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

REPLY BRIEF

Daniel M. Greenfield
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8538
daniel-greenfield@law.northwestern.edu

Easha Anand
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore Street, #380-15875
San Francisco, CA 94115
(510)588-1274
easha.anand@macarthurjustice.org

ATTORNEYS FOR PLAINTIFF-APPELLANT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The very first sentence of the factual allegations in Dennis Wayne Hope's complaint reads: "Plaintiff Dennis Wayne Hope is a 49 year old prisoenr [sic] who has been continiously [sic] held in solitary confinement (Ad. Seg.) for over twenty-three (23) years.." ROA.65. Mr. Hope alleges that his solitary confinement has "almost totally deprive[d] him of human contact, mental stimulus, physical activity, personal property, and human dignity" since 1994; that "decades of isolation ha[ve] deteriorated both his physical and mental faculties"; and that spending virtually every waking minute alone in his cell for over two decades (and counting) has resulted in chronic pain, hallucinations, and thoughts of suicide. ROA.67-72.

The gravamen of Mr. Hope's complaint, in other words, is the devastation—recognized for centuries, by experts of all stripes and jurists of all ideologies—that solitary confinement has wrought on his body, mind, and spirit. But Defendants' response brief does not once use the words "solitary" or "isolation." Because Defendants' arguments don't address the core of Mr. Hope's claims, they miss the mark:

- *First*, Defendants say Mr. Hope cannot state an Eighth Amendment claim, arguing that he "cannot expect the amenities, conveniences, and services of a good hotel" while in prison. Response Brief (RB) 7. But Mr. Hope has alleged a *quarter century of solitary confinement*—the kind of confinement one Supreme Court justice has termed a "penal tomb," another "a regime that will bring you to the edge of madness, perhaps to madness itself," and a third a "further terror" even above and beyond a death sentence. *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2018) (statement of Sotomayor, J., respecting denial of certiorari); *Davis v. Ayala*, 576 U.S. 257, 288 (2015) (Kennedy, J., concurring); *In re Medley*, 134 U.S. 160, 170 (1890). That's not a subpar hotel stay; it's the heart of what the Eighth Amendment prohibits.
- *Second*, Defendants assume that Mr. Hope's past crimes somehow vitiate his right to procedural due process. RB9-14. But prior cases from both this Court and the Supreme Court have made clear that Mr. Hope's past crimes do not undermine his constitutionally protected liberty interest in avoiding long-term solitary confinement.

The process afforded by Defendants is insufficient, under the Due Process Clause, to protect that interest. Opening Brief (OB) 44-54.

- *Third*, Defendants argue—in two conclusory sentences—that Mr. Hope failed to make out a First Amendment retaliation claim because he did not adequately allege retaliatory motive or causation. RB14-15. They are wrong. Mr. Hope's complaint alleges that, from 1994 through 2012, he was not moved between cells with any unusual frequency, but after engaging in protected First Amendment activity in 2012, he was moved between cells on a weekly basis—the quintessential chronology from which retaliation may be inferred. ROA.69-70.
- *Fourth*, Defendants raise various threshold objections and argue this Court should not reach the merits of Mr. Hope's claims. None of these objections have any purchase. For example, Defendants claim that because defendants Harris and Rehse no longer work at the Polunsky Unit (the prison where Mr. Hope is confined), claims against the two for injunctive relief should be dismissed. But Federal Rule of Civil Procedure 25(d) provides for automatic substitution of the two officials' successors, not dismissal. OB56-61.

Perhaps more telling than Defendants' responses to Mr. Hope's arguments are those arguments to which Defendants don't respond. Defendants don't deny that solitary confinement has a devastating effect on prisoners' mental and physical health, a truth that medical professionals, correctional experts, and courts agree on. OB16-23. They don't deny that solitary confinement of the length Mr. Hope is enduring is "cruel and unusual" within the original meaning of the Eighth Amendment—unheard of at the time of the Founding, never used for centuries apart from an isolated and failed experiment in the 1800s, and rare even today. OB28-44. They don't explain why Mr. Hope's case is any different from *Wilkerson v. Goodwin*, 774 F.3d 845 (5th Cir. 2014), which squarely held that prisoners in long-term solitary confinement have a liberty interest protected by the Due Process Clause. OB44-54.

The list goes on. But in short, nothing in Defendants' 12 pages of argument meaningfully shores up the district court's decision to dismiss Mr. Hope's complaint. This Court should reverse that dismissal and remand for further proceedings.

ARGUMENT AND AUTHORITIES

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

Mr. Hope's complaint stated an Eighth Amendment claim in at least two ways. First, the Eighth Amendment is violated when prison officials are deliberately indifferent—that is, when there is (1) a substantial risk of objectively serious harm that (2) officials knew of and disregarded. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Mr. Hope has more than adequately alleged that Defendants know of the mental and physical deterioration decades of solitary confinement are causing him but do nothing in response. Mr. Hope's complaint also states an Eighth Amendment claim in a second way: It describes a punishment that is so rare and so harsh that it is categorically prohibited by the Eighth Amendment. OB28-44; *see Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019).

Start with *Farmer*. Near-total isolation since 1994 has surely created a substantial risk of objectively serious harm sufficient to satisfy the first prong of the *Farmer* test. 511 U.S. at 834; *see* OB16-23. To recapitulate, Mr. Hope alleged that he has been continuously held in solitary confinement for more than a quarter century, OB 4-5 (citing

ROA.65-67); that he spends between 22 and 24 hours per day alone in a 54-square-foot cell, OB4 (citing ROA.65-67); that he eats alone in that cell, OB5 (citing ROA.66); that he exercises alone in another cell, OB5 (citing ROA.67); that he cannot socialize with other prisoners, OB5 (citing ROA.67); that he has been permitted only one phone call to his family in 26 years, OB5 (citing ROA.67); that he cannot participate in congregate worship, OB5 (citing ROA.67); that a quarter century "almost totally" without "human contact, mental stimulus, [and] physical activity" is destroying his mind and his body, OB5-6 (citing ROA.71-72); that he is plagued by hallucinations, OB5 (citing ROA.71-72); that he endures chronic pain, OB5-6 (citing ROA.71); that he suffers from anxiety, depression, and insomnia, OB6 (citing ROA.71-72); that he must fend off suicidal impulses, OB17 (citing ROA.72); and that Defendants have informed him that he will not leave solitary confinement until he deteriorates further or is in a body bag, OB17 (citing ROA.74).

Defendants do not argue that Mr. Hope's ongoing solitary confinement is anything less than "objectively serious." In fact, Defendants' Eighth Amendment argument does not so much as

reference a single one of Mr. Hope's allegations regarding solitary confinement. RB6-9. Likewise, Defendants do not cite a single solitary confinement case. RB7

Defendants instead mischaracterize Mr. Hope's complaint as a "litany of grievances" concerning a "lack of condiments," meals featuring "peanut butter sandwiches," and the like.[1] RB6. Responding to *those* allegations, Defendants argue that there is "no right to a stress-free environment," that "the Constitution does not protect prisoners from discomfort and inconvenience," and that "prisoners cannot expect the amenities, conveniences, and services of a good hotel." RB7 (internal citations and quotation marks omitted). But Mr. Hope, of course, did not file suit because he is confined at the Polunsky Unit rather than at the St. Anthony Hotel. Instead, he alleged that his body and mind have

[1] Even under Defendants' characterization, dismissal still would not be warranted. Setting aside the quarter century of solitary confinement, Mr. Hope's "litany of grievances" included allegations that Defendants hold him in cells covered in feces, urine, and black mold; regularly gas him with pepper spray; and subject him to constant noise that prevents him from sleeping. ROA.66, 68, 70-71. Any one of those conditions has undoubtedly exposed Mr. Hope to a substantial risk of serious harm even independent of his decades of solitary confinement. For instance, the Supreme Court recently held that holding a prisoner in a cell covered in raw sewage for just six days not only violated the Eighth Amendment but did so sufficiently obviously that qualified immunity was unwarranted. *Taylor v. Riojas*, No. 19-1261, 2020 WL 6385693, at *1-2 (U.S. Nov. 2, 2020).

become unsound as a result of more than two-and-a-half decades in solitary confinement. OB17 (citing ROA.71-72). Those allegations are both plausible and objectively serious. OB17-18 (discussing *Fussell v. Vannoy*, 584 F. App'x 270, 271 (5th Cir. 2014)).

In his opening brief, Mr. Hope also listed four reasons his complaint was sufficient to establish that Defendants knew of and disregarded the serious harm occasioned by more than two decades of solitary confinement: (a) He reported his own symptoms to prison personnel, and Defendants knew that other prisoners in long-term solitary confinement at the Polunsky Unit have self-mutilated or committed suicide; (b) the risks associated with solitary confinement are so well-known that any correctional official would be aware of them; (c) the Texas prison system's own policies reflect an understanding of the dangers of solitary confinement; and (d) there is no penological purpose to his continued confinement. OB23-28. Mr. Hope also alleged that, despite this knowledge, Defendants continue to perpetuate his dangerous isolation. OB24.

Again, Defendants fail to engage with any of Mr. Hope's allegations. They simply announce that Mr. Hope did not "satisfy the

extremely high standard of showing the defendants acted with deliberate indifference." RB9.[2] But Defendants' bald statement altogether ignores Mr. Hope's complaint, which articulates at least four bases for demonstrating deliberate indifference, each of which is independently sufficient under controlling case law. OB24-28.

Mr. Hope's complaint also states an Eighth Amendment claim for another reason: Twenty-six years of solitary confinement is both sufficiently uncommon and sufficiently brutal to warrant categorical prohibition under the Eighth Amendment. *See Bucklew*, 139 S. Ct. at 1123. Mr. Hope devoted 16 pages of his opening brief to that argument, explaining that his quarter-century solitary confinement is "cruel" by any metric and "unusual" whether measured against the practices of

[2] Defendants also suggest Mr. Hope's complaint fails because he did not show "egregious intentional conduct." RB8-9. That badly misstates the law: The Supreme Court has explained that "purposeful or knowing conduct is *not* [] necessary to satisfy the *mens rea* requirement of deliberate indifference for claims challenging conditions of confinement." *Farmer*, 511 U.S. at 836 (emphasis added); *see also Garza v. City of Donna*, 922 F.3d 626, 634-35 (5th Cir. 2019) (deliberate indifference "is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result"). In any event, Mr. Hope has shown egregious intentional conduct—he has alleged not only that Defendants know of the harm they are causing him but also that they will not let him out of solitary confinement until he further deteriorates. OB24 (discussing ROA.74).

the Founding era, the centuries since, or today's prisons.[3] OB28-44, A1-A4. Defendants say not one word in response.

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.

To state a procedural due process claim, Mr. Hope was required to plausibly allege two things. First, that continuous solitary confinement since 1994 constitutes an "atypical and significant hardship" when judged against the "ordinary incidents of prison life," which creates a constitutional "liberty interest" in avoiding that hardship. *Wilkinson v. Austin*, 545 U.S. 209, 222-23 (2005). Second, that Defendants infringe upon that "liberty interest" without adequate procedural protections. *Id.* at 224-25. Mr. Hope adequately alleged both. OB44-54.

Defendants don't meaningfully contest the first. This Court considers three factors to gauge "atypical and significant hardship": The duration of the challenged hardship, its severity, and whether it is effectively indefinite. *Wilkerson v. Goodwin*, 774 F.3d 845, 854-55 (5th Cir. 2014). In this case, all three factors require a finding that Mr. Hope

[3] This brief includes an Appendix estimating the number of prisoners in each State who have spent more than 20 years in solitary confinement. *See infra* at A1-A4. Estimates updated since the opening brief have been highlighted in yellow.

is suffering an "atypical and significant hardship." First, the stunning duration of Mr. Hope's solitary confinement—more than a quarter century and counting—entitles him to procedural protections. OB46-47. As this Court has recognized, "two and a half years of segregation is a threshold of sorts for atypicality"; Mr. Hope's time in solitary confinement has exceeded that "threshold" by ten times. *Bailey v. Fisher*, 647 F. App'x 472, 476 (5th Cir. 2016); *see also Wilkerson*, 774 F.3d at 855. Second, the conditions of Mr. Hope's solitary confinement are sufficiently severe as to entitle him to meaningful process. OB47-49; *see Wilkinson*, 545 U.S. at 222-23; *Wilkerson*, 774 F.3d at 857-58. Mr. Hope spends 22-24 hours a day alone in his cell, exercises alone, is forbidden from socializing with other prisoners, cannot call family members, and has become physically and psychologically ill as a consequence of this intense isolation. *Id.* Third, Mr. Hope's solitary confinement is effectively indefinite—he has been told by multiple prison officials that he's unlikely to ever be released. OB49-50.

Defendants' only rejoinder is that prison officials may impose isolation in perpetuity because of the crimes for which Mr. Hope was incarcerated and because of an escape in 1994. RB10-12. But the cases

Defendants rely upon for this proposition almost all predate the seminal cases on this question, the Supreme Court's *Wilkinson v. Austin* (2005), and this Court's *Wilkerson v. Goodwin* (2014). RB10-12. *Wilkinson* and *Wilkerson* make plain that "the recognized need to afford prison officials wide latitude to maintain safety and order in the prisons they manage must coexist with constitutional dictates"—here, the requirement to afford due process to *any* prisoner subjected to an "atypical and significant hardship," regardless of their crime of conviction or behavior in prison. *Wilkerson*, 774 F.3d at 852-53. The class members in *Wilkinson*, for instance, had been convicted of murder, kidnapping, and similarly seriously crimes. *Austin v. Wilkinson*, 189 F. Supp. 2d 719, 728-30 (N.D. Ohio 2002). In *Wilkerson*, two of the plaintiffs had murdered a correctional officer. 774 F.3d at 849, 858-59. Those facts did not play any role in the analysis of whether plaintiffs had suffered an "atypical and significant hardship" and were entitled to process. *Id.* at 849, 851-57.

Because Mr. Hope's quarter century of solitary confinement constitutes an "atypical and significant hardship," he is entitled to procedural due process, which, at minimum, guarantees periodic

opportunities to meaningfully contest the necessity of continued isolation. *Wilkinson*, 545 U.S. at 211, 224; *see also Sahara Health Care, Inc. v. Azar*, 975 F.3d 523, 530 (5th Cir. 2020) (due process requires that "notice and an opportunity to be heard be granted at a meaningful time and in a meaningful manner") (internal quotations omitted).

As Mr. Hope explained in his complaint, although Defendants convene biannual State Classification Committee (SCC) reviews, those reviews do not comply with the Fourteenth Amendment because they are "a sham and meaningless." OB51 (quoting ROA.72, 74). Indeed, although the SCC is entitled by prison policy to "make[] final decisions regarding administrative segregation," its members steadfastly refuse to exercise that authority and, in fact, disclaim it. OB9-10, 51-52. As a consequence, Mr. Hope's SCC reviews are hollow formalities that allow for only one outcome: a rubber stamp perpetuating his solitary confinement. OB9-10, 51-53. Defendants no longer bother with even a veneer of legitimacy—at one recent review, Defendants used the time to talk about "the availability of firewood and whether or not it can be delivered." OB10 (quoting ROA.72).

The Constitution is not satisfied by a committee that disavows any authority to actually release Mr. Hope from solitary confinement. *See Schaper v. City of Huntsville*, 813 F.2d 709, 715-16 (5th Cir. 1987) (due process requires hearing at which plaintiff "can receive redress"). Nor is it satisfied by a committee that simply rubber stamps continued solitary confinement; as one circuit put it, due process is "not an inconvenient ritual intended to shelter officials from liability so that they may mechanically continue an inmate's confinement." *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 575-76 (3d Cir. 2017); *see also Proctor v. LeClaire*, 846 F.3d 597, 610-12 (2d Cir. 2017) (similar; collecting cases from the Third, Sixth, Eighth, and Tenth Circuits); *Isby v. Brown*, 856 F.3d 508, 527-29 (7th Cir. 2017) (similar).

Defendants' only argument regarding the process afforded Mr. Hope is based on two misreadings of Mr. Hope's complaint. First, they suggest that the director of the Texas Department of Criminal Justice "may have retained sole authority regarding plaintiff's possible release to General Population." RB12. But that's not what Mr. Hope alleged. Fairly read, Mr. Hope's complaint alleges that the *SCC* has "sole authority" to release him and that blaming the director—who is not a

member of the SCC—is just one of many (false) excuses members provide for refusing to release Mr. Hope. ROA.64-65, 72-74. That allegation is more than sufficiently plausible to survive a motion to dismiss. For one thing, Texas's own handbook for prisoners—authored by the director himself—claims that the SCC, not the director, "makes final decisions regarding administrative segregation." *See* Offender Orientation Handbook, Tex. Dep't of Criminal Justice, Dir. of the Corr. Insts. Division 7 (2017), https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf. For another, it would be passing strange for the SCC to convene twice a year for a hearing if it in fact had no authority to release Mr. Hope.[4] ROA.65.

Indeed, if only the director of the prison system has authority to release Mr. Hope, that would make the due process problem worse, not better. Clearly, if the handbook Texas gives to its prisoners affirmatively misleads them by instructing that release authority is

[4] Defendants also repeatedly claim that the magistrate judge "correctly found" that SCC does not have the power to release Mr. Hope. *E.g.*, RB5-6, 12. But of course, the court below had no power to "find" any facts at this preliminary stage—Mr. Hope's allegations must be accepted as true. *See, e.g.*, *Cent. Laborers' Pension Fund v. Integrated Elec. Servs. Inc.*, 497 F.3d 546, 550 (5th Cir. 2007).

vested in the SCC, then Mr. Hope does *not*, in fact, receive the "opportunity to challenge" his solitary confinement that Defendants concede is a minimum requisite of due process. *See* RB13. After all, Mr. Hope has no way of presenting argument to the director, before whom he never receives a hearing. *Id.*; *Wilkinson*, 545 U.S. at 211 ("a fair opportunity for rebuttal" is "among the most important procedural mechanisms" for procedural due process).

Defendants misread Mr. Hope's complaint a second way: They suggest Mr. Hope has "tacitly acknowledg[ed] in his pleadings that he has received adequate due process" because he has "been given notice of classification hearings, has had an opportunity to challenge the decision, periodic reviews have been provided to him, committee members have reviewed his file, and it has been extensively discussed with him." RB13. Again, Mr. Hope's allegations—which must be taken as true at this junction—belie that characterization: He is denied "an opportunity to challenge the decision," because the SCC disclaims the authority to remove him from solitary confinement; he has not been given "periodic reviews," because twice-yearly conversations about firewood can hardly be called "reviews"; and any "extensive[]

discuss[ions]" about his file can't comply with the Constitution if the SCC insists on passing the buck to other actors who do not participate in the hearings. ROA.72-74.

For 26 years and counting, Defendants have subjected Mr. Hope to an "atypical and significant hardship." *See Wilkerson*, 774 F.3d at 857-58. As a consequence, Mr. Hope has long been entitled to a *meaningful* opportunity to challenge his continuing solitary confinement. *Sahara Health Care, Inc.*, 975 F.3d at 530. A rubber stamp and conversations about firewood do not provide that opportunity. Mr. Hope has stated a claim for a violation of his right to procedural due process.

III. Mr. Hope Has Plausibly Alleged That Prison Officials Retaliated Against Him For Filing A Grievance.

Mr. Hope alleges that from 1994-2012, he was rarely moved between cells. ROA.69-70. In 2012, he filed a grievance against a prison official. ROA.69-70. Since then, he has been moved on a weekly basis, often to cells that are filthy (covered by feces, urine, or black mold). ROA.70-71. In total, Defendants moved Mr. Hope between cells 263 times from 2012 through 2018.[5] ROA.70-71. As explained in Mr. Hope's

[5] The prison official also retaliated against Mr. Hope by, among other things, planting a contraband screwdriver in Mr. Hope's cell, triggering disciplinary

opening brief, *see* OB54-56, those allegations state a chronology far more suggestive of retaliation than cases this Court has allowed to survive a motion to dismiss (or even to survive summary judgment).

To survive a motion to dismiss on a First Amendment retaliation claim, Mr. Hope just needs to allege: (1) that he was exercising his First Amendment right; (2) that Defendants acted with retaliatory motive; (3) that Defendants took some adverse action against him; and (4) that the adverse action was caused by the retaliatory motive. *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006). Defendants do not contest that (1) Mr. Hope was exercising a constitutional right when he filed his grievance or that (3) the weekly cell moves constitute an adverse act. RB15.

Defendants do contest—in two sentences—that Mr. Hope's complaint plausibly alleges retaliatory motive or causation. To show those two elements, Mr. Hope need not present direct evidence and can

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proceedings; pepper spraying Mr. Hope, then leaving him nude in his cell for eight days with nothing to clean off the pepper spray burning his skin; depriving him of food for 48 hours; and confiscating the very typewriter he used to draft and file his grievance. ROA.69-70, 77; *see also* Keri Blakinger, *4 Texas 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.

instead "allege a chronology of events from which" motive and causation "may plausibly be inferred." *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995). In *Butts v. Martin*, 877 F.3d 571, 589 (5th Cir. 2017), for instance, this Court reversed a grant of summary judgment to a prison official defendant where a prisoner-plaintiff was sent to solitary confinement immediately after complaining about the defendant. That was the sum total of the evidence of retaliation, but this Court held that, when viewed in the light most favorable to the plaintiff, the timing was sufficient to raise an inference of retaliatory motive and causation, even at the summary judgment stage. *Id.* As detailed in Mr. Hope's opening brief, other such examples abound in this Court's cases. OB54-56.

Mr. Hope has alleged that he was not subjected to a cell-move policy for nearly 20 years until he filed a grievance. ROA.69-71. Immediately after lodging this formal complaint, the cell-move policy took effect and has continued to this day. ROA.69-71. That chronology raises a causal inference at least as strong as the one in *Butts*. 877 F.3d at 589; OB54-55 (collecting other cases where chronology sufficed to allege causation).

Mr. Hope has also alleged a plausible retaliatory motive. A grievance can have negative professional consequences for a correctional officer, which is why *Butts* found allegations of adverse actions following a formal complaint sufficient to establish retaliatory motive. 877 F.3d at 589; *see also Jackson v. Cain,* 864 F.2d 1235, 1248-49 (5th Cir. 1989) (evidence that prisoner's job was changed following filing of grievance "raised an issue of material fact regarding the motives behind" the decision); *Richard v. Martin*, 390 F. App'x 323, 325-26 (5th Cir. 2010) (similar); *Cross v. Dretke*, 241 F. App'x 203, 205 (5th Cir. 2007) (similar). Indeed, the inference of retaliatory motive in this case is even stronger than in *Butts*, at least at this stage, because unlike in *Butts*, there is no alternative, legitimate penological motivation for moving Mr. Hope between cells 263 times in six years. *See Richard*, 390 F. App'x at 325-26 (lack of alternative explanation buttresses finding of retaliatory motive).

In short, the inferences of causation and retaliatory motive are at least as strong in this case as in a summary judgment case like *Butts*. At this preliminary stage, no greater showing is necessary.

IV. Mr. Hope Has Standing, And Neither Sovereign Immunity Nor §1997e(e) Bar Relief In This Case.

Mr. Hope sued seven correctional officials, each in their "official and individual capacities." ROA.64-65. He is entitled to seek injunctive relief against each in their official capacities and damages against each in their individual capacities. OB56-61. Defendants provide no sound reason why Mr. Hope cannot seek both forms of relief.

First, Defendants argue that some combination of sovereign immunity and Article III standing forecloses Mr. Hope from seeking injunctive relief. RB4-5. To start, as Defendants concede, injunctive relief would properly lie against Defendants in their official capacities under the *Ex parte Young* exception to sovereign immunity so long as Defendants have "some connection" with the unconstitutional act (here, Mr. Hope's decades-long solitary confinement). RB4. Each defendant in this suit had the requisite "some connection" at the time the complaint was filed—Harris, by virtue of his status as the prison's warden, with responsibility for the entire facility's operation; Rehse because he "oversees" the "conditions of confinement and treatment" of prisoners in solitary confinement; Eschessa and White because of their role in classifying prisoners; and Enloe, Benet, and Fiveash because they were

responsible, per Texas's official Offender Orientation Handbook, for Mr. Hope's classification, even though they have attempted to pass the buck to others. *See* OB58-61.

Defendants argue that *Ex parte Young* does not allow Mr. Hope to seek injunctive relief against defendants Harris and Rehse because the magistrate judge claimed (with no citation) that "Harris and Rehse are no longer employed at the Polunsky Unit." RB5 (citing ROA.138). But insofar as Mr. Hope brings claims against Harris and Rehse in their official capacities, Federal Rule of Civil Procedure 25(d) provides that Harris's and Rehse's successors should be automatically substituted in their stead, and the claims should proceed. *See Kentucky v. Graham*, 473 U.S. 159, 166 n.11 (1985).

Defendants also appear to suggest that Mr. Hope cannot satisfy the redressability element of Article III standing as to Harris and Rehse. RB5-6. But what matters in an official-capacity claim is not the individual officer's ability to redress the injury but the ability of an official in that officer's position to do so. *Goodman v. Harris Cty.*, 571 F.3d 388, 395 (5th Cir. 2009). Because Harris's and Rehse's successors can redress Mr. Hope's injury, he has Article III standing to sue them.

In short, this Court substitutes one official's name for her successor's all the time; that process raises neither sovereign immunity nor Article III redressability concerns. *Graham*, 473 U.S. at 166 n.11; *see, e.g.*, *Corn v. Miss. Dep't of Pub. Safety*, 954 F.3d 268, 275 n.4 (5th Cir. 2020); *ACLU of Miss., Inc. v. Finch*, 638 F.2d 1336, 1341 (5th Cir. 1981).

As to Defendants Eschessa, White, Enloe, Benet, and Fiveash, Defendants do not contest that they are properly named under *Ex parte Young*.[6] Defendants argued that the "magistrate correctly found" that various Defendants "do not have the ability" to release Mr. Hope from solitary confinement and thus cannot redress his complaint. RB5-6. But Mr. Hope specifically alleged that Defendants have such authority yet refuse to exercise it. OB58-61. The district court was not authorized to make contrary "findings"—rather, it was required to "accept all well-pleaded facts alleged in the complaint as true and ... construe the allegations in the light that is most favorable" to Mr. Hope. *Cent.*

[6] In fact, the names of those five defendants do not even appear in the response brief.

Laborers' Pension Fund v. Integrated Elec. Servs., Inc., 497 F.3d 546, 550 (5th Cir. 2007).

Defendants also argue that 42 U.S.C. §1997e(e) bars recovery (an argument the district court did not reach). Section 1997e(e) bars a prisoner from recovering compensatory damages for a "mental or emotional injury" unless the prisoner has also suffered a "physical injury."[7] This Court has held—and Defendants do not contest—that §1997e(e) does not limit injunctive and declaratory relief, both of which Mr. Hope seeks. *See Geiger v. Jowers*, 404 F.3d 371, 375 (5th Cir. 2005); ROA.64. And Mr. Hope's request for "monetary relief" encompasses not only compensatory damages, but also nominal and punitive damages. ROA.64. Section 1997e(e) does not limit nominal or punitive damages. *Hutchins v. McDaniels*, 512 F.3d 193, 198 (5th Cir. 2007). So at a minimum, there is no argument that Mr. Hope's claims for injunctive and declaratory relief and for nominal and punitive damages are barred by §1997e(e).

[7] The full text of 42 U.S.C. §1997e(e) reads: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18)."

Section 1997e(e) does not bar Mr. Hope's request for compensatory damages, either. Mr. Hope asserts that 26 years in solitary confinement have resulted in physical injury. ROA.71. He has developed chronic pain from living in such cramped quarters—after accounting for the furniture, a 3'x3' space, about the size of a phone booth. ROA.65-66, ROA.71. His pain is so bad that he can no longer sleep on his mattress; he prefers the steel bunk. ROA.71. That pain not only impacts Mr. Hope's ability to engage in the typical activities of everyday life—walking, moving, sleeping—but is also exacerbated by those incidents particular to life in solitary confinement, such as being handcuffed and strip-searched. ROA.66. And Mr. Hope's complaint alleges more generally that he has suffered the "harmful effects of long-term isolation and the toll it takes on the human body and brain." ROA.77. Fairly read, the allegation encompasses not only the literal "rewiring" of the brain that solitary confinement causes—a "physical" modification—but also the attendant consequences for Mr. Hope's back, knees, and whole body. *See "Isolation Devastates the Brain": The Neuroscience of Solitary Confinement*, Solitary Watch (May 11, 2016), https://solitarywatch.org/2016/05/11/isolation-devastates-the-brain-the-

neuroscience-of-solitary-confinement/; Brief of *Amici Curiae* Professors and Practitioners of Psychiatry, Psychology, and Medicine in Support of Plaintiff-Appellant at 10-12. Defendants offered no reason, either in this Court or below, why Mr. Hope's chronic pain and the other physical ailments solitary confinement has produced do not rise to the level of a "physical injury" allowing recovery under §1997e(e).[8]

In short, Defendants have presented no reason why this Court should not reach the merits of Mr. Hope's claims.

CONCLUSION

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

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[8] In alleging First Amendment retaliation, Mr. Hope also asserts a constitutional harm to his liberty that cannot be characterized as a "mental or emotional injury" and that thus falls outside the scope of §1997e(e). Mr. Hope recognizes that this circuit has nonetheless held that §1997e(e) bars relief for First Amendment injuries absent a showing of a "physical injury." *See Geiger*, 404 F.3d at 374-75. As set forth, Mr. Hope easily satisfies his burden of showing a "physical injury." However, Mr. Hope preserves the right to challenge this Court's rule that First Amendment harms are "mental or emotional injur[ies]" under §1997e(e), a rule which conflicts with the law of other circuits. *See Wilcox v. Brown*, 877 F.3d 161, 169-70 (4th Cir. 2017); *Aref v. Lynch*, 833 F.3d 242, 267 (D.C. Cir. 2016); *King v. Zamiara*, 788 F.3d 207, 212-13 (6th Cir. 2015); *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998); *cf. Carter v. Allen*, 940 F.3d 1233, 1235 (11th Cir. 2019) (W. Pryor, J., concurring in the denial of rehearing en banc) (calling for Eleventh Circuit to reconsider whether §1997e(e) applies to First Amendment harms); *Hoever v. Carraway*, 815 F. App'x 465, 466 (11th Cir. 2020), *reh'g en banc granted,* 977 F.3d 1203 (11th Cir. 2020).

Respectfully Submitted,

s/ Easha Anand

Easha Anand*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
2443 Fillmore St., #380-15875
San Francisco, CA 94115
easha.anand@macarthurjustice.org

* Northwestern Law student Katie McCallister contributed significantly to the preparation of this brief.

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 5,960 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) but including the Appendix.

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 2016 in 14-point Century Schoolhouse typeface.

Date: November 25, 2020

s/ Easha Anand
Easha Anand

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 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: November 25, 2020

s/ Easha Anand
Easha Anand

APPENDIX

Entries highlighted in yellow have been changed since the filing of the opening brief.

Jurisdiction	**Number of Prisoners 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	45[8]
New Hampshire	0[9]
New Jersey	0[10]
New Mexico	0[11]
New York	≤8[1]
North Carolina	≤7[1]
North Dakota	0[1]
Ohio	≤24[1]
Oklahoma	≤11[1]
Oregon	≤1[1]
Pennsylvania	0[12]
Rhode Island	0[1]
South Carolina	0[1]
South Dakota	≤2[1]
Tennessee	≤162[1]

Texas	129[13]
Utah	0[2]
Vermont	0[1]
Virginia	0[6]
Washington	≤10[1]
West Virginia	2[14]
Wisconsin	0[1]
Wyoming	≤1[1]

TOTAL: ≤683.

[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) (hereinafter "CLA-Liman Survey 2019"). The survey reports only the number of prisoners who have been in solitary confinement for more than six years; thus, the number of prisoners 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). The survey reports only the number of prisoners who have been in solitary confinement for more than six years; thus, the number of prisoners who have been in solitary confinement for more than 20 years is likely 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). The survey reports only the number of prisoners who have been in solitary confinement for more than six years; thus, the number of prisoners who have been in solitary confinement for more than 20 years is likely far lower than the numbers reported here.

[7] Email from Monica Chiazza, Administrative Assistant III to Acting Public Information Officer William "Bill" Quenga, Nevada Department of Corrections Media & Communications Office, to Easha Anand, Counsel for Appellant (Sept. 22, 2020) (on file with counsel).

[8] CLA-Liman Survey 2019, at 13 n.±.

[9] CLA-Liman Survey 2019, at 13 n.£.

[10] 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.

[11] 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).

[12] Email from Andrew Filkosky, Agency Open Records Officer, Pennsylvania Department of Corrections—Office of Chief Counsel, to Easha Anand, Counsel for Appellant (Oct. 8, 2020) (on file with counsel).

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

[14] Email from Sarah F. (Sallie) Daugherty, Paralegal, West Virginia Department of Homeland Security, to Easha Anand, Counsel for Appellant (Sept. 8, 2020) (on file with counsel).