IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 20-40379

DENNIS WAYNE HOPE,
Plaintiff–Appellant,

v.

TODD HARRIS, CHAD REHSE, LEONARD ESCHESSA, JONI WHITE, KELLY ENLOE, MELISSA BENET, B. FIVEASH
Defendants–Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, LUFKIN DIVISION
NO. 9:18-CV-27

CORRECTED APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate any potential disqualification or recusal.

Name of Interested Party	**Connection And Interest**
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be granted because this case presents important issues of constitutional law and because of the psychological and physical harm to which Mr. Hope has been subjected.

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STATEMENT OF JURISDICTION

Dennis Wayne Hope brought this action under 42 U.S.C. §1983. ROA.64. The district court had jurisdiction under 28 U.S.C. §1331. On May 5, 2020, the district court entered a final judgment dismissing all claims. ROA.165. Mr. Hope timely filed a notice of appeal on June 3, 2020. ROA.166. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED

1. Whether Mr. Hope's allegations that he has spent a quarter century in isolation in a cell roughly the size of a king bed are sufficient to state a claim under the Eighth Amendment.

2. Whether 26 years (and counting) of solitary confinement implicate a liberty interest under the Due Process Clause and, if so, whether Mr. Hope has stated a procedural due process claim by alleging that the committees responsible on paper for evaluating his placement have refused to do so.

3. Whether allegations that prison officials instituted a disorienting and cruel "cell-move" policy against Mr. Hope immediately after he filed a prison grievance and at the instigation of the prison official against whom he filed that grievance are sufficient to raise an inference of retaliation in violation of the First Amendment.

4. Whether the officials who run the prison, oversee the classification of prisoners, and evaluate whether prisoners can be released from solitary confinement are proper defendants.

INTRODUCTION

Since 1994, Dennis Wayne Hope has spent virtually every waking minute alone in a cell somewhere between the size of an elevator and the size of a compact parking space. ROA.65-66. He is let out of his 9'x6' cell for between one and two hours a day to exercise, in another enclosure barely four times its size. ROA.67 His only human contact is with the guards that strip search and handcuff him. ROA.66-67. He has alleged that decades of isolation have led to hallucinations and thoughts of suicide; that he is deteriorating, mentally and physically; and that Defendants have made plain his conditions will not change until his body or spirit are broken. ROA.71-72, 74.

Often shorthanded as "solitary confinement," such conditions—22 or more hours per day in a cell without meaningful social interaction—have been understood for centuries as a form of torture. At the time of the Founding, only one jail imposed solitary confinement, and there only for a period of months—never years. Even still, newspapers reported that prisoners "beg[ged], with the greatest earnestness, that they may be hanged out of their misery." LOUIS P. MASUR, RITES OF EXECUTION 82-83 (1989). A century later, the Supreme Court, considering a sentence of just

four weeks of isolation—less than one three-hundredth of the time Mr. Hope has spent in solitary confinement—characterized solitary confinement "as an additional punishment of such a severe kind" that it imposed "a further terror and peculiar mark of infamy" even over and above a death sentence. *In re Medley*, 134 U.S. 160, 170 (1890). And today, jurists around the country warn that "[y]ears on end of near-total isolation exact a terrible price." *Davis v. Ayala*, 576 U.S. 257, 289 (2015) (Kennedy, J., concurring); *see Hamner v. Burls*, 937 F.3d 1171, 1180-81 (8th Cir. 2019) (Erickson, J., concurring) (concerns about "detrimental and devastating effects that placement in administrative segregation has on the human psyche").

For twenty-six years—and counting—Mr. Hope has paid that "terrible price." The district court dismissed his claim without citing a single case. But the physical and psychological effects of isolation and the sheer length of time Mr. Hope has been in solitary confinement at least give rise to a plausible inference that his Eighth Amendment rights have been violated.

Mr. Hope's complaint also states two other claims on which relief can be granted. He has pleaded facts sufficient to state a claim that his

right to procedural due process has been violated: As virtually every circuit has held, Mr. Hope's quarter century in solitary confinement is more than sufficient to implicate a liberty interest under the Due Process Clause, and he has alleged that the "process" he is nominally given is a sham. He has also pleaded facts sufficient to infer that Defendants are retaliating against him for exercising his First Amendment right to file prison grievances.

The district court's order granting Defendants' motion to dismiss should be reversed.

STATEMENT OF THE CASE

I. Factual Background.

Mr. Hope has spent between 22 and 24 hours per day alone in a 54-square-foot cell for the past 26 years.[1] ROA.65-67. After accounting for

[1] This brief refers to Mr. Hope's conditions as "solitary confinement," which scholars define as 22 or more hours per day in a cell without "meaningful human contact." Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 LAW & SOC. INQUIRY 1604, 1607-09 (2018) (collecting sources). Incidental interactions with guards or doctors, phone calls, or limited time outside of a cell are thus consistent with "solitary confinement." The Supreme Court has used the term "solitary confinement" to refer to such conditions. *E.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 214 (2005) (referring to "a highly restrictive form of solitary confinement" though, per lower court opinion, *see Austin v. Wilkinson*, 189 F. Supp. 2d 719, 724-25 (N.D. Ohio 2002), inmates went outside

the furniture in his cell, all that remains is a 3'x3' space for Mr. Hope to move around in. ROA.65-66. For one hour, seven days per week, or two hours, five days per week (assuming no inclement weather or staff shortages), Mr. Hope is removed from his cell to exercise, in an enclosure that is four times the size of his cell; he exercises alone. ROA.67. He receives food through a slot in his door; he eats alone. ROA.66. He does not socialize with other prisoners, participate in religious activities, work, or attend group vocational programs. ROA.67. He sees visitors only through plexiglass. ROA.67. Prison officials have allowed Mr. Hope one personal phone call in the last 26 years, when his mother died. ROA.67. Solitary confinement "almost totally deprives him of human contact, mental stimulus, physical activity, personal property and human dignity." ROA.67. At this point, "Mr. Hope has spent more time in solitary confinement than he was alive prior to coming to prison." ROA.76.

Mr. Hope's quarter century in solitary confinement has taken a toll. He is afflicted by visual and auditory hallucinations. ROA.71-72. He has

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daily, made phone call each week, and attended congregate programming, such as counseling); *In re Medley*, 134 U.S. 160, 163-64 (1890) (referring to "solitary confinement" though inmate had contact with "attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family").

developed chronic pain and periodic swelling from living in such cramped quarters. ROA.71. He suffers from anxiety, depression, and insomnia. ROA.71-72. Many of the other prisoners in solitary confinement have physically harmed themselves or committed suicide. ROA.72.

The differences between Mr. Hope's experience and that of other inmates extend to every detail of his daily life. Other prisoners have contact with visitors and participate in group programming; Mr. Hope cannot. ROA.67. Whereas guards pat down other prisoners once a day, they strip search Mr. Hope an average of four times daily. ROA.66. Mr. Hope faces twice as many lockdowns as other inmates, is denied the privacy for medical and mental health appointments afforded other inmates, and is subjected to more constant noise (and therefore less sleep) and more frequent exposure to chemical agents than other inmates. ROA.68-69, 71-72. The sanitary standards Defendants apply to solitary confinement—down to the way that the food trays are cleaned—are far laxer than those applied to other inmates. ROA.66, 69-71. Mr. Hope has not been allowed to watch television since January 31, 1996. ROA.67. Even Mr. Hope's library access is curtailed because of his placement. ROA.69.

Mr. Hope also alleges that his "continued confinement in solitary confinement has far reaching consequences and places a stigma on him." ROA.76-77. Specifically, Mr. Hope's placement in solitary confinement "drastically reduces the chances of Mr. Hope ever getting a favorable parole review." ROA.76-77. The parole board cannot consider various strong indicators of his suitability for parole because they believe placement in solitary confinement automatically proves unfitness for parole. ROA.76-77.

The conditions of Mr. Hope's confinement worsened dramatically after an incident in February 2012. ROA.69-70. From 1994 until 2012, Mr. Hope was rarely moved between cells. ROA.69-70. Then, in 2012, Mr. Hope had a run-in with Major Virgil McMullen after he filed grievances against McMullen. ROA.69-70. McMullen "took exception" to the grievances and planted a contraband screwdriver in Mr. Hope's cell to trigger disciplinary proceedings. ROA.69-70. He confiscated Mr. Hope's typewriter. ROA.69-70, 77. And he pepper sprayed Mr. Hope, leaving him nude in his cell for eight days with nothing to clean off the pepper spray (and without food for two of those days). ROA.69-70. (McMullen was later demoted after a scandal involving planting screwdrivers in inmates' cells.

See Keri Blakinger, *4 Texas Prison Officials Indicted After Alleged Screwdriver-Planting Incident at Brazoria Lockup*, HOUSTON CHRON., July 11, 2018, https://www.chron.com/news/houston-texas/article/4-Texas-prison-officials-indicted-after-alleged-13064474.php.)

McMullen's revenge didn't stop there. He instituted a policy of moving Mr. Hope's cell on a weekly basis. ROA.69-70. When Major Chad Rehse took over, he ordered the policy continued. ROA.69-70. Between 2012 and 2018, Mr. Hope was moved between cells an astounding 263 times. ROA.69-70. Each time he is moved to a new cell, he is subjected to grotesque and unsanitary conditions. ROA.70-71. At best, the cell has not been disinfected. ROA.70-71. At worst, it has feces and urine on the walls, floor, and doors. ROA.70-71. Once, the cell had no lights; another time, Mr. Hope spent nearly two weeks in a cell where black mold covered 80% of one wall. ROA.70-71. Major Rehse personally saw the black mold. ROA.70-71. Mr. Hope is never given cleaning supplies with which to make the cells more habitable. ROA.70-71. The constant and disorienting moves have contributed to Mr. Hope's physical (from exposure to mold and other unsanitary substances) and psychological deterioration. ROA.77.

Mr. Hope was placed in solitary confinement in 1994, following an escape attempt. After 11 years in solitary confinement, the prison's Security Precautions Designator Committee voted to remove the "escape risk" designator from Mr. Hope's file. ROA.76. But 14 years (and counting) later, Mr. Hope remains in solitary confinement, and he has never been told what he must do to end his isolation. ROA.75. He has not had a disciplinary case in six years; due to his good behavior, he is "at the highest time-earning class" (that is, he is able to accrue credit toward a sooner release date at a faster rate than other inmates) and the lowest security detention status. ROA.76-77. He has been given only two reasons for his ongoing solitary confinement: First, that he is "high profile," and second, that he is "still in good shape"—that is, he is not yet "disabled or dead." ROA.73, 75.

On paper, the State Classification Committee (SCC) is supposed to review Mr. Hope's placement in solitary confinement every 180 days. ROA.72-74. But committee members have falsely disclaimed any ability to do so. ROA.73-74 (committee members have told Mr. Hope, "I don't have the authority," "I was told that's not my call," and "that's not my decision"). At least seven committee members have recommended that

Mr. Hope be returned to the general population, and each has been overruled. ROA.74. Because no one on the committee cares to redress Mr. Hope's injury, the meetings have become a sham, with Defendants using the time to talk about "the availability of firewood and whether or not it can be delivered." ROA.72.

Mr. Hope is "not sure how much longer he can endure this treatment absent judicial intervention." ROA.72.

II. The Proceedings Below.

Mr. Hope filed suit in 2018 under 42 U.S.C. §1983 against Defendants Todd Harris, the prison's warden; Chad Rehse, a high-ranking official who oversaw administrative segregation; Leonard Eschessa, Deputy Director of Support Operations; Joni White, Assistant Director of Classifications; Kelly Enloe, chairperson of the SCC; and two SCC members, Melissa Benet and Bonnie Fiveash. ROA.64-65. He sought damages and injunctive and declaratory relief. ROA.64. The complaint was referred to a magistrate judge, and Defendants moved to dismiss. ROA.130, 134. Throughout, Mr. Hope proceeded *pro se*.

The magistrate judge recommended granting Defendants' motion to dismiss. He concluded that (1) Mr. Hope did not have standing to sue,

because Defendants could not redress his challenged injuries; (2) the Defendants did not fall within the exception to the Eleventh Amendment for claims seeking injunctive relief; and (3) Mr. Hope failed to state any claims on which relief could be granted. ROA.136-45. The district court found that Mr. Hope failed to state any claims on which relief could be granted and accepted the magistrate judge's report and recommendation. ROA.162-64.

STANDARD OF REVIEW

This Court reviews a dismissal de novo. *Cherry Knoll LLC v. Jones*, 922 F.3d 309, 316 (5th Cir. 2019). All factual allegations in the complaint are taken as true. *Id.* To survive a motion to dismiss and proceed to discovery, a complaint need only "contain sufficient factual matter…to 'state a claim for relief that is plausible on its face.'" *Id.* "Plausibility" is "not akin to a 'probability requirement'"; rather, a claim is plausible if there is "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

SUMMARY OF THE ARGUMENT

I. A. Defendants violated the Eighth Amendment because, for the past 26 years, they have been deliberately indifferent to a substantial

risk of serious harm to Mr. Hope. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Courts around the country—including this one—have recognized that virtually everyone subjected to solitary confinement will eventually deteriorate psychologically and physically and, consequently, that solitary confinement poses a sufficiently serious risk of harm to state a claim under the Eighth Amendment. *See Fussell v. Vannoy*, 584 F. App'x 270 (5th Cir. 2014); *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019); *Porter v. Pa. Dep't of Corr.*, ___ F.3d ___, 2020 WL 5200680 (3d Cir. 2020). Mr. Hope has alleged that, in his case, decades of isolation have resulted in hallucinations, thoughts of suicide, and constant pain. Moreover, Defendants are aware of Mr. Hope's suffering, both because he has told them of his symptoms and because the harms of long-term solitary confinement are widely known. And though Mr. Hope was placed in solitary confinement after an escape attempt, the prison system itself has concluded Mr. Hope is no longer an escape risk, so it is at least plausible that there is no legitimate penological reason to keep Mr. Hope in isolation.

B. More than two decades of solitary confinement are "unusual" under the Eighth Amendment. At the time of the Founding, only one

State routinely imposed solitary confinement and only for months, not years. In the centuries since, long-term solitary confinement was effectively abandoned until Mr. Hope's generation of prisoners were subjected to it. And today, only five States authorize solitary confinement of the length Mr. Hope has endured, and only a few hundred inmates have spent anywhere near as much time in isolation as Mr. Hope has. Mr. Hope's quarter century of solitary confinement is also "cruel" under the Eighth Amendment: Since the 1700s, solitary confinement has been understood to be torture and a fate in some respects worse than death.

II. This Court recognized in *Wilkerson v. Goodwin*, 774 F.3d 845 (5th Cir. 2014), that decades of solitary confinement are sufficiently "atypical and significant" to entitle a prisoner to procedural protections. Mr. Hope alleges that the only "process" he is afforded are sham committee meetings at which prison officials pass the buck and refuse to actually consider his placement. Taking those allegations as true, Mr. Hope's complaint states a claim for a violation of his right to procedural due process.

III. Mr. Hope has alleged a plausible First Amendment retaliation claim. His complaint explains that before he filed a grievance, he mostly

remained in the same cell for almost 14 years, and that after filing the grievance, he was moved to a different cell 263 times in a five-year period. That chronology is sufficient to give rise to an inference of retaliation.

IV. The magistrate judge erred in dismissing Mr. Hope's suit on jurisdictional and immunity grounds. The magistrate judge's finding that Mr. Hope did not have standing because a favorable decision would not redress his injury is contrary to black-letter law that "when the suit is one challenging the legality of government action or inaction" and the plaintiff "is himself an object of the action," "there is ordinarily little question…that a judgment preventing or requiring the action will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Similarly, the magistrate judge's finding that the Eleventh Amendment bars suit in this case is foreclosed by the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). The prison officials Mr. Hope sued are the very individuals who have violated his First, Fifth, and Eighth Amendment rights.

ARGUMENT AND AUTHORITIES

I. Mr. Hope's Quarter Century In Solitary Confinement Plausibly Violates The Eighth Amendment.

Mr. Hope's 26 years of solitary confinement implicate at least two of the Eighth Amendment's protections. First, prison officials are violating Mr. Hope's Eighth Amendment rights because they are deliberately indifferent to a sufficiently severe risk of harm. *See Farmer v. Brennan*, 511 U.S. 825 (1994). Second, Mr. Hope's decades of solitary confinement are sufficiently rare and harsh as to be categorically off-limits under the Eighth Amendment. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019).

A. Mr. Hope Has Plausibly Alleged That He Faces A Substantial Risk Of Serious Harm To Which Defendants Were Deliberately Indifferent.

Mr. Hope alleges that for over two decades, he has been confined to a 9'x6' cell for between 22 and 24 hours a day with virtually no human contact; that, during that time, his body and mind have deteriorated, to the point where he experiences constant pain, suffers from hallucinations, and considers suicide; and that Defendants are aware of the effect of Mr. Hope's ongoing solitary confinement, yet refuse to alleviate his suffering. Those allegations are sufficient to make out an

Eighth Amendment claim under *Farmer v. Brennan*, 511 U.S. at 834, because they cover both the objective (i.e., a sufficiently serious risk of harm) and the subjective (i.e., that Defendants are deliberately indifferent) components of such a claim.

1. Twenty-six years in solitary confinement puts Mr. Hope at substantial risk of serious harm.

To state an Eighth Amendment claim, the "deprivation" Mr. Hope alleges "must be, objectively, 'sufficiently serious.'" *Id.* The deprivation needn't be physical; the Eighth Amendment "proscribe[s] more than physically barbarous punishments," *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), and recognizes that "mental health needs are no less serious than physical needs," *Gates v. Cook*, 376 F.3d 323, 332-33 (5th Cir. 2004). And a prisoner "does not have to await the consummation of threatened injury" to state a claim for a violation of the Eighth Amendment; a risk of harm is enough. *Farmer*, 511 U.S. at 845; *see Ball v. LeBlanc*, 792 F.3d 584, 593-94 (5th Cir. 2015) (finding Eighth Amendment violation where plaintiffs were at risk of heatstroke despite no prior incidents of heatstroke).

Mr. Hope alleges that 26 years in solitary confinement has caused myriad serious physical and psychological harms. He has developed

chronic pain from only being able to move around in the 3'x3' portion of his cell not occupied by furniture. ROA.65-66, 71. He suffers from auditory and visual hallucinations, anxiety, depression, and insomnia. ROA.71-72. He has contemplated suicide. ROA.72. And various defendants have *told* Mr. Hope that they will not release him until he deteriorates, making the risk of serious harm not just substantial, but inevitable. ROA.74. The damage that a quarter-century of isolation has done and threatens to do to Mr. Hope is more than sufficient to entitle Mr. Hope to proceed to discovery.

Although the district court held, with no citation or analysis, that "plaintiff's allegations fail to rise to the level of a violation of the Eighth Amendment," the physical and psychological repercussions Mr. Hope has alleged are precisely the sorts of harms that state a claim for relief under the Eighth Amendment. *See* ROA.163. In *Fussell v. Vannoy*, 584 F. App'x 270 (5th Cir. 2014), this Court reversed the dismissal of a complaint that, like Mr. Hope's, was filed pro se, by an inmate who, like Mr. Hope, had been subjected to 25 years of "extended lockdown (i.e. a form of solitary confinement)" and who, like Mr. Hope, alleged "serious mental health issues, including suicidal tendencies." *Id.* at 271. This Court held that "it

is more than plausible" that the plaintiff's "decades of extended lockdown have caused the serious mental health problems he alleges, and it is clear that such allegation is sufficiently serious to invoke Eighth Amendment concerns." *Id.*

Going still further, the Third and Fourth Circuits have held that plaintiffs were entitled to relief under the Eighth Amendment because long-term solitary confinement even where plaintiffs did not show either that they themselves suffered any harm or that they were at any individualized risk of harm. *Porter v. Pa. Dep't of Corr.*, ___ F.3d ___, 2020 WL 5200680, at *7 (3d Cir. 2020); *Porter v. Clarke*, 923 F.3d 348, 360-61 (4th Cir. 2019). Those courts reasoned that solitary confinement poses a sufficient risk of harm to just about everyone, so plaintiffs needn't demonstrate they had suffered any specific harm. *Id.* In each case, the Court relied on the scientific consensus that prolonged solitary confinement is physically and psychologically toxic. *Porter*, 2020 WL 5200680, at *7-8 (summarizing evidence); *Porter*, 923 F.3d at 356-57 (same). It can cause severe and traumatic psychological damage, including hallucinations, paranoia, depression, PTSD, and suicidal ideation; prisoners may lose their ability to differentiate faces, their

memories, or their very sense of self. *Id.*[2] The harm is physical as well as psychological; solitary confinement causes changes to the brain, muscular atrophy, heart abnormalities, "more general physical deterioration," and premature death. *Porter*, 2020 WL 5200680, at *7.[3] And solitary's harms far outlast release from confinement. *Porter*, 923 F.3d at 357.[4]

These harms are essentially universal. "[T]here is *not a single published study* of solitary or supermax-like confinement" for longer than

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[2] *See also* Elena Blanco-Suarez, *The Effects of Solitary Confinement on the Brain*, PSYCHOL. TODAY (Feb. 27, 2019), https://www.psychologytoday.com/intl/blog/brain-chemistry/201902/the-effects-solitary-confinement-the-brain; Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 500 (1997).

[3] *See also* Lauren Brinkley-Rubinstein, et. al., *Association of Restrictive Housing During Incarceration With Mortality After Release*, JAMA NETWORK OPEN (Oct. 4, 2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2752350; Dana G. Smith, *Neuroscientists Make a Case Against Solitary Confinement*, SCIENTIFIC AMERICAN (Nov. 9, 2018), https://www.scientificamerican.com/article/neuroscientists-make-a-case-against-solitary-confinement/.

[4] *See also* Diana Arias & Christian Otto, NASA, DEFINING THE SCOPE OF SENSORY DEPRIVATION FOR LONG DURATION SPACE MISSIONS 43 (2011), http://www.medirelax.com/v2/wp-content/uploads/2013/11/F.-Scope-of-Sensory-Deprivation-for-Long-Duration-Space-Missions.pdf (chronicling psychiatric distress more than 40 years after release from prolonged isolation); Terry A. Kupers, *The SHU Post-Release Syndrome: A Preliminary Report*, 17 CORR. MENTAL HEALTH REPORT 81, 92 (March/April 2016).

10 days—two orders of magnitude less than Mr. Hope's time in solitary confinement—that failed to show that isolation has negative psychological effects. *Porter*, 923 F.3d at 356 (quoting Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 132 (2003)). "[V]irtually *everyone* exposed to such conditions is affected in some way." *Porter*, 2020 WL at 5200680, at *7.

Judges from the highest court on down have expressed concern about the harms of long-term solitary confinement. Over a century ago, the Supreme Court recognized the devastating effects of even four weeks of solitary confinement, writing that "experience demonstrated" that "[a] considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them"; even those who "stood the ordeal better" still "did not recover sufficient mental activity to be of any subsequent service to the community." *In re Medley*, 134 U.S. 160, 168 (1890). Writing of a solitary confinement stint less than half the length of Mr. Hope's, Justice Sotomayor opined that solitary confinement "comes perilously close to a penal tomb," "imprint[ing] on those that it clutches a wide range of

psychological scars." *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2019) (statement of Sotomayor, J., respecting denial of certiorari). Justice Kennedy warned that prolonged solitary confinement would inevitably bring prisoners "to the edge of madness, perhaps to madness itself." *Davis v. Ayala*, 576 U.S. 257, 288 (2015) (Kennedy, J., concurring).[5]

And the analysis in these cases applies with perhaps even greater force to Mr. Hope's. First, in some ways, Mr. Hope's conditions of confinement are worse than those considered in the Third and Fourth Circuit's cases. In the Fourth Circuit's case, for instance, inmates in solitary confinement had cells nearly 50 percent larger than Mr. Hope's. *Compare Porter*, 923 F.3d at 353 (71 square feet) *with* ROA.65-66 (54 square feet). They were allowed television, daily telephone access, conversations with each other during outdoor recreation, institutional

[5] *See also Ruiz v. Texas*, 137 S. Ct. 1246, 1246-47 (2017) (Breyer, J., dissenting from denial of stay); *Hutto v. Finney*, 437 U.S. 678, 688 (1978) ("Commissioner of Correction himself stated that prisoners should not ordinarily be held in punitive isolation for more than 14 days."); *Hamner v. Burls*, 937 F.3d 1171, 1180-81 (8th Cir. 2019) (Erickson, J., concurring); *Grissom v. Roberts*, 902 F.3d 1162, 1176-77 (10th Cir. 2018) (Lucero, J., concurring); *Wallace v. Baldwin*, 895 F.3d 481, 484 (7th Cir. 2018); *Palakovic v. Wetzel*, 854 F.3d 209, 225-26 (3d Cir. 2017); *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 566-67 (3d Cir. 2017); *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015); *Kervin v. Barnes*, 787 F.3d 833, 837 (7th Cir. 2015).

jobs, and contact visits, all of which are denied Mr. Hope. *Compare Porter*, 923 F.3d at 354; *id.* at 370 (Niemeyer, J., dissenting) *with* ROA.67.

Second, Mr. Hope has been in confinement for over a quarter century. The Supreme Court has explained that "the length of confinement cannot be ignored"; some conditions "might be tolerable for a few days and intolerably cruel for weeks or months," let alone years or decades. *See Hutto v. Finney*, 437 U.S. 678, 686-87 (1978). As with other cruel conditions, the harms of solitary confinement increase with duration. *See* Craig Haney, *Mental Health Issues in Long-Term Solitary & "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 138-41 (2003).

Third, this Court has held that the Eighth Amendment extends special solicitude to cell conditions when a prisoner is solitarily confined. *See McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir. 1991). Mr. Hope's cell conditions have been deplorable. Some of his cells were covered with feces and urine; others with black mold. ROA.70-71. Inmates in solitary are regularly "gassed" with pepper spray. ROA.66. Meal trays are rarely washed, and noise from other inmates and guards creates a "loud roar" 24/7 that prevents sleep. ROA.66, 68. Any of those deprivations might violate the Eighth Amendment independently. *See Harper v. Showers*,

174 F.3d 716, 719-20 (5th Cir. 1999) (unsanitary conditions); *Fountain v. Rupert*, 2020 WL 3524550, at *2 (5th Cir. 2020) (lack of sleep). Taken together and superimposed upon a regime of isolation, they make clear that, at least at this preliminary stage, Mr. Hope's allegations are sufficiently severe and plausible to state a claim.

In short, the inevitable, grave, and universal risks of solitary confinement have been recognized by jurists around the country and deemed by two circuits to suffice, standing alone and without any individualized showing of harm, to violate the Eighth Amendment. Against that backdrop, Mr. Hope's specific allegations of severe psychological and physical distress are more than sufficient to state a claim for relief.

2. Mr. Hope has plausibly alleged Defendants understand the harm that over two decades of isolation have wrought.

To satisfy the subjective prong of the Eighth Amendment, Mr. Hope must allege that Defendants are "deliberately indifferen[t]"—that they "disregard[ed] an excessive risk to inmate health and safety." *Farmer*, 511 U.S. at 837. He needn't allege that correctional officials acted "with the knowledge that harm will result." *Id.* at 826. No "smoking gun" is

required to prove deliberate indifference. *Moore v. Mabus*, 976 F.2d 268, 271 (5th Cir. 1992). For four reasons, Mr. Hope's complaint suffices to establish deliberate indifference at this early stage.

First, Mr. Hope alleges that he has reported his anxiety, depression, and hallucinations to prison personnel, to no avail. ROA.71-72. Defendant Rehse has spoken with Mr. Hope about the physical toll of indefinite confinement. ROA.71. Defendant White has received letters from Mr. Hope's advocates about the consequences of his ongoing solitary confinement and has received training "on the effect that long-term isolation takes on the brain." ROA.75-76; *see Converse v. City of Kemah, Tex.*, 961 F.3d 771, 779-80 (5th Cir. 2020) (considering correctional official's training in assessing deliberate indifference). Defendant Fiveash told Mr. Hope that she would not release him until he had deteriorated further, meaning that she knows that solitary confinement will eventually affect Mr. Hope. ROA.74. And many other prisoners in solitary confinement in Mr. Hope's facility have physically harmed themselves or committed suicide—surely enough to put Defendants on notice that long-term deprivation of meaningful human contact poses a substantial threat. ROA.72.

Second, deliberate indifference can be inferred if the risks of harm are "open and obvious." *Hinojosa v. Livingston*, 807 F.3d 657, 665-66 (5th Cir. 2015). Correctional officials needn't be aware of a risk as to one particular inmate; awareness that conditions are generally dangerous is sufficient. *Id.* at 667-68. Other circuits have held that the risks of decades of isolation are sufficiently well-known that deliberate indifference can generally be inferred. The Fourth Circuit, for instance, concluded that "[g]iven [D]efendants' status as corrections professionals, it would defy logic to suggest that they were unaware of the potential harm that the lack of human interaction…could cause," explaining that "the extensive scholarly literature" regarding solitary confinement "provides circumstantial evidence that the risk of harm 'was so obvious that it had to have been known.'" *Porter*, 923 F.3d at 361-62.[6]

[6] *See also Porter*, 2020 WL 5200680, at *11 (risks of solitary confinement are so "longstanding, pervasive, [and] well-documented" that reasonable jury could infer prison officials must have known of them); *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 678-80 (M.D. La. 2007) ("Any person in the United States who reads or watches television should be aware that lack of adequate exercise, sleep, social isolation, and lack of environmental stimulation are seriously detrimental to a human being's physical and mental health."); *McClary v. Kelly*, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998) ("[T]hat prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science.").

This circuit, too, has held that the risks of solitary confinement are known to every prison official: In *Wilkerson v. Goodwin*, this Court denied qualified immunity to correctional officers in a procedural due process case precisely because those risks were so obvious. 774 F.3d 845, 858-59 (5th Cir. 2014). And the sheer length of Mr. Hope's deprivation makes it particularly likely that prison officials knew of and disregarded a substantial risk of serious harm. *See Wilson v. Seiter*, 501 U.S. 294, 300-01 (1991) (deliberate indifference easier to establish if cruel prison condition is of "long duration"); *Alberti v. Sheriff of Harris Cty., Tex.*, 937 F.2d 984, 998 (5th Cir. 1991) (same).

Third, this Court has also recognized that a prison's own policies may reflect the knowledge necessary to prove deliberate indifference. In *Hinojosa*, for instance, this Court found that policies regarding inmates' exposure to heat "would establish that Defendants were 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . also dr[ew] the inference.'" 807 F.3d at 666-67; *see also Porter*, 923 F.3d at 361 (prison procedures "constitute unrebutted evidence of State Defendants' awareness" of harms of solitary confinement). In Texas, inmates sentenced to multiple 15-day terms of

solitary confinement are, at least on paper, supposed to have a 72-hour respite between such terms, and those serving longer stints in isolation are supposed to receive weekly or monthly reviews of their continuing placement. *See* Offender Orientation Handbook, Texas Department of Criminal Justice, Director of the Correctional Institutions Division 7, 72 (2017), https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf. These policies support the inference that Defendants know that indefinite solitary confinement carries serious risks.

Finally, deliberate indifference can be shown from actions taken without penological purpose. *See Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1981). At this preliminary stage, Mr. Hope has plausibly alleged that his continued confinement without human contact serves no penological purpose. Mr. Hope was placed in solitary confinement following an escape in 1994. ROA.71-72. But prison administrators removed the "escape risk" designator from Mr. Hope's file 15 years ago. ROA.76. The only reasons Defendants have given Mr. Hope for his continued suffering—that he is "high profile" and that he is "still in good shape" (that is, he has not yet

completely deteriorated)—are not legitimate penological purposes. ROA.73-74.

Taking Mr. Hope's allegations as true, his complaint thus states an Eighth Amendment claim because he has alleged that Defendants were deliberately indifferent to a substantial risk of serious harm.

B. Under Any Definition Of The Terms, Mr. Hope's Ongoing Solitary Confinement Is Cruel And Unusual.

Mr. Hope has also plausibly alleged facts describing a punishment that is both out of the ordinary—whether measured against the practices at the Founding, the centuries since, or today—and extraordinarily harsh. Such a punishment is "cruel and unusual" under the Eighth Amendment.

1. A quarter century without meaningful human contact is "unusual" under the Eighth Amendment.

The Supreme Court has held that a punishment may be "unusual" under the Eighth Amendment if one of at least three conditions obtains. First, a punishment is "unusual" if it was not "an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights." *Glossip v. Gross*, 576 U.S. 863, 867 (2015); *see also Ford v. Wainwright*, 477 U.S. 399, 405 (1986). Second, punishments that "had long fallen out

of use" are also "unusual" within the meaning of the Eighth Amendment. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019). Finally, the Eighth Amendment may also be violated by a punishment that is contrary to the "evolving standards of decency that mark the progress of a maturing society"—that is, by a punishment against which a "national consensus" has developed. *Atkins v. Virginia*, 536 U.S. 304, 311-12, 314 (2002). Mr. Hope's sentence is the rare punishment that is "unusual" under all three tests.

a. The Founding era. Solitary confinement in the United States was "little known prior to the experiment in Walnut-Street Penitentiary, in Philadelphia, in 1787." *In re Medley*, 134 U.S. 160, 167-68 (1890). Not one inmate at Walnut Street ever served anywhere close to a decade—let alone multiple decades—in solitary confinement. David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 567-68 (2019). Although a handful of inmates were sentenced to multiple years in solitary confinement—Professor Shapiro identifies two six-year sentences and one nine-year sentence meted out between 1795 and 1800—in practice, those sentences were broken up into multiple

intervals. *Id.* at 565, 567-68.[7] As late as 1827, the jail's inspectors wrote: "We have known a convict to have been confined within a solitary cell upwards of sixteen months, and this is the longest time." *Id.* at 567.[8] Courts, not prison officials, imposed solitary confinement terms of longer than a few days, and they limited total solitary confinement to between one-twelfth and one-half of the total sentence. *Id.* at 562-66.

Even that limited use of solitary confinement—for periods far shorter than Mr. Hope's ongoing isolation—was incredibly unusual. Only one facility—Walnut Street—in one jurisdiction (Pennsylvania) used the practice with any regularity. That one facility had only 16 cells for solitary confinement,[9] and solitary confinement was limited to crimes

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[7] *See also* Robert J. Turnbull, A VISIT TO THE PHILADELPHIA PRISON 41 (1797) (correctional officials "have the power to direct the infliction of [solitary confinement] at such intervals" as they choose).

[8] *See also* Reiter & Rubin, *supra* note 1, at 1613, 1615 (until 1810s, solitary confinement "was only used for short periods"); Letter from Hon. John Sergeant (1827), *reprinted in* Richard Vaux, BRIEF SKETCH OF THE ORIGIN & HISTORY OF THE STATE PENITENTIARY FOR THE EASTERN DISTRICT OF PENNSYLVANIA, AT PHILADELPHIA 25-26 (1872) (hypothesis that "continued solitude for a considerable length of time" might be "intolerable" had "never been fairly tested by experiment").

[9] Of note, those cells were reportedly "high and healthy, not subject to damps"; "finished with lime and plaster; white washed twice a year; and in every respect clean"—a far cry from the cells in which Mr. Hope has been confined. *Compare* Shapiro, *supra*, at 558 (quoting Thomas Condie, *Plan, Construction*

previously punishable by death and, even among inmates who committed those serious crimes, to only the "hardened and most atrocious offenders" (only four prisoners in 1795 and seven in 1796 served any time in solitary confinement). Negley K. Teeters & John D. Shearer, THE PRISON AT PHILADELPHIA CHERRY HILL 19 (1957); Shapiro, *supra*, at 546.

Far from "an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights," *Glossip*, 576 U.S. at 867, Mr. Hope's 26 years of solitary confinement would thus have been unimaginable in 1790, when the Bill of Rights was passed.

b. Disuse. A punishment is also "unusual" within the meaning of the Eighth Amendment if it has "long fallen out of use." *Bucklew*, 139 S. Ct. at 1123. In the article cited by the Supreme Court for that definition, Professor John Stinneford elaborates: A punishment that enjoyed "long usage"—that is, universal reception over a period of numerous generations—could be considered "usual" and thus enjoy a presumption of legitimacy. John F. Stinneford, *The Original Meaning of "Unusual":*

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and Etc. of the Jail and Penitentiary House of Philadelphia, PHILA. MONTHLY MAG., Feb. 1798, at 97), *with* ROA.70-71 (many cells in which Mr. Hope has been housed have "feces and urine on the walls, floor and door"; at least one "had black mold on the back wall and floor, covering about 80% of the back wall").

The Eighth Amendment as a Bar to Cruel Innovation, 102 NW. U. L. REV. 1739, 1770-71 (2008). Even such a punishment, however, became "unusual"—and thus suspect—if it was not used for a long period of time; presumably, the punishment fell out of favor for a reason. *Id.* So for instance, punishment by the "ducking stool"—a sort of seesaw that plunged a defendant repeatedly into a pond—was deemed "unusual" in one nineteenth-century case because "there is no judicial record, certainly no report, of this punishment being inflicted for more than one hundred years." *James v. Commonwealth*, 12 Serg. & Rawle 220, 229 (Pa. 1825).

When Mr. Hope was placed in long-term solitary confinement in 1994, he was among the first prisoners to be subjected to the punishment in more than 100 years. Mr. Hope's punishment qualifies as "unusual" for two reasons: First, long-term solitary confinement has never enjoyed "long usage." And second, as in the ducking stool case, there is *no* record of long-term solitary confinement being inflicted for more than 100 years prior to Mr. Hope's placement in isolation in 1994.

As to the first: A few States attempted to impose long-term solitary confinement but gave up after a year or two.[10] Only in Pennsylvania were inmates subjected to years or decades in solitary confinement, and there only at one facility, Eastern State Penitentiary. Teeters & Shearer, *supra*, at 4. Indeed, the idea of housing prisoners in solitary confinement for years on end was so *sui generis* that it became known as the "Pennsylvania system." Rubin & Reiter, *supra*, at 1615, 1625.

And even that one experiment with long-term solitary confinement was, in some ways, less brutal than today's version. Eastern State's cells were far roomier (8'x12', more than 75 percent larger than Mr. Hope's cell). Harry Elmer Barnes, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA: A STUDY IN AMERICAN SOCIAL HISTORY 142 (1927). They

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[10] For example, Auburn State Prison ended its experiment with solitary confinement after two years, and the effects were so gruesome the governor pardoned all surviving prisoners. Gershom Powers, A BRIEF ACCOUNT OF THE CONSTITUTION, MANAGEMENT, & DISCIPLINE, &C. &C., OF THE NEW YORK STATE PRISON AT AUBURN 36 (1826). Auburn quickly shifted to a model of congregate labor during the day, with solitary confinement only at night. Rubin & Reiter, *supra*, at 1615. Other experiments were similarly limited. *See* Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History & Review of the Literature*, 34 CRIME & JUST. 441, 458 (2006) (New Jersey learned that total isolation led to "many cases of insanity" and abandoned solitary confinement for "a little more intercourse"); Rubin & Reiter, *supra*, at 1614, 1616 ("similar disaster" at Maine State Prison and Rhode Island); Teeters & Shearer, *supra*, at 201 (experiments in Maryland, Massachusetts, and Virginia).

had an adjoining yard, and the door to the yard was latticed to allow in air and sunlight. Teeters & Shearer, *supra*, at 69. Chaplains, physicians, and members of the local penal reform society rotated visits, such that each prisoner had an in-person visitor at least once per week. *Id.* at 32; Rubin & Reiter, *supra*, at 1615-16. Prisoners often gardened and kept small pets, such as birds and rabbits. Teeters & Shearer, *supra*, at 79.

And long-term solitary didn't enjoy *any* usage from the time Eastern State ended the practice in the middle of the nineteenth century until around the time Mr. Hope was placed in solitary confinement. By 1866, inmates at Eastern State were double-celled, meaning that, whatever other cruelties they experienced, lack of human contact wasn't one of them. *Id.* at 218-20. Writing a generation later, the Supreme Court explained that by 1850 or 1860, long-term solitary confinement "was found to be too severe." *In re Medley*, 134 U.S. at 168; *see also* Teeters & Shearer, *supra*, at 222 (by official statutory repeal in 1913, Pennsylvania system had been defunct for 50 years). Between the demise of long-term solitary confinement at Eastern State in the 1860s and Mr. Hope's placement in solitary confinement in 1994, solitary for a term of decades was virtually unheard of. John F. Stinneford, *Experimental Punishments*,

95 NOTRE DAME L. REV. 39, 65-66, 71-72 (2019); Terry Allen Kupers, SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION & HOW WE CAN ABOLISH IT 25 (2017) (solitary confinement resurrected in 1990s). Mr. Hope's generation of prisoners is thus the first to be subjected to its ravages—precisely the sort of "experiment" the Founders worried about when they sought to ban "unusual" punishments.

Mr. Hope's sentence qualifies as "unusual" under the *Bucklew* Court's definition of the term, because long-term solitary confinement was barely ever used and, in any event, was "long disused" by the time Mr. Hope was placed in solitary confinement.

c. Contemporary standards. Finally, punishment can be unusual because it violates a "national consensus" reflected by the current practices of the 50 States. *See Roper v. Simmons*, 543 U.S. 551, 564 (2005). A national consensus has emerged against solitary confinement as a general matter; the consensus against *more than two decades* of solitary confinement is even more robust.

The Supreme Court has explained that "[t]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302,

331 (1989). By one count, only five State legislatures (Texas not among them) have expressly authorized indefinite solitary confinement outside of death row (Illinois, Louisiana, Pennsylvania, South Carolina, and Wisconsin); of those, both Pennsylvania and South Carolina anticipate that such confinement will be imposed pursuant to a criminal sentence, rather than at the discretion of prison officials. *See* Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 959-62 & nn.181-82, 190-91 (2018). Three additional State legislatures have authorized indefinite solitary confinement for individuals on death row. *Id.* at 959 n.183. Of the dozen or so other States where legislatures have voted to authorize solitary confinement, all impose time limits ranging up to 30 days per offense. *Id.* at 961-62 & nn.192-98. By the measure of how many states have actually "endorsed a given penalty," long-term solitary confinement is thus far more "unusual" than other practices the Supreme Court has outlawed. *Miller v. Alabama*, 567 U.S.460, 485-86 (2012); *see id.* at 465, 472, 482 (penalty at issue permitted in 29 States); *Atkins*, 536 U.S. at 306, 314-15, 319 (20 States); *Graham v. Florida*, 560 U.S. 48, 52-53, 62, 71, 80 (2010) (37 States).

As salient as the dearth of State legislatures that have affirmatively sanctioned long-term solitary confinement is the "consistency of the direction of change." *Atkins*, 536 U.S. at 315-16. In 2019 alone, a majority of States introduced legislation to ban or restrict solitary confinement. Amy Fettig, *2019 Was a Watershed Year in the Movement to Stop Solitary Confinement*, ACLU (December 16, 2019), https://www.aclu.org/news/prisoners-rights/2019-was-a-watershed-year-in-the-movement-to-stop-solitary-confinement; *see also* Maurice Chammah, *Stepping Down from Solitary Confinement*, THE ATLANTIC, Jan. 7, 2016, https://www.theatlantic.com/politics/archive/2016/01/solitary-confinement-reform/422565. And the number of individuals in solitary confinement has plummeted in recent years. *See* Stinneford, *Experimental Punishments*, at 75-76.

Of course, prison administrators in many States, like Texas, continue to impose solitary confinement, even where legislatures have not voted to allow such a punishment. But prison administrators, too, rarely subject inmates to decades of solitary confinement. The number of inmates in solitary confinement who have spent more than 20 years there, pursuant to either a statute or a prison official's discretionary

decision, is small—likely well below 650 inmates nationwide. *See* Appendix.[11] And almost half the inmates we know to be serving such a sentence are located in either Texas, Tennessee, or the federal prison system. Appendix; *see Graham*, 560 U.S. at 64-65 (concentration of particular punishment in small number of jurisdictions does not reflect national practice).

As relevant as the absolute number of offenders is the fraction of eligible offenders to whom the punishment is meted out. *See, e.g.*, *Graham*, 560 U.S. at 65-66; *Thompson v. Oklahoma*, 487 U.S. 815, 832-33 (1988). By that metric, too, Mr. Hope's sentence is staggeringly unusual: The few hundred prisoners noted above are a fraction of either the number of offenders serving sentences of 20 or more years or the number of offenders who have spent any time in solitary confinement. *See* Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, THE SENTENCING PROJECT, May 2017, at 10 (more than 200,000 inmates serving sentences of 50 years or longer); *Time-In-Cell 2019: A Snapshot of Restrictive Housing*, ARTHUR LIMAN CENTER FOR PUBLIC INTEREST LAW AT YALE LAW SCHOOL, Sept. 2020, at 5,

[11] Located at end of brief, following certificates.

https://law.yale.edu/sites/default/files/area/center/liman/document/time-in-cell_2019.pdf (more than 60,000 inmates in solitary confinement).

Finally, the Supreme Court has weighed whether the consensus based on objective indicators "reflects a much broader social and professional consensus." *Atkins*, 536 U.S. at 316 n.21. That consensus may be measured by the positions of "organizations with germane expertise." *Id.* Here, both the scientific community and the corrections community agree about the cruelty of long-term solitary confinement. *See supra*, at 19-20; Timothy Williams, *Prison Officials Join Movement to Curb Solitary Confinement*, N.Y. TIMES, Sept. 2, 2015, https://www.nytimes.com/2015/09/03/us/prison-directors-group-calls-for-limiting-solitary-confinement.html. That "broader social consensus" can also be measured by "the world community." *Atkins*, 536 U.S. at 316 n.21; *see also Roper*, 543 U.S. at 554. Today, there is an international consensus against solitary confinement, as reflected by the United Nations's Nelson Mandela Rules, which prohibit solitary confinement for longer than 15 days—a tenth of a percent of the time Mr. Hope has spent in solitary. G.A. Res. 70/175 (Jan. 8, 2016), Rules 43-44.

Mr. Hope thus at least plausibly alleges that his punishment is "unusual" by today's standards.

2. Twenty-six years (and counting) without meaningful human contact is cruel under the Eighth Amendment.

As catalogued *supra*, at 19-20, an enormous collection of contemporary research demonstrates that solitary confinement ravages the mind and body. That research confirms what prison officials have known for centuries: "Even when administered with the utmost humanity," solitary confinement "produces so many cases of insanity and of death as to indicate most clearly, that its general tendency is to enfeeble the body and the mind." Francis C. Gray, PRISON DISCIPLINE IN AMERICA 108-09 (1847).[12] Penal reformers and prison administrators alike have long expressed opposition to solitary confinement because of its "effects on the bodily and mental health of the prisoners." *Id.* at 43.[13]

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[12] *See also* Smith, *supra*, at 456-57, 508 tbl. A1 (2006) (surveying reports from 1800s "document[ing] significant damage to prisoners"); Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960-2006*, 57 STUD. L. POL. & SOC'Y 71, 7879 (2012) (hundreds of cases of death and madness among prisoners in solitary confinement during 1800s).

[13] *See also* Reiter & Rubin, *supra*, at 1615; *Medley*, 134 U.S. at 170 (noting public "revolt[]" against solitary confinement in England in 1830s).

As Alexis de Tocqueville put it, "absolute solitude, if nothing interrupt it, is beyond the strength of man"; "it does not reform, it kills." GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 5 (S. Ill. Univ. Press 1964).

For that reason, solitary confinement has always been recognized as a form of torture—precisely what the Eighth Amendment forbids. *See, e.g.*, *In re Kemmler*, 136 U.S. 436, 447 (1890) (Eighth Amendment outlaws torture); Stephen F. Eisenman, *The Resistable Rise & Predictable Fall of the U.S. Supermax*, MONTHLY REV., Nov. 2009, https://monthlyreview.org/2009/11/01/the-resistable-rise-and-predictable-fall-of-the-u-s-supermax/ (solitary confinement understood to be torture in 1800s). Charles Dickens, the great chronicler of destitution, wrote that solitary confinement is "immeasurably worse than any torture of the body," even though "its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh." Charles Dickens, AMERICAN NOTES FOR GENERAL CIRCULATION 81 (Chapman & Hall 1913), https://www.gutenberg.org/files/675/675-h/675-h.htm. Nearly two centuries later, this Court's sister circuit has found "robust support" for

the notion that "isolation can be as clinically distressing as physical torture." *See Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 574 (3d Cir. 2017).

Not only has solitary confinement been understood as torture; prisoners and observers have also viewed it as worse than death itself. A 1788 newspaper article "reported that a condemned man considered solitude 'infinitely worse than the most agonizing death.'" Mark E. Kann, PUNISHMENT, PRISONS, & PATRIARCHY 141 (2005).[14] Over the centuries, prisoners have routinely chosen death over solitary confinement. One nineteenth-century prisoner "threw himself from the gallery upon the pavement," while "[a]nother beat and mangled his head against the walls of his cell until he destroyed one of his eyes." Powers, *supra*, at 36. Hundreds of years later, prisoners in isolation routinely attempt suicide,

[14] *See also* Shapiro, *supra*, at 555 (group of prominent Philadelphia reformers suggested that it "may very safely be assumed as a principle that the prospect of long solitary confinement…would, to many minds, prove more terrible than even an execution") (quoting The Society, Established in Philadelphia, for Alleviating the Miseries of Public Prisons, EXTRACTS & REMARKS ON THE SUBJECT OF PUNISHMENT & REFORMATION OF CRIMINALS 4 (1790)); *id.* at 558-59 (Duke of La Rochefoucauld noted that death was less severe than "that most dreaded of all punishments: solitary confinement") (citing La Rochefoucauld-Liancourt, ON THE PRISONS OF PHILADELPHIA BY AN EUROPEAN 29-32 (1796)); Louis P. Masur, RITES OF EXECUTION 82-83 (1989) (president of the Philadelphia Court of Quarter-Sessions said solitary confinement was a "greater evil than certain death").

overcoming the challenge of doing so in a bare cell by swallowing glass from a light bulb, biting through their own veins, or volunteering to have their capital sentences consummated. Alex Kozinski, *Worse Than Death*, 125 YALE L.J. FORUM 230, 234 (2016).

Both because it can lead to self-mutilation and because restricting movement to a portion of a prison cell (in Mr. Hope's case, a portion the size of a telephone booth) has serious health consequences, solitary confinement is physically debilitating. But even if solitary confinement "involved no physical mistreatment," it would still violate the Eighth Amendment if it meant the "total destruction of the individual's status in organized society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Decades without meaningful human contact does just that. Without relationships with other flesh-and-blood human beings, Mr. Hope is destroyed just as totally as if he were stretched on a rack.

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Mr. Hope has spent more than half his life in near-total isolation. He is one of a vanishingly small number of inmates who have *ever* been placed in solitary confinement for so long, and he alleges there is no end in sight. Given centuries of evidence regarding the devastating effects of

solitary confinement, Mr. Hope's allegations are sufficient to state an Eighth Amendment claim.

II. Mr. Hope's Complaint Plausibly Alleges That His Decades In Solitary Confinement Implicate A Liberty Interest And That The Process Accorded Him Is A Sham.

Mr. Hope has been and continues to be deprived of adequate process regarding his solitary confinement. To make out a procedural due process claim, Mr. Hope must allege two things. First, he must allege that the circumstances of his confinement are sufficiently different from those ordinarily to be expected in prison as to implicate a liberty interest under the Due Process Clause. *Wilkinson v. Austin*, 545 U.S. 209, 222-23 (2005). Second, he must demonstrate that the process he is afforded in relation to that liberty interest does not comply with the Constitution. *Id.* Mr. Hope's complaint satisfies both standards.

A. Liberty interest. At the first step, this Court assesses whether decades of solitary confinement "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). The Supreme Court has supplied two data points on the "atypical and significant hardship" test. First, in *Sandin v. Conner*, the Supreme Court explained that 30 days in

disciplinary segregation was not sufficiently "atypical and significant" to create a liberty interest, since inmates who were not in segregation faced significant amounts of "lockdown time" and since plaintiff himself had at times requested segregation for his own protection. *Id.* at 486-87. Later, in *Wilkinson*, a unanimous Supreme Court held that indefinite placement in solitary confinement *did* create a liberty interest, focusing on the duration of the placement and explaining that the conditions "impose[d] an atypical and significant hardship under any plausible baseline." 545 U.S. at 223-24.

Mr. Hope's 26 years (and counting) in solitary confinement fall on the *Wilkinson* end of the spectrum; in fact, Mr. Hope's sentence has exceeded, by at least threefold, the longest stint in solitary at issue in *Wilkinson*. *See Austin v. Wilkinson*, 372 F.3d 346, 349 (6th Cir. 2004) (supermax facility opened in 1998, meaning inmates had been in solitary confinement for at most seven years before 2005 Supreme Court decision).

This Court's analysis in *Wilkerson v. Goodwin* is instructive. That case held that 39 years in solitary confinement not only implicated a liberty interest, but implicated that interest so clearly that Defendants

were not entitled to qualified immunity, because it was "difficult, if not impossible, to imagine circumstances more 'extraordinary'" than decades of solitary confinement. 774 F.3d at 857-58. This Court considered three factors: The duration of the challenged condition; its severity; and whether the challenged condition is "effectively indefinite." *Id.* at 855. All three factors weigh heavily in favor of finding that Mr. Hope's isolation is a liberty interest protected by the Constitution.

The *duration* of Mr. Hope's confinement—an extraordinary 26 years and counting—is more than sufficient to give rise to a liberty interest. As the *Wilkerson* court noted, the only courts to find no liberty interest have considered solitary confinement for 2.5 years or less, a "mere fraction" of the length of Mr. Hope's sentence. 774 F.3d at 855; *see Bailey v. Fisher*, 647 F. App'x 472, 476 (5th Cir. 2016) ("The Fifth Circuit recently suggested that two and a half years of segregation is a threshold of sorts for atypicality."). And other circuits have found that even sentences measured in days or months, rather than decades, give rise to a liberty interest. *See Colon v. Howard*, 215 F.3d 227, 231-32 (2d Cir. 2000) (305 days); *Brown v. Or. Dep't of Corr.*, 751 F.3d 983, 988 (9th Cir. 2014) (27 months). And most circuits have deemed a period shorter than

Mr. Hope's ongoing isolation sufficient to trigger a right to procedural due process. *See id.*; *Aref v. Lynch*, 833 F.3d 242, 248-49, 257 (D.C. Cir. 2016) (4-5 years); *Williams*, 848 F.3d at 561-65 (6-8 years); *Incumaa v. Sterling*, 791 F.3d 517, 531-32 (4th Cir. 2015) (20 years); *Selby v. Caruso*, 734 F.3d 554, 559 (6th Cir. 2013) (13 years); *Isby v. Brown*, 856 F.3d 508, 524-29 (7th Cir. 2017) ("Defendants sensibly do not contest the conclusion" that 10 years of solitary confinement creates a liberty interest); *Williams v. Norris*, 277 F. App'x 647, 648-49 (8th Cir. 2008) (12 years).

The *severity* of Mr. Hope's term in solitary confinement is also comparable to that found sufficient to state a liberty interest in *Wilkerson*. As in *Wilkerson*, inmates are "confined alone to their cells for 23 hours per day" with just one hour to exercise, "limited to isolated areas." *Wilkerson*, 774 F.3d at 855; ROA.65-68, 17. As in *Wilkerson*, Mr. Hope is "not afforded the same ability to partake in religious or educational opportunities or to enjoy other privileges as those housed in general population." 774 F.3d at 855-56; ROA.67. In fact, the severity of Mr. Hope's solitary confinement term is, in some ways, worse than that at issue in *Wilkerson* and in the Supreme Court's *Wilkinson* decision. The

inmates in *Wilkerson* were allowed contact visits, whereas Mr. Hope is not. 774 F.3d at 855-56; ROA.67. Mr. Hope's cell, at 9'x6', is smaller than the cells in *Wilkerson*, which, in turn, were smaller than the cells in *Wilkinson*. ROA.65-66; *Wilkerson v. Stalder*, 329 F.3d 431, 433 (5th Cir. 2003) (cells of "approximately 55 to 60 square feet"); *Wilkinson*, 545 U.S. at 214 (cells "measure 7 by 14 feet"). Unlike the inmates in *Wilkinson*, who received weekly phone calls, Mr. Hope has had one personal phone call since 1994. *Compare* ROA.67 *with Austin v. Wilkinson*, 189 F. Supp. 2d 719, 726 (N.D. Ohio 2002). And Mr. Hope, unlike the inmates in *Wilkinson*, is strip searched an average of four times daily. *See Incumaa*, 791 F.3d at 531 (noting that appellant's conditions of confinement "may, in fact, be worse in some respects" than those in *Wilkinson* because "[a]ppellant is subject to a highly intrusive strip search every time he leaves his cell").

As in *Wilkinson*, those conditions mean that Mr. Hope's experience in prison differs almost totally from his experience prior to being placed in solitary. Prior to placement in solitary, he could see visitors face-to-face, attend religious services, participate in group vocational and educational programming, hold a job, socialize with other prisoners, and

spend hours of his day outside his cell; now, he is confined to a 9'x6' cell for between 22 and 24 hours per day, allowed out only to exercise in a different enclosure. ROA.67. As a result of those differences, Mr. Hope suffers physical and psychological harms to which other prisoners are not subjected. *See, e.g.*, Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 292 (2018) (citing Craig Haney, *The Dimensions of 'Social Death': Psychological Reactions to Extremely Long-Term Solitary Confinement* (2017) (unpublished manuscript)) (comparing psychological effects of solitary confinement to psychological effects of incarceration in general population); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History & Review of the Literature*, 34 CRIME & JUST. 441, 453 (2006) (same). And as detailed *supra*, those differences extend to every detail of his daily life, from library privileges to security protocols, standards of hygiene to television access. *Supra*, at 6.

Finally, like the solitary confinement at issue in both *Wilkinson* and *Wilkerson*, Mr. Hope's solitary confinement is *effectively indefinite*. *Wilkinson*, 545 U.S. at 214-15; *Wilkerson*, 774 F.3d at 856. Mr. Hope has been in solitary confinement since 1994 and, as detailed further *infra*,

despite a half-dozen recommendations for release and a finding that he is not a security risk, he has been told that he will remain in solitary confinement. ROA.72-74. Both *Wilkinson* and *Wilkerson* considered the indefinite duration of solitary confinement a critical factor in identifying a liberty interest for procedural due process purposes. *Wilkinson*, 545 U.S. at 214-15; *Wilkerson*, 774 F.3d at 856.

The district court dismissed Mr. Hope's procedural due process claim in three sentences, citing exclusively to cases that predate *Wilkinson*. ROA.162. But as a unanimous Supreme Court explained in *Wilkinson* and as this Court confirmed in *Wilkerson*, Mr. Hope's 26 years and counting in solitary confinement "imposes an atypical and significant hardship under any plausible baseline" and thus entitles him to at least some process. *Wilkinson*, 545 U.S. at 223.[15]

[15] That accords with the way solitary confinement has historically been treated. In most cases brought by inmates, any hardships are "within the expected perimeters of the sentence imposed by a court of law," such that a criminal trial supplied all the necessary process. *Sandin*, 515 U.S. at 485. But confinement without human contact was never considered "a mere unimportant regulation as to the safe-keeping of the prisoner." *Medley*, 134 U.S. at 167. Instead, it has always been "an additional punishment" of a "severe kind." *Id.* at 169-70. At the time of the Founding, solitary confinement for a period of longer than a few days "could be imposed only by a court acting pursuant to a criminal sentencing statute." Shapiro, *supra*, at 546. And the Supreme Court has held that four weeks of solitary confinement before an execution was a new punishment over

B. Inadequate process. Because Mr. Hope's ongoing solitary confinement implicates a liberty interest, he is entitled to due process before it can be continued. "[W]henever process is constitutionally due, no matter the context, '[i]t . . . must be granted at a meaningful time and in a meaningful manner.'" *Proctor v. LeClaire*, 846 F.3d 597, 609 (2d Cir. 2017) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) (second alteration in original). In other words, "[i]t is not sufficient for officials to go through the motions of nominally conducting a review meeting." *Id.* at 610.

Mr. Hope has alleged that, although Defendants make a show of convening biannual State Classification Committee (SCC) reviews, these reviews are "a sham and meaningless." ROA.72, 74. Though the committee is empowered, on paper, to order an end to Mr. Hope's isolation, in practice, its members have disclaimed the authority. *Compare* Offender Orientation Handbook, *supra*, at 7 ("The SCC also

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and above the death sentence itself, so as to implicate the Ex Post Facto Clause. *Medley*, 134 U.S. at 174-75. Because solitary confinement of any length of time has been held to be a "punishment," for constitutional purposes, it plausibly triggers Mr. Hope's Sixth Amendment right to a jury trial; surely, then, the Due Process Clause entitles him to the far lesser procedural protection of some kind of hearing. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 163-64 (1963).

makes final decisions regarding administrative segregation."); ROA.72-73 (SCC "is supposed to determine whether prisoners remain in solitary confinement"), *with* ROA.73-74 (SCC members tell Mr. Hope they "don't have the authority to release" him, "I was told that's not my call," "that would be the Director's call," and "that's not my decision"). A half-dozen SCC members have cleared Mr. Hope for release, only to be overruled; eventually, SCC members were told not to recommend Mr. Hope's release, making any ostensible "review" meaningless. ROA.73-4, 76. In fact, the various correctional officials on the SCC spend his biannual reviews "talking about the availability of firewood and whether or not it can be delivered." ROA.72. The only explanation Mr. Hope has ever been given for his continued isolation is that he is "high profile"; he "has not once been told what he must do in order to be released." ROA.73-4.

Even if the various committees had not disclaimed their responsibility to evaluate Mr. Hope's placement, they cannot satisfy the Due Process Clause by conducting a review when they have already decided the outcome. As one of this Court's sister circuits put it, "Review with a pre-ordained outcome is tantamount to no review at all." *Proctor*, 846 F.3d at 610-12 (collecting cases from Third, Sixth, Eighth, and Tenth

Circuits); *see also Williamson v. Stirling*, 912 F.3d 154, 179-80 (4th Cir. 2018) ("Such 'rubber-stamp[ing]'…constitutes compelling evidence of 'arbitrary decisionmaking.'" (alteration in original)).

That's particularly so where the only plausible basis for Mr. Hope's ongoing isolation—his 1994 escape—is no longer relevant, since a separate State committee has determined he is no longer an "escape risk." *See* ROA.76. And even if Mr. Hope's escape *were* plausibly relevant to his ongoing solitary confinement, he is still entitled to the opportunity to show that he should not remain in isolation; in *Wilkerson*, this Court held that even two inmates who had murdered a correctional officer were entitled to meaningful process. 774 F.3d at 849, 858-59.

* * *

Even if the Constitution tolerates "this level of deprivation," it cannot be "reflexively imposed without individualized justification." *Williams*, 848 F.3d at 574. "Few other incidents of prison life involve such a level of deprivation as disciplinary segregation." *Orellana v. Kyle*, 65 F.3d 29, 32 (5th Cir. 1995), *overruled on other grounds by Wilkerson*, 774 F.3d at 853. Because Mr. Hope has alleged that he is subjected to one of the most devastating and extraordinary "incidents of prison life" possible,

he is entitled at the very least to process that actually considers whether he must remain in solitary confinement.

III. Mr. Hope Has Plausibly Alleged That Prison Officials Are Retaliating Against Him For Exercising His First Amendment Rights.

Mr. Hope's allegations state a classic retaliation claim: Mr. Hope exercised a constitutional right (here, his First Amendment right to file prison grievances); shortly thereafter the subject of his grievance confiscated the very typewriter he used to exercise his First Amendment rights, planted contraband in his cell, and pepper sprayed him; and that same official then imposed a debilitating policy—continued by Defendants Harris and Rehse to this day—moving him from cell to cell on a weekly basis when, prior to the exercise of his constitutional right, he had not been moved at all. *Supra* at 7-8.

Such allegations are similar to those this Court has held are sufficient to make out a claim for retaliation. In *Jackson v. Cain*, 864 F.2d 1235 (5th Cir. 1989), this Court reversed a grant of summary judgment to defendants—therefore under a far more demanding standard than the one faced by Mr. Hope at a motion to dismiss—because changing a prisoner's job following the filing of a grievance "raised an issue of

material fact regarding the motives behind" the decision, even though prison officials had put forth evidence that the plaintiff's job performance was unsatisfactory. at 1248-49. In *Richard v. Martin*, 390 F. App'x 323 (5th Cir. 2010), this Court found that plaintiff had stated a claim where he filed a grievance and his placement was subsequently changed—a "chronology of events from which retaliatory motive can plausibly be inferred," particularly since "defendants did not provide any explanation" for the change. *Id.* at 325-26; *see also Petzold v. Rostollan*, 946 F.3d 242, 253-54 (5th Cir. 2019) (where subject of grievance was instigator of retaliatory acts, inference of retaliation is strengthened).

The district court was simply wrong to conclude that Mr. Hope did not "allege a chronology of events from which retaliation may plausibly be inferred." ROA.164; *see also* ROA.141-42. First, the timing of the cell-move policy creates an inference of retaliation at this early stage: Prior to filing a grievance against McMullen, Mr. Hope was not being moved; after the filing, he was moved on a weekly basis. *See Gonzales v. Gross*, 779 F. App'x 227, 230 (5th Cir. 2019). Additionally, the cell-move policy was implemented at the same time as a series of events—planting contraband; pepper spraying without cause and then leaving Mr. Hope

nude, sans food, and without anything to wipe off the chemical for days; and confiscating Mr. Hope's typewriter—that could not be anything *but* retaliatory; the first two are illegal, and the third is so closely tied to the act of filing a grievance that it is plausibly retaliatory. Second, Defendants have not suggested there could be any legitimate reason to move Mr. Hope each week; as in *Richard*, the lack of any alternative explanation increases the likelihood the cell moves are retaliatory. 390 F. App'x at 325. Finally, though the cell-move policy has been carried on by multiple prison officials, including Defendants Harris and Rehse, subsequent to that time, it was originally put in place by the subject of Mr. Hope's grievances, which this Court has held makes retaliation a more plausible inference. *See Petzold*, 946 F.3d at 253-54.

Mr. Hope has alleged enough at this early stage to infer that Defendants are retaliating against him for his exercise of his First Amendment right.

IV. Mr. Hope Has Standing And The Eleventh Amendment Does Not Bar His Request For Injunctive Relief.

Mr. Hope filed suit against seven prison officials in their individual and official capacities for both injunctive relief and damages. ROA.64-65. The magistrate judge correctly ruled that the Eleventh Amendment bars

Mr. Hope from seeking money damages from Defendants in their official capacities. But the magistrate judge did not provide any reason why Mr. Hope could not seek money damages from Defendants in their individual capacities. And the magistrate judge erred in finding that Article III and the Eleventh Amendment bar Mr. Hope from seeking injunctive relief from Defendants in their official capacities.

The magistrate judge held that Mr. Hope did not have standing because the suit could not redress Mr. Hope's injury. ROA.137-38. But "[w]hen the suit is one challenging the legality of government action or inaction" and the plaintiff "is himself an object of the action," "there is ordinarily little question…that a judgment preventing or requiring the action will redress it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). Here, of course, Mr. Hope is the "object" of the prison's continuing solitary confinement and retaliation, so a judgment preventing those government actions will redress his harm.

The magistrate judge was also wrong to hold the Eleventh Amendment bars relief. ROA.136-37. The Eleventh Amendment shields State actors in their official capacities against suit, but the *Ex parte Young* exception is a "gaping hole" in that shield. *Brennan v. Stewart*, 834

F.2d 1248, 1252 (5th Cir. 1988). "[H]uge number[s]" of cases—including "all institutional litigation involving state prisons"—are brought under the *Ex parte Young* exception; "[t]he exception is so well established that" virtually none even "mentions the Eleventh Amendment or *Ex parte Young*." *Id.* at 1252 n.6. Any State defendant may be sued in their official capacity just so long as they have "some connection" with the allegedly unconstitutional act. *Air Evac. EMS, Inc. v. Tex. Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 518-19 (5th Cir. 2017). Each of the Defendants here has the requisite "some connection" with Mr. Hope's solitary confinement.

Start with Defendant Harris, the warden of the prison where Mr. Hope is housed. A prison's warden is the prototypical defendant in an Eighth Amendment case—the key precedent is called *Farmer v. Brennan* because Edward Brennan was the warden of the prison where Dee Farmer was housed. 511 U.S. 825 (1994).[16] Similarly, the three other

[16] The magistrate judge held that Mr. Hope cannot seek injunctive relief against Warden Harris because he is "no longer the warden at the Polunsky Unit." ROA.138. The magistrate judge did not cite the basis for that assertion, but in any event, "[i]n an official-capacity action in federal court, death or replacement of the named official…result[s] in automatic substitution of the official's successor in office." *Kentucky v. Graham*, 473 U.S. 159, 166 n.11 (1985); *see* Fed. R. Civ. P. 25(d)(1).

administrators have the requisite "some connection" to Mr. Hope's placement in solitary confinement by virtue of the scope of their authority: Rehse "oversees the conditions of confinement and treatment" of inmates in solitary confinement, Eschessa the "overall treatment, conditions of confinement, and classifications of Plaintiff," and White "the overall classifications of the department." ROA.64-65.

Moreover, Mr. Hope has made specific factual allegations regarding how each Defendant is involved in his mistreatment. Each Defendant has the authority to return Mr. Hope to general population: Harris and Rehse through their participation in the SCC and Eschessa and White by virtue of their positions. Each chooses not to (in White's case, because she "doesn't want the responsibility that goes along with making that decision"). ROA.72, 75-76. Defendants Harris, Rehse, and Eschessa are responsible for the strip-search policy, and the former two are responsible for the unsanitary conditions of the secure housing unit—two of the crueler incidents of Mr. Hope's confinement. ROA.66, 69. Defendants Harris and Rehse continue the retaliatory cell-move policy begun eight

years ago.[17] ROA.69-72, ROA.77. And Defendant Rehse encourages pepper spraying and tear gassing inmates in solitary confinement, discourages cleanup or medical help after, and personally saw that Mr. Hope was placed in a cell with black mold. ROA.68, ROA.70-71.

Finally, the various members of the State Classification Committee—Defendants Enloe, Benet, and Fiveash—are clearly proper defendants in a case stemming from Mr. Hope's classification. In *Wilkerson v. Goodwin*, for instance, plaintiffs in solitary confinement sued two "classification officers"; in over 13 years of litigation, no one ever raised concerns about *Ex parte Young*. Mr. Hope's allegations that these defendants have the authority to reclassify prisoners are confirmed by the prison's own regulations, which explain that the State Classification Committee "makes final decisions regarding administrative segregation." Offender Orientation Handbook, Texas Department of Criminal Justice, Director of the Correctional Institutions Division 7 (2017), https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf; ROA.65.

[17] Mr. Hope agrees that his retaliation claim does not lie against Defendants Eschessa, White, Enloe, Benet, and Fiveash.

In short, Mr. Hope has brought a classic conditions of confinement suit against a classic set of defendants, and the district court's dismissal must be reversed.

CONCLUSION

For the aforementioned reasons, this Court should reverse the district court's order dismissing Mr. Hope's case.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and 5th Cir. R. 32.3, I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) but including the Appendix below.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolhouse typeface.

Date: September 24, 2020

s/ Easha Anand
Easha Anand

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: September 24, 2020

s/ Easha Anand
Easha Anand

APPENDIX

Jurisdiction	**Number of Inmates in Solitary Confinement for More Than 20 Years**
Alabama	≤1[1]
Alaska	0[2]
Arizona	≤30[1]
Arkansas	15[3]
California	0[4]
Colorado	0[1]
Connecticut	0[1]
Delaware	0[1]
Federal	≤155[2]
Florida	13[5]
Georgia	≤1[1]
Hawaii	0[2]
Idaho	≤1[6]
Illinois	≤16[2]
Indiana	≤8[1]
Iowa	0[2]
Kansas	0[1]
Kentucky	0[1]
Louisiana	≤18[1]
Maine	0[1]

Maryland	0[1]
Massachusetts	0[1]
Michigan	0[2]
Minnesota	0[1]
Mississippi	≤20[1]
Missouri	≤2[2]
Montana	≤2[7]
Nebraska	0[1]
Nevada	UNKNOWN
New Hampshire	0[8]
New Jersey	0[9]
New Mexico	0[10]
New York	≤8[1]
North Carolina	≤7[1]
North Dakota	0[1]
Ohio	≤24[1]
Oklahoma	≤11[1]
Oregon	≤1[1]
Pennsylvania	≤15[1]
Rhode Island	0[1]
South Carolina	0[1]
South Dakota	≤2[1]
Tennessee	≤162[1]
Texas	129[11]

Utah	0[2]
Vermont	0[1]
Virginia	0[6]
Washington	≤10[1]
West Virginia	2[12]
Wisconsin	0[1]
Wyoming	≤1[1]

TOTAL: ≤653, excluding Nevada.

[1] Correctional Leaders Assoc. & The Liman Center for Pub. Interest Law at Yale Law Sch., *Time-in-Cell 2019: A Snapshot of Restrictive Housing* 12-13 Table 2 (Sept. 2020). Survey reports only number of inmates who have been in solitary confinement for more than six years; thus, the number of inmates who have been in solitary confinement for more than 20 years is likely far lower than the numbers reported here.

[2] Assoc. of State Corr. Adm'rs. & The Liman Center for Pub. Interest Law at Yale Law Sch., *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell* 15 Table 2 (Oct. 2018). Survey reports only number of inmates who have been in solitary confinement for more than six years; thus, the number of inmates who have been in solitary confinement for more than 20 years is far lower than the numbers reported here.

[3] Email from Cindy Murphy, Communications Director, Arkansas Department of Corrections to Easha Anand, Counsel for Appellant (Sept. 14, 2020) (on file with counsel).

[4] Alex Emslie, A Year After Settlement, Hundreds of Prison Isolation Cells Empty, KQED NEWS (Sept. 4, 2016), https://www.kqed.org/news/11067321/a-year-after-settlement-hundreds-of-state-prison-isolation-cells-empty

[5] Email from Sumayya Saleh, Staff Attorney, Southern Poverty Law Center to Easha Anand, Counsel for Appellant (Aug. 17, 2020) (on file with counsel).

[6] Assoc. of State Corr. Adm'rs. & The Liman Center for Pub. Interest Law at Yale Law Sch., *Aiming to Reduce Time-in-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the*

Potential of Policy Changes to Bring About Reforms 27 Table 4 (Nov. 2016). Survey reports only number of inmates who have been in solitary confinement for more than six years; thus, the number of inmates who have been in solitary confinement for more than 20 years is likely far lower than the numbers reported here.

[7] CLA-Liman Survey 2019, at 13 n.±.

[8] CLA-Liman Survey 2019, at 13 n.£.

[9] Catherine Kim, *Solitary Confinement Isn't Effective. That's Why New Jersey Passed a Law to Restrict It*, VOX (July 11, 2019), https://www.vox.com/policy-and-politics/2019/7/10/20681343/ solitary-confinement-new-jersey.

[10] Email from Catherine Ahring, Paralegal, New Mexico Corrections Department—Office of General Counsel to Easha Anand, Counsel for Appellant (Sept. 8, 2020) (on file with counsel).

[11] Michael Barajas, *The Prison Inside Prison*, TEX. OBSERVER (Jan. 21. 2020), https://www.texasobserver.org/solitary-confinement-texas.