No. 20-15293

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Richard Johnson,

Plaintiff-Appellant,

v.

Charles L. Ryan, et al.,

Defendants-Appellees.

On Petition for Review of a Final Judgment of the
United States District Court for the District of Arizona
Case No. 2:18-cv-03055-MTL-ESW, Hon. Michael T. Liburdi

SUPPLEMENTAL OPENING BRIEF FOR PLAINTIFF-APPELLANT RICHARD JOHNSON

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INTRODUCTION

Plaintiff-Appellant Richard Johnson is incarcerated in Arizona state prison. Johnson spends every day alone in solitary confinement because prison officials have unilaterally determined that he is a gang member. He is strip searched and handcuffed behind his back on the rare occasions when he is permitted to leave his cell. He is ineligible for earned-release credits or parole. The prison offers inmates like Johnson regular reviews of their placement in solitary confinement. But because Johnson has been determined to be a gang member, the review is meaningless because, under prison policy, it cannot result in Johnson leaving solitary confinement.

Johnson formally has two paths out of gang-related solitary confinement. One is a dead end. Johnson can "debrief"—in other words, provide information to prison officials about the prison gang to which he allegedly belongs. But prisoners who debrief are in grave danger of assault by other inmates and, as a result, are placed in protective custody (rather than back into the general population) after debriefing.

The only real chance that inmates like Johnson have to re-enter the general prison population is the Step-Down Program. Arizona offers the Program to inmates who have not engaged in gang-related activity for two years, undergo a comprehensive investigation by prison officials, and pass a polygraph. Participants are told that after completing the Program, they will be returned to "close custody," meaning they will again have regular human contact in the general prison population. They will also be eligible for

earned-release credits and parole, giving them the opportunity to be released from prison sooner.

But there is a catch. A prisoner can be removed from the Step-Down Program at any time, without explanation or a chance to refute the basis for his removal. That's what happened to Johnson. He was removed without warning from the Program and, despite his repeated pleas for an explanation, he received none. He was told that "jailhouse lawyers" are not welcome in the Program—an apparent reference to Johnson's pending lawsuit against the prison. That removal, and the prison's failure to offer Johnson meaningful periodic reviews of his solitary confinement, violated Johnson's constitutional rights under the Due Process Clause and the First Amendment. The district court overlooked those violations, and this Court should reverse.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. The district court dismissed Count III of Johnson's complaint on November 14, 2018, 1-ER-025, and, on February 13, 2020, granted summary judgment to defendants on the remaining counts. 1-ER-016. Johnson filed a timely notice of appeal from both orders on February 21, 2020. 3-ER-345. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

I. Under the Due Process Clause, prisoners are entitled to some process before being deprived of a protected liberty interest. As relevant here, liberty interests arise when a state-imposed action affects the length of a prisoner's sentence or results in the prisoner suffering an "atypical and significant hardship."

The first issue is whether Johnson had a protected liberty interest in remaining in the Step-Down Program and, if so, whether Defendants Ryan, Montano, Crabtree, and Days violated Johnson's due-process rights by removing him from the Program without any process at all.

II. The Due Process Clause also requires that prisoners in solitary confinement receive meaningful periodic reviews of their detention.

The second issue is whether the periodic reviews provided to Johnson, at which officers consider no evidence and have no power to change Johnson's confinement status, violate the Due Process Clause.

III. The First Amendment protects prisoners from retaliatory actions taken by prison officials that would chill a prisoner's exercise of protected First Amendment conduct, such as pursuing civil-rights litigation in federal court. At the time of his removal from the Step-Down Program, Johnson had a lawsuit against the prison ongoing in this Court.

The third issue is whether Defendants Belt and Montano violated Johnson's First Amendment rights when they removed him from the Step-Down Program and told him that "jailhouse lawyers" were not welcome.

STATEMENT OF THE CASE

I. Factual background

Richard Johnson is confined in a 10-foot-by-8-foot windowless cell for 24 hours every day. On the rare instances when he leaves his cell to shower or spend time in the recreational yard, he is strip searched and handcuffed behind his back. Most days pass without any human contact at all.

Prison officials placed Johnson in those conditions under a complicated web of prison regulations. In this section, we first review those regulations. We then discuss Johnson's experience tangled within that web.

A. Security Threat Groups and the Step-Down Program

1. When the Arizona Department of Corrections (ADC) suspects a prisoner is a gang member, he risks indefinite placement in solitary confinement. 2-ER-242. Officers who suspect an inmate is a gang member collect information about him, and a hearing is held to examine that information and decide whether to "validate" the inmate as a gang member (formally, "Security Threat Group" member). 2-ER-199–200.

Validation has severe consequences. Validated inmates are placed in maximum-security solitary confinement, 2-ER-200, where they are confined to their cells for 24 hours a day, except for three 2.5-hour blocks of recreation per week—also spent alone. 2-ER-054, 142, 242. As mentioned above, on the rare occasions when they are permitted to leave their cells, they are strip searched and handcuffed. *Id.* Validated inmates are ineligible for parole and forfeit all good-time credits (also called "earned-release credits"), meaning

that they have no chance to leave prison early, unlike other Arizona prisoners.[1] *See* Ariz. Rev. Stat. §§ 41-1604.06(A); 41-1604.09(B).

2. To leave maximum-security confinement, a validated inmate has two options. First, he can renounce his gang membership and "debrief." 2-ER-200. To debrief, the inmate must provide officers enough information regarding the gang's "structure, activity, and membership that would adversely impact the [group] and assist in management of the [group] population." *Hernandez v. Schriro*, No. CV 05-2853-PHX-DGC, 2011 WL 2910710, at *3 (D. Ariz. July 20, 2011). In other words, debriefing requires an inmate to inform on the gang to which he allegedly belongs. As a result, even an ostensibly *successful* debriefing places an inmate in significant danger, and he cannot safely return to general population; instead, he is sent directly to Protective Segregation. *Id.* Indeed, most inmates who debrief are placed in permanent Involuntary Protective Segregation—which is even more restrictive than ordinary Protective Segregation—to protect them from inmates within Protective Segregation who might want to harm them. *Id.*

Second, an eligible validated inmate may request to participate in the Step-Down Program, which, unlike debriefing, enables the inmate to actually return to the general prison population. D.O. 806 § 7.2.1. Validated

[1] *See* Arizona Department of Corrections, Rehabilitation and Reentry, Department Order: 806 – Security Threat Groups (STGs) § 5.2.2 (Apr. 15, 2021), https://corrections.az.gov/sites/default/files/policies/800/0806_041521.pdf (D.O. 806).

inmates are eligible if they have served two years of maximum-security solitary confinement with no disciplinary incidents or documented gang activity, undergone a comprehensive background investigation by prison officials, and passed a polygraph examination. 2-ER-200–01. The Step-Down Program proceeds in five phases that provide increasing access to out-of-cell time and other benefits. 2-ER-186–90. If the inmate successfully completes Phases I through IV and passes another polygraph, he then becomes eligible to return to general population. D.O. 806 § 7.2.1; *see* 2-ER-201. Phase V, an indefinite period of monitoring, begins after the successful transition to general population. D.O. 806 § 7.2.1; *see* 2-ER-201. During Phase V, a validated inmate once again becomes eligible for good-time credits and parole.[2] *See* Ariz. Rev. Stat. §§ 41-1604.06(A); 41-1604.09(B).

3. ADC's Department Order (D.O.) 806 outlines the circumstances under which an inmate may be removed from the Step-Down Program—for example, if he participates in gang activity or fails a subsequent polygraph exam. 2-ER-201–02, 265–66, 270–73. In 2018, when Johnson was removed from the Program, inmates in Phases I-IV were not entitled to a "revocation hearing," an opportunity to present a defense, or an appeals process. 2-ER-

[2] *See* Arizona Department of Corrections, Rehabilitation and Reentry, Department Order: 1002 – Inmate Release Eligibility System §§ 1.4.3.3, 2.1 (Nov. 30, 2020), https://corrections.az.gov/sites/default/files/policies/1000/1002_031021.pdf (D.O. 1002).

270–71. Instead, an officer would document a rationale for the inmate's removal, then the Deputy Warden would review the report and determine whether to approve the removal. 2-ER-202, 270–71. As recently as 2017, however, ADC policy required that all inmates receive a revocation hearing before being terminated from the Program. 2-ER-191. That protection was eliminated in January 2018. 2-ER-270; 3-ER-335—36.

If an inmate is removed from the Step-Down Program, he may not re-enter the Program for two years. 1-ER-006. Those two years are spent in solitary confinement. *Id.* An inmate who is twice removed from the Step-Down Program is permanently banned from participating in the program; he remains validated, and thus in maximum security, "unless [he] choose[s] to participate in the debrief process." 2-ER-202. The inmate will never return to general population. Rather, he will remain either in solitary confinement (if he chooses not to debrief) or Protective Segregation (if he debriefs to the prison's satisfaction).

4. All validated inmates, whether or not they are in the Step-Down Program, receive annual reviews of their validation status. In those reviews, a Security Threat Group Threat Assessment Committee "make[s] annual recommendations to the Director … regarding whether or not to continue certification." 2-ER-172. Nothing in the record suggests that this review involves a hearing, notice to the inmate, or any other procedural protections. *Id.*

Every inmate in maximum-security confinement—whether or not he is validated—receives periodic reviews of that confinement every 180 days, and whenever "events occur that will change the inmate's custody level."[3] Under Department policy, however, validated inmates who have not debriefed are subject to a "non-discretionary override" and may be placed only in maximum-security custody. D.O. 801 § 3.3.7. Therefore, during the reviews of validated inmates, an officer asks only two questions: (1) are you validated, and (2) have you debriefed? *See id.* Officers do not review the appropriateness of an inmate's underlying validation. *See* 2-ER-085, 319. Although inmates can appeal the outcome of these reviews, the same restrictions apply. *See* 2-ER-084, 280.

B. Richard Johnson, his litigation history, and his participation in, and removals from, the Step-Down Program

Richard Johnson is a Native American inmate in the Arizona Department of Corrections. 2-ER-306. In 2014, Johnson was validated as a member of the Warrior Society Security Threat Group, a predominantly Native American gang, subjecting him to solitary confinement. 2-ER-203. Johnson's appeal of his validation status was denied. 2-ER-062–63.[4]

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[3] Arizona Department of Corrections, Rehabilitation and Reentry, Department Order: 801 – Inmate Classification §§ 1.6, 10.8 (May 11, 2019), https://corrections.az.gov/sites/default/files/policies/800/0801.pdf (D.O. 801).

[4] In an earlier case, this Court found that Johnson had raised a genuine dispute of material fact as to whether he had been validated as a gang member "in retaliation for filing grievances" when prison officials said, "if

In 2016, Johnson enrolled in the Step-Down Program. 2-ER-049. As we now explain, that enrollment was followed by a series of events that led to this suit.

1. First revocation and reinstatement. Following a failed polygraph examination, Johnson was removed from the Program in December 2017. 2-ER-056. Despite the version of D.O. 806 then in effect, which entitled Johnson to a revocation hearing, Johnson received no hearing. 2-ER-072. Johnson filed a grievance challenging his removal, and a three-member Validation Hearing Committee refused to re-enroll him in the Program. 2-ER-056. After threatening litigation, Johnson was re-enrolled in the Step-Down Program at Phase III. 1-ER-007, 019. On April 12, 2018, Johnson entered Phase IV. 2-ER-204.

2. Second revocation. The next day, on April 13, officers searched Johnson's property and found materials that prison officials asserted showed Johnson's involvement with the Warrior Society. *See* 2-ER-204. Defendant Sergeant Sean Belt wrote a memorandum detailing the discovery of three documents: (1) a "calendar code" with the name and prison number of a validated Warrior Society inmate; (2) a "roster" with the names and ADC numbers of validated Warrior Society members in the wing that houses

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you hadn't grieved any officers you wouldn't be here." *Johnson v. Bendel*, 745 F. App'x 750, 751 (9th Cir. 2018). The case later settled, and Johnson received a cash settlement. *See* Notice of Settlement, *Johnson v. McWilliams*, No. 2:15-cv-00670-PHX-GMS (D. Ariz. Jan. 16, 2020); Amended Complaint at 2, *Johnson v. Shinn*, No. 2:21-cv-00559-MTL-ESW (D. Ariz. Jun. 9, 2021).

validated inmates; and (3) a note written by another Security Threat Group validated inmate, Diné Pride, and addressed to another validated inmate. *Id.*

Defendant Deputy Warden Ruben Montano determined that the evidence documented by Belt's memorandum was sufficient to remove Johnson from the Step-Down Program a second time because the documents purportedly proved that he had violated the Program's ban on participating in gang activity. 2-ER-204.

Belt told Johnson that he was being removed from the Step-Down Program. 2-ER-244. Johnson asked Belt why. *Id.* Although Belt knew the official justification firsthand—he had written the memo recommending Johnson's removal—Belt gave Johnson a different reason: "Higher ups" wanted Johnson terminated and "'jailhouse lawyers' weren't welcomed on his unit." *Id.* When Johnson asked Belt why he was labeled as a jailhouse lawyer, Belt responded, "you know why." 2-ER-245.

Johnson has filed five suits while in prison. Besides this suit, Johnson has sued prison officials for confiscating his religious items, *Johnson v. Ariz. State Dep't of Corr.*, No. CV2007-007248 (Ariz. Sup. Ct., Maricopa Cty.); deliberate indifference to his safety, which led to Johnson getting stabbed by another inmate, *Johnson v. Juvera*, No. 2:12-cv-00539-PHX-GMS (D. Ariz.); retaliating against him for his prison grievances by validating him, *Johnson v. McWilliams*, No. 2:15-cv-00670-PHX-GMS (D. Ariz.);[5] and other due process

[5] Johnson eventually received a cash settlement from Arizona in this case. *See supra* note 4.

and First Amendment violations surrounding his validation, *Johnson v. Shinn*, No. 2:21-cv-00559-MTL-ESW (D. Ariz.). At the time of Johnson's removal from the Step-Down Program, the suit alleging that Johnson had been validated in retaliation for filing prison grievances was before this Court.

Johnson has also pursued intra-prison grievances to address several disturbing allegations, including that officers placed him in a cell covered with human feces and mold and refused his requests for cleaning supplies, Complaint at 3-3a, *Johnson v. McWilliams*, No. 2:15-cv-00670-PHX-GMS (D. Ariz. Apr. 14, 2015); an officer sexually assaulted him, *id*. at 4; officers denied him access to library materials, *id*. at 4d; and officers refused to answer his outstanding grievances, Amended Complaint at 3, *Johnson v. Shinn*, No. 2:21-cv-00559-MTL-ESW (D. Ariz. Jun. 9, 2021).

Johnson did not receive a hearing regarding his removal from the Step-Down Program, and Department policy did not require one. 1-ER-006. Johnson was never formally provided notice of the reason for his removal from the Program until this litigation. With only Belt's "jailhouse lawyer" comment to go on, Johnson wrote in his September 2018 complaint for this case that "[t]o this day Plaintiff has not received any kind of notification of what is being used to classify him as an 'active [Security Threat Group] member.'" *See* 3-ER-331.

Johnson's removal from the Step-Down Program triggered a hearing to review his security classification and housing placement before the Security

Threat Group Appeals Committee. 2-ER-215—17. As discussed above, the Committee did not have the authority to reconsider his removal from the Step-Down Program—only to confirm that he was validated and had not debriefed. 2-ER-227. Johnson's "reclass score" has been "low enough to be on a lower security level unit" as long as he has been validated, 3-ER-341–42, but because of his "status as a validated [Security Threat Group] member," the outcome of the hearing—and his subsequent appeal—was preordained. *See id.* Defendant Stacey Crabtree, the Offender Services Bureau Administrator, responded to Johnson's appeal and informed him that his placement in maximum custody was correct because he was a validated member of a Security Threat Group. 2-ER-222.

3. Aftermath of Second Revocation. Johnson filed a grievance about his removal from the Program, requesting a hearing and notice of the evidence prison officials had used to remove him. 2-ER-050. Prison officials were not forthcoming. Defendant Deputy Warden Days responded in writing that Johnson was not entitled to a revocation hearing. *Id.* Defendant Charles Ryan, ADC's Director, also responded in writing, explaining only that Johnson's removal "was done in accordance with Department Policy." 2-ER-090. On May 10, 2018, Officer Medrano told Johnson that he "would need to be issued a Court Order to know what is being used against [him]." 2-ER-050.

During this litigation, Johnson was finally able to see the documents used to justify his removal from the Step-Down Program. He disputes the

officials' characterization of the material, maintaining that the State's evidence was (1) a crossword puzzle-like "Mind Teaser[]" game, (2) a list of other Native American inmates compiled for the purposes of coordinating religious observances, and (3) a note written by one inmate to another inmate that Johnson denied ever knowing about. 2-ER-251–52. Johnson offered a declaration by the inmate who allegedly wrote the note "contradict[ing] Belt and Montano's allegations." 2-ER-115 ("I would never even consider to ask Richard Johnson to pass along any type of note(s) … under penalty of perjury.").

II. Procedural background

Johnson brought this suit under 42 U.S.C. § 1983, seeking damages and injunctive relief. 3-ER-344. In Counts I and III, respectively, Johnson alleged that Defendants Ryan, Crabtree, Days, Belt, and Montano removed him from the Step-Down Program without notice or a hearing and that Defendants Ryan and Crabtree failed to provide him with meaningful periodic reviews of his security classification, all in violation of the Fourteenth Amendment's Due Process Clause. 2-ER-308–09, 321. In Count II, Johnson alleged that Defendants Montano and Belt violated his First Amendment rights when they removed him from the Step-Down Program in retaliation for his ongoing lawsuit regarding his initial validation. 2-ER-316.

On screening under 28 U.S.C. § 1915A(a), the district court determined that Johnson stated Due Process Clause claims (Count I) against Defendants Ryan, Crabtree, Days, and Montano, and First Amendment retaliation

claims (Count II) against Defendants Belt and Montano. 1-ER-024. The district court dismissed Johnson's Count III claim, noting that the District of Arizona had previously held ADC's periodic-review procedures to be constitutional. 1-ER-025. The court also dismissed the due-process Count I claim against Defendant Belt. 1-ER-024.

After discovery, the district court granted defendants' motion for summary judgment and denied Johnson's motion for summary judgment. 1-ER-016. On the remaining due-process claim, the court held that because the Step-Down Program did not create a liberty interest under the Due Process Clause, Defendants did not violate the Clause by removing him from the Program without any process. 1-ER-013. As for Johnson's First Amendment retaliation claim, the court held that Johnson failed to show a disputed issue of material fact as to whether Defendants' motive for removing him was retaliatory and whether his removal satisfied a legitimate penological goal. 1-ER-015–16.

SUMMARY OF THE ARGUMENT

I. The Due Process Clause protects inmates from arbitrary deprivations of their liberty by prison officials. The due-process inquiry proceeds in two steps: Courts ask if a prisoner suffered a deprivation of a protected liberty interest and, if so, what process was due.

Johnson had a protected liberty interest in remaining in the Step-Down Program for two reasons: The Program affected his good-time credits and parole eligibility, and the removal caused him to suffer atypical and

significant hardships in relation to ordinary prison life. Because the removal deprived Johnson of a protected liberty interest, prison officials were required to provide him with notice of the basis for the deprivation, an opportunity to be heard, review of the deprivation, and some evidence supporting the allegations on which the removal was based. But the Arizona Department of Corrections provided none of these things. As a result, the removal violated the Due Process Clause.

II. The Due Process Clause also requires that inmates in solitary confinement receive meaningful periodic reviews of their continued confinement. For a review to be meaningful, it must determine that the inmate remains a threat the institution; re-evaluate the evidence supporting his validation status; offer sufficient evidence to support those conclusions; and give officers discretion to alter the inmate's confinement when appropriate. Johnson plausibly alleges that validated inmates are denied that meaningful periodic review, so the district court erred in dismissing that claim.

III. The First Amendment protects inmates from retaliation by prison officials for exercising their First Amendment rights, including filing lawsuits. A prisoner establishes a First Amendment retaliation claim when prison officials take an adverse action against him because of his protected conduct, that action could chill the exercise of his rights, and that action did not advance a correctional goal. A reasonable jury could find that this standard is met here because Johnson was removed from the Step-Down

Program while his lawsuit against the prison was ongoing, and a prison official told Johnson that "jailhouse lawyers" weren't welcome in the Program.

STANDARD OF REVIEW

This court reviews an order granting summary judgment de novo, asking whether, when viewing the evidence "in the light most favorable to the non-moving party, there are no genuine issues of material fact." *Brodheim v. Cry*, 584 F.3d 1262, 1267 (9th Cir. 2009) (quoting *San Diego Police Officers' Ass'n v. San Diego City Emps. Ret. Sys.*, 568 F.3d 725, 733 (9th Cir. 2009)).

This Court also reviews a district court's dismissal of a complaint under 28 U.S.C. § 1915A for failure to state a claim de novo. *Mangiaracina v. Penzone*, 849 F.3d 1191, 1195 (9th Cir. 2017). Pro se complaints, like Johnson's, must be construed liberally and may be dismissed only if it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014)).

ARGUMENT

I. Johnson's removal from the Step-Down Program violated his due-process rights.

The Due Process Clause "protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of those interests is at stake." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). A liberty interest "may arise from the Constitution itself,

by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Id.* (citations omitted).

Whether a prison official has unconstitutionally deprived a prisoner of a liberty interest without due process is determined under a two-part inquiry. First, the court asks whether the prisoner has been deprived of a liberty interest protected by the Due Process Clause. Second, if a deprivation has occurred, the court then determines whether the process afforded the prisoner, if any, was sufficient to satisfy the Clause. *See Wilkinson*, 545 U.S. at 224.

Under that two-part inquiry, Johnson's removal from the Step-Down Program was unconstitutional. Johnson had a liberty interest in remaining in the program for two independently sufficient reasons: Remaining in the program affected his good-time credits and parole eligibility, and removal from the program subjected him indefinitely to the grim conditions of solitary confinement. That removal violated Johnson's constitutional rights because he was not provided with any process at all before it occurred.

A. Johnson has a protected liberty interest in remaining in the Step-Down Program.

The Step-Down Program creates a liberty interest under two separate legal frameworks. First, under certain circumstances, states can create a protected liberty interest in the accrual of good-time credits and parole. *See Wilkinson*, 455 U.S. at 228; *Greenholtz v. Inmates of Neb. Penal and Corr.*

Complex, 442 U.S. 1, 12 (1979); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Second, prisoners have a liberty interest in not being subjected to prison policies that cause "atypical and significant hardship … in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Under both frameworks, Johnson's removal from the Step-Down Program deprived him of a protected liberty interest.

1. Remaining in the Step-Down Program affects the accrual of good time and parole eligibility, and prison regulations allow removal only for major misconduct.

States can create liberty interests in good time and parole. "[T]his is a liberty interest of the most fundamental sort, the prisoner's right to walk out the prison gate and hear it clang behind him." *Hayward v. Marshall*, 603 F.3d 546, 556-57 (9th Cir. 2010). This liberty interest exists when a state's governing statutes or regulations contain "explicitly mandatory language" guaranteeing good-time credits or parole. *Carver v. Lehman*, 558 F.3d 869, 874-75 (9th Cir. 2009) (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 463 (1989)). Further, when a prisoner loses "explicitly mandatory" good-time credits or parole eligibility based only on his past behavior—not on the discretion or forward-looking predictions of state officials—a liberty interest in retaining those benefits exists. *Hayward*, 603 F.3d at 560-61; *see also Wilkinson*, 545 U.S. at 228 (noting due process is required "to revoke good-time credits for specific, serious misbehavior"). This Court has recognized

that Arizona's system "create[s] a liberty interest in the receipt of good-time credits." *McFarland v. Cassady*, 779 F.2d 1426, 1428 (9th Cir. 1986).

The Step-Down Program provides validated inmates with the opportunity to restore their good-time credits and parole eligibility, an opportunity that Arizona statutes entitle them to have. *See* Ariz. Rev. Stat. §§ 41-1604.06; 41-1604.09. Validated inmates aren't eligible for early release or for the restoration of good-time credits, even if they otherwise qualify. *See* 2-ER-242, 3-ER-320. Validated inmates are also ineligible for parole and do not earn additional good-time credits.[6] *See* 2-ER-182–83. Upon completion of the Step-Down Program, however, inmates can request restoration of lost good-time credits and regain eligibility for early release. D. Ct. Dkt. 64 at 6; D.O. 806 § 7.2.2. Completing the Program also entitles inmates to apply to regain parole eligibility. *See* D.O. 1002 § 2.1, 2.1.4.

By outlining a path to good-time credits and parole eligibility, the Step-Down Program complies with Arizona law, which requires ADC to establish systems whereby inmates can accrue good time and earn parole eligibility. *See* Ariz. Rev. Stat. §§ 41-1604.06(B), 41-1604.09(B); *see also McFarland*, 779 F.2d at 1428. State law also requires that a prisoner receive "a hearing prior to reclassification … to noneligible" or "lower" classes, in which they are no

[6] *See* Arizona Department of Corrections, Rehabilitation and Reentry, Department Order 1002 – Inmate Release Eligibility System § 1.4.3.3 (March 10, 2021), https://corrections.az.gov/sites/default/files/policies/1000/1002_031021.pdf (D.O. 1002).

longer eligible for good-time credits or parole. Ariz. Rev. Stat. §§ 41-1604.06(C); 41-1604.09(E). If inmates lose eligibility for good-time credits or parole, Arizona law mandates they receive notice of the "procedures and performance standards by which prisoners, reclassified to noneligibility classifications, may earn eligibility classification." Ariz. Rev. Stat. §§ 41-1604.06(B); 41-1604.09(B). The Step-Down Program is one such "procedure," and participants "may earn eligibility classification" by completing it. The Program therefore determines whether an inmate can access his statutory entitlements to good-time credits and parole eligibility.

Finally, removal from the Step-Down Program "depends on a straightforward historical determination of what the prisoner has done," rather than prison officials' discretion or speculation about the inmate's behavior in the future. *Hayward*, 603 F.3d at 557, 561; *cf. Carver*, 558 F.3d at 875-76. A validated inmate may be removed from the Program only "upon confirmation that the inmate has violated … criteria outlined" in Department orders. 2-ER-270. At the time of Johnson's removal, those criteria included gang activity, violent behavior, drug use, a "major disciplinary violation or more than three minor disciplinary violations within the last six months," or other behavior "that could adversely affect the safety of staff" or others. 2-ER-266, 268, 270. Given that removal from the Step-Down Program was "neither subjective nor predictive" and that Johnson had an expectation he would be removed only upon a specific

finding of misconduct, he had a liberty interest in remaining in the Program. *See Hayward*, 603 F.3d at 560.

2. Removal from the Program imposes an atypical and significant hardship.

Prisoners have a liberty interest in avoiding conditions of confinement that impose "atypical and significant hardship … in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. Courts look to several factors when analyzing whether a prisoner's placement in restrictive conditions of confinement is an "atypical and significant hardship," including (1) "the severity of the conditions," (2) the length of confinement, (3) the frequency of review of confinement, and (4) whether confinement affects eligibility for parole. *See Wilkinson*, 545 U.S. at 214, 224. In the solitary-confinement context, the severity and duration of the confinement's conditions are especially important. *See Brown v. Or. Dep't of Corr.*, 751 F.3d 983, 988 (9th Cir. 2014).

a. The severity of the conditions. Removal from the Step-Down Program requires a validated inmate to remain indefinitely in the harsh conditions of solitary confinement. Validated inmates are confined to their cells for 24 hours a day, except for a few hours each week for recreation—also alone. 2-ER-142, 242. On the rare occasions when they leave their cells, they are strip searched and handcuffed behind their back. 2-ER-242–43. In another lawsuit, Johnson elaborated on his confinement—"designed to … eliminate human contact"—in "a windowless cell measuring 10x8 feet … for 24 hours a day

except 3 times a week for recreation and showers … [where n]o other inmates are permitted." Amended Complaint at 5, *Johnson v. Shinn*, No. 2:21-CV-00559 (D. Ariz. June 9, 2021).

A district judge who "made a personal visit to the facility" explained: "Life in SMU II [later renamed Browning Unit] is grim. The ADC maintains that SMU II is the most restrictive form of confinement in the state of Arizona and the most secure super-maximum security prison in the United States." *Koch v. Lewis*, 216 F. Supp. 2d 994, 997 n.5 (D. Ariz. 2001), *vacated as moot sub nom.*, *Koch v. Schriro*, 399 F.3d 1099 (9th Cir. 2005). Along with validated inmates like Johnson, the Browning Unit houses prisoners sentenced to death.[7]

The Supreme Court confronted similarly restrictive conditions in *Wilkinson*, where "cells measure[d] 7 by 14 feet" (18 square feet larger than Johnson's cell) and where "inmates [we]re deprived of almost … all human contact." 545 U.S. at 214. The inmates there received more recreational time than Johnson does. *See id*. at 224 (noting "exercise is for 1 hour per day"). The Court held that these conditions were "an atypical and significant hardship under any plausible baseline." *Id*. at 223.

b. The duration of the confinement. Inmates "who are removed from the Step-Down Program … shall be required to serve a minimum of two years

[7] *See* Arizona Department of Corrections, Rehabilitation and Reentry, Department Order: 812 – Inmate Maximum Custody Management System and Incentive System, Attachment B (July 24, 2019), https://corrections.az.gov/sites/default/files/policies/800/0812-051220.pdf.

under validated status before they are eligible to participate in the program" again. 1-ER-006. The Program itself is 18 months long, *id.*, so an inmate who is removed must suffer at least three and a half more years in solitary confinement before successfully completing the Program anew (assuming he is allowed to re-enroll) and becoming eligible to re-enter the general population. And "if removed from the program two times, inmates become permanently ineligible." 1-ER-006—07.

Johnson has been removed from the Program at least once. His recent removal automatically subjects him to maximum-security solitary confinement for at least three and a half years. And if prison officials deem Johnson to have been twice removed, he will remain in solitary confinement indefinitely.[8] This Court held in *Brown* that a "twenty-seven month confinement" constituted "an atypical and significant hardship under any plausible baseline." 751 F.3d at 988.

c. The frequency of review. Removal from the Step-Down Program subjects inmates to solitary confinement with only annual reviews of their validated status. *See* D.O. 806 § 1.4.2; *Wilkinson*, 545 U.S. at 224 (finding an atypical and significant hardship where maximum security confinement was reviewed "just annually"). That annual review, as explained below (at 38), is "essentially meaningless." *Brown*, 751 F.3d at 988.

[8] It is unclear whether Johnson has been formally removed from the Program once or twice. As discussed above (at 9), he was removed from the Program in December 2017 but reinstated after filing an appeal and threatening litigation. He was removed again in April 2018.

d. The effect on parole. As discussed (at 18-20), removal from the Step-Down Program renders validated inmates unable to regain their parole eligibility. Validated inmates are ineligible for parole, 2-ER-182–83, but validated inmates who have completed the Program may "apply for consideration" to regain parole eligibility. *See* D.O. 1002 § 2.1.

In short, the repercussions of removal from the Step-Down Program are severe. Inmates who are accepted in and complete the Program exit indefinite solitary confinement and shed parole ineligibility, while removed inmates are subjected to these conditions for at least two years without review.

3. The district court's contrary conclusion was mistaken.

The district court held that the Step-Down Program does not create a liberty interest because the Program is "voluntarily administered by the ADC and is not necessary for the ADC to comply with Due Process." 1-ER-013. But, as explained above (at 18), a state's voluntary actions may create a liberty interest. The Constitution itself does not create an entitlement to good-time credits or parole eligibility. But if a state "provide[s] a statutory right to good time [and] also specifies that it is to be forfeited only for serious misbehavior," then it creates a protected liberty interest *See Wolff*, 418 U.S. at 557. Similarly, a prisoner has a state-created liberty interest in parole where, under the governing statutes, the grant or denial of parole is based on "a straight-forward historical determination of what [he] has done" that is "neither subjective nor predictive." *Hayward*, 603 F.3d at 560-61. "[S]tate

policies or regulations" may also create a liberty interest in "avoiding particular conditions of confinement" that create a "significant and atypical hardship." *Wilkinson*, 545 U.S. at 222-23 (citing *Sandin*, 515 U.S. at 483-84). The district court was wrong to conclude that because Arizona voluntarily offers the Step-Down Program to its inmates, Johnson cannot have a protected liberty interest in remaining in the Program.

The district court was also mistaken that because Johnson receives "yearly reviews and the opportunity to debrief," the Due Process Clause requires nothing more. 1-ER-013–14. Neither the annual reviews nor the debriefing option provides validated inmates with a path out of solitary confinement back into the general population. As explained below (at 35-40), the annual reviews are a sham. They ask only whether a validated inmate has debriefed, do not provide the inmate an opportunity to refute the underlying facts of his validation, and do not present prison officials with the discretion to return an inmate to the general population. As for debriefing, an inmate who informs on a prison gang will never return to general population. Instead, he will be transferred from maximum-security solitary confinement to Involuntary Protective Custody (for his own safety), and his freedom will continue to be severely and atypically restrained. *See Hernandez v. Schriro*, No. CV 05-2853-PHX-DGC, 2011 WL 2910710, at *3 (D. Ariz. July 20, 2011).

B. Johnson's due-process rights were violated because when he was terminated from the Step-Down Program, he received no process at all.

When a prisoner is deprived of a liberty interest, he is entitled to notice of the basis for the deprivation, access to the evidence that will be presented against him, and the opportunity to be heard by the person effecting that deprivation. *See Wilkinson*, 545 U.S. at 225-26; *Hewitt v. Helms*, 459 U.S. 460, 476 (1983); *Melnik v. Dzurenda*, No. 20-15378, 2021 WL 4396682, at *3-4 (9th Cir. Sept. 27, 2021). When a prisoner is in solitary confinement, he is entitled to meaningful periodic review of that confinement. *See Toussaint v. McCarthy*, 801 F.2d 1080, 1101-02 (9th Cir. 1986); *Brown*, 751 F.3d at 987-88. And the State must provide "some evidence" of the basis for holding the prisoner in solitary confinement, to ensure that he is not arbitrarily placed there. *See Superintendent v. Hill*, 472 U.S. 445, 454 (1985); *Castro v. Terhune*, 712 F.3d 1304, 1314 (9th Cir. 2013). When Johnson was removed from the Step-Down Program, he received none of those protections.

When Johnson was removed from the Program, inmates in Phases I-IV of the Program were not entitled to any notice of the reasons for their removal. *See* 1-ER-006; 2-ER-270. Although the regulations provided that the "[r]ationale for removals shall be documented in" a report and the "Deputy Warden shall review" and "determine to either reinstate or terminate the inmate," they did not entitle the prisoner to review those documents. 2-ER-271. As a result, Johnson received no notice of the basis of his removal from the Program and no access to the evidence used against him at all.

When Johnson asked for the reasons for his removal, prison officials were not forthcoming. Defendant Days told Johnson that he remained in solitary confinement "because [he] violated *one or several* of the criteria" outlined in the relevant Department Order. 2-ER-093 (emphasis added). Defendant Ryan, ADC's director, stated only that Johnson's removal was "in accordance with Department Policy." 2-ER-090. Defendant Crabtree's response justified Johnson's maximum-security placement because of "security threat group documented activity found in your belongings," but provided nothing else. 2-ER-084. When Johnson asked officers in his unit why he had been removed, they told him he would need a "court order" to find out. 2-ER-309. In fact, Johnson did not receive any meaningful explanation for his removal from the Program until discovery in this case. *See* 2-ER-042 ("Plaintiff can only speculate about the evidence … he was only able to obtain through discovery.").

Nor did Johnson receive any opportunity to be heard by the official who decided to remove him from the Program. *See Hewitt*, 459 U.S. at 476; *Toussaint v. McCarthy*, 926 F.2d 800, 803 (9th Cir. 1990). Deputy Warden Montano, the official tasked with deciding to reinstate or terminate Johnson, merely "reviewed the memorandum" alleging Johnson participated in barred activity and signed off on his removal. *See* 2-ER-204.

Johnson also did not receive meaningful review of his removal from the Step-Down Program. *See Brown*, 751 F.3d at 988. Johnson received no hearing regarding his removal from the Program and had no right to appeal that

removal. *See* 2-ER-270–71. While Johnson used the general prison grievance process to inquire about his removal, under ADC's regulations, the "Inmate Grievance Procedure does not serve as a duplicate appeal process or substitute appeal process" for the Security Threat Group program.[9] *See Standley v. Ryan*, No. CV 10-1867-PHX-DGC, 2012 WL 3288728, at *3 (D. Ariz. Aug. 13, 2012). In other words, Johnson's removal from the Program was final and not subject to any review at all.

Finally, the State did not provide "some evidence" that Johnson had violated any criteria that would justify his removal from the Step-Down Program. Even though the "some evidence" test is "minimally stringent" and evidence "only must bear some indicia of reliability," a reasonable jury could find that the State did not meet that bar. *See Castro*, 712 F.3d at 1314 (quotations omitted); *Bruce v. Ylst*, 351 F.3d 1283, 1287 (9th Cir. 2003).

Johnson disputes the State's characterization of the three documents purportedly found in his cell and, if a jury finds his explanations credible, the State would not meet the "some evidence" standard. Johnson maintains that the State offered (1) a crossword puzzle-like "Mind Teaser[]" game, (2) a list of other Native American inmates compiled for the purposes of coordinating religious observances, and (3) a note written by one inmate to another inmate that Johnson denied any knowledge of. 2-ER-251–52.

[9] Arizona Department of Corrections, Rehabilitation and Reentry, Department Order: 802 – Inmate Grievance Procedure § 1.3.4 (Feb. 7, 2021), https://corrections.az.gov/sites/default/files/policies/800/0802_020721.pdf (D.O. 802).

Johnson offered a sworn declaration by the note's alleged author, which states "I would never even consider to ask Richard Johnson to pass along any type of note(s)." 2-ER-115. Indeed, courts have repeatedly questioned the factual basis for Johnson's validation in the first place, further highlighting that a reasonable jury could disagree with the State's characterization of the evidence here. *See* 2-ER-104 ("Superior Court of Arizona Maricopa County … not[ing] its concern about the unreliability of the bases for the State's proffered … evidence that Johnson is a member of or affiliated with the Warrior Society."); 2-ER-298—99 (federal court noting the same).

C. Defendants are individually liable for violating Johnson's due-process rights.

A prison official is liable for violating a prisoner's rights if that "[]official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). As relevant here, the requisite individual action exists when officials "devise[]" and "b[ear] responsibility for administration" of a prison "policy that instructs its adherents to violate constitutional rights." *OSU Student All. v. Ray*, 699 F.3d 1053, 1076-77 (9th Cir. 2012); *see also Benitez v. Hutchens*, 817 F. App'x 355, 358 (9th Cir. 2020) (citing *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1075 (9th Cir. 2016 (en banc)). Thus, an official may be held liable for violation of a prisoner's rights under an unconstitutional policy if the policy "was

published in [his] name and on h[is] letterhead," or if he personally implemented it. *Benitez*, 817 F. App'x at 359.

Ryan. Ryan designed the unconstitutional Step-Down Program removal procedures that deny validated inmates notice and a hearing. The procedures were "published in [his] name and on h[is] letterhead." *Benitez*, 817 F. App'x at 359; *see* 2-ER-132 (displaying Ryan's name on ADC Department Order manual); 3-ER-313 ("Ryan has promulgated a system-wide practice and a systematic culture of … constitutionally unacceptable" policies.). Nothing more is required for him to be individually liable for the Due Process Clause violations.

Montano, Crabtree, and Days. The other three defendants are liable for implementing those unconstitutional removal provisions against Johnson. Government officials may be liable for the administration of an unconstitutional policy if they "implement, or in some way possess responsibility for the continued operation of the … policy" and cause constitutional violations "pursuant to that policy." *Benitez*, 817 F. App'x at 359 (quoting *OSU Student All.*, 699 F.3d at 1076) (cleaned up)).

Montano is liable for his role in the administration of the unconstitutional removal provisions. As in *OSU Student Alliance*, where an official who "ultimately denied [a] petition … bore responsibility for administration," *id.* at 1077, it was Montano who signed off on Johnson's removal from the Step-Down Program. *See* 1-ER-008.

Likewise, in response to Johnson's grievance about his removal, Days "informed him that his removal from the Step-Down Program was appropriate because" inmates in his Phase were not entitled "to receive a revocation hearing." 1-ER-009. In other words, Days "ultimately denied" Johnson's "petition" for review and a meaningful opportunity to be heard. *See OSU Student All.*, 699 F.3d at 1077. All the while, Days "refus[ed] to tell [Johnson] why he was terminated" from the Program, *see* 2-ER-246, thereby denying him the factual basis for his deprivation.

Finally, Johnson alleged, and the State did not dispute, *see* 2-ER-118, that Crabtree as "Offend[e]r Services Bureau Administrator … exercises administrative control of, and responsibility for classification and housing decisions for" all inmates. 2-ER-246. That necessarily includes the decision to classify and confine Johnson in maximum security, so Crabtree "bore responsibility for administ[ering]" the unconstitutional removal provisions. *OSU Student All.*, 699 F.3d at 1077.

D. Defendants are not entitled to qualified immunity.

Johnson seeks both injunctive relief and damages for Defendants' violations of his due process rights. *See* 2-ER-322. Upon a showing that his due-process rights were violated, Johnson is entitled to injunctive relief. *See Brown*, 751 F.3d at 990 ("Qualified immunity … does not provide immunity" from "declaratory or injunctive relief.") (quotations omitted). As to the damages claim, government officials may be held liable if a plaintiff shows

both a "violation of a constitutional right" and that the right was "clearly established." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

A right is "clearly established" when "a reasonable person would have known" that her conduct violated it. *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Pearson*, 555 U.S. at 231). In conducting the "clearly established" inquiry, there need not be a case "directly on point" if "existing precedent … place[s] the statutory or constitutional question beyond debate." *Id.* at 12 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)); *see also Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002).

When encountering "novel factual circumstances," the "salient question" is "whether the state of the law" at the time of the deprivation "gave respondents fair warning" that their conduct was unconstitutional. *Hope*, 536 U.S. at 741; *Wilk v. Neven*, 956 F.3d 1143, 1148 (9th Cir. 2020). And "in some instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Hardwick v. Cty. of Orang*e, 844 F.3d 1112, 1117 (9th Cir. 2017) (quoting *Hope*, 536 U.S. at 741) (cleaned up). In the excessive-force context, for instance, this Court held in *Young v. Cty. of Los Angeles*, 655 F.3d 1156 (9th Cir. 2011), that the foundational and "long-standing" principle that the Fourth Amendment only allows objectively reasonable force, alone, was sufficient to put the defendant on notice that pepper-spraying and striking the plaintiff in

response to his refusal to get back in his car was unconstitutional. *Id.* at 1167-68.

When Johnson was removed from the Step-Down Program, it was clearly established that the Due Process Clause subjected prison officials to liability when they deprive inmates of good time or parole eligibility—or subject them to indefinite solitary confinement—without *any* process at all.

1. It was clearly established that inmates may have a liberty interest in good time and parole eligibility, entitling them to some process upon deprivation. In *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) this Court held that as "a fixed, specific entitlement lost on the basis of misconduct," good-time credits create "a right to liberty, that is, release from prison, that can be taken away from the prisoner only with due process of law." *Id.* at 556; *see also Davis v. Silva*, 511 F.3d 1005, 1011 (9th Cir. 2008) (describing the specific procedures due to a prisoner deprived of good-time credits). Indeed, this Court specifically held in *McFarland v. Cassady*, 779 F.2d 1426 (9th Cir. 1986) that "Arizona created a liberty interest in the recipient of good-time credits through its use of 'mandatory language'" in the statutory scheme. *Id.* at 1428.

As to parole, *Hayward* held that states may create protected liberty interests where state statutes limit the discretion of prison officials in granting parole. 603 F.3d at 560. Arizona statutes required Ryan to develop and make inmates aware of policies that would provide prisoners deprived of good time and parole eligibility the ability to gain them back, *see* Ariz.

Rev. Stat. §§ 41-1604.06(B); 41-1604.09(B), and offer inmates hearings when declared ineligible for these things. *Id.* §§ 41-1604.06(C); 41-1604.09(E).

2. It was also clearly established that placing an inmate in indefinite solitary confinement implicates a protected liberty interest, thereby entitling him to some process. *Brown v. Or. Dep't of Corr.*, 751 F.3d 983 (9th Cir. 2014) definitively "conclude[d] that a lengthy confinement without meaningful review may constitute atypical and significant hardship." *Id.* at 989-90. There, this Court held that a prisoner's "twenty-seven month [solitary] confinement" without meaningful review "imposed an atypical and significant hardship under any plausible baseline," where the prisoner was alone "for over twenty-three hours each day with almost no interpersonal contact" and denied "most privileges afforded inmates in the general population." *Id.* at 988. Johnson presents nearly identical facts.

3. Finally, it was clearly established that deprivation of a protected liberty interest required prison officials to give Johnson *some* process. The Supreme Court has repeatedly held that an inmate must "receive some notice of the charges against him and an opportunity to present his views to the prison official" responsible for the deprivation. *Hewitt*, 459 U.S. at 476; *see also Wilkinson*, 545 U.S. at 225-26; *Melnik*, 2021 WL 4396682, at *6. Montano, Days, and Crabtree each gave Johnson no process at all in rubberstamping his transfer to maximum-security solitary confinement. Nor did they give him the factual basis for his removal from the Program (*see* 26-27), or a chance to rebut that basis or his removal (*see* 27-28). Each violated clearly established

law mandating *some* procedural protections for prisoners who suffer serious deprivations.

II. Johnson was entitled to meaningful periodic review of his validated status, but he did not receive it.

Beyond his unconstitutional removal from the Step-Down Program, Johnson's due-process rights were also violated because he was indefinitely detained in maximum-security solitary confinement without meaningful periodic review of his status. Defendants' failure to provide him with that review independently violates the Due Process Clause.

A. Arizona's review procedures do not satisfy due process.

The most fundamental guarantee of due process is "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The Due Process Clause requires periodic review of an inmate's confinement in administrative segregation with an opportunity to appeal. *See Brown v. Or. Dep't of Corr.*, 751 F.3d 983, 987-88 (9th Cir. 2014); *Frank v. Schultz*, 808 F.3d 762, 764 (9th Cir. 2015). Because administrative segregation cannot be a "pretext for indefinite confinement of an inmate," *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983), due process demands that periodic reviews "are not meaningless gestures," *Toussaint v. McCarthy*, 801 F.2d 1080, 1102 (9th Cir. 1986).

To be meaningful, a validated inmate's periodic review must determine that the inmate currently poses a danger to prison security, *Toussaint*, 801 F.2d at 1101, and engage in a substantive re-examination of the evidence

underlying his validation, *Lira v. Herrera*, 448 F. App'x 699, 701 (9th Cir. 2011); *see Guizar v. Woodford*, 282 F. App'x 551, 553 (9th Cir. 2008). Those determinations must be supported by "some evidence." *See Lira*, 448 F. App'x at 701; *Cato v. Rushen*, 824 F.2d 703, 704-05 (9th Cir. 1987). And even if all of those conditions are satisfied, review is nonetheless meaningless if the official conducting the evaluation lacks discretion to make changes to the inmate's security level when the evidence supports it. *Brown*, 751 F.3d at 987-88.

The district court dismissed these due-process allegations at the 28 U.S.C. § 1915A(a) screening stage. The district court concluded that "ADC's periodic review, combined with the ability to debrief at any time, satisfies due process" and "[n]othing in [Johnson's] allegations compels a different conclusion." 1-ER-025. That conclusion was wrong. Johnson alleges facts that, if true, demonstrate that Arizona's periodic reviews of validated inmates' maximum-security placement fail with respect to all of the due-process considerations that this Court has identified as relevant.[10]

[10] This Court has never squarely decided whether Arizona's periodic review of inmates' validation status, when coupled with the option to renounce and debrief, violates the Due Process Clause. *See Hernandez v. Schriro*, 357 F. App'x 747, 748-49 (9th Cir. 2009). In *Hernandez*, this Court concluded that Arizona's review process for validated inmates "raise[d] legal and factual questions that [could not] be answered on the record" and remanded the case to the district court. *Id.* On remand, the district court held that Arizona's procedures passed constitutional muster. *Hernandez v. Schriro*, No. CV 05-2853-PHX-DGC, 2011 WL 2910710, at *9 (D. Ariz. July 20, 2011).

1. Johnson was not a threat to the institution.

A prisoner confined in administrative segregation may not be "retained [there] unless allowing the prisoner to remain in the general population would severely endanger the lives of prisoners, the security of the institution, or the integrity of an investigation." *Toussaint*, 801 F.2d at 1101; *see Garcia v. Schwarzenegger*, No. C05-4009CWPR, 2007 WL 2782850, at *8 (N.D. Cal. Sept. 25, 2007), *aff'd*, 327 F. App'x 689 (9th Cir. 2009). These "substantive criteria assure that plaintiffs' due process rights are not meaningless gestures," while balancing the government's interest in maintaining the safety of the institution. *Toussaint*, 801 F.2d at 1101-02 (citing *Hewitt*, 459 U.S. at 477 n.9). Indeed, Arizona's own regulations describe maximum-security custody as only suited for "[i]nmates who represent the highest risk to the public and staff."[11]

Johnson's periodic reviews have never considered whether he remains a threat to the institution. His reviews are "based solely" on his validated status, without any consideration of "disruptive behavior." 3-ER-341. If they considered whether Johnson is a threat to the institution, officers would be

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As we explain in this section, that conclusion was incorrect, in part because of the district court's own observation: "even if the review occurred more frequently, even daily, the result would remain the same because debriefing is the [only] mechanism to exit administrative segregation." *Id.*

[11] Arizona Department of Corrections, Rehabilitation and Reentry, Department Order: 801 – Inmate Classification § 2.3.1 (May 11, 2019), https://corrections.az.gov/sites/default/files/policies/800/0801.pdf (D.O. 801).

forced to confront that Johnson's "reclass score" has been "low enough to be on a lower security level unit" as long as he has been validated. 3-ER-341–42.

2. Johnson's periodic reviews do not consider any evidence justifying his continued validation.

Reviews that merely rubberstamp an earlier decision are "meaningless gestures" that deny an inmate due process. *See Touissant*, 801 F.2d at 1101-02. If an inmate routinely receives periodic reviews during his segregation, but "officials consistently deny an inmate's requests for an opportunity to refute his gang validation," then "due process is not satisfied." *Lira v. Cate*, No. C 00-0905 SI, 2009 WL 10677792, at *25 (N.D. Cal. Sept. 30, 2009), *aff'd sub nom. Lira v. Herrera*, 448 F. App'x 699 (9th Cir. 2011) (citing *Guizar*, 282 F. App'x at 553). Periodic reviews of an inmate's placement in administrative segregation must also satisfy the "some evidence" and "some indicia of reliability" standards. *See Cato*, 824 F.2d at 704-05 (citing *Superintendent v. Hill*, 472 U.S. 445, 454 (1985)); *see also supra* at 26, 28-29 (discussing these standards).

In *Lira*, this Court held that prison officials violated the Due Process Clause where the plaintiff received periodic reviews of his solitary confinement, but "there was no further re-investigation or re-evaluation of the validation evidence after his transfer to administrative segregation." 448 F. App'x at 701. The hearings denied him due process because they were "largely perfunctory," and their only purpose was to "verify that plaintiff's

validation was procedurally proper," providing "no substantive review of the propriety of plaintiff's retention in administrative segregation." *Lira*, 2009 WL 10677792, at *27. Likewise, in *Guizar*, a plaintiff routinely appeared before a reviewing body during his confinement in segregation, but prison officials "consistently denied [his] multiple requests for an opportunity to refute the gang validation." 282 F. App'x at 553.

Johnson's hearings did not consider the continuing appropriateness of his validation. No "evidence has ever been used or shown in [his] numerous Appeal Responses or [his] yearly reclassification hearing to substantiate [him] as an active [Security Threat Group] member." 3-ER-340–41. Johnson's periodic reviews also fail the "some evidence" standard because they are based on no evidence at all. *See* 3-ER-340–41. Officers ask only whether a prisoner (1) was previously validated and (2) has debriefed. *See* 3-ER-341.

3. Prison officials lack discretion to adjust Johnson's security level.

Even if the conditions described above were satisfied (and they were not), if the prison official conducting an inmate's periodic review "lack[s] [the] discretion to promote an inmate from one programming level to another or to release an inmate," the reviews are "essentially meaningless." *Brown,* 751 F.3d at 987-88. In *Tapia v. Alameida*, the plaintiff's periodic reviews "were conducted by committees that did not have the authority to make any changes to Plaintiff's validation and resulting housing assignment," "giv[ing] rise to a triable issue of fact regarding whether or not Plaintiff was

provided with periodic reviews which amounted to more than meaningless gestures, in satisfaction of due process." No. 1:03-CV-5422-AWI-SMS, 2006 WL 842470, at *11. (E.D. Cal. Mar. 29, 2006).

Johnson presents facts identical to those in *Tapia*. The ADC reclassification officers "don't have any discretion" to consider factors other than whether a validated inmate has debriefed. 3-ER-341. Validated inmates are categorically ineligible under prison policy for any reduction in their security level. 3-ER-342. And, as the district court acknowledged, Defendant Crabtree "did not have the authority to address, question, or change the issues surrounding Plaintiff's removal from the Step-Down Program" when she reviewed Johnson's appeal. 1-ER-009.

B. Defendants Ryan and Crabtree may be held liable for depriving Johnson of meaningful review.

Ryan. As explained above (at 29-30), Ryan is liable because the policy of providing constitutionally deficient reviews of inmates' validation status "was published in [his] name and on h[is] letterhead." *Benitez*, 817 F. App'x at 359; 3-ER-334–35.

Crabtree. Johnson alleges that Crabtree "bore responsibility for the operation of the policy" by signing off on his placement in maximum security, based on nothing other than his validation status. *See OSU Student All. v. Ray*, 699 F.3d 1053, 1077 (9th Cir. 2012); 3-ER-333–34. As in *OSU Student Alliance*, where an official was held responsible for "analyz[ing]" a petition for recognition as a campus publication and "ultimately den[ying]

that petition" in violation of the First Amendment, it was Crabtree who effectuated Johnson's placement through a meaningless review. 699 F.3d at 1077; 2-ER-084.

C. It was clearly established that periodic reviews must be more than meaningless gestures.

As discussed above (at 31-32), "a general constitutional rule already identified in the decisional law" may sometimes "apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Hardwick v. Cty. of Orang*e, 844 F.3d 1112, 1117 (9th Cir. 2017) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)) (cleaned up). In *Brown v. Or. Dep't of Corr.*, 751 F.3d 983 (9th Cir. 2014), this Court squarely held that "a lengthy confinement without meaningful review may constitute atypical and significant hardship." *Id.* at 989-90. Furthermore, since this Court's decision in *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), district courts in this Circuit have held that it is clearly established that "due process require[s] that … plaintiff be provided with periodic reviews that [a]re more than meaningless gestures." *Lira v. Dir. of Corr.*, No. C-00-0905 SI, 2008 WL 619017, at *12 (N.D. Cal. Mar. 4, 2008) (citing *Toussaint*, 801 F.2d at 1098-1101).[12] Under these decisions, it was clearly established that the

[12] *See also Tapia*, 2006 WL 842470, at *16-17 (denying qualified immunity for post-validation hearings were not meaningful); *Peralta v. Swetalla*, No. 1:18-CV-01023-DAD-EPG (PC), 2021 WL 2894176, at *11 (E.D. Cal. July 9, 2021), *report and recommendation adopted*, No. 1:18-CV-01023-DAD-EPG (PC), 2021 WL 3630396 (E.D. Cal. Aug. 17, 2021) ("[T]he procedures required when

defendants unconstitutionally denied Johnson due process by denying him meaningful review of his validation status.

III. Defendants violated Johnson's First Amendment rights when they retaliated against him for pursuing civil-rights litigation.

A. Defendants retaliated against Johnson by removing him from the Step-Down Program and subjecting him to solitary confinement for the duration of his sentence.

Retaliatory actions taken against a prisoner for filing grievances or civil-rights suits violate the First Amendment. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005). To allege unconstitutional retaliation, a prisoner must show an (1) adverse action was taken against him; (2) which was motivated by (3) his First Amendment protected conduct; that the action (4) would chill a reasonable person's exercise of his First Amendment rights; and that the action (5) did not reasonably advance a legitimate correctional goal. *Id.* at 567-68. A retaliation claim need "not establish an independent constitutional interest," because "the crux of [the] claim is that state officials violated [the plaintiff's] *First Amendment* rights by retaliating against him." *Pratt v.*

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an inmate is segregated for administrative purposes appear to have been clearly established since at least 1986, which is when *Toussaint* was decided"); *cf. Guizar*, 282 F. App'x at 553 (denying qualified immunity to defendants where "a decade of case law … make[s] clear that the ICC-defendants had 'fair warning' that they needed to provide Guizar with [an opportunity to refute his gang validation]").

Rowland, 65 F.3d 802, 806 (9th Cir. 1995). A reasonable jury could find that Johnson successfully established all five of these elements.

1. Terminating Johnson from the Step-Down Program was an adverse action.

A claim of retaliation "may assert an injury no more tangible than a chilling effect on First Amendment rights." *Brodheim v. Cry*, 584 F.3d 1262, 1269-70 (9th Cir. 2009) (quoting *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001)). Indeed, "the mere *threat* of harm can be an adverse action," *id.* at 1270, and an adverse action need not be an independent constitutional violation, *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012). Here, Belt and Montano terminated Johnson from the Step-Down Program, causing him to lose opportunities to leave his cell he had accrued in Phase IV of the Program, and subjecting him to solitary confinement for at least two more years. 2-ER-188–90; *see supra* at 23. By Defendant Days' own admission, this second revocation will likely lead to Johnson's placement in maximum security confinement for the rest of his sentence. *See* 2-ER-246. That loss of Phase IV benefits and the likelihood of indefinite placement in solitary confinement is more than enough to establish an adverse action.

2. Defendants had a retaliatory motive for removing Johnson from the Program.

Retaliatory motive can be established through a combination of factors: comments from defendants, *Bruce v. Ylst*, 351 F.3d 1283, 1288-89 (9th Cir. 2003); *Johnson v. Bendel*, 745 F. App'x 750, 751 (9th Cir. 2018); the plaintiff's

reputation, *Hines v. Gomez*, 108 F.3d 265, 268 (9th Cir. 1997); "suspect timing," *Bruce*, 351 F.3d at 1288-89; *Pratt*, 65 F.3d at 808; and the plaintiff's "express rejection" of the defendant's proffered justification for the adverse action, *Hines*, 108 F.3d at 268. A reasonable jury here could find retaliatory motive based on any combination of those four factors.

a. Comments from Belt. Johnson has alleged facts virtually identical to those in *Bruce*. There, the plaintiff raised a triable issue of fact regarding defendants' retaliatory motive when he described comments from a prison official that plaintiff had "pissed off higher ups" with his "complaints and protests," and higher-ups had instructed the officer to validate him. *Bruce*, 351 F.3d at 1289. Here, Belt told Johnson he was being kicked out of the Step-Down program because "higher ups" removed him and because "'jailhouse lawyers' weren't welcome." 2-ER-049. Deputy Warden Montano was the higher-up. *See* 1-ER-008; 2-ER-101, 155.

b. Johnson's reputation. "Circumstantial evidence of [a plaintiff's] reputation within the prison as a complainer and a whiner" can support a finding of retaliatory motive. *See Hines*, 108 F.3d at 268. When Johnson asked why Belt called him a jailhouse lawyer, Belt said, "You know why." 2-ER-308. Between Johnson's prison grievances and three lawsuits against the Arizona Department of Corrections, Belt's meaning was clear. And as Belt and Montano were removing Johnson from the Step-Down Program, one of those suits—Johnson's challenge to his initial validation as a Security Threat Group member as retaliation for filing prison grievances—was being briefed

in this Court. *See Johnson v. Bendel*, 745 F. App'x 750, 751 (9th Cir. 2018). Johnson later received a cash settlement from that suit. *See* Notice of Settlement, *Johnson v. McWilliams*, No. 2:15-cv-00670-PHX-GMS (D. Ariz. Jan. 16, 2020); Amended Complaint at 2, *Johnson v. Shinn*, No. 2:21-cv-00559-MTL-ESW (D. Ariz. Jun. 9, 2021).

c. Suspect timing. In *Bruce*, the plaintiff raised a triable issue of fact regarding the motive behind his validation with the "suspect timing" of his validation, "coming soon after his success in the prison conditions grievances." 351 F.3d at 1288-89. And in *Hines*, the timing of the adverse action shortly after plaintiff threatened to file a grievance supported a jury finding a retaliatory motive. 108 F.3d at 268. Here, the temporal proximity is even stronger: As just noted, Johnson's suit was *ongoing* when he was removed from the Step-Down Program. *See Johnson v. McWilliams*, No. 2:15-cv-00670-PHX-GMS (D. Ariz.) (filed April 4, 2015).

d. Johnson's express rejection of defendant's justification for his removal. In *Hines*, the plaintiff's "express rejection of Pearson's proffered reason" for the adverse action supported a jury finding a retaliatory motive. 108 F.3d at 268. Here, as described (at 12-13), Johnson has repeatedly refuted the reliability of the evidence used to remove him from the Step-Down Program and has offered non-gang-related explanations for each of the documents described by Belt.

3. Pursuing civil-rights litigation in the courts is protected conduct.

"The most fundamental of the constitutional protections that prisoners retain are the First Amendment rights to file prison grievances and to pursue civil rights litigation in the courts," *Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017), because "[w]ithout those bedrock constitutional guarantees, inmates would be left with no viable mechanism to remedy prison injustices," *Rhodes*, 408 F.3d at 567. Johnson alleges that his removal was retaliation against him for his then-ongoing lawsuit against the prison challenging his initial validation. 3-ER-316.

4. Defendants' actions would have had a chilling effect on a reasonable person's First Amendment right to sue prison officials.

A chilling effect exists when the retaliatory action "would chill *or* silence a person of ordinary firmness from engaging in such protected activities in the future." *Jones v. Williams*, 791 F.3d 1023, 1036 (9th Cir. 2015) (quotations omitted). Protected conduct does not, however, have to be "actually inhibited or suppressed." *Rhodes*, 408 F.3d at 569 (quoting *Mendocino Env. Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir. 1999)). In *Shepard v. Quillen*, 840 F.3d 686 (9th Cir. 2016), for example, this Court held a reasonable person would have been chilled by a threat of harm: "the possibility of near-total isolation for all but a few hours a week, with little hope for visits, phone calls and recreational opportunities." *Id*. at 691; *see also Watison*, 668 F.3d at 1115. Allegations that a prisoner actually "suffered harm"—including a

sanction that deprives a plaintiff "of points toward program incentives"—also satisfy this element in their own right. *See Jones*, 791 F.3d at 1036; *Rhodes*, 408 F.3d at 567 n.11; *Pratt*, 65 F.3d at 807.

The impacts on Johnson himself demonstrate a chilling effect under both approaches. As to the threat of harm, when Belt and Montano removed Johnson from the Step-Down Program, Johnson faced indefinite confinement in conditions analogous to those in *Shepard*. *See* 2-ER-246. And Johnson was also directly harmed, as his removal from the Program deprived him of the opportunity to return to general population and regain eligibility for good-time credits and parole. *See supra* at 4-5.

5. Johnson's removal from the Step-Down Program did not reasonably advance a legitimate correctional goal.

Prison officials are not liable for an adverse action taken against a plaintiff, even if a retaliatory motive is present, when those actions serve a "neutral institutional objective." *Pratt*, 65 F.3d at 808; *see Watison*, 668 F.3d at 1114-15. But "prison officials may not defeat a retaliation claim on summary judgment simply by articulating a general justification for a neutral process." *Bruce*, 351 F.3d at 1289. When an official uses a legitimate prison procedure "as a cover or a ruse to silence and punish" a prisoner, the official fails to demonstrate a legitimate penological purpose even if the prisoner "*arguably* ended up where he belonged." *Id.*

To establish that their actions reasonably advanced a legitimate correctional goal, Belt and Montano must show that their justification is

supported by more than "some evidence." *Hines*, 108 F.3d at 269 (citing *Superintendent v. Hill*, 472 U.S. 445, 454-55 (1985)). The plaintiff in *Bruce* lost on his due-process claim because there was "some evidence" to support his validation, but successfully raised a genuine issue of material fact with regard to whether his validation was in retaliation for grievances he filed. 351 F.3d at 1288, 1289-90. And in *Jones*, this Court rejected the purported penological purpose of "maintaining order and security" when the document supporting that justification bore "no indication of any security issues arising from [plaintiff's] behavior" and where plaintiff's "version of events" presented "no security issue." 791 F.3d at 1036.

The district court held that this element was satisfied by Defendants' assertion that their decision to remove Johnson from the Program was based on the documents found in his cell. 1-ER-015. But, as already explained, those documents cannot meet the "some evidence" standard applied in the due-process context, *see supra* at 28-29, let alone the higher standard applied to First Amendment retaliation claims. *See Hines*, 108 F.3d at 269; *Bruce*, 351 F.3d at 1289 ("The 'some evidence' standard applies only to due process claims attacking the result of a … proceeding, not the correctional officer's retaliatory accusation."). And like in *Jones*, Johnson's "version of events" directly negates the government's purported correctional goal, demonstrating that he posed "no security issue"—that is, there are at least disputes of material facts. *See* 791 F.3d at 1036. As discussed above (at 12-13), the ADC removed Johnson from the Step-Down Program based on (1) a

crossword puzzle, (2) a list of Native American inmates participating in a religious observance, and (3) a note written by one inmate to another inmate, where both the alleged author and Johnson deny that Johnson would have ever had possession of the note. *See* 2-ER-115, 251–52. Moreover, Johnson's "reclass score" has been "low enough to be on a lower security level unit" as long as he has been validated. 3-ER-341–42. Thus, a reasonable jury could find that defendants used a legitimate prison procedure "as a cover or a ruse to silence and punish" him. *See Bruce*, 351 F.3d at 1289.

B. It was clearly established that prison officials cannot punish a prisoner for pursuing civil-rights litigation.

Belt and Montano are not entitled to qualified immunity, as "the prohibition against retaliatory punishment is 'clearly established law' in the Ninth Circuit, for qualified immunity purposes." *Pratt*, 65 F.3d at 806 & n. 4 (collecting cases); *Rhodes*, 408 F.3d at 569-70. Homing in on this case more precisely, it is clearly established that "officials may not abuse a valid procedure as a cover or a ruse to silence and punish an inmate." *Shepard*, 840 F.3d at 694 (quotations omitted).

CONCLUSION

This Court should reverse the district court's dismissal of Count III and its grant of summary judgment on Counts I and II, and remand for further proceedings.

Respectfully submitted,
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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