No. 22-1716

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JERRY CINTRON,

Plaintiff-Appellee,

v.

PAUL BIBEAULT, in his official and individual capacity; RUI DINIZ, in his official and individual capacity; MATTHEW KETTLE, in his official and individual capacity; PATRICIA ANNE COYNE-FAGUE, in her individual capacity; WAYNE T. SALISBURY, JR., Interim Director, in his official capacity; SPECIAL INVESTIGATOR STEVE CABRAL, in his official and individual capacity; JEFFREY ACETO, in his individual and official capacity; LYNNE CORRY, in her individual and official capacity,

Defendants-Appellants,

LT. HAYES, in his official and individual capacity; LT. MOE, in his official and individual capacity; LT. BUSH, in his official and individual capacity; JENNIFER CHAPMAN, in her official and individual capacity; "COUNSELOR" FRANCO, in her official and individual capacity,

Defendants.

On Appeal from the U.S. District Court for the District of Rhode Island
Case No. 1:19-cv-497; Chief Judge John J. McConnell

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND, AARON REGUNBERG AND LEONELA FELIX IN SUPPORT OF AFFIRMANCE

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae, the American Civil Liberties Union of Rhode Island (RI ACLU) is a nonprofit entity operating under § 501(c)(4) of the Internal Revenue Code. RI ACLU is not a subsidiary or affiliate of any publicly owned corporations and does not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to RI ACLU's participation.

IDENTITY AND INTEREST OF AMICI CURIAE[1]

I. INTEREST OF THE AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND

The American Civil Liberties Union of Rhode Island ("RI ACLU"), with over 5,000 members, is the Rhode Island affiliate of the American Civil Liberties Union, a nationwide, non-profit, nonpartisan organization. RI ACLU, like the national organization with which it is affiliated, is dedicated to vindicating the principles of liberty embodied in the Bill of Rights to the U.S. Constitution, including the rights of incarcerated individuals to due process, equal protection, access to the state and federal courts, and to be free from cruel and unusual punishments. In furtherance of these goals, RI ACLU cooperating attorneys and the National Prison Project of the ACLU have, over the past 45 years, appeared as both direct counsel and amicus before the federal and state courts of Rhode Island to vindicate the civil rights of incarcerated individuals. See, e.g., Baxter v. Palmigiano, 425 U.S. 308 (1976); Spratt v. Rhode Island Department of Corrections, 482 F.3d 33 (1st Cir. 2007); Palmigiano v. Garrahy, 443 F.Supp. 956 (D.R.I. 1977), remanded, 599 F.2d 17 (1st Cir. 1979).

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. Only amici, their members or their counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. (29)(c)(5). All parties have consented to the filing of this brief.

On the issue presently before the Court, RI ACLU has supported affirmative litigation challenging the constitutionality of the use of solitary confinement in Morris v. Travisono, 69-cv-4192, and Paiva v. Rhode Island Department of Corrections, 17-mc-00014-JJM-PAS.

RI ACLU has a strong, documented, and consistent record spanning nearly 50 years of battle to obtain civil rights and access to the courts for incarcerated persons and to prevent inhumane and unconstitutional conditions of confinement in Rhode Island prison facilities.

II. INTEREST OF AARON REGUNBERG AND LEONELA FELIX, CURRENT AND FORMER STATE LEGISLATORS

Each of the individuals identified as amici herein has a strong, documented and abiding interest in abolishing the scourge of prolonged solitary confinement, however labelled.

Aaron Regunberg served as a member of the Rhode Island House of Representatives from 2015 to 2018. In addition to sponsoring legislation in 2016 to limit the maximum duration of isolation/restrictive housing, former Rep. Regunberg sponsored the establishment of a legislative commission to study the use of restrictive housing/solitary confinement in Rhode Island and, after its establishment in 2017, served as the Chair of the Commission, whose report is discussed in the within brief.

Leonela Felix has served as a member of the Rhode Island House of Representatives since 2021. She currently serves as co-chair of the Rhode Island Black, Latino, Indigenous, Asian-American and Pacific Islander Caucus. Rep. Felix has served as the lead sponsor of legislation in both 2022 and 2023 to limit the availability and duration of restrictive housing/disciplinary confinement in Rhode Island.

In this brief, Amici hope to provide additional historical perspective concerning the adoption and implementation of solitary confinement and its place in Rhode Island and national jurisprudence in support of the Plaintiff-Appellee and to negate the contention of Defendants-Appellants that they are entitled to assert the defense of qualified immunity.

SUMMARY OF THE ARGUMENT

At issue in this matter is whether qualified immunity protects the Defendants-Appellants from the Plaintiff-Appellee's claim that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution when he was kept in disciplinary segregation for a prolonged period exceeding one year[2] where he spent 23-24 hours a day in an eight-by-ten

[2] Amici have used the convention that Mr. Cintron was kept in solitary confinement for more than one year and do not consider it necessary to pin their argument on a resolution of whether the prolonged isolation was "just" one year as Defendants-Appellees assert or two and one-half years as alleged by Plaintiff-Appellee. Either

foot cell, received a maximum of one 10-minute phone call each month, had no radio, TV, or MP3 player, no desk in his cell, and no access to programming. This prolonged isolation caused Cintron to suffer mental illness, including anxiety and depression, to engage in self-harm, including pulling out his hair and badly injuring his hand by bashing it against the wall, and weight loss of almost 70 pounds. This deterioration was exactly what Defendants intended, having told him that they would "bury [him] alive" and keep him in solitary until he was no longer "normal." A.21 ¶41.

The text of 42 U.S.C. § 1983 expressly imposes liability on "[e]very person" acting under color of law who deprives someone of a federal right. The United States Supreme Court has construed § 1983 to contain a qualified immunity defense grounded in the Court's understanding of Congressional purpose. In the Court's view, Congress sought to impose § 1983 liability only on people who had "'some notice that their alleged conduct violates[s]' the Eighth Amendment." United States v. Lanier, 520 U.S. 259, 271 (1997)(citations omitted). The Court has thus held that government actors are entitled to qualified immunity when the law at the time of an alleged deprivation of rights could be "reasonably misapprehend[ed]." See id.

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way, under the facts concerning that prolonged isolation alleged in the operative complaint, the district court was correct in rejecting Defendants-Appellees' assertion of the defense of qualified immunity.

This brief addresses the historical backdrop of disciplinary (also called solitary) confinement in Rhode Island's prison system and Rhode Island's documented recognition that its prolonged use violates a prisoners' rights under the Eighth Amendment to assist the Court in concluding that the defense of qualified immunity is not available to Defendants-Appellants.

ARGUMENT

I. THE HISTORY OF SOLITARY CONFINEMENT IN RHODE ISLAND SUPPORTS THE CONCLUSION THAT QUALIFIED IMMUNITY IS NOT AVAILABLE TO THE DEFENDANTS.

Qualified immunity is available as a defense to an Eighth Amendment claim of cruel and unusual punishment unless a government official should reasonably have understood that their conduct violated clearly established law. Berthiaume v. Caron, 142 F.3d 12, 15 (1st Cir. 1998). The objective reasonableness determination is for the court to make. DeAbadia v. Izquierdo Mova, 792 F.2d 1187 (1st Cir. 1986). "The question is not whether the official actually abridged the plaintiff's constitutional rights but, rather, whether the official's conduct was unreasonable, given the state of the law when he acted." Alfano v. Lynch, 847 F.3d 71, 75 (1st Cir. 2017).

History often provides us with important lessons if we are willing to learn them. A cursory review of the history of the use of solitary confinement in Rhode

Island shows that it abandoned the use of long-term solitary confinement from 1840 until 1960 because it determined that its use caused inmates to become deranged or insane and could lead to inmate suicide. By 1844, its use for more than a short period was deemed to be cruel and unusual punishment. After restoring solitary for a relatively brief period in the 1960s, the State agreed to limit its use by court order in 1970. Prison officials have repeatedly ignored their obligations to limit its duration, instead permitting inmates like Cintron to be isolated for prolonged periods of years, this despite their participation in a Legislative Commission that heard testimony about solitary confinement's ills, and despite numerous other decisions allowing inmates to bring these claims based on injury they suffered after being kept in solitary confinement for long periods.

A. The Use of Long-Term Solitary in the 1800s in the United States and Rhode Island and why it was abandoned.

The use of solitary confinement in this country began around the end of the Revolutionary War when mass incarceration began. See generally David M. Shapiro, Solitary Confinement in the Young Republic, 133 Harv.L. Rev. 542, 552 (2019) ("Shapiro, Solitary Confinement"). Before that time, the incarceration of a prisoner was rare, and a wide range of physical punishment, from the stock to the gallows, was far more common. Id.

A few decades later, practices concerning the use of long-term solitary confinement shifted.[3] Pennsylvania led the way and from 1817-1829 constructed a series of new prisons significantly increasing its capacity for solitary confinement. Shapiro, Solitary Confinement at 569. It also amended its criminal laws in 1829 so that most prisoners were kept in solitary confinement for the full duration of their sentence. Id. at 569, nn. 211-12 (citations omitted).

The result was a system of "absolute solitary confinement," in which prisoners spent years in conditions of near-total isolation and sensory deprivation. G. de Beaumont & A. de Toqueville, On the Penitentiary System in the United States, and Its Application in France (Francis Lieber ed. & trans., Philadelphia, Carey, Lea & Blanchard 1833) ("Beaumont & Toqueville, Penitentiary System"). Other states followed suit and created similar long-term solitary-confinement regimes. John F. Stinneford, Is Solitary Confinement a Punishment?, 115 Nw. U. L. Rev. 9, 40 (2020) ("Stinneford, Punishment").

The result was an unmitigated "disaster." Id. Prison cells were so small that prisoners could not get minimal exercise and their physical health collapsed. Id.

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[3] Documents Accompanying the Commissioners' Report on Punishment & Prison Discipline: Answer of the Inspectors to Questions Proposed by the Commissioners (Apr. 19, 1828), reprinted in The Register of Pennsylvania: Devoted to the Preservation of Facts and Documents, and Every Other Kind of Useful Information Respecting the State of Pennsylvania 206, at 241 (Samuel Hazard ed., Philadelphia, W.F. Geddes 1828).

Many prisoners suffered total nervous breakdowns and engaged in drastic self-harm as a result of this type of confinement. Id.; see also John Stinneford, Experimental Punishments, 95 Notre Dame L. Rev. 39, 61-63 (2019)("Stinneford, Experimental Punishments"). Visitors were appalled. Among them were distinguished authors and observers such as Alexis de Toqueville and Gustave Beaumont, who concluded that solitary confinement "destroys the criminal without intermission and without pity," and Charles Dickens, who denounced it as "worse than any torture." Id. at 61 and 63. The Auburn State Prison in New York experienced deteriorating consequences "so dire that New York dropped [the solitary-confinement regime at the prison] after less than two years and gave most of the prisoners [who were subjected to solitary confinement] pardons." Stinneford, Experimental Punishments at 62. Only a handful of decades after it had begun, this experiment in widespread long-term solitary confinement had been judged a failure and was largely abandoned. Stinneford, Punishment at 40-41; Shapiro, Solitary Confinement at 572.

Rhode Island's use of solitary confinement ran a similar trajectory. As documented in the Report of the Inspector of the Rhode Island State Prison to the legislature in 1841, the rules then in use at the prison kept inmates in almost total isolation and silence. The rules provided: "No convict shall speak to any person within the prison, excepting to the officers of the prison, or to persons lawfully

visiting their cells" and "No convict shall, by signs or otherwise, communicate or attempt to communicate with any person outside the prison." Report of the Inspector of the Rhode Island Prison, October 26, 1841. The rules forbade prisoners speaking with the Prison Physician unless it involved their health, with their moral instructors except in relation to that instruction, or with any other person in relation to any matter that did not pertain to their job. *Id.* A later Report from Inspector of the Rhode Island Prison, October 1845, reflected that during this time prisoners were housed in isolation and therefore could not communicate with a cellmate. The inmates were almost completely barred from communicating with other human beings.

The Rhode Island experiment did not end well either. In their report to the Legislature in 1841, the Prison Inspectors remarked that this systematic "experiment of solitary confinement, has not, since the prison has been in operation, proved perfectly satisfactory. [The inspectors] fear the effect is to injury [sic] strong minds, and to produce imbecility or insanity into those that are weak." Report of the Inspector of the Rhode Island Prison, October 26, 1841.

These inspectors[4] were so alarmed that, in the Report of the Inspector of the Rhode Island Prison, October 1842, they recommended that the Legislature form a commission to decide whether the separate confinement of prisoners should

[4] From context, the role of "Inspector" was performed by multiple people.

continue. The inspectors noted: "Of the thirty-seven convicts who have been committed to the State Prison, six have become insane; of whom four now remain in the prison, one has been cured, and one discharged. Several others have at times exhibited slight symptoms of derangement." Id.

In 1842 and 1843 a legislative committee investigated the conditions at the Rhode Island Prison. It was the unanimous opinion of the Committee that the then system of punishment--conditions we call solitary confinement--was the principal cause of derangement among the prisoners. Report of Legislative Committee, January 1843. In its report, the Committee stated there were:

> a number of cases of insanity among the prisoners and at the present time one or more of the convicts manifest strong symptoms of mental derangement…. [Imprisonment] deprives them of all knowledge of their families or connections and that kind of exercise which is necessary for the health of the body.

Id. The Committee concluded that: "strict solitary confinement is a mistaken system of punishment experience has clearly proved." Id. The Committee therefore reached the same conclusion as others--that solitary confinement was a mistake because of the serious and deleterious effects it had on the inmates subjected to it.

The General Assembly thereafter passed an act that allowed the Prison Inspectors, who oversaw the Warden, to end the isolation each prisoner faced. The Act provided:

> [T]he Inspectors of the State Prison shall have full power and authority to cause the prisoners . . . sentenced to said prison to be enlarged of their confinement by permitting such prisoners to perform labor in the corridor of said prison; by permitting more than one person to remain in a cell or a nurse to be with them in ease of sickness; by permitting them to the yard by the prison in the day time; by permitting such communication to and from their friends and among themselves and to receive such books and articles as may be necessary under such rules and regulations and under such restrictions as said Inspectors may establish and furnish to the Warden from time to time consistent with the safe keeping of said prisoners…

An Act in Amendment of an Act Entitled an Act Concerning Crimes and Punishment, January 18, 1843 read and adopted in the House and Senate on the same day.

A change in the prisoners lives was almost immediately noted. The Warden, in his January 1844 report to the General Assembly, stated: "the good effects upon the health, general appearance and conduct of the prisoners, arising doubtless from the change from solitary to congregated labor, has been very apparent, reducing the loss of time occasioned by sickness at least three-fourths." Report of the Warden of the State Prison, January 1844.

In his next report to the Legislature in October 1844, the Warden noted that the policy of labor in strict solitude had been discontinued. Report of the Warden of the State Prison, October 1844. He reflected on the prior use of solitary confinement at the prison and stated that "the bad effects of solitary imprisonment upon the mind were very apparent" and that inmates subjected to it who were not

addicted to spirits often displayed deranged symptoms, like delirium tremens, "within six to eighteen months of solitude." Id.

The Warden continued: "Of the forty prisoners, committed while the strict solitary system was in operation, ten, or one-fourth of the whole number. . . manifested decided symptoms of derangement; seven so much so as to unfit them from labor for a longer or shorter period, and five were discharged insane, two of whom recovered, and three now remain unrestored to a sound state of mind," and of "the nineteen committed since the system was abandoned, three only. . .have shown symptoms of derangement." Id.

He added: "I have been able to make, that but few men, and those strongly constituted, can be subjected to the discipline of solitary imprisonment, as it was here established, without becoming, sooner or later, through its depressing effects, more or less debilitated in some of their physical and mental operations." Id.

In the 1845 report of the Prison Inspectors to the Legislature, the health and work performance of the inmates after the end of extended solitary confinement was addressed. The Inspectors stated: "No case of insanity has developed itself since the prisoners have labored in the workshop, and most of them have performed the task assigned them as cheerfully as could be reasonably expected." Report of the Inspector of the Rhode Island Prison, October 1845.

The Prison Inspectors report of 1854 to the Legislature again noted:

> That the results of the discipline and management of the prison are more satisfactory than at the time of any previous report; after the passage of the act giving them authority, the inspectors so modified the regulations of the prison, that a portion of the convicts work together. The confinement in the cells during the time when no work continues to be separate, excepting in cases of sickness. The symptoms of insanity have disappeared from the prison since the modification of the system of confinement, and the general health of the prisoners is good.

Report of the Inspector of the Rhode Island Prison, 1854. The report continued: "The discipline of the prison has also been greatly improved. In only 20 cases has punishment been administered. The number of stripes inflicted is 27, and the number of hours of solitary confinement 256." Id.

An excerpt from the Board of Inspectors Report in 1861 reveals that: "The discipline of the prison is excellent; no corporal punishment has been inflicted for several years, and the punishment of solitary confinement has been required in but a few cases, and for a period in no case exceeding 36 hours, during this year." Report of the Inspector of the Rhode Island Prison, 1861.

Records from 1864, maintained in the State Archives, include two slips of paper that indicate that the use of solitary confinement at that time was very limited. They state that one prisoner was subjected to eighty hours in solitary (3.3 days), and three others to 12 hours in solitary in May of that year.

To sum up, while Rhode Island used solitary confinement in its strictest form in the first half of the 1800s, by 1845 its long-term use was abandoned. The Warden, the Prison Inspectors, and the Legislature were all in agreement that it

needed to be abandoned as a long-term type of imprisonment because it was causing inmates to suffer serious physical and mental injury. Unfortunately, Rhode Island forgot the lessons that it learned about solitary confinement, and it again became an issue in the 1960s as we set forth below.

B. The Use of Long-Term Solitary Confinement in Rhode Island during the 20th and 21st Centuries and findings that its use supported Eighth Amendment claims.

We could find no reference to the return of prolonged solitary confinement in the Rhode Island prisons until the filing of the case Morris v. Travisono, 69-cv-4192, in 1969.[5] The Morris case, and its related filings, addressed the conditions of confinement for prisoners at the Rhode Island Adult Correctional Institution ("ACI"). The litigation produced a system of rules known as the "Morris Rules" which addressed, among other things, the length of solitary confinement. For discussion of the early history of the litigation and the Morris Rules, see, e.g., Cugini v. Ventetuolo, 781 F.Supp. 107 (D.R.I.1992).

The events that led to their adoption began on September 27, 1969 when, following a sit-in by inmates at the ACI for better food, rehabilitation, and vocational opportunities, twenty-three inmates were put in the Behavioral Control Unit ("BCU") where they were subjected to twenty-three-hour a day solitary lock-

[5] Morris was originally docketed as case 4192 in the district court for the District of Rhode Island. The case, which continues to this day, has been restyled as case 69-cv-4192 in the federal electronic filing system.

down. Cugini at 109. "On September 28, 1969, the segregated inmates began a food strike after their water was shut off. When the food trays piled up in their cells, the inmates threw them out into the hall along with other waste products, creating an unhealthy situation in the cellblock." Id.

On October 11, 1969, a complaint was filed seeking to enjoin the administrators from keeping the prisoners in segregation and in the unhealthy conditions. Id. In January 1970, following extended negotiations, the parties submitted to the Court a draft of proposed "Regulations Governing Disciplinary and Classification Procedures at the Adult Correctional Institutions, State of Rhode Island." Morris v. Travisono, 310 F. Supp. 857, 865 (1970). The Court adopted the rules and made them a part of an interim consent decree. Id. The full text of the Morris Rules appears as an Appendix to Morris v. Travisono, 499 F.Supp. 149, 151, 161-174 (D.R.I. 1980).

On April 20, 1972, the Court entered its final decree, declaring that the inmate class was "entitled to those minimum procedural safeguards with respect to classification and discipline as are set out in the [Morris rules]." Cugini, 781 F. Supp. at 111, quoting Morris v. Travisono, No. 4192 (D.R.I. April 20, 1972)(final decree). On October 10, 1972, three years after the commencement of the civil action, the prison administration filed the rules with the Rhode Island Secretary of State. Id.

Among other things, the Morris Rules restricted the duration of punitive segregation/solitary confinement to no more than thirty days. Morris v. Travisono, 499 F. Supp. 149 (D.R.I. 1980) (Appendix Morris Rules).

In 1974, the Rhode Island Department of Corrections ("RIDOC") unilaterally suspended the Morris Rules in response to an emergency and declined to reinstate them once the emergency had passed. Cugini, supra at 111. The district court issued a permanent injunction prohibiting the Department from continuing the suspension of the Morris Rules and this Court affirmed. Morris v. Travisono, 373 F.Supp. 177 (D.R.I. 1974), aff'd, 509 F.2d 1358 (1st Cir. 1975). The First Circuit observed that the Morris Rules had been adopted as part of a judgment of the court and that "[t]he district court acted within its power and did not err in concluding that injunctive relief was necessary and proper to enforce its declaratory judgment and decree of April 20, 1972. 28 U.S.C. § 2202." 509 F.2d at 1362 (footnote omitted). "[S]tate officials may not unilaterally disregard [the court's] judgments." Id.

RIDOC repeatedly pushed back on the enforceability of the Morris Rules over the years. In 1982, the district court considered RIDOC's continued solitary confinement of class member John Carillo in violation of the Rules. Morris v. Travisono, 549 F. Supp. 291 (D.R.I. 1982), aff'd, 707 F.2d 28 (1st Cir. 1983). The court found that the Department's decision to subject Carillo to years of solitary

confinement, by keeping him in his cell 23 to 24 hours a day, with no work, educational, or vocational opportunities, and limited access to reading materials, violated the Eighth Amendment and 42 U.S.C. § 1983. Id. at 292. It ordered Carillo's reintegration into the general population. Id. The Department appealed. The First Circuit affirmed the district court's relief based on violation of the Morris Rules, expressly declining to reach the constitutional issue. Morris v. Travisono, supra, 707 F.2d at 33.

In later years, a string of decisions in the state and federal courts questioning jurisdiction to enforce the Morris Rules emboldened RIDOC to stop complying with them, including its restriction of no more than thirty days in solitary confinement. See, e.g., Cugini, supra; L'Heureux v. Department of Corrections, 708 A.2d 549 (R.I.1998) (disavowing enforcement under the Rhode Island Administrative Procedures Act).[6]

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[6] The Rules themselves—embodied in a permanent injunction as part of a judgment of the federal district court—remained "on the books" notwithstanding the Department's unilateral disregard. Thus, by Judgment and Order entered December 21, 2018, vacating and remanding the district court's denial of a motion for enforcement of the Rules, this Court observed that the district court had jurisdiction to consider "a claimed violation of an injunction if the injunction has not expired or been terminated." In re Paiva, Case No. 17-1511 (1st Cir. December 21, 2018). On remand, the district court concluded that the Morris Rules remained in effect. Paiva v. Rhode Island Department of Corrections, 498 F. Supp. 3d 277 (D.R.I. 2020). The district court declined to find the Department in contempt for failing to adhere strictly to the 30-day limit on disciplinary confinement "because the order was not 'clear and unambiguous' as to when RIDOC could change the Morris Rules without permission from the Court." Id. at 286 (footnote omitted). In

Thereafter, RIDOC began relying more on the use of extended solitary confinement. For example, in its 2009 Code of Inmate Discipline, 11.01-5 DOC, RIDOC allowed its Hearing Officers to impose disciplinary confinement for up to one year.

By 2016 the Rhode Island State Legislature took notice. R.I. House Bill 8206 was enacted on June 16, 2016, and created a special legislative commission to study and assess the use of solitary confinement in Rhode Island. The stated reasons for the commission were that:

> Evidence shows unlimited solitary confinement is inhumane and ineffective; Subjecting people to solitary confinement without meaningful human contact, programming, services or therapy often causes deep and permanent psychological, physical, and developmental harm; and . . . This harm not only violates common values of decency, but also is counterproductive because people often have more difficulty complying with prison rules after being placed in solitary confinement; and . . Solitary confinement can be particularly devastating for certain vulnerable people, including: the young and elderly, pregnant women and persons with disabilities or histories of addiction and trauma; and . . The United Nations Special Rapporteur on Torture concluded that solitary confinement can amount to torture and recommended abolishing its use beyond fifteen days and prohibiting any use of solitary confinement for vulnerable groups or for the purpose of punishment; ….

2016 R.I. House Bill 8206.

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response to that ruling, the Department in 2020 filed a motion to terminate the permanent injunction and to stay the court's order of enforcement. The motions and order are stayed while the parties are in mediation.

On June 29, 2017, the Special Legislative Commission formed to Study and Assess the Use of Solitary Confinement at the ACI issued its report. Its members included A.T. Wall, the then Director of RIDOC; James Weeden, then Assistant Director Institutions /Operations at the ACI; and Louis Cerbo, the ACI's then Director of Behavioral Health. The Commission was chaired by Representative Aaron Regunberg, one of the amici here.

The Commission heard testimony from experts in medical and psychiatric fields regarding the physical and psychological impact of solitary confinement on a prisoner.

> Presenters offered testimony on recent research studies which showed that prolonged isolation causes higher rates of psychiatric hospitalization, sleeplessness, anxiety, depression and suicidal thoughts among prisoners. Additional research studies noted negative physiological effects on prisoners to include loss of appetite, lethargy and diminished impulse control. Additional presenters pointed to recent studies' results that those serving in solitary confinement have a higher rate of pre-existing mental illness than inmates serving in general population with a particular impact on those inmates with serious and persistent mental illness (SPMI). Importantly, presenters further noted the lack of any empirical evidence of the effectiveness of solitary confinement as a tool to deter recidivism or change a prisoner's behavior.

Report of the Special Legislative Commission to Study and Assess the Use of Solitary Confinement at the Rhode Island ACI, June 29, 2017, 6. ("Special Commission, 2017").

The Special Commission concluded by recommending a 15-day maximum limit for solitary confinement, the reduction of sensory deprivation by allowing

family/outside contact via calls and visits, 20 hours out of cell every week and accessibility to programming geared toward inmate behavior change to allow for inmates to move to less restrictive housing as soon as possible. Special Commission, 2017,12-13.

The Special Commission's recommendations have not been implemented as of the writing of this brief.

In 2018, the year before Plaintiff-Appellee's confinement in solitary began, the United States District Court of Rhode Island issued decisions allowing inmates to raise claims based on being held in extended solitary confinement, such as Dupont v. Wall, 288 F. Supp. 3d 504 (D.R.I. 2018), which held that inmates kept "in disciplinary confinement for one year" and "subjected to the RIDOC version of housing that most closely resembles the general definition of solitary confinement" stated a claim for a violation of the Eighth Amendment's ban on cruel and unusual punishment. Id. at 508. See also Diaz v. Wall, No. CV 17-94 WES, 2018 WL 1224457 at *5 (D.R.I. Mar. 8, 2018) where Plaintiff stated a claim for cruel and unusual punishment when he "asserts that he has been placed in segregation over thirty times for a total of five hundred fifty-five days in order to sanction out-of-control behavior resulting from mental illness." (Footnote omitted).

Despite all of the above, the Defendants-Appellants continued to implement long term disciplinary confinement on inmates such as Cintron.

C. Qualified Immunity does not apply where the Defendants were on notice that their conduct violated a constitutional right of an inmate.

Qualified immunity's protection for unlawful behavior applies only where government actors could have reasonably believed their actions were lawful at the time of the challenged conduct. Cf. Davis v. Scherer, 468 U.S. 183, 195 (1984). The doctrine is designed "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." Hope v. Pelzer, 536 U.S. 730, 739 (2002). The doctrine protects officers who lack "fair warning" that their conduct was unlawful, Mlodzinski v. Lewis, 648 F.3d 24, 37 (1st Cir. 2011), but those who had advance notice cannot evade liability, see, e.g., Marrero-Mendez v. Calixto-Rodriguez, 830 F.3d 38, 47 (1st Cir. 2016). Government actors are deemed to lack the requisite notice when "their conduct does not violate clearly established statutory or constitutional rights." Pearson v. Callahan, 555 U.S. 223, 231 (2009). In deciding what the law was at any given time, "the court must canvass controlling authority in its own jurisdiction and, if none exists, attempt to fathom whether there is a consensus of persuasive authority elsewhere." Savard v. Rhode Island, 338 F.3d 23, 28 (1st Cir. 2003), citing Wilson v. Layne, 526 U.S. 603, 617 (1999); Brady v. Dill, 187 F.3d 104, 116 (1st Cir.1999).

This does not mean that the court needs to find that, at the relevant time, the exact same fact scenario existed for the Plaintiff-Appellee as existed in other cases where a violation of the Eighth Amendment occurred to deny an official's claim

for qualified immunity, but rather: "in the light of pre-existing law the unlawfulness [of the defendant's actions] must be apparent." Hope, 536 U.S. at 739. In Hope v. Pelzer, an inmate was allowed to bring a claim alleging cruel and unusual punishment, despite a claim of qualified immunity, against prison guards who had subdued him and then punished him by handcuffing him to a hitching post for a seven-hour period in a painful, unnatural position, while exposing him to the sun, prolonged thirst and taunting, and depriving him of bathroom breaks. Id. at 743. The Court held that a prior case, where the Eleventh Circuit stated that an officer denying an inmate water at the prison as punishment for his earlier refusal to work on the farm might violate the Eighth Amendment, put the officers in Hope on notice that "physical abuse directed at [a] prisoner *after* he terminate[s] his resistance to authority would constitute an actionable eighth amendment violation." Id. (internal quotations, citations omitted; emphasis in original). In making that finding, the Court also noted that the Department of Justice had conducted a study of the State's use of a hitching post and told them that its use was unconstitutional except in an emergency situation. Id.

Punishment in prison as part of ordinary prison life may violate the Eighth Amendment if "it is extremely disproportionate, arbitrary or unnecessary." O'Brien v. Moriarty, 489 F.2d 941, 944 (1st Cir. 1974). In O'Brien, the First Circuit rejected an Eighth Amendment claim where the prisoners received the same food

as others; did not complain of heat, sanitation, lighting, or bedding; and were allowed out of their cells for an hour each day. Id. However, the court noted that, if imposed "for too long a period, even the permissible forms of solitary confinement might violate the Eighth Amendment," and that most cases upholding solitary confinement are where it is "a short-term punishment for disciplinary infractions." Id.; see also Hutto v. Finney, 437 U.S. 678, 687 (1978) (unpleasant conditions of confinement "might be tolerable for a few days and intolerably cruel for weeks or months").

Here, the Defendants-Appellants knew that the extended use of solitary confinement posed a substantial risk of serious harm to the Plaintiff-Appellee. Each of the employees responsible for Plaintiff-Appellee's prolonged isolation in solitary confinement knew that he spent 23 to 24 hours a day in an eight-by-ten foot cell, with one 10-minute phone call each month, no radio, TV, or MP3 player, and no access to programming. They knew the harm this caused the Plaintiff-Appellee as he deteriorated, losing more than seventy pounds, engaged in visible self-harms, including pulling out his hair and badly injuring his hand by bashing it against the wall, and reported suffering anxiety and depression.

The Defendants-Appellants were clearly aware of the courts' prior holdings in the Morris line of cases, including Morris v. Travisono, supra, where the district court held that keeping an inmate in solitary confinement for a period of years

violated the Eighth Amendment (with this Court affirming on other grounds) and this Court's decision in O'Brien v. Moriarty, supra, which set forth parameters of a future Eighth Amendment violation based on the use of solitary confinement--akin to that set forth in Hope v. Pelzer. The Defendants-Appellants were clearly aware of the Rhode Island federal district court's 2018 decisions discussed above, in Dupont v. Wall, supra , and Diaz v. Wall, supra.

They are also appropriately charged with the knowledge--when the Plaintiffs-Appellee's placement in solitary confinement began in June 2019-- that their reliance on the abandonment of the Morris Rules was not grounded in law as this Court had entered its decision on In Re Paiva in December 2018. Further, as of January 28, 2020, it was aware that the federal court concluded that the Morris Rules, which allowed only a thirty-day placement into solitary confinement remained in effect. See Paiva v. Rhode Island Department of Corrections, supra.

The Defendants-Appellants' predecessors participated in the Special Commission of 2017, as the leadership of the RIDOC, and heard testimony from experts in medical and psychiatric fields regarding the physical and psychological impact of solitary confinement on prisoners, including research that "showed that prolonged isolation causes higher rates of psychiatric hospitalization, sleeplessness, anxiety, depression and suicidal thoughts among prisoners." Special Commission, 2017, 6. They knew that other studies showed: "negative

physiological effects on prisoners to include loss of appetite, lethargy and diminished impulse control." Id. They knew that the Special Commission supported limiting solitary confinement to a 15-day maximum sentence, the reduction of sensory deprivation during that time by allowing family/outside contact via calls and visits, with at least 20 hours out of cell every week and accessibility to programming geared toward inmate behavior change. Id. at,12-13.

They are also appropriately charged with knowledge of the Supreme Court's decisions that note it is: "well documented that ... prolonged solitary confinement produces numerous deleterious harms." Glossip v. Gross, 576 U.S. 863, 926 (2015) (Breyer, J. Ginsburg, J., dissenting). They knew that the damage that prolonged solitary confinement can inflict upon the human mind has been long documented and acknowledged, both around the world and at home. Id. (noting the United Nations Special Rapporteur on Torture has called for a global ban on solitary confinement exceeding fifteen days); see also Davis v. Ayala, 576 U.S. 257, 287 (2015) (Kennedy, J., concurring) (recounting the horror that solitary confinement instilled in prisoners in Britain even in the eighteenth century and citing authority that shows "growing awareness" of the issue of solitary confinement in modern American penal systems).

Yet each of the Defendant-Appellants kept Plaintiff-Appellee in near total isolation for more than a year, despite the pronounced and obvious deterioration in his health. This is not a reasonable action for any correctional officer.

The Defendants-Appellants, on this facts of this case, cannot rely upon the defense of qualified immunity. They should not be provided a shield for their actions.

CONCLUSION

This Court should affirm the district court's order on the Defendants-Appellants' motion for judgment on the pleadings and return the matter to the district court for further proceedings on the merits of Plaintiff-Appellee's claims for relief.

Dated: May 11, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 6,458 words.

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Dated: May 11, 2023

/s/ Sonja L. Deyoe
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CERTIFICATE OF SERVICE

I certify that on May 11, 2023, the foregoing Amici Curiae Brief was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

Dated: May 11, 2023

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