No. 13-31289

In the United States Court of Appeals for the Fifth Circuit

ROBERT KING WILKERSON; ALBERT WOODFOX; VICTORY WALLACE; BARBARA WALLACE MARSHALL; LORRAINA WALLACE ANDERSON; JUSTINA WALLACE WILLIAMS,

Plaintiffs - Appellees,

v.

JERRY GOODWIN, Warden, David Wade Correctional Center, in his official and individual capacity; JAMES ARNOLD, Deputy Warden of Security, David Wade Correctional Center, in his official and individual capacities; LONNIE NAIL, Lieutenant Colonel, David Wade Correctional Center, in his official and individual capacities; MARK HUNTER, Classification Officer, David Wade Correctional Center, in his official and individual capacities; HOWARD PRINCE, Warden, Elayn Hunt Correctional Center, in his official and individual capacities; GREG MCKEY, Assistant Warden of Security, Elayn Hunt Correctional Center, in his official and individual capacities; BETTY JOHNSON, Lieutenant Colonel, Elayn Hunt Correctional Center, in her official and individual capacities; KEVIN DURBIN, Lieutenant Colonel, Elayn Hunt Correctional Center, in his official and individual capacities; JEFFREY GLADNEY, Classification Officer, Elayn Hunt Correctional Center, in his official and individual capacities; CHRIS EVANS,

Defendants - Appellants

On Appeal from the United States Middle District of Louisiana

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ORIGINAL BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

No. 13-31289, *Robert King Wilkerson et al. v. Jerry Goodwin et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellants Affiliated with David Wade Correctional Center
Warden Jerry Goodwin; Deputy Warden of Security James Arnold; Lonnie Nail, Lieutenant Colonel; Mark Hunter, Classification Officer; Chris Hunter, Classification Officer

Appellants Affiliated with Elayn Hunt Correctional Center
Warden Howard Prince; Greg McKey, Assistant Warden of Security; Betty Johnson, Lieutenant Colonel; Kevin Durbin, Lieutenant Colonel; Jeffrey Gladney, Classification Officer

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument will significantly assist the Court in deciding this appeal. The appeal concerns the qualified immunity of ten corrections officials at two facilities (Hunt and Wade), who were recently added to complex litigation against officials from another facility (the Louisiana State Penitentiary) that has been pending for nearly 14 years. The underlying qualified immunity issues are complex and turn on interpretations of Circuit and Supreme Court precedent that were contested by the parties below. Furthermore, oral argument will assist the Court in highlighting those specific parts of the voluminous record which are material to Appellants' qualified immunity.

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JURISDICTIONAL STATEMENT

The district court's order denying Appellants' motion for summary judgment on the basis of qualified immunity was entered on December 17, 2013. ROA.8182. A notice of appeal was timely filed by all Appellants the following day. ROA.8222.

The district court had original jurisdiction under 28 U.S.C. §1332 and §1343, because Appellees assert claims against them under 42 U.S.C. §1983 and various provisions of the United States Constitution. *See* ROA.7163 (Fourth Amended Complaint).

This Court has jurisdiction over this appeal under the collateral order doctrine because it is an appeal from the denial of a motion for summary judgment based on qualified immunity. *See, e.g., Morgan v. Swanson*, 659 F.3d 359, 370 (5th Cir. 2011) (en banc) (explaining that "[a]n order denying qualified immunity, to the extent it turns on an issue of law, is immediately appealable") (quotation marks omitted).

STATEMENT OF THE ISSUES

Appellees are two prisoners who were transferred from the Louisiana State Penitentiary ("LSP") to the Hunt and Wade facilities in 2009 and 2010, respectively. Appellants—prison officials at Hunt and Wade—classified Appellees upon transfer as maximum security based on their convictions for murdering an LSP guard years before. Based on their security classification, Appellees were assigned to restrictive single-cell housing. Appellees subsequently sued Appellants for damages under the Due Process Clause, claiming inadequate review of their housing assignments. Appellants moved for summary judgment based on qualified immunity, which the district court denied.

The issues presented are:

(1). Do Appellees have a protected liberty interest under the Due Process Clause in their housing assignments at Hunt and Wade?

(2). Assuming a protected liberty interest, did the Appellant prison officials violate clearly established law by assigning Appellees to single-cell housing based on their previous conviction for having murdered a prison guard at LSP?

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ROBERT KING WILKERSON, *et al.*,

Plaintiffs - Appellees,

v.

JERRY GOODWIN, *et al.*,

Defendants - Appellants

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

This appeal concerns claims of qualified immunity by prison officials at two separate facilities: the Elayn Hunt Correctional Center ("Hunt") and the David Wade Correctional Center ("Wade"). Those officials are collectively referred to in this brief as the "Hunt/Wade officials" or simply as "Appellants."[1] Appellee Herman Wallace was transferred from the Louisiana State Penitentiary at Angola ("LSP") to Hunt on

[1] Specifically, the Wade officials are Warden Jerry Goodwin, Deputy Warden James Arnold, Lt. Col. Lonnie Nail, Classification Officer Chris Evans, and Classification Officer Mark Hunter. The Hunt officials are Warden Howard Prince, Assistant Warden Greg McKey, Lt. Col. Betty Johnson, Classification Officer Kevin Durban, and Classification Officer Jeffrey Gladney.

March 19, 2009. ROA.7818, ¶2.[2] Appellee Albert Woodfox was transferred from LSP to Wade on November 1, 2010. ROA.7800, ¶2.

Upon transfer, Appellees were each classified as maximum security by Hunt and Wade officials because they had previously been convicted for the murder of an LSP guard, Brent Miller, in 1972. ROA.7800, ¶4; ROA.7818, ¶4; *see also* ROA.7803-05, 7810-12 (Wade policy memorandum discussing "inter-institutional transfers," "initial classification," and maximum security designation). Under prison policies, their outstanding convictions for killing a corrections officer justified a maximum security classification. ROA.7801, ¶7; ROA.7818-19, ¶¶4-5; ROA.7822, ¶5; ROA.7823. The Hunt and Wade officials had full authority to alter Appellees' classification, however, if they deemed it appropriate. ROA.7800, ¶4; ROA.7818, ¶3; ROA.7821, ¶2.

Based on their security classification, Appellees were assigned to Closed-Cell Restriction ("CCR"). ROA.7801, ¶9; ROA 7818, ¶4. CCR involves significant restrictions: An inmate is housed in a single cell and allowed one hour per day for exercise, showering, and walking

[2] Wallace died in October 2013 and his heirs have now been substituted as plaintiffs (ROA.8205). These heirs are named in the Certificate of Interested Persons, but for simplicity Herman Wallace will be referred to in this brief as "Appellee." Unless context otherwise indicates, "Appellees" refers collectively to both Albert Woodfox and Herman Wallace.

along the tier. ROA.7811; ROA.7917. CCR, however, does allow contact visits, phone privileges, peer counselors, and limited religious and educational opportunities. ROA.7918; ROA.7925; ROA.7936-37; ROA.7945; ROA.8056-57; ROA.8065. Assignment to CCR is not a disciplinary measure, and no Hunt or Wade inmate has ever been placed in CCR as a result of disciplinary action. ROA.7801, ¶9; ROA.7819, ¶7. Appellees, like all other CCR inmates, receive periodic review of their housing status. ROA.7812; ROA.7920; ROA.7923; ROA.8071-8081; ROA.8083-8090. While Woodfox's status has not been changed since his arrival in late 2010, Wallace's was changed to "medical medium" in 2013 due to his liver cancer. ROA.7818, ¶8. (Wallace was released from custody on October 1, 2013 and died on October 4, 2013).

When Appellees arrived at Hunt and Wade, they had already been involved in longstanding litigation against LSP officials concerning their conditions of confinement at LSP.[3] Appellees' housing at LSP involved CCR restrictions similar to those at Hunt and Wade, except

[3] This lawsuit was filed in 2000 against the former Secretary of the Louisiana Department of Public Safety and Corrections and four LSP officials. Subsequent amendments substituted Secretary James LeBlanc and added other LSP officials as defendants.

with smaller cells and less generous phone privileges. ROA.8056; ROA.8182 (district court noting CCR at Hunt / Wade differs from LSP in "cell size and telephone privileges"). Appellees' litigation against LSP officials, and how Appellants eventually became involved in it, is described below.

B. PROCEDURAL HISTORY

1. Appellees sue LSP officials in 2000.

In 2000, Appellees sued LSP officials in state court, claiming that their CCR housing assignment at LSP violated the First, Eighth, and Fourteenth Amendments; the original defendants timely removed that suit to federal court. ROA.75.[4] That lawsuit, which is still ongoing, has involved extensive and complex litigation, including parallel habeas corpus proceedings by both Woodfox and Wallace.[5]

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[4] Inmate Robert King Wilkerson also sued and remains a plaintiff in this case. He is not, however, an appellee here because he was released from custody at LSP and was never incarcerated at Hunt or Wade.

[5] *See, e.g., Woodfox v. Cain*, 609 F.3d 774 (5th Cir. 2010) (reversing grant of habeas corpus on ineffective-assistance grounds). On February 26, 2013, the district court again granted Woodfox habeas corpus, this time based on a finding that his grand jury forewoman had been selected through a racially imbalanced process. *Woodfox v. Cain*, 926 F.Supp.2d 841 (M.D. La. 2013). Woodfox remains at Wade during the State's appeal, which was argued on January 7, 2014. *Woodfox v. Cain* (5th Cir. No. 13-30266). On October 1, 2013, the district court granted Wallace habeas corpus based on a finding that women had been excluded from his grand jury venire. *Wallace v. Prince*, 2013 WL 5486862 (M.D. La. 2013). He was released from Hunt and moved to hospice care, where he died shortly thereafter.

In 2003, this Court considered whether LSP officials were entitled to qualified immunity on Appellees' claim that their housing assignments at that facility violated "procedural" due process. *See Wilkerson v. Stalder*, 329 F.3d 431, 433 (5th Cir. 2003); ROA.362. The key threshold issue was whether Appellees had a "liberty interest" under the Supreme Court's decision in *Sandin v. Conner*, 515 U.S. 472 (1995). *See Wilkerson*, 329 F.3d at 435. To answer that question, this Court explained that it was "crucial to know" whether Appellees' assignment to CCR was "the result of an initial classification by prison officials as opposed to confinement for violations of less serious prison disciplinary rules," because "an inmate has no protectable liberty interest in his classification." *Id.* (citing *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir.1999); *Whitley v. Hunt*, 158 F.3d 882, 889 (5th Cir.1998); *Woods v. Edwards*, 51 F.3d 577, 581–82 (5th Cir.1995)).

The record in *Wilkerson* was unclear, however, on whether Appellees' housing assignment at LSP resulted from classification decisions or instead from disciplinary measures, and so the Court remanded for further proceedings. *Id.* at 436. Subsequently, in ruling on the LSP officials' post-appeal summary judgment motion based on qualified

immunity, the district court (adopting the magistrate's report) found a factual dispute over whether Appellees' assignment was an initial classification, a disciplinary sanction, or a "hybrid" re-classification based on crimes committed in prison. ROA.1541, 1555-1563; ROA.1685. The court therefore denied the LSP officials' motion for summary judgment based on qualified immunity. ROA.1568; ROA.1685.

2. Appellees add Hunt/Wade officials to lawsuit in 2013.

In August 2013, about four years after their transfers (and about thirteen years after originally suing the LSP officials), Appellees were granted leave to add the ten Hunt/Wade officials (Appellants here) to their lawsuit. ROA.7150 (granting Appellees' motion to file Fourth Amended Complaint); ROA.7151 (Fourth Amended Complaint). As relevant here, Appellees asserted a damages claim against Appellants under the Due Process Clause, based on their assignment to CCR at those facilities upon transfer. ROA.7161-62. (As damages were not sought on any of the other constitutional claims, those claims are not relevant to Appellants' qualified immunity defense.)

Appellants asserted qualified immunity from the due process claim in their Answer, ROA.7289, and subsequently moved for summary judgment on the basis of qualified immunity. ROA.7729.

3. The district court's decision

On December 17, 2013, the district court denied summary judgment. ROA.8182-8204 (ruling on Appellants' motion for partial summary judgment).

Analyzing Appellants' assertion of qualified immunity, the district court first inquired whether Appellees had "alleged the violation of a constitutional right." ROA.8190 (citing *Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844, 846 (5th Cir. 2003)). Because Appellees claimed their assignment to CCR at Hunt and Wade violated the procedural component of due process, the court had to determine, first, whether they had "a protectable liberty interest" in those housing assignments. ROA.8190 (citing *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)); *see generally Sandin*, 515 U.S. at 484 (discussing protected liberty interest under Due Process Clause). To answer this question, the court relied on its previous denial of qualified immunity as to the LSP officials, ROA.1541, 1685, where it had found factual disputes over

whether Appellees' housing assignment at LSP resulted from classification or from disciplinary violations. ROA.8191-92. Consequently, the court examined Appellees' Hunt/Wade housing records and concluded that, here too, there were analogous factual disputes over whether Appellees' assignments to CCR upon transfer to Hunt and Wade were "due solely to their initial classification." ROA.8193-95.

The court added, however, that "the inquiry need not stop there." ROA.8195. Regardless of any factual disputes over Appellees' housing assignments, the court found that Appellees had established a liberty interest under what it called an "extraordinary circumstances" exception to *Sandin*. ROA.8192, 8195. On this point, the court relied heavily on the Supreme Court's decision in *Wilkinson v. Austin*, 545 U.S. 209 (2005), which found that inmates had a protectable liberty interest in avoiding assignment to a "Supermax" facility in Ohio. ROA.8196.[6]

[6] Because the court found that Appellees had a protected liberty interest in their Hunt/Wade housing assignments, it went on to find that there were also material factual disputes as to whether Appellees had received adequate review of those assignments. ROA.8198-8201.

Having concluded that Appellees had a liberty interest, the court then turned to the second qualified immunity question—*i.e.*, whether the Hunt/Wade officials' decisions to assign Appellees to CCR "were objectively unreasonable in light of clearly established law at the time of the conduct in question." ROA.8202 (citing *Tarver v. City of Edna*, 410 F.3d 745, 750 (5th Cir. 2005)). The court found that the Hunt/Wade officials' actions were objectively unreasonable because Appellees' confinement, in the court's view, met the *Sandin* "extraordinary circumstances" exception. The court also pointed to its "dispositive decisions … in this very litigation" which recognized that Appellees had a protected liberty interest in their housing at LSP. ROA.8202 (citing Magistrate's Report and Recommendation from 2002 ("Doc. 46," or ROA.300) and 2005 ("Doc. 105," or ROA.1541)). The court also relied on the overall length of Appellees' time in CCR—aggregating their lengthy time at LSP with their much shorter time at Hunt and Wade—which it thought rendered Appellants' assignment of Appellees objectively unreasonable. By contrast, the court observed that, had Appellees' confinement been of "only one, two, or even three years duration,

[Appellants'] entitlement to qualified immunity might be a foregone conclusion." ROA.8202 (quoting ROA.316-17).

Consequently, the district court denied Appellants' motion for summary judgment on the basis of qualified immunity and simultaneously lifted the discovery stay it had previously entered. ROA.8204. Appellants filed a timely notice of appeal the next day under the collateral order doctrine. ROA.8222. The district court subsequently granted Appellants' motion to stay proceedings pending that appeal. ROA.8234.

SUMMARY OF ARGUMENT

The Court has jurisdiction over this collateral order appeal from the denial of Appellants' qualified immunity. The Appellant prison officials are entitled to qualified immunity as a matter of law based on undisputed facts in the summary judgment record. *See infra* Part I.

The first part of the qualified immunity analysis asks whether Appellees showed the violation of a statutory or constitutional right. The right allegedly violated here is the Fourteenth Amendment's protection against deprivation of "liberty" without due process of law. To prove such a deprivation, however, one must first show the existence

of a protected "liberty interest." Appellees cannot do so. It is black letter law that a prisoner has no protected liberty interest in his custodial classification, even if that classification results in him being confined to single-cell housing like the housing at Hunt and Wade to which Appellees were assigned. The undisputed record shows that, upon transfer to new facilities, Appellees were classified and housed based on their outstanding convictions for having murdered a prison guard. Qualified immunity protects the Appellant government officials who made those discretionary decisions. *See infra* Part II.A.

The district court erred in finding Appellees had a protected liberty interest in their housing assignments at the transferee institutions. The court misapplied a previous decision rendered by this Court in this case that correctly distinguished between custodial classifications (which do not create a liberty interest) and disciplinary measures (which may). There is simply no dispute on this record that Appellees' assignments at the transferee facilities were the result of their initial classifications by Appellants—and not the result of any disciplinary infractions. The minor and speculative factual disputes the district court identified are

immaterial to that issue and hence cannot defeat summary judgment on qualified immunity. *See infra* Part II.A.1.

The court erred further by finding that Appellees' housing assignments triggered a liberty interest as a matter of law under the Supreme Court's *Sandin* decision. *Sandin* recognized that, in the prison context, an "atypical and significant hardship" could create a protected liberty interest. But the single-cell housing at issue here comes nowhere near the threshold set in *Sandin*, which pointed to such atypical hardships as transfer to a mental institution or involuntary administration of psychotropic drugs. Numerous decisions from this Court have explained, however, that *Sandin* did not alter the settled rule that inmates have no liberty interest in their custodial classification—even one that results in their being housed in restrictive, single-cell conditions. Nor was *Sandin*'s settled rule altered by the Supreme Court's subsequent decision in *Wilkinson*, which recognized a liberty interest in avoiding extreme and isolating "Supermax" conditions that bear little resemblance to Appellees' confinement at Hunt and Wade. *See infra* Part II.A.2.

Even assuming a protected liberty interest, however, Appellees also had to show that the due process rights allegedly violated were "clearly established" under the particular circumstances presented here. This stringent standard requires showing that governing precedent placed the issue "beyond doubt," such that every reasonable official would have known they were violating Appellees' due process rights by assigning them to single-cell housing based on outstanding murder convictions of a prison guard. But Appellees made no such showing. This Court's previous decision with respect to LSP officials—not to mention decades of prior Fifth Circuit case law—gave the Appellant officials every reason to believe that assigning Appellees to single-cell housing implicated no protected liberty interest. The district court avoided this obvious conclusion only by theorizing that the Supreme Court's *Wilkinson* decision may have changed the liberty interest analysis in this Circuit. But even if the district court's theory were correct (and it is not), qualified immunity would still shield Appellants' decision. A government official sheds qualified immunity only by violating rights established "beyond debate," a standard of certitude that the district court itself admitted was lacking here. *See infra* Part II.B.

The Court should reverse the district court's denial of summary judgment and enter judgment recognizing that the Appellant prison officials are entitled to qualified immunity.

ARGUMENT

I. STANDARD OF REVIEW AND APPELLATE JURISDICTION

The Court reviews *de novo* the district court's denial of summary judgment on the basis of qualified immunity. *Kovacic v. Villareal*, 628 F.3d 209, 211 (5th Cir. 2010). That denial is immediately appealable under the collateral order doctrine, to the extent that it involves legal issues. *Good v. Curtis*, 601 F.3d 393, 397 (5th Cir. 2010). The Court's jurisdiction over a collateral order appeal involving qualified immunity is limited. *Juarez v. Aguilar*, 666 F.3d 325, 331 (5th Cir. 2011). The Court "can review the *materiality* of any factual disputes, but not their *genuineness*." *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (en banc) (quotation marks omitted) (emphases in original). The fact that the district court purported to find factual disputes below does not prevent this Court from reviewing whether those disputes, assuming they exist, are material to the qualified immunity analysis. *See, e.g., Kovacic*, 628 F.3d at 211 n.1 (reviewing materiality of factual disputes

on qualified immunity even though district court "did find … there was a factual dispute sufficient to defeat summary judgment"). The Court can also review the district court's determination that Appellants' conduct was objectively unreasonable in light of clearly established law. *See, e.g., Kinney*, 367 F.3d at 347 (court of appeals "ha[s] jurisdiction to review … the purely legal question whether a given course of conduct would be objectively unreasonable in light of clearly established law") (citing *Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996)).

II. APPELLANTS ARE ENTITLED TO SUMMARY JUDGMENT BASED ON QUALIFIED IMMUNITY FROM APPELLEES' DUE PROCESS CLAIM.

A government official is entitled to qualified immunity unless a plaintiff shows "'(1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.'" *Gibson v. Kilpatrick*, 734 F.3d 395, 400 (5th Cir. 2013) (quoting *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080 (2011)). A court may resolve qualified immunity under either prong. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Once a defendant invokes qualified immunity and shows he is a "government official whose position involves the exercise of discretion," the plaintiff bears the burden "'to rebut this defense by establishing

that the official's allegedly wrongful conduct violated clearly established law.'" *Thompson v. Upshur County, TX*, 245 F.3d 447, 456 (5th Cir. 2001) (quoting *Salas v. Carpenter*, 980 F.2d 299, 306 (5th Cir. 1992)). The law "do[es] 'not require that an official demonstrate that he did not violate clearly established federal rights; our precedent places that burden upon plaintiffs.'" *Id.* Moreover, when a government official's summary judgment motion "correctly points to an absence of evidence to support the plaintiff's claim," then "summary judgment should be granted for the [official] unless the plaintiff produces summary judgment evidence sufficient to sustain a finding in plaintiff's favor on that issue." *Kovacic*, 628 F.3d at 212 (citing, inter alia, *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986)).

The constitutional right relevant to Appellants' claim of qualified immunity is the protection against deprivations of "liberty" without "due process of law." U.S. Const. amend XIV. This so-called "procedural" component of due process asks, first, "whether there exists a liberty … interest which has been interfered with by the State," and second, "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dept. of Corr. v. Thompson*, 490

U.S. 454, 460 (1989) (citations omitted). In the prison context, the scope of a prisoner's protected "liberty" interests was "dramatically narrowed" by the Supreme Court's decision in *Sandin*. *See Orellana v. Kyle*, 65 F.3d 29, 32 (5th Cir. 1995) (discussing *Sandin*). Protected liberty interests are limited to freedom from restraints "impos[ing] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. As examples of such "atypical" restraints, *Sandin* cited transfer to a mental institution or involuntary administration of psychotropic drugs. *See Sandin*, 515 U.S. at 484 (citing *Vitek v. Jones*, 445 U.S. 480 (1980); *Washington v. Harper*, 494 U.S. 210 (1990)). Since *Sandin*, the Supreme Court also found a liberty interest in avoiding transfer to a "Supermax" facility where prisoners were indefinitely kept in cells lit 24-hours-a-day, where "almost all human contact [was] prohibited," where placement was "reviewed just annually," and where the placement itself disqualified otherwise eligible inmates for parole. *Wilkinson*, 545 U.S. at 223-24.

Outside these "unusual deprivations," however, "it is difficult to see that any other deprivations in the prison context, short of those that clearly impinge on the duration of confinement, will henceforth qualify

for constitutional 'liberty' status" after *Sandin*. *Orellana*, 65 F.3d at 32& n.1. Finally, it is likewise settled that the Due Process Clause "does not give rise to a liberty interest in avoiding transfer" to other facilities, even where those facilities involve "more adverse conditions of confinement." *Wilkinson*, 545 U.S. at 221 (citing *Meachum v. Fano*, 427 U.S. 215, 225 (1976)).

A. Appellees had no liberty interest in how they were classified upon transfer to Hunt and Wade.

The district court erred at the first step of the qualified immunity analysis by finding that Appellees had a protected liberty interest in the classifications and housing assignments they received upon transfer to Hunt and Wade. *See, e.g., Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc) (explaining that first step of qualified immunity inquiry is whether "the official violated a statutory or constitutional right") (quotations omitted). Appellees pointed to nothing in the summary judgment record either demonstrating any such liberty interest or creating a factual dispute material to the issue. Appellants were therefore entitled to judgment as a matter of law on their qualified immunity defense because the record showed without dispute that, in

classifying Appellees upon arrival at Hunt and Wade, they violated no right of Appellees protected by the Due Process Clause.

The undisputed summary judgment record established that (1) Appellees were transferred from LSP to the Hunt and Wade facilities (ROA.7818, ¶2; ROA.7800, ¶2; ROA.7731-32, ¶¶1, 9); (2) upon arrival at those facilities, Appellants had the discretionary authority to set Appellees' security classification (ROA.7800, ¶4; ROA.7818, ¶3; ROA.7821, ¶2; ROA.7731-32, ¶¶2, 10); (3) Appellants classified Appellees as maximum security based on their outstanding convictions for the murder of a corrections officer at LSP (ROA.7800, ¶4; ROA.7818, ¶4; ROA.7803-05, 7810-12; ROA.7721-32, ¶¶3, 11); (4) those outstanding convictions alone would have justified a maximum security classification (ROA.7801, ¶7; ROA.7818-19, ¶¶4-5; ROA.7822, ¶5; ROA.7823; ROA.7731-32, ¶¶4, 12); and (5) Appellees were consequently assigned to single-celled CCR housing (ROA.7801, ¶9; ROA 7818, ¶4; ROA.7731-32, ¶¶4, 11).

Based on these undisputed facts, Appellees had no liberty interest in their housing assignments at Hunt and Wade as a matter of law. It is settled that "[i]nmates have no protectable … liberty interest in

custodial classification." *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir 1999). The undisputed record shows Appellees' assignments at Hunt and Wade were a result of their initial classification upon transfer to those facilities. Furthermore, a liberty interest is not created simply by the fact that Appellees were housed in single cells separately from other prisoners: in *Sandin* the Supreme Court explained that a prisoner's "discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." 515 U.S. at 486. And this Court has drawn the obvious inference from *Sandin* that "[i]t is unlikely … that administrative segregation can give rise to any constitutional claim [under the Due Process Clause] after *Sandin*." *Orellana*, 65 F.3d at 32 n.2; *see also Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995) (noting that "*Sandin* establishes that … administrative segregation, without more, does not constitute a deprivation of a constitutionally cognizable liberty interest").

Reinforcing this conclusion is the fact—again, undisputed—that the classifications and resulting housing assignments at issue in this case were the result of Appellees' *transfer* to new facilities. *See, e.g.,*

ROA.7800 (affidavit of Warden Jerry Goodwin stating that "Albert Woodfox … was transferred to Wade on November 1, 2010"); ROA.7818 (affidavit of Warden Howard Prince stating that "Herman Wallace … was first transferred to Hunt on March 19, 2009"). That calls for a distinct qualified immunity analysis for the transferee officials responsible for the safe and orderly operation of the distinct facilities under their care. Not only is it settled law that prisoners have no liberty interest in their custodial classification, it is equally settled that prisoners have no liberty interest in their transfer to a new prison. As the Supreme Court explained decades ago in *Meachum*, 427 U.S. at 224-25, just as

> [t]he initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause … [n]either, in our view, does the Due Process Clause, in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system.

This means that prisoners cannot subject to due process scrutiny the reasons for or circumstances surrounding their transfer: "If officials may transfer a prisoner 'for whatever reason or for no reason at all,' there is no … [liberty] interest for [due] process to protect." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (quoting *Meachum*, 427 U.S. at

228)). Nor is a liberty interest created when prisoners are transferred to alternate facilities based on their prior criminal actions: "A prisoner's past and anticipated future behavior will very likely be taken into account in selecting a prison in which he will be initially incarcerated or to which he will be transferred to best serve the State's penological goals." *Meachum*, 427 U.S. at 228.

In sum, the summary judgment record conclusively shows that Appellees had no protectable liberty interest in how they were classified and housed by Appellants when they arrived at Hunt and Wade. Appellees pointed to no countervailing evidence creating a factual dispute material to that issue, and Appellants were consequently entitled to entry of summary judgment on their qualified immunity defense.

1. This Court's decision in Wilkerson *strongly supports the conclusion that Appellees lacked a liberty interest in their Hunt and Wade classifications.*

The district court, however, concluded that Appellees did have a protected liberty interest in their Hunt and Wade housing assignments. This mistaken conclusion depended on a series of errors.

First, the court relied on this Court's previous consideration of the *LSP officials'* qualified immunity in *Wilkerson v. Stalder*, 329 F.3d 431 (5th Cir. 2003), to suggest there were similar factual disputes concerning Appellees' housing assignments by the Hunt and Wade officials. *See* ROA.8191 (noting that "the proper focus for determining whether or not a liberty interest has been established was further elaborated on by the Fifth Circuit in [*Wilkerson*]," and quoting the decision at length). But the district court simply misread *Wilkerson*, which applied the liberty interest analysis to claims of qualified immunity asserted over a decade earlier by officials at a different facility based on a different factual record. Moreover, far from supporting the district court's conclusion, the *Wilkerson* decision strongly supports Appellants' qualified immunity here, because—unlike the LSP record in *Wilkerson*, the record as to Hunt and Wade is quite clear that Appellees' housing assignment was based on their security classifications.

In *Wilkerson* this Court explained that, to determine whether Appellees had a protected liberty interest at LSP, it was "crucial to know" whether their housing assignment was "the result of an initial

classification by prison officials as opposed to confinement for violations of less serious prison disciplinary rules." *Id.* at 435. Because the record *as to LSP* was unclear on that point, the Court remanded. *Id.* at 436. The district court subsequently found there were factual disputes over the reasons for Appellees' LSP assignment and denied summary judgment.[7]

Relying on the *Wilkerson* analysis, the district court purported to find analogous factual disputes over whether Appellees' assignments many years later at Hunt and Wade were "due solely to their initial classification" at those facilities. ROA.8195. But the district court misunderstood the legal framework established by this Court in *Wilkerson*, which correctly distinguished between confinement resulting from "initial classification" and confinement resulting from "violations of … disciplinary rules." 329 F.3d at 435-36. In this case, the district

[7] More specifically, the magistrate recommended denying the LSP officials summary judgment on qualified immunity, reasoning that Appellees' lockdown review records at LSP were ambiguous about whether they had been assigned to CCR for disciplinary reasons. ROA.1556-57. Further, the magistrate found that she was "faced with a 'hybrid' situation," somewhere between classification and discipline, "since the killing of a prison guard and inmate while incarcerated necessarily is also a violation of prison disciplinary rules." ROA.1557. Finally, the magistrate opined that the length and indefinite nature of Appellees' confinement could, in and of themselves, create a liberty interest. ROA.1557-62. The district court adopted the magistrate's report and denied summary judgment to the LSP officials. ROA.1685.

court pointed to *no* record evidence even suggesting that Appellees' assignments at Hunt and Wade were the result of "violations of … disciplinary rules." Consequently, *Wilkerson* itself compels the conclusion that Appellees showed no protected liberty interest, entitling Appellants to qualified immunity as a matter of law.

The purported factual disputes the district court relied on to deny summary judgment—even assuming they exist—are simply not *material* to the liberty interest inquiry. *See* ROA.8194-95. For instance, the court pointed to evidence that "there was not a CCR tier at Hunt or Wade prior to [Appellees'] transfer." ROA.8194. But, even assuming that is true, such evidence says nothing about whether Appellees' assignments at Hunt and Wade resulted from classification or disciplinary infractions. The court also thought a single comment—"From LSP"—on one of Wallace's eleven Cellblock Review Summaries "appears to undercut [Appellants'] assertion that there were independent evaluations conducted." ROA.8194 (referring to ROA.7820 (6/8/09 Cellblock Review Summary)). On its face, however, this comment simply notes the facility (LSP) from which Wallace had been transferred; but even if the comment carries the hidden meaning the

district court ascribed to it, it is difficult to understand how it has anything to do with whether Wallace was initially classified as maximum security at Hunt.[8] *All* of Wallace's relevant review summaries, including the one form singled out by the district court, unambiguously indicate that he was "[a]ssigned to [c]ellblock" because of his "Initial Classification Board." *See* ROA.7820, ROA.8071-81. Neither Appellees nor the district court pointed to any summary judgment evidence creating a dispute as to that material fact.

Notably, the district court also relied—not on actual evidence concerning Appellees' classification at Hunt and Wade—but rather on Appellees' mere insinuations that there was something improper about those classifications. *See, e.g.,* ROA.8194 (noting Appellees "suggest that it is highly unlike [sic] that an independent and sincere review of their records, age, and infirmity would lead a review board to find that they … should be housed in isolation"); ROA.8195 (noting that Appellees

[8] The district court also vaguely alluded to "evidence" that "at the time of transfer, there was no intention to house [Appellees] other than at CCR." ROA.8194. It is difficult to assess the court's reasoning on this point, however, since it did not specify what "evidence" it relied on. But even if there were such evidence, the intentions of *LSP officials* regarding Appellees' custodial status cannot possibly be material to the actions of the *Hunt/Wade officials* who actually classified them upon transfer. The record is undisputed that those officials had unfettered authority to classify Appellees upon arrival and to change their classification if they thought it warranted.

"point out that the [Appellants], having the benefit of pending litigation to inform what they reflect in their record, 'had every advantage to [use] certain labels over others'"). But such "conclusory statements" and "naked assertions" are not presumed true on review of denial of summary judgment, and they therefore cannot defeat a summary judgment motion. *See, e.g., Morgan*, 659 F.3d at 370 (explaining that, in reviewing denial of summary judgment, "we do not presume true a number of categories of statements," including "'conclusory statements'" and "'naked assertions devoid of further factual enhancement'") (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)). Rather, to defeat summary judgment, Appellees were required to "produce[] summary judgment evidence sufficient to sustain a finding in [their] favor on [the] issue" of a protected liberty interest. *Kovacic*, 628 F.3d at 212. They did not do so, and the district court should have granted summary judgment in Appellants' favor on the issue of qualified immunity.

2. The district court erred in finding Appellees' housing at Hunt and Wade triggered Sandin*'s "atypical and significant hardship" standard.*

Ultimately, however, the district court suggested that any putative factual disputes were irrelevant to its conclusion that Appellees had a protected liberty interest. *See* ROA.8195 (observing that "the inquiry need not stop here" [*i.e.*, at the court's discussion of factual disputes]). The court found that Appellees' assignments at Hunt and Wade triggered *Sandin*'s "atypical and significant hardship" standard as a matter of law because of what it considered the overall length of Appellees' time in CCR (including their previous time in CCR at LSP), as well as the purportedly "indefinite" nature of their housing assignment. ROA.8196-98. In making this legal determination, the district court relied heavily on the Supreme Court's decision in *Wilkinson v. Austin*, 545 U.S. 209, 214 (2005), which found prisoners had a liberty interest in avoiding placement in a "Supermax" facility where prisoners were indefinitely "deprived of almost any environmental or sensory stimuli and of almost all human contact." ROA.8196 (discussing *Wilkinson*). Indeed, the district court went so far as to suggest that *Wilkinson* had "rendered unnecessary" the analysis in

this Court's 2003 *Wilkerson* decision, which assessed the qualified immunity of LSP officials in this same case. ROA.8195 n.8. As a result, the district court decided that Appellees' Hunt and Wade assignments deprived them of a liberty interest under *Sandin* as a matter of law—despite the fact that Appellees did not move for summary judgment on that point. The district court's reasoning was gravely flawed.

First, the district court misunderstood this Circuit's treatment of *Sandin*. The court read Fifth Circuit precedent to have created an open-ended "extraordinary circumstances" exception to *Sandin*'s normal rule that a prisoner lacks a liberty interest in custodial classification. *See* ROA.8192 (reasoning that "the circuit has created an exception to the general rule when there are extraordinary circumstances"). But this fails to capture what the Supreme Court did in *Sandin*. As this Court has explained, *Sandin* "dramatically narrowed" the scope of a prisoner's protected liberty interests, *Orellana v. Kyle*, 65 F.3d 29, 32 (5th Cir. 1995), limiting such interests to freedom from restraints "impos[ing] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. And, to underscore just how "atypical" such restraints were, *Sandin* cited as its

only examples the transfer of a prisoner to a mental institution and the involuntary administration of psychotropic drugs. *See Sandin*, 515 U.S. at 484 (citing *Vitek v. Jones*, 445 U.S. 480 (1980); *Washington v. Harper*, 494 U.S. 210 (1990)). Outside these "unusual deprivations," however, this Court has emphasized that, after *Sandin*, "it is difficult to see that any other deprivations in the prison context, short of those that clearly impinge on the duration of confinement, will henceforth qualify for constitutional 'liberty' status." *Orellana*, 65 F.3d at 32 & n.1.

Thus, contrary to the district court, *Sandin* did not alter this Circuit's longstanding precedents that a prisoner's custodial classification—including assignment to highly restrictive conditions such as administrative segregation—does not create a constitutionally protected liberty interest under the Due Process Clause. *See generally Orellana*, 65 F.3d at 32 & n.1 (doubting that deprivations outside transfer to mental hospital or forced administration of psychotropic drugs would trigger a due process liberty interest following *Sandin*); *see also, e.g., Harper*, 174 F.3d at 719 (noting that "[i]nmates have no protectable … liberty interest in custodial classification"); *Luken*, 71 F.3d at 193 (noting that "*Sandin* establishes that … administrative

segregation, without more, does not constitute a deprivation of a constitutionally cognizable liberty interest"). Indeed, in this very case, the Court previously explained that "[t]his circuit has continued to hold post-*Sandin* that an inmate has no protectable liberty interest in his classification." *Wilkerson*, 329 F.3d at 435 (and collecting cases).

The district court also mistakenly reasoned that Appellees' "forty-year length of incarceration in extended lockdown" independently triggered *Sandin*. ROA.8197. To be sure, length of detention factors into the liberty interest analysis. *See, e.g., Sandin*, 515 U.S. at 486 (noting that the prisoner's segregated confinement "did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction"). But here, the court lumped together Appellees' time spent at LSP with the far shorter time spent—in different facilities under admittedly different conditions—at Hunt and Wade. The district court pointed to no support in Fifth Circuit or Supreme Court jurisprudence for the proposition that time spent at two different facilities can be aggregated to create a protected liberty interest.

For similar reasons, the court mistakenly relied on *Hernandez v. Velasquez*, 522 F.2d 556 (5th Cir. 2008), for the proposition that "the

present matter" met the *Sandin* "atypical" threshold. ROA.8198. To the contrary, in *Hernandez* this Court was not referring to "the present matter." Instead, the Court was referring to Appellees' three-decade confinement at LSP—not to their much shorter confinement at Hunt and Wade. *See* 522 F.3d at 563 (observing that "due process *might* have been violated where the plaintiffs had been kept on lockdown status for 30 years") (citing *Wilkerson*, 329 F.3d at 436) (emphasis in original). Indeed, elsewhere in its order, the district court noted that "[i]f this case involved solitary confinements [sic] of only one, two, or even three years duration, [Appellants'] entitlement to qualified immunity might be a foregone conclusion." ROA.8202.

As authority for its dubious interpretation of *Sandin*, the district court relied exclusively on the Supreme Court's *Wilkinson* decision. But the court misread that decision. It cannot be right that *Wilkinson* somehow altered the liberty interest analysis set forth in this Court's 2003 *Wilkerson* decision. *See* ROA.8195 n.8 (suggesting it is "unclear" whether the *Wilkerson* inquiry "has been rendered unnecessary in light of" *Wilkinson*). In *Wilkerson*, this Court carefully applied *Sandin*'s due process test—a test the Supreme Court *confirmed* in *Wilkinson* two

years later. *See Wilkerson*, 329 F.3d at 435-36 (discussing and applying *Sandin*'s liberty interest analysis); *Wilkinson*, 545 U.S. at 222-23 (re-affirming *Sandin*'s liberty interest analysis). The district court cited no decision from this Court suggesting that *Wilkinson* changed the liberty interest test applied in *Wilkerson*. Moreover, *Wilkerson* did not create that liberty interest test from scratch, but instead drew on two decades of Circuit precedent. *See Wilkerson*, 329 F.3d at 436 (relying on *Harper*, 174 F.3d at 719; *Whitley*, 158 F.3d at 889; *Woods*, 51 F.3d at 581-82; *Wilkerson v. Maggio*, 703 F.2d 909, 911 (5th Cir. 1983); *McCord v. Maggio*, 910 F.2d 1248, 1250 (5th Cir. 1990)). Indeed, the district court expressly *acknowledged* the continuing force of those decisions, rendering its speculation about the proper liberty interest standard all the more puzzling. *See* ROA.8182 n.6 (noting that "[t]he Fifth Circuit has long held that classification of prisoners is a matter better left to the discretion of prison officials," and that "the Fifth Circuit has emphasized that prison officials must be afforded broad discretion, free from judicial intervention, in classifying prisoner[s] in terms of their custodial status") (citing *McCord*, 910 F.2d at 1250).[9]

[9] Furthermore, as explained below, even if one speculates that *Wilkinson* changed

In light of this Circuit's longstanding precedents applying *Sandin*, the district court had no basis for equating Appellees' CCR housing at Hunt and Wade with a prisoner's assignment to the "Supermax" conditions at issue in *Wilkinson*. Apart from the actual time of confinement in single cells, the summary judgment record here shows that CCR at Hunt and Wade bears little resemblance to the severe and isolating conditions in *Wilkinson*. In the Ohio Supermax facility at issue there, prisoners were indefinitely housed in cells lit 24-hours-a-day, with "solid metal doors" and metallic walls that "prevent conversation or communication with other inmates." Prisoners received review of their Supermax assignment only annually. And, since visitation was "rare" and only "conducted through glass walls," inmates were "deprived of almost any environmental or sensory stimuli and of almost all human contact." *See generally* 545 U.S. at 214-15.

The Hunt and Wade CCR housing does not even approach this level of extreme deprivation. While CCR does involve significant restrictions, it is in no sense the kind of extreme solitary confinement involved in the

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the liberty interest analysis in 2005, Appellants could not have been objectively unreasonable in failing to divine that kind of subtle alteration in legal standards. *See infra* Part II.B.

Supermax facility in *Wilkinson*. There is no hint in the record, for instance, that CCR inmates at Hunt and Wade are confined behind metal doors in perpetually-lighted cells that prohibit them from conversing with other inmates, as was the case in *Wilkinson*. To the contrary, inmates are allowed to walk along the tier on which their cells are located for up to one hour daily, and are allowed contact visits, phone privileges, peer counselors, and limited religious and educational opportunities. *See* ROA.7811; ROA.7917; ROA.8185 n.5; ROA.7918; ROA.7925; ROA.7936-37; ROA.7945; ROA.8056-57; ROA.8065. (Additionally, the district court noted that CCR housing at Hunt and Wade had more generous "cell size and telephone privileges" than at LSP. ROA.8185 n.5.) They also receive 90-day reviews of their classification status, as opposed to the annual review in *Wilkinson*. At bottom, there was no evidence that the conditions of prisoners' confinement at Hunt and Wade—in contrast to the extreme isolation at issue *Wilkinson*—cut off their ability to regularly converse with other inmates or have regular contact with visitors. *See, e.g., Hardaway v. Meyerhoff*, 734 F.3d 740, 744 (7th Cir. 2013) (observing that *Wilkinson*

involved "segregation that deprives [prisoners] of virtually all sensory stimuli or human contact").

The district court also overlooked what *Wilkinson* said about its own analysis. As the Supreme Court emphasized, any of the severe limitations in the Supermax facility "standing alone might not be sufficient to create a liberty interest," but "taken together" they did. 545 U.S. at 224. Here, the conditions in CCR at Hunt and Wade, "taken together," rise nowhere near the level of the extreme isolation imposed on the Supermax inmates in *Wilkinson*. *See also, e.g., Hardaway*, 734 F.3d at 744 (observing that prisoner's disciplinary confinement in which he "was not deprived of all human contact and was permitted to use the shower and prison yard once every week," was "hardly analogous to a confinement that deprives a prisoner of all human contact or sensory stimuli" as in *Wilkinson*).

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In sum, by finding that Appellees demonstrated a protected liberty interest in their classifications at Hunt and Wade, the district court erred in its legal conclusions about the prevailing state of Circuit law on protected liberty interests under the Due Process Clause, erred by

overlooking the legal significance that Appellees' purported liberty interest arise from their *transfers* to Hunt and Wade, and erred in finding a material fact dispute as to the existence of a liberty interest. There being no material factual dispute as to the lack of a liberty interest, Appellants were entitled to judgment as a matter of law on the basis of qualified immunity.[10]

B. Any purported liberty interest in Appellees' classification at Hunt and Wade was not clearly established at the time of their transfers.

Even assuming the existence of a protected liberty interest, Appellants would nonetheless be entitled to qualified immunity because that "purported [liberty interest] was not 'clearly established' by prior case law" at the time of the challenged conduct. *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012); *see also, e.g., Morgan*, 659 F.3d at 371 (in addition to showing a government official violated a statutory or constitutional right, a plaintiff seeking to overcome qualified immunity

[10] Because the district court erred in finding a protected liberty interest, its subsequent discussion of the adequacy of Appellees' 90-day review boards is irrelevant. It is settled that, if a prisoner has no protected liberty interest, then there is no basis for examining the constitutional adequacy of his review process. *See, e.g., Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted) ("procedural" due process asks, first, "whether there exists a liberty … interest which has been interfered with by the State," and second, "whether the procedures attendant upon that deprivation were constitutionally sufficient").

must also show "that the right was 'clearly established' at the time of the challenged conduct") (quotations omitted).

A government official violates "clearly established" law, and thereby loses qualified immunity, only "when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). As this Court has explained recently, "clearly established" is a stringent standard: it means that "'existing precedent must have placed the ... constitutional question *beyond debate*.'" *Hogan v. Cunningham*, 722 F.3d 725, 733 (5th Cir. 2013) (quoting *Reichle*, 132 S. Ct. at 2093) (brackets omitted) (emphasis added); *see also, e.g., Morgan*, 659 F.3d at 371 (same). Consequently, the Supreme Court has "repeatedly" cautioned courts "not to define clearly established law at a high level of generality." *al-Kidd*, 131 S. Ct. at 2084 (citations omitted). To the contrary, "the right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the

right are clear to a reasonable official." *Reichle*, 132 S. Ct. at 2094 (citations and internal quotes omitted).

Here, the question is whether Appellants violated Appellees' "clearly established" due process rights—"clearly established" in the sense of being "beyond debate" under governing precedent—by assigning them to CCR when they arrived at Hunt and Wade in 2009 and 2010, based on outstanding convictions for having murdered an LSP prison guard. The answer is plainly no, and one need look no further than this Court's 2003 *Wilkerson* decision to understand why.

Wilkerson turned on what this Court correctly called the "crucial" distinction between "an initial classification by prison officials" (which does not trigger a protected liberty interest) and "confinement for violations of less serious prison disciplinary rules" (which may). *See Wilkerson*, 329 F.3d at 435. Thus, on the strength of *Wilkerson* itself—which, after all, is a governing precedent rendered in this same case—the Appellant officials had solid grounds for believing that classifying transferred inmates based on their prison murder record did not even implicate a protected liberty interest. And, as discussed above, *Wilkerson*'s basic distinction between custodial classification and

disciplinary measures was grounded in decades of Fifth Circuit precedent. *See supra* Part I.A.2; *see also, e.g., Wilkerson v. Maggio*, 703 F.2d 909 (5th Cir. 1983) ("It is well settled that '[p]rison officials must have broad discretion, free from judicial intervention, in classifying prisoners in terms of their custodial status.'") (quoting *McGruder v. Phelps*, 608 F.2d 1023, 1026 (5th Cir. 1979)). The district court pointed to no governing precedent undermining these longstanding principles—much less a governing precedent placing the question of Appellees' liberty interest "beyond debate."

Instead of grappling with the obvious implications of *Wilkerson*, the district court suggested that that decision's liberty interest analysis was no longer good law when Appellees were transferred to Hunt and Wade in 2009 and 2010. As support for this theory, the court relied heavily on its intuition that the Supreme Court's 2005 *Wilkinson* decision somehow altered—or "rendered unnecessary"—*Wilkerson*'s previous analysis. *See* ROA.8195-96 & n.8. As discussed above, the district court misread *Wilkinson*, which did not alter this Court's longstanding application of *Sandin*'s liberty interest analysis. *See supra* Part II.A.2. But even assuming *Wilkinson* nudged due process analysis in the

direction the district court suggested, that is all the more reason to afford Appellants qualified immunity here. A government official should not be denied qualified immunity "'unless existing precedent … placed the statutory or constitutional question *beyond debate*.'" *Morgan*, 659 F.3d at 371 (quoting *al-Kidd*, 131 S. Ct. at 2083) (emphasis in original). Here, the district court itself observed that "it is *unclear* if [this Court's previous *Wilkerson*] inquiry has been rendered unnecessary in light of [*Wilkinson*]." ROA.8195 (emphasis added). But if it is "unclear" whether *Wilkinson* changed governing law, then it cannot possibly be "beyond debate" that the liberty interest analysis laid down by this Court in *Wilkerson* did not continue to apply in 2009 and 2010, thus affording Appellants qualified immunity for their classification decisions.

Furthermore, in light of *Wilkerson*, it could not possibly have been "beyond debate" at the time of Appellees' transfers (or now, for that matter) that assignment to CCR at Hunt and Wade met *Sandin*'s "atypical and significant hardship" standard. *See Sandin*, 515 U.S. at 484; *see also, e.g., Hardaway*, 734 F.3d at 744 (observing that "the most that can be said for the jurisprudence existing in September 2009 regarding what presents an 'atypical and significant hardship' [under

Sandin] is that it is not at all clear except at the fringes"). Had this Court thought the matter was so clear in *Wilkerson*, it simply would have denied the LSP officials qualified immunity as a matter of law, instead of remanding to determine whether their CCR assignment was a classification or a disciplinary measure. *See* 329 F.3d at 435-36. Moreover, *Sandin* itself set high benchmarks for meeting its "atypical" hardship standard: the only examples it cited were transfer to a mental institution or subjection to psychotropic drugs, *see* 515 U.S. at 484. So, even without *Wilkerson*'s guidance, Appellants could have reasonably concluded based on *Sandin* alone that assigning prisoners to restrictive single-cell confinement based on their past history of having murdered a guard is not the kind of atypical housing that would independently trigger due process. Indeed, this Court has suggested that is precisely what *Sandin* means. *See Orellana*, 65 F.3d at 32 & n.1 (observing that, aside from "unusual deprivations" like transfer to a mental facility or forced administration of psychotropic drugs, "it is difficult to see that any other deprivations in the prison context, short of those that clearly impinge on the duration of confinement, will henceforth qualify for constitutional 'liberty' status"). And *Sandin* itself remarked that even

"discipline in segregated confinement d[oes] not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." 515 U.S. at 486.

The district court, however, mistakenly found that Appellants should have been aware of a clearly established "extraordinary circumstances" exception to these settled principles based on its own prior rulings in this case, and also based on the length of Appellees' total confinement in CCR (including their time both in LSP and in Hunt and Wade). ROA.8202. But that cannot be right. The prior rulings referenced by the lower court, *see* ROA.300 and 1541, were entered years before Appellants were added as defendants in 2013. Moreover, those rulings were directed at the specific circumstances experiences by Appellees in a different facility (LSP). As the district court itself noted, while this litigation "has proceeded … for over thirteen years … [t]he Hunt/Wade Defendants were not made parties … until earlier this year[.]" ROA.8182-83. Prior rulings from years before, grounded in distinct facts, and involving different actors, could not possibly establish Appellees' liberty interest in the "particularized sense" required by the Supreme Court to defeat Appellants' qualified immunity. *Reichle*, 132 S.

Ct. at 2094; *see, e.g., al-Kidd*, 131 S. Ct. at 2078 ("To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right") (quotation marks and citations omitted).

For similar reasons, the district court was also mistaken to charge Appellants with any decision to place Appellees in "solitary confinement approaching *three decades* duration." ROA.8202 (emphasis in original). Appellees were not transferred to Hunt and Wade until 2009 and 2010, respectively, and it is from that time—the time of the "challenged conduct"—that the objective reasonableness of Appellants' conduct must be measured. Indeed, the district court's own opinion recognized that, had Appellees' confinement been of "only one, two, or even three years duration, the defendants' entitlement to qualified immunity might be a foregone conclusion." ROA.8202. Why that principle would not dispose of this case in favor of Appellants, the district court did not explain.

CONCLUSION

For the foregoing reasons, Appellants respectfully ask the Court to reverse the district court's denial of summary judgment and to enter judgment recognizing Appellants' entitlement to qualified immunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2014, the foregoing Original Brief of Appellants has been filed electronically with the Clerk of the U.S. Fifth Circuit Court of Appeals using the court's CM/ECF system. Notice of this filing will be sent to counsel of record for all Appellees by operation of the Court's electronic filing system. I further certify that paper copies of this Brief will also be timely delivered to the Clerk of Court and sent by United States mail, properly addressed and postage pre-paid, to counsel of record for Appellees addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.3, the undersigned certifies that:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains **8765** words, exclusive of parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2011, Century Schoolbook, 14-point font.

s/ *S. Kyle Duncan*

Counsel for Appellants
February 24, 2014

United States Court of Appeals

FIFTH CIRCUIT
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February 25, 2014

Mr. John F. Weeks II
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No. 13-31289 Robert Wilkerson, et al v. Richard Stalder, et al
USDC No. 3:00-CV-304

Dear Mr. Weeks,

The following pertains to your brief electronically filed on February 24, 2014.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Failure to timely provide the appropriate number of copies will result in the dismissal of your appeal pursuant to 5TH CIR. R. 42.3.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Shawn D. Henderson, Deputy Clerk
504-310-7668

cc:
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Mr. Stuart Kyle Duncan
Mr. George H. Kendall
Mr. William P. Quigley
Mr. Nicholas Joseph Trenticosta
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