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 REPLY BRIEF FOR PLAINTIFF-APPELLANT RICHARD JOHNSON

Sanders Keyes Gilmer*
Student Counsel
Daniel Wassim
Student Counsel

Hannah Mullen
Brian Wolfman
Madeline Meth
GEORGETOWN LAW APPELLATE
COURTS IMMERSION CLINIC
600 New Jersey Ave., NW,
Suite 312
Washington, D.C. 20001
(202) 662-9549

Counsel for Plaintiff-Appellant Richard Johnson

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*An unopposed motion to authorize Ms. Gilmer's student practice under Rule 46-4 is pending. *See* Doc. 43.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Richard Johnson wakes up every day in a prison cell about the size of a parking space. Most days, he spends twenty-four hours in that cell without any human interaction. On the rare occasions when he is permitted to leave his cell to shower or exercise alone, he is strip searched and handcuffed. And because he has no meaningful opportunity to challenge his continued detention in solitary confinement, Johnson does not know when, if ever, he will be permitted to return to the general population.

Defendants insist that Johnson's predicament poses no constitutional problems. On their telling, Johnson can be kept in indefinite solitary confinement without meaningful review, and they can remove him from the Step-Down Program for any reason without any process at all. Defendants are wrong.

I. Defendants admit that they did not provide Johnson with any process when they removed him from the Step-Down Program, contending that no process was constitutionally required because Johnson lacked a liberty interest in remaining in the Program. That's incorrect. As decades of precedent from the Supreme Court and this Court explain, prisoners like Johnson have liberty interests in good-time credits, parole, and avoiding the atypical and significant hardship of solitary confinement. Defendants' attempts to avoid individual liability and assert qualified immunity are similarly unavailing.

II. Defendants rely on a smattering of district-court cases to argue that ADC's scheme for reviewing the continued detention of inmates in solitary confinement satisfies due process. Those cases are wrongly decided because, as this Court has explained, due process demands more than sham procedures. Here, because Johnson is validated and has not debriefed, the reviews' results are predetermined: Johnson cannot leave solitary confinement. And if Johnson debriefs, he will enter protective custody—a classification that also substantially restricts an inmate's ability to interact with other people. Defendants did not raise any arguments that they cannot be held individually liable for constitutional deficiencies in the review procedures. Nor did they raise a qualified-immunity defense on that score. Defendants have forfeited these arguments, and, in any event, they would be meritless.

III. As for Johnson's First Amendment retaliation claim, Defendants contend only that they lacked a retaliatory motive and had a legitimate correctional goal in removing him from the Step-Down Program. But these arguments refuse to credit Johnson's version of events or draw reasonable inferences in his favor, while brushing past Officer Belt's damning statement that Johnson was removed because "jailhouse lawyers" were not welcome on Belt's unit. And to the extent that Defendants contest this evidence, they simply identify genuine disputes of material fact that must be viewed in Johnson's favor at summary judgment.

ARGUMENT

I. Johnson was entitled to due process before his removal from the Step-Down Program.

A. Johnson was deprived of a liberty interest.

Defendants deprived Johnson of two liberty interests: his interest in receiving good-time credits and parole eligibility, and his interest in avoiding the atypical and significant hardship of solitary confinement.

1. Johnson has a liberty interest in receiving his statutory entitlement to parole and good-time credits.

A state voluntarily creates liberty interests in good-time credits and parole when the governing statutes and regulations contain "explicitly mandatory language." *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)). Thus, when a prisoner loses good-time credits or parole eligibility based on only an objective inquiry into the prisoner's past behavior, a liberty interest in receiving those benefits exists. *See Hayward v. Marshall*, 603 F.3d 546, 560-61 (9th Cir. 2010). As our Supplemental Opening Brief explains (at 19-21), the regulations governing the Step-Down Program do just that.

Defendants do not quarrel with this well-established framework. And they even admit that "the wording of the regulations governing the Step-Down Program might appear to create a right." Supp. Resp. Br. 33-34. But they nonetheless resist the conclusion that Johnson had a liberty interest in remaining in the Program.

First, Defendants argue that Johnson has no liberty interest because, when he filed this lawsuit, he was a validated inmate who was not presently eligible for good-time credits or parole. *See* Supp. Resp. Br. 25-26. In their view, prison regulations can create a liberty interest in *remaining* eligible to receive those benefits, but not in *becoming* eligible to do so. Defendants cite no authority for that made-up distinction. Nor could they. No court has ever suggested that the existence of a liberty interest in good-time credits or parole turns on the prisoner's current eligibility to receive them. Rather, this Court articulated the interest created by Arizona law in broader terms: The law "create[s] a liberty interest in the *receipt* of good-time credits through its use of 'mandatory language.'" *McFarland v. Cassady*, 779 F.2d 1426, 1428 (9th Cir. 1986) (emphasis added).

Defendants' argument is further refuted by a close reading of Arizona's statutory and regulatory regime. Arizona law requires ADC to establish systems whereby prisoners—both validated and non-validated—can become eligible to receive good-time credits and earn parole eligibility. *See* Ariz. Rev. Stat. §§ 41-1604.06(B), 41-1604.09(B); Supp. Opening Br. 19-20. The regulations implementing the Step-Down Program require prison officials to maintain an inmate in the Program unless an inmate violates enumerated criteria. *See* 2-ER-270-72; Supp. Opening Br. 20. That mandatory language creates an "expectation or interest" in remaining in the Step-Down Program. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

Second, Defendants insist that because the Program is a "privilege, not a right"—that is, because ADC is not constitutionally required to offer the Program—that Johnson cannot have a liberty interest in remaining in it. Supp. Resp. Br. 33-35. That is not correct. The Supreme Court has long "rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights," *Bd. of Regents v. Roth*, 408 U.S. 564, 571 (1972), and held that a liberty interest may arise from voluntarily-created state policies. *Wilkinson*, 545 U.S. at 222 (citation omitted); *see* Supp. Opening Br. 24-25. For example, though the Constitution itself does not guarantee good-time credits, *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974), this Court held that Arizona law creates a liberty interest in the receipt of good-time credits, *McFarland*, 779 F.2d at 1428. So, regardless of whether the Step-Down Program is "constitutionally required," Supp. Resp. Br. 34, state law and prison regulations can create a liberty interest in remaining in it—and, as explained above (at 3-4), they do so here.

2. Johnson has a liberty interest in avoiding the atypical and significant hardship of solitary confinement.

The Constitution provides prisoners a liberty interest in avoiding conditions of confinement that impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Solitary confinement is one type of condition

that presents an "atypical and significant hardship." *Wilkinson*, 545 U.S. at 223-24.

Defendants do not dispute that Johnson's placement in maximum-custody solitary confinement imposes an "atypical and significant hardship" on him. But they assert that Johnson lacks a liberty interest in remaining in the Step-Down Program because "removal from the program results in no penalty" and merely "returns [him] to his status before participating in the program." Supp. Resp. Br. 34.

Defendants are factually and legally mistaken. Factually, removal from the Program *does* result in a penalty. As our Supplemental Opening Brief explains (at 22-23), inmates removed from the Step-Down Program for the first time are required to spend a minimum of two years in maximum custody before they are eligible to re-enter the program. 1-ER-006. And if an inmate is removed from the Program a second time, the inmate is permanently ineligible to re-enter the program and will remain in maximum custody. 1-ER-006–07. Defendants describe Johnson as being twice removed, *see* Supp. Resp. Br. 13-14, meaning that his most recent removal effectively sentences him to indefinite solitary confinement. The indefinite duration of this confinement heightens the "atypical and significant hardship" Johnson faces and belies Defendants' argument that no penalty attaches to removal from the Step-Down Program. *See Brown v. Or. Dep't of Corr.*, 751 F.3d 983, 988 (9th Cir. 2014).

Legally, even if Defendants are correct that removal from the Program "returns [Johnson] to his status before participating in the program," Supp. Resp. Br. 34, the regulations implementing the Step-Down Program create a liberty interest in remaining in the Program. As explained in the Supplemental Opening Brief (at 24-25), "state policies or regulations" may 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 mandatory language of the regulations implementing the Step-Down Program created an "expectation or interest" that the door out of maximum custody would be kept open unless Johnson violated one of the removal criteria. *Id.* at 221; *see Hayward*, 603 F.3d at 557, 561.

B. Johnson is entitled to more process than none at all.

Defendants nowhere contend that they offered Johnson any process at all when they removed him from the Step-Down Program. Nor do they dispute that prisoners deprived of a liberty interest are entitled to fundamental due-process protections, including notice and the opportunity to be heard. *See* Supp. Opening Br. 26-27. If Johnson is correct that he has a liberty interest in remaining in the Step-Down Program, Defendants do not contest that providing no process violates the Due Process Clause. *See Wilkinson*, 545 U.S. at 224; Supp. Opening Br. 26-29.

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

Montano. Defendants acknowledge that Montano can be held liable because he was "actively involved in removing Johnson from the Step-Down Program." *See* Supp. Resp. Br. 16, 23.

Ryan. Defendants do not dispute that Ryan "promulgated" the unconstitutional removal policy "in [his] name and on h[is] letterhead." *See Benitez v. Hutchens*, 817 F. App'x 355, 359 (9th Cir. 2020); Supp. Opening Br. 30. Instead, they attempt to shield Ryan from liability by pointing to the doctrine of legislative immunity. *See* Supp. Resp. Br. 21. Defendants forfeited that affirmative defense by failing to raise it in the district court, and this Court should not consider it now. *See Fraternal Ord. of Police v. City of Hobart*, 864 F.2d 551, 554 (7th Cir. 1988) (by failing to invoke legislative immunity in the district court, members of city council waived that defense); *Scott v. Taylor*, 405 F.3d 1251, 1258 (11th Cir. 2005) (Jordan, J., concurring).

In any event, even if legislative immunity protects Ryan from liability for promulgating the unconstitutional removal policy, he remains liable for his personal involvement in Johnson's removal from the Step-Down Program. *See Kaahumanu v. Cnty. of Maui*, 315 F.3d 1215, 1219 (9th Cir. 2003). When Johnson complained about the lack of due process accompanying his removal from the Step-Down Program, Ryan himself concluded in writing that "[n]o further action was warranted." 2-ER-090. Ryan thus "possesse[d] responsibility for the continued operation" of the unconstitutional removal

policy by "ultimately den[ying]" Johnson's grievances. *See OSU Student All. v. Ray*, 699 F.3d 1053, 1076-77 (9th Cir. 2012).

Crabtree. Defendants observe that Crabtree lacked discretion to alter the decision to remove Johnson from the Step-Down Program. Supp. Resp. Br. 22. Under *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012), that is irrelevant. There, this Court addressed individual liability for a university facilities official who relied on an unconstitutional policy to "deny plaintiffs permission to place their newsbins" in certain locations on campus. *Id.* at 1070. Because the official "personally applied the policy to the plaintiffs," he could be held liable. *Id.*

So too here. Crabtree likewise "administer[ed]" and "enforce[d]" the unconstitutional policy when she "upheld" Johnson's placement in maximum custody despite his grievance. *See OSU Student All.*, 699 F.3d at 1076-77; 2-ER-084. She also exacerbated the constitutional deprivation by refusing to tell Johnson why he was terminated. *See* Supp. Opening Br. 27; *Wilkinson*, 545 U.S. at 225-26; *Melnik v. Dzurenda*, 14 F.4th 981, 985-86 (9th Cir. 2021). Nothing more is required to hold her personally liable.

Days. Defendants admit that Days "reviewed Montano's actions and the policy in effect at the time and determined that DO 806 had been followed correctly." Supp. Resp. Br. 23. That is, Days told Johnson that "[n]o revocation hearing is needed for inmates removed from phases I through IV" and "denied" Johnson's "proposed resolution" of receiving a revocation

hearing. 2-ER-234. Days also refused to tell Johnson the reasons for his removal. 2-ER-246; *see Wilkinson*, 545 U.S. at 225-26; *Melnik*, 14 F.4th at 985-86. Days thus "enforce[d]" and "administer[ed]" the policy against Johnson. *OSU Student All.*, 699 F.3d at 1076-77.

D. Defendants are not entitled to qualified immunity for violating Johnson's due-process rights.

Defendants assert that they are entitled to qualified immunity from damages because there is "no case that establishes that due process must be provided to inmates being removed from a program similar to the Step-Down Program."[1] Supp. Resp. Br. 45. They look to a district-court case that held that because no Supreme Court or Ninth Circuit decision had "examine[d] whether a maximum custody prisoner's participation in a program like the [Step-Down Program] creates a liberty interest," the law is not clearly established. *Brummer v. Ryan*, 2020 WL 888289, at *7 (D. Ariz. Feb. 24, 2020).

That misunderstands the qualified-immunity inquiry. "[C]asting an allegedly violated right too particularly would be to allow the instant defendants, and future defendants, to define away all potential claims." *Gordon v. Cnty. of Orange*, 6 F.4th 961, 969 (9th Cir. 2021) (cleaned up). As this Court recently explained, "[s]tate officials can still be on notice that their

[1] Defendants do not dispute that if Johnson's removal from the Step-Down Program violated due process, he is entitled to injunctive relief. *See* Supp. Opening Br. 31.

conduct violates established law even in novel factual circumstances." *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 680 (9th Cir. 2021) (quotation marks omitted). "Thus, the salient question" is "whether the state of the law … gave [the officers] fair warning" that their actions were unconstitutional. *Hardwick v. Cnty. of Orange*, 844 F.3d 1112, 1117 (9th Cir. 2017) (quoting *Hope v. Peltzer*, 536 U.S. 730, 471 (2002)) (quotation marks omitted).

Every step of the due-process inquiry was clearly established long before 2018, when Defendants unconstitutionally removed Johnson from the Step-Down Program. For over three decades, *McFarland v. Cassady*, 779 F.2d 1426 (9th Cir. 1986), has clearly established that Arizona prisoners have a "liberty interest in the receipt of good-time credits through the use of 'mandatory language'" in state statutes. *Id.* at 1428. Similarly, *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010), clearly establishes that when state statutes create a mandatory scheme for parole eligibility, they create a liberty interest in that scheme. *See id.* at 560-61. Defendants' hair-splitting distinction that "Johnson had already lost his eligibility for good-time credits and parole when he was removed from the Step-Down Program" has no basis in law and does not undermine Johnson's clearly-established liberty interest in becoming eligible to receive good-time credits and parole. Supp. Resp. Br. 46.

Likewise, in *Wilkinson v. Austin*, 545 U.S. 209 (2005), the Supreme Court held that prisoners have a continuing liberty interest in "avoiding particular conditions of confinement" that impose an "atypical and significant

hardship." *Id.* at 222 (citation omitted). Defendants protest that Johnson has a liberty interest only in "not being placed into a higher custody level or into administrative segregation for the first time," not in obtaining release from solitary confinement. Supp. Resp. Br. 47. But *Wilkinson* described the relevant liberty interest as "avoiding particular conditions of confinement"—not just in avoiding an initial placement in these conditions. And in *Brown v. Oregon Department of Corrections*, 751 F.3d 983 (9th Cir. 2014), this Court held that a prisoner's liberty interest in avoiding solitary confinement entitles him to "meaningful review" of his continuing, prolonged placement in solitary confinement. *Id.* at 987-88. Together, *Wilkinson* and *Brown* clearly establish that once placed in solitary confinement, prisoners have an ongoing liberty interest in avoiding—that is, in exiting—those conditions.

With Johnson's liberty interests clearly established, Defendants have no leg to stand on. By removing Johnson from the Step-Down Program, Defendants deprived him of those liberty interests. And as Defendants concede, they provided Johnson with no process at all—cementing the due-process violation.

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

A. Arizona's review scheme and option to renounce and debrief do not satisfy the Due Process Clause.

Arizona's periodic reviews rubberstamp Johnson's continued detention in solitary confinement. They ask only whether Johnson has renounced and

debriefed, without considering whether "some evidence" actually supports Johnson's placement in solitary confinement. *See* Supp. Opening Br. 37-40. And renouncing and debriefing may offer a path out of maximum custody, but that path leads into protective custody, a security level that continues to present an "atypical and significant hardship." *See id.* at 25.

These sham procedures do not satisfy due process. *See* Supp. Opening Br. 35-40. Defendants cite several district-court cases that hold otherwise, *see* Supp. Resp. Br. 27-29, but, as discussed below, those cases are wrongly decided. They rely on mistaken factual assumptions and misconstrue binding precedent, and this Court should repudiate them.

1. The review procedures do not assess whether Johnson currently poses a danger to prison security.

This Court has been clear: 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 v. McCarthy*, 801 F.2d 1080, 1101 (9th Cir. 1986). To meaningfully achieve that end, prison officials must periodically review "whether a prisoner *remains* a security risk." *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983) (emphasis added); *see* Supp. Opening Br. 37. Yet, contrary to these commands, several of the district-court opinions cited by Defendants held that prison officials need not make "individualized determinations" to justify a prisoner's continued detention in solitary confinement because "the

initial validation … is sufficient ground for retention." *Hernandez v. Schriro*, 2011 WL 2910710, at *8 (D. Ariz. July 20, 2011); *see also Faulkner v. Ryan*, 2012 WL 407452, at *9 (D. Ariz. Feb. 9, 2012) (citing *Hernandez*, 2011 WL 2910710, at *8).

That cannot be correct because it would render review a pointless ritual. As Defendants acknowledge, the reviews provided to validated prisoners ask only whether the prisoner has debriefed. *See* Supp. Resp. Br. 31; Supp. Opening Br. 37-38. Rather than determining "whether a prisoner remains a security risk," the reviews do no more than replicate the renounce-and-debrief process. *See Hewitt*, 459 U.S. at 477 n.9. These reviews are therefore incapable of independently determining whether Johnson "severely endanger[s] the lives of prisoners" or "the security of the institution," and are therefore meaningless. *See Toussaint*, 801 F.2d at 1101.

2. ADC does not substantively re-examine the evidence underlying Johnson's validation.

As described above (at 11-12), Johnson has a continuing liberty interest in "avoiding particular conditions of confinement" that impose a significant and atypical hardship, not just a liberty interest in avoiding his initial validation. *Wilkinson v. Austin*, 545 U.S. 209, 222 (2005). Given that continuing liberty interest, this Court has recognized that reviews that merely rubberstamp an earlier decision are "meaningless gestures" that deny an inmate due process. *See Toussaint*, 801 F.2d at 1101-02; *Brown v. Or. Dep't of Corr.*, 751 F.3d 983, 987-88 (9th Cir. 2014). In *Lira v. Herrera*, 448 F.

App'x 699 (9th Cir. 2011), this Court applied those well-settled principles to hold that for a validated inmate's periodic review to be meaningful, officials must engage in a substantive re-examination of the evidence underlying the validation. *Id.* at 701; *see Guizar v. Woodford*, 282 F. App'x 551, 553 (9th Cir. 2008); Supp. Opening Br. 38-39.

Defendants do not argue that *Lira* is wrongly decided. But they suggest that its rule does not apply here because Johnson, unlike the prisoner in *Lira*, does not claim that his due-process rights were violated in the initial validation decision. *See* Supp. Resp. Br. 28. On the contrary, *Lira* does not limit its holding to prisoners who did not receive due process in their initial validation. *Lira* addressed two separate constitutional violations: the lack of a meaningful opportunity to be heard prior to Lira's gang validation *and* the lack of sufficient meaningful periodic review of Lira's retention in administrative segregation. *Lira*, 448 F. App'x at 701. Nowhere does *Lira* suggest that its separate holdings depend on one another.

Moreover, Defendants do not directly respond to the argument that reviews that ask only whether an inmate has debriefed fail to meet the "some evidence" standard. *See* Supp. Opening Br. 39. As the previous section shows, the periodic reviews simply mimic the debriefing process, which does not provide due process for people in solitary confinement.

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

The periodic reviews of Johnson's solitary confinement status also violate due process because prison officials lack discretion to meaningfully adjust Johnson's security level even when it is merited. 3-ER-341; *see* Supp. Resp. Br. 22. If Johnson does not renounce and debrief, the review process—with its mandatory override for validated prisoners—ensures he remains in maximum custody. *See* Supp. Opening Br. 39-40.

Defendants point to some district courts that have held that the scheme's lack of discretion is constitutional. *See* Supp. Resp. Br. 27-28. These decisions are wrong because they rely on the mistaken factual premise that a prisoner wishing to exit the atypical and significant hardship of solitary confinement may do so through debriefing. *See Faulkner v. Ryan*, 2012 WL 407452, at *9 (D. Ariz. Feb. 9, 2012) (describing debriefing as a "method of leaving administrative segregation"); *Hernandez v. Schriro*, 2011 WL 2910710, at *9 (D. Ariz. July 20, 2011) (same); *Baptisto v. Ryan*, 2005 WL 2416356, at *6 (D. Ariz. Sept. 30, 2005) (stating that debriefing can affect a prisoner's security level). Even if Johnson debriefs, security officials lack the authority to remove him from an "atypical and significant hardship." Rather, ADC regulations require that individuals who have debriefed be automatically

moved to protective custody. *See* D.O. 806 § 5.6.[2] Given protective custody's objective of protecting prisoners from harm by other inmates, it necessarily follows that protective custody, like solitary confinement, substantially restricts inmates' contact with other people.

That understanding is confirmed by courts' summaries of Arizona prison conditions, which have repeatedly described protective custody and solitary confinement as placing similar restrictions on an inmate. *See Koch v. Lewis*, 216 F. Supp. 2d 994, 1006 (D. Ariz. 2001) (noting that protective custody is not a "realistic way out of solitary confinement"), *vacated as moot sub nom. Koch v. Schriro*, 399 F.3d 1099 (9th Cir. 2005); *see also Denham v. State of Ariz.*, 1996 WL 554464, at *1 (9th Cir. Sept. 26, 1996) (describing protective custody placement as a "solitary cell"). Thus, prison officials lack discretion to meaningfully change Johnson's conditions of confinement.

Defendants quibble with Johnson's description of protective custody, arguing that *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2011), precludes reliance on facts from *Hernandez v. Schriro*, 2011 WL 2910710, at *3 (D. Ariz. July 20, 2011), to show that "debriefing places an inmate in significant danger" and that protective custody imposes an "atypical and significant

[2] *See* Arizona Department of Corrections, Rehabilitation and Reentry, Department Order: 806 — Security Threat Groups (STGs) § 5.6 (Apt. 15. 2021), https://corrections.az.gov/sites/default/files/policies/800/0806_041521.pdf (D.O. 806).

hardship." Supp. Resp. Br. 29-30; *see* Supp. Opening Br. 25. But *Lee* is inapposite here, as it held only that a court may not take judicial notice of "another court's opinion … for the truth of the facts recited therein" in the context of a Rule 12(b)(6) motion to dismiss, where the relevant facts were disputed. 250 F.3d at 690 (citation omitted). Notably, Defendants do not offer any facts to actually dispute Johnson's description of protective custody. And indeed, in *Hernandez* itself, ADC did not dispute the description of protective custody and involuntary protective custody. *See Hernandez*, 2011 WL 2910710, at *2.

B. Arizona's review scheme does not satisfy the *Mathews v. Eldridge* framework.

As discussed above and in our Supplemental Opening Brief (at 35-40), this Court has repeatedly held that inmates in solitary confinement are entitled to meaningful periodic review of their continued detention. *See Toussaint*, 801 F.2d at 1101-02; *Lira*, 448 F. App'x at 701; *Guizar*, 282 F. App'x at 553; *see also Brown*, 751 F.3d at 987-88. Those cases control here.

Unable to explain how the rubberstamp review procedures satisfy binding precedent, Defendants ask this Court to start its constitutional analysis anew. They look to the *Mathews v. Eldridge* framework to argue that due process is satisfied when renouncing and debriefing is the sole way to exit maximum custody. *See* Supp. Resp. Br. 30-32. But even if applying *Mathews* is required here, Defendants may not ignore inconvenient facts to

skew the results. A proper *Mathews* analysis generates a familiar result: that ADC's existing review procedures are constitutionally inadequate.

1. Johnson has a substantial private interest in avoiding indefinite solitary confinement.

Defendants rest on the truism that a prisoner's private interest in leaving maximum custody is not the same as "the right to be free from confinement at all" and must be evaluated "within the context of the prison system and its attendant curtailment of liberties." *Wilkinson*, 545 U.S. at 225; *see* Supp. Resp. Br. 31. But, as already discussed (at 6), Johnson asserts a weighty interest recognized by this Court: avoiding indefinite solitary confinement. He spends every day in an 8-foot-by-10-foot windowless cell, allowed to exit only a few times a week to exercise (alone) and shower (also alone). Johnson has a significant private interest in avoiding "deteriorat[ing] to the point of *social death* as a direct result of his continued isolation." *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 574 (3d Cir. 2017) (citation omitted).

2. ADC's procedures risk unjustly classifying Johnson to solitary confinement.

Defendants contend that the review procedures present "virtually no chance for error" because evaluating whether an inmate has renounced and debriefed is wholly objective. Supp. Resp. Br. 31. But the relevant inquiry is whether Johnson risks being erroneously detained in solitary confinement in violation of the Due Process Clause, not whether "officials would miss the fact that an inmate has renounced and debriefed." *Id.* at 31-32. As explained

above (at 13-14), the periodic reviews are meaningless and do not examine whether Johnson *remains* a security risk. *See Hewitt*, 459 U.S. at 477 n.9. The prison's own metrics support the notion that Johnson does not pose a threat. His "reclass score" has been "low enough to be on a lower security level unit" since the day he was validated. 3-ER-341–42. Thus, there is a significant risk that Johnson is being erroneously deprived of his entitlement to exit maximum custody and the probable value of additional procedural safeguards—for example, reviews that ask whether Johnson remains a security threat and substantively re-evaluate evidence—is high.

3. Meaningful reviews do not undermine the government's interest nor impose undue fiscal and administrative burdens.

For the third *Mathews* prong, Defendants offer only the broad assertion that the state has an interest in ensuring prison security. Supp. Resp. Br. 32. But Defendants may not use vague notions of prison security as a trump card to defeat prisoners' due-process rights. And Defendants do not contend meaningful reviews impose undue fiscal or administrative burdens on the prison system. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

A *Mathews* analysis, like decades of this Court's precedent, reveals that the Due Process Clause requires meaningful periodic review for inmates in solitary confinement.

C. Ryan and Crabtree are liable for the unconstitutional review procedures.

Though Defendants argue that Ryan and Crabtree are not liable for Johnson's removal from the Step-Down Program, *see* Supp. Resp. Br. 19-24, they do not directly dispute that they are liable for the allegedly unconstitutional review procedures. Consequently, they have forfeited any argument that they cannot be held individually liable.

Regardless, any argument that Ryan and Crabtree are not responsible for administering the challenged policy, would fail under *OSU Student Alliance v. Ray*, 699 F.3d 1053 (9th Cir. 2012). Both Ryan and Crabtree "promulgate[d], implement[ed], or in some other way possesse[d] responsibility for the continued operation of" the procedures. *Id.* at 1076.

Ryan. Ryan is liable for the deficient review process because the policy providing these meaningless reviews "was published in [his] name and on h[is] letterhead." *Benitez v. Hutchens*, 817 F. App'x 355, 359 (9th Cir. 2020); 3-ER-334–35. Consequently, he played a role in "promulgat[ing]" and "implement[ing]" the unconstitutional review procedures. *See OSU Student All.*, 699 F.3d at 1076. As discussed above (at 8), insofar as Ryan asserts legislative immunity in response to this claim, this defense has been forfeited.

Crabtree. As "Offend[e]r Services Bureau Administrator," Crabtree "exercises administrative control of, and responsibility for classification and housing decisions for" all inmates. 2-ER-246. Consequently, she has the

continuing authority to confine Johnson in maximum custody. By continuing to classify Johnson in administrative segregation without any meaningful review, Crabtree "[bears] responsibility for adminst[ering]" the unconstitutional review procedures. *OSU Student All.*, 699 F.3d at 1077.

D. Ryan and Crabtree are not entitled to qualified immunity.

Defendants do not contend that Ryan and Crabtree are entitled to qualified immunity for their administration of the unconstitutional review procedures. If the Court agrees that ADC's review procedures violate the Due Process Clause, Ryan and Crabtree may be held liable for damages.

Even if they had raised qualified immunity, Defendants would not be entitled to it. Qualified immunity is not appropriate where general constitutional rules articulated by the Supreme Court and this Court provide "fair warning" that Defendants' conduct is unlawful. *Hardwick v. Cnty. of Orange*, 844 F.3d 1112, 1117 (9th Cir. 2017) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

When Defendants subjected Johnson to solitary confinement without meaningful periodic review, binding precedent clearly established that ADC's review procedures did not satisfy due process. It had been clearly established for several decades that inmates have a constitutionally protected entitlement to periodic reviews of their placement in solitary confinement. *Hewitt v. Helms*, 459 U.S. 460 (1983), required prisons to conduct "periodic review[s] of the confinement of such inmates," *id.* at 477 n.9, and *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), held that, for

those reviews to be constitutionally adequate, they had to occur more than once per year and "must not" be "meaningless gestures," *id.* at 1101-02. *See also Wilkinson v. Austin*, 545 U.S. 209, 222 (2005) (holding that prisoners have an ongoing liberty interest in avoiding the "atypical and significant hardship" of solitary confinement).

This Court has built on those cases, providing prisons with further guidance on how to ensure that the required reviews are meaningful. *Lira v. Herrera*, 448 F. App'x 699 (9th Cir. 2011), held that these reviews must substantively re-examine the evidence underlying the validation. *Id.* at 701. Moreover, periodic reviews cannot be propped up with vague allegations of misconduct. *Cato v. Rushen*, 824 F.2d 703 (9th Cir. 1987), required review findings be supported by "some evidence" with "some indicia of reliability," *Id.* at 704-05, and *Brown v. Oregon Department of Corrections*, 751 F.3d 983 (9th Cir. 2014), further established that officials conducting the evaluations must have the discretion to change a prisoner's security level. *See id.* at 987-88.

Defendants violated those clearly established rules here. They offer no argument that they substantively examined the evidence underlying Johnson's validation, that they had discretion to change Johnson's security level, or that the decisions keeping him in solitary confinement were supported by some evidence, as this Court's precedents demand.

Rather, in their merits arguments, Defendants cite a smattering of unpublished district-court cases upholding the constitutionality of the review procedures, *see* Supp. Resp. Br. 27-28, which cannot (of course)

overcome clearly established precedent of the Supreme Court and this Court. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). As explained above (at 13-18), Defendants' cases rest on faulty factual and legal premises. And this Court has hesitated to consult unpublished opinions in qualified-immunity analyses when, as here, there are "published opinions on point or overwhelming obviousness of illegality." *Rico v. Ducart*, 980 F.3d 1292, 1300 (9th Cir. 2020) (quoting *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002)). In the face of the Supreme Court's and this Court's clear instruction that periodic reviews not be "meaningless gestures," Defendants' district-court cases do not entitle them to qualified immunity.

III. Defendants violated Johnson's First Amendment rights by retaliating against him for pursuing civil-rights litigation.

To allege unconstitutional retaliation, a prisoner must show an (1) adverse action was taken against him (2) that 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 (5) that the action did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). Defendants do not contest that an adverse action was taken against Johnson, that Johnson engaged in First Amendment protected conduct, or that the adverse action would chill a reasonable person's exercise of his First Amendment rights. Defendants dispute only that they had a retaliatory motive and lacked a legitimate correctional goal in removing Johnson from the Step-Down Program. *See* Supp. Resp. Br. 36-

43. In doing so, they refuse to credit Johnson's version of events and fail to draw reasonable inferences in his favor, thereby emphasizing the disputes of material fact that must be resolved by a jury. *See Brodheim v. Cry*, 584 F.3d 1262, 1267 (9th Cir. 2009).[3]

A. Viewed in the light most favorable to Johnson, Defendants had a retaliatory motive for removing Johnson from the Step-Down Program.

Defendants offer different interpretations from Johnson regarding the comments by Officer Belt, Johnson's reputation, the timing of his removal, and the reliability of Johnson's evidence. In other words, Defendants identify genuine disputes of material facts that, at the summary-judgment stage, must be resolved in Johnson's favor. *See Brodheim*, 584 F.3d at 1267.

Comments from Belt. Sergeant Belt told Johnson he was being removed from the Step-Down Program because "higher ups" wanted him off the yard and "jailhouse lawyers" weren't welcome in his unit. 2-ER-244. Johnson reasonably interprets these comments to demonstrate retaliatory motive in removing him from the Program. Though Defendants dismiss that inference as "speculation" that "is insufficient to raise [a] genuine issue[] of fact," Supp. Resp. Br. 37, they fail to offer any alternative meaning. Indeed, it is difficult to imagine what else Belt could have meant. Even if Johnson's

[3] Moreover, Defendants do not maintain that Belt or Montano are entitled to qualified immunity, as it was clearly established that punishing an inmate for exercising First Amendment rights is unconstitutional retaliation. *See* Supp. Opening Br. 49.

interpretation relies on any inferential leap at all, he is entitled to draw reasonable inferences based on Belt's comments in this summary-judgment posture. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Suspect Timing. Defendants also urge this Court to ignore Johnson's ongoing civil suit because that litigation did not name Belt or Montano as a defendant. *See* Supp. Resp. Br. 37. But there is no requirement that those retaliating against Johnson must be the same parties about whom he previously complained. In *Bruce v. Ylst*, 351 F.3d 1283 (9th Cir. 2003), for example, the plaintiff alleged that undisclosed "higher-ups"—about whom he had not previously complained—retaliated against him for challenging inadequate prison conditions. 351 F.3d at 1289. Here, Johnson presents analogous facts. Belt and Montano retaliated against him for filing grievances against their co-workers in the same institution: other prison officials.

Defendants point out that Johnson "provides no argument as to why prison officials would choose that moment to retaliate" against him when he had been litigating his prison-conditions suit for several years. Supp. Resp. Br. 38. But the relevant analysis is whether a jury could find Defendants' timing suspect, not whether Johnson can prove *why* the Defendants chose a particular month or day to carry out their retaliation. Johnson was removed from the Step-Down Program in the midst of ongoing petitioning activity. A reasonable jury could find that timing suspicious.

In any case, Belt's own comments suggest an explanation for the timing of the retaliation. Belt stated that "jailhouse lawyers weren't welcome *on his unit*." 2-ER-244 (emphasis added). "His unit" was the ASPC-Florence, Central Unit. 2-ER-204. Johnson had only moved to that unit on April 12, 2018. *Id.* The search occurred the next day (that is, right after Belt gained the opportunity to retaliate), and Johnson was removed from the Step-Down Program around two weeks later. *Id.* Thus, a reasonable jury could find relevant the fact that the alleged retaliation unfolded one day after moving to a new unit, where Belt told Johnson "jailhouse lawyers weren't welcome."

Johnson's reputation. Defendants assert there was no evidence that Montano or Belt knew of Johnson's reputation as a filer of civil-rights suits. Supp. Resp. Br. 38. That's flatly wrong, given that Belt called Johnson a "jailhouse lawyer." 2-ER-244. In any event, "circumstantial evidence of [the plaintiff's] reputation within the prison as a complainer" is enough to support an inference of retaliation. *Hines v. Gomez*, 108 F.3d 265, 268 (9th Cir. 1997). Here, a reasonable jury could find this circumstantial evidence through Belt's comments, Johnson's multiple prison grievances, and Johnson's three lawsuits against ADC. Defendants' contrary contentions highlight a genuine dispute of material fact that must be resolved at trial.

Johnson's express rejection of Defendants' justification for his removal. Defendants claim that the evidence collected from Johnson's property satisfies the "some evidence" standard required to demonstrate that Johnson was involved in gang conduct, even if Johnson can provide

equally reasonable interpretations of that evidence. Supp. Resp. Br. 41-42. But as Defendants' response implies, the reliability and interpretation of that "evidence" is hotly disputed. In other words, Defendants identify a genuine dispute of material fact that, at this stage, must be resolved in favor of Johnson. *See Brodheim*, 584 F.3d at 1267.

B. Viewed in the light most favorable to Johnson, Johnson's removal from the Step-Down Program did not serve a legitimate correctional goal.

Defendants argue that the evidence presented is reliable and establishes "some evidence" of continued gang activity. Supp. Resp. Br. 41-42. Thus, according to Defendants, the removal served the legitimate correctional goal of prison security. *Id.* at 40-41. However, as just discussed (at 28), when viewing the evidence in the light most favorable to Johnson, the evidence collected does not meet the "some evidence" standard—let alone the higher standard applied to First Amendment retaliation claims. *See Hines*, 108 F.3d at 269; *Bruce*, 351 F.3d at 1289. Thus, to the extent Defendants dispute Johnson's characterization of the "evidence" underlying his removal, they simply identify genuine disputes of material facts that, at this stage, must be resolved in favor of Johnson.

More fundamentally, Defendants may not invoke prison security to shield them from responsibility for retaliatory behavor. If 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 correctional purpose

even if the prisoner "*arguably* ended up where he belonged." *Bruce,* 351 F.3d at 1289. Even if the evidence met the "more than some evidence" standard to remove Johnson from the Step-Down Program—which this Court must assume it doesn't at summary judgment—the evidence is irrelevant to the retaliation claim because Johnson has put forth substantial evidence that the removal process was itself "a cover or a ruse to silence and punish" him. *Id.* Thus, Johnson's evidence of retaliatory motive in that removal precludes summary judgment for Defendants.

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,

/s/ Hannah Mullen

Sanders Keyes Gilmer*
Student Counsel
Daniel Wassim
Student Counsel

Hannah Mullen
Brian Wolfman
Madeline Meth
GEORGETOWN LAW APPELLATE COURTS IMMERSION CLINIC
600 New Jersey Ave., NW,
Suite 312
Washington, D.C. 20001
(202) 662-9549

*An unopposed motion to authorize Ms. Gilmer's student practice under Rule 46-4 is pending. *See* Doc. 43.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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