No. 21-1714

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM M. 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 APPELLANTS

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September 8, 2021

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 21-1714 Caption: William Thorpe v. Harold Clarke

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(name of party/amicus)

who is Appellants, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify entity and nature of interest:

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7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
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Signature: /s/ Laura H. Cahill Date: 07/02/2021

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INTRODUCTION

The Virginia Department of Corrections (VDOC) is at the forefront of the national reform effort to end restrictive housing for inmates. As of July 22, 2021, VDOC completed removal of restrictive housing in Virginia's prisons. VDOC no longer operates anything that meets the American Correctional Association definition of restrictive housing. And the Council of State Governments' Southern Legislative Conference recently awarded VDOC the 2021 State Transformation in Action Recognition award.

As with all progress, this transition has taken time and careful attention. For decades, it was commonplace for correctional agencies to place the most dangerous inmates in conditions-of-confinement designed to minimize confrontations with other inmates and staff members. Whether called "administrative segregation," "solitary confinement," or "restrictive housing," these conditions typically involved housing an inmate in a cell of their own while also limiting the amount of time the inmate was allowed outside of that cell.

VDOC followed this common practice, establishing a custodial classification level "S" for inmates whose misconduct qualified them for

long-term administrative segregation. In 2011, however, VDOC implemented the Segregation Reduction Step-Down Program (Step-Down Program) designed to transition inmates back into the general population. Following the program's implementation, the number of VDOC inmates confined at level "S" has been reduced from 511 to 72.[1]

A group of current and former inmates now challenge their past and continuing confinement at level "S," alleging violations of their Eighth Amendment and due process rights. At issue in this appeal is whether a reasonable corrections official would have concluded that plaintiffs' participation in the Step-Down Program amounted to a constitutional violation.

Until *Porter v. Clarke* was decided in May 2019 (three days before plaintiffs filed their complaint), cases in this Circuit had long held that "solitary confinement" alone, absent a corresponding deprivation of a basic human need, did not violate the Eighth Amendment. *Latson v.*

[1] JA 368. See also VDOC, State Responsible Population Trends, FY2015-FY2019 (Jan. 2020), at 9 (reporting, as of June 2019, that 72 inmates, or less than 1% of the Commonwealth's 34,719 state-responsible offenders, were designated as security level "S"), https://vadoc.virginia.gov/media/1473/vadoc-offender-population-trend-report-2015-2019.pdf (last visited Sept. 7, 2021).

Clarke, 794 Fed. App'x 266, 270 (4th Cir. 2019). Numerous district court opinions—many affirmed by this Court—also upheld the procedures of the Step-Down Program against due process challenges, holding that the conditions of confinement at Red Onion State Prison (ROSP) and Wallens Ridge State Prison (WRSP) were not so onerous as to trigger a protected liberty interest.

Under the law as it existed in May 2019, therefore, Defendants were not on notice that they might be violating the federal Constitution. Because Defendants are entitled to qualified immunity as to plaintiffs' claim for damages, this Court should reverse the judgment below and direct that the constitutional claims against Defendants, in their individual capacities, be dismissed.

JURISDICTIONAL STATEMENT

Plaintiffs assert claims under 42 U.S.C. § 1983 against eleven current and former VDOC employees in their individual capacities, seeking money damages from alleged violations of the Eighth Amendment and the procedural due process clause under the Fourteenth Amendment to the United States Constitution.

Accordingly, the district court had subject matter jurisdiction under 28 U.S.C. § 1331.

On June 16, 2021, the district court denied defendants' Rule 12(b)(6) motion to dismiss, which raised and argued the defense of qualified immunity. JA 889–916. Defendants timely filed their notice of appeal on June 22, 2021. JA 917.

This Court has jurisdiction to review that portion of the district court's order rejecting defendants' motion to dismiss on qualified immunity grounds under 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985).

ISSUES PRESENTED

1. Did the district court err in rejecting Defendants' qualified immunity defense as to plaintiffs' Eighth Amendment claim where defendants are alleged to have enacted and enforced policies allowing plaintiffs to be held in administrative segregation under conditions that this Court and district courts had previously held do not violate the Eighth Amendment?

2. Did the district court err in rejecting defendants' qualified immunity defense as to plaintiffs' due process claim, where the

plaintiffs have not plausibly alleged either an as-applied or facial challenge to the Step-Down Program?

3. Did the district court err in rejecting defendants' qualified immunity defense to plaintiffs' procedural due process claim, where plaintiffs did not have a clearly established liberty interest in avoiding confinement at security level "S," and inmates in the Step-Down Program receive significantly more procedural reviews than the process upheld in *Wilkinson v. Austin*?

STATEMENT OF THE CASE AND FACTS

Plaintiffs, twelve inmates currently or previously confined within VDOC, filed their complaint on May 6, 2019, challenging their former or ongoing placement as security level "S" inmates being held in administrative segregation at ROSP. The complaint alleged seven counts: (1) breach of contract arising out of a settlement agreement entered into by VDOC in 1985; (2) procedural due process violations; (3) violation of inmates' equal protection rights; (4) deliberate infliction of unnecessary and wanton pain in violation of inmates' Eighth and Fourteenth Amendment rights; (5) violation of the Americans with Disabilities Act (ADA); (6) violation of Section 504 of the Rehabilitation

Act (RA). This appeal involves only plaintiffs' contention that their placement in segregation violates the Eighth Amendment's proscription against cruel and unusual punishment, and their procedural due process claim under the Fourteenth Amendment. JA 28–124.

A. The Step-Down Program: Structure

Within VDOC, security level "S" is a "non-scored security level reserved for offenders who must be managed in a segregation setting." JA 200. Level "S" inmates are housed only at ROSP (and, previously, WRSP), two maximum-security prisons located in southwest Virginia.

Between 2011 and 2012, VDOC designed and implemented a "Segregation Reduction Step-Down Program" that "established procedures for incentive based offender management," creating "a pathway for offenders to step-down from Security level S to lower security levels in a manner that maintains public, staff and offender safety." JA 200; see also JA 77, 136–37. The program uses "observable standards" to evaluate inmates and reward those who engage in positive behavior with incremental privileges. JA 200, 203–04.

The Step-Down Program provides for two pathways for level "S" offenders: Intensive Management (IM) and Special Management (SM).

JA 80, 200, 203–05. The IM pathway is for offenders "with the potential for extreme and/or deadly violence." JA 82, 156, 181, 200. The SM pathway is for offenders with a history of fighting with staff or other offenders, but "without the intent to invoke serious harm or the intent to kill," or who repeatedly commit relatively minor disciplinary infractions with the apparent goal of remaining in restrictive housing. JA 82, 158, 178, 200.

Each pathway has its own internal tiers. IM privilege levels are IM0, IM1, IM2 and IM-SL6. SM offenders have corresponding privilege levels—SM0, SM1, SM2, and SM-SL6. JA 86, 204–05. Offenders who are designated at level "0" within their pathway (either IM0 or SM0) are those offenders who choose not to participate in the Step-Down Program. JA 203–04. In terms of housing and privileges, offenders designated as IM0 or SM0 receive the "basic requirements" set forth in VDOC Operating Procedure 841.4, *Restrictive Housing Units*. JA 203–04.[2] Inmates who elect to participate in the Step-Down Program earn progressively greater privileges as they advance through the internal

[2] Although OP 830.A references OP 861.3, *Special Housing Units*, OP 861.3 has been administratively superseded by OP 841.4. JA 409.

pathway levels. JA 183–87 (IM Privileges), JA 191-93 (SM Privileges); see also JA 203-05.

Regardless of pathway, level "S" offenders must satisfy specific goals before advancing to the next privilege level. Among other things, offenders must avoid disciplinary charges and progress through the *Challenge Series*, a series of seven workbooks promoting pro-social goals. JA 151. "Following a successful period in IM or SM, offenders are eligible for advancement and to step down from Level 'S' to their first introduction into general population at Security Level 6." JA 160, 205, 406. Once the offender has made adequate progress at security level 6, the offender will be reclassified at security level 5, "stepped down" into the general population, and considered for eventual transfer to a lower security level institution. JA 209; 406–07.[3]

[3] Although the IM pathway ends at security level 6, an inmate within that pathway may be reclassified as a "SM" offender by the Dual Treatment Team (DTT) and thereby transition out of the Step-Down program and into the general population. JA 209, 139, 146; see also JA 39 (noting that Plaintiff Khavkin transitioned to the general population by being reassigned from the IM to the SM pathway, and then progressing out of security level 6).

This Court has described VDOC's Step-Down Program as a "sophisticated, well-conceived program to better inmates' behavior and their confinement, as well as to improve safety and the overall operation of the prison." *Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019).

B. Step-Down Program: Procedural Reviews

Offenders may be assigned to security level "S" based on a variety of factors. JA 201–02; 406. The classification of an inmate to security level "S" requires a formal hearing by the Institutional Classification Authority (ICA), review by Central Classification Services (CCS), and approval by both the Warden of ROSP and the appropriate regional administrator. JA 201–02, 406. A formal ICA hearing triggers specific procedural requirements, including 48-hour advance notification and the opportunity to be present at the hearing, as well as the right to appeal any classification decision through the offender grievance procedure. JA 429–30.

Following an inmate's initial assignment to security level "S," the Dual Treatment Team (DTT), a facility-specific team, makes the initial recommendation as to which pathway an offender should be assigned.

The DTT is required to "meet and interview offenders as part of [that] process." JA 210. Level "S" inmates then receive regular program compliance and security level reviews, including formal hearings every 90 days, and informal hearings at least monthly, quarterly, and bi-annually.

Formal hearings and review. Level "S" offenders receive a formal ICA hearing at least once every 90 days to "determine whether to recommend that the offender continue in Segregation for a subsequent period of up to 90 days or be assigned to the general population." JA 211, 406; see also JA 427–28. This formal hearing requires 48 hours advance notice, an in-person opportunity to be heard, review by the warden, and a written copy of the final disposition provided to the inmate. JA 430–32. Inmates may initiate an interim review, through submission of an offender request, if they believe their security level has been inappropriately calculated. JA 434. Interim ICA reviews are also conducted for inmates "performing exceptionally well and ready for advancement before the next routinely scheduled ICA meeting." JA

188, 194.[4] All ICA decisions may be appealed through the offender grievance procedure. JA 434.

Bi-annual informal reviews. Twice a year, an External Review Team (ERT)[5] informally reviews each level "S" offender to determine: (1) whether the offender is appropriately assigned to level "S"; (2) whether the offender meets the criteria for the internal pathway to which they are currently assigned; (3) whether a pathway change would be appropriate; and (4) whether the DTT has made appropriate decisions to advance the offender. JA 139, 209.

Quarterly informal reviews. The DTT informally reviews level "S" offenders on an as-needed basis, but "at least quarterly," and specifically reviews any offender who is "recommended to be considered

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[4] Beginning in 2017, level "S" inmates suffering from mental illness were reviewed by staff to determine whether they should be reclassified as security level "M." JA 407. Offenders diagnosed with a serious mental illness are designated level "M" and, following a formal Multi-Disciplinary Team review, diverted to appropriate housing, such as an acute care unit, mental health residential unit, secure diversionary treatment program, or a secured allied management unit. JA 413, 442.

[5] The ERT is composed of multiple VDOC administrators who hold supervisory positions within the agency, as well as employees from ROSP and WRSP who are directly involved in the day-to-day operations of the Step-Down Program. JA 209.

for a status or pathway change." JA 210; see also JA 140–41. The DTT is to notify the Regional Operations Chief and Warden if, at any time, they conclude that "an offender no longer needs to be a Level S or was assigned as a Level S incorrectly." JA 141.

Monthly informal review. Under the Step-Down Program, the Building Management Committee (BMC), comprised of individuals "directly involved in the operations of a specific unit" informally reviews all level "S" inmates "at least monthly." JA 211. The BMC may recommend changes to an inmate's privilege level and adjust individual pod incentives and sanctions. JA 142, 204, 211.

In addition to the various reviews, level "S" offenders are rated weekly on their progress by prison officials and counselors, who are encouraged to communicate with each offender routinely on their ratings as an opportunity to acknowledge positive performance and to motivate them to improve when needed. JA 204.

C. Parties to this Case

On the date they filed the complaint, eleven of the twelve plaintiffs were housed at ROSP in some phase of the Step-Down Program. The confinement profiles of the plaintiffs are as follows:

Plaintiff	Sentence	Alleged Time at Level "S"	ROSP Pathway	Current Incarceration Status[6]	JA
William Thorpe	Release in 2057	24 years "at several VDOC institutions"	IM	Transferred out of state	38, 369.
Frederick Hammer	Multiple life	8 years	IM	ROSP	38, 370
Dmitry Khavkin	Release in 2049	6 years	IM, then SM	WRSP	39
Gerald McNabb	Life	3 years	IM	Transferred out of state	39
Gary Wall	Release in 2032	3 years	IM	WRSP	40
Vernon Brooks	Release in 2037	4 years	IM	Sussex I State Prison	40
Brian Cavitt	Life	2 years	IM	ROSP	40
Derek Cornelison	Release in 2045	2 and a half years	IM	ROSP	41
Christopher Cottrell	Released July 2021	7 years	SM	Released	41
Peter Mukuria	Release in 2049	7 years	IM	ROSP	42
Steven Riddick	Release in 2058	4 years	SM	ROSP	42
Kevin Snodgrass	Release in 2053	4 years, then WRSP	SM	Sussex II State Prison	43

Only five plaintiffs currently remain at ROSP, with the remaining seven either having been successfully transitioned out of administrative

[6] Housing information for VDOC inmates is publicly-available on VDOC's website, using the "Offender Locator" feature.

segregation at ROSP, transferred out-of-state, or released from VDOC custody.[7]

Defendants are eleven current and former VDOC employees sued in their individual and official capacities. JA 28. The complaint alleges that the defendants were supervisors who generally oversaw and participated at some level of the Step-Down Program.

Plaintiffs allege that Harold Clarke, as Director of VDOC, was generally responsible for implementing and overseeing the Step-Down Program. JA 44–45. The complaint alleges that multiple defendants were members of the ERT and were thus responsible for developing, reviewing, and updating the Step-Down Program. JA 46 (Richeson); JA 46–47 (Robinson); JA 47 (Ponton); JA 48 (Elam); JA 48–49 (Malone); JA 50 (Raiford).

The complaint further alleges that:

[7] All Plaintiffs allege some deleterious effects from their incarceration at ROSP, which generally focus on symptoms of anxiety and depression. None provides any of the specifics about the allegedly insufficient security reviews occurring after their assignment to security level "S."

- Defendant Mathena, former warden at ROSP, was generally responsible for the care and custody of prisoners, and as chairperson of the ERT, now "reviews [] prisoner classification and pathway assignments." JA 45–46.
- Defendant Robinson, as VDOC Chief of Corrections Operations, was responsible for the overall operation of VDOC facilities. JA 46–47.
- Defendant Ponton, as Regional Operations Chief, was "responsible for approving the reassignment or transfer of any inmate to Red Onion and Wallens Ridge for placement in Level S," and had "ultimate authority" over the DTT's decisions "regarding whether a prisoner should advance through the Step-Down Program." JA 47.
- Defendant Elam, as Regional Operations Administrator for the Western Region of VDOC, was "responsible for approving any inmate at Red Onion or Wallens Ridge for placement in Level S, and reviews determinations by the wardens of Red Onion and Wallens Ridge to assign prisoners from the Level S security classification." JA at 48.
- Defendant Malone, as Chief of Mental Health Services for VDOC, was responsible for supervising the provision of mental health

services at VDOC facilities and was responsible for VDOC mental health policies. JA 48–49.

- Defendant Herrick, as Health Services Director, was responsible for supervising the provision of health care at VDOC facilities. JA 49.
- Defendant Raiford as a former ROSP Unit Manager was a member of the DTT and reviewed ICA reports. JA 50.[8] Plaintiffs further allege that Defendant Raiford was the Statewide Restrictive Housing Coordinator and, in that role, was responsible for planning and overseeing operation of VDOC's restrictive housing programs and policies. JA 50.
- Defendant Kiser, former warden of ROSP, and assistant warden from 2011 to 2012, was generally responsible for care and custody of inmates at ROSP, and was responsible for overall operations and compliance with VDOC procedures. JA 50–51. Defendant Kiser is also alleged to have the "ultimate responsibility" over DTT decisions "regarding a prisoner's progress through the Step-Down Program,"

[8] Defendant Raiford is not alleged to have reviewed any of those plaintiffs, and none of the plaintiff have alleged that they were housed in her building during the period of time that she was a unit manager.

and to have been involved in development and updates of that Program. JA 51.

- Defendant Manis, former warden of WRSP, was generally responsible for the care and custody of inmates at WRSP, and for overall operations and compliance with VDOC procedures. JA 51. Defendant Manis is also alleged to have been involved in the development and updates to the Step-Down Program and had "ultimate responsibility" over the DTT and BMC decisions "regarding a prisoner's progress through the Step-Down Program." JA 51.

All defendants are alleged to have knowledge that the Step-Down Program "permits long-term solitary confinement without a legitimate penological purpose," and to be aware that "long-term solitary confinement causes severe mental and physical harms." JA 45–52. No defendants are alleged to have conducted any faulty or meaningless reviews, themselves, or to be specifically aware of any plaintiff who was failing to appropriately progress through the Step-Down Program.

D. Factual Allegations: Conditions of Confinement

Specific to their conditions of confinement, plaintiffs allege that they "are alone within their cell for the vast majority of the day," their

cell has a "solid steel door with a tray for food and a small window," they "receive their meals in their cell," they smell "noxious" odors and are subjected to "unceasing noise" from other inmates, and "cannot control the artificial lighting in their cell." JA 68. Plaintiffs also allege that they are denied "meaningful physical contact and social interaction," but acknowledge that "prison staff conduct status checks with each prisoner during periodic rounds through the cellblock." JA 69. They are allowed one hour of non-contact visitation per week, and although legal visits are allowed, plaintiffs allege they are required to use the general visitation area for these visits. JA 70.

Plaintiffs allege that segregation inmates must "strip naked" and allow for a body inspection before being allowed to leave their cells. JA 71. They admit that, by policy, inmates are allowed one hour of outdoor recreation per day, as well as three 15-minute showers per week. JA 71. Outdoor recreation takes place in adjacent outdoor enclosures. JA 71–72. Plaintiffs allege that inmates held in segregated confinement are permitted limited work opportunities and reduced opportunities for earning sentence-reducing credit. JA 72–73.

Offenders in special housing receive laundry, barbering, and hair care services in the same manner as offenders in the general population, and they receive exchanges of clothing, bedding, and linen in the same manner as offenders in the general population. JA 419. They also receive the same number and type of meals as the general population, and they have the same mail regulations and privileges as the general population. JA 420.

All offenders at level "S" may check out two library books per week, possess legal and religious materials, purchase up to $10 of commissary items from an approved list, have in-cell programming, out-of-cell recreation at least 2 hours per day, one hour of non-contact visitation per week, at least three showers per week, and two phone calls per month. JA 183, 191. Additionally, offenders on the "SM" pathway have access to a television and are permitted to purchase a radio for personal use.

E. Factual Allegations: Procedural Reviews

Plaintiffs allege that the Step-Down Program is an ineffective tool to progress inmates out of administrative segregation because they believe inmates "must spend an excessive and unwarranted minimum

number of months in each of the many Phases of solitary confinement." JA 87. Plaintiffs also allege that the informal BMC reviews are conducted "in secret" and without notice, an opportunity to be heard, or an opportunity to appeal. JA 92, 93.

Plaintiffs further allege that the criteria for retaining inmates fail to accommodate inmates with disciplinary issues and that ROSP staff "have falsely charged prisoners" to retain them at a certain privilege level. JA 91. But plaintiffs do not allege that they were unable to progress through the Step-Down Program because of inappropriate disciplinary charges, nor do they allege that defendants were aware of such behavior on the part of individuals they supervised.

F. Procedural History

Defendants moved to dismiss arguing, among other things, that they were protected by qualified immunity. JA 364. The magistrate judge recommended that defendants' motion to dismiss be granted in part and denied in part. JA 604–92. As pertinent to this appeal, the magistrate found that plaintiffs plausibly alleged violations of the Eighth and Fourteenth Amendments, further ruling that defendants were not entitled to qualified immunity as to those claims. JA 674–84.

Defendants submitted objections to the report and recommendation, JA 693–94, again raising qualified immunity.

The district court accepted some, but not all of, the magistrate's report and recommendation. JA 889–915. As to the procedural due process claim, the district court determined that plaintiffs "plausibly alleged that the Step-Down program creates a liberty interest in avoiding long-term solitary confinement, because the Program's stated goal is for inmates to step-down from Level S to lower security levels in the general population, and the program requires a review of inmates' progression on the path to general population every 30 days." JA 898. The district court further held that "[t]he conditions of confinement alleged in the Complaint are plausibly harsh and atypical under the Supreme Court's three-factor test [established in *Wilkinson v. Austin*, 545 U.S. 209 (2005)]," using the general population as the atypicality baseline. JA 898.

Without directly deciding whether plaintiffs mounted a facial or as-applied challenge, the district court held that "plaintiffs have plausibly alleged that VDOC's administrative review procedures are constitutionally inadequate to protect their interest in avoiding long-

term solitary confinement," reasoning that the complaint "adequately alleges that the reviews are [] flawed insofar as they rely on [] unreliable criteria, and the hearings do not provide adequate notice, substantial rationales, or an opportunity to contest the evaluation." JA 899–900.

With respect to plaintiffs' Eighth Amendment claim, the district court held that "plaintiffs have plausibly alleged that their conditions of confinement pose a substantial risk of causing them serious physical and psychological injuries, or in fact have already caused the same," JA 905, and that "VDOC was deliberately indifferent to the harms that they would endure from prolonged confinement in the Step-Down Program," JA 907.[9]

In assessing defendants' entitlement to qualified immunity, the district court, quoting *Porter v. Clarke*—a decision issued

[9] As to the other causes of action, the district court held that (i) it lacked subject matter jurisdiction on the breach of contract claim because the Commonwealth is protected by sovereign immunity, JA 893–97; (ii) the equal protection claim failed because inmates assigned to the IM and SM pathways are not similarly situated, JA 900–03; (iii) the complaint plausibly alleged a continuing violation of the ADA and RA, JA 911–15.

contemporaneously with the filing of this complaint—held that "caselaw had clearly established that the Eighth Amendment had 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 the well-documented attendant psychological and emotional harm." JA 910.

As to the due process claim, the district court held that "a reasonable person would have known that the Due Process Clause provided an inmate the right to a 'meaningful review of whether he was fit for release to the general population' which must entail a 'meaningful opportunity to understand and contest its reasons for holding him in solitary confinement.'" JA 911 (quoting *Incumaa v. Stirling*, 791 F.3d 517, 524, 532 (2015)). Defendants timely noted their appeal. JA 917.

SUMMARY OF ARGUMENT

Qualified immunity protects officers from the burdens of litigation when no constitutional violation has occurred, or the right at issue was not clearly established at the time of the violation.

As to the Eighth Amendment claim, during the time period relevant to this complaint (August 2012 through May 2019), clearly-established law would not have placed "every reasonable corrections official" on notice that plaintiffs' rights were being violated. In a long series of cases, this Court held repeatedly that segregated confinement, without "more"—such as the deprivation of a basic life necessity like food, water, clothing, or shelter—does not violate the Eighth Amendment. The district court's reliance on a decision published contemporaneously with the complaint was improper. A decision published after the challenged conduct cannot defeat a claim to qualified immunity.

As to the due process claim, plaintiffs have not plausibly alleged either an as-applied or facial challenge to the procedures established by the Step-Down Program. Plaintiffs' general allegations that the program reviews are not "meaningful" do not plausibly allege facts sufficient to establish that the procedures established by the Step-Down Program, as applied to them at any identifiable review (much less by any of the named defendants), violated their due process rights. Any facial challenge fails because plaintiffs have not alleged facts

establishing that the Step-Down Program is unlawful in all its applications.

The due process claim also fails because plaintiffs did not have a clearly established liberty interest in being released from continued confinement at security level "S," as required to trigger the protections of the Due Process Clause. Moreover, because inmates receive multiple formal and informal reviews following their assignment to segregation, they receive more than sufficient process. Considering that no court has ever held that the procedures established by the Step-Down Program were somehow insufficient or not "meaningful," a reasonable corrections officer would not have known that the alleged failure to provide additional substantive reviews violated the Due Process Clause.

Because defendants are entitled to qualified immunity as to plaintiffs' Eighth Amendment and due process claims for monetary damages under 42 U.S.C. § 1983, the district court erred in denying defendants' motion to dismiss. This portion of the district court's ruling should be reversed, and the claims against defendants in their individual capacities should be dismissed.

STANDARD OF REVIEW

On appeal, the disposition of a Rule 12 motion to dismiss for failure to state a claim is reviewed de novo, "viewing the facts in the light most favorable to the plaintiff." *Sheppard v. Visitors of Va. State Univ.*, 993 F.3d 230, 234 (4th Cir. 2021). Similarly, a decision disposing of an argument that a defendant is entitled to dismissal on grounds of qualified immunity is reviewed de novo. *Halcomb v. Ravenell*, 992 F.3d 316, 319 (4th Cir. 2021).

ARGUMENT

This Court should reverse the district court and hold that qualified immunity bars plaintiffs' claims for monetary damages against defendants in their individual capacities. The doctrine of qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is more than a "mere defense; it is . . . 'an entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526

(1985)). And to preserve this defense, the Supreme Court and this Court have emphasized the importance of resolving the question of qualified immunity at "the earliest possible stage in litigation." *Id.* at 201; see also *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992).

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Mays v. Sprinkle*, 992 F.3d 295, 301 (4th Cir. 2021) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). "'To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Id.* (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). "In other words, existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *Reichle*, 566 U.S. at 664).

Also, "[t]hat right must not be defined 'at a high level of generality' but with precision.'" *Mays*, 992 F.3d at 301 (quoting *City & Cty. of S.F. v. Sheehan*, 575 U.S. 600 (2015)). "And that precision requires looking to the law *at the time* of the conduct in question." *Id.*;

see also *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) ("Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.").

I. Defendants are entitled to qualified immunity because plaintiffs did not have a clearly established Eighth Amendment right to avoid administrative segregation conditions that did not also deprive them of a basic life necessity

In holding that plaintiffs alleged a plausible Eighth Amendment claim, the district court relied entirely on this Court's decision in *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019). In fact, *Porter* is the only case the district court cited to support its Eighth Amendment analysis. JA 904–07 (citing *Porter* 12 times). The district court likewise relied on *Porter* (and *Porter* alone) to conclude that the Eighth Amendment right being asserted was clearly established. JA 910.

At the time of the events in question, however, *Porter* had not been decided, and Circuit precedent governing segregated confinement had consistently affirmed the practices challenged here. In an en banc decision, this Court described the Eighth Amendment as requiring that "the conditions of segregated confinement" must "meet basic sanitation and nutrition requirements." *Sweet v. South Carolina Dep't of Corr.*,

529 F.2d 854, 860–61 (4th Cir. 1975) (en banc) (internal quotations omitted). General "isolation from companionship, [and] restriction on intellectual stimulation and prolonged inactivity," however, "will not render segregated confinement unconstitutional absent other illegitimate deprivations." *Id.*; accord *Breeden v. Jackson*, 457 F.2d 578, 580–81 (4th Cir. 1972) (complaints "related to limited recreational and exercise opportunities, the prison menu and restricted shaving and bathing privileges" did "not assume constitutional dimensions" but were instead "the usual and accepted regulations imposed in maximum security" and were "manifestly within the discretionary authority of prison administration"). *Sweet* and *Breeden* were repeatedly re-affirmed by holdings that administrative segregation, regardless of duration, was not constitutionally objectionable as long as the inmates received some opportunity for out-of-cell exercise, and their nutritional and sanitation needs were otherwise met.[10]

[10] See, *e.g.*, *Shrader v. White*, 761 F.2d 975, 918 (4th Cir. 1985); *Allgood v. Morris*, 724 F.2d 1098, 1101 & n.1 (4th Cir. 1984); *Ross v. Reed*, 719 F.2d 689 (4th Cir. 1983); *Crowe v. Leeke*, 540 F.2d 740, 741 (4th Cir. 1976); see also *Lopez v. Robinson*, 914 F.2d 486, 490 (4th Cir. 1990) (holding that the lower court erred in denying qualified immunity

Following further articulation of the two-part deliberate indifference analysis for Eighth Amendment challenges to prison conditions, see *Strickler v. Waters*, 989 F.2d 1375, 1379 (4th Cir. 1993), this Court concluded that "conditions in administrative segregation" do not constitute an Eighth Amendment violation as long as the inmates were provided with "adequate food, clothing, shelter, and medical care." *Mickle v. Moore*, 174 F.3d 464, 471–72 (4th Cir. 1999) (quoting *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). Moreover, this Court specifically held that "the isolation inherent in administrative segregation or maximum custody is not itself constitutionally objectionable," nor does "the indefinite duration of the inmates' segregation," alone, violate the Eighth Amendment. *Id.* at 472.[11]

Notably, *Mickle* was decided around the time that ROSP and WRSP were opened (1998 and 1999, respectively). And as recently as 2012—when the Step-Down Program went into effect—*Mickle* remained

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to prison officials alleged to have violated the Eighth Amendment with respect to certain prison conditions).

[11] Finding no constitutional violation, *Mickle* did not address the correctional officials' argument that they were entitled to qualified immunity. 174 F.3d at 473 n.6.

the controlling precedent for Eighth Amendment conditions-of-confinement cases challenging segregated confinement. Specifically, in *Williams v. Branker*, 462 Fed. Appx. 348 (4th Cir. 2012), this Court affirmed the grant of a Rule 12(c) motion for judgment on the pleadings where the inmate alleged that he had been in segregated confinement for ten years, was "allowed to leave his cell for one hour on five days of each week," was "kept indoors constantly and has not had outdoor recreation [for] several years," was "allowed minimal contact with other inmates," "could not participate in religious, work, rehabilitative, or other activities," did not have "access to a television," had "very limited access to reading materials," and that these conditions "aggravated his mental illness." *Id.* at 350. This Court reasoned that the "conditions of which [the inmate] complain[ed] are no different than those we found not actionable in [*Mickle*], amid a claim that those conditions harmed plaintiffs' mental health," observing that "negative effects of such restrictions on mental health are unfortunate concomitants of incarceration" but do not "typically constitute the extreme deprivations . . . required to make out a conditions-of-confinement claim." *Id.* at 354 (internal quotations omitted) (omission in original).

Relying on this precedent, district courts held that the conditions-of-confinement at ROSP, based on allegations virtually indistinguishable from those presented by these plaintiffs,[12] did not violate the Eighth Amendment, and at least three of those opinions were affirmed on appeal to this Court. See *Obataiye-Allah v. Clarke*, 688 Fed. Appx. 211, 212 (4th Cir. 2017); *DePaola v. Virginia Dep't of Corr.*, 703 Fed. Appx. 205, 206 (4th Cir. 2017); *Mukuria v. Clarke,* 706 Fed. Appx. 139 (4th Cir. 2017).

Fourth Circuit Eighth Amendment precedent on segregated confinement thus remained fundamentally unchanged until May 2019.

The case on which the district court exclusively relied, *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019), was decided three days before

[12] Plaintiffs allege that they were held, alone "for the vast majority of the day," in a cell with a solid door, where they were required to eat their meals. JA 68. They allege they were subjected to unpleasant odors and noise, and the lack of "meaningful physical contact and social interaction." JA 69. They allege that they received one hour of non-contact visitation per week, had limited legal visitation, one hour of outdoor recreation per day, and three 15-minute showers per week. JA 70–71. They further allege they were required to "strip naked" and allow for a full body inspection before being allowed to leave their cells. JA 71. And they allege that they were provided limited work opportunities and reduced opportunities for earing sentence-reducing credit. JA 72–73.

plaintiffs filed their complaint. The mandate in *Porter* was not issued until August 2019, *four months after* the complaint in this case was filed. JA 28 (complaint dated May 6, 2019); *Porter v. Clarke*, No. 18-6257, Doc. 67 (mandate issued on August 5, 2019).

Addressing a challenge to the conditions-of-confinement on Virginia's death row, and upholding an injunction issued by the district court, this Court explained that, "[i]n recent years, advances in our understanding of psychology and new empirical methods have allowed researchers to characterize and quantify the nature and severity of adverse psychological effects attributable to prolonged placement of inmates in isolated conditions." *Id.* at 355. Citing out-of-circuit precedent, *Porter* concluded that, as to the objective prong of the deliberate indifference analysis, "solitary confinement poses an objective risk of serious psychological and emotional harm to inmates, and therefore can violate the Eighth Amendment." *Id.* at 357. On the subjective prong, *Porter* opined that "the district court erred in failing to consider State Defendants' penological justification for housing death row inmates in conditions amounting to solitary confinement." *Id.* at 362; see also *id.* at 363. Because the issue was not raised in the

appellant's opening brief, however, this Court treated it as waived. *Id.* at 363–64.

A few months later, this Court described *Porter* as having changed "the state of the law" in this circuit. *Latson v. Clarke*, 794 Fed. App'x 266, 270 (4th Cir. 2019) (citing *Mickle*, *Sweet*, and *Breeden* as standing for the proposition "that long-term solitary confinement did not violate the Eighth Amendment"). Affirming the lower court's grant of qualified immunity in a case challenging the imposition of segregated confinement for an inmate with a mental disability, this Court also rejected the inmate's argument that, based on "a handful of district court opinions from outside this Circuit," the defendants "nevertheless had fair notice of the unconstitutional nature of solitary confinement as applied to prisoners with mental disabilities." *Id.* (reasoning that "[t]hese decisions simply do not represent an overwhelming consensus of persuasive authority that clearly established and gave fair notice of

an Eighth Amendment violation, particularly due to our contrary circuit authority at the time of the alleged violation").[13]

In sum, although this Court has long recognized that an inmate may state an Eighth Amendment conditions-of-confinement challenge based on segregated confinement, the plausibility threshold for those claims changed with the issuance of *Porter*. At the time of the facts underlying the complaint, it had long been the law in this Circuit that an indefinite stay in segregated confinement did not amount to an Eighth Amendment violation as long as the inmate was not being deprived of basic life necessities, such as food, clothing, exercise, and shelter. It was equally clear that allegations regarding the alleged deleterious effects of being alone—in other words, the "solitary" part of "solitary confinement"—would not give rise to an Eighth Amendment claim, even where the inmate alleged negative mental health effects from the general isolation allegedly inherent in those conditions. See *Mickle*, 174 F.3d at 471–72; see also *Williams*, 462 Fed. Appx. at 354;

[13] Although *Latson* referred to *Sweet* and *Breeden* as "no longer good law," *id.*, *Latson* did not explain how *Porter* (a three-judge panel opinion) could abrogate *Sweet* (an en banc decision).

Shrader, 761 F.2d at 918; *Sweet*, 529 F.2d at 860–61; *Breeden*, 457 F.2d at 580–81.

Even accepting that *Porter* cabined this Court's en banc analysis in *Sweet* and the subsequent holding in *Mickle*, no such holding was clearly the law at the time of the conduct in question (2012–2019). At the very least, defendants were entitled to rely on these cases until *Porter* became binding because existing precedent did not establish, "beyond debate," that the conditions alleged in this case were unconstitutional. *al-Kidd*, 563 U.S. at 741. Given the state of the law *at the time of the alleged misconduct*, it was simply not the case that every reasonable corrections official would have understood that the Step-Down Program conditions violated plaintiffs' Eighth Amendment rights. "To hold a government official liable because she failed to accurately predict the outcome of a future court decision would work a miscarriage of justice, and, under the *Harlow* test, the critical inquiry is the state of the law *at the time of the official's actions*, not the result reached after years of judicial pondering." *Akers v. Caperton*, 998 F.2d 220, 227 (4th Cir. 1993) (internal quotation marks and citations omitted).

To hold the defendants here liable because they failed to accurately predict the outcome of *Porter* is to expect the defendants to predict the future course of constitutional law. *Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (an "official cannot be expected to predict the future course of constitutional law"); *Francis v. Giacomelli*, 588 F.3d 186, 196 (4th Cir. 2009) ("for purposes of qualified immunity, executive actors cannot be required to predict how the courts will resolve legal issues"); *Price v. Sasser*, 65 F.3d 342, 346 (4th Cir. 1995) ("Under the doctrine of qualified immunity, although public officials may be charged with knowledge of constitutional developments, [they] are not required to predict the future course of constitutional law."). Plaintiffs' Eighth Amendment claim, against defendants in their individual capacities, should have been dismissed.[14]

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[14] See *Hamner v. Burls*, 937 F.3d 1171, 1179 (8th Cir. 2019) (finding, at the motion to dismiss stage, that defendants were entitled to qualified immunity as to the plaintiff's Eighth Amendment claim arising from placement of mentally-ill inmate in long-term segregation, reasoning that "a debatable argument for distinguishing prior decisions and breaking new legal ground [] does not suffice to allege that the officials violated a clearly established right"); accord *Porter v. Pennsylvania Dep't of Corr.*, 974 F.3d 431, 450 (3d Cir. 2020) (holding that the inmate's Eighth Amendment rights were violated when he was held in prolonged solitary confinement, but finding that defendants

II. Defendants are entitled to qualified immunity on plaintiffs' procedural due process claim

The standard used to analyze the procedural due process rights of inmates held in administrative segregation has fluctuated over time. With respect to ongoing segregation reviews, however, the law has been relatively consistent since 1983 and has not been materially impacted by intervening court decisions.

In *Hewitt v. Helms*, the Supreme Court upheld a Due Process challenge to the placement of an inmate in segregation following a prison fight, noting that "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." 459 U.S. 460, 468 (1983). Despite finding that mandatory language in Pennsylvania laws gave rise to a state-created liberty interest, the Court determined that "the Due

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were entitled to qualified immunity based on the absence of any "Eighth Amendment cases with sufficiently similar fact patterns"); *Grissom v. Roberts*, 902 F.3d 1162, 1174 (10th Cir. 2018) (finding defendants were entitled to qualified immunity where inmate alleged that he was held in solitary confinement for 20 years, where "the most recent relevant decision by this court is an unpublished opinion rejecting an Eighth Amendment claim brought by a prisoner who had been in solitary confinement for 30 years under conditions not markedly different from those here").

Process Clause requires only an informal nonadversary review of evidence . . . in order to confine an inmate feared to be a threat to institutional security to administrative segregation." *Id.* at 474. "So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied." *Id.* at 476.

The Court further opined that, for inmates who are already confined in administrative segregation, "[p]rison officials must engage in some sort of periodic review of the confinement of such inmates." *Id.* at 477 n.9. However, the Court also observed that a "periodic review"—as opposed to an initial review—"will not necessarily require that prison officials permit the submission of any additional evidence or statements," considering that the decision to retain an inmate in segregation will be based on facts "which will have been ascertained when determining to confine the inmate to administrative segregation," as well as "the officials' general knowledge of prison conditions and tensions, which are singularly unsuited for 'proof' in any highly structured manner." *Id.*

In 1990, this Court interpreted *Hewitt* as requiring only "limited due process" for an inmate who is placed in "[a]dministrative segregation." *Baker v. Lyles*, 904 F.2d 925, 930 (4th Cir. 1990). Reasoning that *Hewitt* only required an "informal, nonadversary evidentiary review," this Court agreed with a lower court determination that monthly informal reviews by a classification team complied "with the requirements for administrative segregation." *Id.* at 933–34.

The following year, this Court distinguished placement in disciplinary segregation from that of administrative segregation, holding that segregation "imposed not as punishment . . . falls within the scope of necessary prison management" and did not "implicate a liberty interest" within the meaning of the Due Process Clause. *O'Bar v. Pinion*, 953 F.2d 74, 84–85 (4th Cir. 1991). Subsequent opinions focused upon the language at issue in the classification procedures themselves, distinguishing between regulations with mandatory language (said to create a liberty interest) from those that used permissive or discretionary language. See, *e.g.*, *Slezak v. Evatt*, 21 F.3d 590 (4th Cir. 1994); *Ewell v. Murray*, 11 F.3d 482, 487–88 (4th Cir. 1993); *Berrier v. Allen*, 951 F.2d 622 (4th Cir. 1991).

In 1995, however, the Supreme Court decided *Sandin v. Conner*, 515 U.S. 472 (1995), holding that a protected liberty interest may arise where the state procedure at issue "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. *Sandin* did not specifically reaffirm or otherwise address the holding in *Hewitt*—that, for purposes of procedural due process, placement in administrative segregation requires only an "informal, nonadversary evidentiary review." Rather, *Sandin* concluded that placing an inmate in disciplinary confinement "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest," where "disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody," and did not "work a major disruption in his environment." *Id.* at 486.

In 1997, this Court interpreted *Sandin* in the context of a case involving inmates confined to administrative segregation, for whom "classification reviews were conducted approximately every 30 days." *Beverati v. Smith*, 120 F.3d 500, 502 (4th Cir. 1997). There, the inmates "complain[ed] of a six-month administrative confinement,

claiming that the length of the confinement and the conditions to which they were exposed made the assignment an atypical and significant hardship." *Id.* at 503. Specific facts asserted by the inmates were that their "cells were infested with vermin; were smeared with human feces and urine; and were flooded with water," that "they were forced to use their clothing and shampoo to clean the cells," that "their cells were unbearably hot and that the food they received was cold," that they "did not receive clean clothing, linen or bedding as often as required," that they were only "permitted to leave their cells three to four times per week," that "no outside recreation was permitted," and that "no educational or religious services [were] available." *Id.* at 504. Even construing those allegations in the light most favorable to the inmates, this Court held that, "although the conditions were more burdensome than those imposed on the general prison population, they were not so atypical that exposure to them for six months imposed a significant hardship in relation to the ordinary incidents of human life." *Id.*

In 2005, the landscape shifted again, with the Supreme Court's decision in *Wilkinson v. Austin*, 545 U.S. 209 (2005). The *Wilkinson* court acknowledged that "use of Supermax prisons has increased over

the last 20 years, in part as a response to the rise in prison gangs and prison violence." *Id.* at 213. As to the specific conditions of segregated confinement in Ohio, the Court observed that "almost every aspect of an inmate's life is controlled and monitored," with inmates remaining their cells "for 23 hours a day," where "[a] light remains on in the cell at all times." *Id.* at 214. "During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells." *Id.* Overall, "[i]ncarceration . . . is synonymous with extreme isolation," considering that the cell doors "prevent conversation or communication with other inmates," meals "are taken alone in the inmate's cell," and visitation is "conducted through glass walls." *Id.* Moreover, "[a]side from the severity of the conditions, placement [in segregation] is for an indefinite period of time," and inmates incarcerated there "lose their eligibility [for parole]." *Id.* at 214–15.

Interpreting and applying *Sandin*, the *Wilkinson* court first noted that "the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of the regulations regarding those conditions but the nature of those conditions themselves 'in relation to

the ordinary incidents of prison life.'" *Id.* at 223 (quoting *Sandin*, 515 U.S. at 484). *Wilkinson* concluded that the conditions-of-confinement in Ohio's segregated housing unit imposed "an atypical and significant hardship under any plausible baseline," thereby triggering a protected liberty interest. *Id.*

With that established, *Wilkinson* utilized the three-factor framework from *Mathews v. Eldridge*, 424 U.S. 319 (1976),[15] to examine the sufficiency-of-process surrounding that deprivation. 545 U.S. at 224. In balance, *Wilkinson* held that the "informal, nonadversary procedures" set forth in Ohio policy were "adequate to safeguard an inmate's interest in not being assigned to [segregation]." *Id.*

This Court first interpreted *Wilkinson* in *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006), addressing a due process challenge to a prison religious policy. As to claims brought against prison officials in their

[15] The three factors are (1) "the private interest that will be affected by the official action," (2) the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

individual capacities, *Lovelace* clarified that an inmate "must show that the defendants acted intentionally in depriving him of his protected interest" to state an actionable due process claim. *Id.* at 202 ("[N]egligent deprivations are not actionable under § 1983.").

Nine years later—following establishment of the Step-Down Program—this Court issued its next reported opinion on procedural due process and inmate classification or segregation decisions. In *Prieto v. Clarke*, 780 F.3d 245 (4th Cir. 2015), this Court emphasized that "confinement conditions alone" do not "trigger a Due Process claim." *Id.* at 251. Because the inmate in *Prieto* was confined to death row, and because state law mandated that "all persons convicted of capital crimes are, upon receipt of a death sentence, automatically confined to death row," the "baseline for determining atypicality" was not, then, general population conditions, but rather, those imposed by virtue of the inmate's sentence. *Id.* at 254. Because the challenged state regulation did not impose an atypical and significant hardship on the inmate with respect to his expected conditions of confinement, this Court concluded that the inmate lacked a protected liberty interest in avoiding assignment to death row. *Id.*

Later that same year, this Court decided *Incumaa v. Stirling*, 791 F.3d 517 (2015), opining that an inmate confined to administrative segregation had "an interest in avoiding onerous or restrictive confinement conditions" because state policy "mandates review of [the inmate's] security detention every 30 days." *Id.* at 527.[16] This Court then determined that "the general prison population" is the "relevant atypicality baseline" for cases "where the inmate asserting a liberty interest was sentenced to confinement in the general population and later transferred to security detention." *Id.* at 528–29. Based on "uncontested evidence describing the severely restrictive and socially isolating environment of the [special management unit] in contrast to the general population," *Incumaa* determined that the inmate "has demonstrated a liberty interest in avoiding solitary confinement in security detention." *Id.* at 531–32. Applying the three *Mathews* factors, and highlighting the absence "of any evidence that [the inmate] has ever received meaningful review," this Court concluded that there were

[16] In doing so, this Court did not distinguish between a liberty interest in avoiding initial assignment to segregated confinement, as opposed to whether the state had created a post-deprivation liberty interest for an inmate to be *released* from segregated confinement.

triable issues of fact on the inmate's as-applied procedural due process claim. *Id.* at 533.

However, in December 2018, a few months before this complaint was filed, this Court re-announced that the *Hewitt* "standard governs the imposition of administrative restrictions on convicted prisoners," requiring only "some minimal procedural protections" before being placed in administrative segregation. *Williamson v. Stirling*, 912 F.3d 154, 176 (4th Cir. 2018). Following confinement in segregation, "[p]risoners are also entitled to periodic review of their confinement to ensure that administrative segregation is not 'used as a pretext for indefinite confinement.'" *Id.* at 177 (quoting *Hewitt*, 459 U.S. at 477 n.9). Although decided in the context of a pretrial detainee, *Williamson* is notable because it defines the state of the law regarding procedural due process and administrative segregation. Specifically, as of December 2018, and based on *Incumaa* and *Wilkinson*, "a long-term detention in solitary confinement—even when imposed for security reasons—justifies some level of procedural protection" that "would at least satisfy *Hewitt*." *Id.* at 189. But a formal due process hearing,

complete with advance notice, an opportunity to be heard, and an opportunity to appeal, is not required.

In *Smith v. Collins*, 964 F.3d 266 (4th Cir. 2020), decided after the filing of this complaint and the submission of defendants' motion to dismiss, this Court reversed a grant of summary judgment in favor of Virginia prison officials in an as-applied due process challenge for an inmate within the Step-Down Program, ruling that there was "a genuine dispute of material fact as to whether [the inmate's] conditions of confinement [at WRSP] imposed a significant and atypical hardship in relation to the ordinary incidents of prison life." *Id.* at 268. This Court did not address, however, the sufficiency-of-process provided by the Step-Down Program, and declined to take up the qualified immunity question for the first time on appeal. *Id.* at 281.

Most recently, in *Halcomb v. Ravenell*, 992 F.3d 316 (4th Cir. 2021), this Court assessed whether a prison official was entitled to qualified immunity based on a due process claim alleging lack of adequate notice prior to a security detention hearing that led to restrictive confinement. Defining the asserted right as whether an inmate is entitled to "fair notice of a security detention hearing," *id.* at

320, this Court concluded that the prison official was entitled to qualified immunity, for "while it is clear from *Hewitt*, *Wilkinson*, and *Incuma* that inmates are entitled to *some* level of procedural protection, none of those cases definitively require prior notice of administrative segregation hearings." *Id.* at 322.

Considering the above precedent, as of 2019, the law as to alleged procedural due process violations and segregated confinement may be summarized as follows: The Due Process Clause, in and of itself, does not give rise to a protected liberty interest in avoiding administrative segregation. *Hewitt*, 459 U.S. at 468; *O'Bar*, 953 F.2d at 84–85. Rather, to establish the existence of a protected liberty interest, an inmate must show: (1) "a basis for an interest or expectation in state regulations" for avoiding such confinement, and also (2) "that the conditions "impose[] atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Prieto*, 780 F.3d at 249–50. With respect to the first factor, this Court has held that periodic segregation reviews are sufficient to create an interest in avoiding segregated confinement. *Incumaa*, 791 F.3d at 537. As to the second factor, *Wilkinson* sets the appropriate framework for determining whether the

conditions of confinement are atypical and significant within the meaning of *Sandin*.

If a protected liberty interest is established, for post-confinement reviews of inmates in segregated housing, *Hewitt* and *Williamson* establish the governing standards. Specifically, "[p]risoners are [] entitled to periodic review of their confinement to ensure that administrative segregation is not 'used as a pretext for indefinite confinement.'" *Williamson*, 912 F.3d at 177 (quoting *Hewitt*, 459 U.S. at 477 n.9). But this periodic review does not "require that prison officials permit the submission of any additional evidence or statements," and may include "the officials' general knowledge of prison conditions and tensions, which are singularly unsuited for 'proof' in any highly structured manner." *Hewitt*, 459 U.S. at 477 n.9; accord *Baker*, 904 F.2d at 930; see also *Wilkinson*, 545 U.S. at 224 (noting that *Hewitt* remains "instructive for [its] discussion of the appropriate level of procedural safeguards"). Advance notice is not required. *Halcomb*, 992 F.3d at 322. Finally, as to claims against individual defendants, a "mere failure to take reasonable care" is not sufficient to sustain an as-applied challenge—the inmate must establish, instead, "that the

defendants acted intentionally in depriving him of his protected interest." *Lovelace*, 472 F.3d at 202.

A. Plaintiffs have not plausibly alleged a due process violation

It is not clear whether plaintiffs' procedural due process claim has been pled as an as-applied challenge, a facial challenge, or both. Although plaintiffs initially asserted that they were mounting a facial challenge "rather than the application of a policy to an individual," see JA 560, 805, they changed their tune mid-litigation, JA 758, and it appears the district court construed the claim as being primarily an as-applied challenge, JA 899.[17] Whether plaintiffs advance a facial challenge, an as-applies challenge, or both, the procedural due process claim fails.

[17] Generally, courts "look to the scope of the relief requested to determine whether a challenge is facial or as-applied in nature." *AFSCME Council 79 v. Scott*, 717 F.3d 851, 862 (11th Cir. 2013) (citing *Doe v. Reed*, 561 U.S. 186, 194 (2010)). Here, plaintiffs seek a declaration that "Defendants have violated plaintiffs' rights to procedural due process," and they request an award of monetary damages. JA 123. The relief sought—which does not include broader equitable or injunctive relief—suggests that plaintiffs sought an as-applied, rather than facial challenge, to the provisions of the Step-Down Program.

1. Any facial challenge fails as a matter of law

To the extent that plaintiffs are attempting to raise a facial due process challenge to the segregation review procedures embodied in the Step-Down Program, they have also failed to state a plausible claim to relief. In a facial challenge, plaintiffs "can only succeed . . . by 'establish[ing] that no set of circumstances exists under which the [Step-Down Program] would be valid,' *i.e.,* that the [Program] is unconstitutional in *all* of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (emphasis added). Thus, "a facial challenge must fail where the challenged regulation has a "'plainly legitimate sweep,'" *id.* (quoting *Washington v. Glucksberg,* 521 U.S. 702, 739–40 & n.7 (1997) (Stevens, J., concurring in judgments)), which makes a facial challenge "the most difficult challenge to mount successfully," *Salerno*, 481 U.S. at 745.

"VDOC's Step-Down Program is designed to provide Level S prisoners with a pathway out of segregation," *Smith*, 964 F.3d at 278, and the periodic reviews minimize the risk of an ongoing and erroneous deprivation of a protected interest. Indeed, by asserting that the "Step-

Down Program does not provide *many* prisoners with 'any real opportunity for release from segregation,'" JA 758–59 (emphasis added), plaintiffs concede that, as to *some* inmates, the procedures spelled out in the Step-Down Program have, in fact, provided a meaningful pathway out of segregation. That concession is fatal to any facial due process challenge. Even construing the allegations of the complaint in the light most favorable to plaintiffs, they have failed to sufficiently and plausibly allege that there is no set of facts under which the Step-Down Program could operate constitutionally. See *Washington State Grange*, 552 U.S. at 449.

2. Plaintiffs have not plausibly alleged an as-applied procedural due process claim

Any as-applied procedural due process claim fails because plaintiffs have not sufficiently alleged defendants' personal involvement in the Step-Down Program as applied to them, nor have they plausibly alleged an intentional deprivation by these defendants.

"[B]ecause vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Plaintiffs have alleged,

generally, that they do not believe VDOC employees are utilizing the procedures set forth in the Step-Down Program to provide inmates at ROSP with meaningful segregation reviews. None of the plaintiffs, however, identifies any specific segregation review of their own that they allege failed to comport with procedural due process. And although they allege that defendants, generally, are supervisors who generally oversee and participate at some level of the Step-Down Program, they have identified no specific wrongdoing, as to any specific defendant, in a segregation review conducted for any specific plaintiff.

Without plausibly alleging that any of these defendants actually did anything wrong in the context of a review for any of these plaintiffs—that is, actively and deliberately participated in an as-applied due process violation specific to one or all of these claimants—plaintiffs have failed to state a procedural due process claim, and defendants are entitled to qualified immunity. See *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) ("'[N]aked assertions' of wrongdoing necessitate some 'factual enhancement' within the complaint to cross 'the line between possibility and plausibility of

entitlement to relief.'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

B. Defendants' alleged actions did not violate any clearly established right as of the time of the alleged misconduct

Under the law in existence at the time the complaint was filed, plaintiffs did not have a clearly established liberty interest in avoiding the conditions of confinement at security level "S." Nor did they have a clearly established right to some form of procedural review greater than that already established by the Step-Down Program.

1. Plaintiffs did not have a clearly established liberty interest in avoiding administrative segregation at ROSP

"To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). "The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *Id.* And "[t]he rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Id.* (quoting *Saucier*, 533 U.S. at 202). This inquiry "requires a high degree of specificity," because defining "clearly

established law at a high level of generality . . . avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Id.* (internal quotation marks and citations omitted). "A rule is too general if the unlawfulness of the officer's conduct does not follow immediately from the conclusion that [the rule] was firmly established." *Id.*

Certainly, based on *Wilkinson*, established law as of 2005 reflected a protected liberty interest in avoiding initial assignment to administrative segregation in the first place. But that general rule did not establish a liberty interest in being *released* from the specific conditions of confinement maintained within the Step-Down Program.

Within this Circuit, established law as of 2015 reflected a liberty interest in avoiding confinement in segregation conditions involving "near-daily cavity and strip searches; the confinement to a small cell for all sleeping and waking hours, aside from ten hours outside the cell per month; the inability to socialize with other inmates and the denial of educational, vocational, and therapy programs." *Incumaa*, 791 F.3d at 531–32. The facts of *Incumaa*, however, do not place the claimed right here beyond debate, such that every reasonable corrections official

should have known that plaintiffs' constitutional rights were being violated.

Specifically, the allegations here do not involve conditions as onerous as those raised in *Incumaa*. Rather, ROSP's conditions of confinement are, at base, at least the same (if not better) than those in disciplinary segregation, where general population inmates may expect at least a temporary stay without implicating a protected interest. *Sandin*, 515 U.S. at 486 (thirty days); *Beverati*, 120 F.3d at 504 (six months). And inmates within level "S" have an opportunity to progress through to levels with increasingly greater privileges that are much more permissive than the restrictions at issue in *Wilkinson* and *Incumaa*, thereby alleviating the isolating conditions and indefiniteness identified in those cases.

Indeed, multiple district court decisions issued during the relevant time period (and post-*Incumaa*) concluded that the conditions of confinement at security level "S" were not harsh and atypical as compared to the ordinary incidents of human life, and therefore did not create a protected liberty interest—and each case appealed during the time period leading up to the filing of this complaint was affirmed. See

Delk v. Younce, 709 Fed. App'x 184 (4th Cir. 2018); *DePaola v. Virginia Dep't of Corr.*, 703 Fed. App'x 205, 206 (4th Cir. 2017); *Obataiye-Allah v. Clarke*, 688 Fed. App'x. 211 (4th Cir. 2017). These unpublished opinions, finding no protected liberty interest, weigh against any conclusion that defendants' alleged conduct violated clearly-established law.

"[A]t the time of the challenged conduct," therefore, "reasonable [VDOC] official[s] would [not] have understood that what [they were] doing violate[d]" plaintiffs' procedural due process rights. *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 583 (4th Cir. 2017). Defendants are entitled to qualified immunity on plaintiffs' procedural due process claim.

2. Plaintiffs did not have a clearly established right to procedural reviews in addition to the processes offered by the Step-Down Program

Even if plaintiffs had a clearly established liberty interest in avoiding continuing confinement at security level "S", they certainly did not have a clearly established right to any form of procedural review exceeding the multiple reviews already offered through the Step-Down Program.

No Court has ever held that a full-fledged due process or adversarial hearing is required in the context of continuing segregation reviews, so as to make that review "meaningful." *Hewitt* and *Williamson* specify that some segregation review is required, but periodic informal reviews have been held to satisfy constitutional standards. See *Baker*, 904 F.2d at 930 (upholding 30 day informal review process). These informal periodic reviews do not "require that prison officials permit the submission of any additional evidence or statements," do not require advance notice, a right to appeal, or the presence of the inmate, and may include "the officials' general knowledge of prison conditions and tensions, which are singularly unsuited for 'proof' in any highly structured manner." *Hewitt*, 459 U.S. at 477 n.9.

Indeed, balancing the three factors in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the *Wilkinson* Court upheld a segregation review scheme that only had a single formal annual review, analogous to the ICA reviews that the Step-Down Program provides every ninety days. *Wilkinson*, 545 U.S. at 224–28. The informal reviews in the Step-Down Program are therefore *in addition* to a formal review scheme that is in

all material respects not just analogous to *Wilkinson*, but exceeds the minimum standards upheld in that opinion.

Plaintiffs take issue with the informal BMC reviews being conducted "in secret" and without notice, an opportunity to be heard, or an opportunity to appeal. JA 92, 93. Yet, under clearly established law both at the time of the filing of the complaint—and now—informal segregation reviews need not supply those procedural protections. *Hewitt*, 459 U.S. at 477 n.9; see also *Baker*, 904 F.2d at 930. Although inmates possess a protected liberty interest in avoiding assignment to segregation in the first instance—see, *e.g.*, *Incumaa*, 791 F.3d at 527—once a segregation assignment has been made, and the "liberty interest" is already deprived, it cannot be said that an inmate has an equally great liberty interest in securing *release* from segregated confinement. The only type of review that has ever been required in this context is the "some sort of periodic review" referenced in *Hewitt* and applied by this Court in *Baker* and *Williamson*.

Particularly considering the actual conduct attributed to these defendants in the complaint—generally establishing and reviewing the Step-Down Program and participating in the ERT—even if this Court

were to conclude that additional "meaningful" procedural protections are required in the segregation review context, defendants were not sufficiently on notice as to this constitutional "requirement." Defendants are alleged to have created a program that provided for a formal, due process hearing prior to an inmate being placed in segregation; ongoing formal due process hearings by the ICA every 90 days (complete with notice, the opportunity to be heard, a review procedure, and the opportunity to appeal); informal quarterly reviews by a DTT; bi-annual informal reviews by an ERT; and 30-day informal reviews by the BMC. See *supra* pp. 9-12. The multiple reviews built into the Program reduce the risk of arbitrary decision-making, while parallel assessments by different institutional actors guard against the risk of an erroneous deprivation. These procedures far exceed the "some sort of review" standard from *Hewitt* and are constitutionally sufficient to protect an inmate's "liberty interest" (if one exists) in being released from administrative segregation.

In addition, no court has found that the multiple reviews VDOC uses to assess the status of inmates in the Step-Down Program—mechanisms that are *more* protective than those approved in

Wilkinson—fail to provide sufficient process or were otherwise not meaningful. Considering the overwhelming number of inmates who have transitioned through the Step-Down Program and into the general population, defendants could hardly be said to be on notice that the periodic segregation reviews offered were not "meaningful," particularly where that precise term has never been defined or otherwise explained by the Supreme Court or this Court.

The Tenth Circuit has held that a "meaningful" review in the context of a "stratified incentive program that involves an atypical and significant progress" is one that provides "meaningful individualized reviews to prisoners to help them progress through the program." *Toevs v. Reid*, 685 F.3d 903, 914 (10th Cir. 2012). Although finding due process violations under the circumstances of that case, the Tenth Circuit noted that they had never "previously interpreted 'meaningful' to require officials to inform prisoners placed in a stratified behavior-modification program of the reasons for their continued placement, so as to provide a guide for future behavior," nor had the court ever "considered the due-process implications of [that particular program]." *Id.* at 916. The Tenth Circuit concluded that the "state of the law" had

not given "defendants fair warning that the [program] review process was not meaningful," and therefore held that the defendants were entitled to qualified immunity. *Id.* So too here.

Even if this Court were to determine that some additional type of review or protection is required to make the periodic Step-Down reviews "meaningful," the law on this issue was not sufficiently clear, such that "every reasonably corrections official" would have known that plaintiffs' constitutional rights were being violated. As one court has aptly stated, "a qualified immunity analysis looks through the rearview mirror, not the windshield." *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 570 (3d Cir. 2017). Looking back at the existing law at the time of defendants' alleged misconduct, they are entitled to qualified immunity because the right being claimed by the plaintiffs was not clearly established and beyond debate.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellants request oral argument to address the constitutional issues raised in this appeal.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 11,966 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/ *Margaret A. O'Shea*

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2021, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Margaret A. O'Shea*

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