UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

CLINTON NORTHCUTT, *et al.*,

Plaintiffs,

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

Case No. 4:17-cv-03301-BHH-TER

Honorable Bruce Howe Hendricks
ORAL ARGUMENT REQUESTED

PLAINTIFFS' EMERGENCY MOTION AND MEMORANDUM OF LAW FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs seek the Court's intervention, on an emergency basis, because Defendants are planning to move Plaintiffs from the current Kirkland maximum security unit ("Kirkland MSU") to a new facility, without providing sufficient details to Plaintiffs' counsel — including the approximate date of the relocation — and without agreeing to delay the move so Plaintiffs may fully understand and discuss the conditions in the new facility. Plaintiffs do not seek a lengthy delay through this motion. Instead, they are only asking for a sufficient amount of time to allow them to (a) conduct an inspection of the new facility (which will take place shortly); and (b) work through any disagreements between Plaintiffs and Defendants regarding the conditions. In short, Plaintiffs are merely requesting that the Court preserve the *status quo* for the period of time that is required for an inspection and follow-up discussions.

Plaintiffs' counsel has been informed that this move is imminent, yet Defendants' counsel have refused to provide critical information to Plaintiffs' counsel regarding the move,

including the conditions at the new facility, despite repeated requests since January 2019 for such information. Instead, Plaintiffs' counsel has been forced to rely primarily on information from their clients and they have learned that Plaintiffs are being threatened with total "lockdown" in the new facility and other repercussions. Thus, in the absence of injunctive relief (or a commitment from Defendants to provide adequate time to discuss the new conditions), there is a high likelihood that Plaintiffs' already unconstitutional conditions will worsen as a result of the imminent, hasty relocation to a new facility.

Defendants possess limited staffing, financial resources and real estate; for example, Defendants' counsel implied to Plaintiffs' counsel that once Plaintiffs leave Kirkland MSU, there exists no alternative space to house Plaintiffs in the event the new facility requires further modification to satisfy Eighth and Fourteenth Amendment standards. It is apparent that Defendants' counsel has refused to engage with Plaintiffs' counsel meaningfully on the move because Defendants want to present Plaintiffs — and the Court — with a *fait accompli* and undermine Plaintiffs' ability to obtain the relief they seek in this action. Plaintiffs are unaware of any legitimate reason why Defendants cannot provide the requested information and delay the move for a sufficient period of time while the parties continue their discussions about a potential resolution of their differences.

Therefore, Plaintiffs respectfully request that this Court grant immediate injunctive relief in the form of a temporary restraining order ("TRO") and preliminary injunction. Plaintiffs request that the Court order Defendants to permit Plaintiffs' counsel to inspect the newly modified facility and to provide Plaintiffs' counsel access to any plans, schematics, blueprints, or outlines of pending modifications yet to be made and any revised Death Row policies before the contemplated move or ratification of those policy revisions are consummated.

BACKGROUND[1]

As Plaintiffs prepared to file this lawsuit challenging solitary confinement conditions on South Carolina's Death Row at Lieber Correctional Facility ("Lieber"), Defendants suddenly moved Plaintiffs to Kirkland MSU. As detailed previously in the record, the procedure that Defendants employed to effectuate this move resulted in significant distress to Plaintiffs as well as significant loss of Plaintiffs' property. The conditions at Lieber, dire as they were, paled in comparison to those at Kirkland MSU, where Plaintiffs now live in extreme isolation, devoid of any access to natural light, interpersonal communication, adequate medical care, regular exercise, and other basic human needs. There is no reason to believe Defendants will not take another step backward in this new move, further isolating Plaintiffs and worsening their conditions of confinement. Indeed, as noted above, Plaintiffs' counsel have been informed that Plaintiffs will be in "lockdown" at the new facility.

Discovery and Depositions

Against this backdrop, the parties commenced fact depositions in the summer of 2018, nearly one year after Plaintiffs' move to Kirkland MSU. Defendants deposed all 17 named Plaintiffs in Kirkland's administrative wing, and required Plaintiffs remain shackled throughout their depositions, despite Plaintiffs' counsel's objection. *See* Decl. of Nicole E. Schiavo in Supp. of Pls.' Emergency Mot. for Temp. Restraining Order and Prelim. Inj. ("Schiavo Decl.") at ¶ 3.

Plaintiffs subsequently noticed depositions and issued subpoenas to Defendants' employees in the fall of 2018. Schiavo Decl. at ¶ 4. Mere days before the first deposition was scheduled to take place, Defendants offered to engage in mediation and noted that the population

[1] To avoid burdening the Court with unnecessary detail, Plaintiffs have set forth below only the facts necessary for the instant motion. For a full recitation of the relevant facts, we respectfully refer the Court to the Amended Complaint (the "Am. Compl.," Dkt. 30) and other filings.

at the Broad River Correctional Institution ("BRCI") was soon vacating the premises, and the facility could possibly serve as a new home for Plaintiffs and the other Death Row prisoners. Defendants refused to negotiate unless Plaintiffs canceled the scheduled depositions of South Carolina Department of Corrections ("SCDC") personnel and warned that proceeding with any depositions would have a significantly detrimental effect on any settlement discussions, with the likelihood that Defendants would refuse to mediate at all. *Id.* at ¶ 5.

Eager to reach a negotiated resolution that would end decades of solitary confinement, Plaintiffs reluctantly acquiesced and released Defendants from their scheduled depositions, without prejudice. *Id.* at ¶ 6. The parties agreed on a mediator and a date for Plaintiffs' counsel to inspect BRCI. Plaintiffs' counsel — along with psychological and prison industry experts — conducted site inspections of BRCI and Kirkland MSU on January 28 and 29, 2019, respectively. On January 28, 2019, Plaintiffs emailed Defendants a list of seven major issues that were evident at BRCI to be discussed and addressed at the mediation scheduled for January 30. Defendants did not respond. *Id.* at ¶ 7.

Attempt at Mediation

The parties met for mediation on January 30, 2019 and the Honorable Judge Pleicones acted as mediator. Defendants' counsel was accompanied by Mr. McCall on behalf of SCDC management. The mediation was unproductive. As the mediation collapsed, Judge Pleicones suggested that Defendants respond to Plaintiffs' January 28 email within two weeks' time. *Id.* at ¶ 8.

The parties conferred telephonically on February 5, 2019. Plaintiffs' counsel reiterated their request for information relating to planned modifications to BRCI in an effort to negotiate any disagreements *before* construction progressed further, to obviate the need for any

modifications to then be "undone." Defendants were unwilling to provide any information, stating at one point that it was "none of [Plaintiffs' counsel's] business." *Id.* at ¶ 9. Defendants delivered a brief letter to Plaintiffs on February 15, 2019 summarily stating, without any meaningful detail, their positions on issues raised by the Plaintiffs. *Id.* at ¶ 10; Schiavo Decl., Ex. 1 (Letter from Daniel R. Settana to Brian Richichi (Feb. 15, 2019)). In this letter, Defendants did not provide any details about the physical plans at BRCI, the physical layout of the recreation field, or the classification policy — information crucial to settlement discussions. Defendants stated they would "look into" other topics. *Id.*

Plaintiffs responded in substantial detail on March 5, 2019, requesting clarity on nearly all of Defendants' positions, setting forth suggestions for implementing new Death Row policies at BRCI, and expressing a desire to work together to have BRCI meet constitutional muster. *See id.* at ¶ 11; Schiavo Decl., Ex. 2 (Letter from Nicole E. Schiavo to Daniel R. Settana (Mar. 5, 2019)).

Over two months later, despite numerous follow-up inquiries, Plaintiffs received no substantive response from Defendants at all until after a meet and confer discussing this anticipated motion, and still have received no further information as to the conditions in the BRCI facility. Defendants repeatedly promised to respond, and then failed to do so, or merely kicked the can down the road. *Id.* at ¶ 12. Defendants have effectively shut down any negotiations and have made clear that they intend to proceed as they wish, without regard to whether the conditions at BRCI will further exacerbate the injuries being suffered by Plaintiffs or meet constitutional standards. Defendants' behavior demonstrated that their purported desire to engage in settlement discussions was merely a subterfuge to further delay depositions.

Impending Move to the BRCI Facility

Despite Defendants' stonewalling, Plaintiffs' counsel has significant reason to believe the move is imminent. Defendant Janet Hollis told an individual Plaintiff that SCDC was conducting inventory of the prisoners' belongings on May 22, 2019, and that the prisoners should keep enough soap with them to last for two to three weeks. *Id.* at ¶ 13. An SCDC guard told an individual Plaintiff that he instructed the IRC (a type of canteen) to cancel any orders that are not delivered to Kirkland MSU by June 1, 2019. *Id.* SCDC guards are being sent in waves to see the new facility and have told individual Plaintiffs that the cells do not have standard electrical outlets (despite Defendants' representation in the February 5 letter to the contrary), that pillows are not allowed, and that the top of the existing bunks in each of the cells that Plaintiffs' counsel saw during the January inspection, which are Plaintiffs' only prospective storage options in the new facility, are being removed. *Id.* at ¶¶ 13–14. Plaintiffs have a history of good behavior and have continued to behave well at Kirkland MSU, yet Defendant Hollis has told individual Plaintiffs that they will remain on "lockdown" at BRCI and that they need to "crawl" before they can learn to walk. *Id.* at ¶ 15. The looming move, with no concrete information from their counsel, has created a significantly heightened state of anxiety and distress for Plaintiffs. *See id*.

With the increasing urgency as the countdown until the anticipated move ticks by, Plaintiffs' counsel once again followed up with Defendants' counsel on May 9, 2019, specifically concerning the rumors that the moving process was commencing this month. *Id.* at ¶ 16; Schiavo Decl., Ex. 3 (E-mail between Nicole E. Schiavo and Daniel R. Settana (May 9 & 10, 2019)). Given the complete lack of information thus far, Plaintiffs demanded a response to their previous requests for information, confirmation of a day when Plaintiffs' counsel would be

given access to inspect BRCI, and confirmation that individual Plaintiffs would not be moved before Plaintiffs' counsel had the opportunity to inspect BRCI. Defendants replied on May 10, 2019, refusing Plaintiffs' requests, and stating that they did not need "yours, or your clients' approval prior to any move." *Id.*

Meet and Confer

On May 16, 2019, Plaintiffs inquired of Defendants' availability for a telephonic conference, noting again the imminent move to BRCI and Plaintiffs' need for assurances that the conditions there satisfy constitutional standard prior to the move. *Id.* at ¶ 19; Schiavo Decl., Ex. 4 (E-mail between Nicole E. Schiavo and Daniel R. Settana (May 16, 2019)). The parties conferred telephonically on May 17, 2019. Defendants failed to provide Plaintiffs' counsel with any concrete information regarding conditions at BRCI, proposed revisions to Defendants' Death Row policies, or the anticipated date of the move. *Id.* at ¶ 20.

Plaintiffs' counsel requested written assurances that the move to BRCI would not occur until Plaintiffs' counsel could re-inspect the modified conditions there, and advised that they would file the instant request for injunctive relief enjoining the move if those assurances were not provided. *Id.* at ¶ 21. Defendants dismissively asked Plaintiffs' counsel, "You think the Court can stop the move if we wanted to do it tomorrow? . . . I don't think the Court's gonna stop them from making a move" and "Is it your belief that we need your approval before we can move [Plaintiffs]?" *Id.* at ¶ 22.

Defendants' counsel further stated that they would not speak to any of the conditions at BRCI, noting the information they received from SCDC's General Counsel was inconsistent, that it was possible SCDC's General Counsel was unaware of what actions SCDC staff was taking at

the facility, and admitting that Defendants' counsel *did not know* what conditions exist or are planned for BRCI. *Id.* at ¶ 23.

Plaintiffs' counsel reiterated their request for written assurances and, given the unreliability of SCDC General Counsel's information, demanded these assurances come from Defendants' operations staff with firsthand knowledge of conditions at BRCI. Plaintiffs' counsel set a response deadline of May 20, 2019, stating that they would move for injunctive relief if the assurances were not provided. Defendants' counsel grew suddenly frustrated, hanging up while Plaintiffs' counsel was mid-sentence. *Id.* at ¶¶ 24–25.

Plaintiffs reiterated the request once more by email. *Id.* at ¶ 25; Schiavo Decl. Ex. 5 (E-mail between Nicol E. Schiavo and Daniel R. Settana (May 17, 2019). Defendants' counsel offered only that they hoped to share information with Plaintiffs' counsel "by the end of next week" and repeating unreliable and vague statements from SCDC General Counsel that the move would not occur "this month." *Id.* at ¶ 26; Ex. 6 (E-mail between Janet Brooks Holmes and Nicole E. Schiavo (May 17, 2019)). Plaintiffs' counsel responded thanking Defendants for the promise of information, but again noted the need for assurances that Plaintiffs' counsel be permitted time to inspect the conditions at BRCI and any revised Death Row policies with enough time to negotiate any necessary changes — to bring those conditions and policies into compliance with constitutional standards — *before* any move is consummated. To ensure adequate time, Plaintiffs specifically requested assurances from SCDC operations staff that the move to BRCI would not occur prior to June 14, 2019. *Id.* at ¶ 27; Schiavo Decl. Ex. 7 (E-mail exchange between Nicole E. Schiavo and Janet Brooks Holmes (May 19, 2019).

Defendants responded by letter on May 20, 2019, informing Plaintiffs only that "SCDC is not moving the Death Row prisoners before or on May 31, 2019" but refusing to provide even an

estimated date of the move "for security and safety reasons."[2] Defendants stated that they are "working on getting [Plaintiffs' counsel] into BRCI next week (the week of May 27–31)." *Id.* at ¶ 28, Ex. 8 (Letter from Janet Brooks Holmes to Nicole E. Schiavo (May 20, 2019)). Defendants' May 20 letter, again, offers Plaintiffs *no* assurances that the conditions at BRCI will meet constitutional standards, nor that Plaintiffs' counsel would have adequate time to review those conditions and revisions to the Death Row policy before the move is consummated. *Id.* at ¶ 29.

Given Defendants' refusal to engage with Plaintiffs' counsel or at least provide the approximate date for the move, Defendants' constant equivocation surrounding the anticipated conditions at BRCI, word of completed and pending modifications to the facility, and threats to keep Death Row on "lockdown," Plaintiffs have every reason to believe the conditions at BRCI will be substantially similar to, or perhaps worse than, those experienced at Kirkland MSU and Lieber. Plaintiffs also have every reason to believe that Defendants are seeking to make the move without involving Plaintiffs' counsel so that Defendants can make the conditions worse and then claim that the changes cannot be undone. It is telling that Defendants refused to provide information on the date of the move so that Plaintiffs could avoid filing this motion and use the time to engage in further negotiations with Defendants.

LEGAL STANDARDS

Preliminary injunctions provide relief to a party seeking to enjoin another from committing an irreparable injury prior to a final determination on the merits. *See* Fed. R. Civ. P.

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[2] Plaintiffs' counsel provided June 14 as an approximate date by which the inspection could take place and Plaintiffs could raise any objections for discussion. There is no "magic" to the June 14 date and it could be another date thereafter so long as it provides sufficient time for the inspection and follow-up discussions. Also, by referring to any move date, Plaintiffs do not concede that such a move should take place (especially considering their lack of information about the conditions), and they reserve all rights.

65. To secure preliminary injunctive relief, Plaintiffs must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent preliminary injunctive relief; (3) that the balance of equities tips in favor of providing preliminary injunctive relief; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also United States v. South Carolina*, 840 F. Supp. 2d 898, 914 (D.S.C. 2011). Standards for issuing a temporary restraining order and a preliminary injunction are substantially similar. *See Samuel v. Nolland*, C.A. No. 2:11-03417, 2012 WL 3062471, at *1 (D.S.C. June 21, 2012), *report and recommendation adopted*, C.A. No. 2:11-CV-03417-MGL, 2012 WL 3059619 (D.S.C. July 26, 2012).

ARGUMENT

SCDC's decision to move Death Row prisoners into BRCI without affording them any process or sufficient opportunity to assess the conditions at that facility creates a likelihood of continued and indefinite constitutional injury to Plaintiffs. Although Plaintiffs' counsel inspected the facility on January 28, 2019 as a potential alternative to Kirkland MSU for Death Row, Defendants have since engaged in numerous facility modifications which render the current conditions at BRCI unknown. Plaintiffs have reason to believe the conditions at BRCI have deteriorated significantly since counsel's inspection, including Defendants' own representations that Plaintiffs will be kept on "lockdown" following the move. Should Defendants move Plaintiffs into further unconstitutional conditions at BRCI, Plaintiffs' hopes of ending their cruel and unusual treatment will be dashed: the BRCI facility is available by happenstance, and Defendants have *no* other alternative locations available in which to house Plaintiffs and limited funds should further modifications be required to bring BRCI into compliance with constitutional standards. In that scenario, Plaintiffs would languish in

continued isolation at BRCI indefinitely — it is far more prudent that Defendants grant Plaintiffs' counsel access to BRCI prior to the move, to ensure its constitutional sufficiency in the first instance and before deleterious modifications that cannot be inexpensively "undone" are complete.

Defendants continue to subject Plaintiffs to confinement conditions that impose an atypical and significant hardship on Plaintiffs in violation of their Eighth and Fourteenth Amendment rights under the United States Constitution, and a premature move to BRCI risks perpetuating this treatment indefinitely and wasting tax-payer dollars making a second round of modifications that could be avoided by an open dialogue with Plaintiffs' counsel. Preliminary injunctive relief is thus warranted to preserve the status quo and protect Plaintiffs and the public from this hardship, at least until Plaintiffs' counsel has a meaningful opportunity to inspect the modified BRCI to ensure its sufficiency to house Death Row.

Plaintiffs meet all of the factors warranting injunctive relief in the form of a TRO and preliminary injunction because: (1) they are likely to succeed on the merits of their Eighth and Fourteenth Amendment claims; (2) they are likely to suffer irreparable harm in the absence of relief, due to the ongoing and continued, prospective violation of their constitutional rights and their lack of access to basic services and humane living conditions; (3) the balance of equities weighs in their favor; and (4) an injunction would serve the public interest by upholding Plaintiffs' constitutional rights and preventing economic waste. *See Winter*, 555 U.S. at 20; *South Carolina*, 840 F. Supp. 2d at 914.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A district court "has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right." *Henry v. Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir. 1960). "While plaintiffs

seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits, they 'need not show a certainty of success.'" *League of Women Voters of N. Car. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (quoting *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013)).

As detailed below, SCDC has a decades-long history of violating Plaintiffs' Eighth Amendment rights to be free from cruel and unusual punishment, as well as Plaintiffs' Fourteenth Amendment rights to due process. SCDC has refused to provide any evidence that it plans to remedy those violations in the BRCI facility. As such, Plaintiffs are substantially likely to prevail on the merits. This is particularly so after the Fourth Circuit's recent decision in *Porter v. Clarke*, No. 18-6257, 2019 WL 1966780, at *2 (4th Cir. May 3, 2019), *as amended* (May 6, 2019), which found that confinement conditions bearing a striking resemblance to those at Kirkland MSU violate the Eighth Amendment.

A. Substantial Evidence Suggests That SCDC Prisoners Will Continue to Be Exposed to Conditions Constituting Cruel and Unusual Punishment at BRCI

The Eighth Amendment prohibits infliction of "cruel and unusual punishments," U.S. Const. amend. VIII, and applies to claims by prisoners against corrections officials challenging conditions of confinement. *Porter*, 2019 WL 1966780, at *2; *see also Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016) ("[T]he Eighth Amendment imposes a duty on prison officials to 'provide humane conditions of confinement . . . [and] ensure that inmates receive adequate food, clothing, shelter, and medical care." (omission and alteration in original) (quoting *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). Courts in this circuit utilize a two-prong test to evaluate claims of Eighth Amendment violations, one prong being objective and the other subjective. *Porter*, 2019 WL 1966780, at *2. To satisfy the objective prong, a plaintiff inmate must "demonstrate that 'the deprivation alleged [was], objectively, sufficiently serious.'" *Id.* at *3

(alteration in original) (quoting *Scinto*, 841 F.3d at 225). To satisfy the subjective prong, a plaintiff must demonstrate that prison officials acted with "deliberate indifference" to the plaintiff's rights. *Id.* at *7 (citing *Scinto*, 841 F.3d at 225). Plaintiffs are likely to satisfy both of these prongs on the merits.

a. Plaintiffs Will Likely Continue to Be Exposed to Conditions That Pose Substantial Risk of Serious Psychological and Emotional Harm at BRCI

In its recent decision in *Porter*, the Fourth Circuit found that certain conditions to which prisoners on Virginia's Death Row had been exposed posed a "substantial risk" of objectively serious psychological and emotional harm which violated the Eighth Amendment. *Id.* at *4. These conditions included: housing in non-adjacent cells with solid steel doors, posing a significant barrier to prisoners' communication; cells that were always lit, with a low-level night light for security purposes; access to recreation only five days a week, with no access to exercise equipment; and no access to congregate entertainment or programming. *Id.* at *6. These conditions are substantially similar to – if not better than – those to which Defendants subject Plaintiffs. *See* Am. Compl. ¶¶ 2, 72–268.

In holding that these confinement conditions violated the Eighth Amendment, the Fourth Circuit relied on recent advances in the field of psychology that have allowed researchers to quantify the nature and severity of adverse psychological effects attributable to prolonged placement of prisoners in isolated conditions. *Porter*, 2019 WL 1966780, at *3. Such adverse psychological effects include declines in mental functioning, cognitive impairment, concentration and memory problems, and problems with impulse control. *Id.* The Court explicitly acknowledged that, in light of these developments, its earlier decisions adverse or skeptical to prisoners' Eighth Amendment rights now lack precedential value. *Id*. at *5.

Conditions Plaintiffs experience at Kirkland MSU, which are likely to continue, if not worsen, at BRCI, bear a striking resemblance to the confinement conditions in *Porter* including:

- Plaintiffs have almost no human contact, and the two solid doors between each inmate and prison staff—and the solid cell walls between prisoners—make it difficult for Plaintiffs to speak with other prisoners or prison staff. *See* Am. Compl. ¶¶ 76–77, 141, 151, 157, 165, 173, 185, 189, 197, 200, 202, 212, 224, 257.

- Plaintiffs have minimal control over the lighting in their hall: Plaintiffs must get assistance from the guards in order to control the lights in their own cells, and when officers make rounds at night they turn on the lights in the hall, making it difficult for Plaintiffs to sleep. *See id.* ¶¶ 75, 94, 105, 178, 188, 213, 259.

- Plaintiffs are given limited opportunity for recreation and all recreation occurs in a small enclosed space with no exercise equipment. *Id.* ¶¶ 84, 109–110, 148, 152, 167–168, 261.

- Plaintiffs have no congregate programming or religious opportunities. *Id.* ¶¶ 87, 107–108, 149, 151.

Defendants have provided no indication that these conditions would change at the new BRCI facility. Indeed, Defendants have provided *no* concrete answers to Plaintiffs' counsel's inquiries, claiming only that new policies "are coming," and that they "may consider [Plaintiffs' counsel's] thoughts" with respect to those policies. *See* Schiavo Decl. ¶ 14.

There exists a cognizable risk of Defendants' continued violation of Plaintiffs' rights at BRCI following a move from Kirkland MSU, regardless of whatever unsupported promises Defendants might make to the contrary. Defendants have expressed little regard for Plaintiffs' rights in the past decades, and have proffered no evidence that they are motivated by a sincere desire to remedy inhumane conditions. In fact, Plaintiffs believe Defendants' purported BRCI plans are nothing more than a cynical attempt to "reset" this litigation: Defendants have not committed to ameliorating the unconstitutional conditions in which Plaintiffs are held and initiated the purported move only in reaction to the instant litigation. They have repeatedly

stated their beliefs that the Plaintiffs' confinement conditions at Kirkland MSU do not qualify as Eighth Amendment violations in the first instance. *See, e.g.*, Answer to Am. Compl. ¶¶ 6, 31, 33, 37 (ECF No. 33); Defs.' Resp. in Opp'n to Pls.' Mot. and Mem. for Prelim. Inj. at 11–12, 14 (ECF No. 14). Under the Fourth Circuit's analytical framework, therefore, Plaintiffs are likely to establish that the conditions at the BRCI facility pose a "substantial risk" of continued, indefinite serious psychological harm in violation of the Eighth Amendment. *Porter*, 2019 WL 1966780, at *4.

b. Evidence Suggests That Defendants Will Continue to Deliberately Disregard the Obvious Risk of Psychological and Emotional Harm to Plaintiffs

To satisfy the subjective prong in an Eighth Amendment case, a plaintiff must show that prison officials acted with "deliberate indifference" to the plaintiff's rights: that is, that they "kn[ew] of and disregard[ed] an excessive risk to inmate health or safety." *Porter*, 2019 WL 1966780, at *7 (alterations and quotation omitted). "Deliberate indifference is more than mere negligence, but less than acts or omissions [done] for the very purpose of causing harm or with knowledge that harm will result." *Id.* (alteration in original) (quoting *Scinto*, 841 F.3d at 225). "An obvious risk of harm justifies an inference that a prison official subjectively disregarded a substantial risk of serious harm to the inmate." *Id.* (quoting *Schaub v. VonWald*, 638 F.3d 905, 915 (8th Cir. 2011)).

In *Porter*, the Court found that "the extensive scholarly literature describing and quantifying the adverse mental health effects of prolonged solitary confinement that has emerged in recent years provides circumstantial evidence that the risk of such harm 'was so obvious that it had to have been known.'" *Id.* at *8 (quoting *Makdessi v. Fields*, 789 F.3d 126, 136 (4th Cir. 2015)). The Court also noted that the corrections department procedures barring detention of non-Death Row prisoners in segregated confinement further evidenced the defendants'

awareness that extended stays in segregation can have harmful psychological effects. *Id.* at *7. Finally, the Court stated that while penological considerations can play a role in determining defendants' subjective intent, defendants may be hard-pressed to establish that such considerations are legitimate when subjecting a whole group to the same conditions, regardless of the prisoners' individual record of violence while in prison. *Id.* at *9.

Here, Defendants have been privy to the same scholarly literature as defendants in *Porter*. Moreover, just like in *Porter*, SCDC subjects all Death Row prisoners to segregated confinement and there is no reason to believe that this policy will change once prisoners are moved to the BRCI facility. Finally, just like in *Porter*, SCDC will be unable to demonstrate that Death Row prisoners, as a group, "have disproportionate rates of serious violence when confined under general population security conditions." *Id.* at *9 (internal quotation omitted). As such, Plaintiffs will likely establish that Defendants have acted and will continue to act with deliberate indifference towards the obvious risk of psychological and emotional harm that segregated confinement poses to prisoners.

B. Plaintiffs Are Likely to Prevail on the Fourteenth Amendment Claim Because Prisoners Have a State-Created Liberty Interest in Avoiding Arbitrary Detention at BRCI and They Will Likely Be Deprived of That Interest Without Due Process

"Although lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a prisoner's right to liberty does not entirely disappear." *Incumaa*, 791 F.3d at 526 (alterations and internal quotation omitted). To determine whether Plaintiffs are likely to succeed on a procedural due process claim, this Court should consider: (1) whether Plaintiffs have a "protectable liberty interest" in avoiding arbitrary segregated confinement (which conditions are threatened to continue at BRCI); and (2) whether SCDC failed to afford Plaintiffs "minimally adequate process to protect that liberty interest." *Id.* at 526. Here, Fourth Circuit precedent confirms that Plaintiffs, who have lived subject to SCDC's unconstitutional

Death Row policies for years — and in some instances, for decades — have a liberty interest in being free from arbitrary detention in solitary confinement and that they were not provided with even minimally adequate process to protect that interest. This Court should therefore grant Plaintiffs injunctive relief, allowing Plaintiffs' counsel to inspect and ensure that conditions at BRCI comply with the constitutional baseline before Plaintiffs are moved to the facility.

a. Plaintiffs Have a Liberty Interest in Avoiding BRCI Confinement Conditions As These Conditions Will Likely Impose Atypical and Significant Hardship on the Prisoners

"[P]risoners have a liberty interest in avoiding confinement conditions that impose 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Incumaa*, 791 F.3d at 526 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). To determine whether confinement conditions are considered atypical and significantly harsh, courts in this Circuit use a two-part analysis. First, the Court must "determine what the normative 'baseline' is: what constitutes the 'ordinary incidents of prison life' for this particular inmate." *Id*. at 527 (emphasis omitted) (quoting *Prieto v. Clarke*, 780 F.3d 245, 253 (4th Cir. 2015)). Second, the Court should consider "whether the prison conditions impose atypical and substantial hardship in relation to that norm." *Id.*

The baseline determination of what constitutes "ordinary incidents of prison life" is made on a case-by-case basis. *Prieto*, 780 F.3d at 253; *see also Incumaa*, 791 F.3d at 527 (citing *Beverati v. Smith*, 120 F.3d 500, 502–503 (4th Cir. 1997)). Whatever that baseline is, however, conditions that constitute cruel and unusual punishment under the Eighth Amendment surely depart from "ordinary incidents of prison life." The Fourth Circuit in *Porter* found that housing prisoners in non-adjacent cells with solid steel doors, providing severely limited access to exercise, and denying congregate programming constitute precisely such cruel and unusual punishment. *Porter*, 2019 WL 1966780, at *6. Similarly, the Supreme Court has held that

assignment to a maximum-security prison with highly restrictive conditions "imposes an atypical and significant hardship under *any plausible baseline*." *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (emphasis added).

As established above, the current conditions at Kirkland MSU closely resemble the conditions that were held to violate the Eight Amendment in *Porter*. *See supra,* at p 14. Defendants have refused to provide any concrete information that they intend to remedy those deficiencies at the BRCI facility, rather threatening these conditions will continue. Therefore, Plaintiffs are likely to continue to suffer "atypical and substantial hardship" if moved to BRCI.

b. Evidence Suggests That Plaintiffs Will Be Denied Any Meaningful Process at BRCI

Courts consider three factors in determining whether procedural protections are sufficient to protect a prisoner's interests:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Here, Defendants have not provided Plaintiffs with *any* process — let alone "meaningful" — prior to their indefinite solitary confinement at Lieber and Kirkland MSU. *See* Am. Compl. ¶¶ 46–48, 70, 86, 126–128, 132–13, 137, 279. And Defendants' statements that the conditions at BRCI are "none of [Plaintiffs' counsel's] business" and inquiry into whether Plaintiffs' counsel "think[s] the court can stop the move if [Defendants] wanted to do it tomorrow?" indicate that no such process will be afforded to Plaintiffs before they are moved to BRCI. *See* Schiavo Decl. ¶¶ 11, 24. As such, no balancing of the traditional *Mathews* factors is

necessary. *See Incumaa*, 791 F.3d at 533 (holding that "Appellant has demonstrated a triable dispute on his procedural due process claim" when the record was "bereft of any evidence that Appellant has ever received meaningful review").

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT IMMEDIATE INJUNCTIVE RELIEF

Plaintiffs will likely suffer irreparable harm if SCDC is allowed to move them to the BRCI facility at this time. First, such a move will likely only perpetuate existing unconstitutional conditions, or subject Plaintiffs to even worse conditions, and therefore cause further irreparable harm. The violation of a constitutional right constitutes irreparable injury. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And where "defendants are shown to have settled into a continuing practice [of violating constitutional rights], courts will not assume that it has been abandoned without clear proof." *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952). The courts "must guard against attempts to avoid injunctive relief 'by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption.'" *Porter,* 2019 WL 1966780, at *11 (quoting *Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 367 (7th Cir. 1990)).

Courts have upheld injunctive relief even where defendants have provided unequivocal evidence that they have discontinued unconstitutional conduct so long as there remains a "cognizable danger of recurrent" unconstitutional conditions. This "cognizable danger" standard is satisfied even where "Defendants' aver[] lack of present *intent* to revert to the challenged conditions" but defendants' purported ameliorating of confinement conditions is "influenced, although not entirely dependent on, the current litigation." *Porter*, 2019 WL 1966780, at *11 (emphasis in original) (internal quotations omitted) (upholding injunctive relief where defendants made post-filing changes to the challenged conditions of Virginia's Death Row prisoners

because there was "no legal barrier to defendants returning to prior conditions and no pre-implementation mechanism for plaintiffs to challenge such a return"); *see also Washington v. Fed. Bureau of Prisons*, Civil Action No. 5:16-3913-BHH, 2018 WL 6061039, at *6 (D.S.C. Nov. 20, 2018) (noting that defendants corrected "many, perhaps most or even all, of the inadequacies" in inmate's medical care only after initiation of litigation and issuing injunctive relief).

Currently, Plaintiffs are suffering irreparable harm due to numerous deprivations, including: a lack of human interaction with other prisoners, friends, family, legal counsel, and chaplains, *see* Am. Compl. ¶¶ 77, 96–104, 106–108, 113–114, 137–138, 141, 146, 151, 156–157, 165–166, 173–174, 189–190, 197–198, 202–203, 205, 207, 212, 220, 224, 226, 228, 233, 236–237, 249, 255–256; unsanitary conditions, including exposure to mold and inability to obtain clean clothing and sheets, *see id.* ¶¶ 80–83, 124–125, 168, 177, 184, 191, 232, 238, 244, 261; severely limited access to recreation, *see id.* ¶¶ 84, 109–110, 148, 152, 167–168, 261; inadequate access to medical care and prescription medication, *see id.* ¶ 88–89, 134, 143, 163, 183, 193, 200, 205, 214–215, 221, 225, 231, 239, 247, 251, 257–259, 266; and lack of mental stimulation, *see id.* ¶¶ 87–88, 122, 141, 158, 200, 212, 220, 222, 249–250, 262.

Just like in *Porter* and *Washington*, there is "cognizable danger" that the unconstitutional conditions (and the attendant irreparable harm) will persist, or worsen, in the BRCI facility. In fact, whereas the issue in *Porter* and *Washington* was that defendants failed to demonstrate that they would not *revert* to unconstitutional practices, it is unclear whether SCDC even intends to modify the unconstitutional practices it already employs at Kirkland MSU. Plaintiffs have strong reason to believe that, after allowing Plaintiffs' counsel to inspect the BRCI facility in January, SCDC has made substantial modifications to the facility which it now refuses to disclose to

Plaintiffs' counsel, while simultaneously threatening to keep Plaintiffs on "lockdown" following the move. *See* Schiavo Decl. ¶¶ 14–17. Therefore, moving Plaintiffs to the BRCI facility will likely perpetuate inhumane conditions and cause Plaintiffs further irreparable harm.

Second, allowing SCDC to move Plaintiffs to BRCI at this stage of the litigation will entrench SCDC's unconstitutional practices, thereby threatening the efficacy of the Court's final decision. Injunctions are issued "to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *Murray v. Terry*, No. 2:18-CV-00942, 2018 WL 3543076, at *2 (S.D.W. Va. July 23, 2018) (quoting *Perry v. Judd*, 471 F. App'x 219, 223 (4th Cir. 2012)); *see also* 11 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (3d ed. 2019) (noting a need for preliminary relief when the threatened harm would impair the court's ability to grant an effective remedy).

Courts have recognized situations where plaintiffs would likely suffer irreparable harm if defendants were given an opportunity to entrench their unlawful practices. For example, in *Arlington Coalition on Transportation*, the Fourth Circuit issued an injunction halting a highway-planning process to conduct an environmental review reasoning that, "[o]nce the highway-planning process has reached these latter stages, flexibility in selecting alternative plans has to a large extent been lost" and "there is likely to be an 'irreversible and irretrievable commitment of resources,' which will inevitably restrict the [Defendant's] options." *Arlington Coal. on Transp. v. Volpe*, 458 F.2d 1323, 1333–34 (4th Cir. 1972) (quoting *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1128 (D.C. Cir. 1971)). The court was leery that allowing the highway-planning process to continue would result in tolerating the environmental harm instead of requiring highway planners to undergo a major expense in making alterations to a completed plan. *Id.*

The same irreparable injury is likely to occur here. If SCDC is allowed to move the prisoners into the new BRCI facility now, SCDC will lose its flexibility to efficiently modify conditions in that facility. Even if this Court will not ultimately tolerate these conditions, particularly in light of the recent decision in *Porter*, SCDC will have to expend additional time and resources to fix them. This could result in having to move Plaintiffs to a temporary facility while SCDC makes modifications and for SCDC to have to secure additional funding — a proposition SCDC has repeatedly indicated is not an option. As such, allowing SCDC to move the Death Row prisoners to the BRCI facility at this time would likely cause Plaintiffs irreparable harm and impair the Court's ability to grant an effective remedy.

III. THE BALANCE OF EQUITIES FAVORS PLAINTIFFS

The purpose of a preliminary injunction is not to determine the final rights of the parties, but "to balance the equities as the litigation moves forward." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). Here, the balance of equities favors Plaintiffs. As described above, the harms to Plaintiffs — both current and prospective — are dire and irreparable: denial of fundamental constitutional rights; deprivation of basic needs; irreversible psychological and physical injury; and denial of human dignity. By contrast, the Defendants face *no* countervailing harm if forced to engage with Plaintiffs' counsel and confirming conditions at BRCI will meet constitutional baselines, and affording Plaintiffs' counsel the opportunity to review those conditions to confirm. South Carolina "is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction." *Centro Tepeyac v. Montgomery County.*, 722 F.3d 184, 191 (4th Cir. 2013) (quoting *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002)); *see also Carolina Pride, Inc. v. McMaster*, C.A. No. 3:08-4016-CMC, 2009 WL 238206, at *14 (D.S.C. Jan. 30, 2009), *as amended* (Feb.

17, 2009) ("Defendants do not have a legal interest in the enforcement of an unconstitutional statute."). Furthermore, Plaintiffs here are asking only that their counsel be afforded the opportunity to inspect and approve of the BRCI facility, its conditions, and any revised Death Row policies before the contemplated move to BRCI or ratification of those policy revisions are consummated.

IV. PRESERVING THE STATUS QUO WOULD ADVANCE THE PUBLIC INTEREST

Granting Plaintiff's request for preliminary injunctive relief would also be in the public interest. There can be no doubt that "upholding constitutional rights surely serves the public interest." *Giovani Carandola*, 303 F.3d at 521. The Constitution recognizes that prisoners are not stripped of their constitutional rights simply by virtue of their incarceration. *Sweet v. S.C. Dep't of Corrs.*, 529 F.2d 854, 859–60 (4th Cir. 1975) (en banc), *abrogated by Porter*, 2019 WL 1966780. Indeed, the Fourth Circuit has held that "[c]ourts can and should intervene when any due process, equal protection or Eighth Amendment rights of prison inmates are violated." *Id.* at 860. Courts across the country have found infringements on the constitutional rights of prisoners, like the ones at issue here. *See, e.g.*, *Wilkinson*, 545 U.S. at 223; *Sweet*, 529 F.2d at 860; *Allah v. Seiverling*, 229 F.3d 220, 223–24 (3d Cir. 2000) (upholding constitutional right of access to the courts for prisoners in administrative segregation under the Due Process Clause); *Ambrose v. Young*, 474 F.3d 1070, 1077 (8th Cir. 2007) (finding that prisoner had Eighth Amendment right to a safe work environment); *DeSpain v. Uphoff*, 264 F.3d 965, 974–75, 977 (10th Cir. 2001) (holding that inmate's exposure to human waste as a result of flooding in the cell violated the Eighth Amendment). In so doing, courts recognize that ensuring adequate protection of prisoners' constitutional rights benefits the public interest in having a prison system

that obeys the law. *See Edmisten v. Werholtz*, 287 F. App'x 728, 735 (10th Cir. 2008). And this Court can and should do precisely that here.

Preserving the status quo also furthers the public interest by preventing Defendants' waste of tax-payer dollars. Defendants are currently expending public funds in modifying the conditions at BRCI, with no assurances that those conditions will pass constitutional muster. Should these conditions fail to meet those standards, Defendants will be required to expend yet more public funds in either *reversing* completed modifications or requiring yet further construction to bring BRCI into compliance. By granting the injunctive relief Plaintiffs seek, this Court will protect the public interest by guarding against economic waste of tax-payer dollars making a second round of modifications that could be avoided by an open dialogue with Plaintiffs' counsel. *City of Rochester v. U.S. Postal Serv.*, 541 F.2d 967, 977 (2d Cir. 1976) (recognizing "public interest in averting economic waste"); *see also Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 156 (D.D.C. 2018) (considering "waste of taxpayer funding" in balancing public interest).

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court grant their motion for a TRO and preliminary injunctive relief.

LOCAL CIVIL RULE 7.02 STATEMENT

Pursuant to Local Civil Rule 7.02, counsel for Plaintiffs conferred with counsel for Defendants and attempted in good faith to resolve the matter contained in this motion. As discussed above, those efforts were unsuccessful.

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Respectfully submitted,

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