UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Tallahassee Division

JAC'QUANN (ADMIRE) HARVARD, et al.,	
Plaintiffs,	
v.	Case No.: 4:19-cv-00212-AW-MAF
MARK S. INCH, et al.,	
Defendants.	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT INCH'S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

Defendant Inch constructs his motion for partial summary judgment around a wholesale mischaracterization of Plaintiffs' Eighth Amendment claim and the wrong legal standard. Plaintiffs claim that the way the Florida Department of Corrections ("FDC") implements solitary confinement in its prisons violates the Eighth Amendment by subjecting people to a substantial risk of serious harm. FDC's implementation of solitary confinement is a result of both its written policies *and* its practices in carrying out those policies. Because Defendant Inch misconstrues Plaintiffs' claim as a facial challenge to FDC isolation regulations *per se*, fails to

apply the correct Eighth Amendment standard to Plaintiffs' conditions of confinement claim, and cannot establish the absence of factual disputes material to the correct legal analysis, this Court should deny Defendant's motion for partial summary judgment.

As this Court has recognized, the putative Plaintiff class has made it abundantly clear that their suit is not a "facial challenge" to Florida's isolation regulations, but a challenge to *the manner* in which Florida actually implements solitary confinement in its prisons. *See, e.g.*, Order Denying Defendants' Motion to Dismiss, ECF No. 54 at 15 ("Plaintiffs' claims of violation of their statutory and constitutional rights stem from the statewide policies and practices related to isolation."); *id.* at 20 (internal citations omitted) ("Plaintiffs allege that the cumulative effects of various forms of deprivation subject people to a substantial risk of serious psychological and physiological harm. Specifically, Plaintiffs allege that deprivation of normal human contact, environmental stimulation, and exercise along with degrading and dehumanizing security measures subject Plaintiffs to a substantial risk of serious psychological and physiological harm."); *id.* at 22 ("While some of these allegations in isolation may not result in a violation of the Eighth Amendment, Plaintiffs have alleged sufficient facts to show that the conditions of confinement, in combination, have a 'mutually enforcing effect that produces the deprivation of a single identifiable human need' such as human contact,

environmental stimulation, and exercise) (quoting *Wilson v. Seiter*, 501 U.S. 294, 304 (1991)).

Indeed, Defendant's contorted logic that Plaintiffs assert a "facial challenge" is belied by Defendant's own acknowledgement that, "Plaintiffs allege that 'in practice' the Department does not even follow its own written policies, which also subjects people to a substantial risk of harm." ECF No. 343 at 3 n.1. Defendant also admits "to the extent" Plaintiffs' claim "is based on the Department's failure to follow the [written Confinement] policies," "Defendant does not seek summary judgment on that claim." *See* ECF No. 343 at 9 n.3; *see also id.* at 8 (asserting illogically that Plaintiffs "seek to certify several 'practices' which are in effect claims that FDC *sometimes* does not follow its own written policies.").

Defendant's motion also improperly attempts to divide Plaintiffs' single Eighth Amendment claim into two separate and divisible claims: one based on FDC's written regulations, and a second based on FDC practices. This is not how Eighth Amendment conditions of confinement law works, nor what Plaintiffs have pleaded, as the Court already recognized in denying Defendants' motion to dismiss.

Even if Plaintiffs were challenging FDC's prison regulations on their face (which they are not), Defendant's motion still applies the wrong legal standard for challenges to prison regulations: the United States Supreme Court made clear that the standard of review it adopted in *Turner v. Safley*, 482 U.S. 78 (1987) is "the

proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights." *Washington v. Harper*, 494 U.S. 210, 223 (1990). The *Turner* standard asks whether the regulation "is reasonably related to legitimate penological interests" and requires the court to consider several factors "in determining the reasonableness of the regulation at issue." 482 U.S. at 89-90. Defendant does not even cite to *Turner* in his motion for partial summary judgment, much less attempt to show that undisputed facts in this case satisfy the *Turner* reasonableness analysis as a matter of law. Instead of applying *Turner*, Defendant erroneously uses the general standard for facial challenges to legislative acts set forth by the Supreme Court in *United States v. Salerno*, 481 U.S. 739 (1987), five days prior to the Court's decisive *Turner* ruling directly on point to the issues here. *Compare id.* (decided May 26, 1987) *with Turner*, 482 U.S. at 78 (decided June 1, 1987).

Defendant's motion for partial summary adjudication is nothing more than a second attempt at a motion to dismiss where the first failed. Defendant's secondary argument that the subclasses' Eighth Amendment claim "fails as a matter of law" because it must be brought as a writ of habeas corpus rather than a Section 1983 claim, is taken whole-cloth from Defendants' prior motion to dismiss the class's Eighth Amendment claim, which this Court already squarely rejected. *Compare*

ECF No. 343 at 27-28 *with* ECF No. 28-1 at 40-41. As explained further below, Defendant's arguments are incorrect, and the Court should deny his motion.

STATEMENT OF FACTS

FDC incarcerates between 9,000 and 10,000 people in isolation units it generally calls "Restrictive Housing." *See, e.g.*, ECF No. 311-16 at EHA00392939 (Ex. B-6); *see generally* ECF No. 311 at 6-8. FDC forces people in Restrictive Housing to spend 22-to-24 hours per day in tiny cells while cutting them off from minimally necessary human contact and routinely subjecting them to punitive and dehumanizing custody practices. *See generally* ECF No. 311 at 9-15. These practices include destructive searches of the property in people's cells if they are let out for basic necessities such as showers or exercise, and even further isolation referred to as "strip status," in which FDC leaves people in only their boxer shorts in completely empty cells, barren even of hygiene items and mattresses, for days at a time. *See id.* at 13-14.

Plaintiffs' Eighth Amendment challenge to FDC's use of isolation is based on the cumulative conditions of solitary confinement, as implemented by FDC throughout its prisons statewide. Plaintiffs have gathered substantial evidence that FDC officials are aware that the cumulative effect of these conditions places people in isolation in FDC at substantial risk of serious harm, and have not taken reasonable measures to ameliorate that risk.

A. Conditions of Confinement in Restrictive Housing

Defendants' motion for partial summary judgment focuses solely on FDC regulations defining the Restrictive Housing levels and completely ignores the additional written policies implementing Restrictive Housing;[1] unwritten policies resulting from accepted FDC custom or practice; physical conditions of the cells and units; threats and abuse by correctional officers; and FDC's failure to follow policies and other omissions in Restrictive Housing units statewide. Plaintiffs allege that these policies, practices, and omissions operate in concert to create bleak and dehumanizing conditions of confinement constituting cruel and unusual punishment. Plaintiffs submitted substantial evidence of these statewide conditions in support of their Motion for Class Certification, ECF Nos. 311 and 311-1 through 311-20, and hereby incorporate that evidence in support of their opposition to Defendant's motion for partial summary judgment. Plaintiffs also submit additional evidence of these conditions in support of this opposition to partial summary judgment. This evidence includes:

[1] For example, FDC regulates Restrictive Housing through additional written policies such as post orders, technical manuals, health services bulletins, and operating procedures. *See, e.g.,* ECF No. 311-16 (Ex. B-7, Housing Sergeant/Officer (Confinement) Post Order); ECF No. 311-17 at 121-22 (Ex. C-6, 23:16–24:3, post orders); *id.* at 91-94 (Ex. C-4, 25:11-27:11, 32:3-12 technical manuals); ECF No. 311-20 at 37-49 (Ex. F-4, HSB 15.03.13, Assignment of Health Classification Grades to Inmates); *id.* at 51-60 (Ex. F-5, Table of Contents for Health Services Bulletins); Ex. 13 (Health Services Bulletin No.15.05.08, Mental Health Services for Inmates [in Restrictive Housing]); and Ex. 14 (Procedure Table of Contents).

- **Cell Conditions**: Cells in Restrictive Housing units are too small to meet American Correctional Association standards, and are filthy and in disrepair. *See generally* ECF No. 311 at 9-10; *see also id.* at 10 n.12 (class member declarations describing filthy and infested cells); *id.* at 10 n. 13 (class member declarations describing plumbing in disrepair or controlled by staff, and forcing people to eat and sleep inches from toilets full of human waste); ECF No. 311-13 (Pacholke Decl.) at ¶¶ 33-34, 46; ECF No. 311-11 (Venters Decl.) at ¶ 14; ECF No. 311-16 at PIX0000015, PIX0000082, PIX0000168, PIX0000371, PIX0000639 (Ex. B-1, photos of Restrictive Housing cells); ECF No. 311-21 at 142-43 (Ex. G-12, cell size does not meet ACA minimum standard); Ex. 7 at Row 50 (series of 2018 audits of Apalachee East Correctional Institution showing a lack of plumbing and other maintenance issues in Restrictive Housing units); Ex. 8 at DHA00225219 (unit and cells are not clean); Ex. 9 at EHA00000045298 (roaches); Ex. 10 at EHA00034382-86 (roaches, mice droppings, and disrepair); Ex. 11 at EHA00000043499-506 (roaches, rats, and no toilet paper or toothbrushes); Ex. 12 at DHA00217708 (people left for days without clothes); Ex. 2 at 03:06 – 03:26 ([redacted]).

- **Lack of Necessary Exercise:** FDC does not provide minimally necessary exercise because it offers recreation only in cages resembling dog kennels that do not contain sufficient exercise equipment, and even this opportunity for exercise is denied in practice because of lack of staffing, failure of officers to provide escort to/from recreation, and the use of oppressive and punitive custody practices to constructively deny people the opportunity for recreation. *See generally* ECF No. 311 at 12, 16-17 and ECF No. 311-13 (Pacholke Decl.) at ¶¶ 46-48, 52-53, 65, 68-69; *see also* ECF No. 311-16 at PIX0000212, PIX0000608, PIX0000648 (Exs. B-3 - B-5, photos of recreation cages); Ex. 15 at DHA01081487-92 ([redacted]); Ex. 16 at DHA01065135 ([redacted])

- **Lack of Necessary Human Contact:** FDC deprives people in Restrictive Housing units of minimally necessary human contact by prohibiting people from communicating with people in other cells, barring or severely restricting visits and phone calls, regularly failing to provide correctional or healthcare "rounds" or even the meager dayroom and group activities afforded by their written policies, and providing "programming," if any, only from the other side of a closed

cell door. *See generally* ECF No. 311 at 9-11; s*ee also id.* at 10 n.14 (putative class member declarations describing prohibition on communicating with people in neighboring cells); ECF No. 311-13 (Pacholke Decl.) at ¶ 31 (rules prohibiting people from communicating with each other); ECF No. 311-21 at 74 (Ex. G-7, visits may be suspended indefinitely); ECF 311-17 at 82-84 (Ex. C-2, 32:7-34:18, FDC suspended Plaintiff Johnny Hill's visits for years at a time); *id.* at 87-88 (Ex. C-3, 48:21-49:22, Plaintiff Harvard denied visitation for ten years); ECF 311-21 at 38 (Ex. G-3, dayroom-time cancelled or reduced because not enough staff); Ex. 3 at EHA00017204, EHA00016575, EHA00014328, EHA00519778, EHA00518967 (Correctional Medical Authority audits include findings that "therapeutic groups were not provided"); Ex. 4 at EHA00033914, EHA00036309 ([redacted]); Ex. 5 at 39:21 - 40:20 (any programming in Administrative Confinement and Disciplinary Confinement available only at cell-front); Ex. 1 ([redacted]);

Ex. 2 at 7:00:11 – 7:01:09 ([redacted]).

- **Lack of Necessary Environmental Stimulation:** FDC deprives people in Restrictive Housing of minimally necessary environmental stimulation by, *inter alia*, failing to provide access to natural light; prohibiting decorating of cell walls; prohibiting televisions in isolation cells; severely restricting access to radios and written material; and failing to provide minimally sufficient programming and job assignments. *See generally* ECF No. 311 at 11-12; *see also id.* at 9 n.11 (class member declarations describing lack of windows or windows covered or frosted over); *id.* at 12 n.16 (class member declarations describing restrictions on access to books and periodicals); ECF No. 311-13 (Pacholke Decl.) at ¶¶ 38-40, 49; ECF No. 311-16 at PIX0000471, PIX0000559 (Ex. B-2, [redacted]); *id.* at EHA01075675 (Ex. B-7, ¶ 21, [redacted]); Ex. 5 at 54:7 - 55:3 (no programming for people in Maximum Management); *id.* at 39:21 - 40:20 (any programming is provided only at cell-front in Administrative Confinement and Disciplinary Confinement); *id.* at 66:7-17; 68:1 - 69:2; 70:14-23; 72:12-25; 77:25 - 78:7; 82:5-11 (nearly all cell-front programs unavailable to

people in Administrative and Disciplinary Confinement); *id.* at 85:9 - 18 (FDC offers only one program for people in Close Management who are not in the "Restrictive Housing Program"[2]); *id.* at 137:13 - 138:9 (not enough program slots for everyone in Close Management); *id.* at 99:4-10 (the Restrictive Housing Program is only at 4 prisons); *id.* at 101:1-5 (the Restrictive Housing Program participants can be in only one class at a time); Ex. 37 (only 291 people participated in the Restrictive Housing Program over a three-year period); Ex. 6 at 55:13 – 56:19, 71:22 - 72:10 (no academic enrollment for people in Administrative Confinement and Disciplinary Confinement, except for those in Special Education); *id*. at 82:18 - 83:7 (no vocational programs offered to people in Restrictive Housing).

- **Punitive and Dehumanizing Custody Practices:** FDC regularly subjects people in isolation to extreme and penologically unsupported strip searches, mechanical restraints, cell searches, property restrictions, chemical agents, and cell extractions—including for behaviors likely related to psychological decompensation such as

[2] According to FDC, the "Restrictive Housing Program (RHP) was created to provide pro-social programming for inmates. The purpose of the RHP is to assist inmates to progress more productively through [Close Management] in a way that increases pro-social capacity and increases self-efficacy." Ex. 19 at PLS0021125.

yelling, self-harm, and suicide attempts. Not only do these custody practices inflict direct harms on putative class members, but they also create an environment of retribution for accessing basic human necessities like showers and recreation, which further amplifies the degree of harm. *See generally* ECF No. 311 at 13-15, 40-41; *see also id*. at 13 n.19 (putative class member declarations describing strip searches when leaving cell); *id*. at 14 n.20 (class member declarations describing cell searches when they have left their cells); *id.* at 14 n.21 (putative class member declarations describing property restriction and strip status); *id.* at 15 n.22, n.23 (putative class member declarations describing use of physical force and chemical agents); ECF No. 311-13 (Pacholke Decl.) at ¶¶ 52-60, 63, 65-66, 68-71; ECF No. 311-11 (Venters Decl.) at ¶¶ 30-31; ECF No. 311-10 (Burns Decl.) at ¶ 21; ECF No. 311-12 (Kraus Decl.) at ¶¶ 51-52; ECF No. 311-9 (Haney Decl.) at ¶¶ 60, 70; ECF No. 311-16 at EHA01075675 (Ex. B-7, [redacted]); *id.* at DHA0013833-34, DHA00030402-03, DHA0078084-85, DHA00073962, DHA00923979 (Ex. B-9, [redacted]); *id.* at DHA00211937 (Ex. B-8, [redacted])

[redacted]"); ECF 311-20 at 11 (Ex. F-1, "confinement wings to look as if hit by a Category 5 hurricane" after searches); *id.* at 20 (Ex. F-2, strip searches required whenever people come in and out of confinement unit); ECF 311-21 at 3-9 (Ex. G-1, strip status for messy cells); Ex. 3 at EHA00343604 (FDC used chemical force in response to the 16 suicide attempts by hanging at one prison from June to November 2018; 9 of those 16 happened in confinement); Ex. 21 at EHA00032022-23 (25-30 people on strip status at the same time at one prison).

- **Inadequate Staff to Provide Necessary Services**: FDC's admittedly dangerous levels of understaffing result in failure to provide people in isolation with necessary services including recreation, dayroom, phone calls, healthcare appointments, and even security checks. *See generally* ECF No. 311 at 15-16; *see also* ECF No. 311-21 at 13 (Ex. G-2, FDC "is experiencing unacceptably high vacancy rates which are impacting the Department's ability to fulfill its mission"); *id.* at 38 (Ex. G-3, dayroom-time cancelled or reduced because not enough staff); *id.* at 43 (Ex. G-4, suicides occurred in units that were short-staffed); *id.* at 47 (Ex. G-5, FDC Deputy Secretary states "we are at a breaking point" and that officers are "documenting 30 minute checks because they didn't

want to say they were overloaded due to short staffing"); Ex. 12 at DHA00215790 (group therapy and individual therapy not completed due to lack of security staff); Ex. 23 at EHA00279815 ("security staffing issue" making it "difficult" for mental health staff to see patients); *id*. at EHA00283242 (backlog of mental health appointments because not enough security staff); Ex. 25 at EHA00636159 (recreation not provided due to staff shortages); Ex. 24 at DHA00007588 ("Staffing levels at level one are not safe for offering program supervision out of cell … Because of vacancy rates, staffing levels are often at or below level one.").

- **Failure to Follow Healthcare Policies and Procedures:** Despite recognition of the critical importance of health services and treatment to people in isolation, FDC regularly fails to follow its own policies and procedures with respect to provision of necessary healthcare, including by failing to respond to psychiatric and medical emergencies. *See* Ex. 30 at 52 – 64 (describing necessary mental health treatment and staffing for people in isolation); Ex. 26 at DHA00009733 ([redacted]); Ex. 27 at EHA00000048633-34 (investigator believes

allegations that officers ignored a medical emergency in Restrictive Housing); Ex. 23 at EHA00280608 (mental health staff failing to provide rounds and treatment to people in isolation); Ex. 3 at EHA00518963 (failures to provide health appraisals and psychotropic medications to people in isolation); *id.* at DHA00014326 (failure to provide psychotropic medications or appropriate psychiatry referrals, including to someone who was suffering from auditory hallucinations and insomnia in Restrictive Housing); Ex. 23 at DHA00025243 [rows 43 and 46], DHA00024229 [rows 43 and 46], and EHA00301028 [rows 42 and 45] (mental health staff failed to timely, if at all, evaluate people placed in Restrictive Housing, including those with mental illness ("S-3")); *id.* at EHA00176853 (Row 54: nurses performed rounds only 54% of the time), *id.* at DHA00927662 (Rows 37 – 39: mental health staff failed to perform evaluations and rounds).

- **Habitual Use of Isolation for Extended Periods of Time:** FDC imposes no maximum time limit on how long a person can be held in isolation, and, in practice FDC routinely keeps people in solitary confinement for months and years on end. *See generally* ECF No. 311 at 6-7; *see also* ECF No. 311-13 (Pacholke Decl.) at ¶ 26; ECF No. 311-19 at 36-40 (Ex. E-4, 221 people in isolation for 5 years or longer,

including 12 for more than 20 years, 9 for more than 15 years, and 39 for more than 10 years); ECF No. 311-17 at 87-88 (Ex. C-3, 48:21 – 49:3, Plaintiff Harvard was in Disciplinary Confinement for 10 years with no books, education, visits, or phone calls except for when she had to be hospitalized for mental health treatment); ECF No. 311-18 at 112-114, 116-118 (Ex. D-3, Nos. 114-119, 123, 125-127, no limit to the number of consecutive Disciplinary Confinement terms or amount of time in Restrictive Housing that FDC may impose); Ex. 28 at DHA00002815 (156 people in Restrictive Housing for six years or longer); Ex. 29 (60 people in Disciplinary Confinement longer than 180 days, including 25 longer than 365 days); Ex. 22 at 48:22 - 53:16 (FDC doesn't count the total amount of time people are in isolation; they start and stop the clock with each change of isolation status).

B. Substantial Risk of Serious Harm to People in Isolation in FDC

As a result of the cumulative effect of cell conditions; lack of basic human contact, exercise, and environmental stimulation; and oppressive security measures; FDC subjects everyone in isolation to a substantial risk of serious harm. *See generally* ECF No. 311 at 17-19. The severe deprivations FDC inflicts in its Restrictive Housing units renders putative class members vulnerable to devastating psychological and physical symptoms such as: anxiety, panic, emotional breakdown,

hypersensitivity to stimuli, aggression, rage, loss of control, ruminations, paranoia, cognitive dysfunction, hallucinations, depression, self-mutilation, and suicidal ideation and behavior. *See* ECF No. 311-9 (Haney Decl.) at ¶¶ 14, 28, 53, 61, 69, 84-86; ECF No. 311-10 (Burns Decl.) at ¶¶ 14, 21, 26; ECF No. 311-12 (Kraus Decl.) at ¶¶ 19-25, 39, 43, 50; ECF No. 311-11 (Venters Decl.) at ¶¶ 18-21, 62. This unconscionable risk of harm is reflected in, for example, the disproportionately high suicide rate in FDC's isolation units. From 2015 to 2019, while the FDC isolation population was 10% of the total FDC population, it accounted for 58% of the suicides in FDC custody. ECF No. 311-9 (Haney Decl.) at ¶ 81; *see also* ECF No. 311 at 18-20. These suicides represent only the tip of the harm iceberg: for every person who completes a suicide, there are many more experiences of acute psychological distress. ECF No. 311-9 (Haney Decl.) at ¶¶ 29, 42, 53, 79; ECF No. 311-10 (Burns Decl.) at ¶¶ 14, 39; ECF No. 311-11 (Venters Decl.) at ¶ 20; ECF No. 311-12 (Kraus Decl.) at ¶¶ 20-21.

C. FDC's Knowledge of and Failure to Ameliorate the Risk of Harm to Plaintiffs.

FDC officials have long known about the substantial risk of serious harm to people in its isolation units, but have refused to take necessary and reasonable steps to ameliorate this risk. *See, e.g.*, Ex. 31 at DHA00006571 (email from FDC official describing the "concern" with isolation as "the de-humanizing effect of the lack of social interaction which people need to be healthy mentally and emotionally"); Ex.

12 at DHA00216731 ("We must work toward educating our staff on restrictive housing and the steps being taken to minimize the mental health issues that arise from long-term restrictive housing."); Ex. 32 at 23-24 (powerpoint by FDC Director of Mental Health Services describing the risk of psychiatric decompensation and suicide in Restrictive Housing, and that "teens are 19 times more likely to commit suicide when placed in isolation"); Ex. 33 at EHA00055719 (FDC suicide prevention training warns that "people are more likely to attempt suicide while in segregated housing" due to the conditions and deprivations).

In 2017, then-Secretary Julie Jones presented a statement to the Senate Appropriations Committee that included:

> We need to reduce the use of restrictive housing (RH) through intensive programming, assisting inmates with transition back to general population and community. Confinement, or restrictive housing, has negative impacts on the health and wellness of an inmate, which contributes to behavioral issues and disciplinary infractions, inhibiting an inmate from receiving access to programs that prepare them for release to community.

Ex. 34 at EHA00352748. With respect to psychological harms to people in Restrictive Housing, FDC's Director of Mental Health documented the disproportionate mental health needs and impacts of the Restrictive Housing population compared to FDC's population as whole. ECF No. 311-18 at 23-26; Ex. 30 at 33 ("Clinical research has consistently indicated that when people are subjected to social isolation and reduced environment stimulation, they may decompensate

mentally and in some cases develop psychiatric symptoms."). FDC's tracking of its suicide rates also reflects the drastically disproportionate rate of deaths by suicides in isolation versus the general prison population. ECF No. 311-9 (Haney Decl.) at ¶ 81.

For decades, scientists, correctional administrators, and others studying solitary confinement have warned about exactly these types of risks. *See* ECF No. 311-9 (Haney Decl.) at ¶¶ 24-31, 40-41; *see also* ECF No. 309 at ¶¶ 66-79. In 2015, the United Nations General Assembly revised its Standard Minimum Rules for the Treatment of Prisoners (the "Mandela Rules") to prohibit use of isolation for more than 15 consecutive days and restrict its use for people with mental or physical disabilities. Ex. 17 at 16-17 (G.A. Res. 70/175, U.N. Doc. A/Res/70/175 (Dec. 17, 2015)). In 2016, the National Commission on Correctional Health Care ("NCCHC") issued a position statement recognizing that solitary confinement greater than 15 consecutive days "is cruel, inhumane, and degrading treatment, and harmful to an individual's health" and "[j]uveniles, mentally ill individuals, and pregnant women should be excluded from solitary confinement of any duration." Ex. 18 at 1, 4 (NCCHC Position Statement: Solitary Confinement (April 2016)).

While other states and correctional systems across the country have moved to drastically reduce or eliminate their use of solitary confinement, FDC has doubled down, maintaining one of the highest rates of isolation in the nation. *See, e.g.*, ECF

No. 311-9 (Haney Decl.) at ¶ 52; ECF No. 311-16 at EHA00392939 (Ex. B-6, FDC isolation rates); Ex. 38 at EHA000214630 (FDC Deputy Secretary is "glad" Florida is one of only two states that did not respond to a survey about restrictive housing from the Association of State Correctional Administrators because "we would have been one of the highest in the country"); *see also* ECF No. 309 at ¶¶ 79, 133. Despite FDC's review of contemporary correctional standards including the Mandela Rules and NCCHC's position statement, FDC also refuses to place a maximum time limit on solitary confinement, or to exclude from isolation especially vulnerable populations such as juveniles and people with serious mental illness. Ex. 35 (FDC Director of Mental Health Services emails then-Secretary Julie Jones about NCCHC position statement); Ex. 36 at EHA00497884 and EHA00497886 (request from Deputy Secretary to print a document that includes information about the Mandela Rules); and Ex. 19 at PLS0007246 (FDC does not exclude juveniles and people with mental illness from isolation).

Not only has FDC refused to limit the use of isolation, but—as the above descriptions of the physical cells in Restrictive Housing units, lack of access to basic human contact, environmental stimulation, and exercise, and oppressive custody practices, make clear—FDC also has failed to make necessary changes to the draconian conditions and security practices that subject people to a grave risk of harm. Instead, after purportedly committing in 2016 to "safely reduce the use of

restrictive housing," FDC has changed only a paltry fraction of its disciplinary procedures (applicable to only a third of the people in isolation), and implemented programs it has already eliminated[3] or that are currently available to a mere 2% of the approximately 9,500 people in Restrictive Housing. Ex. 20 at EHA00000049723-25 and EHA01001080-84 (efforts to "safely reduce the use of restrictive housing" targeted almost entirely to Disciplinary Confinement); ECF No. 311-16 at EHA00392939 (Ex. B-6, around 3,200 people in Disciplinary Confinement); Ex. 19 at PLS0021134 ("Alternative Housing Program" terminated in 2019); *id.* at PLS0021136, PLS0021138-41 (the only people enrolled in the Restrictive Housing Program as of April 2021 were 139 people at Florida State Prison and Santa Rosa Correctional Institution); *id*. at PLS0007236 (only 92 beds available in the Secure Treatment Unit). It is unsurprising, then, that FDC subjects people to the same devastating conditions and rate of isolation as it has done since at least 2014.

ARGUMENT

I. Defendant Is Not Entitled to Partial Summary Judgment on Plaintiffs' Eighth Amendment Claim as a Matter of Law.

[3] This includes the "step-down" program at New River Correctional Institution that was closed due to "severe staff shortages." *See* Ana Ceballos and Ben Conark, Slammed by Staff Shortages and 'Desperation,' Some North Florida Prisons to Shutter, Miami Herald (Aug. 26, 2021), https://www.miamiherald.com/article253769043.html.

Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986). A party seeking summary judgment bears the initial burden of identifying those portions of the pleadings and discovery that demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. In considering a motion for summary judgment, "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986).

Rather than demonstrating the absence of a genuine issue of material fact, Defendant Inch moves for partial summary judgment based on a contorted misreading of Plaintiffs' case and the wrong law. In so doing, Defendant Inch does not even satisfy his initial burden as the moving party. Defendant simply submits the regulations defining the levels of Restrictive Housing in FDC, asserts that no term in the regulations establishes a *de facto* constitutional violation in and of itself, and therefore concludes that Plaintiffs' claim fails as a matter of law under the general standard for facial challenges set forth in *Salerno*. But Defendant Inch does not establish the absence of genuine and material factual disputes by simply ignoring Plaintiffs' claim that FDC violates their right to be free from cruel and unusual punishment based on the *totality of the circumstances* of solitary confinement in

FDC. *See* ECF No. 54 at 20-22; *see also Hutto v. Finney*, 437 U.S. 678, 687-88 (1979) ("We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells, continued to violate the prohibition against cruel and unusual punishment . . . . The order is supported by the interdependence of the conditions producing the violation."); *Rhodes v. Chapman*, 452 U.S. 337, 362-63 (1981) (Brennan, J., concurring) ("It is important to recognize that various deficiencies in prison conditions must be considered together. The individual conditions exist in combination; each affects the other; and taken together they may have a cumulative impact on the inmates. Thus, a court considering an Eighth Amendment challenge to conditions of confinement must examine the totality of the circumstances." (internal quotations, alteration, and citations omitted)).

A. Defendant Fails To Apply the Correct Legal Analysis to Plaintiffs' Claim That the Conditions of Confinement in FDC Isolation Units Violate the Eighth Amendment

"A two-part analysis governs Eighth Amendment challenges to conditions of confinement." ECF No. 54 at 19 (citing *Quintanilla v. Bryson*, 730 F. App'x 738, 746 (11th Cir. 2018)). First, Plaintiffs must show that the conditions of confinement pose an unreasonable risk of serious harm to their future health or safety. *See id.* Second, Plaintiffs must show that prison officials subjectively acted with deliberate indifference to the risk posed by the conditions at issue. *See id.* In moving for partial summary judgment, Defendant Inch offered no analysis under the applicable Eighth

Amendment conditions of confinement standard. Rather, he simply asserted that various conditions imposed by FDC regulations do not, individually, establish *de facto* constitutional violations. This misunderstands Plaintiffs' claims in this case.

Plaintiffs claim that the cumulative effects of the actual conditions of confinement in FDC isolation—resulting from the combination of written policies and procedures, FDC practices and omissions, and physical conditions—pose an unreasonable risk of serious harm to their future health or safety. Therefore, a decision as to this claim requires the factfinder to evaluate evidence about the actual conditions. *See Rhodes v. Chapman*, 452 U.S. 337, 352 ("The question before us is . . . whether the actual conditions of confinement at [the prison] are cruel and unusual."); *see id.* at 362 (Brennan, J., concurring) ("The first aspect of judicial decisionmaking in this area is scrutiny of the actual conditions under challenge.").

Defendant pointed to only one portion of FDC's written policies—the regulations—and did not establish any facts about how those policies are implemented and the *actual* conditions of confinement in FDC. This makes Defendant's reliance on *Sheley v. Dugger*, 833 F.2d 1420, 1428-29 (11th Cir. 1987) for the proposition that "administrative segregation and solitary confinement do not, in and of themselves, constitute cruel and unusual punishment" inapposite. *See* ECF No. 343 at 18. Defendant also cannot rely on factual findings from *Osterback v. McDonough*, 549 F. Supp. 2d 1337 (M.D. Fla. 2008) regarding conditions in certain

FDC Close Management units thirteen years ago to establish a lack of unconstitutional conditions throughout FDC's Restrictive Housing units today. *See* ECF No. 343 at 20-21. Instead, Defendant must establish that there are no current factual disputes material to an evaluation of isolation conditions in FDC Restrictive Housing units—which he failed to do.

Nor did Defendant identify any evidence establishing the absence of a dispute about FDC's deliberate indifference to Plaintiffs' risk of harm—rather, Defendant simply cited a single Eleventh Circuit case finding that, more than twenty years ago, FDC was not deliberately indifferent to two people in Close Management whose outdoor recreation time was suspended. ECF No. 343 at 26 (citing *Bass v. Perrin*, 170 F.3d 1312, 1317 (11th Cir. 1999)). Neither this case nor any of the other historical cases Defendant cites demonstrate that FDC is not currently deliberately indifferent to the putative Plaintiff class's risk of harm from current cumulative conditions in isolation. As set forth *infra*, Plaintiffs have already gathered substantial evidence establishing their current risk of harm in FDC isolation and FDC's ongoing deliberate indifference.

Further, Defendant's argument that Plaintiffs' Eighth Amendment claim must fail *as a matter of law* because Plaintiffs' allegations in the complaint do not define a specific period of time a person must spend in restrictive housing is nonsensical. The questions of whether and how duration of isolation affects the degree of risk of

serious harm in FDC are evidence-dependent questions. Plaintiffs' challenge is not based on an abstract claim that all solitary confinement is unconstitutional or even that all solitary confinement after some specified number of days is unconstitutional. Plaintiffs' claim is that solitary confinement, *as implemented in and by FDC*, subjects people in the putative class to substantial risk of serious harm. The degree of that risk of harm—including whether there is some minimal number of days in Restrictive Housing that may be constitutionally tolerable, given the totality of circumstances at FDC—is among the disputed issues of fact for which the parties must present evidence to the factfinder and, therefore, cannot be resolved by summary judgment.

B. Defendant Applies the Wrong Legal Standard for Evaluating the Constitutionality of Prison Regulations.

While Plaintiffs' Eighth Amendment claim is not a facial challenge to FDC prison regulations, even if it were, the correct legal standard is *Turner*, not *Salerno*. *See Washington*, 494 U.S. at 223-24 ("[T]he proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is reasonably related to legitimate penological interests.'" (quoting *Turner*, 482 U.S. at 89)). The United States Supreme Court has "made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights." *Washington*, 494 U.S. at 224. Yet, instead of applying the *Turner* standard,

Defendant erroneously uses the general standard for facial challenges to legislative acts set forth by the Supreme Court in *Salerno*.[4]

As *Turner* firmly established, a court evaluating a challenge to prison regulations must evaluate fact-intensive factors "in deciding whether a prison regulation affecting a constitutional right that survives incarceration survives constitutional challenge," including, *inter alia*, "whether the regulation has a 'valid, rational connection' to a legitimate governmental interest" and "what impact an accommodation of the right would have on guards and inmates and prison resources." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (quoting *Turner*, 482 U.S. at 89-91). Defendants offered no analysis of the *Turner* factors—indeed they fail even to cite *Turner* at all—and their lengthy recitations of law pertaining to *Salerno* are irrelevant. Nor did Defendant submit or identify any evidence in the record to establish that there are no disputed issues of fact with respect to whether FDC's confinement regulations are rationally connected to a legitimate government interest, what impact reforms aimed at minimizing the use of Restrictive Housing would have on the Plaintiff class, correctional officers, and prison resources, or any of the other *Turner* factors.

[4] There is no doubt the Supreme Court quite specifically meant for *Turner* to apply to prison regulations rather than *Salerno*, given that the Court handed down the two decisions within days of each other. *Compare Salerno*, 481 U.S. 739 (decided May 26, 1987) *with Turner*, 482 U.S. 78 (decided June 1, 1987).

Not only did Defendant move for partial summary judgment based on a fundamental mischaracterization of Plaintiffs' Eighth Amendment claim, but he failed to make even a *prima facie* showing that there are no genuine issues of material fact such that he would be entitled to partial summary judgment as a matter of law.

II. Even at This Early Stage of the Case, Plaintiffs Can Demonstrate an Eighth Amendment Violation.

Although discovery is still ongoing, Plaintiffs can present sufficient evidence at this stage to support a finding that FDC is deliberately indifferent to the ongoing substantial risk of serious harm to people housed in FDC's isolation units. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Helling v. McKinney*, 509 U.S. 25, 35 (1993). This evidence demonstrates genuine issues of material fact under the correct conditions of confinement legal standard for Plaintiffs' claim, precluding partial summary judgment as a matter of law.

As described in the Statement of Facts, *supra*, FDC subjects the putative Plaintiff class to unduly harsh and punitive conditions in solitary confinement that, in combination, result in intolerable risk of harm. *See e.g., Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (recognizing Eighth Amendment violation may be established when conditions of confinement "have a mutually enforcing effect that produces the deprivation of a single, identifiable human need"); *Rhodes*, 452 U.S. at 347 (holding conditions alone or in combination may result in deprivation of minimal civilized

measure of life's necessities as to violate Eighth Amendment); *Hutto*, 437 U.S. at 687-88 (holding conditions in isolation cells "taken as a whole" can violate Eighth Amendment); *Quintanilla*, 730 F.App'x at 746-47 (holding conditions of confinement in isolation cells are subject to scrutiny under Eighth Amendment standards and judged under "evolving standards of decency that mark the progress of a maturing society") (*quoting Rhodes*, 452 U.S. at 346-47); *see also Porter v. Clarke*, 923 F.3d 348, 357 (4th Cir. 2019), *as amended* (May 6, 2019) ("[S]everal courts have found—based on the empirical evidence set forth above—that solitary confinement poses an objection risk of serious psychological and emotional harm to inmates, and therefore can violate the Eighth Amendment."); *Palakovic v. Wetzel*, 854 F.3d 209, 225 (3d Cir. 2017) (noting "the robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation in solitary confinement)); *Gates v. Cook*, 376 F.3d 323, 332 (5th Cir. 2004) ("Prison officials must provide humane conditions of confinement; they must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measure to ensure the safety of the inmates."); *Tellis v. LeBlanc*, No. 5:18-cv-00541-EEF-MLH, ECF No. 462 at 14 (W.D. La. Sept. 20, 2021) (recognizing Eighth Amendment claim where plaintiff class alleged conditions of confinement in isolation, including social isolation, forced idleness, and indefinite time on extended lockdown, are inhumane and expose the class to

serious risk of harm); *Braggs v. Dunn*, 367 F. Sup. 3d 1340, 1355 (M.D. Ala. 2019) ("[E]xtended placement in segregation poses a substantial risk of serious, potentially permanent psychological harm and decompensation."); *Shoatz v. Wetzel*, No. 2:13-CV-0657, 2016 WL 595337, at *9 (W.D. Penn. Feb. 12, 2016) (quoting *Wilkerson v. Stalder*, 639 F. Supp.2d 654, 680 (M.D.La. 2007)) (observing that "lack of adequate exercise, sleep, social isolation, and lack of environmental stimulation are seriously detrimental to a human being's physical and mental health.").

The declarations Plaintiffs' experts submitted in support of class certification explain that people in FDC isolation do suffer and risk suffering devastating health consequences consistent with the harms documented in scientific research about solitary confinement. *See* ECF No. 311-10 (Burns Decl.) at ¶¶ 22, 26, 39; ECF No. 311-12 (Kraus Decl.) at ¶¶ 27, 32, 39, 46-52; ECF No. 311-11 (Venters Decl.) at ¶¶ 29, 42; ECF No. 311-9 (Haney Decl.) at ¶¶ 54, 58, 84-85. Thirty putative class members also submitted declarations in support of the motion for class certification in which they describe in detail the harmful effects of the isolation they have experienced. *See* ECF No. 311-8 (Exs. A2-A31).

FDC is well aware of the substantial risk of serious harm to people it holds in solitary confinement, but has not taken reasonable and necessary action to reduce its Restrictive Housing population, to limit the lengths of time people are held in isolation, or to change the oppressive and inhumane conditions it subjects people to

in Restrictive Housing. FDC's refusal to modify its isolation policies and practices to ensure it treats people humanely constitutes deliberate indifference in violation of the Eighth Amendment.

III. Under the Applicable Legal Standard, Summary Judgment Would Be Premature While Substantial Discovery and Expert Reports Remain to be Completed.

Plaintiffs have gathered substantial evidence showing that FDC and Inch are deliberately indifferent to the substantial risk of serious harm posed to the people they subject to isolation in FDC. To the extent further evidentiary showing were needed from Plaintiffs, the appropriate course of action would have been for the Court to defer ruling on the motion pursuant to Fed. R. Civ. P. 56(d) until Plaintiffs had the opportunity to complete fact and expert discovery, including submission of the parties' expert reports concerning the merits of the case. *See*, *e.g.*, *Celetox*, 477 U.S. at 322 (finding summary judgment should be granted only after adequate time for discovery); *Anderson*, 477 U.S. at 250 n.5 (noting summary judgment should be refused where the nonmoving party has not had the opportunity to discover information essential to opposition); *Jones v. City of Columbus*, 120 F.3d 248, 253 (11th Cir. 1997) ("The law in this Circuit is clear: The party opposing a motion for summary judgment should be permitted an adequate opportunity to complete discovery prior to consideration of the motion."). But, given that Defendant did not meet even his preliminary burden as movant for summary judgment to demonstrate

the absence of genuine issues of material fact under the correct legal standard, and Plaintiffs present ample evidence based on which factfinder could find an Eighth Amendment violation, it is proper for the Court to deny Defendant's motion forthwith.

IV. The Subclasses Properly Raised Their Eighth Amendment Claim.

This Court already rejected Defendants' argument that a writ of habeas corpus rather than a civil rights action under 42 U.S.C. § 1983 is the appropriate mechanism for the putative Plaintiff class to challenge conditions of confinement. ECF No. 54 at 18-19 (citing to *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006) (challenges to "circumstances of confinement" are "properly raised in a civil rights action under § 1983")).

Now, Defendant Inch reprises the literally identical argument with respect to the two putative Plaintiff subclasses. But the Eighth Amendment claim of the two subclasses is the same as the Eighth Amendment claim of the class: the subclasses contend that Defendants subject them to a substantial risk of serious harm through the conditions of confinement in isolation, and Defendants are deliberately indifferent to this harm. Plaintiffs have moved for certification of these two subclasses because their extreme degree of vulnerability further amplifies the already-substantial risk of serious harm resulting from isolation. *See* ECF No. 311 at 36-37. But consideration of these subclasses' particular vulnerabilities to harm

from isolation does not change the legal nature of their Eighth Amendment claim. As this Court already found, Plaintiffs—including the Youth and SMI subclasses:

> [P]roperly raised a civil rights action under 42 U.S.C. § 1983. Unlike Defendants' assertion, Plaintiffs are neither challenging the disciplinary decisions that led to their restrictive housing nor simply challenging the length of the confinement imposed. A fair reading of Plaintiffs' amended complaint leads this Court to conclude that Plaintiffs are challenging the conditions of their confinement. . . . Plaintiffs have, therefore, chosen the proper avenue for relief.

ECF No. 54 at 18-19. Defendant has offered no reason as to why the Court's conclusion with respect to the larger putative class's Eighth Amendment claim does not also apply to the subclasses' same claim.

CONCLUSION

For the foregoing reasons, this Court should deny Defendant Inch's motion for partial summary judgment.

Dated: October 1, 2021

Respectfully Submitted,

s/ Kelly Knapp

Kelly Knapp
Fla. Bar No. 1011018
Leonard L. Laurenceau
Fla. Bar No. 106987
Krista Dolan
Fla. Bar No. 1012147
Southern Poverty Law Center
2 South Biscayne Boulevard
Miami, FL 33131

Telephone: (786) 457-7310
kelly.knapp@splcenter.org
leo.laurenceau@splcenter.org
krista.dolan@splcenter.org

Dante P. Trevisani
Fla. Bar No. 72912
Laura A. Ferro
Fla. Bar No. 1015841
Sam Thypin-Bermeo
Fla. Bar No. 1019777
Marcel A. Lilavois, Jr.
Fla. Bar No. 1016175
Kara Wallis
Fla. Bar No. 1028563
Florida Justice Institute, Inc.
PO BOX 370747
Miami, FL 33137
Telephone: (305) 358-2081
dtrevisani@floridajusticeinstitute.org
lferro@floridajusticeinstitute.org
sthypin-bermeo@floridajustice.org
kwallis@floridajusticeinstitute.org

Andrea Costello
Fla. Bar No. 532991
Christopher M. Jones
Fla. Bar No. 994642
Rachel Ortiz
Fla. Bar No. 83842
Alexis Alvarez
Fla. Bar. No. 120069
Rebecca Klonel
Fla. Bar No. 1028003
Florida Legal Services
122 E. Colonial Drive, Suite 100
Orlando, FL 32801
Telephone: (407) 801-0332
andrea@floridalegal.org
christopher@floridalegal.org

rachel.ortiz@floridalegal.org
alexis.alvarez@floridalegal.org
rebecca.klonel@floridalegal.org

Lori Rifkin*
CA Bar No. 244081
Rifkin Law Office
3630 High St. #18917
Oakland, CA
Telephone: (510) 414-4132
lrifkin@rifkinlawoffice.com

* *Admitted Pro hac vice*

Attorneys for Plaintiffs

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s/ Kelly Knapp
Kelly Knapp
Fla. Bar No. 1011018