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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. Virginia has been a nationwide leader in reducing the use of restrictive housing 2

II. Where Plaintiffs misrepresent the provisions contained in certain VDOC policies and procedures, the plain language of those procedures should prevail 7

III. Clearly-established law did not put Virginia officials on notice that placing inmates in restrictive housing for a prolonged period of time violates the Eighth Amendment, even if that placement might potentially exacerbate underlying mental health conditions 14

IV. Clearly-established law did not put Virginia officials on notice that the multi-tiered review process established by the Step-Down Program violated the Due Process Clause 19

CONCLUSION 22

CERTIFICATE OF COMPLIANCE 24

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

Page

CASES

Baker v. Lyles,
904 F.2d 925 (4th Cir. 1990) 19, 20

Birmingham v. PNC Bank, N.A.,
846 F.3d 88 (4th Cir. 2017) 8

City of Tahlequah v. Bond,
No. 20-1668, 595 U.S. ___ (Oct. 18, 2021) 1

Del. Riverkeeper Network v. FERC,
243 F. Supp. 3d 141 (D.D.C. 2017) 8

DePaola v. Clarke,
703 Fed. App'x 205 (2017) 17, 21

District of Columbia v. Wesby,
138 S. Ct. 577 (2018) 22

Delk v. Younce,
709 Fed. App'x 184 (4th Cir. 2018) 21

Fayetteville Investors v. Commercial Builders, Inc.,
937 F.2d 1462 (4th Cir. 1991) 8

Goines v. Valley Cmty. Servs. Bd.,
822 F.3d 159 (4th Cir. 2016) 8

Goldfarb v. Mayor & City Council of Baltimore,
791 F.3d 500 (4th Cir. 2015). 9

Greenhill v. Clarke,
944 F.3d 243 (4th Cir. 2019) 6, 22

Grissom v. Roberts,
902 F.3d 1162 (10th Cir. 2018). 18

Hall v. Virginia,
385 F.3d 421(4th Cir. 2004) 8

Hewitt v. Helms,
459 U.S. 460 (1983) 19

Hubbert v. Washington,
No. 7:14cv00530, 2016 U.S. Dist. LEXIS 89031
(W.D. Va. July 8, 2016) 10

Latson v. Clarke,
794 Fed. App'x 266 (4th Cir. 2019) 18

Mays v. Sprinkle,
992 F.3d 295 (4th Cir. 2021) 16

Mickle v. Moore,
174 F.3d 464 (4th Cir. 1999) 15

Obataiye-Allah v. Clarke,
688 Fed. App'x. 211 (4th Cir. 2017) 21

Papasan v. Allain,
478 U.S. 265 (1986) 8

Porter v. Clarke,
923 F.3d 348 (4th Cir. 2019) 18, 19

Reichle v. Howards,
566 U.S. 658 (2012) 16

Reyes v. Clarke,
No. 3:18cv611, 2019 U.S. Dist. LEXIS 150854
(E.D. Va. Sept. 4, 2019) 11

Rivas-Villegas v. Cortesluna,
No. 20-1539, 595 U.S. ___ (Oct. 18, 2021) 1

Schneider v. Donaldson Funeral Home, P.A.,
733 Fed. App'x 641 (4th Cir. 2018) 9

Tellabs, Inc. v. Makor Issues & Rights Ltd.,
551 U.S. 308 (2007) 7

Wilkinson v. Austin,
545 U.S. 209 (2005) 19, 20

Williams v. Branker,
462 Fed. App'x 348 (4th Cir. 2012) 15

STATUTES

Va. Code § 53.1-136 10

OTHER AUTHORITIES

Frank Green, *Virginia Prisons in Solitary Confinement Reduction Effort*, RICHMOND TIMES-DISPATCH (Dec. 31, 2016) 4

Rule 44, United Nations Standard Minimum Rules for Treatment of Prisoners 6

The Liman Center at Yale Law School, *Regulating Restrictive Housing: State and Federal Legislation on Solitary Confinement as of July 1, 2019* 6

U.S. Dep't of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* (2016) 3, 4

Va. Dep't of Corr., *The Reduction of Restrictive Housing in the Virginia Department of Corrections*, FY2019 Report (Oct. 1, 2019) 5

Vera Institute of Justice, *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Virginia Department of Corrections* (Dec. 2018) 4

RULES

Fed. Rule Civ. P. 10(c) 8

Fed. Rule Civ. P. 8 9

ARGUMENT

The doctrine of qualified immunity is hotly debated, and reasonable people dispute whether the doctrine should be amended by legislation or by the Supreme Court. This case, however, addresses whether qualified immunity, as it currently stands, forecloses plaintiffs' claims. It does.

In a pair of decisions issued just days ago, the Supreme Court reversed two lower court holdings that denied qualified immunity to law enforcement officers, and emphasized the Supreme Court's "repeated[]"admonition that lower courts "not [ ] define clearly established law at too high a level of generality." *City of Tahlequah v. Bond*, No. 20-1668, 595 U.S. ___ (Oct. 18, 2021); *Rivas-Villegas v. Cortesluna*, No. 20-1539, 595 U.S. ___ (Oct. 18, 2021). Application of qualified immunity principles here similarly demands that the district court's decision be reversed. These defendants are alleged to have enacted policies allowing inmates to be held in restrictive housing, while also devising a multi-tiered program to help those inmates progress out of restrictive housing and back into the general population. Because clearly-established law did not notify defendants that their

alleged conduct violated the Eighth or Fourteenth Amendments, they are entitled to qualified immunity.

I. Virginia has been a nationwide leader in reducing the use of restrictive housing

The continuing efforts by appellees and their amici to characterize the Segregation Reduction Step-Down Program as unconstitutionally regressive are meritless. Amici correctly point out that, over the past 10 years, "reforming states" implemented segregation-reduction programs to return inmates to general population, and that those efforts had a positive impact on the overall inmate population. See, *e.g.*, Br. of Former Corrections Executives (Doc. 24-1) at 4–5. Virginia was not just a member of this reformative movement, but one of its leaders.[1]

[1] For example, amici point to a 2016 report by the Association of State Correctional Administrators, published through the Arthur Liman Public Interest Program at Yale Law School. See Br. of Former Corrections Executives at 11 n.28. Virginia, in fact, was one of the jurisdictions identified in that report as having implemented a step-down program to "facilitate the transition of individuals from restricted housing back to the general population." ASCA-Liman 2018 Report at 57. Interestingly, at the time of that report, Virginia reported that approximately 2.8% of its inmate population was held in restrictive housing for 15 days or more, a figure lower than that of Pennsylvania (3.9%) and New York (8.5%), the jurisdictions associated with amicus Martin Horn, as well as Texas (3.8%), the jurisdiction associated with amicus Steve Martin, and New Hampshire (4.6%), the jurisdiction associated with amicus Phil Stanley.

In 2013, following VDOC's implementation of the Step-Down Program, the Southern Legislative Conference presented Virginia with the State Transformation in Action Recognition (STAR) Award, recognizing its work in reducing the use of restrictive housing. In 2014, Virginia's General Assembly passed Senate Joint Resolution 184, "commending the Virginia Department of Corrections for its outstanding leadership and dedication to public safety in administering the Step Down program." S.J. 184. And in 2016, the United States Department of Justice singled out VDOC as one of five jurisdictions that had "undertaken particularly significant reforms in recent years." U.S. Dep't of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing*, at 74 (2016).[2] The DOJ highlighted the "culture change within the facility [ROSP]," as well as the establishment of the "Segregation Step-Down Program as a path for inmates in long-term administrative segregation to work their way into the general population." *Id.* at 77. The DOJ further noted that, between 2011 and the date the report was issued, Virginia had accomplished a "68 percent

[2] The report is available at https://www.justice.gov/archives/dag/file/815551/download (last visited Oct. 29, 2021).

reduction in the number of security level S inmates," along with sizeable reductions in incident reports, inmate grievances, and informal complaints. *Id.*

Later that year, Virginia was one of five states[3] selected to partner with the Vera Institute of Justice in the Safe Alternatives to Segregation Initiative, with the goal of safely reducing the use of restrictive housing in Virginia prisons. See Frank Green, *Virginia Prisons in Solitary Confinement Reduction Effort*, RICHMOND TIMES-DISPATCH (Dec. 31, 2016). That effort led to a report, issued in December 2018, in which the Vera Institute acknowledged that VDOC "has been one of the agencies at the forefront" of the movement to reduce or otherwise eliminate the use of restrictive housing. Vera Institute of Justice, *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Virginia Department of Corrections*, at 5 (Dec. 2018).[4] The Report contained various findings

[3] The five states involved in the 2016 selection process were Virginia, Louisiana, Minnesota, Nevada, and Utah. Jurisdictions previously selected were Nebraska, North Carolina, Oregon, New York City, and Middlesex County in New Jersey.

[4] The Vera Report is available at https://www.vera.org/downloads/publications/segregation-findings-

and recommendations for VDOC, many of which were subsequently implemented.

As detailed in a 2019 legislative report to Virginia's General Assembly, as of June 30, 2019, there were 37 inmates remaining at security level "S", representing 0.1% of VDOC's average daily population. Va. Dep't of Corr., *The Reduction of Restrictive Housing in the Virginia Department of Corrections*, FY2019 Report, at 4 (Oct. 1, 2019).[5] Inmates released from the Step-Down Program in 2019 had been held in that program for an average of 221 days (approximately seven months). *Id.* Almost one-third of those had been released within six months. *Id.* at 4–5. Also of note, VDOC reported that Virginia had provided "support to thirteen different states who have toured, observed, and applied aspects of the step-down operations in their own jurisdictions." *Id.* at 2.

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recommendations-virginia-dept-corrections.pdf (last visited Oct. 29, 2021).

[5] This legislative report is available at https://vadoc.virginia.gov/media/1452/vadoc-research-restrictive-housing-report-2019.pdf (last visited Oct. 29, 2021).

Effective August 1, 2021, VDOC updated its policies to reflect that no inmates remaining in VDOC facilities were being confined without at least four hours of out-of-cell time and, therefore, were not being held in conditions that met the American Correctional Association's definition of "restrictive housing."[6] VDOC's new Restorative Housing Policy, Operating Procedure 841.4, is publicly-available on the VDOC website.

For the years preceding the filing of this complaint, then, VDOC received multiple accolades and awards for the establishment of its Step-Down Program, including recognition by the United States Department of Justice and the Vera Institute of Justice. Courts—including this one—were also complimentary of the program. *Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019). Far from being out of step

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[6] The generally-accepted definition of "restrictive housing" is a placement that requires an inmate to be confined to a cell at least 22 hours per day. The Liman Center at Yale Law School, *Regulating Restrictive Housing: State and Federal Legislation on Solitary Confinement as of July 1, 2019*, at 1 (available at https://law.yale.edu/sites/default/files/area/center/liman/document/restrictive_housing_legislation_research_brief.pdf (last visited Oct. 29, 2021)); see also Rule 44, United Nations Standard Minimum Rules for Treatment of Prisoners at 14 ("[S]olitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact."), available at https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf (last visited Oct. 29, 2021).

with emerging correctional trends and reformation efforts, VDOC has been a nationwide leader in this area. And it is hard to conceptualize how VDOC officials could have been aware that their operation of an award-winning program—one that served as a model for multiple other jurisdictions and ultimately led to the elimination of long-term restrictive housing in this state—somehow also violated the federal Constitution.

II. Where Plaintiffs misrepresent the provisions contained in certain VDOC policies and procedures, the plain language of those procedures should prevail

Plaintiffs' arguments rest on numerous misstatements and mischaracterizations of the VDOC policies at issue. Because defendants' only alleged wrongdoing stems from their adoption of those policies, an understanding of the precise terms and provisions of the challenged policies is critical to analyzing plaintiffs' claims. Contrary to plaintiffs' apparent assumption, see Appellees' Br. at 20-21 & n.4, it is entirely appropriate to consider them in this context.[7]

[7] See *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the

Where there is a conflict between a bare allegation in the complaint, and the plain language of a challenged law or policy, the plain language of the policy must prevail. *Del. Riverkeeper Network v. FERC*, 243 F. Supp. 3d 141, 154 (D.D.C. 2017) ("[T]he court is not required to assume the truth of allegations by Plaintiffs that directly conflict with the statutory scheme at issue."). This is particularly true where, as here, the challenged policy has been attached to the complaint and made a part of that filing pursuant to Rule 10(c) of the *Federal Rules of Civil Procedure*. *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016); *Fayetteville Investors v. Commercial Builders, Inc.*, 937 F.2d 1462, 1465 (4th Cir. 1991). The overriding inquiry, after all, is whether plaintiffs have *plausibly* alleged certain facts in support of their claims. If their factual allegations are directly

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complaint by reference, **and matters of which a court may take judicial notice**." (emphasis added)); *Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986) ("Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record."); see also *Birmingham v. PNC Bank, N.A.*, 846 F.3d 88, 92 (4th Cir. 2017); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (taking judicial notice of information publicly-available on an official government website in the context of reviewing the district court's decision to grant a Rule 12 motion to dismiss).

contradicted by Virginia law or the express language of a VDOC policy, those unsupported allegations fail to meet the plausibility standard of Rule 8 of the *Federal Rules of Civil Procedure* and are properly disregarded. *Schneider v. Donaldson Funeral Home, P.A.*, 733 Fed. App'x 641, 645 (4th Cir. 2018); *Goldfarb v. Mayor & City Council of Baltimore*, 791 F.3d 500, 509 (4th Cir. 2015).

Factual allegations repeated in plaintiffs' brief that are directly contradicted by VDOC policy include the following:

- Plaintiffs repeatedly allege that the "only way" a level "S" prisoner "may earn a lower security level" is through "[s]uccessful completion of Step-Down." Appellees' Br. at 4, 12. This is incorrect. Inmates may be administratively removed from security level "S" at any time if it appears to a reviewer that the inmate should no longer be held at that security level. See, *e.g.*, J.A. 139, 209 (external review team ("ERT") may recommend reassigning an inmate classified at level "S"); J.A. 141, 210 (dual treatment team ("DTT") must immediately notify the warden and regional operations chief if an inmate no longer meets the criteria for assignment to level "S"); J.A. 211, 406, 427–28 (90-day formal hearing by the Internal Classification Authority ("ICA") to

determine whether inmate should continue at level "S" or be assigned to general population); J.A. 188, 194 (interim ICA reviews allowed for inmates performing "exceptionally well and ready for advancement").[8]

- Plaintiffs assert that they "are denied parole while in solitary, even if otherwise parole-eligible." Appellees' Br. at 7. But as defendants explained in the district court, Virginia law expressly vests parole decisions in an entirely separate agency, the Virginia Parole Board. VDOC plays no role in this decision-making process. See Va. Code § 53.1-136.[9]

- To support the false suggestion that VDOC does not sufficiently monitor the health of inmates, plaintiffs allege that VDOC "does not keep doctors or psychiatrists on staff at Red Onion or Wallens

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[8] See also *Hubbert v. Washington*, No. 7:14cv00530, 2016 U.S. Dist. LEXIS 89031, at *12–13 (W.D. Va. July 8, 2016) (describing how inmate, who had been assigned to level "S" because of a pending investigation, was immediately transitioned from level "S" and privilege level IM-1, to level 6, through an interim ICA hearing, once the facility learned that the investigation had concluded).

[9] Of note, based on the date they became state-responsible offenders, only two named plaintiffs appear to be potentially eligible for parole, which was generally abolished in Virginia for crimes committed after January 1, 1995. Both inmates—William Thorpe and Gerald McNabb—have been transferred out of state and are no longer held at ROSP.

Ridge." Appellees' Br. at 8. This is also incorrect. See VDOC Operating Procedure 701.1, *Health Services Administration* (requiring that each VDOC have a designated Medical Authority, who must be a physician); VDOC Operating Procedure 720.10, *Psychiatric Services* (requiring that psychiatric services be provided at all facilities—such as ROSP—with full-time psychology associates).[10]

- Plaintiffs repeatedly complain that the criteria for determining whether an inmate should be assigned to the IM or SM pathway are "vague." Appellees' Br. at 5, 8. The policies, however, are crystal-clear. Inmates who are considered particularly violent are assigned to the IM pathway. J.A. 156. Inmates who do not have a violent history, but are repeatedly disruptive in a prison environment, are assigned to the SM pathway. J.A. 158. There is nothing vague or ambiguous about that distinction.

[10] This allegation is perplexing, considering that some of plaintiffs' attorneys were counsel of record in another case where ROSP's institutional psychiatrist was named as a defendant. See *Reyes v. Clarke*, No. 3:18cv611, 2019 U.S. Dist. LEXIS 150854, at *22 (E.D. Va. Sept. 4, 2019) (noting that Defendant McDuffie was ROSP's institutional psychiatrist).

- Plaintiffs allege that inmates "may not advance before a minimum period in each Phase," Appellees' Br. at 9, which they contend is 15 months for inmates on the SM pathway, and 30 months for inmates on the IM pathway. This bare and factually unsubstantiated allegation is not found or even referenced in any VDOC policy. Plaintiffs' unsupported allegation is not plausible, particularly when considered alongside with the actual text of VDOC's operating procedures and other available historical information. See *supra* at 5 (noting that inmates released from the Step-Down Program in 2019 had been held for an average of 221 days, or approximately seven months).

- Plaintiffs allege that "IM pathway prisoners who achieve Level SL-6 are kept in a pod with no pathway to general population." Appellees' Br. at 9. Although the IM pathway ends at security level 6, an inmate within that pathway may be reclassified as a "SM" offender by the DTT and thereby transition out of the Step-Down program and into the general population. J.A. 209, 139, 146; see also J.A. 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).

- Plaintiffs contend that "[t]he Step-Down operating manual acknowledges these criteria [for advancement through the Step-Down Program] are not based on any scientific findings or citable evidence." Appellees' Br. at 10. The cited portion of the Step-Down manual, however, simply notes that there is "no reliable assessment instrument" that can "predict with certainty the level of dangerousness towards staff or other offenders" that is posed by an inmate "who has exhibited the willingness and capability to perpetrate extreme or deadly violence while incarcerated." J.A. 157. The manual goes on to explain, however, that decisions regarding the placement of IM offenders are therefore based on the "evidence-based principle that past behavior is one predictor of the likelihood of future behavior." J.A. 157. Contrary to plaintiffs' assertion, the manual explains that the Step-Down Program is based on "the science of Evidence-Based Practices," J.A. 136, which are set forth in detail in Appendix B to the manual, and which include various risk management strategies, social learning principles, responsivity principles, motivational privileges, cognitive-behavioral programs, systems perspective, and the predictability of past behavior. J.A. 173–75.

- Plaintiffs allege that the ERT 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." Appellees' Br. at 12. Again, plaintiffs misconstrue the language of the policy, which requires the ERT to examine whether the inmate is "currently appropriately" assigned to security level S, as well as whether they presently meet the criteria for the pathway to which they are assigned, or if they require a pathway change. J.A. 139, 209. And although plaintiffs allege that "[m]any IM prisoners have never seen or heard of the ERT," Appellees' Br. at 13, they do not allege that any plaintiff has been deprived of a single bi-annual ERT review. Nor do they explain how "IM prisoners" could be unaware of ERT reviews—which are not just memorialized in an operating procedure fully accessible to them, but also are conducted in person.

III. Clearly-established law did not put Virginia officials on notice that placing inmates in restrictive housing for a prolonged period of time violates the Eighth Amendment, even if that placement might potentially exacerbate underlying mental health conditions

In 2012, this Court squarely held that an inmate failed to state an Eighth Amendment claim where he allegedly was 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 ha[d] 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 further alleged that these conditions "aggravated his mental illness." *Williams v. Branker*, 462 Fed. App'x 348, 350 (4th Cir. 2012). The Court reasoned that the "conditions of which [the inmate] complains [] are no different than those we found not actionable in [*Mickle v. Moore*, 174 F.3d 464 (4th Cir. 1999)], amid a claim that those conditions harmed plaintiffs' mental health." *Id.* at 354. This Court further observed 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.* (internal quotations omitted) (omission in original). Plaintiffs do not and cannot differentiate *Williams* from the circumstances of the present case, nor do they even attempt to do so, instead dismissing it in a single-sentence footnote. Appellees' Br. at 31 n.9. Yet, its reasoning is dispositive here.

Plaintiffs also wrongly contend that prior court decisions upholding the conditions-of-confinement at ROSP are irrelevant, arguing that those cases have no bearing on whether their rights were "clearly established." Appellees' Br. at 33 n.10. This is an oversimplification of the qualified immunity inquiry. "'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.'" *Mays v. Sprinkle*, 992 F.3d 295, 301 (4th Cir. 2021) (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).

Where precedent does not place the constitutional question "beyond debate," but instead upholds the precise behavior that is now being challenged, it is inconceivable that "every reasonable official" would nevertheless have understood that their alleged behavior violated the Eighth Amendment. In case after case after case, district courts upheld the conditions-of-confinement at ROSP against analogous challenges, and this Court affirmed those cases that were appealed. See Opening Br. at 32. Plaintiffs ask this Court to disregard its own

decisions that arise from cases where a plaintiff was *pro se*, suggesting that this Court fails to engage in reasoned decision-making when one a party lacks counsel. Appellees' Br. at 33 n.10; *id.* at 46. Plaintiffs cite no authority for their suggestion that *pro se* cases are neither precedential nor instructive, or that this Court is otherwise unable to meaningfully decide a case without the help of counsel. It is also notable that, in at least one of those appeals, the inmate was represented by the same law firm as plaintiffs here. See *DePaola v. Clarke*, 703 Fed. App'x 205 (2017).

Regardless, it hardly seems equitable to fault corrections officials for relying on previous cases—even if unpublished or involving *pro se* plaintiffs—telling them, repeatedly and in unison, that their conduct did not stray outside constitutional bounds. As one court explained, it would be contrary to the purpose of the qualified immunity defense to impose liability "on an official for conduct that had held to be lawful, even in an unpublished opinion, by the federal appellate court with jurisdiction over the conduct, at least in the absence of later contrary authority issued before the official acted," for an official cannot said to be "plainly incompetent for taking guidance from an unpublished

appellate decision." *Grissom v. Roberts*, 902 F.3d 1162, 1168 (10th Cir. 2018).

Perplexingly, plaintiffs do not agree that *Porter v. Clarke* changed applicable Eighth Amendment standards in this circuit, relative to segregated confinement and inmates with mental illness. But this Court recognized as much in *Latson v. Clarke*, 794 Fed. App'x 266, 270 (4th Cir. 2019) ("In *Porter v. Clarke*, we held that conditions similar to, and in some ways less draconian than, those imposed on Latson violated the Eighth Amendment. . . . But this was not the state of the law at the time of Latson's incarceration [2014–2015]."). As in *Latson*, these defendants are entitled to qualified immunity on plaintiffs' claim for monetary damages for conduct pre-dating the finalization of the *Porter* decision—the mandate for which had not issued at the time defendants filed their motion to dismiss. J.A. 393.

Finally, although plaintiffs again insist that they have sufficiently alleged the absence of a penological purpose for holding them in segregated confinement, this contention goes to the subjective prong of an Eighth Amendment conditions-of-confinement claim. Defendants' qualified immunity argument concerns whether plaintiffs have

plausibly alleged conditions-of-confinement that are sufficiently serious to trigger the objective prong of that analysis, in light of clearly-established precedent in this circuit. Before *Porter*, multiple cases held that the segregated conditions-of-confinement at ROSP (or analogous to those alleged to exist at ROSP) were not sufficiently serious to constitute an "extreme deprivation" within the meaning of the Eighth Amendment—*even when considered in conjunction with allegations of an inmate's deteriorating mental health*. Given those holdings, no reasonable corrections official would have concluded, pre-*Porter*, that the challenged policies violated the Eighth Amendment. Defendants are entitled to qualified immunity on this claim.

IV. Clearly-established law did not put Virginia officials on notice that the multi-tiered review process established by the Step-Down Program violated the Due Process Clause

The Step-Down Program provides segregation review mechanisms that exceed the constitutional minimums established by any court, far eclipsing *Hewitt*'s "some sort of periodic review" standard. In *Baker v. Lyles*, 904 F.2d 925 (4th Cir. 1990), this Court upheld monthly informal (non-adversary) reviews by a classification team. In *Wilkinson v. Austin*, 545 U.S. 209 (2005), the Supreme Court upheld a review

process involving annual informal reviews by a classification committee. No court has ever held that an inmate is entitled to post-segregation formal due process hearings, complete with advance notice, an opportunity to be heard, an opportunity to present evidence, and an opportunity to appeal.

Through the Step-Down Program, VDOC has adopted not just monthly informal reviews, analogous to those this Court upheld in *Baker*, but has also implemented: (1) 90-day formal ICA hearings, complete with an opportunity to appeal (analogous to the informal but **yearly** classification hearings upheld in *Wilkinson*), (2) quarterly informal reviews by the DTT, and (3) bi-annual external reviews that are informal, but are conducted by high-ranking VDOC officials from outside ROSP who examine each inmate's situation from an objective viewpoint. To establish a due process violation, plaintiffs must plausibly allege that defendants knew these multiple segregation reviews were meaningless *in the aggregate*, failed to remedy the issue, and therefore violated clearly-established law. Although plaintiffs attempt to pick apart various aspects of these reviews, for the reasons

described above, they have not plausibly alleged that these "issues" are actually embodied in the challenged VDOC policies.

Despite the length of their complaint and its voluminous attachments, plaintiffs have identified no specific segregation review of any plaintiff that was inadequate or meaningless. And although they argue that other, unspecified inmates might have had reviews that were insubstantial, this does not mean that defendants were adequately placed on notice—either factually or legally—that the multi-tiered review process in the Step-Down Program wasn't working and was, in fact, so defective as to violate procedural due process. Factually, between 2011 and 2019, VDOC reduced the number of inmates confined at security level "S" from 511 to 37. Legally, multiple district court decisions upheld the Step-Down Program against due process challenges, and each case appealed during the relevant time period was affirmed. See *Delk v. Younce*, 709 Fed. App'x 184 (4th Cir. 2018); *DePaola v. Va. 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).

In the qualified immunity context, the overriding inquiry is whether clearly-established law placed the defendants on fair notice

that their alleged conduct violated the federal constitution. This "demanding standard" protects all but the plainly incompetent or those who knowingly violate the law. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The overwhelming weight of available precedent informed these corrections officials not just that their conduct was acceptable, but that it was laudable. See *Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019). No reasonable corrections official (much less "every" reasonable official), charged with knowledge of established law, would have concluded that the enactment and operation of the Segregation Reduction Step-Down Program, and its corresponding segregation review process, violated the procedural due process rights of these plaintiffs. Defendants are entitled to qualified immunity on this claim.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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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 4766 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/ *Margaret A. O'Shea*

Margaret A. O'Shea

CERTIFICATE OF SERVICE

I hereby certify that on October 29, 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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