No. 21-____

IN THE
Supreme Court of the United States

DENNIS WAYNE HOPE,

Petitioner,

v.

TODD HARRIS, ET. AL.

Respondents.

On Petition for a Writ of Certiorari to the
U.S. Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Dennis Wayne Hope has been in solitary confinement since 1994—for 27 years (and counting). The court below in a 2-1 opinion, over a dissent by Judge Haynes, held that solitary confinement cannot violate the Eighth Amendment, no matter how long it is imposed for, its impact on a prisoner's mental and physical health, or the rationale for imposing it. The first question presented is:

> Whether decades of solitary confinement can, under some circumstances, violate the Eighth Amendment, as at least five circuits have held, or whether solitary confinement can never run afoul of the Eighth Amendment, as the court below and three other circuits have held.

II. Mr. Hope alleges that the regular "reviews" of his isolation are sham proceedings, where officials sign off on his continuing isolation without even bothering to review his file. The court below held—again, 2-1—that those proceedings comply with the Due Process Clause. The second question presented is:

> Whether the Due Process Clause requires hearings where prison officials are open to the possibility of a different outcome, as at least seven circuits have held, or whether a hearing that rubber-stamps a prisoner's placement suffices, as the court below held.

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Petitioner Dennis Wayne Hope respectfully petitions this Court for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion (Pet. App. 2a-31a) appears at 861 F. App'x 571. The district court's relevant rulings (Pet. App. 32a-58a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 2021. Petitioner timely filed a petition for rehearing *en banc*, which was denied on September 1, 2021. Justice Alito granted a 60-day extension of the period for filing this petition to January 28, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

INTRODUCTION

Since 1994, Dennis Wayne Hope has spent virtually every waking minute alone in a cell somewhere between the size of an elevator and a compact parking space. Pet.App.61a-62a¶12. He eats alone, exercises alone, and worships alone. Pet.App.62a-64a¶¶13-16. His only human contact is with the guards who strip search and handcuff him. Pet.App.62a-63a¶14; Pet.App.63a-64a¶16. He has alleged that decades of isolation have led to hallucinations and thoughts of suicide and that there is no reason for his ongoing solitary confinement. Pet.App.71a¶28, Pet.App.74a-75a¶35.

In a 2-1 opinion, over a dissent by Judge Haynes, the panel below held that those allegations do not state a claim because solitary confinement *never* violates the Eighth Amendment, no matter how long it is imposed for, how devastating its effects on a prisoner, or how penologically unnecessary. That conclusion is at odds with the approach of the Second, Third, Fourth, Seventh, and Eleventh circuits, all of which hold that prolonged solitary confinement can violate the Eighth Amendment, at least in some circumstances.

It is also contrary to the original meaning of the Eighth Amendment. John Stinneford, the scholar whose historical research regarding the original understanding of the Eighth Amendment this Court has embraced, has explained that long-term solitary confinement is a paradigmatic "unusual" punishment—unheard of at the Founding, attempted and quickly aborted in the following centuries, and resurrected only with Mr. Hope's generation of prisoners. John F. Stinneford, *Experimental*

Punishments, 95 NOTRE DAME L. REV. 39, 65-66, 71-72 (2019); *see Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (quoting John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008)).

And near-total isolation for any length of time, let alone for decades, has always been understood to be "cruel" beyond measure: Newspapers at the Founding reported that prisoners confined to even a few months of solitary confinement begged to be hanged, LOUIS P. MASUR, RITES OF EXECUTION 82-83 (1989); a century later, this Court said that solitary confinement imposed "a further terror" even over and above a death sentence, *In re Medley*, 134 U.S. 160, 170 (1890); and contemporary research confirms that solitary confinement has devastating psychological and physical effects, *e.g.*, *Porter v. Clarke*, 923 F.3d 348, 356 (4th Cir. 2019).

The panel also held—again over a dissent by Judge Haynes—that the Due Process Clause was satisfied by sham "hearings" at which prison administrators use the time to talk about everything but Mr. Hope's case, then sign off on his continued isolation. Pet.App.28a-29a. That decision breaks ranks with every circuit to consider the question, all of which hold the Due Process Clause demands hearings that are, at a minimum, open to the possibility of a different outcome. And the Due Process Clause demands particular scrutiny in this context because allowing prison administrators to impose this sort of punishment is a recent innovation; from the Founding until recent decades, solitary confinement of any

length was only ever imposed by a court and pursuant to a criminal statute.

More than 500 Texas prisoners have served more than 10 years in solitary confinement, and an extraordinary 138 Texas prisoners have served more than 20 years in isolation. This Court should grant certiorari to confirm that, at least when it comes to solitary confinement measured in decades, rather than weeks, months, or even years, the Constitution imposes *some* constraints.

STATEMENT OF THE CASE

1. Mr. Hope has spent between 22 and 24 hours per day alone in a 54-square-foot cell for the past 27 years. Pet.App.61a-62a¶12, Pet.App.65a¶17. When Mr. Hope is removed from his cell to exercise, he is taken to another enclosure, where he exercises alone. Pet.App.65a¶17. He does not socialize with other prisoners, participate in religious activities, work, or attend group vocational programs. Pet.App.63a-64a¶16. Prison officials have allowed Mr. Hope one personal phone call since 1994. *Id.* At this point, "Mr. Hope has spent more time in solitary confinement than he was alive prior to coming to prison." Pet.App.78a¶41.

Mr. Hope's quarter century in solitary confinement has taken a toll. He is afflicted by visual and auditory hallucinations and suicidal ideation. Pet.App.71a¶28. He suffers from anxiety and depression. *Id.* And he endures chronic pain from constant confinement in cramped quarters. Pet.App.70a-71a¶27.

Mr. Hope was initially placed in solitary confinement in 1994, following an escape attempt. After he spent 11 years in solitary confinement, a

committee of prison security personnel concluded he was no longer an "escape risk." Pet.App.78a¶42. But another 16 years later, Mr. Hope remains in solitary confinement. Pet.App.76a¶38. An administrative committee "reviews" Mr. Hope's placement twice a year, but in practice, those reviews merely rubber-stamp Mr. Hope's ongoing solitary confinement, notwithstanding that he is no longer an escape risk. Pet.App.72a-75a¶¶31-35; Pet.App.77a¶39. So pre-ordained are the outcomes of Mr. Hope's reviews that committee members have stopped pretending to even read Mr. Hope's file; instead, they make small talk about, for instance, "the availability of firewood and whether or not it can be delivered." Pet.App.71a-72a¶30.

2. In 2018, Mr. Hope filed suit under 42 U.S.C. § 1983. As relevant here, Mr. Hope raised a claim that his ongoing isolation violated the Eighth Amendment and that the sham reviews violated the Fourteenth Amendment's Due Process Clause. Defendants moved to dismiss Mr. Hope's complaint. The district court found that Mr. Hope failed to state any claims on which relief might be granted.[1]

3. The Fifth Circuit reversed as to claims not at issue in this petition,[2] but in a 2-1 opinion affirmed

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[1] A magistrate judge also found that Mr. Hope did not have standing and that sovereign immunity barred his claims. Pet.App.46a-49a. The Fifth Circuit rejected those arguments. Pet.App.4a-11a & nn.3-4.

[2] The claims not at issue in this petition are: (1) A First Amendment retaliation claim, based on Mr. Hope's allegations that since 2012, he has been put in a new cell on a near-weekly basis as punishment for exercising his First Amendment rights.

the dismissal of Mr. Hope's claim that his quarter century of solitary confinement violated the Eighth Amendment. Although the majority of Mr. Hope's briefing focused on that claim, the panel rejected it in two cryptic sentences in a footnote:

> Similarly, to the extent that Hope has alleged an Eighth Amendment violation based on the sheer length of his confinement, this claim also fails. As the Supreme Court has explained, "the length of isolation sentences was not considered in a vacuum." *Hutto*[*v. Finney*, 437 U.S. 678, 685 (1978)]; *see also Grabowski v. Lucas*, No. 94-60117, 1994 WL 652674, at *3 (5th Cir. Nov. 11, 1994) (per curiam).

Pet.App.17a n.5.

The two judges in the majority also held that Mr. Hope's complaint failed to state a claim for a violation of the Due Process Clause. Pet.App.12a-15a. They found that Mr. Hope's ongoing solitary confinement implicated a "liberty interest" that entitled him to the protections of the Due Process Clause, but that the

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The Fifth Circuit reversed the dismissal of this claim. Pet.App.15a-17a. (2) An Eighth Amendment claim for "sometimes unsanitary conditions of Mr. Hope's cells, including urine, feces, and mold on the walls, floor, and showers, insufficient cleaning supplies, and exposure to pepper spray and tear gas without decontamination." Pet.App.16a-17a, 20a-22a. The Fifth Circuit reversed the dismissal of this claim as well. Pet.App.20a-24a. (3) An Eighth Amendment claim for the denial of psychiatric treatment. Mr. Hope did not press this claim on appeal to the Fifth Circuit. Pet.App.21a n.6.

periodic rubber-stamping of that placement satisfied the Constitution. Pet.App.13a-14a.

Judge Haynes dissented. As for Mr. Hope's claim that decades of isolation have wreaked havoc on his mental health and thus violate the Eighth Amendment, she concluded he should be allowed to proceed on two theories. First, Mr. Hope's solitary confinement violated the Eighth Amendment because it was, objectively, a sufficiently serious deprivation and because prison officials, subjectively, acted with deliberate indifference to that deprivation (one defendant, for example, knew of the effects long-term isolation had on Mr. Hope yet refused to order his release from solitary confinement). Pet.App.25a-28a. Alternatively, Judge Haynes held that Mr. Hope's allegations stated an Eighth Amendment claim because "the State's continued reliance on Hope's escape—over two decades ago—to justify keeping him in solitary confinement constitutes 'grossly disproportionate' punishment." Pet.App.30a n.6.

Judge Haynes would also have found that Mr. Hope stated a violation of the Due Process Clause. Pet.App.28a-30a. "In particular," she wrote, "if Hope is correct that the forty-eight SCC hearings were a 'sham,' then it would be as if he never attended any hearings at all." Pet.App.29a.

The Fifth Circuit denied Mr. Hope's petition for rehearing *en banc*. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve Whether Decades Of Solitary Confinement Can, In At Least Some Circumstances, Violate The Eighth Amendment.

The court below held that Mr. Hope's prolonged solitary confinement could not violate the Eighth Amendment. In so doing, it deepened a clear split among the federal circuits: At least five circuits hold that solitary confinement can violate the Eighth Amendment, depending on its length, its impact on a prisoner's mental and physical health, and its necessity. That rule accords with this Court's cases and with the original understanding of the Eighth Amendment. This Court should grant certiorari to resolve this entrenched split.

A. The Circuits Are Split On This Question.

The panel below did not reject Mr. Hope's Eighth Amendment claim because he remained healthy despite his decades of isolation or because there was no feasible alternative placement for him or because a quarter century of solitary confinement simply wasn't long enough to raise constitutional concerns. In fact, it said nothing at all about Mr. Hope's particular claim. Instead, it held that solitary confinement simply cannot violate the Eighth Amendment. That proposition is the subject of a decades-old circuit split that shows no signs of resolving.

1. Five Circuits Hold That Long-Term Solitary Confinement Can, In Some Circumstances, Violate The Eighth Amendment.

At least five circuits hold that solitary confinement can violate the Eighth Amendment.

Most recently, in *Porter v. Pennsylvania Department of Corrections*, the Third Circuit held that a prisoner who had spent decades in solitary confinement made out an Eighth Amendment violation at summary judgment. 974 F.3d 431 (3d Cir. 2020). That Court applied the "two-prong test" for violations of the Eighth Amendment established in *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). As for the objective prong of the test, the Third Circuit concluded that the plaintiff faced a sufficiently "substantial risk of serious harm" because he had shown that lengthy solitary confinement was likely to result in grave psychological consequences. *Porter*, 974 F.3d at 441-42. As for the subjective prong of the test, which requires showing "deliberate indifference" to that risk of harm, the Third Circuit held that "the substantial risks of prolonged solitary confinement are obvious, longstanding, pervasive, [and] well-documented." *Id.* at 445-46.

The Fourth Circuit is in accord. In *Porter v. Clarke*, that court upheld an injunction ending solitary confinement for a group of prisoners. 923 F.3d 348, 364 (4th Cir. 2019). "[T]he undisputed evidence," the court explained, established that the challenged conditions "created a substantial risk of serious psychological and emotional harm and that State Defendants were deliberately indifferent to that risk." *Id.* It held that even long-term solitary confinement

might not violate the Eighth Amendment if there were a "legitimate penological purpose" justifying its use, but found that defendants hadn't and couldn't put forth any such purpose in that case. *Id.* at 363-64.

The Seventh Circuit has also held that "prolonged confinement in administrative segregation may constitute cruel and unusual punishment in violation of the Eighth Amendment." *Walker v. Shansky*, 28 F.3d 666, 673 (7th Cir. 1994). "Whether such confinement does in fact violate the Eighth Amendment depends on the duration and nature of the segregation and the existence of feasible alternatives." *Id.*; *see also Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 666-67 (7th Cir. 2012); *Meriwether v. Faulkner*, 821 F.2d 408, 417 (7th Cir. 1987).

Confronted with a prisoner who had been in solitary confinement for 12 years, the Eleventh Circuit held that such solitary confinement would violate the Eighth Amendment where it "shocks the conscience, is grossly disproportionate to the offense, or is totally without penological justification." *Sheley v. Dugger*, 833 F.2d 1420, 1429 (11th Cir. 1987). And it remanded the case for evidentiary development of those considerations, even though, as the dissent put it, plaintiff was a "manipulative, dangerously violent man" and prison officials "forecast an escape attempt" if plaintiff was let out of solitary confinement. *Id.* at 1430 (Edmondson, J., dissenting).

Finally, the Second Circuit has found triable issues of fact regarding whether even one year in solitary confinement was "constitutionally excessive." *Mukmuk v. Comm'r of Dep't of Corr. Servs.*, 529 F.2d 272, 276 (2d Cir. 1976); *see also Reynolds v. Quiros*,

990 F.3d 286, 294 (2d Cir. 2021) (remanding for development of facts regarding solitary confinement); *Gonzalez v. Hasty*, 802 F.3d 212, 224 (2d Cir. 2015) (whether solitary confinement can violate the Eighth Amendment "depends on the duration and conditions of confinement").[3]

Of course, solitary confinement, even for very long periods of time, is not *always* unconstitutional. *See, e.g.*, *Isby v. Brown*, 856 F.3d 508, 523-24 (7th Cir. 2017). But in five circuits, extended solitary confinement can, at least in *some* circumstances, violate the Eighth Amendment. Mr. Hope's complaint would have easily survived a motion to dismiss in any of those circuits. He's alleged that the "effects of long-term confinement," *see Sheley*, 833 F.3d at 1429-30, have been devastating, resulting in muscular atrophy, hallucinations, and suicidal ideation, *see* Pet.App.70a-71a, 74a-75a. He's alleged that prison officials have been "deliberately indifferent" to those risks, *see Porter*, 923 F.3d at 364—he's reported his mental and physical symptoms to each defendant, to no avail, *see* Pet.App.71a-72a, 75a. And he's alleged that his ongoing placement in solitary confinement is "totally without penological justification," *see Sheley*, 833 F.3d

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[3] The First Circuit would likely resolve the question presented in Mr. Hope's favor as well. In *Jackson v. Meachum*, 699 F.2d 578 (1st Cir. 1983), the First Circuit's "disinclination to declare even very lengthy periods of segregated confinement beyond the pale of minimally civilized conduct" carried the day, but that court noted that the Constitution would impose a "burden on prison authorities to explore feasible alternative custodial arrangements" if a prisoner faced "the threat of substantial, serious, and possibly irreversible psychological illness" from solitary confinement. *Id.* at 583-85.

at 1429, because the only reason for his placement in solitary confinement—that he might escape—evaporated 16 years ago, when a committee of Texas prison personnel deemed him no longer an escape risk. Pet.App.78a.[4]

2. The Court Below And Three Other Circuits Hold That Long-Term Solitary Confinement Cannot Violate The Eighth Amendment.

Like the panel below in this case, three other circuits have taken the position that solitary confinement *cannot* violate the Eighth Amendment, no matter its duration, its effect on the prisoner, or how unnecessary it is to ensure prison safety.

a. The Sixth Circuit routinely dismisses claims of solitary confinement on the basis that isolation cannot violate the Eighth Amendment. As one representative opinion summarized: "Because placement in segregation is a routine discomfort that is part of the penalty that criminal offenders pay for their offenses against society, it is insufficient to support an Eighth Amendment claim." *Harden-Bey v. Rutter*, 524 F.3d

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[4] Indeed, the allegations in Mr. Hope's complaint make out an Eighth Amendment violation even more clearly than the facts at issue in the Third and Fourth Circuit cases in at least one respect. The plaintiffs in those cases were (in the Fourth Circuit case) or had been until recently (in the Third Circuit case) on death row. *Porter*, 974 F.3d at 444; *Porter*, 923 F.3d at 352. Their isolation thus at least arguably fell within a historical tradition of housing condemned prisoners in solitary confinement (although that isolation used to last days or weeks, not years or decades). Stinneford, *Experimental Punishments*, *supra*, at 65-66, 74-75. Mr. Hope's solitary confinement, by contrast, is a historical anomaly. *Id.* at 76-77; *see infra*, §I.B.1.

789, 795-96 (6th Cir. 2008); *see also Murray v. Evert*, 84 F. App'x 553, 556 (6th Cir. 2003); *Jones v. Raye*, No. 12-6568, 2014 WL 10319865 (6th Cir. 2014).

So, too, in the Ninth Circuit. In *Anderson v. County of Kern*, 45 F.3d 1310 (9th Cir. 1995), that circuit rejected a claim that solitary confinement can violate the Eighth Amendment. *Id.* at 1316. It reasoned that "administrative segregation, even in a single cell for twenty-three hours a day, is within the terms of confinement ordinarily contemplated by a sentence." *Id.* Since then, that circuit has rejected Eighth Amendment claims on the basis of long-term solitary confinement with little analysis, citing *Anderson*. *See, e.g.*, *Mora-Contreras v. Peters*, 851 F. App'x 73, 73-74 (9th Cir. 2021).

Finally, the Tenth Circuit holds that so long as a prisoner can yell to an inmate in another cell, has incidental interactions with prison staff, and is afforded exercise, reading materials, and medical care, his isolation cannot violate the Eighth Amendment—even if a prisoner is otherwise totally deprived of human contact and confined to his cell. *Grissom v. Roberts*, 902 F.3d 1162, 1174-75 (10th Cir. 2018); *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739, 756 (10th Cir. 2014). While the Tenth Circuit left open that some more restrictive form of isolation might violate the Eighth Amendment, *Silverstein*, 559 F. App'x at 755-56, the conditions it permitted—more than 22 hours per day in a cell, no face-to-face contact with other prisoners or visitors, and only negligible interactions with prison staff—are precisely the kind of conditions that research,

historical precedent, and courts have decried as solitary confinement.[5]

b. Like the Sixth, Ninth, and Tenth circuits, two judges below held that Mr. Hope's ongoing isolation could not violate the Eighth Amendment, no matter how long it lasted, how totally it destroyed his psyche, or how easily he could have been housed elsewhere.

But the panel majority below went further than any of its sister circuits. As far as counsel can tell, neither the Sixth nor the Ninth circuits have had occasion to consider a case of solitary confinement nearly as long as the one Mr. Hope has endured. *See Harden-Bey*, 524 F.3d at 791 (less than six years); *Murray*, 84 F. App'x at 555-56 (less than one year); *Jones*, 2014 WL 10319865, at *2 (less than three years); *Mora-Contreras*, 2020 WL 2089479, at *1 (less than six years).

And the one Tenth Circuit case that reached the constitutional question in a case concerning a similar period of solitary confinement considered a prisoner whose deprivation of all stimulation was less totalizing than Mr. Hope's (that prisoner, unlike Mr. Hope, had access to a television, for instance) and whose mental health symptoms were concededly mild

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[5] *See In re Medley*, 134 U.S. 160, 163-64 (1890) (referring to ravages of "solitary confinement" though inmate had contact with "attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family"); *Porter*, 923 F.3d at 359-61 (conditions that allow contact with prison staff and exercise nonetheless "hew closely to the sensory deprivation described in the studies in the research literature"); Stinneford, *Experimental Punishments*, *supra*, at 46-47 (defining solitary confinement as "confinement in a cell for 22 hours or more per day, without meaningful human contact").

(unlike Mr. Hope, who suffers from depression and hallucinations as a result of his time in solitary confinement). *Silverstein*, 559 Fed. App'x at 756-58. Most importantly, prison officials had determined the prisoner could not be safely housed outside of solitary confinement because he was a leader of the Aryan Brotherhood prison gang and had committed multiple murders while incarcerated. *Id.* at 756-58. By contrast, a committee of Texas's own security experts determined, in 2005, that Mr. Hope can safely be housed elsewhere. Pet.App.78a¶42.

* * *

Mr. Hope alleges that he hasn't so much as shaken another human being's hand in more than 27 years; that a quarter century of isolation has permanently scarred him; and that Texas prison officials have determined that he is no longer an escape risk, such that it would be feasible to change his placement. In at least five circuits, that claim would survive a motion to dismiss. This Court should grant certiorari to resolve this decades-old split among the circuits.

B. The Decision Below Was Wrong.

The decision below contravenes the Eighth Amendment in at least two respects, and the panel's single citation cannot support its sweeping rule.

1. First, the conditions Mr. Hope alleges violate the Eighth Amendment because they are "cruel and unusual punishment" within the original meaning of that provision.

a. A punishment is "cruel" when it "superadd[s]" "terror, pain, or disgrace" to an existing sentence. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019).

More than a century ago, this Court held that just four weeks of solitary confinement superadds pain, terror, and disgrace even to a death sentence. *In re Medley*, 134 U.S. 160, 170 (1890). As the Court chronicled, the Founding generation viewed solitary confinement as "an additional punishment of such a severe kind that it is spoken of . . . as 'a further terror and peculiar mark of infamy' to be added to the punishment of death." *Id.* (discussing 25 George II, c. 37).

Prison administrators and prisoners over the centuries have confirmed the *Medley* court's view. The activists who created the first regime of solitary confinement in the New World wrote that it "may very safely be assumed" "that the prospect of long solitary confinement . . . would, to many minds, prove more terrible than even an execution"; a 1788 newspaper reported that condemned prisoners "considered solitude 'infinitely worse than the most agonizing death.'"[6] Indeed, prisoners have routinely chosen death over even a few years of solitary confinement. *See* Gershom Powers, A BRIEF ACCOUNT OF THE

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[6] David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 555 (2019) (quoting The Society, Established in Philadelphia, for Alleviating the Miseries of Public Prisons, EXTRACTS & REMARKS ON THE SUBJECT OF PUNISHMENT & REFORMATION OF CRIMINALS 4 (1790)); Mark E. Kann, PUNISHMENT, PRISONS, & PATRIARCHY 141 (2005); *see also* Shapiro, *supra*, at 558-59 (Duke of La Rochefoucauld noted that death was less severe than "that most dreaded of all punishments, solitary confinement" (citing La Rochefoucauld-Liancourt, ON THE PRISONS OF PHILADELPHIA BY A EUROPEAN 29-32 (1796)); Louis P. Masur, RITES OF EXECUTION 82-83 (1989) (president of the Philadelphia Court of Quarter-Sessions described solitary confinement as a "greater evil than certain death").

CONSTRUCTION, MANAGEMENT, & DISCIPLINE, &C. &C., OF THE NEW YORK STATE PRISON AT AUBURN 36 (1826) (one nineteenth-century prisoner "threw himself from the fourth gallery upon the pavement," while "[a]nother beat and mangled his head against the walls of his cell until he destroyed one of his eyes"); Alex Kozinski, *Worse Than Death*, 125 YALE L.J. FORUM 230, 234 (2016).

Prison officials have long known that "even when administered with the utmost humanity," long-term solitary confinement "produces so many cases of insanity and of death as to indicate most clearly, that its general tendency is to enfeeble the body and the mind." Francis C. Gray, PRISON DISCIPLINE IN AMERICA 181 (1847). Contemporary research confirms as much: As the Fourth Circuit summarized one group of researchers on the point, "[T]here is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects." *Porter*, 974 F.3d at 441-42.

In addition, this Court in *Bucklew* explained that the existence of a "feasible and readily implemented alternative method" of carrying out a sentence is particularly strong evidence that a punishment is "cruel." 139 S. Ct. at 1125. Mr. Hope has alleged just that: His complaint explains that, some 16 years ago, a committee of prison officials determined that he was no longer an escape risk, voiding the only reason he has been given for why housing him outside of solitary confinement would not be "feasible." Pet.App.78a¶42.

At this preliminary stage, then, Mr. Hope's allegations are more than sufficient to establish that

his treatment has been "cruel" within the meaning of the Eighth Amendment.

b. A punishment is "unusual" if it has "long fallen out of use," *Bucklew*, 139 S. Ct. at 1123, or if it runs "contrary to longstanding usage or custom," *Edmo v. Corizon, Inc.*, 949 F.3d 489, 507 (9th Cir. 2020) (Bumatay, J., dissenting from denial of reh'g en banc). In the article cited by *Bucklew*, Professor John Stinneford elaborates that even a punishment that was once "usual" may become "unusual" (and thus constitutionally dubious) after a period of disuse; presumably, the punishment fell out of favor for a good reason, and any resurrection is suspect. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745-46 (2008).

Under the original understanding of the term "unusual," then, "long-term" solitary confinement—and certainly isolation as long as Mr. Hope's—is a quintessentially "unusual" punishment: "[I]t never achieved universal reception" at any point, let alone "over a period of numerous generations," and in any event had long been abandoned by the time Mr. Hope was placed in solitary confinement. John F. Stinneford, *Experimental Punishments*, 95 NOTRE DAME L. REV. 39, 45, 77 (2019).

Solitary confinement in the United States was "little known prior to the experiment in Walnut-Street Penitentiary, in Philadelphia, in 1787." *Medley*, 134 U.S. at 167-68. Not one inmate at Walnut Street ever served anywhere close to a decade—let alone multiple decades—in solitary confinement. David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 567-68 (2019). As late as 1827, the

jail's inspectors wrote: "We have known a convict to have been confined within a solitary cell upwards of sixteen months, and this is the longest time." *Id.* at 567.

In the centuries since, a few States attempted to impose long-term solitary confinement. Stinneford, *Experimental Punishments*, *supra*, at 60-62. All but one gave up on the experiment after a year or two because the effects were so grisly. *Id.* And even that one facility gave up on solitary confinement by the Civil War. *Id.* at 64-65; *see Medley*, 134 U.S. at 168 (long-term solitary "was found to be too severe" by 1850 or 1860). By the time prolonged solitary confinement was revived with Mr. Hope's generation of prisoners, then, it had "long fallen out of use." *Bucklew*, 139 S. Ct. at 1123; Stinneford, *Experimental Punishments supra*, at 64-65; Terry Allen Kupers, SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION & HOW WE CAN ABOLISH IT 25 (2017) (solitary confinement resurrected in 1990s). This is precisely the sort of "unusual" punishment the Founders had in mind when they drafted the Eighth Amendment. Stinneford, *Original Meaning*, *supra*, at 1770-71 ("more than one hundred years" sufficient to qualify as "long disused").

Nor is Mr. Hope's punishment particularly "usual" today. "The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). Only five State statutes authorize solitary confinement of longer than 30 days outside of death row. *See* Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 959-62 & nn.181-82, 190 (2018). In many other

States (including Texas), of course, prison administrators impose solitary confinement despite no statutory authorization to do so. *Id.* at 960. But even among those States, Mr. Hope's sentence is a dramatic outlier; only a miniscule fraction of America's prisoners have spent anywhere near three decades in solitary confinement, and the bulk of those prisoners are incarcerated in Texas. Appellant's Reply Br. Appendix.

c. Finally, Mr. Hope's decades in solitary confinement are "punishment" within the meaning of the Eighth Amendment. The conditions in which a prisoner is confined are as much a part of his "punishment" as the sentence imposed by a court. *Helling v. McKinney*, 509 U.S. 25, 31-32 (1983).

That rule applies with special force to solitary confinement. As a historical matter, solitary confinement was "punishment" even in the narrower sense of that which is "meted out by statutes or sentencing judges." *See Hudson v. McMillian*, 503 U.S. 1, 18-19 (1992) (Scalia, J., dissenting). In the one jail that allowed solitary confinement at the time of the Founding, isolation for any period longer than a few weeks "could be imposed only by a court acting pursuant to a criminal sentencing statute." Shapiro, *supra*, at 546. And as this Court put the point more than a century ago, confinement without human contact was never considered "a mere unimportant regulation as to the safe-keeping of the prisoner," but instead "an additional punishment" of a "severe kind." *Medley*, 134 U.S. at 167, 169-70.

2. Mr. Hope's 27 years in solitary confinement violates the Eighth Amendment for a second, independent reason: it (a) poses a "substantial risk of

serious harm"; and (b) was inflicted with "deliberate indifference" to his "health and safety." *Farmer*, 511 U.S. at 834.

a. Mr. Hope has *already* suffered "serious harm," and he faces more than a "substantial risk" of deteriorating further. Mr. Hope alleges that prolonged isolation has resulted in auditory and visual hallucinations, anxiety, depression, and insomnia. Pet.App.71a¶28. He has contemplated suicide. Pet.App.71a¶28. And he has developed chronic pain from being confined to a tiny cell. Pet.App.70a-71a¶27. As court after court has found, it is more than plausible that solitary confinement has, in fact, produced such serious harms. *E.g.*, *Porter*, 974 F.3d at 442; *Porter*, 923 F.3d at 364.

b. Drawing all inferences in his favor, Mr. Hope's complaint also plausibly alleges that Defendants are "deliberately indifferen[t]"—that they are "knowingly disregard[ing] an excessive risk to inmate health and safety." *Farmer*, 511 U.S. at 837. Mr. Hope has reported his anxiety, depression, and hallucinations to prison personnel, to no avail. Pet.App.70a-71a¶27; Pet.App.71a¶28; Pet.App.74a-75a¶35; Pet.App.77a¶40. And many other prisoners in solitary confinement in Mr. Hope's facility have committed suicide, putting Defendants on notice that long-term deprivation of meaningful human contact poses a risk of serious harm. Pet.App.71a¶29.

Indeed, as the Fourth Circuit put it, "[g]iven [D]efendants' status as corrections professionals, it would defy logic to suggest that they were unaware of the potential harm that the lack of human interaction . . . could cause." *Porter*, 923 F.3d at 361-62. Of course, "it remains open to the officials to prove that they

were unaware even of an obvious risk." *Farmer*, 511 U.S. at 844. But at this preliminary stage, drawing all inferences in Mr. Hope's favor, it is at least plausible that Defendants acted with deliberate indifference.

3. Two judges below concluded that Mr. Hope was not even entitled to discovery because *no* duration of solitary confinement violates the Eighth Amendment, no matter its impact on a prisoner or whether there is any reason for imposing it. Pet.App.17a. By way of explanation, the panel majority said only: "As the Supreme Court has explained, 'the length of isolation sentences was not considered in a vacuum.' *Hutto*[*v. Finney*, 437 U.S. 678, 685 (1978)]." *Id.*

But *Hutto v. Finney* had nothing to do with solitary confinement. That case dealt with a placement termed—perhaps misleadingly—"punitive isolation," but far from depriving prisoners of human contact, the problem with "punitive isolation" was too much human contact: "An average of 4, and sometimes as many as 10 or 11, prisoners were crowded into windowless 8'x10' cells." 437 U.S. at 683-84. When the Supreme Court said "the length of isolation sentences was not considered in a vacuum," it was referring to sentences in these *overcrowded* cells—not to sentences like Mr. Hope's. *Id.* at 685-86.

If anything, *Hutto* buttresses Mr. Hope's claim. When this Court wrote that "the length of isolation sentences was not considered in a vacuum," it only meant that courts must consider both the duration of the imposed conditions *and* whether those conditions are "materially different from those affecting other prisoners." *Id.* at 685-86; *see also id.* at 686-87 (emphasizing that "the length of confinement cannot be ignored when deciding whether the confinement

meets constitutional standards"). Mr. Hope has endured both an extraordinary length of confinement in isolation and his conditions of confinement are different in just about every respect from those of other prisoners. Pet.App.61a-65a.

Despite citing *Hutto*, the panel below considered neither the length of Mr. Hope's isolation nor the "material[] differen[ces]" between his conditions and those of other prisoners. Pet.App.17a. Nor, for that matter, did the panel consider how isolation had affected Mr. Hope or whether there was any reason for his placement in solitary confinement. *Id.* Instead, the panel ruled against Mr. Hope because it concluded that solitary confinement can *never* violate the Constitution. *Id.* Such a rule has no basis in the text of the Eighth Amendment, historical practice or this Court's cases.

C. This Is An Ideal Vehicle To Resolve The Question Presented.

This case is an ideal vehicle to resolve the question presented for four reasons.

First, there are no procedural obstacles that would complicate this Court's review. The question presented was pressed at every stage and passed upon below. Pet.App.61a-62a¶12, 63a-64a¶16, 70a-71a¶¶27-29, 72a-75a¶¶33-35, 77a¶¶39-40, 80a¶47; Fifth Circuit Record on Appeal (ROA) 118-119; ROA.151-52, 155-56; Appellant's Opening Br. 15-44; Pet.App.30a n.5. Moreover, because Mr. Hope remains in solitary confinement, he has a claim for injunctive relief, so thorny questions about qualified immunity will not stymie this Court's review. *See, e.g.*, *Grissom*, 902 F.3d at 1173-75; *Porter*, 974 F.3d at 435.

Second, this case presents a clean legal question: Can prolonged solitary confinement *ever* violate the Eighth Amendment? The procedural posture of this case obligates the Court to take as true that Mr. Hope has been subjected to a quarter century of near-total isolation; that the deprivation of meaningful human contact has destroyed his body and mind; and that there is no basis for his ongoing solitary confinement, since correctional officials determined a decade and a half ago that he was no longer an escape risk. *Supra*, 5-6. The panel below treated all of those considerations as irrelevant and instead ruled against Mr. Hope because it believed solitary confinement *could not* violate the Eighth Amendment, a legal conclusion this Court is well-positioned to pass upon.

Third, counsel in this case have argued that the conditions of Mr. Hope's confinement are cruel and unusual within the original meaning of the Eighth Amendment. As far as counsel can tell, this is the only solitary confinement case to have raised an argument regarding the original meaning of those terms. In part because most solitary confinement cases—even many that reach this Court—are *pro se*, most will not present this Court with an opportunity to assess whether long-term solitary confinement is consistent with the original meaning of the Eighth Amendment. And this case is a particularly good vehicle for considering that argument because of the totality of Mr. Hope's isolation. Some prisoners who have spent decades in solitary confinement have had regular access to a telephone or television. *See, e.g.*, *Silverstein*, 559 F. App'x at 755-56. Even such limited amenities raise difficult commensurability questions regarding whether the conditions of confinement are

akin to those abandoned as too cruel by both the Old and New Worlds in the nineteenth century. Mr. Hope's isolation, by contrast, resembles the sort of total isolation that Charles Dickens called a "immeasurably worse than any torture of the body." Charles Dickens, AMERICAN NOTES FOR GENERAL CIRCULATION 81 (Chapman & Hall 1913), https://www.gutenberg.org/files/675/675-h/675-h.htm.

Fourth, and finally, the extraordinary duration of Mr. Hope's time in isolation makes this case a uniquely suitable vehicle to address the question presented. Mr. Hope has been in solitary confinement since before the O.J. Simpson trial. While some terms of solitary confinement may raise difficult line-drawing questions regarding when the Eighth Amendment limits the use of isolation as punishment, Mr. Hope's won't; if the Eighth Amendment imposes any limitations on solitary confinement, 27 years surely triggers those limitations.

And precisely because of the extraordinary duration of Mr. Hope's confinement—precisely because such a tiny percentage of prisoners have *ever*, in the history of this country, been placed in solitary confinement for so long—this Court is unlikely to find a better vehicle to consider the question presented. In other words, because Mr. Hope's case is "unusual" within the meaning of the Eighth Amendment, this Court is unlikely to get another chance to pass on the question presented in the near future.

D. The Question Presented Is Exceptionally Important.

Solitary confinement ravages the mind and body, and just about everyone who has witnessed—or even

read about—its effects has expressed grave concerns about its use.

Jurists around the country, across the political spectrum, and over the centuries have decried the harms of solitary confinement. One hundred years ago, this Court wrote that "experience demonstrated" that "[a] considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them"; even those who "stood the ordeal better" still "did not recover sufficient mental activity to be of any subsequent service to the community." *Medley*, 134 U.S. at 168. Justice Sotomayor has opined that solitary confinement "comes perilously close to a penal tomb," "imprint[ing] on those that it clutches a wide range of psychological scars"[7]; Justice Kennedy that prolonged solitary confinement will inevitably bring prisoners "to the edge of madness, perhaps to madness itself"[8]; and Justice Breyer that "extended solitary confinement alone raises serious constitutional questions."[9] Lower court judges have echoed those concerns.[10]

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[7] *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2019) (statement of Sotomayor, J., respecting denial of certiorari).

[8] *Davis v. Ayala*, 576 U.S. 257, 288 (2015) (Kennedy, J., concurring).

[9] *Ruiz v. Texas*, 137 S. Ct. 1246, 1246-47 (2017) (Breyer, J., dissenting from denial of stay).

[10] *Hamner v. Burls*, 937 F.3d 1171, 1180-81 (8th Cir. 2019) (Erickson, J., concurring); *Grissom*, 902 F.3d at 1176-77 (Lucero, J., concurring); *Wallace v. Baldwin*, 895 F.3d 481, 484-85 (7th Cir. 2018); *Palakovic v. Wetzel*, 854 F.3d 209, 225-26 (3d Cir. 2017); *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 566-67

Experts in psychology and in prison administration have confirmed those judges' fears and admonished that long-term solitary confinement is cruel and should rarely be used. *Supra*, 18, 22; Timothy Williams, *Prison Officials Join Movement to Curb Solitary Confinement*, THE NEW YORK TIMES (Sept. 2, 2015). One prison director spent a night in solitary confinement to understand its effect on prisoners; after recognizing that any longer in confinement would have "chipped [his mind] away" he outlawed solitary confinement in his State. Rick Raemisch, *My Night in Solitary*, THE NEW YORK TIMES (Feb. 20, 2014).

And over the centuries, the general public, too, has been consistently appalled by the use of long-term solitary confinement. *Medley* chronicled how, in the New World, "the whole subject attracted the general public attention, and its main feature of solitary confinement was found to be too severe," and, in the Old World, "[i]n Great Britain, as in other countries, public sentiment revolted against this severity," resulting in the repeal of the statute authorizing solitary confinement in the nineteenth century. 134 U.S. at 170. Today, politicians across the political spectrum have decried the placement of the January

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(3d Cir. 2017); *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015); *Kervin v. Barnes*, 787 F.3d 833, 837 (7th Cir. 2015); *J.H. v. Williamson Cty.*, 951 F.3d 709, 719 (6th Cir. 2020); *Troutman v. Louisville Metro Dep't of Corr.*, 979 F.3d 472, 484 n.9 (6th Cir. 2020); *Young v. Martin*, 801 F.3d 172, 180 n.8 (3d Cir. 2015).

6 defendants in solitary confinement, even for a few months.[11]

The concerns expressed by judges, researchers, correctional officials, and others apply to terms of solitary confinement of a fraction of the duration Mr. Hope has endured. Justice Sotomayor wrote of a term of isolation less than half the length of Mr. Hope's; the *Medley* court of a stint two orders of magnitude shorter. Researchers have raised concerns about solitary confinement for longer than 10 days. And Colorado's warden described deteriorating after just *20 hours* without human contact. *Supra*, 28.

Even one case of a prisoner spending decades, plural, in isolation should warrant this Court's attention, then. But the question presented is also important because of its implications beyond Mr. Hope's case. Certainly, the 138 Texas prisoners who have spent more than 20 years in solitary confinement and the more than 500 Texas prisoners who have spent more than a decade in solitary confinement are a very small fraction of the total prison population and

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[11] *See, e.g.*, Kyle Cheney, et. al., *Jan. 6 Defendants win unlikely Dem champions as they face harsh detainment*, POLITICO (Apr. 19, 2021) (quoting Sen. Elizabeth Warren: "Solitary confinement is a form of punishment that is cruel and psychologically damaging."); Rep. Vicky Hartzler, Letter to Attorney General Merrick B. Garland & Bureau of Prisons Director Hon. Michael Carvajal, July 16, 2021 ("Given the harmful physiological and psychological effects of restrictive housing, also known as solitary confinement, recent reports on the use of solitary confinement for dozens of the pretrial defendants is alarming.").

concentrated in a single outlier State.[12] But for at least those prisoners, not to mention the handful of prisoners in other States subjected to decades of solitary confinement, this Court should make clear that the Constitution does not categorically close the courthouse doors to their claims.

And though Mr. Hope's 27 years in solitary confinement are extraordinarily "unusual," solitary confinement for shorter terms is more common. Some 7,000 prisoners across the country have spent at least one year in solitary confinement. The Correctional Leaders Association & The Arthur Liman Center for Public Interest Law at Yale Law School, *Time-In-Cell 2019: A Snapshot of Restrictive Housing* 12-13 tbl.2 (Sept. 2020). And a not-insignificant fraction of those prisoners turn to courts for redress under the Eighth Amendment. But this Court has not provided any guidance on how to evaluate such claims. The result is a decades-old split among the circuits and a wide variation in the constitutional protections afforded to prisoners depending on which State they are housed in.

* * *

Mr. Hope has spent more than half his life in near-total isolation. He is one of a vanishingly small percentage of prisoners who have *ever* been placed in solitary confinement for so long, and he alleges there is no end in sight. In light of the disarray among the circuits about how to evaluate such claims and the centuries of evidence regarding the devastating

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[12] Email from Tammy Houser, Texas Department of Criminal Justice – PIA, Open Records Coordinator, to Easha Anand, Counsel for Petitioner (Jan. 13, 2022) (on file with counsel).

effects of solitary confinement, this Court should grant certiorari.

II. This Court Should Make Clear That Hearings With A Pre-Ordained Outcome Do Not Satisfy The Due Process Clause's Requirement Of Periodic Reviews.

At this preliminary stage, Mr. Hope has plausibly alleged that the Eighth Amendment forbids keeping him in solitary confinement any longer. But even if it does not, at the very least, the Due Process Clause demands that prison officials provide Mr. Hope with *some* procedural protections in his third decade of solitary confinement. Mr. Hope has alleged that his periodic "reviews" provide no such protections because defendants simply copy/paste exactly the same explanation for his ongoing isolation with no possibility of a different outcome. Such review-less reviews cannot satisfy the requisites of the Fourteenth Amendment.

The panel majority's decision to the contrary deviates from both this Court's precedents and the precedents of every other circuit to consider the question. Indeed, the decision below provides clear grounds for summary reversal to confirm that prison officials at the very least have to *consider* removing Mr. Hope from solitary confinement. There can be no argument that simply convening a gathering at which a prisoner is allowed to speak suffices to satisfy the Due Process Clause. The Constitution demands that any process be provided "at a meaningful time and in a meaningful manner"; sham "reviews" can't suffice. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

A. The Decision Below Is Contrary To Both This Court's Precedents And The Precedents Of Every Other Circuit To Consider The Question.

1. The Fourteenth Amendment's Due Process Clause protects persons against the deprivation of life, liberty, or property without sufficient procedural protection. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Where a prisoner is deprived of a "liberty interest"—that is, by imposing an "atypical and significant hardship"[13]—it must provide "such procedural protections as the particular situation demands." *Id.* at 224.

While the demands of the Due Process Clause are flexible, this Court has made clear that, at minimum, it requires periodic, meaningful hearings when subjecting a prisoner to solitary confinement. *See Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983); *Armstrong*, 380 U.S. at 552. Sham hearings, no matter how frequent, do not satisfy the Fourteenth Amendment because, as Judge Haynes explained in dissent, such hearings are tantamount to no "hearings at all." Pet.App.29a.

2. Courts evaluate the procedural protections demanded by the Fourteenth Amendment using the *Mathews v. Eldridge* balancing test. 424 U.S. 319 (1976). That test considers the procedures provided in light of the plaintiff's interest, the "risk of an

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[13] The Fifth Circuit's conclusion that Mr. Hope faced such an "atypical and significant hardship," Pet.App.13a, accords with the opinion of every court to consider a sentence of solitary confinement anywhere near as long as Mr. Hope's. *See Wilkerson v. Goodwin*, 774 F.3d 845, 855 (5th Cir. 2014) (collecting cases).

erroneous deprivation of such interest," and the Government's interest. *Id.* at 335. As Judge Haynes put the point in her dissent, "the majority opinion errs on virtually every step" of that analysis. Pet.App.28a.

As for the plaintiff's interest, Judge Haynes explained that the majority was wrong to assume that interest was low. Pet.App.23a-24a. "For over two decades, the beginning, middle, and end of every day of Hope's life has taken place in a single cell no larger than a parking space," she wrote. Pet.App.28a-29a. To find that liberty interest "low," as the majority did, "overlooks the crux of Mr. Hope's allegations." Pet.App.29a.

As for the "risk of an erroneous deprivation," Judge Haynes explained that "if Hope is correct that the forty-eight SCC hearings were a 'sham,' then it would be as if he never attended any hearings at all." Pet.App.29a. Plainly, that is not "meaningful" process—the Due Process Clause is not satisfied by show trials.

Finally, as to the State's interest, Judge Haynes "strongly disagreed" that "the State retains any meaningful interest in continuing to isolate Hope in solitary confinement." Pet.App.29a. Whatever interest once existed "expired over fifteen years ago when the 'escape risk' designator was removed from his file." Pet.App.30a.

Balancing the three *Mathews v. Eldridge* factors, then, makes clear that Mr. Hope's due process claim should survive a motion to dismiss.

3. Consider just one facet of Mr. Hope's allegations regarding the sham hearings he attends: That his "reviews" merely sign off on a pre-ordained outcome.

Every circuit to consider that question has held that the Due Process Clause is not satisfied by such hearings. The Seventh Circuit's opinion in *Isby v. Brown* is illustrative. That Court held that the Due Process Clause requires "an actual review—*i.e.*, one open to the possibility of a different outcome." 856 F.3d at 528. "Rote repetition of the same two boilerplate sentences following each review" cannot satisfy that requirement. *Id.*

That holding followed from two considerations. First, the Seventh Circuit noted that "periodic reviews" of administrative segregation are necessary to comply with the Due Process Clause, and "[i]t is inherent in [the Supreme Court's] use of the term 'periodic' that ongoing Ad[ministrative] Seg[regation] reviews may not be frozen in time, forever rehashing information addressed at the inmate's initial Ad Seg determination." *Id.* (discussing *Hewitt*, 459 U.S. at 468). Second, though the government's interest in safety and security is "substantial," the validity of that government interest "continues only so long as the inmate continues to pose a safety or security risk." *Id.* at 526. Reviews must therefore assess whether the inmate "continues to pose" such a risk, not whether the inmate once did; past behavior is relevant, of course, but only insofar as it predicts future behavior. *Id.* at 526-28.

At least six other circuits similarly hold. *See Proctor v. LeClaire*, 846 F.3d 597, 611 (2d Cir. 2017) ("[R]eviewing prison officials must actually evaluate whether the inmate's continued Ad Seg confinement is justified."); *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015) ("The ICC has merely rubber-stamped Appellant's incarceration in [solitary confinement]

(figuratively and sometimes literally), listing in 'rote repetition' the same justification every 30 days."); *Selby v. Caruso*, 734 F.3d 554, 560 (6th Cir. 2013) (plaintiff's allegations "render the monthly reviews during that time a sham"; "perfunctory and meaningless" reviews cannot satisfy Due Process Clause); *Williams v. Hobbs*, 662 F.3d 994, 1008 (8th Cir. 2011) ("[A]ll of the reviews that [defendants] administered lacked the requisite meaningfulness," because plaintiff was told that he would remain in solitary confinement "even if [he] proved to be the perfect model citizen."); *Toevs v. Reid*, 685 F.3d 903, 915 (10th Cir. 2012) ("perfunctory and repetitive" reviews violated right to procedural due process); *Quintanilla v. Bryson*, 730 F. App'x 738, 744 (11th Cir. 2018) (holding that periodic reviews "must be meaningful," "cannot be a sham or a pretext," and must actually evaluate "whether confinement in administrative segregation remains necessary in light of current facts").[14]

The procedure Mr. Hope has alleged flouts the basics of due process even more clearly than cases in those other circuits. Mr. Hope alleges not only that the hearings reach a pre-ordained outcome, but that committee members are so dedicated to that pre-ordained outcome that they do not bother even listening to Mr. Hope make his case for release from

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[14] The Due Process Clause mandates periodic reviews for prisoners in administrative segregation. *Hewitt*, 459 U.S. at 477 n.9. Some courts have held that prisoners placed in disciplinary, rather than administrative, segregation are not entitled to such reviews. *See, e.g.*, *Proctor*, 846 F.3d at 611. All parties agree that Mr. Hope was placed in administrative segregation. *E.g.*, Appellees' Br. 4-6.

isolation, instead using the hearings to make small talk about, for instance, "the price and availability of firewood." Pet.App.71a-72a. And he alleges not only that the hearings rely exclusively on his past conduct, but that they do so while ignoring critical new evidence, namely, the fact that a committee of security experts has already concluded that he is no longer an escape risk. Pet.App.78a¶42.

4. The panel below thus stood alone in holding that sham "reviews" that do not even bother to evaluate Mr. Hope's ongoing placement in solitary confinement satisfy the requirements of the Due Process Clause. And that holding is obviously wrong: If, as this Court has held, the Due Process Clause requires periodic reviews, those reviews must actually, well, *review* a prisoner's ongoing solitary confinement. *See Hewitt*, 459 U.S. at 468; *Armstrong*, 380 U.S. at 552. The Due Process Clause cannot be satisfied by a charade, and Mr. Hope has alleged that his periodic reviews—where prison officials don't even review his file or talk about his case—are just that.

B. This Court's Intervention Is Warranted.

Mr. Hope has suffered an extraordinary deprivation of liberty: 27 years (and counting) without meaningful human contact. At the very least, the Constitution demands that prison officials actually evaluate whether solitary confinement is still warranted.

There are no obstacles to this Court's review. Mr. Hope argued at every stage that the process he was afforded was insufficient to protect his liberty interest

in avoiding solitary confinement for years on end,[15] and the panel clearly passed upon the question presented. Pet.App.15a. And because Mr. Hope alleges that his review-less "reviews" continue, he has an action for injunctive relief as well as damages, meaning that qualified immunity poses no obstacle to this Court's review.

This Court should be particularly skeptical of administrative hearings that impose decades of solitary confinement because, historically, prison administrators never had the power to do that. Even in the one jail that allowed solitary confinement at the Founding, isolation for any period longer than a few days "could only be imposed by a court acting pursuant to a sentencing statute." Shapiro, *supra*, at 546, 557-58. By contrast, Mr. Hope was placed in isolation by prison administrators. No Texas statute authorizes his placement, and no court signed off on it. *See* Reinert, *supra*, at 959-62 & nn.181-82, 190.

It would have been anathema to the Founding generation that unelected, unaccountable bureaucrats, rather than courts and legislatures, were solely in charge of how much torturous isolation to subject a prisoner to. How much more outrageous if those bureaucrats made the decision based on sham hearings that merely rubber-stamped the continued deprivation of human contact.

CONCLUSION

The petition should be granted.

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[15] *See* Pet.App.72a-74a; ROA.118; ROA.153-54; Appellant's Opening Brief 52-53.

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