No. 24-7010

IN THE

United States Court of Appeals for the Fourth Circuit

SAMUEL SMALLS,

Plaintiff-Appellant,

v.

WILLIAM BAILEY, ET AL.,

Defendants-Appellees.

On Appeal from the U.S. District Court
for the District of Maryland
Case No. 1:23-cv-00723-BAH

OPENING BRIEF OF PLAINTIFF-APPELLANT SAMUEL SMALLS

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, Plaintiff-Appellant Samuel Smalls makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

No.

2. Does party/amicus have any parent corporations?

No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?

No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation?

No.

5. Is party a trade association?

No.

6. Does this case arise out of a bankruptcy proceeding?

No.

7. Is this a criminal case in which there was an organizational victim?

No.

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INTRODUCTION

For over 300 days—from August 18, 2022 to June 21, 2023—Samuel Smalls, a prisoner in the custody of the Maryland Department of Corrections, was held in solitary confinement at Eastern Correctional Institution (ECI) in Westover, Maryland. JA617-18. During this time, Mr. Smalls was kept in a cell the size of a parking space, alone, for 23 or 24 hours per day on weekdays and 24 hours per day on weekends and holidays. JA9-10. Throughout this period, he was denied any out-of-cell exercise or outdoor recreation. *Id*. His only opportunity to leave his cell was when prison officials brought him to an empty dayroom—in which he was not allowed to exercise—for no more than one hour per day, three days per week. *Id*. Even that opportunity was regularly denied to him, such that he was often left in his cell for 24 hours per day. *Id*.

This prolonged placement in solitary confinement without out-of-cell exercise or outdoor recreation violated Mr. Smalls' rights under both the Eighth Amendment and the Fourteenth Amendment. This Court has repeatedly held that isolating someone in their cell for prolonged periods without exercise violates the Eighth Amendment. *See, e.g.*, *Porter v. Clarke*, 923 F.3d 348, 364 (4th Cir. 2019); *Lyles v. Stirling*, 844 F. App'x

651, 654 (4th Cir. 2021) ("Denying an inmate out-of-cell exercise for 10 months is objectively serious under the Eighth Amendment."). For the same reasons, holding prisoners in conditions such as these without proper procedural protections violates the Fourteenth Amendment. *See, e.g.*, *Incumaa v. Stirling*, 791 F.3d 517, 535 (4th Cir. 2015); *Smith v. Collins*, 964 F.3d 266, 281 (4th Cir. 2020).

Instead of applying these precedents, the district court rejected Mr. Smalls' claims on two primary grounds, neither of which is valid. First, the district court concluded that Mr. Smalls' Eighth Amendment claim failed because he did not allege a "specific serious or significant physical or emotional injury." JA639. But this Court has expressly recognized that "prolonged isolated confinement . . . creates a substantial *risk* of psychological and emotional harm, which risk is sufficient" to violate the Eighth Amendment. *Porter*, 923 F.3d at 361. On top of that, even if more were required, a reasonable jury could infer that those risks resulted in injuries, given the nature and length of Mr. Smalls' isolation.

Second, the district court rejected Mr. Smalls' Fourteenth Amendment claim on the theory that Mr. Smalls' "time in segregated housing was with his consent." JA637. But Mr. Smalls never consented;

in fact, he repeatedly objected to the extreme restrictions imposed on him and filed an administrative grievance within days of being placed in solitary confinement. Prison officials refused to release Mr. Smalls back to general population or remove the restrictions. Instead, the only thing they did was place Mr. Smalls on the "AdSeg pending transfer" list, telling him that being on that list might speed up his transfer out of the facility. At no point did Mr. Smalls consent to unconstitutional conditions.

Accordingly, the decision below should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this federal civil-rights action under 28 U.S.C. § 1331. The court issued its final decision on September 12, 2024. JA615. Mr. Smalls filed a motion to alter the judgment on September 26, 2024. JA642. He filed a notice of appeal on October 10, 2024, which the district court treated as timely filed when the district court denied his motion on October 18, 2024. JA667-68; Fed. R. App. 4(a)(4)(B)(i). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Defendants violated Mr. Smalls' Eighth Amendment rights by keeping him in solitary confinement without access to out-of-cell exercise or outdoor recreation for nearly one year.

2. Whether Defendants violated Mr. Smalls' Fourteenth Amendment rights by keeping him in solitary confinement without access to out-of-cell exercise or outdoor recreation for nearly one year without basic procedural protections like an opportunity to be heard by the prison's segregation review committee.

STATEMENT OF THE CASE

I. Factual Background

On July 21, 2022, Mr. Smalls began his incarceration at Eastern Correctional Institution (ECI) in Westover, Maryland. JA489-90; JA117. Upon his arrival, Mr. Smalls was placed in the general population unit. JA117; JA488.

In general population, Mr. Smalls regularly had the opportunity for out-of-cell exercise and recreation. There was a "recreation program with planned activities year round," including sports, table games, and television. JA124. Mr. Smalls had access to a recreation courtyard that

was equipped with a basketball hoop. JA134-35. He was able to go to a gym that was equipped with a weight room, where he could use exercise equipment and participate in a program for weight lifting. JA124; JA135.

But on August 18, 2022, Mr. Smalls was transferred to solitary confinement. JA9. That day, Mr. Smalls was moved to Housing Unit 4, a disciplinary segregation unit. JA117; JA187. Housing Unit 4 was a highly restricted unit meant for prisoners who "cannot follow rules, are disruptive, and, in some cases, present assaultive dangers." JA193 (noting Housing Unit 4 was "subject to more restrictions" than "general population"). Mr. Smalls was not transferred because of any risk of violence or other threat to security; rather, he was charged with failing to obey an order because he was "wearing jeans with pockets" and refused to change into different clothing for transportation to court. JA188.

In Housing Unit 4, Mr. Smalls was completely isolated. He was "kept in his cell alone for 23 hours per day and 24 hours on weekends and holidays." JA616. He even ate meals alone in his cell. *See* JA161. He was denied all out-of-cell exercise and could only do "calisthenics" in his cell, which was "the size of a parking space." JA115; *see* JA194 ("Inmates in HU4 could exercise in their cells."); JA10. He was also denied any outdoor

recreation, including any of the recreation programs available in general population. JA9; JA115.

Mr. Smalls' only opportunity to leave his cell was when he was taken to a dayroom for no more than one hour a day, three days per week. *See* JA9; JA194; JA164. Even there, Mr. Smalls was not allowed to exercise. JA9. There were not even tables or chairs at which he could sit in the dayroom. JA115. As Defendant Kessler admitted, moreover, Mr. Smalls was "often" denied even his hour in the dayroom because of "staffing issues." JA194.

Mr. Smalls' time in solitary confinement could have ended just 11 days after it began. On August 29, 2022, the disciplinary charge against Mr. Smalls was reduced to an incident report, which "is not a guilty finding" and results in "No Rule violation charges." JA183. At this point, Mr. Smalls became eligible to return to general population. *See* JA195. Indeed, Defendant McCabe conceded that "correctional staff had intended to move him from the restrictions of HU4 DisSeg to general population." JA475.

Mr. Smalls was not returned to general population, however, because—according to Defendants—"there were no available beds."

JA195. Instead, prison officials decided that Mr. Smalls "would stay on HU4." JA189. Prison officials specifically told Mr. Smalls that they "could not move him to general population." JA195.

Aside from keeping Mr. Smalls in Housing Unit 4, the only other option prison officials considered was to designate Mr. Smalls on the "AdSeg pending transfer" list. JA195. In an effort to end his solitary confinement, Mr. Smalls had asked to be transferred out of ECI. JA189. But he was not eligible for a lateral transfer because he had recently arrived at ECI. *Id.* Defendant Kessler told Mr. Smalls, however, that being placed on "AdSeg pending transfer" could potentially allow him to "be transferred faster than if he asked for a lateral transfer." JA195. When, exactly, that would happen was left unclear; officials told Mr. Smalls that such a placement could result in a transfer "within a week or in twelve months." JA621. According to Defendant Kessler, Mr. Smalls "did not object to the placement idea." JA195; *see also* JA200 (official claiming that this was Mr. Smalls' "best option at the time"). Defendants ultimately chose to place him on the list.

Accordingly, on September 8, 2022, Mr. Smalls was transferred to Housing Unit 5, another highly restricted unit designed for prisoners who

"were under investigation or required segregation from the general population for specific reasons," such as being "a threat to themselves or other inmates." JA115. There was no reason to believe Mr. Smalls needed to remain in segregation because he presented a threat to himself or others. *See* JA197. He was placed there solely because Defendants had designated him as "AdSeg pending transfer." *See id.*

In Housing Unit 5, Mr. Smalls faced the same kind of isolating conditions as in Unit 4. *See* JA632 (determining Mr. Smalls faced "more of the same" conditions); JA188-89; JA200. In Unit 5, as in Unit 4, he spent 23 or 24 hours per day alone in his cell. JA9. He was again denied any opportunity for out-of-cell exercise, and could only do "calisthenics" in his cell. JA207. He was denied access to recreational programming and any opportunity for outdoor recreation. JA9; JA52; JA54; JA56; JA58; JA60; JA62. The only time he could leave his cell was when prison officials brought him to a dayroom, which did not have tables, chairs, recreation items, or exercise equipment. JA625; JA207; JA52-53; JA215 (describing the "lack of tables, chairs, board games, microwaves, and other amenities"). Again, he was not allowed to exercise in the dayroom. JA9.

As in Unit 4, Mr. Smalls was regularly denied even the opportunity to leave his cell to go to the dayroom. *See* JA207-08. According to prison officials, "staff limitations" and "the number of inmates to be moved" often made it so that Mr. Smalls was left alone in his cell for the full 24 hours per day, even during weekdays. *See id.*

During the months Mr. Smalls spent in Housing Units 4 and 5, the prison's Segregation Review Committee met several times to review Mr. Smalls' placement, each time approving the same restrictive conditions. *See* JA622. "[T]here is no indication in the record that [Mr.] Smalls attended any of those meetings," much less that he had an opportunity to be heard or present evidence. *Id.*; *see* JA188 (listing those in attendance, which did not include Mr. Smalls); JA471 (describing discussion among prison officials without Mr. Smalls present). Mr. Smalls was not even allowed to review notes from the meetings afterwards; he only received the Committee's final decision. JA468; JA188 (explaining that notes from the meeting "may not be disclosed" to prisoners, including Mr. Smalls).

On June 21, 2023, Mr. Smalls was finally released back to general population. JA202. In total, Mr. Smalls had spent more than 300 days in

solitary confinement since he was first transferred on August 18, 2022. *See* JA4.

II. Procedural History

In accordance with Maryland's Administrative Remedy Procedure, just 5 days after he was placed in Housing Unit 4, Mr. Smalls notified prison officials of the unlawful conditions he faced in solitary confinement and sought administrative relief. *See* JA630; *see also* JA194 (noting "many conversations with inmate Smalls about his concerns about HU4's amount of out-of-cell activity"). On August 23, 2022, he filed a grievance with ECI's warden, Defendant William Bailey, challenging the lack of "outdoor recreation and exercise opportunity." JA239; *see* JA240 (explaining that he was only allowed "3 hours of out-of-cell" time at most each week); JA3. Prison officials denied his grievances and the appeal he took from denial. JA5; JA239; JA242; JA243-45.

After exhausting administrative remedies, Mr. Smalls, proceeding *pro se*, filed suit on March 15, 2023, alleging that Defendants violated his Eighth and Fourteenth Amendment rights by keeping him in solitary confinement and depriving him of out-of-cell exercise and outdoor recreation. JA7. In his verified complaint, Mr. Smalls specifically cited

the "vast body of research that shows the serious detrimental effects on mental and physical health of spending 22 to 24 hours per day alone and idle in a cell the size of a parking space." JA10. He emphasized that he "has been and will continue to be irreparably injured by the inhumane deprivations" of solitary confinement. JA12.

On September 12, 2023, Defendants filed a motion to dismiss, or in the alternative, for summary judgment. JA71. As a threshold matter, Defendants argued that Mr. Smalls failed to exhaust administrative remedies as to conditions in Housing Unit 5, as required by the Prison Litigation Reform Act. *See* JA83. On the merits, Defendants argued that Mr. Smalls' Eighth Amendment claim failed because "[c]onditions here were not severe," and Mr. Smalls failed to allege a "physical injury from his segregation housing or related restrictions." JA100-01. In addition, Defendants argued that "there appears to be no liberty interest" under the Fourteenth Amendment "implicated in placement on administrative segregation." JA93.

Because of the early stage of the proceedings, Mr. Smalls—still incarcerated and litigating *pro se*—had not had an adequate opportunity to conduct discovery before responding to Defendants' motion. *See* JA531-

40 (Mr. Smalls attempting to serve discovery requests as part of his response to Defendants' motion). Nevertheless, Mr. Smalls opposed Defendants' motion with evidence, including his verified complaint and affidavits from other incarcerated individuals in solitary confinement. *See* JA482-519; JA29-40; *Goodman v. Diggs*, 986 F.3d 493, 498 (4th Cir. 2021) ("[I]t is well established that 'a verified complaint is the equivalent of an opposing affidavit for summary judgment purposes, when the allegations contained therein are based on personal knowledge.'").

On September 12, 2024, the district court construed Defendants' motion as seeking summary judgment and granted their motion on the merits. *See* JA615; JA628. The district court first rejected Defendants' threshold exhaustion challenge, noting that "Defendants concede that [Mr.] Smalls exhausted administrative remedies regarding out of cell recreation in HU #4" and solely challenged exhaustion as to Housing Unit 5. JA629; *see* JA373 (Defendants acknowledging Mr. Smalls challenged the "conditions of confinement in disciplinary segregation"). The district court determined Mr. Smalls exhausted as to both Housing Units because "his assignment to HU #5 was simply more of the same and should be covered by the ARP [grievance] that he unquestionably did file." JA632.

On the merits, the district court concluded that Mr. Smalls' Eighth Amendment claim failed because he did not establish "any specific serious or significant physical or emotional injury" resulting from solitary confinement. JA639. The district court acknowledged that "the alleged depravations complained of by [Mr.] Smalls should not be trivialized," but concluded that "there is no evidence that out-of-cell exercise was completely banned at ECI or that the relatively short duration at issue here rose to the requisite level to be actionable under the Eighth Amendment." *Id.* In addition, the district court concluded that Defendants did not act with subjective deliberate indifference because, in declarations they submitted, they claimed that "at times, out-of-cell exercise could not be accommodated" based on staffing shortages. JA640. Finally, the district court cited Defendants' claim "that [Mr.] Smalls essentially agreed to these limits . . . by consenting to remain in segregation to facilitate his eventual transfer." *Id.* As to Mr. Smalls' Fourteenth Amendment claim, the district court relied solely on Defendants' theory that Mr. Smalls consented to his transfer to Housing Unit 5. JA633.

Mr. Smalls filed a motion to alter the judgment, which the district court denied. JA642; JA668. Mr. Smalls filed a notice of appeal, which the district court treated as timely filed when it denied the motion on October 18, 2024. JA664.

SUMMARY OF ARGUMENT

I. Defendants violated Mr. Smalls' Eighth Amendment rights when they placed him in solitary confinement without access to out-of-cell exercise or outdoor recreation for almost a year with no penological justification. This Court has repeatedly recognized that isolating someone in their cell for prolonged periods without the opportunity for outdoor recreation or out-of-cell exercise violates the Eighth Amendment. *See Porter*, 923 F.3d at 361; *Lyles*, 844 F. App'x at 654.

I.A. Relying on a broad judicial and scientific consensus, this Court has recognized that prolonged solitary confinement, including restrictions on out-of-cell exercise and outdoor recreation, create an objectively serious risk of harm sufficient to satisfy the first prong of the Eighth Amendment inquiry. *Porter*, 923 F.3d at 357. Even focusing on exercise alone, this Court has held that "[d]enying an inmate out-of-cell exercise for 10 months is objectively serious under the Eighth

Amendment." *Lyles*, 844 F. App'x at 654. These kinds of extreme deprivations create "a substantial *risk* of psychological and emotional harm, which risk is sufficient to satisfy the objective prong." *Porter*, 923 F.3d at 361.

Here, Mr. Smalls spent 23 or 24 hours per day isolated in his cell, deprived of any "meaningful social interaction and positive environmental stimulation." *Id.* at 368; *see* JA9. In solitary confinement, Mr. Smalls had no ability to exercise outside of his cell or spend time outdoors. *Porter*, 923 F.3d at 360; JA9. These conditions exposed Mr. Smalls to an objectively serious risk of harm.

The district court erred by denying Mr. Smalls' claim primarily on the ground that he failed to allege "any specific serious or significant physical or emotional injury." JA639. This Court rejected the same reasoning in *Porter*, where the defendants argued that the plaintiffs had failed to identify individual "symptoms of anxiety, depression, insomnia," or other signs of "instability or deterioration" resulting from their confinement. 923 F.3d at 360. This Court concluded that such specific injuries were not necessary because the conditions created "a substantial

risk of psychological and emotional harm, which risk is sufficient to satisfy the objective prong." *Id.* at 361.

So too here. And even if more were required, a reasonable jury could infer that these extreme conditions resulted in psychological or physical injuries, given the nature and length of Mr. Smalls' isolation.

I.B. Defendants acted with deliberate indifference towards the risks of harm Mr. Smalls faced. Mr. Smalls' evidence demonstrates that in two ways. First, his evidence shows that Defendants had specific notice of the unconstitutional conditions from Mr. Smalls' objections and requests for relief, including the grievance Mr. Smalls filed just 5 days after being placed in Housing Unit 4. *See* JA239; *see also* JA194 (describing "many conversations with inmate Smalls about his concerns"). This alone was sufficient to put Defendants on notice of the risks of harm for Eighth Amendment purposes. *See Rivera v. Mathena*, 795 F. App'x 169, 176 (4th Cir. 2019).

Second, and in addition, the risks of harm created by prolonged solitary confinement and a lack of out-of-cell exercise and outdoor recreation are so obvious that any reasonable corrections official would have been on notice. As this Court has explained, given Defendants'

"status as corrections professionals, it would defy logic to suggest that they were unaware of the potential harm" created by the type of extreme restrictions imposed on Mr. Smalls. *Porter*, 923 F.3d at 361. Therefore, a reasonable jury could find that Defendants acted with deliberate indifference.

The district court erred by concluding, in a sentence, that Defendants were not deliberately indifferent based on their claim that, "at times, out-of-cell exercise could not be accommodated in instances where staffing shortages made it unsafe to allow inmates out of their cells." JA640. In doing so, the district court improperly construed the evidence in Defendants' favor. A reasonable jury could reject Defendants' vague assertion and find that Defendants did not have to detain Mr. Smalls in a "highly restrictive form of solitary confinement" for over 300 days. *Porter*, 923 F.3d at 360.

In addition, the district court wrongly relied on Defendants' theory that Mr. Smalls somehow consented to the very conditions he challenged. That theory of consent is entirely meritless. Far from meeting the high standard this Court requires to find affirmative consent to a constitutional violation, Mr. Smalls repeatedly objected to the

restrictions placed on him and sought relief from Defendants. Defendants refused to release him back to general population or lift the restrictions; instead, the only thing they did was place him on the "AdSeg pending transfer" list, telling him that the placement might allow him to leave solitary confinement sooner than if he were not placed on the list. JA195. At no point did Mr. Smalls consent to unconstitutional conditions.

I.C. Before the district court, Defendants also asserted qualified immunity, which the district court did not address. *See* JA640. This Court need not consider that defense in the first instance. *See Smith*, 964 F.3d at 282 ("This Court need not consider an alternative ground for affirmance that was not addressed by the district court.").

Even if it did, qualified immunity should be denied. "[Q]ualified immunity does not shield 'those who knowingly violate the law.'" *Thorpe v. Clarke*, 37 F. 4th 926, 934 (4th Cir. 2022). Because a reasonable jury could find that Defendants were deliberately indifferent, Mr. Smalls has "made a showing sufficient to overcome any claim to qualified immunity." *Id.* On top of that, this Court's precedents clearly established that putting Mr. Smalls in prolonged solitary confinement, without out-of-cell exercise

or outdoor recreation, was unlawful. *See, e.g.*, *Mitchell v. Rice*, 954 F.2d 187, 192 (4th Cir. 1992); *Porter*, 923 F.3d at 361.

II. Defendants also violated Mr. Smalls' Fourteenth Amendment procedural due process rights by subjecting him to solitary confinement without access to out-of-cell exercise or outdoor recreation for nearly a year without basic procedural protections like an opportunity to be heard by and present evidence to the prison's segregation review committee.

II.A. Prolonged solitary confinement with no access to out-of-cell exercise or outdoor recreation implicates a protected liberty interest under the factors this Court has identified. *See Incumaa*, 791 F.3d at 534. First, Maryland corrections policies created an expectation of avoiding solitary confinement and its restrictions by setting out specific procedures for placement review. *See* JA11 (citing MD DOC Case Management Manual Directive 100.0002, section 18(B)).[1] Second, the conditions Mr. Smalls experienced were harsh and atypical in relation to ordinary prison life, as he was locked in his cell for 23 or 24 hours per day and deprived of the exercise and recreation opportunities allowed in

[1] https://www.law.umich.edu/special/policyclearinghouse/Documents/MD%20-Case%20Management%20Manual%20OCR.pdf.

general population. JA9; JA124; JA135. The conditions Mr. Smalls faced were also indefinite, as he was given no indication when he would be released from solitary confinement. *See* JA195. As a result, these deprivations implicated a protected liberty interest requiring due process.

The district court never engaged with these factors. Instead, it relied solely on Defendants' theory that Mr. Smalls somehow consented to remain in unconstitutional conditions without due process. As explained above, that theory is entirely meritless.

II.B. A reasonable jury could find that Mr. Smalls was denied the process required to adequately protect his liberty interest. As the district court recognized, "there is no indication that [Mr.] Smalls attended any [review] meetings" where his placement was discussed, nor that he had the opportunity to be heard or present evidence. JA622; JA476. The evidence also indicates that Mr. Smalls was not allowed to review the substantive basis for the committee's decision afterwards or seek an appeal. *See* JA476. Given this, a reasonable jury could conclude that the review process was not "adequate to protect Appellant's right to procedural due process." *Incumaa*, 791 F.3d at 535. At a minimum, Mr.

Smalls should be given the opportunity to develop his claim further through discovery to determine what process was provided. *See Smith*, 964 F.3d at 281.

II.C. Defendants also asserted qualified immunity in the district court, which the court did not address. Again, this Court need not consider that defense in the first instance, especially given the "need for further discovery." *Smith*, 964 F.3d at 281. But even if the Court were to address it, qualified immunity should be denied because the law was clearly established. *See Thorpe,* 37 F.4th at 941-42 (finding "Supreme Court cases dating back to at least 2005 held materially indistinguishable conditions trigger Fourteenth Amendment protections"); *Smith*, 964 F.3d at 276 (finding a liberty interest when plaintiff was held in solitary in his cell for 23 hours per day without access to outdoor exercise, and one hour of indoor exercise per day).

Accordingly, the Court should reverse the decision below.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of summary judgment. *Porter*, 923 F.3d at 355. In making its determination, this Court must construe the evidence "in the light most favorable" to Mr.

Smalls. *Incumaa*, 791 F.3d at 533. In addition, "[t]he Supreme Court has instructed that summary judgment motions should only be granted 'after adequate time for discovery.'" *Jenkins v. Woodard*, 109 F.4th 242, 250 (4th Cir. 2024). Thus, this Court has "cautioned that district courts should not consider summary judgment motions where the nonmoving party has not had an opportunity to discover information essential to its opposition." *Id.* at 251.

ARGUMENT

Defendants placed Mr. Smalls in solitary confinement for almost a year, where he spent 23 or 24 hours per day alone in his cell, with no ability to exercise outside of his cell and no outdoor recreation. Throughout that time, Defendants denied Mr. Smalls basic procedural protections like the opportunity to be heard by the prison's segregation review committee. In doing so, Defendants violated his Eighth Amendment right to be free from cruel and unusual punishment and his Fourteenth Amendment procedural due process rights.

I. Defendants Violated Mr. Smalls' Eighth Amendment Rights By Placing Him In Solitary Confinement For Nearly One Year Without Access To Out-Of-Cell Exercise Or Outdoor Recreation.

Defendants violated the Eighth Amendment because (1) the extreme conditions Mr. Smalls faced created "a substantial risk of serious harm," and (2) Defendants "knew of but disregarded" this risk. *Thorpe*, 37 F.4th at 933, 935. Taking the evidence in Mr. Smalls' favor, as it must be, a reasonable jury could find that both elements are satisfied here.

A. Mr. Smalls' Prolonged Solitary Confinement With No Access To Out-Of-Cell Exercise Or Outdoor Recreation Created An "Objectively Sufficiently Serious" Risk Of Psychological And Emotional Harm.

Mr. Smalls' detention in solitary confinement for almost a year without out-of-cell exercise or outdoor recreation created an objectively serious risk of harm, satisfying the first prong of the Eighth Amendment analysis.

1. There Is A Broad Judicial And Scientific Consensus That Prolonged Solitary Confinement Is Harmful.

This Court has recognized the substantial risk of serious harm created by long-term solitary confinement and the conditions that come with it, including restrictions on out-of-cell exercise and outdoor

recreation. *See, e.g.*, *Porter*, 923 F.3d at 356 (describing "psychological deterioration" caused by solitary confinement); *Thorpe*, 37 F.4th at 936 ("As far back as 1890, the Supreme Court recognized that prisoners subjected to such confinement exhibited a 'semi-fatuous condition' and 'violen[t] insan[ity]' and even died by suicide."). For example, in *Porter*, this Court held that "[p]rolonged solitary confinement exacts a heavy psychological toll," creating a "'substantial risk' of serious psychological and emotional harm" in violation of the Eighth Amendment. *Porter*, 923 F.3d at 357. In that case, the Court reviewed conditions on Virginia's death row, where prisoners were kept alone in small cells for 23 to 24 hours per day. *Id.* at 357. In isolation, the prisoners were deprived of all "meaningful social interaction and positive environmental stimulation," such as "congregate programming, recreation, or religious practice." *Id.* at 359, 368. Their only opportunity to leave their cells was during one hour of recreation per day, five days per week, which took place outdoors. *Id.* at 360.

This Court recognized that these conditions "amount to, at a minimum, a highly restrictive form of solitary confinement" that created "a substantial risk of serious psychological and emotional harm." *Id.*

at 360-61 (cleaned up). This Court surveyed the "dozens of studies on the psychological and emotional effects of solitary confinement," finding that "'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.'" *Id.* at 356 (quoting Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 132 (2003)) (emphasis added). These effects include paranoia, hallucinations, depression, and suicidal ideation. *Id.*

As this Court noted, a number of other courts have also "found—based on the empirical evidence set forth above—that solitary confinement poses an objective risk of serious psychological and emotional harm to inmates." *Id.* at 357; *see, e.g.*, *Finley v. Huss*, 102 F.4th 789, 814 (6th Cir. 2024) (emphasizing "the growing national consensus that solitary confinement can cause extraordinary harm"). In *Williams v. Secretary Pennsylvania Department of Corrections*, 848 F.3d 549 (3d Cir. 2017), for example, the Third Circuit held that "[t]he empirical record compels an unmistakable conclusion: this experience is psychologically painful, can be traumatic and harmful, and puts many of those who have

been subjected to it at risk of long-term . . . damage." *Id.* at 566-67. So debilitating are the effects of solitary confinement, in fact, that "researchers found that "virtually *everyone* exposed to such conditions is affected in some way." *Id.* at 566. These effects appear, moreover, in as little as thirty days or less. *Perry v. Spencer*, 94 F.4th 136, 151 (1st Cir. 2024) ("[S]olitary confinement is known to have serious adverse psychological effects on those subjected to it, even when it persists for less than thirty days."); *see also Grissom v. Roberts*, 902 F.3d 1162, 1176-77 (10th Cir. 2018) (Lucero, J., concurring) (explaining that "solitary confinement, even over relatively short periods, renders prisoners physically sick and mentally ill").[2]

With this robust scientific and legal consensus in mind, the Court in *Porter* concluded that the plaintiffs, who had been subjected to years of solitary confinement, had been exposed to a serious risk of psychological and emotional harm. *Porter*, 923 F.3d at 357. This Court

[2] *See also Davis v. Ayala*, 576 U.S. 257, 287 (2015) (Kennedy, J., concurring) ("The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators."); *Glossip v. Gross*, 576 U.S. 863, 926 (2015) (Breyer, J., dissenting) (collecting studies acknowledging that even a short time in solitary causes mental health impacts).

ultimately found that the plaintiffs satisfied both prongs of the Eighth Amendment analysis and therefore affirmed the district court's grant of summary judgment to plaintiffs on their Eighth Amendment claim. *See id.* at 363.

2. There Is Broad Judicial Consensus That Depriving People Of Out-Of-Cell Or Outdoor Exercise With No Penological Justification Is Harmful.

As with solitary confinement, this Court has also found that the prolonged denial of out-of-cell exercise without penological justification violates the Eighth Amendment. In *Lyles*, for example, a prison denied a prisoner all out-of-cell exercise for over ten months. 844 F. App'x at 654. As a result, during that period, the prisoner "gained weight, his cholesterol levels increased, and he went from having prediabetes to diabetes." *Id.*

This Court relied on the broad consensus regarding the need for out-of-cell exercise, emphasizing that "[i]t is well-understood that 'some form of regular outdoor exercise is extremely important to the psychological and physical well being of . . . inmates.'" *Id.* The Court cited *Mitchell*, which held, in the context of an eighteen-month deprivation of exercise, that "in most circumstances withholding all exercise

opportunities from a prisoner over an extended period of time violates the Eighth Amendment." 954 F.2d at 192. Accordingly, this Court concluded that "denying an inmate out-of-cell exercise for 10 months is objectively serious under the Eighth Amendment." *Lyles*, 844 F. App'x at 654; *see also Rivera*, 795 F. App'x at 172 (holding, in the context of solitary confinement, that "[d]epriving inmates the opportunity to shower and exercise can violate the Eighth Amendment's protection against cruel and unusual punishment"); *Sweet v. S.C. Dep't of Corr.*, 529 F.2d 854, 866 (4th Cir. 1975) ("Such indefinite limitation on exercise may be harmful to a prisoner's health, and, if so, would amount to 'cruel and unusual' punishment.").[3]

Other circuits have also recognized the harm from depriving a prisoner of out-of-cell exercise without sufficient penological justification. For example, in *Patterson v. Mintzes*, 717 F.2d 284 (6th Cir. 1983), the Sixth Circuit held that summary judgment was "clearly improper" where a prisoner was deprived of out-of-cell exercise or recreational

[3] *See also McNeill v. Currie*, 84 F. App'x 276, 278 (4th Cir. 2003) ("We have held that it may generally be considered that 'complete deprivation of exercise for an extended period of time violates Eighth Amendment prohibitions against cruel and unusual punishment.'").

opportunities for 46 days. *Id.* at 289. The Court explained that a 46-day "total or near-total deprivation of exercise or recreational opportunity, without penological justification, violates Eighth Amendment guarantees" because "[i]nmates require regular exercise to maintain reasonably good physical and psychological health." *Id.*; s*ee also Williams v. Greifinger*, 97 F.3d 699, 704 (2d Cir. 1996) ("[S]ome opportunity for exercise *must* be afforded to prisoners."); *Campbell v. Cauthron*, 623 F.2d 503, 507 (8th Cir. 1980) (same); *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979) ("There is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates."); *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (same); *Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988) (affirming a district court decision requiring five hours minimum out-of-cell exercise per week).[4]

3. Mr. Smalls' Prolonged Solitary Confinement With No Access To Out-Of-Cell Exercise Or Outdoor

[4] *See also Apodaca v. Raemisch*, 586 U.S. 931, 934 (2018) (statement of Sotomayor, J., respecting the denial of certiorari) ("[W]hat is clear all the same is that to deprive a prisoner of any outdoor exercise for an extended period of time in the absence of an especially strong basis for doing so is deeply troubling—and has been recognized as such for many years.").

Recreation Exposed Him To A Serious Risk Of Harm.

The conditions faced by Mr. Smalls created the same objectively serious risks as the conditions addressed in cases like *Porter* and *Lyles*. Like the plaintiffs in *Porter*, Mr. Smalls spent "between 23 and 24 hours a day alone, in a small . . . cell." *Porter*, 923 F.3d at 357; *see* JA9 (describing how Mr. Smalls was "kept in his cell for 23 hours a day (24 hours on weekends and holidays)"). While isolated, he was deprived of any "meaningful social interaction and positive environmental stimulation." *Porter*, 923 F.3d at 368; *see* JA9. Like the plaintiff in *Lyles*, he was deprived of all "out-of-cell exercise." *Lyles*, 844 F. App'x at 654; *see* JA9. His only chance to leave his cell was for, at most, one hour per day, three days per week, when he was taken to an empty dayroom, in which he was prohibited from exercising. *See* JA9; JA194; JA164. Even that minimal opportunity was "often" denied to him, leaving him in his cell for the full 24 hours per day. JA194.

This "highly restrictive form of solitary confinement," *Porter*, 923 F.3d at 360, combined with a denial of "out-of-cell exercise" and outdoor recreation "for 10 months," exposed Mr. Smalls to a serious risk of harm. *Lyles*, 844 F. App'x at 654. As discussed above, every study of the effects

of solitary confinement shows that the "negative psychological effects" begin after as little as 10 days. *Porter*, 923 F.3d at 356. Mr. Smalls was subjected to these conditions for over 300 days, from August 23, 2022, to June 21, 2023. *See* JA4; JA202. As a result, he was exposed to a "substantial risk of psychological and emotional harm." *Porter*, 923 F.3d at 357.

The district court never addressed this Court's caselaw recognizing the harms caused by solitary confinement with no access to out-of-cell exercise or outdoor recreation. Instead, the district court improperly concluded that Mr. Smalls failed to establish "any specific serious or significant physical or emotional injury resulting from his inability to leave his cell for outdoor recreation or exercise." JA639.

The district court erred because, as this Court recognized in *Porter*, prolonged solitary confinement without access to out-of-cell exercise violates the Eighth Amendment because it "creates a substantial *risk* of psychological and emotional harm." *Porter*, 923 F.3d at 355, 360-61. The defendants in *Porter* argued that the plaintiffs had not individually displayed signs of "cognitive instability or deterioration" that reflected harm from solitary confinement. *Id.* at 360. Importantly, because the

district court had granted summary judgment in favor of the plaintiffs, the Court was required to construe the evidence in favor of the defendants—meaning that it had to credit the defendants' evidence that the plaintiffs were not manifesting specific signs of harm. *See id.* at 354, 360.

Nevertheless, this Court rejected the defendants' argument because establishing specific symptoms of "cognitive instability or deterioration" was not required. *See id.* at 360. Instead, it was sufficient that "numerous studies and scholarly articles" demonstrated that solitary confinement "creates a substantial *risk* of psychological and emotional harm." *Id.* at 360-61. This Court held that the "risk," alone, "is sufficient to satisfy the objective prong." *Id.* at 361; *see also Latson v. Clarke*, 794 F. App'x 266, 270 (4th Cir. 2019) (recognizing that, in *Porter* "[w]e concluded that keeping prisoners in a cell at least 23 hours a day, alone, with 'no access to congregate religious, educational, or social programming' posed 'a substantial risk of serious psychological and emotional harm'").

So too here, where Mr. Smalls' prolonged solitary confinement and lack of out-cell-exercise or outdoor recreation created a "substantial *risk* of psychological and emotional harm." *Porter*, 923 F.3d at 360; *Mitchell*,

954 F.2d at 192 ("It is generally recognized that a total or near-total deprivation of exercise or recreational opportunity, without penological justification, violates Eighth Amendment guarantees."). Contrary to the district court's conclusion that the conditions here were not "extreme" enough, JA639, Mr. Smalls' conditions were worse in some ways than those in *Porter*: Whereas prisoners on Virginia's death row were able to exercise outdoors five times per week, Mr. Smalls did not get to go outside at all. JA9; *Porter*, 923 F.3d at 357.[5] Often times, prison officials refused to bring him out of his cell for his one hour of time in the dayroom, leaving him in his cell for the full 24 hours per day. JA194. The dangers of such extreme isolation are well-established. *See Porter*, 923 F.3d at 355-56.

In addition, even if more was required, a reasonable jury could infer that these conditions resulted in physical or psychological injuries, given the length and nature of Mr. Smalls' isolation. See JA10; JA12.[6] For

[5] The district court relied on its conclusion that "there is no evidence that out-of-cell exercise was completely banned at ECI." JA639. But the question is not whether out-of-cell exercise was banned throughout the facility; what matters is that Mr. Smalls was deprived of any opportunity for out-of-cell exercise. *See* JA9 (describing denial of "outdoor exercise" and "indoor exercise").

[6] *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 333 (2006) (describing permanent psychiatric harm as a result of solitary confinement); Mariposa McCall, MD, *Health*

example, in his verified complaint, Mr. Smalls specifically emphasized that he "has been and will continue to be irreparably injured by the inhumane deprivations" of solitary confinement. JA12. Also, he cited the "vast body of research that shows the serious detrimental effects on mental and physical health" caused by solitary, suggesting he, too, experienced these effects. JA10; *see also Lyles*, 844 F. App'x at 654 (noting the plaintiff "gained weight" and his "cholesterol levels increased" from the lack of exercise for 10 months). From this, a reasonable jury could conclude that he suffered physical or psychological injuries, in addition to being exposed to a substantial risk of serious harm.

B. Defendants Acted With "Deliberate Indifference" Towards The Risks Of Harm From Solitary Confinement Combined With No Out-Of-Cell Exercise Or Outdoor Recreation.

Construing the evidence in Mr. Smalls' favor, a reasonable jury could find that Defendants "'kn[ew] of and disregarded an excessive risk to inmate health or safety.'" *Porter*, 923 F.3d at 361 (quoting *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016)). In fact, Mr. Smalls'

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and Solitary Confinement: Issues and Impact, PSYCHIATRIC TIMES (March 16, 2022), https://www.psychiatrictimes.com/view/health-and-solitary-confinement-issues-and-impact (finding solitary confinement associated with 26% increased risk of premature death).

evidence demonstrates that Defendants were deliberately indifferent to the risks posed by solitary confinement without access to out-of-cell exercise or outdoor recreation in two independent ways.

First, Defendants became aware of the risks because Mr. Smalls notified them directly. *See Rivera v. Mathena*, 795 F. App'x at 176 (finding notice based on grievances "alerting staff to Rivera's issues"); *Lyles*, 844 F. App'x at 654 (grievances put officers on notice of Lyles' denial of exercise). In *Rivera*, for example, a prisoner sought to challenge the denial of the opportunity to shower and exercise regularly. This Court held that Defendants were deliberately indifferent to the risks of those deprivations based on grievances the prisoner had filed, and cited the fact that "[p]rison staff responded to these complaints, showing they knew Rivera was being denied showers and recreation against his will." *Id.* at 176. The Court also pointed to "notes" the prisoner left on his door stating "that he wanted showers and recreation," as well as the prisoner's efforts to tell "prison staff in person" about these issues. *Id.* This evidence was sufficient to demonstrate that prison officials "were aware of Rivera's shower and exercise deprivations and the accompanying risks." *Id.*

Here, like in *Rivera*, Defendants received multiple forms of direct notice of the extreme restrictions on Mr. Smalls. Among other things, within days of being placed in Housing Unit 4, Mr. Smalls filed a grievance challenging the denial of out-of-cell exercise and outdoor recreation in solitary confinement. JA239-241. Prison officials responded to these grievances, showing they were aware of the issues. *See* JA5-6; JA239; JA242-45. Indeed, prison officials had to be aware of these issues because the prison's policies expressly prohibited outdoor exercise and recreation, as well as exercise in the dayroom. *See* JA9. Mr. Smalls also repeatedly objected to the lack of "out-of-cell activity" in solitary confinement. *See* JA194 (describing "many conversations with inmate Smalls about his concerns"). These direct forms of notice are sufficient to establish that Defendants knew of but disregarded the risks to Mr. Smalls.

Second, and in addition, Defendants were aware of these risks because they are obvious. In *Porter*, for example, this Court recognized that "the scholarly literature describing and quantifying the adverse mental health effects of prolonged solitary confinement," alone, "provides circumstantial evidence that the risk of such harm was so obvious that it

had to have been known." 923 F.3d at 361. This Court emphasized that, given the defendants' "status as corrections professionals, it would defy logic to suggest that they were unaware of the potential harm that the lack of human interaction on death row could cause." *Id.*; *see also Lyles*, 844 F. App'x at 654 ("It is well-understood that 'some form of regular outdoor exercise is extremely important to the psychological and physical well being of . . . inmates.'").

So too here. Defendants are corrections professionals, including the warden of Eastern Correctional Institution and corrections officers who oversaw Mr. Smalls' conditions of confinement. *See* JA67-69. Given the "extensive scholarly literature describing and quantifying the adverse mental health effects of prolonged solitary confinement," it defies logic to suggest that Defendants were unaware of the risks of harm that solitary confinement without out-of-cell exercise or outdoor recreation creates after 300 days. *Porter*, 923 F.3d at 361.

The district court failed to address any of this evidence that Defendants were deliberately indifferent. Instead, the district court concluded that Defendants were not deliberately indifferent because they claimed that, "at times, out-of-cell exercise could not be accommodated in

instances where staffing shortages made it unsafe to allow inmates out of their cells." JA640.

In doing so, the district court improperly construed the evidence in Defendants' favor. In *Mitchell*, the defendants argued that denying a prisoner out-of-cell exercise was a necessary safety precaution. 954 F.2d at 193. This Court rejected that claim, explaining that "a mere assertion of necessity cannot relieve prison officials of Eighth Amendment requirements." *Id.* The Court emphasized that the complete deprivation of out-of-cell exercise may be justified only in "exceptional circumstances." *Id.* at 191. Financial costs, moreover, cannot be used to "excuse constitutional violations." *Id.* at 192. Because the defendants had failed to demonstrate such exceptional circumstances, the Court remanded the case for "a full hearing on the facts," including "[a] detailed review of the feasibility of alternatives." *Id.* at 193.

Here, a reasonable jury could find that Defendants did not have to detain Mr. Smalls in a "highly restrictive form of solitary confinement" for over 300 days, and that there was no penological justification for depriving him of out-of-cell exercise or outdoor recreation. *Porter*, 923 F.3d at 360. Mr. Smalls did not present any security threat that would

require the kinds of restrictions imposed on him in solitary confinement. Indeed, one prison official conceded that "correctional staff had intended to move him from the restrictions of HU4 DisSeg to general population" after just eleven days. JA475; *see also* JA197 (form showing there were no "[r]easons . . . to believe you are dangerous to the security of the institution and/or staff").[7] Accordingly, a reasonable jury could conclude that Defendants' actions were taken not because of "exigent circumstances," but because of their deliberate indifference. *Mitchell*, 954 F.3d at 193.

Finally, the district court noted Defendants' claim "that [Mr.] Smalls essentially agreed to these limits during a large portion of the time at issue by consenting to remain in segregation to facilitate his eventual transfer." JA640. This was the same theory on which the district

[7] Indeed, at times, Defendants appear to suggest that Mr. Smalls could have "told [officials] that he wanted to be removed from [solitary] to go back to general population," in which case the matter would have been "taken up by the Special Housing Committee." JA208; JA187-90; JA193-96. Defendants make these claims to argue that Mr. Smalls affirmatively consented to his time in solitary confinement. *See* JA640 (noting Defendants' argument "that [Mr.] Smalls essentially agreed to these limits"). As explained below, *infra* at 49-53, that theory of consent is entirely meritless. These claims by Defendants only further undermine the district court's assumption that Defendants had no choice but to impose the restrictions on Mr. Smalls.

court denied Mr. Smalls' Fourteenth Amendment claim. JA635. As explained below, *infra* at 49-53, Defendants' theory of consent is entirely meritless. Far from meeting the high standard this Court requires for an affirmative consent to unconstitutional conditions, Mr. Smalls repeatedly objected to the extreme restrictions in solitary confinement and sought relief from those conditions. His placement on the "AdSeg pending transfer list," moreover, was Defendants' decision to make, and they did so after telling Mr. Smalls that it might reduce the time he had to suffer in solitary confinement. At no point did Mr. Smalls consent to a constitutional violation.

C. Defendants Are Not Entitled To Qualified Immunity.

Before the district court, Defendants also asserted qualified immunity, which the district court did not address. *See* JA640. This Court need not consider that defense for the first time on appeal. *See Smith*, 964 F.3d at 282 ("This Court need not consider an alternative ground for affirmance that was not addressed by the district court."). Instead, it should simply reverse the decision below and remand for further proceedings. But even if this Court did address qualified immunity, that defense should be denied for two reasons.

First, under this Court's precedent, Defendants are not entitled to qualified immunity because a reasonable jury could find that they acted with deliberate indifference. "[Q]ualified immunity does not protect *knowing* violations of the law." *Thorpe*, 37 F. 4th at 930. As a result, "when 'plaintiffs have made a showing sufficient to' demonstrate an intentional violation of the Eighth Amendment, 'they have also made a showing sufficient to overcome any claim to qualified immunity.'" *Id.* at 934. Accordingly, "because the Eighth Amendment's deliberate-indifference standard requires knowing conduct, an officer who was deliberately indifferent could not also believe 'that [their] actions comported with clearly established law.'" *Pfaller v. Amonette,* 55 F.4th 436, 446 (4th Cir. 2022) (quoting *Thorpe*, 37 F.4th at 939); *Short v. Hartman*, 87 F.4th 593, 615 (4th Cir. 2023) (same). Because a reasonable jury could find that Defendants were deliberately indifferent, qualified immunity does not apply here.

Second, this Court's precedent clearly established that "severe isolation alone can deprive prisoners of 'the minimal civilized measure of life's necessities,' violating the Eighth Amendment." *Thorpe*, 37 F.4th at 937. *Porter*, for example, established three years before Mr. Smalls

was placed in solitary confinement that "prolonged isolated confinement . . . creates a substantial *risk* of psychological and emotional harm." 923 F.3d at 361. And even before *Porter*, this Court held that "a reasonable prison official should have known that . . . withholding all exercise opportunities from a prisoner over an extended period of time" without penological justification violates the Eighth Amendment. *Mitchell*, 954 F.2d at 192; *Lyles*, 844 F. App'x at 654 ("Denying an inmate out-of-cell exercise for 10 months is objectively serious under the Eighth Amendment.").

This Court's decisions, moreover, were part of a broad consensus of law from the federal Courts of Appeals. *See Patterson*, 717 F.2d at 289 (finding summary judgment "clearly improper" for a 46-day denial of out-of-cell exercise); *Williams*, 97 F.3d at 704 ("[S]ome opportunity for exercise *must* be afforded to prisoners."); *Campbell*, 623 F.2d at 507 (noting the "physical degeneration" caused by a lack of exercise); *Spain*, 600 F.2d at 199 ("There is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates."); *Davenport*, 844 F.2d at 1315 (citing decisions recognizing the need "for at least five

hours a week of exercise outside the cell"). Every reasonable official, therefore, would know that it was unlawful to place Mr. Smalls in solitary confinement without out-of-cell exercise or outdoor recreation for almost a year without penological justification. Accordingly, qualified immunity should be denied.

II. Defendants Violated Mr. Smalls' Fourteenth Amendment Rights By Placing Him In Solitary Confinement For Nearly One Year Without Access To Out-Of-Cell Exercise Or Outdoor Recreation Without Basic Procedural Protections.

Defendants also violated Mr. Smalls' Fourteenth Amendment procedural due process rights by placing him in solitary confinement without access to out-of-cell exercise or outdoor recreation for nearly a year without basic procedural protections. To determine whether the Fourteenth Amendment was violated, this Court looks to "whether Appellant had a protectable liberty interest in avoiding [solitary confinement]" and "whether the Department failed to afford Appellant minimally adequate process to protect that liberty interest." *Incumaa*, 791 F.3d at 526. A reasonable jury could find that both elements are satisfied here.

A. Prolonged Solitary Confinement Without Access To Out-Of-Cell Exercise Or Outdoor Recreation Implicates A Protected Liberty Interest.

Mr. Smalls' solitary confinement without access to out-of-cell exercise or outdoor recreation for nearly a year implicated a protected liberty interest. *See, e.g.*, *Smith*, 964 F.3d at 276 (finding a protected liberty interest where plaintiff was held in solitary confinement for 23 hours per day and did not have access to outdoor exercise); *Incumaa*, 791 F.3d at 521 (finding a protected liberty interest where plaintiff was confined in his cell for 24 hours per day on non-recreation or shower days). This Court has recognized a protected liberty interest where "onerous or restrictive confinement conditions '[arise] from state policies or regulations'" and "the conditions . . . present atypical and significant hardship in relation to the ordinary incidents of prison life." *Incumaa*, 791 F.3d at 527 (quoting *Prieto v. Clarke*, 780 F.3d 245 (4th Cir. 2015)); *see also McNeill v. Currie*, 84 F. App'x 276, 278 (4th Cir. 2003) ("On remand, the district court should compare the conditions in segregation to which McNeill is exposed, including his loss of out-of-cell exercise, with the ordinary incidents of prison life, to determine whether McNeill possessed a liberty interest requiring due process protections."). Both factors are present here.

First, Maryland state policy created an expectation of avoiding solitary confinement and its restrictions by setting out specific procedures for placement review. *See* JA7 (citing MD DOC Case Management Manual Directive 100.0002, section 18(B)). Specifically, the policy provides for review of placement in administrative segregation at least once every 30 days. *See id.* Because state policy contemplates the need for procedural protections around the use of solitary confinement, it creates an expectation that such protections will be adequate under the Fourteenth Amendment. *See Incumaa*, 791 F.3d at 527 (finding an expectation in avoiding segregation based on "uncontroverted evidence that the Department policy here mandates review of Appellant's security detention every 30 days"); *Thorpe*, 37 F.4th at 942 ("Because 'uncontroverted evidence' establishes that Step Down mandates review at least once every 90 days, Defendants sensibly do not dispute that Plaintiffs have adequately traced their interest to state regulations.").

Second, the conditions faced by Mr. Smalls in solitary confinement were harsh and atypical compared to ordinary incidents of prison life. *See Incumaa*, 791 F.3d at 530. To start, the "magnitude" of the restrictions Mr. Smalls faced in solitary confinement was significant. *Id.* In

Wilkinson, for example, the Court found that restrictions were significant where prisoners in solitary confinement were denied "almost all human contact" and were only allowed to exercise for one hour per day in a small indoor room. *Wilkinson v. Austin*, 545 U.S. 209, 223-24 (2005). Here, Mr. Smalls was kept in his cell for 23 or 24 hours per day—and he was never allowed out-of-cell exercise. *See* JA9. Instead, he was let out of his cell only for, at most, an hour in an empty dayroom, where he could not exercise—and even that opportunity was "often" denied to him. JA9; JA194. These conditions were "harsh and atypical" as compared to the general population, which had access to a full "recreation program with planned activities year round," as well as access to a recreation courtyard and a gym. JA124; JA134-35.

In addition, Mr. Smalls' confinement was "indefinite." *Incumaa,* 791 F.3d at 530. For example, in *Smith*, the Court concluded that solitary confinement was "indefinite" because prison officials did not give the plaintiff a meaningful "path out of segregation." 964 F.3d at 278. Instead, the plaintiff's only "choice" was to either adhere to his religious beliefs and thereby remain in solitary confinement, or violate his religious beliefs and thus comply with prison policy. *Id.* Accordingly, the

indefiniteness of the restrictions further pointed to "a liberty interest in avoiding solitary confinement." *Id.* at 275; *see also Thorpe*, 37 F.4th at 942 (relying on the fact that the "placement 'is for an indefinite period of time'"); *Incumaa*, 791 F.3d at 532 (same).

Similarly, the indefiniteness of Mr. Smalls' placement in solitary confinement further supports the existence of a liberty interest. Prison officials specifically told Mr. Smalls that they "could not move him to general population," JA195, and he also was not eligible for a lateral transfer to a different facility. JA189. The only alternative "option" prison officials considered was to keep Mr. Smalls in solitary confinement under a different classification—AdSeg pending transfer—in the hopes of transferring him out of the facility faster. JA200 (official claiming that this was Mr. Smalls' "best option at the time"). He thus had no meaningful "path out of segregation." *Smith*, 964 F.3d at 278.

This showing of indefiniteness was "strengthen[ed]" by the duration of Mr. Smalls' confinement. *Smith*, 964 F.3d at 278. In *Perry*, the First Circuit considered a prisoner's Fourteenth Amendment challenge to the fifteen months he spent in administrative segregation. 94 F.4th at 145. In holding that he had a liberty interest in avoiding administrative

segregation, the court explained that "solitary confinement for longer than thirty days imposes a meaningful hardship, and a member of the general prison population would not reasonably expect to be subjected to such unreasoned uses of it." *Id.* at 154. Accordingly, the court established a "presumption" that "solitary confinement for longer than thirty days imposes a meaningful hardship." *Id.*

Here, Mr. Smalls spent nearly a year in solitary confinement, isolated for 23 or 24 hours per day in his cell. JA9. Moreover, unlike the prisoner in *Perry*, who was able to exercise outdoors five times a week, Mr. Smalls was given no opportunity for out-of-cell exercise, indoors or outdoors. *Perry,* 94 F.4th at 144; JA9. Mr. Smalls was subjected to these conditions for over 300 days—ten times as long as the 30-day period identified in *Perry*. JA9.

Accordingly, the magnitude, indefiniteness, and duration of Mr. Smalls' extreme confinement establish a basic right to "a procedural opportunity to challenge the basis for the continuation of the challenged confinement." *Perry*, 94 F.4th at 154; *see also Carmouche v. Hooper*, 77 F.4th 362, 367 (5th Cir. 2023) (holding no minimum durational threshold exists to determine whether conditions of confinement give rise to a

liberty interest); *Colon v. Howard*, 215 F.3d 227, 231 (2d Cir. 2000) ("Confinement in normal SHU conditions for 305 days is in our judgment a sufficient departure from the ordinary incidents of prison life to require procedural due process protections.").[8]

Rather than engage with any of the above factors, the district court concluded that Mr. Smalls lacked any protected liberty interest solely on one ground: Defendants claimed "that [Mr.] Smalls' placement on administrative segregation pending transfer was consensual." JA635. The district court appeared to credit Defendants' claim that Mr. "Smalls could have requested to exit administrative segregation at any time," and concluded that his failure to do so meant that he consented to remaining in solitary confinement. *Id.*[9]

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[8] As an additional factor, this Court also considers whether the restrictions created "collateral consequences," such as loss of good time credit or the opportunity for parole. *See, e.g.*, *Smith*, 964 F.3d at 281. Whether such consequences were imposed as a result of Mr. Smalls' solitary confinement requires discovery into information in the custody and control of Defendants, including records of prison officials' discussions about Mr. Smalls' placement in solitary confinement.

[9] The district court also stated that "[Mr.] Smalls fails to dispute" that his "placement on administrative segregation pending transfer was consensual." JA635. That is incorrect: Mr. Smalls disputed Defendants' claim that Mr. Smalls somehow consented to the conditions he faced in Housing Units 4 and 5, explaining that there was no security or other penological justification for those restrictions. *See* JA486-88. Mr. Smalls

That was error for two reasons. First, as a factual matter, the district court improperly construed the evidence against Mr. Smalls. *See Incumaa*, 791 F.3d at 524 ("To make this [summary judgment] determination, we review the entire record, evaluating the evidence in the light most favorable to Appellant."). A reasonable jury could easily reject Defendants' claim that Mr. Smalls—a prisoner under Defendants' custody and control—simply needed to ask to be let out of solitary confinement as incredible. Among other things, prison officials specifically told Mr. Smalls that they "could not move him to general population." JA195. The only "option" that officials considered was keeping Mr. Smalls in solitary confinement under the "AdSeg pending transfer" designation, which officials suggested might allow him to transfer out sooner. *See id*. Whether to place Mr. Smalls on that list, moreover, was ultimately Defendants' decision to make. Accordingly, a reasonable jury could find that Mr. Smalls never had a choice of whether to remain in solitary confinement, let alone that he consented to remain there.

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also specifically disputed Defendants' suggestion that he "could have asked at any time" to be "sent back to general population." JA488 (refuting this "false and misleading narrative").

Second, even on the facts as construed by the district court, Mr. Smalls did not provide meaningful consent. Courts must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Rivera*, 795 F. App'x at 173. No such waiver occurs when a prisoner is not given a meaningful choice. *See Smith*, 964 F.3d at 278 (finding that a prisoner was not "in control of his own fate" because prison officials only gave him a false choice between violating his religious beliefs and being allowed out of solitary confinement). Prison officials cannot force a prisoner to make "a Hobson's choice" and then claim that his "consent" legitimated the choice he made. *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010); *see Williams*, 97 F.3d at 705 ("One could say that [the prisoner] 'held the keys to his cell' in the sense that by agreeing to comply with prison rules he could have achieved release from segregation, but . . . that fact in no way relaxed the court's inquiry into the [constitutional] adequacy of the conditions to which [he] was subjected.").

Nor can prison officials claim consent when they provide "only an illusory procedure" for giving it. *Rivera*, 795 F. App'x at 173. For example, in *Rivera*, the defendants attempted to argue that a prisoner consented

to remaining in solitary confinement without showers or exercise because he never made a verbal request during the early morning period provided by the prison's rules—because he had been asleep at the time. *Id.* at 171. He did, however, leave "notes on his door that he wanted showers and recreation." *Id.* at 176. This Court held that the defendants could not show an "intentional relinquishment of Eighth Amendment protections" simply by pointing to the prisoner's failure to request showers and exercise in the way that the defendants demanded. *Id.* at 173.

So too here. As in *Smith*, Mr. Smalls was not given a meaningful choice to leave solitary confinement. The only "choice" he was given was remaining in solitary confinement in Housing Unit 4, or remaining in solitary confinement in Housing Unit 5—with prison officials suggesting that the latter might bring an end to solitary confinement sooner. That "choice" does not legitimate Defendants' decision to keep Mr. Smalls in solitary confinement and deny him out-of-cell exercise and outdoor recreation.

In addition, as in *Rivera*, Defendants cannot claim that Mr. Smalls consented to solitary confinement simply because he did not request release in the way that they claim he could have. If such a request was

even possible, Defendants never told Mr. Smalls about it; to the contrary, they told him that they "could not move him to general population." JA195. Nevertheless, just as the prisoner in *Rivera* left notes requesting showers and exercise, Mr. Smalls repeatedly notified prison officials that he objected to the harsh conditions in solitary confinement, both through a formal grievance and "many conversations" with prison officials. JA630; JA195. As a result, he never made an "intentional relinquishment" of constitutional protections. *Rivera*, 795 F. App'x at 173. Because that was the sole basis for the district court's rejection of Mr. Smalls' Fourteenth Amendment claim, the decision below must be reversed.

B. A Genuine Dispute Of Fact Remains As To Whether Defendants Failed To Afford Mr. Smalls Minimally Adequate Process To Protect That Liberty Interest.

Because the district court relied solely on Defendants' theory of consent, it never addressed the second prong of the Fourteenth Amendment test. But even at this early stage, Mr. Smalls' evidence raises a genuine dispute about whether he was provided adequate process. He should be given the opportunity to develop his claim further through

discovery. *See Smith*, 964 F.3d at 281 ("[T]here is a clear need for further discovery on the adequacy-of-process issue.").

"To determine whether procedural protections are sufficient to protect an inmate's liberty interests, [courts] look to *Mathews v. Eldridge*'s three factor test: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Incumaa*, 791 F.3d at 532.

In *Incumaa*, for example, this Court held that a prison's mechanism for reviewing placement in solitary confinement violated due process. As to the first factor, the Court found that the prisoner's interest in avoiding the "heavy psychological toll" of prolonged solitary confinement was high. *Id.* at 534. As to the second factor, the Court found that a lack of basic process created a high risk of erroneous deprivation. *Id.* The Court pointed out that, under prison policy, the prisoner did not have a right "to contest the factual bases for his detention before the [committee]

makes its decision," and the committee was not required to "furnish a factual basis for its decisions" afterwards. *Id.* at 534-35. Nor did the prisoner have any opportunity to seek review of the committee's decision. *Id.* at 534. Given these serious procedural defects, the Court concluded that the third factor also weighed in favor of the prisoner because "the prison's interest does not eclipse [the prisoner's] well-established right to receive notice of the grounds for his ongoing confinement and to present his rebuttal to those grounds." *Id.* at 535.

Incumaa squarely applies here. As to the first *Mathews* factor, the severity of the restrictions Mr. Smalls faced create a "significant private interest in leaving the restrictive conditions." *Incumaa*, 791 F.3d at 534. Given the "heavy psychological toll" of solitary confinement with no access to out-of-cell exercise or outdoor recreation, Mr. Smalls was entitled to procedurally adequate review. *Id.*

As to the second *Mathews* factor, the prison's review process appears to have suffered from the same fundamental defects as the process in *Incumaa*. As the district court itself recognized, "there is no indication in the record that [Mr.] Smalls attended any of those meetings" in which his placement was reviewed, much less that he had an

opportunity to be heard or present evidence. JA622; *see* JA188 (listing those in attendance, which did not include Mr. Smalls); JA471 (describing discussion among prison officials without Mr. Smalls present). Mr. Smalls was not even allowed to review notes from the meetings; he only received the Committee's final decision "after each meeting." JA468; JA188 (explaining that notes from the meeting "may not be disclosed" to prisoners). Nor did Mr. Smalls have the opportunity to appear before any other body to appeal the Committee's decision—the warden simply determined that he should remain in solitary confinement. *See* JA476. The lack of basic procedural protections makes the "risk of erroneous deprivation . . . exceedingly high." *Incumaa*, 791 F.3d at 534.

Finally, as in *Incumaa*, the state's interest in "order and security" "does not eclipse" Mr. Smalls' "well-established right to receive notice of the grounds for his ongoing confinement and to present rebuttal to those grounds." *Id.* at 535. Given the failure of the prison to provide basic features of due process like an opportunity to be heard, a reasonable jury could conclude that the review process was not "adequate to protect Appellant's right to procedural due process." *Id.*; *see also Thorpe*, 37 F.4th

at 942 ("Plaintiffs allege Defendants failed to meet even the most basic due process requirements like notice and a meaningful opportunity to be heard.").

At a minimum, as in *Smith*, further discovery is warranted. In that case, the district court "did not address whether Defendants' review of Smith's ongoing confinement in administrative segregation . . . satisfied procedural due process standards." *Smith*, 964 F.3d at 281. On appeal, however, the defendants urged the Court to reach that ground as an alternative basis for affirmance. *Id.* This Court rejected that argument, citing "a clear need for further discovery on the adequacy-of-process issue." *Id.* The Court explained that the plaintiff had not had an opportunity to pursue meaningful discovery about "the process that he received," and that such "information is plainly relevant to the risk of erroneous deprivation." *Id.* at 281-82.

Here, Mr. Smalls—who litigated *pro se* in the district court—has not had an adequate opportunity to conduct discovery. Despite that, he has already presented enough evidence to raise a genuine dispute about whether he was afforded adequate process. He should be allowed to further develop his claim on remand.

C. Defendants Are Not Entitled To Qualified Immunity.

As they did for Mr. Smalls' Eighth Amendment claim, Defendants asserted qualified immunity in the district court, which the court did not address. This Court need not consider that defense in the first instance, especially given that further factual development is warranted. *See Smith*, 964 F.3d at 282 ("This Court need not consider an alternative ground for affirmance that was not addressed by the district court."). The evidence that Mr. Smalls develops on remand "may affect the clearly-established inquiry," and thus this Court should not prematurely assess that question "on this record." *Id.*

But even if the Court were to consider qualified immunity, the defense should be denied because the law was clearly established. *See Wilkinson*, 545 U.S. at 230; *Thorpe*, 37 F.4th at 941-42 ("We easily dispose of [qualified immunity], because Supreme Court cases dating back to at least 2005 held materially indistinguishable conditions trigger Fourteenth Amendment protections."). First, it was clear that Mr. Smalls had a protected liberty interest requiring due process. In *Wilkinson*, for example, the Supreme Court held that the conditions in an Ohio supermax facility—including being confined 23 hours per day in a cell

with only one hour of exercise indoors—imposed an atypical and significant hardship within the correctional context, and therefore prisoners had a protected liberty interest. *See Wilkinson*, 545 U.S. at 224; *see also Incumaa,* 791 F.3d at 532 (finding a liberty interest in avoiding placement in solitary confinement where prisoners were only permitted to leave their cells for recreation one hour, ten times per month); *Smith*, 964 F.3d at 281 (finding a liberty interest when plaintiff was held in solitary in his cell for 23 hours per day without access to outdoor exercise, and one hour of indoor exercise per day). Based on cases like *Wilkinson*, *Incumaa*, and *Smith*, every reasonable official would know that the restrictions imposed on Mr. Smalls implicated a liberty interest requiring due process. *See also Perry*, 94 F.4th at 154 (establishing a "presumption" that solitary confinement in excess of 30 days creates an atypical and significant hardship); *Colon v. Howard*, 215 F.3d at 231 (2d Cir. 2000) (finding a liberty interest based on segregation "for 305 days").

Second, it was also clear that due process requires basic protections like an opportunity to be heard and present evidence. As cases like *Incumaa* established, the "risk of erroneous deprivation" is "exceedingly high" when a prisoner is denied basic procedural protections like an

opportunity to be heard and "contest the factual bases for his detention." 791 F.3d at 534-35. Even on this limited record, no reasonable official would think that Mr. Smalls received adequate process given that "there is no indication in the record that [Mr.] Smalls attended any of those meetings," much less that he had an opportunity to be heard or present evidence. JA622.

Accordingly, qualified immunity should be denied.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision and remand for further proceedings.

Date: February 7, 2025

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Plaintiff Samuel Smalls, through *pro bono* counsel, respectfully requests oral argument. *See* Fed R. App. P. 34(a)(2); Rule 34. This case concerns important substantive and procedural questions related to solitary confinement, one of the most extreme forms of incarceration in the country. Granting oral argument would also give Mr. Smalls' counsel, a relatively junior attorney, the opportunity to present oral argument for the first time.

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,918 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

Dated: February 7, 2025

/s/ Kathleen Pleiss
Kathleen Pleiss

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2025, I electronically filed the foregoing *Opening Brief of Plaintiff-Appellant Samuel Smalls* with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: February 7, 2025

/s/ Kathleen Pleiss
Kathleen Pleiss