No. 16-2444

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.

SUPPLEMENTAL EN BANC BRIEF OF PLAINTIFF-APPELLANT JWAINUS PERRY

Rosalind E. Dillon
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
160 E Grand Ave, 6th Fl.
Chicago, IL 60611
(202) 869-3379

Alexis Garmey Chardon
TERRY GARMEY & ASSOCIATES
482 Congress St., Ste. 402
Portland, ME 04101
(207) 899-4644

Daniel Greenfield
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East. Chicago Ave.
Chicago, IL 60611
(312) 503-8538
daniel-greenfield@law.northwestern.edu

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INTRODUCTION

For 611 days, Jwainus Perry was subjected to indefinite solitary confinement under extreme conditions that denied him virtually all human contact. Already suffering from mental illness, Perry's mental health only deteriorated under the isolating conditions. Yet Perry was never permitted a meaningful opportunity to challenge his prolonged solitary confinement. Despite clearly established law providing ample notice of unconstitutionality, the court below granted Defendants qualified immunity. This Court should reverse.

STATEMENT OF THE CASE

1. The Extreme Conditions Perry Endured in Solitary Confinement

For 20 months, Jwainus Perry spent between 23 and 24 hours per day alone behind a solid steel door in a windowless cell so cramped he could "stand in the middle of it, stretch out his arms, and touch both sides." ECF 127 (Decision and Order) at 9 & n.8. The cell's architecture ensured that he "could not even see other people," let alone communicate. *Id*. at 9. Perry worshipped alone, dined alone, and passed the time alone.[1] ECF 127 at 10-11.

[1] The DOC employs various euphemisms for non-disciplinary solitary confinement, including Departmental Segregation Unit (DSU) and Special Management Unit (SMU).

Perry's out-of-cell time was also dehumanizing. He was barred from "collective activities such as educational, vocational, or rehabilitative programs." *Id.* at 10. He could not attend religious services. *Id.* at 10-11. He could not hold a job. *Id.* at 10. He exercised alone in an "outdoor cage" designed to prohibit contact between prisoners.[2] *Id.* at 9. He was permitted only two non-contact visits and brief non-legal calls per week. *Id*. at 10.

The conditions took a toll. Mental health personnel [redacted] Eventually, Perry went on a hunger strike to protest his prolonged isolation, but Defendants refused to modify his placement. ECF 110 ¶¶145, 150.

2. Defendants' Meaningless Reviews of Perry's Solitary Confinement

[2] General population prisoners participate in team sports, take classes, socialize out-of-cell for up to eight hours per day, play games in a recreation room, visit the law library, work, attend religious services, and have contact visits. ECF 127 at 11.
[3] Pursuant to Local Rule 11.0, Perry also filed a version of this brief under seal.

On December 10, 2010, Defendants suddenly removed Perry from general population and placed him in non-disciplinary solitary confinement.[4] ECF 127 at 16-17. Several days after Perry's initial placement in solitary confinement and periodically thereafter, an administrative committee ostensibly "reviewed" his placement, but in practice those proceedings served to rubber-stamp Perry's continued isolation. ECF 127 at 23.

To start, of the hundreds of administrative reviews of Perry's solitary confinement, he was permitted to attend only two, and was not authorized to speak at either. *See* ECF 102-62 to 102-86; ECF 102 ¶¶143, 173; ECF 110 ¶16. The two

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[4] Despite the summary judgment posture, the magistrate judge appears to have credited Defendants' disputed evidence that Perry's solitary confinement was justified by purported gang-affiliation. ECF 127 at 15-17. To recount just a few of those fact disputes: Defendants alleged that Perry's conviction was gang-related, but the prosecution, defense, and criminal court disagreed (ECF 127 at 15, 17 n.23; *see* ECF 110-36; ECF 110-38 ¶¶18-23); Defendants alleged that Perry was placed in solitary confinement because of anonymous informant information that he was planning to engage in gang-related activity, but Perry disputed any gang affiliation and the existence of such plans, and cited evidence that Defendants consistently declined to use a gang-related "override" code to extend his solitary confinement (ECF 102-3 at 34; ECF 102-16 at 14; ECF 110-2 at 1; ECF 110-40 ¶5; ECF 110 ¶99; ECF 127 at 16); Defendants alleged that Perry could only be housed at facilities without purported gang rivals, but Perry showed he was both routinely housed with purported rivals and that the architectural layout of DOC facilities enabled physical separation of actual rival gang members (ECF 102-10 at 124; ECF 102-59; ECF 110 ¶¶27-28; ECF 110-39 ¶¶252-54; ECF 127 at 17); and, finally, Defendants alleged that Perry wrote a threatening letter using the alias "A-Dub," but Perry's evidence is that he neither wrote that letter nor is known as A-Dub (ECF 127 at 17 n.23; *see* ECF 110-39 at ¶¶20-21; ECF 110 ¶93).

hearings at which he was present resulted in non-binding recommendations of placement outside of solitary confinement, but those recommendations were overruled by *non-appealable* final decisions to place Perry in solitary confinement. ECF 102-3 at 34, 36, 71-72.

The remaining several hundred reviews were conducted outside his presence. Op. 11-12. So predetermined were the outcomes that the text memorializing them seldom varied. For example, of the 219 review "minute notes" in the record—each documenting a purportedly distinct review of the necessity of additional solitary confinement—all but 25 appear to be cut-and-paste from one review to the next. *See* ECF 102-62 to 102-86. Illustrating this, the word "terminated" is incorrectly spelled as "trminated" for 26 reviews in a row. *E.g.*, ECF 102-83 at 8; *cf*. ECF 102-85 at 23 (correcting the spelling).

Even if these notices had been substantive, their impact would have been limited. Perry "was not involved in the review process" and had "no means of appealing," "contest[ing]," or "test[ing] the purported basis for his continued [solitary] confinement[.]" Op. at 11-12. Additionally, Perry was never "informed of steps he could take to mitigate the perceived need for continued segregated confinement," and "he received the same boilerplate notice" each time, which never even hinted at a "conditional release date." *Id*. at 12.

Further emphasizing that these were "reviews" in name only, the justification provided for Perry's solitary confinement was a moving target. Often, Perry was told he was in solitary confinement on awaiting action pending investigation. ECF 1-6 at 3-22. Other times, he was told he was being held awaiting action pending in-state transfer, ECF 1-17 at 2, or awaiting action pending out-of-state transfer, ECF 107-87 at 22-23, 27-37. The rationale changed frequently and without explanation—Perry was never "told when or why his status shifted." Op. at 12.

In November of 2012, the Massachusetts Supreme Judicial Court held that prisoners could not be placed for more than 90 days in solitary confinement on "awaiting action" status without being afforded due process. *LaChance v. Comm'r of Corr.*, 463 Mass. 767, 777 (2012). Several months later, the DOC transferred Perry to general population at a medium security facility. ECF 127 at 3 n.4. The magistrate judge described this timing—*i.e.*, following on the heels of *LaChance*—as "curious." *Id.* at 23 n.27. Nearly a year later, officials at that prison reported that Perry "had not incurred any new disciplinary reports, had received average housing evaluations and had an institutional job." *Id.* at 23.

3. Procedural History

Perry sued the officials responsible for his prolonged solitary confinement, asserting they violated the Due Process Clause. ECF 51. Although the district judge denied defendants' motion to dismiss, explaining he "ha[d] no trouble concluding

that Perry has described [an] 'atypical and significant hardship'" implicating a "liberty interest that was clearly established," ECF 77 at 5 & n.4, a magistrate judge granted Defendants qualified immunity at summary judgment, ECF 127 at 31. In the magistrate judge's view, "[n]either the Supreme Court nor the First Circuit had squarely" answered whether Perry's "placement even triggered a liberty interest, never mind what process was due[.]" *Id.* at 29-31. Then, characterizing out-of-circuit case law as inconsistent and noting that the Supreme Judicial Court "announce[d]" in *LaChance* "that segregated confinement on awaiting actions status for longer than ninety days gives rise to a liberty interest entitling an inmate to notice and a hearing," the magistrate judge reasoned that Perry's right to due process was not clearly established. *Id.* at 28-30.

Perry appealed to this Court pro se. Op. 1. The panel acknowledged both that the "restrictive conditions" imposed upon Perry were "substantially similar to those described in *Wilkinson* [*v. Austin*, 545 U.S. 209 (2005)]" and that Perry was "provided fewer [procedural] safeguards" than the prisoners in *Wilkinson*. Op. at 8, 11. Nonetheless, the panel affirmed on the basis of qualified immunity, relying, like the magistrate judge, on both a purported lack of clarity among federal precedents and the *LaChance* court's analysis of precedent to conclude that Perry's right to due process was not clearly established. Op. 7-13.

ARGUMENT

I. Defendants Are Not Entitled to Qualified Immunity.

Qualified immunity shields government officials from liability insofar as their conduct does not violate "clearly established" law. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The defense calls on courts to decide two questions: (1) whether a right was violated; and (2) whether that right was clearly established. *Id*. at 736, 739. Although courts are authorized to skip the first question if they answer the second one in the negative, it is often beneficial to take the questions in turn because doing so "promotes the development of constitutional precedent." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Here, Defendants are entitled to qualified immunity only if, between December 2010 and February 2013, it was an open question whether they could subject Perry to prolonged solitary confinement without meaningful process. *See Hope*, 536 U.S. at 739. By that time, the unlawfulness of Defendants' conduct was clear.

A. Defendants Violated The Fourteenth Amendment By Holding Perry In Solitary Confinement Without A Genuine Opportunity To Challenge The Necessity Of His Isolation.

In Due Process cases, this Court considers: (1) "whether there exists a liberty or property interest"; and (2) "whether the procedures . . . were constitutionally sufficient." *Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 886 (1st Cir. 2010).

1. Perry Had A Liberty Interest In Avoiding Prolonged And Indefinite Solitary Confinement.

Prisoners retain a liberty interest in freedom from restraints that impose an "atypical and significant hardship" relative to the "ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). When reviewing a solitary confinement claim, "atypical hardship" is judged against "the baseline liberty" enjoyed by "the general prison population[.]" *Gonzalez-Fuentes*, 607 F.3d at 889.

In *Wilkinson*, the Supreme Court considered whether several prisoners had a liberty interest in avoiding prolonged and indefinite placement in non-disciplinary solitary confinement. After considering the conditions of confinement, the duration of confinement, and whether that confinement "disqualifie[d] an otherwise eligible inmate for parole consideration[,]" the Supreme Court unanimously held that the prisoners had a liberty interest. *Wilkinson*, 545 U.S. at 224. By the *Wilkinson* metric, Perry did, too.

a. The Conditions Of Perry's Confinement Created A Liberty Interest.

First and foremost, Defendants subjected Perry to conditions strikingly similar to those the *Wilkinson* Court described as "synonymous with extreme isolation." *Id.* at 214. Perry spent 23 or 24 hours a day in a cell "so small that he could stand in the middle of it, stretch out his arms, and touch both sides of the cell." ECF 127 at 9 & n.8; *see Wilkinson*, 545 U.S. at 214 (prisoners confined to 7x14 cells for 23 hours a day). His contact with other humans was almost nonexistent. He "was placed on

'solid door status,' meaning that the solid" steel door to his cell was kept closed, preventing him from seeing or speaking with other people, despite it being contraindicated by his mental illness. ECF 127 at 9; ECF 110 ¶72; *see Wilkinson*, 545 U.S. at 214 (prisoners bereft of "almost all human contact" because their cells had "solid metal doors"). Contact with those outside of prison was also severely limited: Perry was allowed just 15 minutes of phone time per week, and visitation was rare, with physical contact forbidden. ECF 127 at 10; *see Wilkinson*, 545 U.S. at 214; *Austin v. Wilkinson*, 189 F. Supp. 2d 719, 726 (N.D. Ohio 2002) (prisoners allowed 10 minutes of phone time per week and permitted limited in-person visitations). And Perry, like the *Wilkinson* prisoners, took his meals alone in his cell, was shackled and escorted any time he left his cell, and could not hold a job. ECF 127 at 9-10; *Wilkinson*, 545 U.S. at 214; *Austin*, 189 F. Supp. 2d at 726, 741.

Some of the conditions Perry faced were even more restrictive than those at issue in *Wilkinson*. While the *Wilkinson* prisoners at least had small windows in their cells, Perry's cell was windowless, preventing even a glimpse of the outside world. *Austin*, 189 F. Supp. 2d at 724; *cf.* ECF 110 ¶72. And although the *Wilkinson* prisoners could exercise out-of-cell for one hour *every* day—sometimes, with another prisoner—Perry could only exercise *five* days per week, always alone. *Austin*, 189 F. Supp. 2d at 724; *cf.* ECF 110 ¶¶71, 72. While the *Wilkinson* prisoners

could participate in educational and instructional programs and group counseling, Perry could not. *Austin*, 189 F. Supp. 2d at 725-26; *cf.* ECF 127 at 10.

Wilkinson aside, comparing the conditions Perry endured to the general population baseline, *see* n.2, *supra*, further emphasizes that Perry's solitary confinement amounted to an "atypical and significant hardship."[5]

b. The Duration And Indefiniteness Of Perry's Solitary Confinement Created A Liberty Interest.

Along with conditions in solitary confinement, *Wilkinson* considered its duration and whether it was indefinite. *Wilkinson*, 545 U.S. at 214-15, 224. As in *Wilkinson*, Perry's solitary confinement was both prolonged and indefinite**.**

The magistrate judge found "no question" that the duration of Perry's isolation was "prolonged." ECF 127 at 28. Indeed, courts have found a liberty interest for *shorter* durations under more forgiving conditions. In *Colon v. Howard*, for

[5] Although general population is the baseline, *Gonzalez-Fuentes*, 607 F.3d at 889, the hardships Perry endured "impose[d] an atypical and significant hardship" under any plausible baseline"—including, other forms of solitary confinement—in several ways. *See Wilkinson*, 545 U.S. at 223. Perry was on solid-door status, depriving him of virtually all human contact; his isolation was indefinite, and "indefiniteness contrasts sharply with other common forms of solitary confinement, such as punitive segregation[,]" where "[t]he duration . . . is often predetermined and fixed," *Williams v. Sec'y Pa. Dep't of Corr.,* 848 F.3d 549, 562 (3d Cir. 2017); and Perry had limited access to property and no ability to work, in contrast to prisoners in *disciplinary* solitary confinement. ECF 51 ¶¶88-89, 91; ECF 110 ¶79.

example, the Second Circuit held that a prisoner who was placed in solitary confinement conditions less restrictive than Perry's for only 305 days—half the time of Perry's isolation—had a liberty interest. 215 F.3d 227, 230-32 (2d Cir. 2000). The Second Circuit is no outlier—the Fourth, Seventh, and Eleventh Circuits have also held that durations of solitary confinement far shorter than Perry's create a liberty interest. *E.g.*, *Baker v. Lyles*, 904 F.2d 925, 929 (4th Cir. 1990) (thirteen months); *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 697-99 (7th Cir. 2009) (240 days); *Williams v. Fountain*, 77 F.3d 372, 374 n.3 (11th Cir. 1996) (365 days).[6]

Apart from its extraordinary duration, Perry's solitary confinement was indefinite. As this Court recognizes, *Wilkinson* "stressed" the heavy weight of indefiniteness in the liberty-interest analysis. *Skinner v. Cunningham*, 430 F.3d 483, 487 (1st Cir. 2005). So have other circuits.[7] Here, the magistrate judge agreed that there was "no question" that Perry's placement in solitary confinement was "so

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[6] Perry entered non-disciplinary solitary confinement only three weeks after completing a 24-month disciplinary confinement sentence. Cumulatively, therefore, Perry spent nearly four years in solitary confinement during the period ending in February 2013. ECF 102 ¶¶92(e), 94, 97.

[7] *E.g.*, *Aref v. Lynch*, 833 F.3d 242, 255 (D.C. Cir. 2016) ("emphasiz[ing] that a liberty interest can potentially arise under less-severe conditions when the deprivation is prolonged or indefinite"); *Proctor v. LeClaire*, 846 F.3d 597, 610 (2d Cir. 2017) (explaining that a prisoner's "interest in avoiding an indefinite Ad Seg term is surely substantial").

protracted" that it should be considered "indefinite." ECF 127 at 28-29. That finding is in accord with the plain meaning of the word: "Indefinitely" is defined as "[f]or a length of time with no definite end." BLACK'S LAW DICTIONARY 886 (10th ed. 2014). As long as Perry was in non-disciplinary solitary confinement, the duration of his isolation had no upper limit and "no definite end."

c. Perry's Mental Illness Weighs In Favor Of A Liberty Interest.

Perry's mental illness further tips the scale toward a liberty interest. *E.g.*, *Serrano v. Francis*, 345 F.3d 1071, 1079 (9th Cir. 2003) ("[T]he conditions imposed on [plaintiff] in the SHU, by virtue of his disability, constituted an atypical and significant hardship on him."); *Wheeler v. Butler*, 209 F. App'x 14, 16 (2d Cir. 2006) (noting that "medical need may bear upon the atypicality of [plaintiff's] punishment"); *Shoats v. Horn,* 213 F.3d 140, 144 (3d Cir. 2000) ("psychological damage" wrought by solitary confinement is relevant to atypical and significant analysis). Mentally ill prisoners suffer more acutely than others in solitary confinement. *E.g.*, *Scarver v. Litscher*, 434 F.3d 972, 975-76 (7th Cir. 2006) (noting the "extensive literature on the effect of . . . isolation, on mentally disturbed prisoners").

d. Perry's Ineligibility For Parole Does Not Weaken His Liberty Interest.

For prisoners "otherwise eligible" for parole, the loss of parole weighs in favor of finding a liberty interest. *Wilkinson*, 545 U.S. at 224. For prisoners like Perry who

are not parole eligible, however, that factor is irrelevant. *Wilkinson* makes that clear: the Court held that the prisoner-plaintiffs had a liberty interest in avoiding solitary confinement even though several of them were not parole eligible because they had been sentenced to death.[8] Circuit courts interpreting *Wilkinson* have likewise recognized that the parole-eligibility factor has no bearing on the liberty-interest analysis for prisoners who are not parole-eligible. *E.g.*, *Incumaa v. Stirling*, 791 F.3d 517, 532 (4th Cir. 2015) ("Appellant was already ineligible for parole by virtue of his sentence before he was transferred to the SMU, and therefore his confinement does not implicate the third concern identified in *Wilkinson*."); *Wilkerson v. Goodwin*, 774 F.3d 845, 855-56 (5th Cir. 2014) (similar).

* * * * *

The conditions of Perry's prolonged and indefinite confinement squarely align with those identified in *Wilkinson.* In fact, Perry was subjected to deprivations that were objectively more severe and which were amplified by his mental illness. In circumstances like Perry's, then, the question of whether a protected liberty interest

[8] *See* Am. Compl. at ¶62(d), Austin v. Wilkinson, No. 4:01-CV-071, 2001 WL 34903823, ("Plaintiffs Benge and Robb are among more than a dozen death row inmates who are housed at OSP in violation of AR 5120-9-12.").

exists is not a close call: he was subjected to "an atypical and significant hardship under any plausible baseline." *Wilkinson*, 545 U.S. at 223.

2. Defendants Deprived Perry Of The Procedural Protections He Was Due.

"The function of legal process, as that concept is embedded in the Constitution . . . is to minimize the risk of erroneous decisions." *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979). In the non-disciplinary solitary confinement context, *Greenholtz* and *Hewitt v. Helms*, 459 U.S. 460 (1983), describe the minimum process necessary to acceptably reduce the risk of erroneous decisions. *Wilkinson*, 545 U.S. at 225-27.

"[A]mong the most important procedural mechanisms for purposes of avoiding erroneous deprivations" is the requirement that a prisoner "must receive notice of the factual basis leading to consideration" for placement in solitary confinement and a "fair opportunity for rebuttal." *Id*. at 225-26. Thus, prison officials are required to provide the prisoner with a "summary of the factual basis for the classification review," *id*. at 226, and an opportunity to "present his views to the prison official charged with deciding" whether to place him in solitary confinement, *Hewitt*, 459 U.S. at 476; *see Wilkinson*, 545 U.S. at 225-28. These requirements work in tandem to "safeguard[] against the inmate's being mistaken for another or singled out for an insufficient reason." *Wilkinson*, 545 U.S. at 226.

Once a decision is made to hold a prisoner in solitary confinement, the prisoner must be offered a "short statement of reasons" for his isolation. *Id*. This requirement "guards against arbitrary decision making," provides the prisoner "a basis for objection before the next decisionmaker or in a subsequent classification review[,]" and "serves as a guide for future behavior." *Id*.; *Greenholtz*, 442 U.S. at 16 (same). And, finally, "due process requires periodic review in a meaningful way and by relevant standards to determine whether he should be retained in segregation or returned to population." *Jackson v. Meachum*, 699 F.2d 578, 584 (1st Cir. 1983); *Hewitt*, 459 U.S. at 472, 476-77, n.9 (similar); *Wilkinson*, 545 U.S. at 226 (similar). The periodic review requirement ensures that non-disciplinary solitary confinement "may not be used as a pretext for indefinite" isolation. *Hewitt*, 459 U.S. at 477 n.9.

Defendants disregarded these requirements from day 1 through day 611:

> [Perry] was not provided an opportunity to participate in the administrative reviews or to test the purported basis for his continued confinement, was not informed of steps he could take to mitigate the perceived need for continued segregated confinement, was not given any conditional release date, and was not provided any explicit opportunity to contest his placement. Perry asserts that the periodic reviews were perfunctory, noting that he received the same boilerplate notice at every review, and suggests that they were pretextual, as he was never interviewed in connection with any investigation into his STG status, was not advised of its progress or outcome, and was not told when or why his status shifted from awaiting action pending investigation to awaiting action pending out-of-state placement.

Op. 11-12. In fact, at the two hearings Perry was permitted to attend, but not participate in, the officials present were not even final decision makers as to his isolation. *See* ECF 102-3 at 34, 36, 71-72.

This sort of hollow process, in addition to obviously violating *Wilkinson*, *Hewitt*, and *Greenholtz*, fails the test in circuit courts applying these principles. *E.g.*, *Jackson*, 699 F.2d at 584 ("[D]ue process requires periodic review in a meaningful way and by relevant standards."); *Proctor*, 846 F.3d at 612 (similar); *Sourbeer v. Robinson*, 791 F.2d 1094, 1101-02 (3d Cir. 1986) (Periodic reviews were "perfunctory, thus denying [the prisoner] the most fundamental right of due process: a *meaningful* opportunity to be heard."); *Incumaa*, 791 F.3d at 534-35 (Due process was not satisfied by "perfunctory explanation[s]," "merely rubber-stamp[ing]" decisions, or "listing in 'rote repetition' the same justification every 30 days."); *Black v. Parke*, 4 F.3d 442, 448, 450 (6th Cir. 1993) (denying qualified immunity where there was no evidence that plaintiff "was given an opportunity to challenge his segregation"); *Isby v. Brown*, 856 F.3d 508, 527 (7th Cir. 2017) ("[U]under *Hewitt*, the periodic review must still be meaningful and non-pretextual."); *Williams v. Hobbs*, 662 F.3d 994, 999 (8th Cir. 2011) ("[M]eaningful reviews, rather than sham reviews" are required.); *Lira v. Herrera*, 448 F. App'x 699, 701 (9th Cir. 2011) ("[A] meaningful opportunity" to respond is required.); *Quintanilla v. Bryson*, 730 F. App'x 738, 744 (11th Cir. 2018) (Periodic reviews "must be meaningful[,]"

"cannot be a sham or a pretext[,]" and must actually evaluate "whether confinement in administrative segregation remains necessary in light of current facts.").

* * * * *

If Perry's evidence at summary judgment is credited, as it must be at this stage, for nearly two years Defendants denied him both "a meaningful opportunity to be heard," *Sourbeer*, 791 F.2d at 1101-02, and "periodic review in a meaningful way," *Jackson*, 699 F.2d at 584. Instead, Defendants offered "perfunctory explanation[s]" "merely rubber-stamp[ing]" a preordained outcome, which Perry was powerless to challenge. *See Incumaa*, 791 F.3d at 530-34.

B. Perry's Right To Meaningful Procedural Protections Was Clearly Established.

In analyzing prong two of the qualified immunity inquiry, the "salient question" is: "whether the state of the law in [the relevant years] gave respondents fair warning that their alleged treatment of [the petitioner] was unconstitutional." *Hope*, 536 U.S. at 741; *see also Savard v. Rhode Island*, 338 F.3d 23, 27 (1st Cir. 2003). First and foremost, Supreme Court decisions clearly establish the law. *D.C. v. Wesby*, 138 S. Ct. 577, 591 n.8 (2018). In fact, even a single Supreme Court holding suffices. *French v. Merrill*, 15 F.4th 116, 127 (1st Cir. 2021). Likewise, Supreme Court decisions are dispositive with regard to any conflict of law. *Starlight Sugar, Inc. v. Soto*, 253 F.3d 137, 145 (1st Cir. 2001).

Sources other than Supreme Court precedent can clearly establish the law, too. *See Suboh v. Dist. Atty's Off. of Suffolk Dist.*, 298 F.3d 81, 93-94 (1st Cir. 2002) (determining that the law was clearly established under case law from the Supreme Court, the First Circuit, other federal circuits, and the Massachusetts Supreme Judicial Court). But among those additional sources of law, "the focus must be on federal precedents," *Alfano v. Lynch*, 847 F.3d 71, 76 (1st Cir. 2017), starting with decisions from the relevant circuit court. *Eves v. LePage*, 927 F.3d 575, 584-86 (1st Cir. 2019) (en banc) (turning first to Supreme Court precedent, then to First Circuit law). Additionally, a consensus of other circuit court decisions can clearly establish the law. *E.g.*, *Maldonado v. Fontanes*, 568 F.3d 263, 271 (1st Cir. 2009).

Finally, in "obvious" violation cases, "a general proposition of law may clearly establish the violative nature of a defendant's actions, especially where the violation is egregious." *Irish v. Fowler*, 979 F.3d 65, 78 (1st Cir. 2020); *Hope*, 536 U.S. at 741, 745; *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020). In such cases, "the unlawfulness of the officer's conduct is sufficiently clear" to defeat qualified immunity "even though existing precedent does not address similar circumstances." *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019).

1. Federal Precedent Clearly Established That Perry's Solitary Confinement Entitled Him To Procedural Protections.

There is a Supreme Court case directly on point and that should have been the start and the end of the clearly established inquiry. The conditions endured by Perry were essentially on all fours with those in *Wilkinson*, and where they deviated, they were *more severe* for Perry. *See supra* at 8-10. Likewise, there is "no question" that the duration of Perry's confinement was prolonged and indefinite, just as in *Wilkinson*. ECF 127 at 28-29; *see supra* at 10-12. A reasonable official would have understood that Perry was entitled to procedural protections.

First Circuit precedent also provided notice. In *Stokes v. Fair*, this Court held that Massachusetts regulations governing placement on awaiting action placement created a liberty interest entitling prisoners to the procedural guardrails described in *Hewitt*, both at the outset of placement and periodically thereafter. 795 F.2d 235, 237-238 (1st Cir. 1986). And here, the regulations relied upon to place Perry in solitary confinement—*i.e.*, those governing awaiting action pending investigation, pending out-of-state placement, etc.—generally track the regulations at issue in *Stokes*. While *Sandin* subsequently "refocused the due process inquiry away from parsing of the mandatory/discretionary language in prison regulations," *McGuinness v. Dubois*, 75 F.3d 794, 797 n.3 (1st Cir. 1996), it did not overrule the *Stokes*

methodology.[9] Thus, *Stokes* surely put Defendants on notice that Perry held a liberty interest "in the initiation and continuance" of non-disciplinary solitary confinement. 795 F.2d at 238. Separately, years before Perry was placed in isolation, this Court recognized that "indefinite" durations of solitary confinement weighed heavily in favor of finding a liberty interest, *Skinner*, 430 F.3d at 487, providing additional notice to Defendants.

The fair warning of *Wilkinson*, *Stokes*, and *Skinner* is bolstered by "a robust consensus of cases of persuasive authority." *Wesby*, 138 S. Ct. at 589-90 (quotation omitted). Indeed, some circuits had held, well before Perry was placed in isolation, that confinement under similar—or even less restrictive—conditions triggered due process protections at durations far *shorter* than Perry's. *See supra* at 10-11. Likewise, other circuits have long confirmed the force of indefinite assignment to non-disciplinary solitary confinement. *See supra* at 11 & n.7.

Despite this precedent, the magistrate judge found it "simply unclear as to whether Perry had a protected liberty interest in not being placed [in solitary confinement]." ECF 127 at 29. It recognized that Perry's placement in solitary

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[9] *See Tellier v. Fields*, 280 F.3d 69, 81, 83 (2d Cir. 2000) (noting that *Sandin* did "not overrul[e] *Hewitt*," but instead "shifted the emphasis of the inquiry from the strict language of the statute to an analysis of the right safeguarded by the statute"); *Aref*, 833 F.3d at 257 (similar).

confinement was "so protracted" as to render it "indefinite," but was troubled by a perceived lack of consensus about the exact length of time necessary to trigger a liberty interest. *Id*. at 28-29. That approach is contrary to *Wilkinson*, which emphasized that the precise duration of confinement is not dispositive. 545 U.S. at 224. Rather, the nature of the confinement and the duration of confinement must be "taken together," not artificially separated and analyzed as if each one "stand[s] alone." *Id*. Here, the extreme conditions, their prolonged duration, and their indefinite nature, "taken together," squarely resolved the issue of Perry's liberty interest.

The magistrate judge's analysis also runs afoul of the Supreme Court's repeated admonition that qualified immunity does not turn on a scavenger hunt for cases presenting identical facts. *E.g.*, *Hope*, 536 U.S. at 741, 745. Instead, the question is one of notice. *Id*. It is difficult to imagine what more notice the case law could have provided.

2. Federal Precedent Clearly Established That Defendants Were Required To Afford Perry Meaningful Process.

There are at least three Supreme Court cases directly on point. *Wilkinson*, *Greenholtz*, and *Hewitt* put Defendants on notice that they were required to: (1) adequately convey to Perry the "factual basis" of their decision to hold him in non-disciplinary solitary confinement (*Wilkinson*, 545 U.S. at 226); (2) provide him with

a meaningful opportunity to "present his views to the prison official charged with deciding" whether to isolate him (*Hewitt*, 459 U.S. at 476; *Wilkinson*, 545 U.S. at 225-28); (3) offer him "a short statement of reasons[,]" sufficient to "serve as a guide for future behavior[,]" provide a "basis for objection before the next decisionmaker[,]" and "guard[] against arbitrary decisionmaking" (*Wilkinson*, 545 U.S. at 226; *Greenholtz*, 442 U.S. at 15-16); and (4) provide meaningful—*i.e.*, not a sham—periodic reviews (*Hewitt*, 459 U.S. at 472, 467-77 & n.9; *Wilkinson*, 545 U.S. at 226). These requirements describe the procedural floor necessary to "minimize the risk of erroneous decisions." *Greenholtz*, 442 U.S. at 13.

These same requirements have long been embedded in First Circuit case law. *Jackson*, 699 F.2d at 584 ("[I]ndefinite[]" or "prolonged" non-disciplinary solitary confinement "requires periodic review in a meaningful way[.]"). And well before Perry was placed in isolation, every other circuit had held similarly. *E.g.*, *Rodriguez v. Phillips*, 66 F.3d 470, 480 (2d Cir. 1995); *Mims v. Shapp*, 744 F.2d 946, 950-51 (3d Cir. 1984); *Baker*, 904 F.2d at 933; *Reeves v. Pettcox*, 19 F.3d 1060, 1062 n.1 (5th Cir. 1994); *Black*, 4 F.3d at 447-48; *Westefer v. Snyder*, 422 F.3d 570, 588-90 (7th Cir. 2005); *Clark v. Brewer*, 776 F.2d 226, 234 (8th Cir. 1985); *Toussaint v. McCarthy*, 801 F.2d 1080, 1099 (9th Cir. 1986); *Estate of DiMarco v. Wyo. Dep't of Corr.*, 473 F.3d 1334, 1339-44 (10th Cir. 2007); *Sheley v. Dugger*, 833 F.2d 1420, 1425-26 (11th Cir. 1987). There was no excuse for Defendants to deny Perry the

fundamental elements of process—meaningful notice, opportunity to be heard, and periodic reviews—triggered by his prolonged and indefinite stay in solitary confinement.

Courts have long denied qualified immunity where meaningful notice, a meaningful opportunity to respond, or meaningful periodic reviews were either wanting or materially disputed. In *Black*, for example, the Sixth Circuit denied qualified immunity because fact issues prohibited the court from determining whether reviews were perfunctory or subject to meaningful challenge. 4 F.3d at 448-50. Similar to Perry, the prisoner-plaintiff in *Black* had been placed in "administrative segregation on 'hold ticket' status" pending "transfer to an out-of-state institution," and then challenged the process he received during a 100-day stretch (out of 281 days total in isolation). *Id*. at 443-44, 446, 449. The *Black* court found that "[t]he process described in [the prisoner's] affidavit"—that he was never accorded "any opportunity to challenge the[] purported justification for [his initial] segregation"— "would not suffice under *Hewitt*." *Id*. at 449.

Likewise, in *Isby v. Brown*, the Seventh Circuit denied qualified immunity because of fact issues regarding whether officials had afforded meaningful reviews, as required under *Hewitt*, or merely "perfunctory" reviews, as evidenced by the fact that the prisoner received "the same two-line decision at every [monthly] review." 856 F.3d 508 (7th Cir. 2017); *see also Sourbeer*, 791 F.2d at 1101-03 (denying

qualified immunity where "purported justifications" during a 198-day stretch in non-disciplinary isolation "were simply being applied in a rote fashion" and thus did not meet *Hewitt*'s requirements); *Selby v. Caruso*, 734 F.3d 554, 559-61 (6th Cir. 2013) (reversing a grant of qualified immunity where a genuine issue of material fact existed regarding whether periodic reviews were meaningful—and therefore comported with *Hewitt*—or a "sham"); *Russell v. Coughlin*, 910 F.2d 75, 76-79 (2d Cir. 1990) (qualified immunity denied where prisoner was denied "notice" in violation of *Hewitt*).

3. Prolonged Solitary Confinement Without Procedural Guardrails Is An Obvious Violation Of The Due Process Clause.

Aside from the weight of federal precedent, where conduct is obviously unlawful—as it is here—factually similar precedent is not necessary to defeat qualified immunity. After all, the clearly established inquiry boils down to notice, not whether a court has held that "the very action in question has been previously held unlawful." *Hope*, 536 U.S. at 739. The Supreme Court has repeatedly explained that obviousness alone can provide fair warning to officials that their acts are unlawful. *E.g.*, *id*. at 745.

Although this Court's consistent application of the obvious violation rule has long made clear its continued vitality, the Supreme Court re-emphasized its potency

just last term.[10] First, in *Taylor*, the Court summarily reversed the Fifth Circuit for its unduly narrow view of the clearly established inquiry. 141 S. Ct. at 53-54. The Court was untroubled by the absence of a prior case establishing that the specific conditions and the exact duration of those conditions were unconstitutional. *Id*. Instead, the "obviousness of Taylor's right" was apparent from the "general constitutional rule" barring deliberate indifference under the Eighth Amendment. *Id*. at 53-54 & n.2. Then, several months later, the Court granted, vacated, and remanded in another qualified immunity case: *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (Mem). *McCoy* instructed the Fifth Circuit to reconsider, in light of *Taylor*, the grant of qualified immunity to a correctional officer who sprayed a prisoner with pepper spray for no reason. *Id*. Although the Supreme Court did not explain its reasoning, the Fifth Circuit had rejected the plaintiff's argument that the assault was an "obvious" violation of the general rule that prison officials cannot act "maliciously and sadistically to cause harm." *See McCoy v. Alamu*, 950 F.3d 226, 234 (5th Cir. 2020).

Supreme Court and First Circuit precedent emphasize that lower courts can and must consider whether "general statements of the law" apply with "obvious

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[10] *E.g.*, *Irish*, 979 F.3d at 78; *Raiche v. Pietroski*, 623 F.3d 30, 39 (1st Cir. 2010); *Whitfield v. Melendez-Rivera*, 431 F.3d 1, 8 (1st Cir. 2005); *Limone v. Condon*, 372 F.3d 39, 48 (1st Cir. 2004); *Suboh*, 298 F.3d at 94.

clarity" in a given case, even in the absence of a factually similar prior case. *Hope*, 536 U.S. at 741. Defendants deprived Perry of nearly all human interaction by confining him to a cramped, windowless cell for at least 23 hours a day, seven days a week, fifty-two weeks a year with no genuine way to challenge that placement. Holding a mentally ill prisoner in such isolation without process or end in sight is every bit as obviously unlawful as hitching a prisoner to a post (*Hope*), exposing them to a filthy cell (*Taylor*), or pepper spraying them for no reason (*McCoy*).

4. A Single State Case Does Not Undermine Authoritative Precedent.

The magistrate judge relied in part on *LaChance v. Commissioner of Corrections*, 463 Mass. 767 (2012), to conclude that the law regarding Perry's entitlement to due process was "murky." ECF 127 at 29-31. State law can be relevant to the clearly established analysis when the Supreme Court and circuit court are silent, and "to the extent that [the state court] analyze[s] the relevant federal issue." *Alfano*, 847 F.3d at 76. But here, the magistrate judge's reliance on *LaChance* was misplaced.

As an initial matter, there are at least three Supreme Court decisions—*Wilkinson*, *Hewitt*, and *Greenholtz*—directly on point, *see supra* at 19, 21-22, trumping any potential conflict of law *LaChance* creates. *Starlight Sugar*, 253 F.3d at 145. Where, as here, Supreme Court precedent leaves no doubt regarding the contours of the federal right at issue, turning to state case law is unnecessary. *Id*.

There were other reasons not to consider *LaChance*. To start, *LaChance* analyzed *Massachusetts* rather than federal case law for purposes of identifying clearly established law, a circumstance diminishing its weight in this federal case. *See Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011). Indeed, *LaChance* cited *Wilkinson* just once—noting that the conditions at issue "bore notable similarities to conditions which the United States Supreme Court has described as 'synonymous with extreme isolation'"—but it did not otherwise address *Wilkinson*. *LaChance*, 463 Mass. at 774. And, with respect to adequate process, *LaChance* did not engage with, or even cite, *Hewitt* or *Greenholtz*, which *Wilkinson* clearly identified as the lodestars. 545 U.S. at 229. The notable "absence of substantive discussion deprives [*LaChance*] of any marginal persuasive value it might otherwise have had" for the clearly-established-law analysis. *Glik*, 655 F.3d at 85.

Finally, the *LaChance* court's qualified immunity analysis cannot be squared with a long line of Supreme Judicial Court precedent holding that prisoners subjected to prolonged non-disciplinary solitary confinement are entitled to meaningful process. *LaChance* could only reach its conclusion by defining "clearly established" law at far too granular a level when it concluded that prior state case law had not established precisely what duration of "Awaiting Action Status" triggers a protected liberty interest. 463 Mass. at 775-77. In fact, the Massachusetts courts had for decades confirmed that prolonged and indefinite solitary confinement—regardless

of the euphemism used—triggered a protected liberty interest and required procedural protections.

As early as 1983, the Supreme Judicial Court declared, in a case where a prisoner had been in non-disciplinary isolation for approximately two years, that "[p]rison administrators may not abuse their discretion … by using awaiting action status as a means to accomplish an unlimited punishment immune to the procedures set forth in the rules and regulations." *Royce v. Comm'r of Corr.*, 390 Mass. 425, 429-30 (1983). In fact, the *Royce* court explicitly noted that *Hewitt* prohibits using non-disciplinary solitary as pretext for indefinite confinement and requires periodic review for prisoners enduring such confinement. *Id.* at 430.

Since then, the Supreme Judicial Court has repeatedly reaffirmed that principle. In *Hoffer v. Comm'r of Corr.*, the court found a due process violation where a prisoner was held indefinitely in the DSU—a euphemism for non-disciplinary solitary confinement—without "meaningful" procedural safeguards. 412 Mass. 450, 454, 456 (1992). Then, in *Haverty v. Comm'r of Corr.*, the court found that all prisoners segregated for "nondisciplinary reasons for an indefinite period of time" had a protected liberty interest and thus were "entitled to the procedural protections of due process." 437 Mass. 737, 739, 760 (2002). Several years later, the court held that it had long been clearly established that, before being

placed in solitary confinement, prisoners must be provided due process. *Longval v. Comm'r of Corr.*, 448 Mass. 412, 422 (2007).

Despite that long line of Massachusetts cases holding that prisoners consigned to prolonged non-disciplinary isolation are entitled to procedural protections, the *LaChance* court concluded the law was not clear because the plaintiff was on "Awaiting Action Status"—a form of non-disciplinary solitary confinement possibly governed by different regulations than the regulations at issue in earlier decisions considering non-disciplinary solitary confinement. 463 Mass. at 778. The *LaChance* court reached this conclusion even after recognizing that the conditions under review were essentially equivalent to the non-disciplinary solitary conditions *Hoffer* and *Haverty* held triggered procedural protections. *Id.* at 774. This is precisely the type of microscopic distinction that is forbidden by the Supreme Court. *E.g.*, *Hope*, 536 U.S. at 741, 745; *Taylor*, 141 S.Ct. at 53.

Finally, it is notable that Massachusetts has a long tradition of requiring heightened procedural protections for prisoners subjected to solitary confinement, even when that isolation is measured in weeks or months rather than years. Originally, solitary confinement in Massachusetts emerged as a form of punishment largely reserved for criminal sentences. *See generally* Act of Mar. 15, 1804 Mass. Acts (1804); *see also Wilde v. Commonwealth*, 43 Mass. 408, 412 (Mass. 1841). While prison officials could impose very short terms of solitary

confinement—*i.e.*, on the order of a week or so, *e.g.*, *Williams v. Adams*, 85 Mass. 171, 171 (1861)—lengthier terms of isolation were entrusted to the judiciary, *cf. e.g.*, Act of Mar. 15, 1804, Mass. Acts, chap. 120 §§ 1-4 at 172-74; chap. 143 § 7 at 243 (1804). That history provides even more reason to question the *LaChance* court's analysis—due process protections for those condemned to solitary confinement has arguably been an uninterrupted feature of Massachusetts law for centuries.

5. Even If *LaChance* Controls, Defendants Are Not Entitled To Qualified Immunity.

Finally, even if this Court were to conclude that *LaChance* is outcome determinative, the law was nonetheless clearly established well before Perry was released from solitary confinement. *LaChance* issued on November 27, 2012, yet Perry was not released from isolation until February 19, 2013. ECF 127 at 23 n. 27. Nor did Defendants provide him with any process during the interim months despite their knowledge that, by the *LaChance* metric, that process was overdue by nearly 17 months. *Id.* at 3 n.4. At minimum, therefore, Perry is entitled to take Defendants to trial for flouting the law—and continuing to hold him in isolation without due process—once *LaChance* issued.

CONCLUSION

For the aforementioned reasons, the district court's summary judgment order should be reversed.

Respectfully Submitted,

Daniel M. Greenfield*
RODERICK & SOLANGE MACARTHUR
JUSTICE CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East. Chicago Ave.
Chicago, IL 60611
(312) 503-8538
daniel-greenfield@law.northwestern.edu

Rosalind E. Dillon
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
160 E Grand Ave, 6th Fl.
Chicago, IL 60611
(202) 869-3379

Alexis Garmey Chardon
TERRY GARMEY & ASSOCIATES
482 Congress Street
Suite 402
Portland, Maine 04101
(207) 331-3111
Counsel for Plaintiff-Appellant

* Law students Barrett Cooney, Tyler Dallas, Peter Douglas, and Monet Gonnerman contributed to this brief.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Local Rule 11.0, on March 4, 2022, I electronically filed the foregoing redacted brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I further certify that on March 4, 2022, I filed an unredacted copy of the brief with the court along with a motion to seal via third-party commercial carrier for overnight delivery. Finally, I certify that on March 4, 2022, I served an unredacted copy of the brief and motion to seal via email on the following:

Sheryl Grant
MA Dept of Correction, Legal Division
70 Franklin St, Ste 600
Boston, MA 02110-1300
Sheryl.Grant@doc.state.ma.us

/s/ Daniel M. Greenfield
Daniel M. Greenfield
Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the Court's supplemental briefing order and the type-volume limit of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P 32(f), this document contains 30 pages and 7,074 words.

This document complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Word for Microsoft Office 365 and uses Times New Roman 14-point font.

/s/ Daniel M. Greenfield
Daniel M. Greenfield
Attorney for Plaintiff-Appellant