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

REPLY BRIEF OF PLAINTIFF-APPELLANT JOSEPH VIDAL

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Defendants.

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INTRODUCTION

For 258 days, Joseph Vidal was trapped in a metal cell for 23 hours per day. That alone triggers due process. But Mr. Vidal experienced even worse. For months at a time, he was unable to escape grueling heat, and experienced inadequate ventilation and insufficient nutrition. This Court's caselaw could not be clearer that solitary confinement combined with such egregious conditions implicates a liberty interest.

Defendants do not and cannot dispute the extraordinary harms imposed by solitary confinement. Nor do they or can they contest that Mr. Vidal experienced horrific conditions on top of "normal" solitary. Instead, they attempt to direct this Court's attention away from all that—to factual disagreements that cannot be resolved at this stage of the litigation and to other minor disputes with little bearing on the due process question at the heart of this appeal. All the while, they rely heavily on the district court's opinion, which itself failed to conduct the proper legal or factual analyses. To top it off, they appeal to qualified immunity and personal involvement: arguments that were not addressed by the district court and are, in any case, meritless.

This Court should reverse.

ARGUMENT

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

Spending 258 days in standard solitary confinement conditions imposes an atypical and significant hardship implicating a liberty interest. In the alternative, the time Mr. Vidal spent in solitary confinement—combined with the particularly onerous conditions he experienced—constituted an atypical and significant hardship, triggering due process. But, as Defendants concede, Mr. Vidal was not afforded that process. This Court should therefore reverse the district court's decision granting summary judgment to Defendants.

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

As Mr. Vidal explained at length in his Opening Brief (hereinafter "OB"), *see* 19-25, spending 258 days in solitary confinement imposes an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Indeed, even substantially shorter stints in solitary confinement have profoundly harmful effects relative to ordinary prison conditions. *See* OB 19-24;

Amici Br. 15-19. Prisoners should therefore not endure such placement in the absence of due process. *See Perry v. Spencer*, 94 F.4th 136, 154 (1st Cir. 2024).

Defendants assert that such a holding would "overturn its binding precedent." Response Brief (hereinafter "RB") 26. To the contrary: it is required by precedent. The Supreme Court and this Court have repeatedly made clear that the "atypical and significant" hardship inquiry is dynamic, so what triggers due process must shift whenever the "normal limits" and "expect[ations]" in prisons change. *Sandin*, 515 U.S. at 478, 485; *Colon v. Howard*, 215 F.3d 227, 230-32 (2d Cir. 2000). As a result, a court cannot but find conditions newly atypical and significant when there have been changes to standard prison conditions, expectations around more restrictive conditions, or both. *See Sandin*, 515 U.S. at 484; *Wilkinson v. Austin*, 545 U.S. 209, 222 (2005).

And the normal limits and expectations around solitary confinement have changed since this Court held that 305 days in solitary confinement triggers due process. *Colon*, 215 F.3d at 230. Indeed, recent legislation, caselaw, and studies have all recognized the damage that results from just weeks, let alone months, in isolation. *See* OB 19-24;

Amici Br. 15-19. Due process protections must follow. *See Perry*, 94 F.4th at 154.

What's more, this Court envisioned that the 305-day threshold recognized in *Colon* would later be reduced, noting that the Court would "await subsequent litigation" to lower it.[1] 215 F.3d at 234. And at the time *Colon* was decided, the New York Solicitor General's Office, representing the views of the Attorney General's Office and New York's correctional services, expressed support for a 180-day bright-line rule. *Id.* at 232.[2]

In arguing against a lower durational limit, Defendants misconstrue *Perry v. Spencer*. RB 29. They fail to grapple with the holding in *Perry* that just thirty days in solitary confinement

[1] In fact, in *Colon* itself, this Court did not hold that fewer than 305 days in standard solitary confinement conditions cannot impose an atypical and significant hardship. *Colon*, 215 F.3d at 230-32; *see also id.* at 231 (stating that "wherever the durational line is ultimately drawn," 305 days easily imposed an atypical and significant hardship). Nor has this Court held since *Colon* that a duration of confinement greater than 101 days failed to implicate a liberty interest.

[2] Defendants' Kafkaesque suggestion that standard SHU conditions may *never* be atypical and significant because a prisoner could anticipate confinement in the SHU at some point during their sentence, RB 34, diverges from this Court's precedent. *See Colon*, 215 F.3d at 230.

presumptively implicates a liberty interest. 94 F.4th at 154; OB 23. And in their attempts to distinguish *Perry*, they misread the case.

First, Defendants claim that *Perry* turned on Massachusetts regulations that have no bearing on typical solitary confinement in New York. RB 29. But Defendants overstate the role of the regulations in *Perry*—and downplay the role of federal precedent. The *Perry* court held that 30 days in solitary presumptively triggers due process based on a series of federal cases, including this Court's own caselaw. *Perry*, 94 F.4th at 158-59 (citing *Colon*, 215 F.3d at 230-31). While Massachusetts regulations provided "independent support" for the ruling, it was grounded in federal caselaw that applies with even greater force here. *Perry*, 94 F.4th at 159-60.[3]

Next, Defendants argue that *Perry* only applied to nondisciplinary administrative solitary confinement. RB 30. But the First Circuit did not cabin its opinion to non-disciplinary confinement, holding broadly that when solitary confinement exceeds thirty days, that confinement will

[3] For the same reason, it is inapposite that these regulations were not in place at the time of Mr. Vidal's confinement. *See* RB 29-30. What is more, as explained below, *see infra* at 6-7, Defendants are wrong to claim that the HALT Act "is irrelevant." RB 28.

constitute an "atypical and significant hardship." *Perry*, 94 F.4th at 153-54. Indeed, the court grounded its analysis in the fact that the administrative confinement the prisoner experienced was "at least as severe" as the disciplinary confinement at issue in *Sandin*. *See Perry*, 94 F.4th at 158. And the court relied heavily on disciplinary confinement cases in holding that the length of the prisoner's confinement alone implicated a liberty interest. *Id.* at 153-54 (citing *Colon*, 215 F.3d at 230-31).[4]

Additionally, not only do Defendants misread *Perry*, they misconstrue the importance of New York's HALT Act to Mr. Vidal's argument that shorter durations in solitary confinement presumptively impose an atypical and significant hardship. RB 28. Mr. Vidal does not argue that Defendants violated the HALT Act when they sentenced him to 270 days in solitary confinement. Nor does he contend that the HALT Act *independently* created a liberty interest for him. Instead, the HALT

[4] Defendants likewise misinterpret Mr. Vidal's reliance on *Porter v. Clarke*, 923 F.3d 348, 356 (4th Cir. 2019), and *Palakovic v. Wetzel*, 854 F.3d 209, 225 (3d Cir. 2017). RB 30-31. Those cases simply demonstrate that other circuits have recognized the "devastating mental health consequences" caused by long-term solitary confinement, *Palakovic*, 854 F.3d at 225—a conclusion that Defendants do not and cannot dispute.

Act supports the conclusion that Mr. Vidal's confinement was atypical and significant as a matter of law because the Act's passage was the culmination of norms that evolved over many years and thus reflects the increasingly widespread understanding that long-term solitary imposes substantial hardship. *See* OB at 23-25. Consideration of such evolving understandings is central to the atypicality inquiry. *See supra* at 3-4. And Defendants provide no support for their assertion that the atypicality inquiry is somehow frozen at the time of the misconduct, and this Court must blinker itself to subsequent developments. *Contra Sporty's Farm L.L.C. v. Sportsman's Market, Inc.*, 202 F.3d 489, 496 (2d Cir. 2000) ("As a general rule, we apply the law that exists at the time of the appeal.").

With little support for their merits arguments, Defendants perplexingly assert that Mr. Vidal failed to raise two issues he raises on appeal below. RB 26, 32. First, they say, Mr. Vidal failed to preserve any argument that the 258 days he spent in solitary confinement implicated a liberty interest. RB 26. But Mr. Vidal argued that the duration of his confinement—the length of the time "imposed to disciplinary special housing unit confinement"—implicated a liberty interest triggering due process protections. R. Doc. 125 at 3. This more than suffices to preserve

his claims. And all the more so given that he litigated *pro se* before the district court, and it is "well established that the submissions of a *pro se* litigant must be construed liberally and interpreted to 'raise the strongest arguments that they *suggest*.'" *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (citing *Pabon v. Wright,* 459 F.3d 241, 248 (2d Cir. 2006)).[5]

Defendants next argue that Mr. Vidal "waived" any argument that the intense psychological harm he experienced while in solitary confinement is relevant to an atypical and significant inquiry, because Mr. Vidal's statements about that harm were too "conclusory." RB 32. But in a sworn affidavit, Mr. Vidal described the "agony," "emotional distress," "stress," "sadness," and "upset" resulting from his isolation in inhumane conditions. JA 254-55. These are not "conclusory" statements

[5] Mr. Vidal's request for the appointment of counsel was denied. R. Doc. 76; R. Doc. 80. This Court recognized in *Colon* that "development of a detailed record" to assist appellate review in cases like this one "will more likely result if counsel is appointed for the prisoner." 215 F.3d at 232; *see also Kalwasinski*, *v. Morse*, 201 F.3d 103, 108 n.10 (2d Cir. 1999) (noting that the district court should consider assisting the prisoner in seeking pro bono counsel to ensure development of a detailed factual record); *Palmer v. Richards*, 364 F.3d 60, 63 (2d Cir. 2000) (appointing counsel in a solitary confinement procedural due process case). Thus, Defendants' waiver argument seeks to penalize Mr. Vidal for imperfectly asserting the rights he requested assistance in articulating.

about what people *generally* experience; they are sworn factual evidence about what he *did*, in fact, experience. And in arguing that Mr. Vidal's descriptions of his own experience were "conclusory," Defendants seem to advocate for a rule requiring psychological experts to testify in *every* case where a prisoner alleges psychological injury, RB 32—a rule that would no doubt bar indigent litigants from raising claims of psychological injuries before federal courts.

Moreover, Mr. Vidal's assertions are consistent with what study after study shows is common for people placed in prolonged isolation. OB 21-23; Amici Br. 15-21. Former corrections officials, writing in support of Mr. Vidal, noted that "Mr. Vidal's time in solitary confinement" created "prolonged feelings of loneliness and emotional discomfort," leading to a "profound deterioration in his mental and physical health." Amici Br. 20-21. It is because Defendants cannot—and do not—challenge Mr. Vidal's argument on the merits that they turn to these grasping waiver arguments.

Defendants then go so far as to argue that this Court is not permitted to consider the studies Mr. Vidal cites in his Opening Brief, because Mr. Vidal, proceeding *pro se*, did not present them to the district

court. RB 31-32. But, as Defendants note, this Court has already emphasized the importance of considering the "psychological effects of prolonged isolation" experienced in solitary confinement. RB 31; *Colon*, 215 F.3d at 232.[6] Indeed, in *Colon*, this Court recognized that the harms imposed by solitary confinement were so great that 305 days in "standard" solitary conditions automatically implicated a liberty interest as a matter of law. In line with this precedent, the studies Mr. Vidal cited in his Opening Brief assist the Court with this inquiry.

And in addition to being an important part of the analysis on this issue, the studies in Mr. Vidal's Opening Brief are independently judicially noticeable. *See United States v. Hunt*, 63 F.4th 1229, 1250 (10th Cir. 2023) (finding a website that compiled citations to academic studies constituted legislative facts, of which the lower court was entitled to take

[6] Corrections officials have themselves recognized that prolonged solitary confinement inflicts "a form of torture" on prisoners. Amici Br. 15 (internal citations omitted). In fact, "[t]he health risk rises for each additional day in solitary confinement." *Id.* at 17 (citing Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 495 (2006)). Former Corrections Officials, writing in support of Mr. Vidal, noted that "Mr. Vidal's time in solitary confinement" created "prolonged feelings of loneliness and emotional discomfort," leading to a "profound deterioration in his mental and physical health." Amici Br. 20-21.

notice); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) ("The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court.") (collecting cases).

Accordingly, this Court should hold that the duration Mr. Vidal spent in solitary confinement automatically triggered due process.

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

In the alternative, the time period Mr. Vidal spent in solitary confinement in conjunction with the conditions he experienced imposed an atypical and significant hardship under this Court's longstanding precedent. *See Palmer*, 364 F.3d at 64-65. Mr. Vidal endured extremely hot temperatures relative to general population. JA 250-51. He lacked access to a fan, cold water, ice, fresh air, or frequent showers. *Id.* He also experienced no ventilation and inadequate nutrition. *Id.* Mr. Vidal's confinement in these egregious conditions for long periods of time clearly implicated a liberty interest under this Court's precedent. *See Palmer*, 364 F.3d at 64-65.

Defendants, for their part, have never attempted to rebut Mr. Vidal's detailed factual descriptions of the conditions in both solitary confinement and general population. Instead, they insist that some of Mr. Vidal's conditions were comparable to those in administrative segregation. RB 3-6. But Defendants base these arguments in large part on regulations requiring that prisoners in administrative segregation experience the same conditions as those in disciplinary confinement. These regulations are irrelevant: this Court has made clear that when conducting a due process analysis, a comparison must be made between the conditions at issue and the "actual conditions" elsewhere in the prison, not the conditions prescribed by law. *Davis v. Barrett*, 576 F.3d 129, 135 (2d Cir. 2009).

What's more, even if looking to what regulations required were sufficient (it isn't), Defendants' argument at most creates a triable dispute of fact that must proceed past this stage of litigation. *See Palmer*, 364 F.3d at 65 (stating that disputes about conditions "may not be resolved on summary judgment"). This is so because Mr. Vidal put forth evidence in a sworn affidavit that his conditions differed from those elsewhere in the prison, JA 249-51—which Defendants fail to

acknowledge at all, let alone rebut. And the district court, for its part, did not engage in any factual findings comparing Mr. Vidal's conditions to those present elsewhere in the prison. JA 260-65. That alone merits reversal. *See Davis*, 576 F.3d at 135 (holding that the district court erred in granting summary judgment where it found that conditions the prisoner experienced were "no more severe" than those prescribed by disciplinary solitary confinement regulations rather than comparing the prisoner's conditions to "actual conditions" outside disciplinary solitary confinement); OB 31-33.

Defendants confoundingly argue that, because Mr. Vidal "invoked" the standard conditions of solitary confinement below, he cannot claim that his actual conditions deviated from these conditions. RB 33. As an initial matter, Mr. Vidal does not make reference to any standard conditions in the briefing Defendants cite. And he nonetheless consistently raised his *actual conditions* to the district court. JA 249-51. A *pro se* litigant's offhand reference to "standard" or "normal" conditions does not somehow assuage the district court of its obligation to examine the record before it and determine whether and how the prisoner's conditions diverged from other parts of the prison.

See Palmer, 364 F.3d at 65 (noting that a "more fully developed record" could show that "even relatively brief confinements under normal SHU conditions" are "in fact, atypical").

Defendants then turn to Mr. Vidal's grievance history regarding conditions in *different facilities* to argue that his conditions in solitary were not atypical. RB 38-39. But they are wrong on three grounds.

First, they run headlong into Mr. Vidal's evidence in this case, in which he swore that, unlike general population, the solitary housing block contained no ventilation system or fans. JA 250. He asserted that the food in solitary was nutritionally inadequate, JA 251, while the food in general population was both palatable and easily supplemented with commissary. *Id*. And he expressed that the windows in solitary were bolted shut, intensifying the heat he experienced in his metal cell with no respite for 23 hours per day, JA 249, whereas, in general population, Mr. Vidal had access to a fan in his cell and could "escape" his cell for recreation, to attend programs, or to shower. *Id*. At most, Defendants put forth evidence that raises a factual dispute—and the district court was not at liberty to resolve such disputes at the summary judgment stage. *See Palmer*, 364 F.3d at 65.

Second, the cherry-picked grievances Defendants point to are meaningfully different from the complaints at issue in this lawsuit. For example, Defendants try to use grievances Mr. Vidal filed concerning "messed up" food or food that was not "kosher" to argue that Mr. Vidal's experience in solitary was the same as in general population. RB 39. But such issues are clearly distinct from complaints regarding food so nutritionally inadequate that Mr. Vidal lost weight and grew "weak and thin" while consuming it—particularly because he was unable to supplement his meals in any capacity. JA 251.[7]

Finally, Defendants—like the district court—wholly ignore Mr. Vidal's argument that the conditions he experienced *in combination*—including excessive heat, inadequate nutrition, lack of regular showers and access to water, fresh air, ice, or a fan—imposed an inordinate burden compared to that of prisoners in administrative segregation and

[7] *Even if* issues of similar degree existed in general population, the length of time Mr. Vidal was required to endure such conditions everyday—23 hours in excruciating heat and inadequate ventilation, versus half that time with adequate ventilation and access to cold showers, ice, fans, and recreation outdoors—exacerbated the harms imposed by those conditions. *See Welch v. Bartlett*, 196 F.3d 389, 393 (2d Cir. 1999) ("Although confinement to one's cell for half the day has some similarity to such confinement for 23 hours a day, the difference seems to us to be great.").

general population.[8] *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").

Mr. Vidal's duration of confinement coupled with the conditions he experienced therein thus constitute an atypical and significant hardship. Because he was not provided adequate process—a point Defendants concede—his due process rights were violated.[9]

II. This Court Should Not Reach Defendants' Alternative Arguments; In Any Case, They Are Meritless.

On appeal, Defendants raise arguments about qualified immunity and personal involvement that were not considered by the district court in the first instance. JA 266. This Court ought not reach those arguments

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[8] Defendants do not and cannot defend the district court's error in rejecting Mr. Vidal's claims because they do not meet the Eighth Amendment's cruel and unusual punishment standard, RB 40 n.13, which, as explained in Mr. Vidal's Opening Brief, imposes a much higher standard on prisoners than the Fourteenth Amendment's atypical and significant hardship standard. OB 30 n.13, 32.

[9] Defendants did not address the adequacy of Mr. Vidal's process before the district court or in their Response Brief.

here. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *see also Vincent v. Yelich,* 718 F.3d 157, 177 (2d Cir. 2013) (declining to address correctional officials' alternative arguments for summary judgment where trial court did not consider them); *Zappulla v. Annucci*, 636 F. App'x. 824, 825 (2d Cir. 2016) (same). Defendants have offered no reason why this Court should "deviate from [that] practice" in this case. *Sulzer Mixpac AG v. A&N Trading Co.*, 988 F.3d 174, 184 (2d Cir. 2021).

If this Court chooses to reach Defendants' arguments, it should reject them, as none are persuasive. First, Defendants are wrong to suggest that they are entitled to qualified immunity. At the time of Mr. Vidal's faulty hearing, the law in this Circuit clearly established that the length of time Mr. Vidal spent in solitary alone—or, alternatively, for an intermediate period of time in particularly inhumane conditions—implicated a liberty interest. And, for over forty years, well-established precedent in this Circuit has imposed constitutional liability on prison officials, like Defendant Venettozzi, who affirm grievances pertaining to procedurally unconstitutional appeals. Finally, a genuine dispute of

material fact remains as to Defendant Anspach's involvement. This Court should reject Defendants' arguments on these grounds.

A. Defendants Are Not Entitled To Qualified Immunity On Mr. Vidal's Procedural Due Process Claim.

Defendants are only entitled to qualified immunity when their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Tracy v. Freshwater*, 623 F.3d 90, 95-96 (2d Cir. 2010). Whether the law is clearly established turns on "whether a reasonable person, acting under the circumstances then confronting a defendant, would have understood" that his actions were unlawful. *Vega v. Miller,* 273 F.3d 460, 466 (2d Cir. 2001).

"Even if this Court has not explicitly held a course of conduct to be unconstitutional, [it] may nonetheless treat the law as clearly established if decisions from this or other circuits clearly foreshadow a particular ruling on the issue." *Terebesi v. Torreso*, 764 F.3d 217, 231 (2d Cir. 2014) (internal citations omitted). The inquiry does not require that "the very action in question has previously been held unlawful." *Jones v. Parmley*, 465 F.3d 46, 56 (2d Cir. 2006); *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (holding that a "general constitutional rule already identified in

the decisional law" constitutes clearly established law for qualified immunity purposes); *Taylor v. Riojas*, 592 U.S. 7, 8-9 (2020) (holding that "any reasonable officer should have realized that" a prisoner's conditions in solitary "offended the Constitution," though no caselaw considered the exact duration and conditions the prisoner experienced).

Here, precedent clearly established that the duration of Mr. Vidal's confinement—even under "normal" SHU conditions—implicated a protected liberty interest. At the time of Mr. Vidal's sentence, this Court had held in *Colon* that 305 days spent in solitary confinement implicates a liberty interest triggering due process protections. *Colon*, 215 F.3d at 230-32.[10] Thus, when Mr. Vidal was sentenced to 270 days in solitary confinement—after having already spent 78 days in solitary confinement while he awaited his disciplinary hearing—any reasonable officer would have been on notice that the 348 days Mr. Vidal would ultimately spend in solitary would trigger due process protections. *See Hanrahan v. Doling*, 331 F.3d 93, 98-99 (2d Cir. 2003) (holding that, because "the very concept of fair notice necessarily turns on what defendants believed *ex*

[10] This Court has held that the pronounced sentence—rather than the time ultimately spent in solitary—is used to determine whether a prison official's actions were objectively reasonable. *Hanrahan*, 331 F.3d at 98.

ante," the qualified immunity inquiry must consider the information the officer had at the time of the prisoner's hearing—namely, the prisoner's sentence).

Additionally, reasonable officers, acting 25 years after *Colon*, and with the awareness that this Court in *Colon* invited litigants to argue for a lower threshold (*see supra* at 4), would have understood that sentencing someone to 270 days in "normal" SHU conditions was atypical and significant. Though this Court had not said so explicitly, it *had* made clear that the due process inquiry is dynamic, and must account for changing standards and expectations. *See Sandin*, 515 U.S. at 484; *see also Wilkinson*, 545 U.S. at 222. In light of the increased awareness of the profound harms of solitary confinement at the time Mr. Vidal was sentenced, a reasonable prison official, trained in developments in the field, would have been aware that 270 days—and far less—created atypical hardships sufficient to trigger due process.

In the alternative, and at a minimum, it has been the clearly established law of this Circuit for over two decades that a prison official violates clearly established law when he subjects a prisoner to more than 101 days in conditions more burdensome than "standard" solitary

conditions. *Colon*, 215 F.3d at 232; *Palmer*, 364 F.3d at 67 (holding that the Court had "clearly foreshadow[ed]" that prisoner's liberty interest was infringed by 77 days in solitary). Under this precedent, any reasonable prison officer would have fair warning that confining Mr. Vidal for *258 days*—over 2.5 times the 101-day line—to all of the "standard" SHU conditions *plus* excessive heat, inadequate nutrition, and lack of ventilation would trigger due process protections.

Defendants' brazen position is that the law is not clearly established because Mr. Vidal has not pointed to a prior case with the exact combination of duration and conditions at issue here. RB 45. But the Supreme Court and this Court have repeatedly "ma[d]e clear that officials can still be on notice that their conduct violates established law *even in novel factual circumstances*." *Hope*, 536 U.S. at 741 (emphasis added); *see also Terebesi*, 764 F.3d at 231; *Jones*, 465 F.3d at 56; *Taylor*, 592 U.S. at 8-9. And rightly so: Defendants' position would lead to the absurd result that prisoners are not entitled to monetary relief under

basically any circumstance, no matter how long someone was in solitary confinement or how bad her conditions were.[11]

B. The Law Was Clearly Established That Defendant Venettozzi Violated The Constitution By Affirming Mr. Vidal's Placement In Solitary Confinement Without Process.

Defendant Venettozzi is not entitled to qualified immunity.[12] This Court has long held that an official may be held liable for failing to

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[11] Defendants rely on inapposite cases where qualified immunity did not shield prison officials' misconduct, *see Okin v. Village of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 437 (2d Cir. 2009), where there was no clearly established law whatsoever, *see Reichle v. Howards*, 566 U.S. 658, 664 (2012); *Grice v. McVeigh*, 873 F.3d 162, 169 (2d Cir. 2017), or where the law condoned the practice in question, *see Okin*, 577 F.3d at 438; *Grice*, 873 F.3d 167-68; *Coollick v. Hughes*, 699 F.3d 211 (2d Cir. 2012). Defendants also cite cases involving police uses of excessive force, RB 43-45, a context where the Court has stated that greater specificity *is* required, given the fast-paced nature of policing and the "hazy border between excessive and acceptable force." *Mullenix v. Luna*, 577 U.S. 7, 18 (2015) (internal citations omitted). But the Supreme Court has made clear that no similar precision is required in the prison context. *See Hope*, 536 U.S. at 741; *Taylor*, 592 U.S. at 8-9.

[12] Although framed as a qualified immunity argument, Defendants seem to be arguing that Defendant Venettozzi was not sufficiently personally involved for purposes of § 1983 liability. *See* RB 46. This Court has made clear that "[s]ince personal involvement is a question of fact . . . summary judgment may be granted only if no issues of material fact exist and the defendants [are] entitled to judgment as a matter of law." *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986). Defendants cannot meet this standard.

remedy a constitutionally defective disciplinary proceeding.[13] First, in *Williams*, 781 F.2d at 324, this Court held that an official who affirms a constitutionally defective disciplinary determination on appeal is sufficiently "personally involved" in the violation to be held accountable in court. Ten years later, this Court reaffirmed that conclusion in *Wright v. Smith*, 21 F.3d 496, 502 (2d Cir. 1994), a case much like the present one, wherein a reviewing officer was held liable for failing to provide redress to a prisoner who was placed in solitary confinement without adequate process. With *Williams* and *Wright* on the books, a reasonable officer in Defendant Venettozzi's shoes would have understood that affirming Mr. Vidal's placement in solitary confinement without due process was unlawful.

[13] Defendants do not dispute that Defendant Venettozzi was aware that Mr. Vidal did not receive adequate process, nor could they. Mr. Vidal's appeal to Defendant Venettozzi stated that he had not been allowed to call highly material witnesses and present documentary evidence. R. Doc. 126-1 at 117, 121. What's more, for over ten years, the Commissioner had designated Defendant Venettozzi responsibility over the adjudication of appeals "based on the [prisoner's] belief that there was a due process violation." *Inmate Disciplinary Due Process*, 6500R-B (2006); 7 N.Y.C.R.R. § 254.8. If anyone had sufficient knowledge about the process due for SHU disciplinary proceedings, RB47, surely it was Defendant Venettozzi.

Defendants' arguments to the contrary are unavailing. First, they are wrong to suggest that the holdings in *Williams* and *Wright* turned on the fact that the defendants in those cases were superintendents, rather than the Director of Special Housing and Inmate Disciplinary Programs, as Defendant Venettozzi was. Defendants cite no precedent for the proposition that somehow qualified immunity is a position-by-position inquiry. And, at any rate, this Court made clear in *Williams* that the defendant's status merely provided an *additional* reason to find him liable beyond the fact that he affirmed the constitutionally defective conviction on appeal. *See* 781 F.2d at 324 ("Indeed, *even if* [the defendant] did not actively affirm the conviction on administrative appeal, we cannot say, on this record, that as Superintendent of Attica he was not directly responsible for the conduct of prison disciplinary hearings." (emphasis added)). And in *Wright*, the defendant's role as superintendent did not factor into the analysis at all. *See* 21 F.3d at 502. Accordingly, *Williams* and *Wright* are clear: notice of a constitutional violation and failure to remedy that violation—not the defendant's title—establish liability.[14]

[14] The only reason Mr. Vidal's appeal was not reviewed by a superintendent is because appeals for the most serious offenses are heard by the Commissioner or his designee, not the superintendent. Appeals for

That conclusion conforms with this Court's other qualified immunity caselaw, which makes clear that officer rank is not relevant to the qualified immunity analysis. *See, e.g.*, *Horn v. Stephenson*, 11 F.4th 163, 172 (2d Cir. 2021) (denying qualified immunity to a forensic analyst because the fact that "the police official in *Walker* was a sworn officer [rather than a forensic analyst] is as irrelevant to the *Brady* analysis as the fact that he happened to be a police detective, as opposed to a patrol officer"); *Lennox v. Miller*, 968 F.3d 150, 157 (2d Cir. 2020) (holding that a precedent case concerning a deputy sheriff's use of force clearly established the law regarding a routine police officer's use of force).[15]

Accordingly, Defendant Venettozzi is not entitled to qualified immunity.

C. A Genuine Dispute Of Material Fact Remains As To Defendant Anspach's Involvement.

Should this Court decide to reach Defendants' alternative argument as to Defendant Anspach's personal involvement, this Court

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the two lower tiers of offenses are reviewed by the superintendent or his designee. 7 N.Y.C.R.R. § 252.6 (violation hearings); 7 N.Y.C.R.R. § 253.8 (disciplinary hearings).

[15] Defendants cite to unpublished district court decisions, RB 47, but those decisions are irrelevant to the clarity of the law established in *Williams* and *Wright*.

should reject that argument. Mr. Vidal testified that Defendant Anspach limited Mr. Vidal's ability to call witnesses, thus denying Mr. Vidal adequate process. JA 20, 167-68, 239, 246. Such testimony suffices to raise a genuine issue of material fact about Defendant Anspach's role in Mr. Vidal's unlawful disciplinary process. *See Bellamy v. City of New York*, 914 F.3d 727, 746 (2d Cir. 2019).

Defendants fail to acknowledge this testimony at all, let alone provide a reason to discredit it. *See* RB 48. And their claim that Mr. Vidal's statements are "conclusory" lack support. *Id.* What's more, the record evidence Defendants *do* point to is largely consistent with Mr. Vidal's testimony. RB 48-49. Indeed, Defendant Anspach's role in disciplinary hearings generally—as a Disciplinary Office Escort who would provide information regarding where documents and individuals are located within the prison, R. Doc. 126-1 at 63—provides little reason to doubt Mr. Vidal's assertions about Defendant Anspach's conduct in this particular case. RB 49. And Defendant Anspach's own testimony that he does not remember whether he helped Defendant Carroll deprive Mr. Vidal of the chance to call witnesses, *id.*, does not undermine Mr. Vidal's contention that he did. At any rate, any evidence that runs counter to Mr.

Vidal's testimony cannot override that testimony at this stage of the litigation, and at most creates a dispute of fact that survives summary judgment. *See Williams*, 781 F.2d at 324 (holding that denying personal participation in a due process violation was "not a documented allegation of fact which [nonmovant] need[ed] to rebut in order to survive a motion for summary judgment").

CONCLUSION

For the foregoing reasons, the 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 5,645 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: June 5, 2025

s/ Nethra K. Raman
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Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 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: June 5, 2025

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