No. 18-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Charles Hamner,

Plaintiff-Appellant,

v.

Danny Burls, et al.,

Defendants-Appellees.

Appeal from The United States District Court for the Eastern District of Arkansas
Case No. 5:17-CV-79 JLH-BD
The Honorable Judge James Leon Holmes

BRIEF OF PLAINTIFF-APPELLANT, CHARLES HAMNER

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ORAL ARGUMENT REQUESTED

October 22, 2018

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

"[T]he penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself." *Davis v. Ayala*, 576 U.S. ___, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring). For no discernible reason, Defendants subjected Mr. Hamner to that regime notwithstanding the consensus that solitary confinement devastates those afflicted with mental illness.

Mr. Hamner sued prison officials, alleging that they denied him procedural due process, subjected him to inhumane conditions, and deprived him of constitutionally adequate medical care. The district court concluded, however, that Mr. Hamner had failed to state any claim. Its decision is erroneous in every respect. First, the court failed to review Mr. Hamner's conditions claim. Second, the court identified a non-existent pleading defect in Mr. Hamner's deliberate indifference to medical needs claim. Third, the court reasoned that 203 days of solitary confinement is too short to confer a liberty interest no matter the nature of the restrictions.

This case concerns "the clear constitutional problems raised by keeping prisoners . . . in near-total isolation from the living world, in what comes perilously close to a penal tomb." *Apodaca, et al., v. Raemisch, et al.*, Nos. 17-1284 & 17-1289, 2018 WL 4866124, at *8 (U.S. Oct. 9, 2018) (statement of Sotomayor, J., respecting denial of certiorari) (internal quotations and citations omitted). Given the rights at issue, Mr. Hamner respectfully requests 20 minutes per side for oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1A, the undersigned counsel for Charles Hamner hereby certifies that Charles Hamner is an individual.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutory Authorities

Rules and Regulations

Other

JURISDICTIONAL STATEMENT

Mr. Hamner sued state prison officials under 42 U.S.C. § 1983 for violating his First, Eighth, and Fourteenth Amendment rights. AA 86–103.[1] The district court had jurisdiction pursuant to 28 U.S.C. § 1331. The district court entered final judgment, disposing of all claims, on May 1, 2018. AA 116. On May 23, 2018, Mr. Hamner timely filed a notice of appeal. AA 117. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the district court erred in dismissing Mr. Hamner's unreviewed claim that Defendants subjected him to unconstitutional conditions of confinement by consigning him to solitary confinement for 203 days despite their knowledge of his serious mental illness?

MOST APPOSITE CASES FOR THIS ISSUE

A. *Hope v. Pelzer*, 536 U.S. 730 (2002)

B. *Nelson v. Corr. Med. Servs.*, 583 F.3d 522 (8th Cir. 2009) (en banc)

C. *Palakovic v. Wetzel*, 854 F.3d 209 (3d Cir. 2017)

MOST APPOSITE CONSTITUTIONAL PROVISION FOR THIS ISSUE

A. The Eighth Amendment to the United States Constitution

[1] Throughout this brief, "AA" refers to Appellant's Appendix.

II. Whether the district court erred in dismissing Mr. Hamner's claim for constitutionally inadequate medical care notwithstanding his allegations that Defendants knew of but disregarded an objectively serious risk of harm by interfering with his medical care in solitary confinement?

MOST APPOSITE CASES FOR THIS ISSUE

A. *Plemmons v. Roberts*, 439 F.3d 818 (8th Cir. 2006)

B. *DeGidio v. Pung*, 920 F.2d 525 (8th Cir. 1990)

C. *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988)

D. *Hicks v. Bradley*, No. 5:14-CV-05372, 2016 WL 4014096 (W.D. Ark. July 6, 2016)

MOST APPOSITE CONSTITUTIONAL PROVISION FOR THIS ISSUE

A. The Eighth Amendment to the United States Constitution.

III. Whether the district court's *sua sponte* dismissal of Mr. Hamner's procedural due process claim was error because the district court neglected to consider the nature of the solitary confinement imposed by Defendants?

MOST APPOSITE CASES FOR THIS ISSUE

A. *Sandin v. Conner*, 515 U.S. 472 (1995)

B. *Marion v. Columbia Corr. Inst.*, 559 F.3d 693 (7th Cir. 2009)

C. *Davis v. Barrett*, 576 F.3d 129, 131 (2d Cir. 2009)

MOST APPOSITE CONSTITUTIONAL PROVISION FOR THIS ISSUE

A. The Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

A. Nature of the Case

For more than 125 years, the United States Supreme Court has expressed significant doubts about solitary confinement. In 1890, the Court described it as "an additional punishment of the most important and painful character[.]" *In re Medley*, 134 U.S. 160, 171 (1890). Already, the Court had come to recognize its destructive effects, noting that after even one month of solitary confinement many prisoners descended into a "semi-fatuous condition," "became violently insane," "committed suicide," and "did not recover sufficient mental activity to be of any subsequent service to the community." *Id*. at 168. More recently, Justice Kennedy has emphasized "[t]he human toll wrought by extended terms of isolation[.]" *Davis*, 135 S. Ct. at 2209 (Kennedy, J., concurring). Justice Breyer has observed that "it is well documented that . . . prolonged solitary confinement produces numerous deleterious harms" including hallucination, panic, paranoia, and self-mutilation. *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (citing Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 130; Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH U. J. L. & POLICY 325, 331 (2006)). And just weeks ago, Justice Sotomayor emphasized the devastating harms inflicted by solitary confinement, and cautioned that "[a] punishment need not leave physical scars to be cruel and unusual." *Apodaca, et al., v.*

Raemisch, et al., Nos. 17-1284 & 17-1289, 2018 WL 4866124, at *1 (U.S. Oct. 9, 2018) (statement of Sotomayor, J., respecting denial of certiorari) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). For more than 203 days, Mr. Hamner, a seriously mentally ill prisoner, endured this notorious punishment without apparent reason.

B. Factual Background

1. Mr. Hamner's Unrelenting Solitary Confinement Injures Him.

Charles Hamner, a seriously mentally ill prisoner in the custody of the Arkansas Department of Corrections ("ADOC"), suffers from a variety of maladies, including borderline personality disorder, post-traumatic stress disorder, and chronic depression.[2] AA 73, 77, 90, 113. Notwithstanding these afflictions, Mr. Hamner had maintained a perfect disciplinary record in prison. AA 96, 112. Accordingly, he earned a I-C classification, AA 14, a status reflecting his superior conduct. *E.g.,* ADOC Inmate Handbook at 5–6 ("Class I is the highest classification/class status an inmate can obtain.").[3]

On March 26, 2015, Mr. Hamner provided information to a correctional officer regarding another prisoner's "planned attack," which ultimately prevented the assault and injury of the officer.[4] AA 87. One week later, without explanation, Mr. Hamner

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[2] The facts alleged by Mr. Hamner must be accepted as true at this stage in the proceedings. *Kruger v. Nebraska*, 820 F.3d 295, 302 (8th Cir. 2016).
[3] *Available at* https://adc.arkansas.gov/images/uploads/Inmate_Handbook_2017.pdf.
[4] The prisoner who had planned to commit the attack was subsequently apprehended. AA 88.

was removed from general population at the Tucker Maximum Security Unit ("Tucker") and placed in solitary confinement.[5] AA 88. All told, he spent 203 days in solitary confinement. AA 81. He was not issued a disciplinary ticket prior to or during his period of solitary confinement. AA 14.

Mr. Hamner's daily existence in solitary confinement was defined by social isolation and sensory deprivation. AA 94–96. Mr. Hamner was assigned to a single-occupant cell with a solid- steel door. AA 94, 97. Every weekend and many week days, Mr. Hamner was confined to his cell for 24 hours. AA 74, 94. On those days when Mr. Hamner was permitted to leave his cell for a single hour to engage in solitary exercise and take a shower, he twice had to submit to an invasive strip search, and also contend with cumbersome and painful simultaneous restraint by tether strap, leg irons, and handcuffs. AA 73–74, 94. At times, the discomfort and humiliation compelled Mr. Hamner to forego his shower and exercise. AA 74. Irrespective of whether he remained in his cell for 23 or 24 hours a day, Mr. Hamner was deprived of human contact with other prisoners. AA 94. His visitation rights were strictly limited.[6] AA

[5] Mr. Hamner's isolation was referred to as "administrative segregation" in the district court. That condition, as Justice Kennedy has explained, "is better known [as] solitary confinement." *Davis*, 135 S. Ct. at 2208 (Kennedy, J., concurring); *see also Apodaca, et al., v. Raemisch, et al.*, Nos. 17-1284 & 17-1289, 2018 WL 4866124, at *1 (U.S. Oct. 9, 2018) (statement of Sotomayor, J., respecting denial of certiorari) ("administrative segregation . . . is also fairly known by its less euphemistic name: solitary confinement").) Mr. Hamner follows Justice Kennedy's and Justice Sotomayor's lead throughout this brief.

[6] Indeed, the visitation restrictions imposed upon prisoners in solitary confinement at

14. And he had only incidental contact with prison personnel, for example, when they served him cold food through the chuck hole. [AA 74; *see also* Ark. Dept. of Correction, Admin. Directive 14-07(III)(C)(3) (2014)).

Mr. Hamner's interior life was similarly bleak. Although prison policy permitted those in solitary confinement to keep a reduced number of books, the light in Mr. Hamner's cell was often broken for days on end, leaving him without the ability to read. AA 94. He had no television in his cell.[7] AA 74, 94. And Mr. Hamner was deprived of any opportunity to rehabilitate because ADOC policy forbids prisoners in solitary confinement from working or taking classes. AA 94.

Mr. Hamner was also deprived of adequate medical and mental health care while he was in solitary confinement. AA 73–74, 89–90. For instance, with regularity, ADOC personnel failed to provide Mr. Hamner with the psychiatric medication prison medical staff had prescribed, a failure that ADOC personnel conceded.[8] AA 74, 77, 93, 113. And despite his "pleas" for psychological treatment, none was made

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Tucker appear to have been more severe than those imposed on prisoners in solitary confinement at other ADOC facilities. AA 14.

[7] Although there was a unit television, which Mr. Hamner could theoretically watch by peering out from a narrow window in his solid-steel door, it was more than 50 feet away from Mr. Hamner's cell, and his view was otherwise obscured by an elevator shaft. AA 94.

[8] Mr. Hamner alleges that while ADOC personnel conceded to having deprived him of psychiatric medication nine times during the first two weeks he was in solitary confinement, the deprivation was even more commonplace than ADOC conceded. AA 77.

available. AA 89–90. The combined effects of inadequate treatment and the known effects of solitary confinement on those who suffer from mental illness caused Mr. Hamner's health to deteriorate. AA 73, 89–90. In solitary confinement, Mr. Hamner developed hallucinations, insomnia, depression, panic attacks, and anxiety. AA 75, 77. Mr. Hamner also contemplated suicide as a result of his isolation and the lack of medical and mental health care available in solitary confinement. AA 90.

Mr. Hamner's solitary confinement differed significantly from his time in general population. For example, in general population, Mr. Hamner was able to engage in meaningful social contact with other prisoners, was afforded access to rehabilitative programming, was offered vocational training, was able to shower and exercise daily, had meaningful access to televised entertainment, enhanced access to books, obtained medical and mental health care in a timely fashion, and had access to hot meals in a congregate setting. AA 73–74, 94, 96; *see also e.g.*, ADOC Inmate Handbook, *supra*, at 8, 12, 20 (describing access to televised entertainment, showers, congregate meals, and congregate recreation policies, respectively); Ark. Admin. Code 004.00.2-841 (2018) (describing personal possession policies); Ark. Admin. Code 004.00.2-500 (2018) (describing rehabilitative and educational programming policies).

2. Defendants' Meaningless Reviews of Mr. Hamner's Solitary Confinement.

Pursuant to ADOC "Institutional Classification Committee Procedures,"

prisoners subjected to solitary confinement are entitled to certain procedural protections in connection with required periodic reviews of their solitary confinement. For example, all prisoners are entitled to "meaningful hearing[s] before the Classification Committee." Ark. Dept. of Correction, Admin. Directive 14-07(A)(1) (2014). And "not less than twenty-four (24) hours prior to the hearing," prisoners "will receive written notification of the hearing." 14-07(A)(2); *see also* AA 68. At the hearing itself, "[t]he inmate will be allowed to appear before the committee, to make any statement desired, and to present documentary evidence including witness statements." 14-07(A)(3); *see also* AA 68. And at the conclusion of the hearing, "[t]he inmate will be advised of the reasons of his/her administrative assignment to segregation in writing and a copy of the reasons will be maintained in the inmate's electronic file." 14-07(A)(5); *see also* AA 68. Finally, "[i]f the inmate refuses to appear before any . . . hearings, documentation will be maintained stipulating his refusal to appear." 14-07(D)(5); *see also* AA 69.

These procedures are applicable to the periodic reviews that ADOC personnel must provide to prisoners in solitary confinement according to the following schedule. "[W]ithin seventy-two (72) hours" of assignment to solitary confinement, ADOC personnel must conduct a "probable cause" hearing. 14-07(B)(2); *see also* AA 37, 68. Thereafter, the "Classification Committee or authorized staff must review the status of every inmate assigned to administrative segregation classification every seven (7)

days for the first two months, and every thirty (30) days thereafter to determine if the reason(s) for placement continue to exist." 14-07(D)(1); *see also* AA 69. "Mental Health Staff must review the status of every inmate assigned to the segregation classification for more than thirty (30) days." 14-07(D)(2); *see also* AA 69. Further, when "confinement continues for an extended period, the Segregation Review form from mental health will be completed and reviewed by the unit psychologist at least every three (3) months." *Id*.

Defendants denied Mr. Hamner a 72-hour probable cause hearing until April 1, 2018, by which time he had already spent 13 days in solitary confinement. AA 9, 16, 37, 99. Mr. Hamner did not learn of the hearing until after it was completed, notwithstanding ADOC regulations requiring advance notice and entitling him to attend. AA 15, 88; *see also* 14-07(A)(2)-(3). Mr. Hamner was therefore not permitted to "make any statement desired, and to present documentary evidence including witness statements." *See* 14-07(A)(2)-(3). At the conclusion of the 72-hour probable cause hearing, defendant Jenkins, the Classification Committee Supervisor, sent Mr. Hamner a letter memorializing the hearing. AA 37. Mr. Hamner was informed at that time that the Classification Committee had elected to continue his solitary confinement. AA 37. "Pending investigation" was the sole reported "basis for [the] decision." AA 37. No further detail was provided. AA 37. And Mr. Hamner disputes

that Defendants had a rationale for placing him in solitary confinement on even a temporary basis to allow for an investigation. AA 17, 22–23.

On May 13th, 2015, six weeks after Mr. Hamner entered solitary confinement, prison officials first conducted a "7 day review." AA 19, 41, 92. Thereafter, Defendants completed a form intended to create a "record of release consideration." AA 41. The completed form contains a "reason for initial assignment" check-the-box section intended for completion by the classification committee, and offering three possible justifications for solitary confinement: "[s]eriousness of offense resulting in placement in maximum security," "[t]hreat to security and good order of institution," and "[r]requires maximum protection from themself [sic] or others require maximum protection from them." AA 41. No box was checked. AA 41. Likewise, the form contains an "action/reason" check-the-box section offering eight possible justifications for "continued" solitary confinement, and a ninth box, labeled "other," which includes a corresponding space for a narrative addition. AA 41. Again, no box was checked, and the space adjacent to the "other" box was left blank. AA 41. Nonetheless, all members of the classification committee voted for Mr. Hamner's continued solitary confinement. AA 41. Finally, the form also contains a "warden's review" check-the-box section, offering two choices: "I have reviewed the above and agree with the Committee's decision" and "I have reviewed the above and am referring this back to the Committee." AA 41. Defendant Burl did not check either

box but signed and dated the form. AA 41. Mr. Hamner was not offered an opportunity to attend this hearing or present evidence for the committee's consideration. AA 40–41.

Seven days later the classification committee conducted another review of Mr. Hamner's continued solitary confinement. AA 45. But for the addition of the date of the review and Mr. Hamner's identifying information, the form is completely blank. AA 45. After a week passed, Defendants completed another "record of release consideration." AA 54. The classification committee again voted to retain Mr. Hamner in solitary confinement without ticking a box or otherwise offering information regarding the decision. AA 54. The following week, the "record of release consideration" was identical in substance—Defendants voted to continue Mr. Hamner's solitary confinement without offering any rationale. AA 49. Mr. Hamner was not permitted to attend or present evidence at any of these seven-day hearings, AA 40, 44, 48, 52, notwithstanding ADOC regulations to the contrary.

On June 10, 2015, Defendants conducted a "60 day review" of Mr. Hamner's solitary confinement. AA 58. The form is blank apart from the date and Mr. Hamner's identifying information. AA 58. On August 12, 2015, Defendants completed another 60 day review. AA 65. This time, however, Mr. Hamner was permitted to attend his hearing. AA 65. At the conclusion of the hearing, Defendants completed another "record of release consideration" form. AA 65. As before, Defendants did not check any boxes. AA 65. The form, however, includes

the handwritten words "security concerns" in the section intended to reflect the "inmate's statement concerning release or continued segregation." AA 65. Mr. Hamner disputes that he expressed any such concern. AA 14, 27, 61, 64. The substance of the security concerns is not articulated on the form.[9] AA 65.

Beginning on April 10, 2015, and continuing until October 2, 2015, Mr. Hamner perfected 15 grievances challenging the process he was afforded in connection with the 72-hour, 7-day, and 60-day reviews. AA 34, 39, 40, 42, 44, 46, 48, 50, 52, 57, 59, 61, 62, 64, 66. In summary, Mr. Hamner requested that prison officials adhere to ADOC regulations requiring that the classification committee or other ADOC personnel explain to him why he was in solitary confinement. *Id*. He was not successful. For example, on May 27, 2015, Mr. Hamner complained that he was provided with a record of release consideration review form that was not completed by the classification committee as required, did not reflect that any member of the classification committee had voted for his continued solitary confinement, and did not include a "reason . . . for my continued segregation" or even "my initial assignment"

[9] In a grievance dated August 25, 2015, Mr. Hamner recounted that when he had inquired at the hearing why he was being held in solitary confinement, Defendants informed him that "the Aryans had a paid hit out on" him and he was therefore "being housed in segregation for [his] safety." AA 61. In response, Mr. Hamner informed Defendants that the rationale "[d]oesn't make sense!" because prison personnel had recently moved a "known Aryan" gang member to a cell adjacent to his own. *Id*. Mr. Hamner also noted that upon release from solitary confinement, he was transferred to a general population unit with a robust Aryan gang presence. AA 25–26.

to solitary. AA 44. ADOC staff resolved the grievance against Mr. Hamner without addressing his complaint. AA 44. Nearly a month later, defendant Burls reviewed Mr. Hamner's grievance, but found it to be "without merit" because "[a] unanimous decision was made for your placement and continued assignment to Administrative Segregation." AA 46. Defendant Burls did not, however, describe the basis for that decision. AA 46. On June 2, 2015, Mr. Hamner completed a grievance, in which he complained that another record of release consideration review form does not "show their action or reason for continuing segregation" or "my initial assignment." AA 52. ADOC staff responded, stating only: "Your 7 day review is documented in the system. You are being housed appropriately at this time." AA 52. Several weeks later, defendant Burls reviewed Mr. Hamner's grievance, again finding it "without merit" because "[a] unanimous decision was made for your continued assignment to Administrative Segregation." AA 55. As before, defendant Burls did not explain to Mr. Hamner why he was in solitary confinement. AA 55. The remainder of grievances and responses do not vary meaningfully. AA 57, 59, 61, 62, 64, 66.

Finally, after 203 days Mr. Hamner was transferred to an ADOC facility across the street from Tucker, where he was immediately classified to general population. To date, the reason for Mr. Hamner's solitary confinement is unknown.

C. District Court Proceedings

On March 24, 2017, Mr. Hamner, proceeding *pro se*, filed a complaint pursuant to 42 U.S.C. § 1983, asserting that Defendants violated his Fourteenth Amendment rights in connection with their placement of him in "prolonged" solitary confinement.[10] AA 31. Specifically, Mr. Hamner claimed that his prolonged solitary confinement constituted an atypical and significant departure from the ordinary incidents of prison life, thereby entitling him to procedural due process. AA 28. Defendants' initial and periodic reviews of his solitary confinement violated the Fourteenth Amendment, however, because they were hollow formalities that deprived him of a meaningful opportunity to challenge his unrelenting isolation. AA 29. Defendants are ADOC personnel who were members of the prison classification committee or who were otherwise responsible for Mr. Hamner's prolonged solitary confinement.[11] AA 18.

Pursuant to 28 U.S.C. § 1915(e)(2)(B), which directs the district court to dismiss an action *sua sponte* if a prisoner fails to state a claim upon which relief may be granted, the magistrate judge screened Mr. Hamner's procedural due process claim.

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[10] Mr. Hamner also raised a First Amendment claim, in which he asserted that Defendants consigned him to prolonged solitary confinement in retaliation for grieving their initial decision to place him in solitary confinement. AA 79. The district court ultimately dismissed Mr. Hamner's First Amendment claim for failure to exhaust. AA 115. Mr. Hamner does not press that claim on appeal.

[11] Mr. Hamner sought damages, declaratory, and injunctive relief. AA 32. Mr. Hamner's claim for injunctive relief is now moot.

The magistrate judge's report—which contains four paragraphs addressing Mr. Hamner's due process claim—recommended dismissal. AA 71–72. Although the magistrate judge appeared to agree with Mr. Hamner that Defendants did not permit him adequate notice or opportunity to contest his solitary confinement, that failure was academic: a seven-month period of solitary confinement could not, as a matter of law, constitute an atypical and significant hardship, the magistrate judge concluded.[12] AA 71–72. Accordingly, Defendants were under no obligation to provide Mr. Hamner with the hallmarks of due process. AA 71–72.

Mr. Hamner timely filed an objection to the report, in which he described his mental illness, the deprivations he endured in solitary confinement, and the deleterious effects of isolation. AA 74–75. Specifically, Mr. Hamner explained that solitary confinement and the medical deprivations it entailed were taking a "physical and an emotional toll" and "depletin[g]" his previously "stable mental condition," including by causing him insomnia, hallucinations, anxiety, and panic attacks. AA 75. Mr. Hamner also emphasized that the court was required to take into account his mental

[12] In subsequently reviewing Defendants' motion to dismiss Mr. Hamner's retaliation claim, the magistrate judge concluded that Defendants reported no justification for Mr. Hamner's solitary confinement until nearly five months had elapsed. AA 83. As the magistrate judge explained, it was not until August 12, 2015, that Defendants' own paperwork reflected that unspecified "security concerns" justified Mr. Hamner's "hous[ing] in isolation." AA 83. As a result, the magistrate judge "[could]not conclude that, prior to August 12, 2015, Mr. Hamner was held in administrative segregation for security reasons." AA 83.

illness when considering whether solitary confinement amounted to an atypical and significant hardship. AA 74–75. Nonetheless, the district court adopted the magistrate's recommendations "in all respects," and issued an order dismissing Mr. Hamner's due process claim. AA 79. The district court granted Mr. Hamner's request to amend his complaint, however. AA 107.

On February 7, 2018, Mr. Hamner timely filed an amended complaint, in which he reasserted his procedural due process claim.[13] AA 92–94. Specifically, Mr. Hamner detailed the restrictions that he endured in solitary confinement, including that Defendants afforded him "rarely any human contact." AA 94. Those deprivations marked a sharp contrast with the freedoms he enjoyed in general population. AA 96. And Mr. Hamner alleged that Defendants deprived him of notice and a meaningful opportunity to contest his prolonged solitary confinement. AA 92–93. Indeed, he complained that Defendants had failed to articulate a credible justification for his solitary confinement at any time. AA 92–93. Mr. Hamner also pleaded two Eighth Amendment claims. First, Mr. Hamner claimed that Defendants were deliberately indifferent to his serious medical needs throughout the term of his solitary confinement because (1) they interfered with the delivery of "medication that he needs for his mental illness" and (2) "his pleas for psychological treatment were ignored." AA 89–90, 93, 96. Mr. Hamner also alleged that his mental illness constituted "a

[13] Mr. Hamner also reasserted his First Amendment claim. AA 91.

serious medical need." AA 90. Second, Mr. Hamner claimed that Defendants had subjected him to unconstitutional conditions by consigning him to solitary confinement notwithstanding the dangerous effects of isolation on those who suffer from serious mental illness. AA 90, 94. Specifically, he alleged that he was "a seriously mentally ill inmate" in conditions of confinement so restrictive that "he risked irreparable emotional damage or a death by suicide." AA 90. In support of both Eighth Amendment claims, Mr. Hamner alleged that Defendants "caused him an unnecessary and wanton infliction of pain and suffering" by housing him in solitary confinement. AA 90.

Defendants moved to dismiss. AA 107. With respect to Mr. Hamner's due process claim, they made no substantive argument—instead, Defendants simply argued that the court should not revisit the due process claim. Br. in Supp. of Mot. to Dismiss Pl's. Am. Compl. 1, Feb. 21, 2018, ECF No. 37. In response to Mr. Hamner's allegation of constitutionally inadequate medical care, Defendants argued that the complaint did not state a claim because Mr. Hamner purportedly had suffered only psychological injury, and Defendants purportedly were not responsible for Mr. Hamner's care. *Id*. at 2–3. And Defendants argued that Mr. Hamner had failed to state an unconstitutional conditions claim for two reasons. First, because he purportedly had not "suggest[ed] his confinement was below reasonable standards or constituted unnecessary and wanton infliction of pain." *Id*. at 4. Second, because Mr. Hamner

purportedly failed to allege that Defendants had acted with the requisite mental state. *Id*. at 4–5.

Mr. Hamner timely responded to Defendants' motion to dismiss. AA 104. With respect to his procedural due process claim, Mr. Hamner reiterated that Defendants had deprived him of "meaningful, relevant, or periodical reviews" in connection with his "prolonged" solitary confinement. AA 104. With respect to his conditions of confinement claim, Mr. Hamner explained that "constant isolation . . . and other sensory deprivations for prisoners with serious mental health issues violates the Eighth Amendment." AA 105. Further, he argued that "[D]efendants all knew that plaintiff was a mentally ill inmate." AA 105. Mr. Hamner also explained that Defendants "knew that placing him in segregation was a future risk to his health and safety." AA 105. With respect to his constitutionally inadequate medical care claim, Mr. Hamner reiterated that Defendants deprived him of "adequate medical care" and "medication" while he was in solitary confinement. AA 105. That deprivation caused him "undue hardship" and "pain and suffering" in violation of the Eighth Amendment. AA 105. Finally, he explained that "'[p]ain' constitutes injury" and that some courts permit damages in response to a "showing of emotional or mental injury without a showing of physical injury." AA 105.

The magistrate judge's report—which included five paragraphs concerning Mr. Hamner's due process claim and one paragraph concerning his two Eighth

Amendment claims—recommended dismissal. AA 106–10. With respect to the due process claim, the magistrate judge reasserted that, as a matter of law, a "seven-month assignment to administrative segregation was not long enough to trigger due process protection." AA 108. The nature of Mr. Hamner's solitary confinement was not relevant to the liberty-interest analysis, the magistrate judge concluded. AA 108–09. The magistrate judge neglected to review Mr. Hamner's claim that Defendants subjected him to unconstitutional conditions of confinement, apparently on the rationale that its analysis of Mr. Hamner's constitutionally inadequate medical care claim made it "unnecessary" to consider the conditions claim. AA 110, n.1. Mr. Hamner failed to state a claim for constitutionally inadequate medical care, the magistrate judge concluded, for two reasons. First, because Mr. Hamner had purportedly neglected to allege that Defendants "were aware of his need for mental health treatment or medication." AA 109. Second, because Mr. Hamner had purportedly failed to allege that Defendants "ignored or acted with deliberate indifference to such needs." AA 109–10.

Mr. Hamner filed a timely objection to the report, in which he reasserted the following. First, solitary confinement constituted an atypical and significant hardship in light of its harsh nature and his serious mental illness, but Defendants deprived him of the hallmarks of due process. AA 111–112, 114. Second, Defendants knew of but disregarded his serious medical and mental health care needs. AA 113–114.

Specifically, he explained that Defendants "were aware" that he was seriously mentally ill, yet was "not receiving his prescribed mental health medication" in solitary confinement. AA 113–14. Third, Defendants subjected him to unconstitutional conditions by holding him in solitary confinement notwithstanding their knowledge of both his specified serious mental illness and that solitary confinement "greatly exacerbated his mental health conditions." AA 113–14. Defendants were "deliberately indifferent" to his plight, however. AA 113–14.

On May 1, 2018, the district court adopted the magistrate judge's recommended disposition in full, and ordered the case closed. AA 115. Like the magistrate judge, the district judge neglected to review Mr. Hamner's conditions of confinement claim. AA 115.

STANDARD OF REVIEW

This Court reviews *de novo* the district court's *sua sponte* dismissal of Mr. Hamner's procedural due process claim pursuant to 28 U.S.C. § 1915(e)(2)(B), and takes all well-pleaded factual allegations as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). If the facts as pleaded state a claim for relief that is "plausible on its face," this Court must vacate the district court's judgment. *Id*. at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). The same standards of review apply to Mr. Hamner's Eighth Amendment claims dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). *Clemons v. Crawford*, 585 F.3d 1119, 1124–25 (8th Cir. 2009).

Because Mr. Hamner proceeded *pro se* at the district court, this Court construes his pleadings "liberally," and holds him to a "lesser pleading standard" than counseled parties. *E.g.*, *Whitson v. Stone Cty. Jail*, 602 F.3d 920, 922 n.1 (8th Cir. 2010); *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

SUMMARY OF THE ARGUMENT

1. Mr. Hamner more than adequately alleged that Defendants subjected him to unconstitutional conditions—a seven-month period of near total isolation and sensory deprivation—in light of the well-known deleterious effect of solitary confinement on those who suffer from mental illness. Yet the district court elected to forego consideration of Mr. Hamner's conditions of confinement claim, reasoning that its review of Mr. Hamner's constitutionally inadequate medical care claim obviated the need to do. The analyses are distinct, however, and the district court erred in conflating them. Moreover, Mr. Hamner satisfied his pleading burden.

2. Mr. Hamner pleaded a classic claim of constitutionally inadequate medical care. Mr. Hamner alleged that he suffered from an objectively serious medical condition—several serious mental illnesses. Mr. Hamner also alleged that Defendants knew of but disregarded that condition by frustrating his access to psychiatric medication and psychological treatment notwithstanding his "pleas" for assistance. The district court concluded, however, that Mr. Hamner had failed to state a claim.

That was error—Mr. Hamner satisfied his pleading burden.

3. Mr. Hamner alleged a clear and quintessential due process violation, yet the district court concluded that, as a matter of law, seven months of solitary confinement cannot entitle a prisoner to process. In determining whether solitary confinement amounts to an atypical and significant departure from the ordinary incidents of prison life, however, the district court was required to consider not only the duration of solitary confinement, but also the nature of that confinement. Because the district court failed to do so, its *sua sponte* dismissal was error. Further, at no time did Defendants provide Mr. Hamner with the hallmarks of due process—notice and a meaningful opportunity to respond. Indeed, their reason for subjecting Mr. Hamner to 203 days of solitary confinement remains a mystery.

ARGUMENT

Mr. Hamner, who is seriously mentally ill, endured disabling conditions of solitary confinement for more than 200 days. His clear and specific allegations regarding Defendants' disregard of the dangerous conditions that he was subjected to, in near-total isolation, are more than sufficient to state viable claims under the Eighth and Fourteenth Amendments. The district court erred in concluding otherwise. Its judgment should be vacated, and the case remanded for further proceedings.

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT MR. HAMNER FAILED TO ADEQUATELY PLEAD A CONDITIONS OF CONFINEMENT CLAIM.

To survive a 12(b)(6) motion to dismiss on a conditions of confinement claim, Mr. Hamner was required to plead—as he did—that Defendants were deliberately indifferent to the risk of serious harm solitary confinement posed in light of his serious mental illnesses. The district court determined that it need not review Mr. Hamner's conditions claim because it had already examined his constitutionally inadequate medical care claim. That was error for two reasons. First, the analyses are not interchangeable. Second, Mr. Hamner adequately pleaded a conditions of confinement claim.

A. Pleading Standards

A conditions of confinement claim contains both objective and subjective components. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To satisfy the objective requirement, Mr. Hamner was required to plead that he was subjected to a "substantial risk of serious harm." *Id*. That injury may not manifest until a later date is immaterial, for the objective prong is concerned with the risk of serious harm. *Id.* at 845. And the Eighth Amendment protects against physical and psychological injury. *See Rhodes v. Chapman*, 452 U.S. 337, 345–46, 364 (1981). Some conditions of confinement may establish an Eighth Amendment violation in combination when each alone would not

do so. *Tokar v. Armontrout*, 97 F.3d 1078, 1082 (8th Cir. 1996) (citing *Wilson v. Seiter*, 501 U.S. 294, 305 (1991)).

The "touchstone" of determining "when prison conditions pass beyond legitimate punishment and become cruel and unusual . . . is the effect upon the imprisoned.'" *Rhodes*, 452 U.S. at 364 (internal quotation marks omitted) (Brennan, J., concurring); *see also Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (holding Eighth Amendment violated based on punishment's effects on prisoner). When conditions "threaten[] the physical, mental, and emotional health and well-being of the inmates . . . the court must conclude that the conditions violate the Constitution." *Rhodes*, 452 U.S. at 364 (Brennan, J., concurring) (internal quotation marks omitted).

Because there is no "static test" for determining whether conditions are "cruel and unusual," courts must look to "the evolving standards of decency that mark the progress of a maturing society." *Id*. at 346 (internal quotation marks omitted). To determine those "evolving standards," courts may draw from a variety of "objective indicia" including history, legislation, national and international authorities. *Roper v. Simmons*, 543 U.S. 551, 575–78, 572–73 (2005).

Mr. Hamner must also satisfy the subjective requirement by pleading that Defendants were "deliberate[ly] indifferen[t]." *Farmer*, 511 U.S. at 834. That is, Mr. Hamner was required to allege that an "official knows of and disregards an excessive risk to inmate health or safety," including by failing to take reasonable measures to

abate the risk. *Id*. at 837, 847. The subjective prong of the Eighth Amendment does not require that defendants have actual knowledge of the serious risk of harm. Rather, subjective knowledge can be proved through circumstantial evidence including "from the fact that the risk of harm is obvious." *Hope*, 536 U.S. at 738; *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 529–31 (8th Cir. 2009) (en banc). Further, the lack of any legitimate penological justification for challenged conduct can support an inference that prison officials were deliberately indifferent. *Hope*, 536 U.S. at 737–38; *Nelson*, 583 F.3d at 530–31.

B. The District Court's Review of Mr. Hamner's Inadequate Medical Care Claim Did Not Obviate The Need To Review Mr. Hamner's Conditions Of Confinement Claim.

To survive a motion to dismiss on a conditions of confinement claim, Mr. Hamner was required to plead—as he did—that Defendants knew of but disregarded the risk of serious harm solitary confinement posed in light of his serious mental illness. *Brown v. Fortner*, 518 F.3d 552, 558 (8th Cir. 2008) (citing *Farmer*, 511 U.S. at 837). In contrast, to survive a motion to dismiss on a claim of constitutionally inadequate medical care, Mr. Hamner was required to plead that he suffered from an objectively serious medical condition and that Defendants knew of but failed to adequately treat that condition. *Saylor v. Nebraska*, 812 F.3d 637, 644 (8th Cir.), *as amended* (Mar. 4, 2016), *reh'g denied* (Mar. 28, 2016), *cert. denied sub nom. Saylor v. Kohl*, 137 S. Ct. 161 (2016). The analyses are independent, however, and

consideration of one does not obviate the need to review the other. *E.g.*, *id.*; *McRaven v. Sanders*, 577 F.3d 974, 982 (2009); *Dulany v. Carnahan*, 132 F.3d 1234, 1240 (8th Cir. 1997). For that reason, a conclusion that Mr. Hamner failed to state a claim for constitutionally inadequate medical care has no bearing on whether he failed to state a conditions of confinement claim.

C. Mr. Hamner Adequately Pleaded That Solitary Confinement Posed "A Substantial Risk Of Serious Harm" In Light Of His Serious Mental Illness.

With respect to the objective component, Mr. Hamner clearly pleaded—and records corroborate—that he was suffering from several serious mental illnesses and faced a substantial risk that his condition would be exacerbated by solitary confinement. *E.g.*, AA 73, 77, 89–90, 113. For 203 days, Mr. Hamner endured harsh conditions of solitary confinement, during which he was seldom permitted outside of a cell sealed off from the world by solid steel. *E.g.*, AA 14, 94, 97. Even on those occasions that Mr. Hamner was afforded an opportunity to shower or exercise, he was deprived of meaningful human contact. *E.g.*, AA 73–74, 94. ADOC personnel have classified Mr. Hamner as "seriously mentally ill" because he suffers from borderline personality disorder, post-traumatic stress disorder, and chronic depression. *E.g.*, AA 90, 113–14. He requires multiple medications to safely manage his mental illnesses. *E.g.*, AA 77. And Mr. Hamner in fact got sicker while he was in solitary confinement, where he experienced hallucinations, insomnia, depression, panic attacks, and anxiety.

E.g., AA 75. At times, Mr. Hamner even contemplated suicide as a consequence of his prolonged solitary confinement. *E.g.*, AA 90. All of this was predictable, Mr. Hamner alleged, because solitary confinement is well known to cause mentally ill prisoners to experience grave harm.[14] *E.g.*, AA 89–90.

And Mr. Hamner is correct—it is now beyond serious dispute that placing a prisoner in the conditions Mr. Hamner alleged is dangerous. Prolonged solitary confinement is devastating to human beings. Indeed, "[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social, and physical pathologies." Kenneth L. Appelbaum, *American Psychiatry Should Join the Call to Abolish Solitary Confinement*, 43 J. AM. ACAD. PSYCHIATRY & L. 406, 410 (2015) (quoting David H. Cloud et al., *Public Health and Solitary Confinement in the United States*, 105(1) AM. J. PUB. HEALTH 18, 21 (2015)) (alteration in original). As another expert observes, "[e]mpirical research on solitary and supermax-like confinement has consistently and unequivocally documented the harmful consequences of living in

[14] As set forth above, Defendants moved to dismiss on the basis that Mr. Hamner purportedly had failed to allege that (1) "his confinement was below reasonable standards or constituted unnecessary and wanton infliction of pain" or (2) that they were deliberately indifferent to his plight. Br. in Supp. of Mot. to Dismiss Pl's. Am. Compl. 1, Feb. 21, 2018, ECF No. 37, at 4–5. In light of Mr. Hamner's clear allegations, Defendants position is untenable.

these kinds of environments." Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 130 (2003).

Common injuries from solitary confinement include severe depression, hallucination, cognitive dysfunction, memory loss, anxiety, paranoia, insomnia, withdrawal, lethargy, stimuli hypersensitivity, and panic. *E.g.*, Haney, *supra*, at 130–31, 134 (collecting studies); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL'Y 325, 335–36, 349, 370–71 (2006). Life-threatening behavior, such as suicidal ideation, is all too common among prisoners in solitary confinement. Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1453 (2006). And advances in neurobiology, brain chemistry, and neuroimaging technologies have established that the types of traumatic psychological harms associated with solitary confinement often trigger detectable physical changes in the brain that can be accurately characterized as physical injury or illness. *See generally* Ajai Vyas et al., *Effect of Chronic Stress on Dendritic Arborization in the Central and Extended Amygdala*, 965 BRAIN RESEARCH 290, 290–94 (2003).

What's more, the adverse effects of solitary confinement may persist for decades after prisoners are released into a less restrictive environment such as general population or the community. Terry A. Kupers, *The SHU Post-Release Syndrome: A*

Preliminary Report, 17 CORRECTIONAL MENTAL HEALTH REPORT 81, 92 (March/April 2016). Finally, research consistently demonstrates that solitary confinement causes damage that is extreme in comparison to the harms experienced by prisoners in general population. Appelbaum, *supra*, at 410.

The serious damage wrought by solitary confinement is particularly pronounced for prisoners with mental illness. Inmates with mental illness are not only extraordinarily vulnerable to the well-documented harms caused by solitary confinement but are also at the greatest risk of having their suffering "deepen into something more permanent and disabling." Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 290 (2018). These prisoners are "far less likely to be able to withstand the stress, social isolation, sensory deprivation, and idleness" of solitary confinement. Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with Mental Illness*, 90 DEN. L. REV. 1, 41–42 (2012). When deprived of social interaction, "many prisoners with mental illness experience catastrophic and often irreversible psychiatric deterioration." *Id*. at 38–39 (internal quotations and citations omitted).

As a consequence of the scientific consensus that solitary confinement imposes grave harm, numerous reforms are occurring at both the federal and state level. For example, following the U.S. Government Accountability Office's (GAO) 2013 report

on the Federal Bureau of Prison (BOP)'s use of solitary, the BOP agreed to reduce its segregated population and submit to an independent assessment of its practices. U.S. GAO, Improvements Needed in [BOP] Monitoring and Evaluation of Impact of Segregated Housing, at 61–65, May 2013.[15] In January 2016, the U.S. Department of Justice issued a Report and Recommendations on solitary confinement, calling for a number of reforms aimed at reducing its use. U.S. DOJ Final Report, R. & R. Concerning the Use of Restrictive Housing, at 104–21.[16] At the state level, comprehensive reforms focused on reducing solitary confinement and improving the conditions of such confinement are in effect or underway in a majority of states. *See* Maurice Chammah, *Stepping Down from Solitary Confinement*, The Atlantic, Jan. 7, 2016 (noting that since 2009 at least thirty states have undertaken such reforms)[17]; U.S. DOJ Final Report, *supra*, at 72–78 (discussing state level reforms); *see also id*. at 79–92.

Leading correctional associations and administrators also condemn the practice of placing mentally ill prisoners in solitary confinement. For example, the American Corrections Association ("ACA") has concluded that seriously mentally ill prisoners such as Mr. Hamner should not be placed in prolonged solitary confinement.[18] *See*

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[15] *Available at* http://www.gao.gov/assets/660/654349.pdf.
[16] *Available at* https://www.justice.gov/archives/dag/file/815551/download.
[17] *Available at* https://www.theatlantic.com/politics/archive/2016/01/solitary-confinementreform/422565.
[18] The ACA defines "Extended Restrictive Housing" as "more than 30 days" of

ACA, *Performance Based Practices for Adult Local Detention Facilities*, 4th Ed. (2004); ACA, *Restrictive Housing Performance Based Standards* 41, 69 (2016). And the president-elect of the Association of State Correctional Administrators ("ASCA") "believe[s] that lengthy stays [in solitary confinement] manufacture or increase mental illness." Gary C. Mohr and Rick Raemisch, *Restrictive Housing: Taking the Lead*, Corrections Today (2015).[19] As but one more example, Rick Raemisch, the Director of the Colorado Department of Corrections, has called attention to the toxic combination of solitary confinement and mental illness. Indeed, after spending just one day in solitary, he questioned "[h]ow long [it] would take [] before Ad Seg chipped [] away" his "mind." Rick Raemisch, Opinion, *My Night in Solitary*, N.Y. TIMES, Feb. 21, 2014, at A25.[20] Whatever the precise measure, Director Raemisch was "confident that it would be a battle [he] would lose." *Id.* Director Raemisch has also emphasized that "[i]t is time for this unethical tool to be removed from the penal toolbox." Rick Raemisch, Opinion, *Why We Ended Long-Term Solitary Confinement in Colorado*, N.Y. TIMES, Oct. 12, 2017, at A25.[21]

"[h]ousing that separates the offender from contact with general population while restricting an offender/inmate to his/her cell for at least 22 hours per day." *Restrictive Housing Performance Based Standards August 2016* at 3. Mr. Hamner's diagnoses satisfy the ACA criteria for serious mental illness. *See id*. And in any event, the ADOC classified Mr. Hamner as seriously mentally ill. *See* AA 73–74; AA 76–77.

[19] *Available at* http://www.asca.net/pdfdocs/6.pdf.

[20] *Available at* https://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html.

[21] *Available at* https://www.nytimes.com/2017/10/12/opinion/solitary-confinement-

The view that prolonged solitary confinement is uniquely destructive is also increasingly shared by the federal judiciary. As set forth above, Justices Kennedy, Breyer, and Sotomayor have expressed serious constitutional concerns. S*upra* at 3–4. But they are not alone. *E.g.*, *Wallace v. Baldwin*, 895 F.3d 481, 484–85 (7th Cir. 2018) (citation omitted) (noting the "'scientific consensus . . . that prisoners held in solitary confinement experience serious, often debilitating—even irreparable—mental and physical harms,' including an increased risk of suicide."); *Palakovic v. Wetzel*, 854 F.3d 209, 225–26 (3d Cir. 2017) (describing the "robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation in solitary confinement"); *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 567–68 (3d Cir. 2017) (noting that both "psychological damage" and "[p]hysical harm" can result from solitary confinement, including "high rates of suicide and self-mutilation" as well as "more general physical deterioration"); *Shepard v. Quillen*, 840 F.3d 686, 691 (9th Cir. 2016) (recognizing significant harm suffered by prisoners in solitary confinement); *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015) ("Prolonged solitary confinement exacts a heavy psychological toll that often continues to plague an inmate's mind even after he is resocialized."); *Scarver v. Litscher*, 434 F.3d 972, 977 (7th Cir. 2006) (conditions of solitary confinement "aggravated the symptoms of [a prisoner's] mental illness and by doing

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so inflicted severe physical and especially mental suffering"); *Porter v. Clarke*, 290 F.Supp.3d 518, 530–31 (E.D.Va. 2018) (finding that "prolonged isolation and lack of stimulation can have devastating psychological and emotional consequences."); *Latson v. Clarke*, No. 1:16CV00039, 2017 WL 1407570, at *3 (W.D. Va. Apr. 20, 2017) ("the impacts of solitary confinement can be similar to those of torture and can include a variety of negative physiological and psychological reactions," effects that "are amplified in individuals with mental illness."); *Braggs v. Dunn*, No. 2:14CV601-MHT(WO), 2017 WL 2773833, at *51 (M.D. Ala. June 27, 2017) (finding solitary confinement "subject[ed] mentally ill prisoners to actual harm and a substantial risk of serious harm—including worsening of symptoms, increased isolation, continued pain and suffering, self-harm and suicide"); *People v. Annucci*, 180 F. Supp. 3d 294, 298 (S.D.N.Y. 2016) (noting that "[s]olitary confinement is a drastic and punitive designation, one that should be used only as a last resort and for the shortest possible time to serve the penal purposes for which it is designed" because "it is well known that such confinement causes deterioration of the mental and physical condition of inmates."); *Coleman v. Brown*, 28 F. Supp. 3d 1068, 1095 (E.D. Cal. 2014) (finding that "placement of seriously mentally ill inmates in [segregation] can and does cause serious psychological harm, including decompensation, exacerbation of mental illness, inducement of psychosis, and increased risk of suicide").

The sea change described above cannot be disregarded—the objective

component of the Eighth Amendment responds to "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Consistent with a society that has come to regard as inhumane the practice of housing the mentally ill in solitary confinement, Mr. Hamner alleged that the isolating conditions that Defendants subjected him to violated the objective prong of the Eighth Amendment by placing him at grave risk of serious harm. Mr. Hamner has satisfied his initial pleading burden.

D. Mr. Hamner Adequately Pleaded That Defendants Were Deliberately Indifferent to the Substantial Risk of Serious Harm Posed by His Solitary Confinement In Light Of His Serious Mental Illness.

Mr. Hamner adequately alleged that Defendants were aware that he suffered from serious mental illnesses, yet disregarded the risk posed by prolonged solitary confinement. Specifically, he explained that "[D]efendants all knew that plaintiff was a mentally ill inmate." AA 105. Mr. Hamner also asserted that Defendants "knew that placing him in segregation was a future risk to his health and safety." AA 105. Indeed, Mr. Hamner stated that Defendants were aware that solitary confinement "greatly exacerbated his mental health conditions." AA 113–14. These allegations are corroborated by the record. *E.g.*, AA 89–90, 93, 94, 96. And both ADOC regulations and the review forms that Defendants periodically completed provide further evidence that Defendants were aware that solitary confinement placed Mr. Hamner at risk. *E.g.*, ADOC 14-07(D)(2) (regulation describing requirements to monitor psychological

health of prisoners in solitary confinement); AA 65 (periodic review forms describing requirements to monitor psychological health of prisoners in solitary confinement). For more than 203 days, however, Defendants refused to release Mr. Hamner to general population notwithstanding the absence of a genuine or even articulated rationale. And the lack of any legitimate penological justification for Mr. Hamner's solitary confinement is additional circumstantial evidence that prison officials were deliberately indifferent. *E.g.*, *Hope*, 536 U.S. at 737–38; *Nelson*, 583 F.3d at 530–31.

Moreover, the risk of harm to which Defendants subjected Mr. Hamner was obvious. *See Hope*, 536 U.S. at 738; *Nelson*, 583 F.3d at 529–31. Indeed, no competent corrections official tasked with implementing solitary confinement policies could be unaware of the risks posed to mentally ill prisoners by solitary confinement. *E.g.*, *Shoatz v. Wetzler,* No. 2:13-cv-0657, 2016 WL 595337, at *9 (W.D. Pa. Feb 2, 2016) (noting it should not strike anyone "as rocket science" that solitary substantially increases the risks of mental illness) (internal citations omitted); *Wilkerson v. Stadler*, 639 F. Supp. 2d 654, 680 (M.D. La. 2007) ("Any person in the United States who reads or watches television should be aware that lack of adequate exercise, sleep, social isolation, and lack of environmental stimulation are seriously detrimental to a human being's physical and mental health."). At the very least, defendants are presumed to keep abreast of developments in their field. *See Nelson*, 583 F.3d at 533–34. It would be unusual indeed if Defendants had failed to noticed that leading

correctional associations and prison administrators have clearly condemned the practice of inflicting solitary confinement on the mentally ill. It would be similarly hard to miss the fact that a majority of states had restricted the use of solitary confinement.

In light of the evidence in the record below, the lack of a legitimate penological necessity, and the clear national movement away from subjecting the mentally ill to prolonged solitary confinement, Mr. Hamner has satisfied his initial burden to plead that Defendants knew of but disregarded an excessive risk to his health or safety.

II. THE DISTRICT COURT ERRED IN CONCLUDING THAT MR. HAMNER FAILED TO ADEQUATELY PLEAD DELIBERATE INDIFFERENCE TO HIS SERIOUS MENTAL HEALTH NEEDS.

"Deliberate indifference to a prisoner's serious medical needs is cruel and unusual punishment in violation of the Eighth Amendment." *Gordon ex rel. Gordon v. Frank*, 454 F.3d 858, 862 (8th Cir. 2006) (citing *Estelle*, 429 U.S. at 106). To adequately plead an Eighth Amendment violation arising from failure to treat his mental health needs while in solitary confinement, Mr. Hamner was required to allege "'(1) that [he] suffered objectively serious medical needs and (2) that the prison officials actually knew of but deliberately disregarded those needs.'" *Plemmons v. Roberts*, 439 F.3d 818, 823 (8th Cir. 2006) (quoting *Dulany v. Carnahan*, 132 F.3d 1234, 1239 (8th Cir. 1997)). The Eighth Circuit has recognized various ways of proving deliberate indifference, including "by showing a defendant intentionally

delayed or denied access to medical care." *Allard v. Baldwin*, 779 F.3d 768, 772 (8th Cir. 2015). In particular, "[r]epeated examples of delayed or denied medical care may indicate a deliberate indifference by prison authorities to the suffering that results." *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (internal quotations and citations omitted); *see also Todaro v. Ward*, 565 F.2d 48, 52 (2d Cir. 1977).

Mr. Hamner's complaint sufficiently alleged that prison officials acted with deliberate indifference towards his serious mental health needs by repeatedly frustrating his access to prescribed medication and ignoring his requests for psychological treatment. First, there is no question that Mr. Hamner's mental illness was an "objectively serious medical need." *See White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) ("[P]sychological disorders may constitute a serious medical need."); *see also Coleman v. Rahija*, 114 F.3d 778, 784 (8th Cir. 1997) ("A serious medical need is 'one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a layperson would easily recognize the necessity for a doctor's attention.'") (citing *Camberos v. Branstad*, 73 F.3d 174, 176 (8th Cir. 1995)). Therefore, prison officials were "under a constitutional duty to see that [his medical treatment was] furnished." *Crooks v. Nix*, 872 F.2d 800, 804 (8th Cir. 1989) (citing *Estelle*, 429 U.S. at 103).[22]

[22] It is immaterial that Defendants are not medical professionals, because Defendants were responsible for facilitating Mr. Hamner's medical treatment in solitary confinement. *E.g.*, *Dadd v. Anoka Cty.*, 827 F.3d 749, 755–56 (8th Cir. 2016) (quoting

Second, Mr. Hamner sufficiently alleged Defendants' deliberate indifference to his serious mental health needs. Specifically, he explained that his prison-prescribed psychiatric medication went undelivered with alarming frequency when he was in solitary, and that he informed Defendants of that neglect. *E.g.*, AA 74, 77, 93, 113. He also pleaded that the Defendants in charge of his unrelenting solitary knew that he was mentally ill, yet ignored his pleas for psychological counseling while in solitary. *E.g.*, AA 89–90. Defendants' deliberate indifference may also be inferred through these repeated instances of denied treatment. *See DeGidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990) (affirming the District Court's finding that a prison's response to a tuberculosis outbreak demonstrated "a consistent pattern of reckless or negligent conduct … sufficient to establish deliberate indifference to serious medical needs."). Due to the repetitive nature of Defendants' violations, Mr. Hamner's claim is easily

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Johnson-El v. Schoemehl, 878 F.2d 1043, 1055 (8th Cir. 1989)) (finding deliberate indifference on the part of jail deputies, who were not medical professionals, that failed to distribute the plaintiff's pain medication prescription); *Langford v. Norris*, 614 F.3d 445, 460–61 (8th Cir. 2010) (finding a cognizable claim for deliberate indifference to a serious medical need against a prison administrator, even though "he [was] not a medical doctor and [did] not personally treat inmates' medical needs," because prison officials "[have] a constitutional duty to see that prisoners in [their] charge who need medical care receive it."); *Harris v. Norwood*, No. 1:13-CV-01023, 2017 WL 487040, at *8 (W.D. Ark. Jan. 12, 2017), *report and recommendation adopted*, No. 13-CV-01023, 2017 WL 487033 (W.D. Ark. Feb. 6, 2017) (rejecting Defendants' argument "that as non-medical professionals they were not in control of Plaintiff's medical treatment," and finding that "they did control whether Plaintiff was given access to medical care," and "whether Plaintiff was provided his previously prescribed medication and taken to a previously scheduled medical appointment….").

distinguished from failure to treat claims sounding in negligence, and it should have proceeded. *Cf. Spann v. Roper*, 453 F.3d 1007, 1008–09 (8th Cir. 2006) (finding at the summary judgment stage that a nurse was not deliberately indifferent when she inadvertently gave prisoner-plaintiff someone else's psychiatric medication one time); *Hicks v. Bradley*, No. 5:14-CV-05372, 2016 WL 4014096, at *6 (W.D. Ark. July 6, 2016), *report and recommendation adopted*, No. 5:14-CV-5372, 2016 WL 4007687 (W.D. Ark. July 26, 2016) (dismissing Plaintiff's denial of medical care claim where Plaintiff refused to get dressed before approaching the medical cart, but "received the medication later that day"); *Jones v. Hefner*, No. 1:09CV76SNLJ, 2011 WL 1086059, at *5 (E.D. Mo. Mar. 22, 2011) (granting summary judgment in favor of defendants where plaintiff had conceded in his deposition that the prisoner medication record was accurate, demonstrating that plaintiff actually received prescription pain pills daily, and where two specific pain pills that Plaintiff did not receive were in his wife's possession).

Without considering the weight of his allegations, the district court summarily dismissed Mr. Hamner's claim that Defendants hindered his ability to receive constitutionally adequate medical care. In recommending dismissal, the district court cited to Mr. Hamner's allegation that his "'pleas' for psychological treatment were 'ignored'" and that he "'was deprived of his … medication as prescribed by his healthcare provider while he was housed in administrative segregation.'" AA 109-10.

However, it found that Mr. Hamner failed to allege that "Defendants ignored or acted with deliberate indifference to such needs." AA 109-10. In fact, Mr. Hamner had alleged just that. *E.g.*, AA 89–90. Additionally, the court found that Mr. Hamner failed to allege "Defendants … were aware of his need for mental health treatment or medication." Mr. Hamner, however, stated as much. *E.g.*, AA 105. And, in any event, that Defendants knew of the risk "may be inferred from the record." *Gordon ex rel. Gordon*, 454 F.3d at 862; *see also Gregoire v. Class,* 236 F.3d 413, 417–419 (8th Cir. 2000). The record here shows that Mr. Hamner was diagnosed and prescribed mental health medication, yet prison personnel acknowledged that he was not regularly receiving it while he was in solitary confinement. *E.g.*, AA 74, 77, 93, 113. Further, Mr. Hamner specifically explained that Defendants were aware of these troubling failures. *E.g.*, AA 77, 113.

It bears noting that Defendants' rationale for dismissing Mr. Hamner's medical care claim—*i.e.*, that he alleged only psychological injury—is erroneous as a matter of fact and law. First, as set forth above, the extreme psychological trauma inflicted by solitary confinement causes physical injury. *See supra* at 28. Second, Mr. Hamner alleged that solitary confinement caused him physical injury. AA 75. And, in any event, even had Mr. Hamner suffered only emotional injury, his claim would not be barred by the so-called physical injury requirement of the Prison Litigation Reform

Act, although he might only be entitled to recover nominal and punitive damages. *E.g.*, *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004) (citing cases).

Taking his allegations as true at the dismissal stage, Mr. Hamner has adequately pleaded that Defendants interfered with his access to medical care and were deliberately indifferent in doing so. The district court's contrary conclusion is impossible to square with the record, and its dismissal should be vacated.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT MR. HAMNER FAILED TO ADEQUATELY PLEAD A PROCEDURAL DUE PROCESS CLAIM

A plaintiff adequately pleads a procedural due process claim if he: (1) outlines a protected liberty interest with respect to the nature of his confinement; and (2) demonstrates that he did not receive the process that was due with respect to his liberty interest. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Mr. Hamner plausibly alleged both elements of his procedural due process claim and the *sua sponte* dismissal of this claim must therefore be reversed.

A. Mr. Hamner's Amended Complaint Adequately Pleads Conditions of Confinement Sufficient to Create a Liberty Interest.

The Due Process Clause of the Fourteenth Amendment "protects persons against deprivations of life, liberty, or property." *Wilkinson*, 545 U.S. at 221; *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Prisoners retain a liberty interest in freedom from restraints that impose "atypical and significant hardship" relative to "ordinary incidents of prison life." *Id.* at 222–23. Mr. Hamner has adequately pleaded that his

placement was "atypical and significant" given its duration and harsh nature. Accordingly, Defendants owed Mr. Hamner meaningful process at the commencement of and throughout the duration of Mr. Hamner's solitary confinement.

The district court cut off Mr. Hamner's due-process claim at this first step because, in its view, his confinement did not amount to an atypical and significant hardship. But, as its general terms naturally suggest, that standard does not lend itself to a one-size-fits-all analysis. As the United States Supreme Court and every federal court of appeals, including this Court, hold, whether a given restraint imposes an "atypical and significant hardship"—and thus infringes a cognizable liberty interest—ultimately depends on a fact-specific analysis of multiple factors, including both the nature and duration of an inmate's segregation. *E.g.*, *Sandin*, 515 U.S. at 486 (considering both "degree of restriction" imposed by particular solitary confinement regime and its 30-day duration before concluding that plaintiff did not suffer an "atypical, significant deprivation"); *Skinner v. Cunningham*, 430 F.3d 483, 487 (1st Cir. 2005) (reviewing both "character" of particular solitary confinement program and its duration); *Davis v. Barrett*, 576 F.3d 129, 133, 135 (2d Cir. 2009) (vacating with instructions to review a "detailed factual record" of restrictions imposed during 55-day solitary confinement stint for purposes of considering whether plaintiff suffered "atypical and significant hardship"); *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 560 (3d Cir. 2017) (assessing whether Plaintiff suffered "atypical and significant"

hardship using a "two-factor inquiry" requiring analysis of both restrictions and duration); *Incumaa*, 791 F.3d at 529–32 (holding that the "district court's conclusion that Appellant had no liberty interest … was [] erroneous," where Appellant *inter alia* showed "severe" conditions in solitary, including limited out-of-cell time and "the inability to socialize with other inmates…."); *Wilkerson v. Goodwin*, 774 F.3d 845, 855 (5th Cir. 2014) (analyzing both "severity of the restrictions" and "duration of the solitary confinement" in considering whether plaintiff has a liberty interest); *Harden-Bey v. Rutter*, 524 F.3d 789, 793–95 (6th Cir. 2008) (holding that both the "nature and duration of an inmate's segregation may affect whether the State has implicated a liberty interest…"); *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 694, 697 (7th Cir. 2009) (in connection with a 240-day solitary stint, the court must "analyz[e] the combined import of the duration of the segregative confinement *and* the conditions endured by the prisoner during that period."); *Portley-El v. Brill*, 288 F.3d 1063, 1065 (8th Cir. 2002) (affirming dismissal of due process claim regarding 30 days in solitary confinement, where plaintiff did not describe the solitary conditions and failed to cure the defect despite an opportunity to do so); *Serrano v. Francis*, 345 F.3d 1071, 1078–79 (9th Cir. 2003) (separately analyzing *inter alia* "the duration of the condition, and the degree of restraint imposed"); *Estate of DiMarco v. Wyo. Dep't of Corr., Div. of Prisons*, 473 F.3d 1334, 1342–44 (10th Cir. 2007) (separately analyzing *inter alia* conditions of confinement and duration); *Delgiudice v. Primus*, 679 F. App'x 944,

947 (11th Cir. 2017) (unpublished) (citing *Magluta v. Samples*, 375 F.3d 1269, 1282 (11th Cir. 2004) (noting that "[b]oth the period of time and the severity of the hardship[]," including opportunities for contact with others, is relevant to the atypical and significant analysis)). Notably, this multi-factor approach is necessary even when a court is called upon to review a far shorter period of solitary confinement than endured by Mr. Hamner. *E.g.*, *Kervin v. Barnes*, 787 F.3d 833, 837 (7th Cir. 2015) (30 days); *Palmer v. Richards*, 364 F.3d 60, 65–67 (2d Cir. 2004) (77 days); *Mitchell v. Horn*, 318 F.3d 523, 527, 531–33 (3d Cir. 2003) (90 days); *Gaines v. Stenseng*, 292 F.3d 1222, 1225–26 (10th Cir. 2002) (75 days).

Although the district court's failure to review the restrictions and deprivations that Mr. Hamner alleged is, standing alone, reversible error, that mistake was compounded when the court ignored Mr. Hamner's serious mental illnesses in considering whether solitary confinement imposed an atypical and significant hardship. Mentally ill prisoners suffer more acutely in conditions of solitary confinement, *see supra* at 29, and a court cannot accurately assess whether solitary confinement constitutes an atypical and significant hardship without taking account of that important difference. *E.g.*, *Wheeler v. Butler*, 209 F. App'x 14, 16 (2d Cir. 2006) (noting that "medical need may bear upon the atypicality of [plaintiff's] punishment"); *Serrano*, 345 F.3d at 1079 ("[T]he conditions imposed on [plaintiff] in the SHU, by virtue of his disability, constituted an atypical and significant hardship

on him."); *Shoats v. Horn,* 213 F.3d 140, 144 (3d Cir. 2000) (psychological harm relevant to atypical and significant analysis); *Colon v. Howard*, 215 F.3d 227, 232 (2d Cir. 2000) ("psychological effects" of solitary confinement relevant to the atypical and significant analysis); *Latson*, 249 F. Supp. 3d at 847, 860–61 (denying motion to dismiss mentally ill prisoner's procedural due process claim based on a six-month solitary confinement stint); *Hernandez v. Cox*, 989 F. Supp. 2d 1062, 1068–69 (D. Nev. 2013) (noting that "particular" characteristics of plaintiff informed whether a 168-day solitary confinement constituted an atypical and significant hardship); *Farmer v. Kavanagh*, 494 F. Supp. 2d 345, 363, 366–70 (D. Md. 2007) (taking into account conditions and plaintiff's "medical and mental health disorders" before concluding that a 9-month solitary confinement term constituted an atypical and significant hardship).

The district court concluded that Mr. Hamner's solitary confinement did not constitute an atypical and significant hardship after examining the duration of Mr. Hamner's solitary confinement and turning a blind eye to everything else. Thus, while the court acknowledged that Mr. Hamner had been placed in solitary confinement, it disregarded his specific allegations concerning the conditions of that confinement and his serious mental illness. Because Mr. Hamner sufficiently pleaded the nature and duration of his confinement, the district court erred in determining that Mr. Hamner had not adequately alleged an atypical and significant hardship.

B. Mr. Hamner Did Not Receive the Process He Was Due.

While the district court's interpretive error regarding Mr. Hamner's liberty interest is itself reversible error, it bears noting that Mr. Hamner also adequately alleged that he was denied due process.

Where, as here, a prisoner is subjected to atypical and significant hardship, he is entitled to meaningful periodic reviews of his segregation status to ensure that "administrative segregation [is not] used as a pretext for indefinite confinement of an inmate." *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983)*; see also, e.g., Williams v. Hobbs*, 662 F.3d 994, 1007, 1013 (8th Cir. 2011); *Williams v. Norris*, 277 F. App'x 647, 649 (8th Cir. 2008) (unpublished); *Kelly v. Brewer*, 525 F.2d 394, 400 (8th Cir. 1975); *Proctor v. LeClaire*, 846 F.3d 597, 609–12 (2d Cir. 2017)*; Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d at 575–76; *Incumaa*, 791 F.3d at 534; *Isby v. Brown,* 856 F.3d 508, 527–28 (7th Cir. 2017); *Selby v. Caruso*, 734 F.3d 554, 559 (6th Cir. 2013); *Magluta v. Samples*, 375 F.3d 1269, 1279 n.7 (11th Cir. 2004). Such reviews cannot be hollow formalities or reviews in name only. *E.g., Williams v. Norris*, 277 F. App'x at 649–50 (question of fact existed whether officials conducted meaningful reviews because they "offered no evidence, for example, about [Plaintiff's] behavior or demeanor while in ad seg, his psychological status, or their day-to-day dealings with him, nor any evidence from which it could be concluded that [Plaintiff] had a generally volatile or disruptive character."); *see also, e.g.*, *Isby*, 856 F.3d at 529; *Proctor*, 846

F.3d at 612; *Incumaa*, 791 F.3d at 534. Further, "it should be emphasized that the reason or reasons for the segregation must not only be valid at the outset but must continue to subsist during the period of the segregation." *Kelly*, 525 F.2d at 399–402; *see also* Ark. Dept. of Correction, Admin. Directive 14-07(D)(1) ("Classification Committee . . . must review the status of every inmate assigned to administrative segregation classification every seven (7) days for the first two months, and every thirty (30) days thereafter to determine if the reason(s) for placement continue to exist.").

In construing the allegations in the light most favorable to Mr. Hamner, he has adequately pleaded that prison officials denied him the process he was due for three reasons. First, his much delayed 72-hour review provided no justification for his solitary confinement. *E.g.*, AA 17, 22–23. Nor did subsequent reviews offer additional meaningful insight. For the first four months, in fact, Defendants reported no rationale for their decision to consign Mr. Hamner to solitary confinement. *E.g.*, AA 34, 41, 45, 49, 54, 58, 65. The complete absence of any reason for Mr. Hamner's continued solitary confinement is overwhelming circumstantial evidence that these were not meaningful reviews. *E.g.*, *Williams*, 277 F. App'x at 649–50; *Isby*, 856 F.3d at 527–29; *Proctor*, 846 F.3d at 612–14. It was a check-the-box exercise, and sometimes Defendants did not even bother to take that step. Second, almost four months after he was initially transferred to solitary confinement, Defendants finally suggested that

undisclosed, unspecific, and undefined "security reasons" motivated his continuing solitary confinement. *E.g.*, AA 65. This opaque, post-hoc is further circumstantial evidence that Defendants' reviews were hollow formalities—Mr. Hamner had no opportunity to meaningfully contest a rationale that Defendants would not define. *E.g.*, *Williams*, 277 F. App'x at 649–50; *Isby*, 856 F.3d at 529; *Proctor*, 846 F.3d at 612–14; *Incumaa*, 791 F.3d at 534. Third, Mr. Hamner filed more than a dozen grievances designed to elicit a rationale for his unrelenting solitary confinement. *E.g.*, AA 20, 38, 40, 44, 52, 48, 57, 61, 64, 76. Despite the sum total of these efforts, Defendants' reason for placing and retaining Mr. Hamner in solitary confinement is still unknown. Mr. Hamner has satisfied his initial burden to plead that Defendants denied him the hallmarks of due process.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant, Charles Hamner, respectfully asks the Court to vacate the district court's Order dismissing his claims and remand the case to the district court for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 11,622 words.

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/s/ Daniel M. Greenfield
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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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