No. 16-2444

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JWAINUS PERRY,

Plaintiff-Appellant,

v.

LUIS S. SPENCER, Commissioner; THOMAS DICKAUT, Former Superintendent; ANTHONY MENDOSA, Former Deputy of Classification; JAMES SABA, Superintendent; ABBE NELLIGAN, Deputy of Classification; PATRICK TOOLIN, Correctional Program Officer; KRISTIE LADOUCER; CAROL MICI; THOMAS NEVILLE,

Defendants-Appellees,

JENS SWANSON, Property Officer,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF OF AMICUS CURIAE PRISONERS' LEGAL SERVICES IN SUPPORT OF PLAINTIFF-APPELLANT

CORPORATE DISCLOSURE STATEMENT

As required by Federal Rule of Appellate Procedure 26.1, the *amicus curiae* states that it has no parent corporation and that no publicly held company owns 10% or more of *amicus*'s stock.

/s/ John P. Bueker
John P. Bueker

Counsel for Amicus Curiae
Prisoners' Legal Service

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INTEREST OF *AMICUS CURIAE*

Prisoners' Legal Services ("PLS") is a not-for-profit legal services corporation, established in 1972 to protect and promote the civil and constitutional rights of people incarcerated in Massachusetts prisons. PLS provides legal assistance through litigation, informal advocacy, and advice to inmates on a wide variety of issues. Its priorities focus on addressing (1) inadequate medical and mental health care, (2) extreme conditions of confinement, (3) excessive use of force, (4) solitary confinement, and (5) medical parole. Given the documented and broadly recognized harmful effects of solitary confinement, PLS has a strong interest in decreasing its use in Massachusetts prisons.[1]

[1] No party or its counsel authored this brief in whole or in part. No person other than PLS and its counsel contributed money intended to be used to fund preparing or submitting the brief.

ARGUMENT

Solitary confinement, one of the most powerful disciplinary tools at the disposal of the Massachusetts Department of Corrections ("DOC"), is routinely used to coerce Massachusetts prisoners into complying with correction officers' instructions and prison procedures. Although the DOC has long been afforded discretion in administering the Commonwealth of Massachusetts's prison system, that discretion is not unbounded. Indeed, owing to the severe nature of the punishment, the DOC's use of solitary confinement is subject to specific constitutional and statutory limits. As the Massachusetts Supreme Judicial Court held in *LaChance v. Comm'r of Corr.*, 463 Mass. 767, 777 (2012), for instance, prisoners placed in solitary confinement for more than 90 days on so-called "awaiting action" status must be entitled to due process protections.

The *LaChance* court did not write on a blank slate. Its decision was guided by a rich history of cases interpreting Massachusetts's Departmental Segregation Unit ("DSU") regulations, which governed the use of solitary confinement in the Commonwealth's prisons. *See id.* at 774; 103 Code Mass. Regs. 421.00 *et seq.* These regulations were drafted decades ago under court order to ensure that prisoners receive constitutionally required procedural due process protections before being isolated in solitary confinement. *See Hoffer v. Fair*, No. SJ-85-0071 (Single Justice, Mar. 3, 1988); *see also Haverty v. Comm'r of Corr.*, 437 Mass. 737, 744–

45 (2002) (detailing the history of DSU regulations). Under the DSU regulations, for example, prisoners could not be placed in solitary confinement without a finding by the DOC, "based on substantial evidence," that the prisoner "poses a substantial threat" to others' safety, to prison property, or to prison operations. 103 CMR 421.09. Furthermore, before being transferred to a solitary confinement unit, prisoners had to be afforded a hearing, to be "held within a reasonable time," 103 CMR 421.10, during which the prisoner could be represented by counsel, present evidence, and cross-examine witnesses. 103 CMR 421.13.

As the Massachusetts courts have made clear, these solitary confinement due process protections must be provided to any inmate who is detained in a setting that is materially similar to the conditions in a DSU, even if the DOC concocts a different name for the purportedly "new" setting. *See Longval v. Comm'r of Corr.*, 448 Mass. 412, 422 (2007) (holding that qualified immunity is improper where DOC officials fail to extend the procedural safeguards required under the DSU regulations to inmates held in conditions "substantially similar" to DSU conditions); *Haverty*, 437 Mass. at 763; *Longval v. Comm'r of Corr.*, 404 Mass. 325, 328–29 (1989); *Gilchrist v. Comm'r of Corr.*, 48 Mass. App. Ct. 60, 64 (1999); *Martino v. Hogan*, 37 Mass. App. Ct. 710, 721 (1994). Accordingly, as the Massachusetts Supreme Judicial Court has properly observed, the DOC "may not sidestep statutory and regulatory provisions stating the rights of an inmate as to his placement in [solitary

confinement] by assigning as a pretext another name to such a unit." *Longval*, 404 Mass. at 328–29. Over the years, however, the DOC has tried to do exactly that. It has devised a slew of euphemisms and labels for solitary confinement to bypass these established constitutional due process protections. *See Cantell v. Comm'r of Corr.*, 475 Mass. 745, 750 (2016) (noting that the DOC "historically has had and continues to have a number of different types of and names for such units, including, but not limited to, DSUs.").

The DOC's semantic gymnastics is aptly demonstrated by the policies of the Massachusetts Correctional Institution in Walpole, Massachusetts (now known as the Massachusetts Correctional Institution at Cedar Junction ("MCI-CJ")). During the 1970s—if not even earlier—the MCI-CJ referred to its solitary confinement (or departmental segregation) units by the vague and indeterminate moniker "Block 10." *See Libby v. Comm'r of Corr.*, 385 Mass. 421, 422 (1982) ("Block 10 is the departmental segregation unit at Walpole."). Additionally, MCI-CJ has historically placed individuals in effective solitary confinement by assigning them to so-called "awaiting action pending investigation . . . status," or "AA/PI." *See Littles v. Comm'r of Corr.*, 444 Mass. 871, 874 (2005); *Kenney v. Comm'r of Corr.*, 393 Mass. 28, 34 & n.9 (1984) (holding that the DSU regulations did not permit DOC officials to place inmate in DSU while "in awaiting action status"); *Royce v. Comm'r of Corr.*, 390 Mass. 425, 428 (1983). And in a seeming effort to confuse its regulators and

the public, MCI-CJ has even referred to its solitary confinement units as components of its "general population" wings. *See Haverty*, 437 Mass. at 760 ("We also reject the defendants' claim . . . that the prisoners in the East Wing comprise the 'general population' of Cedar Junction [because] such labeling is nothing more than a pretextual semantic change." (internal quotation marks omitted)).

Although Massachusetts courts have long "permit[ted] prison administrators considerable discretion in the adoption and implementation of prison policies," *Royce*, 390 Mass. at 427, the Supreme Judicial Court also emphasized that "[o]nce an agency has promulgated regulations, it must comply with those regulations." *Id.* at 427. Moreover, an agency's duty to comply with its promulgated regulations does not depend on the particular label that the agency uses for the regulated subject matters, and an agency cannot evade its duty through mere "semantic change[s]." *See Haverty*, 437 Mass. at 760. That is why Massachusetts courts have repeatedly rejected the DOC's suggestion that the procedural protections contained in 103 Code Mass. Regs. §§ 421.00 are applicable only to those housing placements that the DOC chooses to call DSUs. *See, e.g.*, *Haverty*, 437 Mass. at 759–60; *Longval*, 404 Mass at 328–29; *Martino v. Hogan*, 37 Mass. App. Ct. at 721.

For instance, in *Haverty*, the Massachusetts Supreme Judicial Court considered the severely restricted conditions of confinement that the DOC imposed in the 1990s in East Wing housing units of MCI-CJ while denying those inmates the

DSU regulations' procedural due process protections. 437 Mass. at 741–42. When East Wing prisoners sued to enforce the regulations, the court held that because "the degree of segregated confinement experienced by prisoners in the East Wing" was as extreme as the "DSU"-designated segregated facilities, the prisoners were entitled to the protection of the regulations, regardless of the label the DOC used for the unit. *Id.* at 756, 763.

LaChance underscores the *Haverty* court's conclusion. The plaintiff there was held for months in administrative segregation in a "Special Management Unit," or the "SMU." 463 Mass. at 769. The conditions in the SMU in the 2000s were "substantially more restrictive" than those of the general prison population, where inmates were allowed to spend five hours outside their cells each day, engage in recreational activities and contact visits, and participate in a broad range of programming. *Id.* at 771. By contrast, in the SMU, the plaintiff was allowed only one hour of recreation per day in an outdoor cage with shackled wrists and ankles, two non-contact visits per week, and was prohibited from participating in any programming. *Id.* The court found that the conditions of LaChance's confinement were "in some respects even more restrictive" than those in the designated DSUs. *Id.* at 774. The court concluded that even though LaChance was never expressly determined to be in a DSU, because of the substantially similar restrictive conditions

in the SMU, he was nonetheless entitled to constitutional due process protections. *Id.* at 776.

These cases demonstrate that for years, the DOC has engaged in a persistent practice of using multiple and opaque labels and euphemisms to describe solitary confinement and evade due process protections mandated by the courts and the DSU regulations. Nevertheless, Massachusetts courts have emphatically held that the DSU regulations' procedural due process protections are "applicable to *all* placements of prisoners in segregated confinement for nondisciplinary reasons for an indefinite period of time." *Haverty*, 437 Mass. at 60 (emphasis added).

The foregoing case law amply shows that DOC personnel have been aware for decades that the type of conditions in which Jwainus Perry was held entitled him to procedural due process protections, regardless of the label applied to those conditions. For nearly two years, Mr. Perry was kept in solitary confinement for at least twenty-three hours a day in a cell so small that he could simultaneously reach both sides. *See* ECF No. 127 at 9 & n.8. He was not permitted to have meaningful contact with the correction staff, let alone other inmates. *See id.* at 10–11. He was granted only two hours of non-contact visits per week and only minutes of time for personal phone calls. *See id.* at 10. He was granted limited exercise, and even that was confined to a "cage" while he was shackled. *See id.* at 9. He was prohibited

from keeping books, attending educational, vocational, or rehabilitative programs, or taking a prison job. *See id.* at 9–10.

As it has in so many like cases in the past, the DOC tried to escape scrutiny by holding Mr. Perry in an SMU on "awaiting action pending investigation" status or "awaiting action pending transfer" status. But as *LaChance* and the other cases discussed in this brief have established, the DOC's label does not matter. The inescapable conclusion from this line of cases is that the DOC was aware that Mr. Perry was entitled to due process safeguards, and that he was denied those safeguards.

One of the many inmates subjected to solitary confinement summarized the DOC's responsibility better than *amicus* can: the DOC "can call it Heaven—it will not change their obligation to properly classify me before my being placed therein." *McGuinness v. DuBois*, 1995 U.S. Dist. LEXIS 4333 (D. Mass. Mar. 15, 1995). It also does not change the DOC's obligation to provide mandated procedural due process. In Mr. Perry's case, the DOC failed to do so.

CONCLUSION

For the foregoing reasons, as well as those explained more fully in Mr. Perry's submission, the Court should reverse the district court's order granting summary judgment for Defendants.

Dated: March 11, 2022

/s/ John P. Bueker
John P. Bueker
Andrew Cashmore
Jessica Dormitzer
Emma Coreno
Rory Skowron
Jason Roskom
ROPES & GRAY LLP
Prudential Tower, 800 Boylston Street
Boston, MA 02199-3600
(617) 951-7000
John.Bueker@ropesgray.com

Counsel for Amicus Curiae
Prisoners' Legal Services

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this brief was prepared in Microsoft Word 365 in 14-point Times New Roman proportional font and, excluding exempted portions of the brief, contains 1788 words. The brief therefore complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B).

Dated: March 11, 2022

/s/ John P. Bueker
John P. Bueker

Counsel for Amicus Curiae
Prisoners' Legal Services

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of March 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system.

Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ John P. Bueker
John P. Bueker

Counsel for Amicus Curiae
Prisoners' Legal Services