24-2548

IN THE

United States Court of Appeals for the Second Circuit

JOSEPH VIDAL,

Plaintiff-Appellant,

v.

DONALD E. VENETTOZZI, DIRECTOR OF SPECIAL HOUSING UNIT, INMATE DISCIPLINARY PROGRAM, ERIC GUTWEIN, COMMISSIONER HEARING OFFICER, WAYNE CARROL, RECREATION SUPERVISOR, DISCIPLINARY EMPLOYEE ASSISTANT, BRYAN P. ANSPACH, DISCIPLINARY OFFICE ASSISTANT, IN THEIR PERSONAL AND INDIVIDUAL CAPACITY,

Defendants-Appellees,

and

(caption cont'd on inside front cover)

On Appeal from the U.S. District Court for the Southern District of New York, No. 18-CV-6184-NSR

BRIEF OF PLAINTIFF-APPELLANT JOSEPH VIDAL

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INTRODUCTION

After experiencing a brutal assault by several correctional officers, Joseph Vidal was charged with initiating the assault and immediately transferred to solitary confinement. In the disciplinary hearing that followed, he was deprived of the opportunity to introduce key witness testimony and evidence that he had been attacked by the correctional officers and did not himself instigate the assault. Because of this hollow process, Mr. Vidal was forced to spend 258 days in solitary confinement. There, trapped in a cell for at least 23 hours every day, he endured insufficient ventilation, excruciatingly high temperatures, and inadequate nutrition.

These events violated Mr. Vidal's rights under the Due Process Clause of the Fourteenth Amendment. Contrary to the district court's ruling, the 258 days Mr. Vidal spent in solitary confinement in awful conditions "impose[d] atypical and significant hardship" on him "in relation to the ordinary incidents of prison life," thus implicating a liberty interest and triggering due process protections. *Sandin v. Conner*, 515 U.S. 472, 484 (1995). This Court should hold that fewer than 305 days in solitary confinement imposes an atypical and significant hardship on a

prisoner; indeed, the First Circuit recently held that, considering deepening understandings of the harmful effects of solitary confinement, just 30 days presumptively triggers due process protections. *See Perry v. Spencer*, 94 F.4th 136, 154 (1st Cir. 2024). States within this Circuit have also dramatically limited the use of solitary confinement through legislation, rendering its long-term use atypical. In light of these developments, this Court's ruling twenty-five years ago in *Colon v. Howard*, 215 F.3d 227, 229 (2d Cir. 2000)—that 305 days in solitary confinement automatically triggers due process—needs updating: just a fraction of that poses an atypical and significant hardship.

In the alternative, this Court should reverse the district court on the ground that the conditions of Mr. Vidal's confinement—which included debilitating heat, a lack of ventilation, and inadequate nutrition—imposed an atypical and significant hardship when combined with the length of his confinement.

Because Mr. Vidal's confinement implicated a liberty interest, he was entitled to due process, including the opportunity to present essential witness testimony. His hearing did not meet that standard.

This Court should reverse.

JURISDICTIONAL STATEMENT

Plaintiff Joseph Vidal brought this civil rights action under 42 U.S.C. § 1983 alleging violations of his First, Eighth, and Fourteenth Amendment rights. The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered a final order granting summary judgment against Mr. Vidal on August 21, 2024. Mr. Vidal timely appealed. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether 258 days in solitary confinement triggers due process protections under the Fourteenth Amendment in light of recent research, legislation, and caselaw that make clear that there exists a liberty interest in avoiding durations of solitary confinement significantly shorter than the 305 days heretofore recognized by this Court.

2. Whether Mr. Vidal's placement in solitary confinement for 258 days in conjunction with the conditions he experienced therein—including excessive heat and ventilation, as well as inadequate food—triggered due process protections, given that this Court has held that durations of confinement between 101 and 305 days,

coupled with conditions of confinement that diverge from those in other parts of the prison, can impose an atypical and significant hardship. *See Palmer v. Richards*, 364 F.3d 60, 64-65 (2d Cir. 2004).

STATEMENT OF THE CASE

I. Factual Background

A. Mr. Vidal's Disciplinary Hearing

Green Haven Correctional Facility scheduled Mr. Vidal for a housing unit transfer—from E-Block to A-Block—the morning of March 6, 2015. JA 16.[1] Upon his arrival at A-Block, Correctional Officers Wesley and Lampon told Mr. Vidal that he needed to dispose of personal property he was carrying. JA 138. Wesley then told Mr. Vidal to take whatever property he needed "upstairs." *Id.* Mr. Vidal, in response, grabbed a commissary bag containing his legal books, took it upstairs, and handed his things to Espinal, a porter in the prison. JA 138-39. A female officer was also present. JA 139.

Once Mr. Vidal came back downstairs, Lampon punched Mr. Vidal while Wesley yelled at him to "[g]et on the ground." JA 139. Mr. Vidal

[1] In this Court, a verified complaint is treated as an affidavit for summary judgment purposes. *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995).

endured continued punching from Lampon until a response team arrived and asked about the incident. JA 140. In response to the team's questioning about the incident, Wesley stated that Mr. Vidal had not wanted to downsize his property. *Id*.

Later that day, Wesley and Lampon falsely alleged that Mr. Vidal assaulted both officers. JA 18. As a result of the allegations, Mr. Vidal was immediately transferred to Green Haven's Special Housing Unit ("SHU"). JA 169. Two days later, on March 8, 2015, Mr. Vidal was served two Inmate Misbehavior Reports ("IMR"), charging him with violent conduct, creating a disturbance, assault on staff, and refusing a direct order. JA 18. Mr. Vidal was then assigned an individual to assist him in developing his defense, former Recreation Supervisor Defendant Wayne Carrol. JA 142. Mr. Vidal asked Defendant Carrol to find him the name of the female officer who had been present during Mr. Vidal's assault, so Mr. Vidal could call her as a witness at his disciplinary hearing. JA 142-43. He also asked for a statement from Espinal. JA 144. Defendant Carrol confirmed that both the female officer and Espinal would "be [his] witness" at the hearing. JA 144.

Soon after, Defendant Eric Gutwein, the Commissioner Hearing Officer, commenced a hearing in relation to the charged disciplinary violations in the IMRs. JA 257. Defendant Brian Anspach assisted with the hearing. JA 167. As soon as the hearing commenced, Mr. Vidal asked that all the witnesses that had been present during his assault—including the female officer—be able to testify on his behalf. JA 144. But, Defendant Gutwein refused to allow the female officer to be a witness. JA 244.[2] Mr. Vidal was also unable to proffer documentary evidence discrediting the officers' accusations, including prison policy pertaining to prisoner property. JA 243.

At the conclusion of the hearing, Defendant Gutwein found Mr. Vidal guilty of the disciplinary violations. JA 166-67. Mr. Vidal was sentenced to 270 days in solitary confinement and loss of privileges, including access to packages, commissary, and telephone access. JA 257. Mr. Vidal appealed this decision to Defendant Donald Venettozi, then the Disciplinary Appeal Review Officer of the Department of Corrections and

[2] Espinal chose not to testify at the hearing. Mr. Vidal asked that Espinal provide a written statement for the disciplinary hearing, but Defendant Carrol did not obtain a written statement from Espinal. JA 243.

Community Supervision. JA 240. A day later, Defendant Venettozi affirmed Defendant Gutwein's decision. *Id*.

Mr. Vidal was transferred soon after to Upstate Correctional Facility, where he completed his sentence. R. Doc. 125 at 5. In total, he spent 258 days in solitary confinement: 95 days at Green Haven and 163 days at Upstate. JA 248.

B. Mr. Vidal's Experience In Solitary Confinement

In the SHU, Mr. Vidal was subjected to all the typical deprivations associated with solitary confinement—and more. While at Green Haven Correctional Facility, he was confined to his cell for at least 23 hours per day. R. Doc. 124 at 5. He was denied packages and commissary, JA 257, and his personal belongings were limited. JA260. He was also denied telephone access. JA 257. During the brief periods he was allowed outside his cell—including for showers, recreation, and medical appointments—he was forced to wear mechanical restraints. JA 260.

In addition to these deprivations, Mr. Vidal was subjected to excruciating heat at Green Haven. Outside temperatures reached nearly 90 degrees while he was confined there, JA 249-50, and unlike in general population, the SHU contained no fans to provide air circulation. JA 250.

Moreover, the windows in the SHU were bolted shut, JA 249, so there was no breeze. JA 250. And because the corners of the cell wall were metal, "[w]hen the sun beam[ed] into the cell it bec[a]me[] like an oven." *Id*. Moreover, unlike prisoners in general population who could shower daily, *id.*, Mr. Vidal only had access to a shower to cool down and rinse off the sweat twice a week. JA 31-32. He also had no access to cold water or ice, JA 250, which people in general population were provided. *Id*. And, in contrast to prisoners in other parts of the prison, he could not seek respite in program areas or during outdoor recreation. *Id.* As a result, Mr. Vidal had to endure constant "cruel hot temperatures" in his cell. JA 249-50. He had to strip down to his boxers to escape the heat, and even then, he would "sweat and feel sticky." JA 250.

Mr. Vidal was also deprived of adequate nutrition throughout his stay in solitary confinement.[3] JA 251. His meals were often frozen or soggy, *id.*, rather than "nourishing and palatable" as in general population. 7 NYCRR § 1704.8. And he was provided much smaller portions than those available in general population. JA 251. Moreover,

[3] The record is ambiguous, but read in Mr. Vidal's favor, these nutritional issues persisted the entire time Mr. Vidal was in solitary confinement.

prisoners in general population could supplement their meals by asking for an extra scoop of rice or piece of bread; in solitary, Mr. Vidal could not. *Id*. And because he was unable to receive food packages or purchase food items in the facility's commissary and had to abandon all his commissary as part of his disciplinary proceeding, he grew "weak and thin" during his time in isolation. *Id.*

When Mr. Vidal was transferred to Upstate Correctional Facility—where he was confined for over five months—he experienced many of the same deprivations as in Green Haven: he was denied telephone use, packages, and commissary, JA 257, and his personal belongings were limited. JA260. But he also experienced a new kind of torture: he was locked in a cell for 24 hours a day, 7 days a week. JA 251. He could not even leave his cell to shower: showers were installed in the small cells. *Id*. Mr. Vidal was also forced to share his cell with another prisoner for at least part of his time at Upstate, and accordingly had "no privacy" and was forced to "endure his cell mate's poor hygiene" and "waste stench" with no respite. *Id.*[4]

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[4] This Court's due process analysis specifies that the conditions of SHU confinement can raise due process issues and has never held that having a cellmate in such conditions precludes finding a violation of the Due

II. Procedural History

Mr. Vidal, proceeding *pro se*, filed this lawsuit under 42 U.S.C. § 1983 against Defendants Venettozi, Gutwein, Carroll, and Anspach in the United States District Court for the Southern District of New York. JA 13. Mr. Vidal alleged violations arising out of the First, Eighth, and Fourteenth Amendments to the United States Constitution. JA 13-14. Specifically, he argued that Defendant Gutwein violated his procedural due process rights during his disciplinary hearing by arbitrarily denying Mr. Vidal the right to call witnesses and present documentary evidence. JA 24. Mr. Vidal also argued that Defendant Venettozi failed to remedy Defendant Gutwein's violation. JA 24. And he argued that Defendants Carroll and Anspach failed to adequately assist him in preparing his defense. JA 24-25.

Defendants moved for summary judgment, raising three arguments. R. Doc. 114. First, Defendants argued that Mr. Vidal did not

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Process Clause. Indeed, prominent organizations describe the cruelty of "double-cell solitary," noting that this practice exacerbates the harms imposed by SHU confinement. *See The Deadly Consequences of Solitary With a Cellmate*, THE MARSHALL PROJECT (March 24, 2016), https://www.themarshallproject.org/2016/03/24/the-deadly-consequences-of-solitary-with-a-cellmate.

have a liberty interest arising out of the duration or conditions of his solitary confinement. R. Doc. 117 at 8. Second, they argued that Defendant Venettozi was entitled to qualified immunity because the law was not clearly established at the time of the incident that failing to remedy procedurally deficient disciplinary proceedings violates the Constitution. R. Doc. 117 at 14. Third, they argued that Mr. Vidal failed to demonstrate Defendant Anspach was personally involved in the disciplinary hearing. R. Doc. 117 at 17. Defendants did not contest that, if Mr. Vidal had a protected liberty interest, the process he was awarded was not sufficient.

The district court granted summary judgment, agreeing with Defendants' argument that the conditions of Mr. Vidal's confinement did not impose an atypical and significant hardship. JA 256. First, the district court noted that the amount of time Mr. Vidal spent in solitary confinement was a disputed figure: Mr. Vidal argued that he was confined for 258 days, while Defendants claimed that Mr. Vidal was only confined for 180 days. JA 260.[5] Either way, the district court held, Mr.

[5] Defendants argued that only the 180 days after his hearing should be counted, even though Mr. Vidal was placed in solitary confinement while awaiting his hearing, too, for a total of 258 days. R. Doc. 117 at 5.

Vidal was in solitary confinement for an "intermediate duration" per this Court's ruling in *Palmer*, 364 F.3d at 64-65. JA 259. And so, in accordance with that case, to determine whether he had a liberty interest required "development of a detailed record of the conditions of the confinement relative to ordinary prison conditions." *Palmer*, 364 F.3d at 64-65. (cleaned up).

Citing district court cases and New York state regulations, the court found that Mr. Vidal's conditions "reflect[ed] the standard conditions of SHU confinement" and accordingly did not constitute an atypical and significant hardship. JA 260. The court separately concluded that inadequate nutrition, excess heat, and lack of ventilation—while not standard SHU conditions—also did not permit a finding of atypical and significant hardship.[6] JA 262-64. The district court did not reach either of Defendants' alternative arguments regarding Defendant Venettozi's

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[6] To do so, the district court relied largely on decisions arising in the Eighth Amendment context—a much higher standard than the Fourteenth Amendment's atypical and significant hardship standard. JA 263. *See Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) ("We do not suggest, however, that the [*Sandin*] test is synonymous with Eighth Amendment violation. What *less egregious* condition or combination of conditions or factors would meet the test requires case by case, fact by fact consideration." (emphasis added)).

entitlement to qualified immunity or Defendant Anspach's personal involvement. This appeal followed.

SUMMARY OF THE ARGUMENT

Mr. Vidal had a right to due process in his disciplinary hearing, and he was deprived of that right. Indeed, Mr. Vidal's experience in solitary confinement implicated a liberty interest on two independent grounds: duration alone and duration in conjunction with the conditions of his confinement.

First, far fewer than 258 days of solitary confinement imposes an atypical and significant hardship, implicating a liberty interest. Twenty-five years ago, in *Colon v. Howard*, 215 F.3d 227, 230-32 (2d Cir. 2000), this Court held that any confinement in solitary longer than 305 days automatically imposes an atypical and significant hardship, implicating a liberty interest and triggering due process protections. In the decades since then, research has made clear that significantly shorter stints in solitary confinement cause substantial harm. Accordingly, at least one federal circuit has established that just 30 days presumptively triggers due process protections. States in the Second Circuit have also adopted legislation drastically scaling back the use of long-term solitary

confinement. Most recently, New York's Humane Alternatives to Long-Term (HALT) Solitary Confinement Act limited the length of time anyone can spend in segregated confinement to three consecutive days or six days in any given 30-day period. HALT Solitary Confinement Act A.B. 2277A, 244 Leg. Sess. (N.Y. 2022). Accordingly, this Court should hold that the duration of Mr. Vidal's solitary confinement alone—and durations far shorter—impose an atypical and significant hardship.

In the alternative, this Court should reverse the district court on the ground that the duration and specific conditions of Mr. Vidal's confinement together triggered due process protections. In addition to the typical deprivations associated with solitary confinement, Mr. Vidal was subjected to excessive heat, lack of ventilation, and inadequate nutrition. And, for five months, he was denied *any* time outside his cell at all. Combined with the duration of his isolation, these conditions constituted an atypical and significant hardship.

Because Mr. Vidal's confinement implicated a liberty interest, the process he was provided was patently inadequate. This Court has made clear that due process includes the opportunity to introduce witness testimony during a disciplinary hearing, *see Willey v. Kirkpatrick*, 801

F.3d 51, 64 (2d Cir. 2015), and Mr. Vidal was denied that opportunity—a fact upon which all parties and the court below agreed.

This Court should reverse.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision to grant summary judgment, "resolv[ing] all ambiguities and draw[ing] all inferences [from the record] in favor of the party against whom summary judgment is sought." *I.V. Servs. of Am., Inc. v. Trustees of Am. Consulting Engineers Council Ins. Tr. Fund*, 136 F.3d 114, 119 (2d Cir. 1998) (cleaned up). This Court affirms summary judgment "only where 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Willey*, 801 F.3d at 62 (quoting Fed. R. Civ. P. 56(a)). If a plaintiff proceeded *pro se* in the district court—as Mr. Vidal did—the Court "must interpret his papers liberally 'to raise the strongest arguments that they suggest.'" *Id.* (citing *Burgos v. Hopkins*, 14 F.3d 787 (2d Cir. 1994)).

ARGUMENT

I. The Disciplinary Proceedings At Green Haven Correctional Facility Violated Mr. Vidal's Procedural Due Process Rights.

"The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). The Fourteenth Amendment's Due Process Clause protects individuals from "deprivations of life, liberty, or property." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). In determining whether the government violated an individual's procedural due process rights, this Court considers (1) whether the plaintiff possessed a liberty interest; and (2) whether the process defendants provided was constitutionally sufficient to prevent a deprivation of that interest. *Giano v. Selsky,* 238 F.3d 223, 225 (2d Cir. 2001). Mr. Vidal's experience in solitary confinement implicated a liberty interest, triggering procedural due process protections. And the process Mr. Vidal received failed to adequately safeguard his liberty interest. Accordingly, this Court should reverse the district court's decision granting summary judgment to Defendants.

A. Mr. Vidal's Experience In Solitary Confinement Implicated A Liberty Interest.

To invoke the procedural protections of the Due Process Clause, an individual must establish that a liberty interest "is at stake." *Wilkinson*, 545 U.S. at 221. A liberty interest in "avoiding particular conditions of confinement" requires consideration of the "nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'" *Id.* at 222-23 (citing *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). The applicable baseline—the "ordinary incidents of prison life"—are those in the general prison population and non-punitive segregated confinement.[7] *Id.* If the conditions in solitary confinement impose an "atypical and significant hardship" on the prisoner in relation to the established baseline, the

[7] As an initial matter, this Court's precedent requires a comparison to both the general population and non-punitive administrative confinement if such confinements occur in the ordinary course of prison administration. *See Welch v. Bartlett*, 196 F.3d 389, 393 (2d Cir. 1999) ("Whether the conditions of Welch's confinement constitute an atypical and significant hardship requires that they be considered in comparison to the hardships endured by prisoners in general population, as well as prisoners in administrative and protective confinement, assuming such confinements are imposed in the ordinary course of prison administration."); *Brooks v. DiFasi*, 112 F.3d 46, 48 (2d Cir. 1997) (rejecting summary judgment for prison officials for lack of any findings "about the prevailing conditions in administrative confinement or in the prison at large").

prisoner has a liberty interest protected by the Due Process Clause. *Sandin*, 515 U.S. at 483-84.

Mr. Vidal was subjected to an "atypical and significant hardship" and entitled to due process on two independent grounds. *Sandin*, 515 U.S. at 484. First, spending 258 days[8] in standard solitary confinement conditions alone imposes an atypical and significant hardship that triggers due process. Second, the time Mr. Vidal spent in solitary confinement combined with the particularly egregious conditions he experienced together constituted an atypical and significant hardship. Mr. Vidal was thus entitled to due process twice over.

[8] In addition to the 258 days at issue in this case, Mr. Vidal was in solitary confinement from December 13, 2014 until March 3, 2015 (80 days)—ending 3 days prior to the start of the confinement at issue here. *See* JA 249. This Court has repeatedly acknowledged the impact of sustained isolation on a prisoner in solitary confinement. *See Giano v. Selsky*, 238 F.3d 223, 226 (2d Cir. 2001) (holding that lower court erred in failing to aggregate two consecutive periods of administrative segregation for purposes of the *Sandin* analysis); *see also Sims v. Artuz*, 230 F.3d 14, 23-24 (2d Cir. 2000) (noting shorter consecutive sentences may need to be "aggregated for purposes of the *Sandin* inquiry").

1. *A Duration Of Far Fewer Than 258 Days In Standard Solitary Confinement Conditions Imposes An Atypical And Significant Hardship That Triggers Due Process Protections.*

Spending 258 days in solitary confinement, as Mr. Vidal did, poses an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. In fact, even a fraction of that duration triggers due process in light of this Court's longstanding precedent combined with recent research on solitary confinement and state law restricting its use.

This Court has long recognized that duration is fundamental to determining whether a prisoner's experience in solitary confinement implicates a liberty interest, and confinement in "standard SHU conditions" can implicate a liberty interest based on duration alone. *Colon v. Howard*, 215 F.3d 227, 230-32 (2d Cir. 2000).[9] First, in *Welch v. Bartlett*, 196 F.3d 389, 394 (2d Cir. 1999), this Court reversed a grant of

[9] The standard conditions of solitary confinement include confinement for 23 hours a day, one hour of exercise in the yard per day, two showers per week, and denial of various privileges available to general population prisoners, such as the opportunity to work and obtain out-of-cell schooling. *Palmer*, 364 F.3d at 65 n.3; *see also* 7 NYCRR § 304. *Cf.* 7 NYCRR § 301.4 (stating that prisoners in administrative segregation "will not be cell-confined for more than seventeen hours per day").

summary judgment, holding that the district court erred in concluding that 90 days in standard solitary confinement conditions was typical simply because "approximately half the punitive SHU sentences were 90 days or more." Rather, the Court explained, the relevant question was how 90 days in standard solitary conditions compared to the conditions "typically endured by other prisoners" *not* in solitary confinement. *Id.* In so holding, this Court made clear the existence of a liberty interest may turn on the length of time that someone is subjected to normal conditions of solitary confinement, absent any additional deprivations. *See id.*

One year later, this Court created a three-tier framework for determining when solitary confinement triggers due process, and reaffirmed that certain durations automatically suffice. According to the Court, approximately ten months in administrative segregation constituted an "atypical and significant hardship" based on the duration itself. *Colon v. Howard*, 215 F.3d 227, 230-32 (2d Cir. 2000) ("We conclude that Colon's confinement for 305 days in standard SHU conditions met the *Sandin* standard."). Confinement for between 101 days and 305 days requires "development of a detailed record" to assist with appellate review. *Id.* at 232. And even confinement of fewer than 101 days could

implicate a liberty interest on a record "more fully developed." *Id.* at 232 n.5.[10] While *Colon* was right to establish that certain durations of solitary confinement automatically trigger due process, the 305-day benchmark it set is now out of date. In the quarter century since *Colon*, significant scholarship has emerged documenting the profound harms of solitary confinement, suggesting that periods well under 305 days are atypical and significant. *See, e.g.*, Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 Nw. U. L. Rev. 211, 219 (2020). In fact, as the Fourth Circuit recently explained, there "is *not a single published study* of solitary or supermax-like confinement in which nonvoluntary confinement lasted for longer than 10 days . . . that failed to result in negative psychological effects." *Porter v. Clarke*, 923 F.3d 348, 356 (4th Cir. 2019). For its part, the Third Circuit has "acknowledge[d] the robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation in solitary confinement." *Palakovic v. Wetzel*, 854 F.3d 209, 225 (3d Cir.

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[10] Writing for himself, Judge Newman would have set a bright-line rule even lower, but noted that doing so was not required by the facts of the case; as a result, the Court would "await subsequent litigation." *Colon*, 215 F.3d at 232.

2017). For example, studies have found that people who have spent time in solitary confinement are more than three times as likely as other prisoners to engage in self-harm, *see* Kayla James & Elena Vanko, *The Impacts of Solitary Confinement*, VERA INSTITUTE OF JUSTICE (April 2021), https://www.vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf, and people placed in solitary confinement for more than four weeks are twenty times more likely than other prisoners to require psychiatric hospitalization, *see* Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement Is Cruel and Far Too Usual Punishment*, 90 Ind. L.J. 741, 758 (2015).

Moreover, solitary confinement has also been known to cause significant non-psychiatric medical problems. *See* Haney, *supra* at 219. A series of studies conducted over the past two decades show that it "undermines health outcomes" and "literally lowers the age at which people die." Haney, *supra* at 230; *see* Mariposa McCall, MD, *Health and Solitary Confinement: Issues and Impact*, PSYCHIATRIC TIMES (March 16, 2022), https://www.psychiatrictimes.com/view/health-and-solitary-confinement-issues-and-impact (solitary associated with 26% increased risk of premature death);

see also Brie A. Williams, et al., *The Cardiovascular Health Burdens of Solitary Confinement*, 34 J. GEN. INTERNAL MED 1977, 1977-80 (June 21, 2019), https://link.springer.com/article/10.1007/s11606-019-05103-6 (demonstrating that solitary confinement increases prevalence of hypertension, stroke, and myocardial infractions).

In light of evolving understandings of the harms of solitary, at least one of this Court's sister circuits has held that a duration markedly lower than the 305 days established by this Court implicates a liberty interest. In *Perry*, 94 F.4th at 154, the First Circuit recognized a "presumption" that confinement in solitary for more than 30 days imposes an atypical and significant hardship. In so holding, the Court noted that "solitary confinement is known to have serious adverse psychological effects on those subjected to it, even when it persists for *less* than thirty days." *Id.* at 151.

Legislation has also dramatically curbed the use of prolonged solitary confinement, reflecting how durations well under 305 days are significant and atypical today. And New York's HALT Solitary Confinement Act, passed in 2022, suggests that a tiny fraction of the 258 days Mr. Vidal spent in solitary confinement is now presumptively

atypical and significant. HALT Solitary Confinement Act A.B. 2277A, 244 Leg. Sess. (N.Y. 2022). The Act "limits the length of time anyone can spend in segregated confinement" to three consecutive days or six days in any given 30-day period. *Id.* And prisoners can be confined for longer periods—15 consecutive days or 20 days in a 60-day period—only if they commit acts "so heinous or destructive that placement of the individual in general population housing creates a significant risk of imminent serious physical injury to staff or other incarcerated persons, and creates an unreasonable risk to the security of the facility." *Id.* Moreover, the prison can only make such a determination after an evidentiary hearing, followed by a written decision. *Id.* The length of Mr. Vidal's confinement thus represents a dramatic departure from the durational limits set out by New York's legislation. *See also Perry*, 94 F.4th at 157 (holding that a prison may rely on state law to show that the solitary confinement at issue is atypical based on length alone "by showing that such confinement exceeds the longest defined period of time that the state's own regulations specify"). And other states within this Circuit have taken similar steps to limit solitary confinement. *See* 2022 Conn. Pub. Act No. 22-18 (Connecticut law stating that no person may be placed in solitary

confinement for more than fifteen consecutive days or thirty total days within any sixty-day period). These developments in state law are relevant in determining what duration of solitary confinement implicates a liberty interest. *Wilkinson*, 545 U.S. at 222 (quoting *Sandin*, 515 U.S. at 483-84); *see also Perry*, 94 F.4th at 156 (a state's regulations may "inform the durational inquiry" into whether the length of time in solitary confinement constituted an atypical and significant hardship).

In light of this Court's longstanding recognition that standard solitary confinement conditions can trigger due process, coupled with recent studies and legislation rendering even short stints in solitary confinement significant and atypical, this Court should hold that the duration Mr. Vidal spent in solitary confinement automatically triggered due process—and even durations far shorter would have done the same.[11]

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[11] Several correctional systems, including the federal Bureau of Prisons, have also restricted their use of solitary confinement. *See* U.S. GOV'T ACCOUNTABILITY OFF., IMPROVEMENTS NEEDED IN [BOP] MONITORING AND EVALUATION OF IMPACT OF SEGREGATED HOUSING, 61-65 (2013); Maurice Chammah, *Stepping Down from Solitary Confinement*, THE ATLANTIC, Jan. 7, 2016; Rick Raemisch, *Why I ended the Horror of Long-Term Solitary in Colorado's Prisons*, ACLU, Dec. 5, 2018, https://www.aclu.org/news/prisoners-rights/why-i-ended-horror-long-term-solitary-colorados-prisons.

2. The Time Period Mr. Vidal Spent In Solitary, Combined With His Conditions, Posed An Atypical And Significant Hardship In Relation To The Ordinary Incidents Of Prison Life.

In the alternative, the 258 days Mr. Vidal spent in solitary confinement, when combined with the specific conditions Mr. Vidal experienced in isolation, implicated a liberty interest under this Court's longstanding precedent. In *Palmer*, decided over twenty years ago, this Court held that periods of confinement between 101 and 305 days—an "intermediate duration"—could trigger due process in light of "'a detailed record' of the conditions of the confinement relative to ordinary prison conditions." 364 F.3d at 64-65; *see Davis v. Barrett*, 576 F.3d 129, 133 (2d Cir. 2009); *Welch*, 196 F.3d at 393; *Brooks v. DiFasi*, 112 F.3d 46, 48-49 (2d Cir. 1997). Moreover, this Court made clear that in assessing conditions of isolation, all of them must be considered in the aggregate. *See, e.g.*, *Palmer*, 364 F.3d at 66 (conditions including deprivation of property, mechanical restraints during escort, and being out of communication from family together "raise[d] genuine questions of material fact as to the conditions under which Palmer was confined and how those conditions compared to the conditions imposed on the general prison population").

The duration and conditions of Mr. Vidal's solitary confinement amounted to a significant and atypical hardship. He was confined to his cell for 23 hours per day at Green Haven, R. Doc. 124 at 5, and 24 hours per day, seven days a week, at Upstate.[12] JA 251; *see Kalwasinski v. Morse*, 201 F.3d 103, 106-07 (2d Cir. 1999) (noting that the district court in *Welch* "did not appreciate the significant difference" between the 23 hours SHU prisoners were confined in their cells as compared to the half a day those in general population were confined, and recognizing that "[s]uch a finding is necessary" to adequately determine whether an atypical and significant hardship exists). He was not allowed to participate in group activities and denied privileges granted to people in general population, including packages, commissary, and telephone access. JA 250-51; JA 257; *see Welch*, 196 F.3d 391-93 (holding that 90-day confinement to a cell for 23 hours a day can constitute an atypical and significant hardship when a prisoner is also unable to participate in group activities and has "less access than is normal for general population prisoners" to showers, visits, and other privileges); *Palmer*,

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[12] At Upstate, Mr. Vidal was only able to exercise in a small "recreation pen" connected to his cell. JA 251.

364 F.3d at 66 (finding loss of communication from family relevant to due process inquiry). Mr. Vidal could only access showers twice per week, JA 32, whereas prisoners elsewhere in the prison could shower daily or every other day. JA 250; *see Welch*, 196 F.3d 391-93. And Mr. Vidal's personal belongings were limited, JA 260; *see Sims v. Artuz*, 230 F.3d 14, 23 (2d Cir. 2000) (finding denial of personal belongings relevant to due process inquiry).

Additionally, while at Green Haven, Mr. Vidal endured extremely hot temperatures relative to general population. Housing blocks in general population contain ice machines and prisoners have access to cold water. JA 250. Prisoners can possess a fan in their cell to keep cool, even if they are confined in administrative segregation. *Id.* They also have access to a ventilation system in the ceiling and fans circulating air throughout the housing block. *Id.* As noted above, they can shower daily or every other day, and "escape the hot cells" to attend programs or engage in recreation daily. *Id.* In contrast, while in solitary confinement at Green Haven, Mr. Vidal had to endure constant "cruel hot temperatures." JA 249-50. The hot sun would hit the metal corners of his cell's walls, making his cell "like an oven" for 23 hours per day. JA 249-

50. He only had access to a shower to rinse off the heat and sweat twice a week, JA 32, and he had no access to cold water or ice. JA 250. The solitary confinement unit had no fans, creating a complete lack of airflow in the already hot cells. *Id*. And, because the windows were bolted shut, there was no breeze within the housing block. *Id*.

Mr. Vidal was also deprived of adequate nutrition while in solitary confinement, compounding the severity of his conditions. In *Sims*, 230 F.3d at 23, this Court noted that conditions including "deprivation, for two 14-day periods, of his normal meals" could impose an atypical and significant hardship. And unlike the plaintiff in *Sims*, Mr. Vidal appears to have experienced inadequate nutrition relative to general population *the entire 258 days* he spent solitary confinement. He received portions smaller than those available in general population. JA 251. His meals were often frozen, soggy, or reconstituted, *id*, whereas meals in general population must be "nourishing and palatable." 7 NYCRR § 1704.8. And whereas, in general population, prisoners were able to supplement their meals by asking for an extra scoop of rice or a piece of bread, Mr. Vidal was denied that opportunity. JA 251. He was also prohibited from purchasing food items in the facility's commissary and receiving food

packages, unlike prisoners elsewhere in the facility. *Id.* As a result, Mr. Vidal grew "weak and thin" because of his placement in solitary confinement. *Id.* These conditions, in conjunction with the duration of his isolation, combined to constitute an atypical and significant hardship.

In fact, the conditions experienced by Mr. Vidal were so extreme that they likely violated the Eighth Amendment's cruel and unusual punishments clause, a standard much higher than Fourteenth Amendment due process.[13] *See Corselli v. Coughlin*, 842 F.2d 23, 27 (2d Cir. 1988) (reversing district court grant of summary judgment where genuine dispute of fact remained as to whether prisoner's exposure to "bitterly cold temperatures" due to broken windows violated the Eighth Amendment); *Wright v. McMann*, 387 F.2d 519, 526-27 (2d Cir. 1967) (reversing dismissal of complaint where plaintiff alleged exposure to "bitter cold" for 33 days); *Gaston v. Coughlin*, 249 F.3d 156 (2d Cir. 2001)

[13] Courts of appeal have noted that the Eighth Amendment standard is higher than the atypical and significant hardship standard. *See*, e.g., *Keenan v. Hall*, 83 F.3d 1089 (9th Cir. 1996) (stating that if certain conditions violated the Eighth Amendment they implicated a liberty interest but noting that a "less egregious condition or combination of conditions" would ultimately implicate a liberty interest).

(vacating dismissal of complaint alleging frigid temperatures in solitary confinement).

The district court committed three fundamental errors in determining that Mr. Vidal's conditions did not trigger due process protections. First, the district court relied on the wrong comparator: it held that a number of Mr. Vidal's conditions did not trigger due process because everyone in the SHU experienced them per regulation, JA 261-62, but the relevant inquiry was the extent to which Mr. Vidal's conditions diverged from prisoners elsewhere in the prison, including general population and administrative segregation. *See Welch*, 196 F.3d 394; *Davis v. Barrett*, 576 F.3d 129, 135 (2d Cir. 2009) (holding that the district court erred in granting summary judgment where it "simply noted" that conditions prisoner experienced were "no more severe" than those prescribed by disciplinary solitary confinement regulations and did not compare prisoner's conditions to "actual conditions" in both administrative segregation and the general population). As explained

above, Mr. Vidal's conditions were much more severe than those outside solitary confinement.[14]

Second, in assessing whether the extreme heat and lack of nutrition triggered due process, the court looked in part to decisions arising in the Eighth Amendment context—a much higher standard than the Fourteenth Amendment's atypical and significant hardship standard. JA 263. Though, as noted supra at 30, Mr. Vidal's conditions likely meet *even* that standard, it was not the correct standard for the court to use.

Finally, the district court considered Mr. Vidal's conditions in isolation, rather than in conjunction. JA 262-64. The court relied on cases where only one condition Mr. Vidal complained of—for example, inadequate ventilation or nutrition—was raised by the prisoner. But Mr. Vidal experienced all these egregious conditions simultaneously.

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[14] Even if the due process inquiry were to turn on whether Mr. Vidal's conditions diverged from normal solitary confinement conditions—rather than conditions outside of solitary—still, he would be entitled to due process. Indeed, the district court erred in concluding that Mr. Vidal's conditions reflected "the standard conditions of SHU confinement." JA 260. At times during his confinement, Mr. Vidal was confined for 24 hours per day, seven days a week, and experienced extreme heat, lack of ventilation, and inadequate nutrition. JA 250-51. These conditions are far worse than the standard SHU conditions prescribed by New York's regulations. *See* JA 260-61; 7 NYCRR § 304.

Each of these errors independently merit reversal. Together, even more so.

In sum, if this Court declines to hold that the length of Mr. Vidal's confinement alone implicates a liberty interest, it should nevertheless reverse the district court's judgment and remand to the district court to conduct fact-findings as to how the conditions Mr. Vidal actually experienced compares to conditions in New York's general prison population. *See also Welch*, 196 F.3d at 395 n.5 (noting that if the district court proceeds to rule on the due process issue, the court should "procur[e] counsel for the plaintiff" because "[a]n unrepresented prisoner may be incapable of presenting all the pertinent evidence on his side"); *Colon*, 215 F.3d at 230 (recognizing that the record did not require "more refined fact-finding" where prisoner was represented by appointed counsel).

B. Because Mr. Vidal's Experience In Solitary Confinement Implicated A Liberty Interest, The Constitutional Safeguards He Received In His Disciplinary Hearing Were Patently Inadequate.

Because Mr. Vidal's experience in solitary confinement implicated a liberty interest—whether on the basis of the duration of his confinement alone, or the duration when combined with the conditions—

due process required that he be allowed to present witnesses and documentary evidence at his disciplinary hearing. In *Wilkinson*, the Supreme Court held that "notice of the factual basis leading to consideration for [solitary confinement] and a fair opportunity for rebuttal" are "among the most important procedural mechanisms." 545 U.S. at 209, 225-26. The Supreme Court expanded on this in *Wolff*, holding that prisoners charged with disciplinary violations must be able "to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." 418 U.S. at 564-71. And when prison officials deny witnesses, they must explain the reason for their denial. *See Ponte v. Real*, 471 U.S. 491, 492 (1985) (requiring that prison officials state their reasons for refusing to call witnesses). These requirements work in tandem to "safeguard[] against the inmate's being mistaken for another or singled out for insufficient reason." *Wilkinson*, 545 U.S. at 226.

Similarly, this Court in *Willey* recognized that "serious prison discipline like . . . punishment in solitary confinement must meet 'the minimum requirements of procedural due process appropriate for the circumstances.'" 801 F.3d at 64. Due process requires "advance written

notice of the claimed violation and a written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken." *Id.* (citing *Wolff*, 418 U.S. at 563). The court reiterated that a prisoner "should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." *Id.* (citing *Wolff*, 418 U.S. at 566).[15]

Under this caselaw, Mr. Vidal was not afforded due process. During the altercation resulting in Mr. Vidal's confinement, several witnesses were present. JA 153-54. But despite Mr. Vidal's requests prior to his hearing to have them testify or provide evidence, and Defendant Carrol's assurances that they would testify, none of these witnesses were at his hearing. JA 242-43. When Mr. Vidal again asked, at the commencement of the hearing, that the female officer be able to testify on his behalf, JA 144, his request was denied without any reason. JA 244. These

[15] Other circuits are in accord. *See Surprenant v. Rivas*, 424 F.3d 5 (1st Cir. 2005) (affirming jury verdict for prisoner where hearing officer deprived prisoner of ability to call witnesses); *Lang v. Sauers*, 529 F. App'x 121, 123 (3d Cir. 2013) ("*Wolff* requires that inmates be afforded the opportunity to call witnesses and present documentary evidence during the disciplinary hearing, as well as the opportunity to receive assistance from inmate representatives.").

"procedural infirmities" are "repugnant" to the Due Process Clause. *Willey*, 801 F.3d at 64.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that this Brief complies with the type-volume limitation of L.R. 32.1(a)(4)(A) because this brief contains 7,092 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been prepared in the proportionally spaced typeface Century Schoolbook, 14-point font, using Microsoft Word 2016.

Date: January 30, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2025 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Appellate Case Management System (ACMS). Participants in the case who are registered ACMS users will be served by the ACMS system.

Date: January 30, 2025

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