconstitutionally severe deprivation of a basic life need.[10]

d. *Porter* Applied the Existing Standard to the Abundant Evidence Before it to Conclude That Conditions Similar to Those Alleged By Plaintiffs Were Inherently Extreme Deprivations Justifying an Inference of Deliberate Indifference

Defendants concede "this Court has long recognized that an inmate may state an Eighth Amendment conditions-of-confinement challenge based on segregated confinement," but assert that "the plausibility threshold for those claims" changed with the issuance of *Porter*. Opening Br. at 35. While Plaintiffs are unclear what Defendants mean by "plausibility threshold," their suggestion that

[10] Defendants improperly rely on unpublished affirmances of district court summary judgment decisions in cases where *pro se* prisoners failed to present independent evidence of their individualized Eighth Amendment allegations and therefore left many of VDOC's untested recitations regarding Step-Down unchallenged. Opening Br. at 32. This Court should decline Defendants' invitation to adopt a rule that would immunize prison officials from liability for violations of clearly-established rights in the implementation of a wide-ranging and complex program of indefinite and prolonged solitary confinement based on prior *pro se* challenges subject to an expedited court procedure. *See* J.A.-496 (citing Standing Order No. 2018-9 on Procedures for Prisoner Cases and Provisions for Custody of Prisoners (W.D. Va. Nov. 9, 2018) (describing the process associated with these *pro se* cases)). The qualified immunity inquiry examines whether Plaintiffs' rights were clearly established, not whether a prior case already has ruled Step-Down in particular violates those rights.

Porter meaningfully changed the law related to Eighth Amendment conditions claims in a manner that would affect the qualified immunity analysis here is incorrect. Rather, the *Porter* court applied the existing standard for Eighth Amendment conditions claims to the abundant evidence before it of the serious risk of psychological and emotional harm associated with conditions on Virginia's death row. 923 F.3d at 356–57. This included expert evidence reviewing an extensive body of literature that long predated *Porter* demonstrating that prolonged detention in conditions akin to those on Virginia's death row leads to "psychological deterioration," and "establish[ed] the risks and serious adverse psychological and emotional effects of prolonged solitary confinement." *Id.*

While *Porter* did not affect the standard for successfully pleading an Eighth Amendment conditions claim, *Porter* was exceptional as the rare grant of summary judgment *in favor of plaintiffs* on an Eighth Amendment claim, whereby this Court concluded the set of conditions on VDOC's death row were so inherently severe that plaintiffs had satisfied the objective prong as matter of law, and moreover that they had provided unrebutted circumstantial evidence that the risk of harm from such conditions "was so obvious that it had to have been known." *Id.* at 361. But the *Porter* court's conclusion that a specific set of conditions inherently create a substantial risk of harm as a matter of law does not somehow negate earlier decisions establishing that plaintiffs who *are* able to demonstrate that prison

officials *knowingly* placed them in conditions that deprived them of a basic life necessity may also state an Eighth Amendment claim.[11]

Defendants cite dicta from *Latson v. Clarke* for the proposition that *Porter* changed the state of the law. *See* Opening Br. at 34 (citing 794 Fed. App'x 266, 270 (4th Cir. 2019)). But as the *Porter* court explained, the difference between the outcomes in *Porter* and *Mickle* was the evidentiary record in the two cases. 923 F.3d at 358-59 (noting that the *Mickle* plaintiffs failed to introduce any reports or analyses concerning the risks of psychological and emotional harms attributable to their conditions and that, "[p]ut simply . . . the *Mickle* plaintiffs failed to establish an evidentiary record that would have allowed this Court to find that prolonged solitary confinement poses a serious risk of psychological and emotional harm"). In any event, *Latson* was an unpublished decision whose dicta does not control here, and further still, the same district court that granted qualified immunity to the *Latson* defendants at summary judgment *denied* them qualified immunity on the Eighth Amendment claims at the motion to dismiss stage, as this Court should do here.

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[11] Even if this Court were to find that *Porter* established the relevant right, Defendants should not be granted qualified immunity where the rights at issue were clearly established during the continuation of the alleged violations. *See Williamson*, 912 F.3d at 189; *Skinner*, 2021 U.S. Dist. LEXIS 52261, at *27. Plaintiffs allege that the relevant conduct violating their Eighth Amendment rights—Defendants' use of Step-Down to subject them to indefinite and long-term solitary confinement—continues until the present.

e. This Court Should Decline Defendants' Invitation to Define the Clearly Established Right at a Level of Specificity That Would Improperly Immunize Defendants for a Knowing Violation of the Law

Defendants urge the Court to conduct the clearly-established inquiry at a level of specificity that is particularly inappropriate for Plaintiffs' Eighth Amendment conditions claim, and that would shield prison officials even from conduct they *know* to be unconstitutional, in contravention of the principle that qualified immunity does not protect those who "*knowingly* violate the law." *See, e.g.*, *Citynet*, 962 F.3d at 159 (emphasis in original); *Ashcroft v. Al-Kidd*, 563 U.S. 731, 743 (2011) (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

In *Citynet*, this Court held that qualified immunity may not be invoked as a defense to liability under the False Claims Act because liability under the Act was based on intentional or reckless actions, and therefore was inconsistent with the qualified immunity doctrine's purpose of shielding immunity for reasonable but mistaken judgments. 962 F.3d at 159-60. The Court reasoned that, "by acting *intentionally* or *recklessly*, a government official necessarily forfeits any entitlement to qualified immunity" since "qualified immunity does not protect government officials when they act to violate the law with actual knowledge, deliberate ignorance, or reckless disregard of a risk to a constitutional or statutory right." *Id.* Thus, "the state of mind required to establish liability under the FCA [was] also sufficient to preclude immunity protection." *Id.* at 160.

This reasoning applies with equal force here. Plaintiffs allege an Eighth Amendment violation premised on Defendant officials designing and instituting a program to warehouse people in conditions they were aware, based on well-established scientific and medical consensus, put people at substantial risk of severe and often permanent mental and physiological harms sufficient to satisfy the objective prong, and that served no legitimate penological goals. J.A.-102-106, 109. These allegations of bad faith are a far cry from the kinds of conduct—like that involving individual officers' split-second judgments in the Fourth Amendment probable cause context—where "specificity is especially important" to provide fair notice to an officer as to "how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Mullenix*, 577 U.S. at 12; *see also D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018). Rather, Defendant officials' alleged years-long design and implementation of a policy of indefinite and long-term solitary confinement constitute intentional violations of law rather than the type of "reasonable but mistaken judgments qualified immunity is designed to shield." *Citynet*, 962 F.3d at 160 (citations and internal quotations omitted). Where, as here, the underlying claim requires wrongful intent in the form of "deliberate indifference" as an element, defendants' state of mind is relevant to the qualified immunity analysis, as an "officer who acts with culpable state of mind reasonably should know that she is violating the law." *Brooks*, 924 F.3d at 119 &

n.6; *Dean*, 984 F.3d at 310 (noting that in the unusual qualified immunity context where a constitutional violation has "wrongful intent" as an element, defendant acting with prohibited motive reasonably should know he is violating the law).

3. It Has Long Been Clearly Established That Subjecting Prisoners to Harmful Conditions for No Legitimate Penological Purpose Violates the Eighth Amendment.

The district court also correctly concluded that Plaintiffs stated a claim for relief under the Eighth Amendment on the theory that Defendants kept them in objectively harmful conditions without any penological justification. *See* J.A.-905, 908. Defendants do not address this separate theory of relief in their brief, and thereby waive argument on the issue. *United States v. Washington*, 743 F.3d 938, 941 n.1 (4th Cir. 2014).

It has been clearly established for 40 years that "the Eighth Amendment prohibits punishments which, although not physically barbarous, 'involve the unnecessary and wanton infliction of pain.'" *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).[12] Among inflictions of pain considered "unnecessary and wanton" are those that are "totally without penological justification." *Id.* (citations omitted); *Lopez v. Robinson*, 914 F.2d 486, 490 (4th Cir. 1990) ("Prison conditions are unconstitutional if they

[12] Defendants themselves have acknowledged that prison officials violate the Eighth Amendment through "wanton and unnecessary infliction of pain." J.A.-394 (quoting *Rhodes*, 452 U.S. at 347).

constitute an 'unnecessary and wanton' infliction of pain and are 'totally without penological justification.'") (quoting *Rhodes*, 452 U.S. at 346); *id.* (observing that, in the Fourth Circuit, "pain" for purposes of applying *Rhodes* may mean "a serious medical and emotional deterioration attributable to the challenged condition") (citations omitted); *see also Thompson*, 878 F.3d at 102, 105 (stating "prisoners have the right to be free from malicious or penologically unjustified infliction of pain and suffering" and "a prison guard may not allow an inmate to suffer a deterioration in health condition without any legitimate penological interest"); *Dean*, 984 F.3d at 310 (noting "it was clearly established in 2015—and for many years before that—that inmates have a right to be free from pain inflicted maliciously and in order to cause harm, rather than in a good-faith effort to protect officer safety or prison order").

Taking Plaintiffs' allegations as true—i.e. that Defendants loosened the classification criteria to allow prisoners to be placed in long-term solitary confinement for factors unrelated to their risk, including for the purpose of satisfying economic incentives to fill empty prison beds in the Commonwealth's new supermax facilities, J.A.-32-33, 63, 65-67, 100-101—no reasonable official could have believed knowingly inflicting the harms of solitary confinement for the purpose of ensuring prison beds are filled would not violate the Eighth Amendment. *See Thompson*, 878 F.3d at 105 (the "unifying thread" in long-

established case law across the circuits and in a range of diverse factual scenarios "provides fair notice to prison officials that they cannot, no matter their creativity, maliciously harm a prisoner on a whim or for reasons unrelated to the government's interest in maintaining order.").

C. The District Court Correctly Held That The Complaint Adequately Alleged Facts Showing That Defendants Violated Plaintiffs' Clearly-Established Due Process Rights

1. Plaintiffs Adequately Alleged They Had a Clearly Established Liberty Interest in Being Released from Long-Term Solitary Confinement

Plaintiffs have a clearly established liberty interest in being released from long-term solitary confinement. Prisoners have a protected liberty interest in avoiding solitary confinement when (i) that interest has a basis in state laws or policies and (ii) the conditions of confinement impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Wilkinson*, 545 U.S. at 222-23 (citing *Sandin v. Conner*, 515 U.S. 472, 482-484 (1995)); *accord Prieto v. Clarke*, 780 F.3d 245, 249-250 (4th Cir. 2015).

As to the first prong, Defendants do not dispute that Plaintiffs' liberty interest had a basis in state policy. *See* Opening Br. at 55-58. The district court correctly concluded that Step-Down provides this basis because its stated goal is for prisoners to step down from Level "S" to lower security levels in the general

population, and it requires officials periodically to review prisoners' progress. J.A.-898.

As to the second prong, Defendants contend a reasonable correctional official would not have been on notice that Plaintiffs possess a liberty interest in avoiding long-term solitary confinement because Plaintiffs' conditions of confinement are not as onerous as those in *Wilkinson* and *Incumaa*. Opening Br. at 56-57.[13] Defendants also argue those cases are distinguishable based on Plaintiffs' "opportunity to progress through to levels with increasingly greater privileges." Opening Br. at 57. These arguments do not withstand scrutiny.

The Supreme Court in *Wilkinson* clearly established in 2005 that prisoners in long-term solitary confinement conditions materially indistinguishable from those alleged here had a protected liberty interest in avoiding those conditions. 545 U.S. 209. *Wilkinson* pointed to three factors demonstrating prisoners had a liberty interest in avoiding the "harsh and atypical" conditions of solitary confinement at Ohio State Penitentiary ("OSP"). *Id.* at 222-24. First, the conditions were severe. Prisoners were prohibited almost all human contact; the lights were never turned off entirely; and they were allowed only one hour of exercise per day in a small indoor room. *Id.* at 224. Second, the duration of confinement was indefinite, with

[13] Defendants concede, however, that *Wilkinson* set the standard for analyzing the existence of a liberty interest. Opening Br. at 49-50.

review only once per year. *Id.* Finally, placement in OSP disqualified otherwise-eligible prisoners from parole consideration. *Id.*[14] The Court noted that taken together these factors imposed "atypical and significant hardship under any plausible baseline." *Id.* at 223-24.[15]

Plaintiffs have alleged confinement restrictions as, if not more, onerous than those in *Wilkinson*:

- Like the OSP prisoners, Plaintiffs were subject to "extreme isolation" with "almost every aspect of [their] life controlled and monitored." *Wilkinson*, 545 U.S. at 214; J.A.-67-72.
- OSP prisoners remained alone in a 7-by-14 foot cell for 23 hours per day. 545 U.S. at 214. Plaintiffs remain alone in *smaller* cells for 22-24 hours per day, and sometimes up to 48 hours. J.A.-68, 72.
- Like OSP's solitary cells, Plaintiffs' solid metal cell doors are lined with strips to prevent communication with other prisoners. 545 U.S. at 214; J.A.-68-69.
- Like the OSP prisoners, Plaintiffs are forced to eat meals alone in their cells and are subject to light in their cells 24 hours per day. 545 U.S. at 214-15, 223-24; J.A.-69.
- The OSP prisoners were allowed one hour a day of exercise in a small indoor room; Plaintiffs are allowed 1-2 hours per day of exercise in an

[14] *See also Incumaa*, 791 F.3d at 530 (discussing *Wilkinson*'s three factors).

[15] *Incumaa* later specified that the general prison population was the baseline for "atypicality" for prisoners sentenced to confinement in the general population and sent to solitary confinement during their sentence. 791 F.3d at 528-29. Plaintiffs allege they were sentenced to confinement in the general population and placed in solitary confinement during their sentence, and the harshness of their solitary confinement conditions far exceeds what the general prison population experiences. J.A.-37, 67-68, 70-73.

empty outdoor "dog cage"; recreation may be revoked at the discretion of guards, is denied on "off" days, and the cage is unusable in winter. 545 U.S. at 214, 224; J.A.-71-72.

- At OSP, "opportunities for visitations [were] rare" and conducted through glass walls; Plaintiffs are permitted only one hour of visitation per week through thick Plexiglass walls. 545 U.S. at 214; J.A.-70.[16]

As in *Wilkinson*, Plaintiffs' placement in long-term solitary confinement is indefinite. While prisoners in Step-Down face a *minimum* of 15 to 30 months in solitary confinement, depending on their pathway, J.A.-84, Step-Down does not limit a prisoner's solitary confinement to a maximum number of days, or indicate how long a prisoner may be so confined, J.A.-87-89. Several Plaintiffs have been held for six, eight, or even twenty-four years in solitary. J.A.-37-43. Indeed, for prisoners on the IM pathway, VDOC policies create permanent conditions of solitary. J.A.-84-86.[17] Though *Wilkinson* also involved a so-called pathway for

[16] *See also Incumaa*, 791 F.3d at 519, 531 (prisoner's conditions "mirror[ed]" those in *Wilkinson*, while subjection to highly intrusive strip searches each time he left his cell was "worse, in some respects"); J.A.-68-73 (detailing conditions nearly identical to those in *Incumaa*, including dehumanizing, daily cavity searches). Defendants wrongly suggest that the opportunity to increase privilege levels materially lessens these isolating conditions. Opening Br. at 57. At all privilege levels, the core deprivations and extreme isolation do not change. *See* J.A.-183, 191 (2017 Operations Manual); *see also Smith*, 964 F.3d at 277 (a "point-by-point comparison" of conditions "is not required under *Wilkinson*" and *Incumaa* merely required solitary confinement conditions be "'significantly worse' than general-population conditions").

[17] Defendants note that prisoners on the IM pathway may sometimes be reclassified to the SM pathway and, from there, eventually leave solitary confinement.

prisoners to "progress" out of solitary confinement, the Court held that the confinement was indefinite because, as here, the policy provided "no indication how long" prisoners could be held in solitary "once assigned there." 545 U.S. at 214-15.[18]

Finally, Plaintiffs allege their placement in solitary confinement has collateral consequences on their sentence. As in *Wilkinson*, VDOC denies parole to eligible prisoners in solitary confinement. *Id.* at 224; J.A.-73. Placement in Step-Down also greatly reduces or even denies, the opportunity to earn "good time credit" towards sentence reduction that is available to prisoners in the general population. J.A.-73.[19]

Defendants argue, without authority, that *Wilkinson* did not clearly establish a liberty interest in being *released* from solitary confinement, even if it established a liberty interest in the initial assignment. Opening Br. at 56. Defendants' hair-splitting distinction fails in the face of the striking similarities between this case

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Opening Br. at 8 n.3. They ignore Plaintiff's allegations that prison staff reclassify prisoners only if the *original* pathway determination was incorrect. J.A.-97; *see also* J.A.-140-141 (DTT responsibilities do not include assigning prisoners from IM to SM pathway).

[18] *See also Incumaa*, 791 F.3d at 532 (district court wrongly concluded prisoner's stay was not "indefinite," where policy denied prisoner the ability to take actions to "guarantee" his release to general population).

[19] *Cf. Incumaa*, 791 F.3d at 532 (prisoner had liberty interest though already ineligible for parole).

and *Wilkinson*, which made clear the liberty interest was in "avoiding particular conditions of confinement"; it did not say the liberty interest was in avoiding only initial assignment. 545 U.S. at 222. Thus, the law established by *Wilkinson* in 2005 was more than sufficient to put Defendants on notice that Plaintiffs possessed a liberty interest in release from solitary confinement.[20]

In 2020, this Court in *Smith*—applying the law already clearly established by *Wilkinson* and applied in *Incumaa*—concluded a jury could find the *exact* conditions of long-term solitary confinement at issue in this case imposed atypical and significant hardship and implicated a protected liberty interest. 964 F.3d at 281. Further, the Court expressed "skepticism" that the VDOC officials in that case were entitled to qualified immunity in light of *Incumaa*, noting that the question would likely depend on how they were administering Step-Down "in practice," and whether the multiple review mechanisms were in fact meaningful. *Id.* at 282 & n.11.

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[20] In any event, this Court in *Incumaa* held in 2015 that conditions materially indistinguishable from those alleged by Plaintiffs gave rise to a protected liberty interest in *re-entering the general population*. 791 F.3d at 533-34. *See also Williamson*, 912 F.3d at 189 & n.26 (noting *Incumaa* gave clear notice "that a long-term detention in solitary confinement" justified "some level of procedural protection," even when "imposed for security reasons" and lacking "parole implications"); *Smith*, 964 F.3d at 276-281; *Wilkerson v. Goodwin*, 774 F.3d 845, 858 (5th Cir. 2014) (treating long-term confinement as creating a liberty interest potentially greater than initial assignment).

Defendants misguidedly rely on unpublished *pro se* summary judgment decisions to suggest that Defendants were not on notice until *Smith* that Plaintiffs had a protected liberty interest. Opening Br. at 57-58. The cited decisions have "no precedential weight" and merely "highlight[] a failure of proof" by those cases' plaintiffs that long-term solitary confinement imposed significant hardships in comparison to general prison population conditions. *Incumaa*, 791 F.3d at 531; *see also Smith*, 964 F.3d at 282 n.11 ("Given that published district court opinions, like unpublished opinions from our Court, have no precedential value, it follows that we should not consider them." (quoting *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 545 (4th Cir. 2017))). These cases cannot overcome the allegations in Plaintiffs' well-pleaded Complaint.

2. It Was Clearly Established That Defendants Were Required to Provide Meaningful, Non-Pretextual Periodic Review of Prisoners' Ongoing Solitary Confinement

Plaintiffs have a clearly established right to meaningful, non-pretextual periodic review of their long-term solitary confinement, including notice of the factual basis supporting the decision to maintain them in solitary confinement, an opportunity for rebuttal, and review based on their continued security risk or other valid and subsisting penological criteria.

Hewitt established in 1983 that prison officials must "periodic[ally] review" prisoners' long-term solitary confinement status to ensure that solitary confinement

is not "used as a pretext for indefinite confinement." 459 U.S. at 477 n.9 (1983). Defendants misleadingly characterize *Hewitt* as holding only that prisoners in long-term solitary confinement are due "some sort of review," while ignoring that *Hewitt* established that such reviews may not be pretextual. *See* Opening Br. at 39, 47, 50, 61. *Hewitt* also held that "an informal, nonadversary review of evidence" could provide sufficient process when based on an assessment that a prisoner "represents a security threat" or when the prisoner was being investigated for misconduct. 459 U.S. at 476. This informal, nonadversary review required at a minimum providing the prisoner with notice of the grounds for confinement and an opportunity to rebut those grounds. *Id*.

Wilkinson recognized in 2005 that "the most important procedural mechanisms" to safeguard a prisoner's liberty interest in avoiding long-term solitary confinement against "erroneous deprivations" and "arbitrary decisionmaking" were providing the prisoner with notice of the factual basis for the decision, an opportunity for rebuttal, and a statement of reasons for the decision. 545 U.S. at 225-26. The Court further noted that "informal, nonadversary procedures" with these features were appropriate where confinement decisions concerned "the safety of other inmates and prison personnel." *Id*. at 228-29.

Incumaa held in 2015 that, for prisoners in long-term solitary confinement to receive "meaningful review" of their confinement, they must have "a meaningful opportunity to understand and contest" the reasons for continuing to hold them in confinement. 791 F.3d at 532-33. The record in that case was "bereft of any evidence" that Incumaa "ever received meaningful review" and fell "short of satisfying *Hewitt*." *Id.* at 533. First, the prison provided "single-layered confinement review"—one body made the sole decision whether prisoners could be released from solitary confinement. *Id.* at 534. Second, the prison did not provide prisoners with a factual basis for that body's decisions, only a "perfunctory explanation" that "merely rubber-stamped" the prisoner's solitary confinement, listing the same justification in "rote repetition." *Id.* Third, prisoners had no right to contest the factual bases for their solitary confinement. *Id.* at 534-35.

Most recently, *Smith* in 2020 noted that qualified immunity as to a Wallens Ridge prisoner's due process claim would "likely turn on whether the multiple review mechanisms of" the Step-Down Program "were meaningful in practice," and not "a sham." 964 F.3d at 282, 278 n.7. The Court observed that "[t]he answer to this question may affect the clearly-established inquiry" with regard to "the constitutional adequacy of any process provided." *Id.* at 282.[21]

[21] *Halcomb v. Ravenell*, 992 F.3d 316, 322 (4th Cir. 2021), merely held that a specific right to "fair notice" before a detention hearing was not clearly established.

In addition, for the periodic review of prisoners' confinement status under *Hewitt* to be meaningful, rather than a pretext for indefinite confinement or a sham, that review must be aimed at effectively determining whether the prisoner remains an *ongoing* security threat. *See Quintanilla v. Bryson*, 730 Fed. App'x 738, 745 (11th Cir. 2018); *Proctor v. LeClaire*, 846 F.3d 597, 609-12, 614 (2d Cir. 2017); *Selby v. Caruso*, 734 F.3d 554, 560-61 (6th Cir. 2013); *Toevs v. Reid*, 685 F.3d 903, 912-13 (10th Cir. 2012); *Mims v. Shapp*, 744 F.2d 946, 953-54 (3d Cir. 1984); *Kelly v. Brewer*, 525 F.2d 394, 399-400 (8th Cir. 1975). Solitary confinement may not be used as indefinite punishment for past transgressions, and there must be a valid and subsisting reason to continue to hold a prisoner there. *Proctor*, 846 F.3d at 614; *Toevs*, 685 F.3d at 913; *Kelly*, 525 F.2d at 400. Thus, review is meaningful only if decisions to maintain prisoners in long-term solitary confinement are based on evidence indicating they remain a continuing threat. *See Proctor*, 846 F.3d at 611-12 (citing *Selby*, 734 F.3d at 559; *Kelly*, 525 F.2d at 400).[22]

3. Plaintiffs Adequately Alleged That Defendants Violated These Clearly Established Rights

Defendants are mistaken in contending that Plaintiffs did not have clearly established rights "to some form of procedural review greater than that already established by the Step-Down Program." Opening Br. at 55. Defendants largely

[22] In considering whether a right was clearly established, this Court may consider "a consensus of persuasive authority." *Ray*, 948 F.3d at 229 (citation omitted).

ignore the Complaint and rely on their own interpretation of Step-Down's policies as fact. *Compare* Opening Br. at 58, 61 (referring to "multiple reviews already offered through the Step-Down Program," such as through the ICA and ERT, reducing the risk of erroneous deprivation) *with* J.A.-94-97 (alleging the ICA and ERT fail to independently review prisoners' status).[23] They also ignore the core of Plaintiffs' allegations—that Step-Down, as written and operated by Defendants, is a system of illusory review that serves as pretext for indefinite confinement and for reasons unrelated to security. No reasonable official would have believed that creating and administering Step-Down's pretextual and illusory system of review did not violate due process.

First, Plaintiffs allege Step-Down subjects prisoners to a pretextual and illusory system of review, designed to keep prisoners at Red Onion for as long as possible, rather than return them to general population after they no longer pose a security threat. *See* J.A.-63-67, 101. As alleged, Step-Down grants unfettered and arbitrary discretion to officers, who then abuse that discretion to hold prisoners in solitary confinement for no valid penological purpose. J.A.-90-91. *Hewitt* put a reasonable officer on notice that providing prisoners with periodic review that is

[23] Defendants' characterization of VDOC's policies carry no weight. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) (a Rule 12(b)(6) motion "does not resolve contests surrounding the facts") (citation omitted).

merely used as a pretext for indefinite confinement cannot provide adequate process.

Second, Plaintiffs allege Step-Down's illusory system of review fails to provide minimally-adequate procedures. Progress through Step-Down depends entirely on the informal, discretionary decision-making of the Unit Manager and BMC. J.A.-87-88. Yet the Unit Manager/BMC conduct this review in secret, providing prisoners no notice of review, no opportunity to submit statements or evidence, and no access to the form documenting their decisions (which they often do not even prepare), and prisoners have no ability to appeal or grieve their status decisions. J.A.-92-94. Prisoners therefore have no meaningful opportunity to understand or contest the reasons for their progress—or lack thereof. *See Incumaa*, 791 F.3d at 532-33.

The ICA nominally conducts reviews every 90 days and provides "hearings" held "at the prisoners' cell door," but during such "hearings" prisoners are merely provided a pre-prepared ICA review form documenting the BMC/Unit Manager's prior decision on whether he should progress through Step-Down. J.A.-94-95. These forms merely provide non-substantive "rationales" such as "Remain Segregation" or "needs a longer period of stable adjustment." J.A.-95. *Cf. Smith*, 964 F.3d at 278 ("One of three rationales, or a combination of them, was always cited in denying Smith progress in the Step-Down Program," and a "reasonable

jury [could] find that the ICA reviews did not offer Smith any real opportunity for release from segregation.").

Although VDOC instituted the ERT in 2017 purportedly to periodically review prisoners' assignment to the IM pathway, these reviews suffer similar inadequacies. The ERT does not perform an independent check and looks only at whether the *original* decision to place the prisoner on the IM Pathway by the DTT was proper. J.A.-97. Therefore, its reviews (which lack any input from the prisoners or opportunity for challenge) are mostly preordained, unrelated to whether there is a continuing need for solitary confinement. J.A.-97. The ERT provides prisoners with no written explanation of its decisions, which are not subject to appeal or grievance. J.A.-97-98. In fact, the ERT has not provided many IM prisoners with any review, despite years of solitary confinement, and many IM prisoners have never heard of the ERT. J.A.-98.

Rather than serving as a multi-layered system of review, these processes rubber-stamp one another and fail to provide the procedural protections required by *Hewitt* and *Wilkinson*: notice of the factual basis for the decision and an opportunity for rebuttal. As the *Incumaa* court explained, providing only a "perfunctory explanation" supporting decisions with "rote repetition" of the same justifications encourages "arbitrary decisionmaking." 791 F.3d at 534. Taken together with the lack of a genuine multi-layered system of review, a reasonable

official would be on notice that such a failure to provide prisoners an opportunity to understand and contest the decision to keep them in long-term solitary confinement creates an "exceedingly high" risk of erroneous deprivation and fails to provide "meaningful review." *Id.* at 534-35.

Third, Plaintiffs allege Step-Down's progression system is not based on prisoners' continued security risk or other valid penological criteria. VDOC designed the program in a manner that contravenes scientifically established principles, relying on features, such as mandatory minimum time in each Phase, that have no reasoned basis, and rejecting those that do. J.A.-99-101. The result is a system that looks at criteria entirely unrelated to current security risk.

For example, "progress" within Step-Down depends on the prisoners' completion of workbooks and satisfactory progress in "behavioral goals." J.A.-87-89. Guards have described the "behavior" category as "very subjective," allowing them to retain a prisoner in solitary confinement indefinitely based on irrelevant criteria such as hygiene, rapport with guards, and "respect." J.A.-90-91. Guards may return prisoners to Phase 0 at any time, resetting the clock on the prisoner's automatic 15 to 30 month minimum time in solitary confinement, regardless of whether it was reset for a reason related to security. J.A.-87-89. Besides their complete lack of connection to security concerns, these minimum time periods render the review process superfluous and therefore not meaningful. *See Selby*,

734 F.3d at 560 (noting a jury could find reviews were not meaningful when conducted while the prisoner was subject to an administrative hold or within a minimum period of solitary confinement).

Prisoners on the IM pathway face a system even less tethered to their ongoing security risk. These prisoners may be segregated based solely on their past conduct and, even if they fulfill every requirement of Step-Down, can never progress out of what is, effectively, solitary confinement. J.A.-96.

Defendants had ample notice that their solitary confinement program must contain meaningful, non-pretextual review, aimed at assessing security risk rather than allowing the prison systems to serve as a mere "warehouse" for prisoners. J.A.-76. VDOC instituted Step-Down only after it was forced to shut down both its original solitary confinement program at Mecklenberg and then its original Phase Program at Red Onion and Wallens Ridge, following scathing internal and external critiques and attention from the Department of Justice and state lawmakers. J.A.-57-62, 74-79. This history further put a reasonable VDOC official on notice of the need to provide a system of meaningful, non-pretextual review.

Under these circumstances, the only question in determining qualified immunity is whether the Complaint's allegations are true. At the motion-to-dismiss stage, where all reasonable inferences must be drawn in Plaintiffs' favor,

Defendants cannot meet their burden to establish an entitlement to qualified immunity.

4. Defendants' Arguments About Plaintiffs' Facial and As-Applied Challenges Are Meritless

Defendants argue that it is "not clear" whether Plaintiffs' procedural due process claims have been pled as as-applied challenges, facial challenges, or both. Opening Br. at 51. However, the two types of challenges do not require different pleadings; the distinction goes, rather, to remedies. *See* J.A.-758; *Citizens United v. FEC*, 558 U.S. 310, 331 (2010).

Defendants' argument that the Complaint fails to plead a facial due process challenge has no merit. Defendants claim that because Plaintiffs have alleged "many prisoners" have no real opportunity for release from solitary confinement, Plaintiffs have thereby conceded that "*some* inmates" have "a meaningful pathway out of segregation." Opening Br. at 53 (citing J.A.-758-759). This argument asks the Court to make an unsupportable inference based on a single out-of-context quote from a motion-to-dismiss pleading, ignoring the totality of Plaintiffs' allegations.

With respect to the as-applied challenge, Defendants argue that Plaintiffs have failed to state a due process claim because they failed to allege the personal involvement of each Defendant in depriving Plaintiffs of due process, including by reference to specific confinement reviews for specific plaintiffs. Opening Br. at

53-54. But Defendants may not raise this issue for the first time on appeal. This Court has stated it may consider newly-raised issues only in limited circumstances, such as "plain error" or a "fundamental miscarriage of justice," *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993), but only when their proponent argues for them, *United States v. Lavabit, LLC (In re Under Seal)*, 749 F.3d 276, 292 (4th Cir. 2014). Defendants have not done so here.

Before the district court, Defendants sought to distinguish *Smith* because it involved an as-applied challenge, but never argued that the Complaint failed to state a due process claim because it did not allege the personal involvement of each Defendant. *See* J.A.-719-720, 804-806 (Defendants' arguments below); J.A.-899 (district court rejecting them). Despite their attempts to shoehorn this novel issue into their old as-applied arguments, Defendants failed to preserve it, as their motion-to-dismiss pleadings failed to put the district court "on notice" that this issue was anything but undisputed. *See Kadel v. N.C. State Health Plan Teachers & State Emples.*, No. 20-1409, 2021 U.S. App. LEXIS 26389, at *14 (4th Cir. Sep. 1, 2021).

In any event, Plaintiffs sufficiently alleged each Defendant's role and intentional and personal involvement in designing, administering, and implementing Step-Down's system of inadequate review during the relevant period. *See* J.A.-44-52; *see also Williamson*, 912 F.3d at 171 (prisoner sufficiently

alleged the personal involvement of officials who "played key roles in securing and maintaining [his] confinement" throughout the relevant period). Plaintiffs also allege they have spent between two and twenty-four years subject to Step-Down, during which time Defendants failed to provide them with any meaningful review of their continued solitary confinement. J.A.-38-43, 107-108, 115. Defendants acknowledge that periodic reviews, which Plaintiffs allege were inadequate, occurred several times per year. Opening Br. at 10-12. This is sufficient at this stage. To survive a motion to dismiss, a complaint is not required to provide "detailed factual allegations," only to "state[] a plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

CONCLUSION

For the above reasons, Plaintiffs respectfully ask this Court to affirm the district court's denial of Defendants' motion to dismiss Plaintiffs' Due Process and Eighth Amendments claims.

STATEMENT REGARDING ORAL ARGUMENT

This appeal presents an opportunity to explain a rule of law within this Circuit and involves legal issues of continuing public interest. Thus, Plaintiffs respectfully request oral argument.

October 8, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,981 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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October 8, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October 2021, I caused the foregoing Brief for Plaintiffs-Appellees to be filed with the Clerk of the Court using the CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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