No. 22-1716

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JERRY CINTRON,

Plaintiff – Appellee

v.

PAUL BIBEAULT, In his Official and Individual Capacity; RUI DINIZ, in his official and individual capacity; MATTHEW KETTLE, in his official and individual capacity; PATRICIA ANNE COYNE-FAGUE, in her individual capacity; WAYNE T. SALISBURY, JR., Interim Director, in his official capacity; SPECIAL INVESTIGATOR STEVE CABRAL, in his official and individual capacity; JEFFREY ACETO, in his individual and official capacity; LYNNE CORRY, in her individual and official capacity,

Defendants – Appellants

LT. HAYES, in his official and individual capacity; LT. MOE, in his official and individual capacity; LT. BUSH, in his official and individual capacity; JENNIFER CHAPMAN, in her official and individual capacity; "COUNSELOR" FRANCO, in her official and individual capacity,

Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND IN CASE NO. 19-CV-497, CHIEF JUDGE JOHN J. MCCONNELL.

BREIF OF THE DEFENDANTS – APPELLANTS

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JURISDICTIONAL STATEMENT

Plaintiff-Appellee Jerry Cintron ("Plaintiff" or "Cintron") filed this lawsuit against prison staff asserting, inter alia, that retaliation is the reason he was disciplined and criminally charged for trafficking fentanyl into the Rhode Island Adult Correctional Institutions ("ACI"). Even after eventually admitting in the Rhode Island Superior Court that he participated in conveying fentanyl into the ACI, Plaintiff pursued his operative Second Amended Complaint ("Complaint"), which asserted four counts pursuant to 42 U.S.C. § 1983 and the United States Constitution, and three counts pursuant to state law. *See* 28 U.S.C. § 1331; 28 U.S.C. § 1367. Defendants-Appellants Paul Bibeault, Steve Cabral, Rui Diniz, Matthew Kettle, Patricia Coyne-Fague[1], Jeffrey Aceto, and Lynne Corry, each in their official and individual capacities ("Defendants"), moved for judgment on the pleadings based, among other reasons, on qualified immunity.

On August 22, 2022, the District Court, via a text order, granted Defendants judgment on the pleadings as to three counts but denied it as to the remaining four counts. Although raised, the District Court never addressed qualified immunity, and thus denied Defendants' qualified immunity defense. The District Court also failed to dismiss Plaintiff's official capacity damages claims despite Plaintiff agreeing that *Will v. Michigan*, which stems from Eleventh Amendment immunity,

[1] For the official-capacity claim against Coyne-Fague, Wayne Salisbury has been substituted in his official capacity as Interim Director.

bars such claims in § 1983 cases. Additionally, the District Court permitted Plaintiff's injunctive relief claims to proceed even though Plaintiff lacks standing to seek a broad injunction prohibiting future "further retaliation," and admitted that his other request seeking to be removed from disciplinary confinement is moot because he is no longer in disciplinary confinement. On September 20, 2022, Defendants filed notice of this interlocutory appeal, over which this Court has jurisdiction. *See Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *infra* p.51-54 (citing precedent recognizing interlocutory appeal jurisdiction regarding *Will v. Michigan* and standing).

STATEMENT OF THE ISSUES

1. The District Court erred by not granting Defendants qualified immunity on each remaining count.
2. *Will v. Michigan* and lack of standing to pursue injunctive relief resolve all remaining issues and require entering judgment for Defendants.

INTRODUCTION

Plaintiff consumed and overdosed on fentanyl on July 12, 2019 while an inmate at the ACI. After Plaintiff was disciplined for possessing and trafficking narcotics, he sued prison staff. Plaintiff admitted he ingested narcotics but claimed retaliation is the reason he was disciplined and professed he had no idea how the drug he ingested entered the ACI. Subsequently, Plaintiff entered a nolo

contendere plea in criminal proceedings before the Rhode Island Superior Court and admitted during the plea colloquy that he had engaged in an organized effort to bring fentanyl into the ACI two days before his overdose. Despite admitting he ingested narcotics and conspired to convey fentanyl into the ACI, Plaintiff continued to pursue this lawsuit alleging that retaliation is the reason he was issued disciplinary bookings and prosecuted for his conduct. Plaintiff additionally alleges that not being released early from disciplinary confinement constituted cruel and unusual punishment, although he admits he continued to violate prison rules and abuse substances while in disciplinary confinement.

Defendants are entitled to qualified immunity because each count of the Complaint fails to allege a constitutional violation as required by the first prong of the qualified immunity analysis, and even if it did, Defendants did not violate any clearly established right as required by the second prong of qualified immunity. Additionally, Plaintiff's request for damages against Defendants in their official capacities in his § 1983 claims is barred by *Will v. Michigan* and Eleventh Amendment immunity, and he lacks standing to pursue his requests for injunctive relief.

STATEMENT OF THE CASE

A. Plaintiff Admitted Participating in Conveying Fentanyl into the ACI

On July 12, 2019, Plaintiff consumed fentanyl while incarcerated at the ACI. Appendix ("A.").018, ¶18 (Complaint). Plaintiff was found unconscious, taken to the hospital, and revived with multiple doses of Narcan. A.018, ¶19.

On March 9, 2021, the Office of Attorney General filed a Criminal Information in state court, case P2-2021-0683A, charging Plaintiff with conveying an unauthorized article (fentanyl) into the ACI, *see* R.I. Gen. Laws § 11-25-14, and conspiracy to convey an unauthorized article to or from the ACI, *see* R.I. Gen. Laws § 11-1-6.[2] A.101. The Criminal Information describes how the criminal charges are based on Cintron conspiring with another inmate, Davante Neves, to have Neves' girlfriend, Destiny Valley, convey fentanyl into the prison. A.106-110.[3] The conspiracy also involved Rafael Ferrer, who supplied fentanyl and

[2] The criminal complaint was originally filed in District Court on October 7, 2020, and later removed to the Superior Court. *See* Case No. 32-2020-06674. Cintron was also charged with two other counts that were dismissed due to Rhode Island's Good Samaritan Overdose Prevention Act, R.I. Gen. Laws § 21-28.9-4(a).

[3] On a Rule 12 Motion, this Court may consider public records filed on the docket in the criminal proceedings, especially as those proceedings were the basis for two counts in the Complaint. *See Gargano v. Liberty Int'l Underwriters, Inc.*, 572 F.3d 45, 48 (1st Cir. 2009) (recognizing exception allowing "documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint" to be considered without converting a Rule 12 Motion into a motion for summary judgment, and determining that a complaint and judgment from the

transported Valley to the ACI to convey the fentanyl two days before Plaintiff's overdose. *Id.* Valley conveyed the fentanyl into the facility during a routine visit with Neves, who then sold the fentanyl to Cintron. *Id.* This same conspiracy and conveyance was also the basis for a Rule 32(f) violation proceeding[4] initiated against Cintron by the Office of Attorney General on October 7, 2020. A.279.

On April 15, 2021, Cintron filed a Motion to Dismiss the criminal charges, asserting lack of probable cause. The Superior Court rejected that argument on May 28, 2021, holding that "a review of the information package, as discussed at the outset of this decision, in the light most favorable to the State makes it clear that probable cause exists[.]" A.248-50.

On March 31, 2022, Plaintiff pleaded nolo contendere[5] to conveying an unauthorized article (fentanyl) into the ACI, and conspiracy to convey an unauthorized article to or from the ACI. A.261-62; A.264-77. During the plea,

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Massachusetts Superior Court "fit squarely within this exception"); *see also* A.029-30, ¶¶94-95 (Plaintiff's Complaint referencing the criminal cases). Defendants noted to the District Court that their motion could also be converted into one for summary judgment if deemed necessary. *See Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 60 (1st Cir. 2000); A.60-61.

[4] Pursuant to Rule 32(f) of the Rhode Island Superior Court Rules of Criminal Procedure, suspended or deferred sentences or probation may be revoked if the State establishes by a preponderance of the evidence that the defendant breached a condition of their sentence or failed to remain on good behavior.

[5] A nolo contendere plea is the equivalent of a guilty plea in Rhode Island. *State v. Feng*, 421 A.2d 1258, 1266 (R.I. 1980); A.268.

Plaintiff specifically admitted the State could prove "with evidence and by proof beyond a reasonable doubt" that he, along with co-conspirators Ferrer, Neves, and Valley, arranged for Valley to be driven to the ACI to deliver illegal narcotics to then-inmate Neves and that, consistent with their agreement, on July 10, 2019, Valley was driven to the ACI, met with Neves during visiting hours, and provided him with a bag of fentanyl. A.274-76. When asked by the Court whether those facts that were the basis for the criminal charges were "true," Plaintiff answered "Yes." A.275. For each count, Plaintiff was concurrently sentenced to five years, with one year to serve and four years probation. A.261-62. Plaintiff was also found to be a violator in the Rule 32(f) proceeding. A.276.

B. Plaintiff's Lawsuit

Following his overdose and the subsequent investigation, Plaintiff received several disciplinary bookings in July and August 2019 related to his possession and ingestion of an illicit substance, as well as for engaging in an organized effort to traffic narcotics into the ACI. *See* A.163; A.019-23, ¶¶27-28, 53; *see also infra* p.33. Plaintiff commenced this lawsuit against Defendants in their individual and official capacities on September 20, 2019, shortly after he was disciplined. *See* ECF 1. Plaintiff filed the operative Complaint on February 12, 2021, which was after the criminal charges against him were initiated but before he entered a plea in those proceedings. *See* A.014. The operative Complaint asserted seven counts

related to Plaintiff being disciplined and criminally charged following his overdose:

- Count 1: Eighth Amendment Cruel and Unusual Punishment
- Count 2: First Amendment Retaliation
- Count 3: Fifth Amendment Retaliation
- Count 4: Intentional Infliction of Emotional Distress (State Claim)
- Count 5: Negligent Supervision (State Claim)
- Count 6: Abuse of Process (State Claim)
- Count 7: First Amendment Retaliatory Prosecution

The Complaint is chiefly premised on Plaintiff's assertion that he received the disciplinary bookings in July and August 2019 in retaliation for not cooperating in the investigation into his overdose, and that he was prosecuted in state court for trafficking narcotics in retaliation for this lawsuit. Plaintiff's Complaint alleged he "had no involvement" in bringing the narcotics on which he overdosed into the ACI, and that he heard about the drug "for the first time when he was offered it." A.019, ¶25. The Complaint also alleged Plaintiff's disciplinary confinement violated the Eighth Amendment. A.031, ¶99. Stunningly, Plaintiff opted to pursue these allegations even after having finally admitted in Superior Court that he did in fact participate in conveying fentanyl into the ACI two days before his overdose and the State could prove the criminal charges against him with proof beyond a reasonable doubt.

The Complaint seeks the following relief:

A. a preliminary and permanent injunction requiring removal of Plaintiff from disciplinary segregation and a reclassification to Medium Security;

B. a preliminary and permanent injunction prohibiting Defendants from further retaliation against Plaintiff;

C. An award of compensatory, punitive, and nominal damages;

D. An award of costs and attorneys' fees arising out of this litigation; and

E. Any other relief this Court deems appropriate.

A.034.

Prior to Defendants' Motion for Judgment on the Pleadings, the parties engaged in discovery and Defendants produced over 2,000 pages of documents. After Plaintiff pleaded to the criminal charges, Defendants filed a Motion for Judgment on the Pleadings setting forth multiple reasons why they were entitled to judgment on each count and asserting qualified immunity. A.052. Plaintiff filed an Opposition, which acknowledged that Defendants should be granted judgment on Counts 3, 4, and 5. A.310. Besides observing that qualified immunity is an affirmative defense, Plaintiff's Opposition did not address qualified immunity or substantively dispute that it bars the damages claims against Defendants in their individual capacities. A.325. Plaintiff filed a sur-reply conceding certain important arguments raised in Defendants' briefing, including that Defendants are

entitled to qualified immunity on Count 2 and that "*Will v. Michigan* forecloses damages against Defendants in their official capacities" in a § 1983 claim. A.463.

On August 22, 2022, the District Court resolved Defendants' Motion for Judgment on the Pleadings via a text order. A.469. The order granted Defendants judgment on Counts 3, 4, and 5 (which Plaintiff did not contest), but denied the motion as to the remaining counts. The District Court did not address qualified immunity and did not dismiss any damages claims related to the remaining counts despite Plaintiff's sur-reply expressly conceding that Defendants are entitled to qualified immunity on Count 2 and that "*Will v. Michigan* forecloses damages against Defendants in their official capacities" in § 1983 claims. A.463. The District Court's decision also failed to address Defendants' argument that Plaintiff lacks standing to seek the requested injunctive relief, even though Plaintiff acknowledged that his request to leave disciplinary confinement is moot. As Defendants have been granted judgment on Counts 3, 4, and 5, those counts are resolved and are not the subject of this appeal.

SUMMARY OF ARGUMENT

Defendants are entitled to qualified immunity unless Plaintiff pleaded facts showing: (1) the official violated a statutory or constitutional right, and (2) the right was "clearly established" at the time of the challenged action. *See infra* Section 1. For each of the four counts remaining in this case, Plaintiff failed to

satisfy both prongs of the qualified immunity analysis because he failed to plead facts showing that Defendants violated a statutory or constitutional right, and also failed to demonstrate that any such right was clearly established. *See infra* Section 2. *Will v. Michigan* and lack of standing are inextricably intertwined with the immunity issue and resolve all remaining claims in this case. *See infra* Section 3.

STANDARD OF REVIEW

"A motion for judgment on the pleadings bears a strong family resemblance to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and these two types of motions are treated in much the same way." *Kando v. Rhode Island State Bd. of Elections*, 880 F.3d 53, 58 (1st Cir. 2018). The Court's review "may include facts drawn from documents 'fairly incorporated' in the pleadings and 'facts susceptible to judicial notice.'" *Id.*

Given that motions for judgment on the pleadings are treated "much the same way" as motions to dismiss, the appellate standard for reviewing a motion to dismiss is instructive. Appellate courts review a decision on a motion to dismiss de novo. *Segrets, Inc., v. Gillman Knitwear Co., Inc.*, 207 F.3d 56, 61 (1st Cir. 2000). To withstand a motion to dismiss, a "complaint must allege 'a plausible entitlement to relief.'" *ACA Fin. Gaur. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). These "minimal requirements are not tantamount to nonexistent requirements.

The threshold may be low, but it is real – and it is the plaintiff's burden to take the step which brings his case safely into the next phase of the litigation." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir. 1988). A Court need not credit bald assertions or unverified conclusions in a complaint. *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). A Rule 12 motion "streamlines litigation by dispensing with needless discovery and factfinding." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989).

This Court will exercise its authority to determine whether Defendants are entitled to qualified immunity even when the District Court's decision denying qualified immunity was "unilluminating." *Camilo-Robles v. Hoyos*, 151 F.3d 1, 8 (1st Cir. 1998) (declining to subject parties to delay that would be caused by remanding on issue of qualified immunity even though Court would have to "reconstruct the probable basis for the district court's decision"). Although the District Court did not explain its rationale for denying Defendants qualified immunity, applying qualified immunity in this case is a matter of law squarely within this Court's jurisdiction and resolving it now promotes judicial economy and avoids unnecessary delay.

ARGUMENT

1) Qualified Immunity is an Immunity From Suit

The doctrine of qualified immunity precludes suits for money damages against state officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity leaves "ample room for mistaken judgments" and protects "all but the plainly incompetent or those who knowingly violate the law." *Bilida v. McCleod*, 211 F.3d 166, 174 (1st Cir. 2000) (citing *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986)).

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) the official violated a statutory or constitutional right, and (2) the right was 'clearly established' at the time of the challenged action." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citations and quotations omitted).

A government official's conduct violates "clearly established law when at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable officer would have understood that what he is doing violates the right." *Id.* at 741 (citations and quotations omitted). It is insufficient for the constitutional right to be "clearly established" at a highly abstract level; what matters is whether in the circumstances faced by the official, he or she should

reasonably have understood that their conduct violated clearly established law. *Berthiaume v. Caron*, 142 F.3d 12, 15 (1st Cir. 1998). The objective reasonableness determination is for the Court to make. *DeAbadia v. Izquierdo Mova*, 792 F.2d 1187 (1st Cir. 1986). "The question is not whether the official actually abridged the plaintiff's constitutional rights but, rather, whether the official's conduct was unreasonable, given the state of the law when he acted." *Alfano v. Lynch*, 847 F.3d 71, 75 (1st Cir. 2017).

Qualified immunity is "an immunity from suit rather than a mere defense to liability [which]… is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Id.* at 526. Qualified immunity exists not only to shield officials from liability for damages, but also to protect from "the general costs of subjecting officials to the risks of trial — distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816.

This Court has expressly "reject[ed the] contention that qualified immunity should be decided at a later stage of litigation, not on a motion to dismiss." *Eves v. LePage*, 927 F.3d 575, 583 n.5 (1st Cir. 2019). This Court determined that doing

so "would turn well-settled precedent on its head," and noted how "[t]he Supreme Court has repeatedly 'stressed the importance of resolving immunity questions at the earliest possible stage [of the] litigation.'" *Id.* (quoting *Wood v. Moss*, 572 U.S. 744, 755 n.4 (2014)). This Court likewise observed that both the First Circuit and the Supreme Court have "affirmed the dismissal of multiple First Amendment claims on the basis of qualified immunity." *Id.* (citing cases); *see also Rocket Learning, Inc. v. Rivera-Sanchez*, 715 F.3d 1, 8 (1st Cir. 2013) (affirming dismissal due to qualified immunity, which "should be resolved at the earliest possible stage of litigation"); *Penate v. Hanchett*, 944 F.3d 358, 369 (1st Cir. 2019) (reversing denial of qualified immunity on Rule 12 motion).

2) Plaintiff Failed to Satisfy Either Prong of the Qualified Immunity Analysis For Each Count

For each Count, Defendants are entitled to qualified immunity because Plaintiff failed to plead facts showing (1) Defendants violated a constitutional right, and (2) any such right was clearly established. *See al-Kidd*, 563 U.S. at 735. The Court may grant Defendants qualified immunity on either or both prongs of the analysis. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2000). For the four counts at issue here, qualified immunity is most easily resolved under the first prong because caselaw definitively forecloses Plaintiff's allegation that a constitutional right was violated. *See Pagan v. Calderon*, 448 F.3d 16, 31 (1st Cir. 2006) ("a court called upon to review a denied Rule 12(b)(6) motion premised on

qualified immunity ordinarily should consider, as a first step, whether the facts set forth in the complaint, taken in the light most congenial to the complaining party, adequately allege that the defendant violated a federally-secured right"); *Pearson*, 555 U.S. at 236 ("In some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all.").

If this Court determines that Defendants are entitled to qualified immunity because Plaintiff failed to plead the violation of a constitutional right under the first prong of the qualified immunity analysis, that necessarily means the count should be dismissed entirely. *See Morales v. Ramirez*, 906 F.2d 784, 787 (1st Cir. 1990) ("in certain cases, some aspect of the merits may be inexorably intertwined with the issue of qualified immunity"). Defendants will analyze both prongs for each count, beginning with Plaintiff's retaliation-based claims.

a) <u>Count 7: First Amendment Retaliatory Prosecution</u>

Count 7 asserts a retaliatory inducement to criminal prosecution claim, pleading that "Defendant Bibeault violated Plaintiff's right to petition the courts for redress of grievances by initiating criminal charges against Plaintiff in retaliation for advancing litigation against him." A.034, ¶123. Defendant Bibeault is an investigator at the ACI and is the only Defendant named in Count 7. A.015, 034 ¶¶10, 123. The Complaint describes two criminal matters initiated against

Plaintiff that are the apparent subject of this claim: the state criminal case against Plaintiff that was initiated on October 7, 2020, which became Superior Court case P2-2021-0683A, and "the 32(f) Violation Report filed by the Attorney General in P2/16-1525A, *State of Rhode Island v. Cintron*," on October 7, 2020. A.029-30, ¶¶ 94-95. These are the state criminal proceedings during which Plaintiff eventually entered a plea and admitted the charges against him could be proved beyond a reasonable doubt. *See supra* p.4-6.

Seemingly recognizing that his plea in the criminal proceedings forecloses a retaliatory prosecution claim (as discussed further below), Plaintiff's Opposition to the Motion for Judgment on the Pleadings asserted for the first time that Count 7 is based on retaliatory arrest, not retaliatory prosecution. That contention is soundly contradicted by the operative Complaint, which does not identify who arrested Plaintiff or how Defendant Bibeault had any involvement in any arrest. The Complaint does not even contain the word "arrest." A.335. Rather, Plaintiff's Complaint only pleaded allegations related to being *prosecuted*. *See* A.029, ¶94 ("[o]n October 7, 2020, the State of Rhode Island filed a Criminal Complaint against Mr. Cintron, Case No. 32-2020-06674, for four drug trafficking-related felonies, per allegations that Defendant Bibeault had made against him"). Plaintiff cannot fundamentally change the nature of his claim by means of his Opposition memorandum; Defendants had no notice of a retaliatory arrest claim. Plaintiff's

attempt, in the wake of his plea, to salvage Count 7 by changing the nature of it violates pleading requirements. It is also futile because even if Count 7 pleaded a retaliatory arrest claim, it would likewise fail both prongs of the qualified immunity analysis. In an abundance of caution, Defendants will demonstrate how qualified immunity applies regardless of whether the claim is for retaliatory arrest or prosecution.

i) Failure to Plead Violation

To assert a First Amendment retaliation claim, Plaintiff must show that he: (1) engaged in constitutionally protected conduct, (2) was subjected to an adverse action by the Defendant, and (3) the protected conduct was a substantial or motivating factor in the adverse action. *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 43 (1st Cir. 2012).

Significantly, the Supreme Court has held, and Plaintiff has acknowledged, that in order to allege a First Amendment violation based on retaliatory inducement to criminal prosecution, Plaintiff must, as a threshold matter, plead and show the absence of probable cause for the criminal charges. *See Hartman v. Moore*, 547 U.S. 250, 262-66 (2006); A.335. This requirement stems from "the longstanding presumption of regularity accorded to prosecutorial decisionmaking." *Hartman*, 547 U.S. at 263.

Despite lack of probable cause being an element of the claim, Plaintiff did not plead any facts suggesting a lack of probable cause for the criminal charges against him.[6] More importantly, it has now been legally established there *was* probable cause for the criminal charges against Plaintiff. *See supra* p.5-6. During the plea colloquy in the criminal case, the prosecutor recited how Plaintiff conspired with Ferrer, Neves, and Valley to have fentanyl conveyed into the ACI on or about July 10, 2019. In response, Plaintiff expressly agreed that "those facts [are] true" and admitted "the State could prove those facts at trial with evidence and by proof beyond a reasonable doubt." A.275. The Superior Court likewise concluded there was probable cause and "there's a factual basis for each of the charges and for the plea." *Supra* p.5; A.276.

To overcome qualified immunity, Plaintiff must plead facts showing the official violated a constitutional right. In the case of a First Amendment retaliatory

[6] Even putting aside *Hartman*'s lack-of-probable-cause requirement, Plaintiff did not plead sufficient facts to satisfy the second and third elements of a First Amendment retaliation claim. Plaintiff failed to plead facts regarding what role, if any, Investigator Bibeault had in connection with the prosecutor's decision to initiate criminal charges and violation proceedings against Plaintiff. *See Hartman*, 547 U.S. at 262 n.9 ("a plaintiff . . . must show that the nonprosecuting official acted in retaliation, and must also show that he induced the prosecutor to bring charges that would not have been initiated without his urging"). Similarly, Plaintiff did not plead any facts indicating any causal connection between the filing of this lawsuit against Defendant Bibeault in September 2019 and the initiation of a violation report/criminal charges against Plaintiff by a state prosecutor over a year later in October 2020. *See also infra* p.30-32 (discussing how Plaintiff must demonstrate that retaliatory act would not have occurred "but for" protected conduct and how valid reason for adverse action forecloses retaliation claim).

prosecution claim, that requires pleading lack of probable cause for the criminal charges. *See Hartman*, 547 U.S. at 262. As it has been legally established and Plaintiff has admitted there *was* probable cause, Plaintiff cannot overcome the first prong of the qualified immunity test.

Plaintiff's Opposition did not dispute that he failed to plead a retaliatory prosecution claim, but instead attempted to recharacterize Count 7 as a retaliatory arrest claim despite the Complaint failing to plead any allegations about an arrest. Even if Plaintiff had pleaded a retaliatory arrest claim, *Nieves v. Bartlett*, applies *Hartman*'s lack-of-probable-cause pleading requirement in the retaliatory arrest context and holds that "[a]bsent such a showing, a retaliatory arrest claim fails." 139 S. Ct. 1715, 1725 (2019). Plaintiff points to "a narrow qualification" discussed in *Nieves*, which provides that a plaintiff might not be required to plead lack of probable cause in a situation where "officers have probable cause to make arrests, but typically exercise their discretion not to do so." *Id.* at 1727; A.335. The Supreme Court provided an example by describing a case where someone who engaged in speech was arrested for jaywalking since "jaywalking is endemic but rarely results in arrest." *Id.* The Court created this narrow qualification to address "a risk that some police officers may exploit the arrest power as a means of suppressing speech." *Id.*

Here, Plaintiff has not pleaded any allegations or identified any evidence that police officers typically exercise their discretion to not arrest individuals for trafficking narcotics into a correctional facility or that trafficking narcotics is analogous to jaywalking. *See Nieves*, 139 S. Ct. at 1727 (holding that to implicate narrow exception to the no-probable-cause requirement, plaintiff must present objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been).

Nieves' narrow exception is also inapplicable because it pertains to a situation where a police officer could potentially exploit the power to arrest, but Defendant Bibeault is not a police officer and did not arrest Plaintiff. Plaintiff acknowledges that Defendant Bibeault did "not directly bring criminal charges" and that his role is simply to "assist other law enforcement agencies to develop criminal and civil cases." A.337, n.33. As such, *even if* Plaintiff had pleaded a retaliatory arrest claim, *Nieves'* limited exception to the lack-of-probable-cause-requirement is not germane to the circumstances of this case.

Notably, Plaintiff was not just arrested, but was also prosecuted for his conduct and admitted his guilt. Regardless of whether Plaintiff couches his claim in terms of his prosecution or arrest, this situation squarely implicates "the longstanding presumption of regularity accorded to prosecutorial decisionmaking" that led the Supreme Court to impose the lack-of-probable-cause pleading

requirement. *See Hartman*, 547 U.S. at 263; *Nieves*, 139 S. Ct. at 1723. Plaintiff's inability to satisfy this lack-of-probable-cause pleading requirement forecloses Plaintiff's retaliation claim and demonstrates that he failed to make out a claim for violation of a constitutional right under the first qualified immunity prong.

ii) Failure to Demonstrate Clearly Established Right

Assuming this is a retaliatory prosecution claim as Plaintiff pleaded, Plaintiff does not dispute that *Hartman* bars the claim. Any claim for retaliatory prosecution would require overturning *Hartman*, and a claim that requires overturning Supreme Court precedent does not allege violation of a clearly established right.

Even if Count 7 pleaded a retaliatory arrest claim and implicated *Nieves*, Plaintiff does not identify any caselaw applying *Nieves*' narrow exception to the lack-of-probable-cause pleading requirement in circumstances remotely similar to this case. Investigator Bibeault lacked clear notice that a defendant may be liable for retaliatory arrest when there is probable cause the plaintiff committed the crime, the arrest is related to a non-trivial, serious criminal offense, the defendant is not a police officer and did not make the arrest, and the plaintiff was ultimately prosecuted and admitted to the offense. Moreover, the Complaint's allegations pertain to Defendant Bibeault's investigatory actions, but the Supreme Court noted it has not been established that conducting a retaliatory investigation could

constitute a constitutional tort. *See Hartman*, 547 U.S. at 262 n.9. To state what seems obvious, Plaintiff lacks any clearly established constitutional right to not be investigated, arrested, and prosecuted for a serious crime he admits he committed.

b) Count 6: Abuse of Process

Regarding Count 6, Plaintiff pleads, "Defendant Bibeault abused the state criminal justice process by initiating criminal legal proceedings against Plaintiff in retaliation for advancing litigation against him. The initiation of criminal charges was an ulterior or wrongful use of the criminal process." A.033, ¶120. This state law claim is against Defendant Bibeault and apparently based on the same criminal charges that are the subject of Count 7.

Rhode Island recognizes a qualified immunity defense analogous to the federal doctrine of qualified immunity.[7] *Estrada v. Rhode Island*, 594 F.3d 56, 63 (1st Cir. 2010). Moreover, the Rhode Island Supreme Court has held that when an agent is protected by immunity, so is the sovereign. *See Morales v. Town of Johnston*, 895 A.2d 721, 728 (R.I. 2006) (stating that "if the agent is not liable for his conduct, the principal cannot be responsible" and holding that coaches'

[7] Because qualified immunity under Rhode Island law parallels the federal doctrine "routinely applied in § 1983 cases[,]" its denial constitutes an appealable interlocutory decision. *Hatch v. Town of Middletown*, 311 F.3d 83, 90 (1st Cir. 2002); *see Ensey v. Culhane*, 727 A.2d 687, 691 (R.I. 1999) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)) (recognizing qualified immunity as "an *immunity from suit* rather than a mere defense to liability"). This Court has applied qualified immunity to a state law claim on an interlocutory appeal. *See Newman v. Commonwealth of Massachusetts*, 884 F.2d 19, 24 (1st Cir. 1989).

immunity meant school district also could not be sued) (citing *Calhoun v. City of Providence*, 390 A.2d 350, 356 (R.I. 1978)); *Psilopoulos v. State*, 636 A.2d 727, 728 (R.I. 1994) (determining agents and sovereign entity that employed them both entitled to immunity). As such, the application of qualified immunity to Defendant Bibeault also bars a claim against the State, i.e., the Defendant in his official capacity.

i) Failure to Plead a Violation

The tort of abuse of process is "not favored in the law." *Hillside Associates v. Stravato*, 642 A.2d 664 (R.I. 1994) (quoting 8 Stuart M. Speiser et al., The American Law of Torts § 28:3 at 10). Two elements are required under Rhode Island law to demonstrate abuse of process: "(1) the defendant instituted proceedings or process against the plaintiff and (2) the defendant used these proceedings for an ulterior or wrongful purpose that the proceedings were not designed to accomplish." *Vigeant v. United States*, 462 F.Supp. 2d 221, 231 (D.R.I. 2006), aff'd, 245 F. App'x 23 (1st Cir. 2007). Regarding the second element, the Rhode Island Supreme Court has explained that the requisite improper purpose is extortionary, "tak[ing] the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club."

Butera v. Boucher, 798 A.2d 340, 353 (R.I. 2002) (quoting W. Page Keeton, Prosser & Keeton on the Law of Torts § 121 at 898 (5th ed. 1984)).

Regarding the first element, Plaintiff has not pleaded any facts demonstrating that Defendant Bibeault initiated the criminal charges brought by the state prosecutor. Plaintiff's Opposition acknowledged that even if Defendant Bibeault "set in motion" the criminal prosecution by reporting the conduct to the police with "sufficient grounds," that would be insufficient to establish abuse of process. *See* A.329 (citing *Hoffman v. Metcalf*, 851 A.2d 1083, 1090 (R.I. 2004)). Here, Plaintiff cannot argue lack of sufficient grounds for the criminal charges because Plaintiff has admitted the charges could be proved against him "with evidence and by proof beyond a reasonable doubt." *Supra* p.5-6.

Plaintiff also does not plead any facts satisfying the second element of the claim, namely that the criminal proceedings were used "for an ulterior or wrongful purpose *that the proceedings were not designed to accomplish*." *Vigeant*, 462 F. Supp. 2d at 231 (emphasis added). Applying this second element in *Vigeant v. United States*, the District Court observed that "[u]nder Rhode Island law, [t]he gist of an abuse-of-process claim is the misuse of legal process *to obtain an advantage, 'not properly involved in the proceeding itself*....' [However], *even a pure spite motive is not sufficient where process is used only to accomplish the result for which it was created*." *Id.* (emphasis added). There, the District Court

concluded that the agent-defendant's "alleged remarks show, if anything, only a colorable malevolence toward Vigeant and not, as required, the *perversion* of process to obtain some collateral advantage." *Id.*; *see also Bolduc v. United States*, No. CIV.A.01-CV-11376PBS, 2002 WL 1760882, at *4 (D. Mass. July 30, 2002) (cited approvingly in *Vigeant*) ("there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions").

The United States Supreme Court has likewise recognized that "extortionate perversion" is a necessary element of an abuse of process claim and that "[c]ognizable injury for abuse of process is limited to the harm caused by the misuse of process, and does not include harm (such as conviction and confinement) resulting from that process's being carried through to its lawful conclusion." *Heck v. Humphrey*, 512 U.S. 477, 486 n.5 (1994).

Plaintiff alleges the process against him was initiated "in retaliation" and that consequently it was "an ulterior or wrongful use of the criminal process." A.033, ¶120. As recognized in *Heck* and *Vigeant*, it is insufficient to allege that process was abused simply because it was brought with spiteful or retaliatory intentions. Plaintiff was required to also plead facts showing that the process was utilized in order to coerce some other, collateral result, but he failed to do so. Under the first qualified immunity prong, Plaintiff's Complaint fails to assert a

violation of state law because abuse of process does not apply where, as here, the criminal process was simply carried through to its lawful end.

ii) Failure to Demonstrate Clearly Established Right

Even assuming arguendo that Defendant Bibeault initiated the criminal process against Plaintiff and did so out of a retaliatory motive as Plaintiff alleges, multiple cases hold that does not constitute abuse of process. *See e.g.*, *Vigeant*, 462 F. Supp. 2d at 231; *Bolduc,* 2002 WL 1760882, at *4; *see also Heck*, 512 U.S. at 486 n.5. Given this precedent, Defendant Bibeault lacked clear notice that an official could face liability for an abuse of process claim for conducting an investigation that leads to someone being prosecuted for an offense they admit they committed and for which there was probable cause, and where there is no allegation the process was used to extort some collateral gain. As with Count 7, Plaintiff lacks any clearly established right to not be prosecuted for a serious crime he admits he committed.

c) Count 2: First Amendment Retaliation

Count 2 asserts that Defendants Bibeault, Cabral, and Diniz initiated or condoned disciplinary proceedings against Plaintiff for possessing and trafficking narcotics in retaliation for exercising constitutionally-protected conduct, namely refusing to "snitch" and provide information to investigators regarding his overdose and the presence of fentanyl in the prison. A.031-32, ¶¶103. Plaintiff

clarified that the alleged adverse action is the issuance of a disciplinary booking, not any disciplinary conviction or sanction. A.041.

i) Failure to Plead Violation

To assert a First Amendment retaliation claim, Plaintiff must show that he: (1) engaged in constitutionally protected conduct, (2) was subjected to an adverse action by the Defendant, and (3) the protected conduct was a substantial or motivating factor in the adverse action. *Esposito*, 675 F.3d at 43.

Plaintiff cannot satisfy the first element because the "protected" conduct he identifies as the basis for his claim — refusing to cooperate with a prison investigation and "act as a snitch for correctional officers," A.319 — is not a First Amendment right. *See Landor v. Lamartiniere*, 515 F. Appx. 257, 259 (5th Cir. 2013) (no protected interest in refusing to be an informant); *United States v. Paguio*, 114 F.3d 928, 930 (9th Cir. 1997) ("There is no constitutional right not to 'snitch.'"); *Martin v. Neal*, No. 3:21-CV-860 DRL-MGG, 2022 WL 581013, at *2 (N.D. Ind. Feb. 24, 2022) (recognizing that "the weight of authority supports holding that an inmate's refusal to cooperate with a prison investigation is not protected speech" under the First Amendment in case where inmate alleged he was retaliated against for refusing to provide information about an incident in the yard); *Ortiz-Medina v. Bradley*, No. 1:19-CV-2133, 2020 WL 362697, at *5 (M.D. Pa. Jan. 22, 2020) ("refusal to act as an information [sic] or provide information

regarding fellow inmates is not constitutionally protected activity"); *Anderson v. Dohman*, No. 18-cv-3508, 2018 WL 4186396, at *5 (E.D. Pa. Aug. 30, 2018) (refusal to provide names of allegedly "dirty" officers was not protected activity); *Woolfolk v. Meier*, No. 2:17-cv-3513, 2018 WL 1773397, at *4 (E.D. Pa. Apr. 12, 2018) (dismissing prisoner's retaliation claim because prisoner's refusal to provide information about which prisoners possessed contraband was not protected activity); *Garcia v. Covello*, No. ED CV 10-01127-JVS, 2015 WL 160673, at *9 (C.D. Cal. Jan. 12, 2015) ("Failure to cooperate with an investigation is not conduct protected by the First Amendment."); *Ayala v. Harden*, No. 1:12-cv-281-AWI-DLB PC, 2012 WL 4981269, at *2 (E.D. Cal. Oct. 17, 2012) ("Refusal to become an informant is not a protected First Amendment activity."); *Stewart v. Ryan*, No. CV10-1110-PHX-MHMECV, 2010 WL 2489808, at *6 (D. Ariz. June 16, 2010) ("a failure to cooperate with prison officials is not protected conduct"); *Hermosillo v. Santa Clara Cty.*, No. C 08-915 JF (PR), 2008 WL 2156994, at *2 (N.D. Cal. May 21, 2008) (refusal to cooperate with officials as an informant is not protected activity); *Canosa v. State of Hawaii*, No. 05–00791, 2007 WL 128849, at *2, 6, 10 (Jan. 11, 2007) report and recommendation adopted by 2007 WL 473679 (D. Haw. Feb. 8, 2007) ("[t]he act of refusing to provide information about fellow inmates is not 'protected conduct' under the First Amendment"); *Bradley v. Rupert*, No. 5:05CV74, 2007 WL 2815733, at *6 (E.D. Tex. Sept. 25, 2007)

(concluding plaintiff "failed to set out a valid retaliation claim" where he alleged that a criminal justice official retaliated against him for not providing information regarding the theft of another inmate's radio because "his right to do so is not protected by the Constitution of the United States").

For the novel proposition that inmates have a First Amendment right to not cooperate with a prison investigation, Plaintiff relies on a Second Circuit decision where the Court applied the First Amendment to a case "where the guards sought to have [inmate] Burns affirmatively report information about the wrongdoing of others, on potentially an ongoing basis, contrary to his wishes and at great physical peril." *Burns v. Martuscello*, 890 F.3d 77, 89 (2d Cir. 2018)). The Second Circuit expressly noted, "there is no indication that Burns himself was engaged in wrongful conduct. Burns was given a choice between snitching or incurring an otherwise undeserved punishment. The distinction is of appreciable significance. It means that the government may withdraw a benefit—by, for example, refusing to lessen charges where the would-be informant declines to offer information—but may not impose punishments at random." *Id.* at 93.

That makes *Burns* obviously distinguishable from this case where Plaintiff was being questioned about wrongful conduct in which he participated and about a particular event that involved the presence of fentanyl in the prison, which posed an obvious emergency. Plaintiff's Opposition acknowledged that *Burns* "did not

decide whether prisoners have a right 'to refuse to give truthful information about a past event, or in an emergency.'" A.320 (quoting *Burns*, 890 F.3d at 89). Nonetheless, Plaintiff invited the Court to "adopt and extend" the Second Circuit's analysis in *Burns* and create a new First Amendment right that would go beyond *Burns* and contradict the voluminous body of federal precedent cited above. *Id.* There is no precedent supporting the creation of this new constitutional right Plaintiff seeks. As Plaintiff was not engaged in constitutionally protected conduct, he fails to allege a First Amendment retaliation claim.

Plaintiff also fails to plead facts satisfying the second and third elements of a retaliation claim. Regarding the second element, this claim is based on the alleged adverse action of issuing disciplinary bookings, but Plaintiff did not plead that Defendants Cabral or Diniz issued Plaintiff any bookings.

Regarding the third element, "[D]efendants may avoid liability by showing that they would have taken the same action even in the absence of the prisoner's protected conduct." *Moore v. Begones*, No. CIV.A. 09-543 S, 2010 WL 27482, at *5 (D.R.I. Jan. 4, 2010) (adopting report and recommendation) (citing *McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir.1979) for the proposition that plaintiff must demonstrate that retaliatory act would not have occurred "but for" protected conduct). "[E]ven if the defendant had an impermissible reason for the alleged adverse action, if a separate, permissible reason exists, the defendant will not be

liable." *Id.* at *5-6 (dismissing complaint where pleadings alleged facts showing correctional officer had permissible reason for imposing restrictive housing). Similarly, the Rhode Island Federal District Court has repeatedly rejected claims alleging false bookings when there is a permissible reason for imposing discipline. *See Benbow v. Weeden*, No. CA 13-334 ML, 2013 WL 4008698, at *6 (D.R.I. Aug. 5, 2013); *see also Petaway v. Duarte*, No. CA 11-497-ML, 2012 WL 1883506, at *3 (D.R.I. May 22, 2012).

Other federal precedent is in accord. *See Carter v. McGrady*, 292 F.3d 152, 158 (3d Cir. 2002) (holding that *even if* prison officials were motivated by animus based on protected conduct, discipline fell within the "broad discretion" that must be afforded prison officials because it was clear inmate had committed the offenses for which he was disciplined); *Henderson v. Baird*, 29 F.3d 464, 469 (8th Cir. 1994) (ruling that inmate's retaliation claim failed because disciplinary committee found that inmate violated prison rules and the finding was based on some evidence of the violation, which "essentially checkmates his retaliation claim").

Here, Plaintiff admitted in his Complaint that he ingested narcotics, and before the Rhode Island Superior Court admitted there was sufficient evidence to prove he participated in conveying narcotics into the ACI. *Supra* p.5-6. Plaintiff also represents that he "does not challenge in this proceeding the validity of the guilty verdict" on the bookings Plaintiff Bibeault issued him. A.040-41. As there

was clearly a permissible reason for the bookings Plaintiff received, Plaintiff failed to plead the third element of a retaliation claim.

ii) Failure to Demonstrate Clearly Established Right

Even if this Court were to entertain Plaintiff's invitation to create a new constitutional right by expanding *Burns*, Plaintiff's claim would be based on new law that is contrary to a large body of existing federal court precedent. Significantly, the *Burns* Court determined that despite the plaintiff having stated a claim in the particular circumstances of that case, the defendants were still entitled to qualified immunity because neither the Supreme Court nor any circuit court had recognized a constitutional right to not be an informant. *Burns*, 890 F.3d at 94.[8]

Notably, Plaintiff's sur-reply expressly acknowledges that Defendants are entitled to qualified immunity on Count 2, and that Plaintiff cannot obtain damages against Defendants on this Count in either their individual or official capacities: "Since Plaintiff is requesting this Court 'adopt and extend' a Second Circuit holding to the First Circuit, qualified immunity would bar damages on Count 2 against Defendants in their individual capacities and *Will v. Michigan* forecloses damages against Defendants in their official capacities. 491 U.S. 58 (1989)." A.463. Notwithstanding Plaintiff's concession that all damages claims in

[8] Defendants are additionally entitled to qualified immunity because precedent holds that officials cannot be liable when they had a permissible reason to impose discipline and Defendants lacked notice of any departure from that precedent. *See supra* p.30-31.

connection with Count 2 should be dismissed, the District Court failed to do so.

d) Count 1: Eighth Amendment Cruel and Unusual Punishment

Plaintiff's Eighth Amendment claim pleads in conclusory terms that "[a]ll Defendants violated Cintron's right to be free from cruel and unusual punishment by deliberately and recklessly placing him at substantial risk of serious harm." ECF 38 ¶99. The claim seemingly stems from the time Plaintiff spent in disciplinary confinement in connection with his ingestion and trafficking of fentanyl in July 2019 as discussed above. The four disciplinary convictions identified in the Complaint and the corresponding disciplinary confinement sentences are as follows: convictions in July 2019 for being under the influence of an unauthorized drug (25 days) and possessing homemade or purchased narcotics (30 days), and after further investigations, convictions in August 2019 for trafficking narcotics (365 days) and circumventing telephone security procedures (30 days). A.019-23, ¶¶27, 30, 52-53. Plaintiff asserted these disciplines were tied to the same incident involving his overdose. A.023, ¶54. Plaintiff clarified that his Eighth Amendment claim "does not implicate the validity of any underlying conviction, sanction or justification for his restrictive housing," and he "did not and does not challenge in this proceeding the validity of the guilty verdict or sanction resulting from the booking[.]" A.040-41.

i) Failure to Plead Violation

The Eighth Amendment is only violated when an inmate is subjected to sufficiently serious deprivations that deny the minimal civilized measure of life's necessities and when the official acted with deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Here, Plaintiff failed to plead facts showing that the alleged deprivations were sufficiently serious, and also failed to plead facts demonstrating that the particular Defendants exhibited deliberate indifference or personally engaged in conduct that implicates the Eighth Amendment.

(1) Alleged deprivations do not deny life's necessities

Neither the length nor the conditions of Plaintiff's disciplinary confinement violate the Eighth Amendment. The Eighth Amendment is implicated "if, in the circumstances, [the punishment] is extremely disproportionate, arbitrary or unnecessary." *O'Brien v. Moriarty*, 489 F.2d 941, 944 (1st Cir. 1974). Disciplinary confinement "may be a necessary tool of prison discipline, both to punish infractions and to control and perhaps protect inmates whose presence within the general population would create unmanageable risks." *Id.* Trafficking narcotics in prison is an extremely serious offense that poses a grave danger to prison security and risks inmate lives. *See Wheelock v. State of Rhode Island*, CA No. CIV.A.00-144-T, 2002 WL 982381, at *3 (D.R.I. April 8, 2002) ("The unauthorized use of narcotics in a prison by inmates poses a serious threat to prison

officials' ability to maintain institutional safety."); *Williams v. Wall*, No. 06-12S, 2006 WL 2854296, at *2 (D.R.I. Oct. 4, 2006) ("The governmental interest in maintaining prison order is particularly strong and the U.S. Supreme Court has noted the threat to institutional security posed by inmate drug use."). It is also an offense that especially calls for the inmate's separation from the general population, not only as punishment, but also to protect other inmates and to halt the trafficking.

Approximately four years before the events at issue in this lawsuit, the Rhode Island District Court adopted a report and recommendation holding that an inmate had failed to plead an Eighth Amendment claim based on being placed in disciplinary confinement for 365 days as a sanction for narcotics trafficking. *Harris v. Perry*, C.A. No. 15-222ML, 2015 WL 4879042, at *6 (D.R.I. July 15, 2015). The decision noted that "[d]isciplinary segregation, even for periods as long as twenty six months, does not constitute cruel and unusual punishment." *Id.*; *see also Rahman X v. Morgan*, 300 F.3d 970, 974 (8th Cir. 2002) (determining that 26 months in segregation did not violate Eighth Amendment).

Here, Plaintiff received a sentence of 365 days in disciplinary confinement for narcotics trafficking, A.023, ¶52, the exact same sentence the Rhode Island District Court held in *Harris* did not state a claim for violation of the Eighth Amendment. Plaintiff was also disciplined for three other narcotics-related

offenses, but each of those offenses carried 30 days or less of disciplinary time. A.019-23, ¶¶27, 30, 53. Even cumulatively, Plaintiff's disciplinary sentences in July and August 2019 were much less than the 26 months that the District Court noted did not violate the Eighth Amendment. As such, the length of Plaintiff's disciplinary confinement was consistent with federal court precedent, including the precedent of the local federal court. The seriousness of trafficking fentanyl into prison cannot be overstated. The Rhode Island Superior Court found the offense sufficiently serious to sentence Plaintiff to five years' imprisonment. A.276. In these circumstances, where Plaintiff has admitted committing an extremely serious crime that risked his life and the lives of other inmates, an extended sentence in disciplinary confinement cannot be said to be "extremely disproportionate, arbitrary or unnecessary." *O'Brien*, 489 F.2d at 944.

Likewise, the particular conditions with which Plaintiff takes issue were not sufficiently serious to constitute cruel and unusual punishment. "The Constitution does not mandate comfortable prisons." *Rhodes v. Chapman*, 452 U. S. 337, 349 (1981). "[E]xtreme deprivations are required to make out a conditions-of-confinement claim . . . [b]ecause routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society.'" *Hudson v. McMillian*, 503 U.S. 1, 9, (1992) (quoting *Rhodes*, 452 U. S. at 347). "Only deprivations which deny 'the minimal civilized measure of life's necessities' are sufficiently

grave to form the basis of an Eighth Amendment violation." *Hunnewell v. Warden, Maine State Prison*, 19 F.3d 7 (1st Cir. 1994) (unpublished) (quoting *Rhodes*, 452 U.S. at 347).

Plaintiff alleges he was deprived of a mirror, newspapers, radio, a desk, a television, and an MP3 player. *See* A.024, ¶¶62-63. These items are "not necessary for a civilized life." *Rahman X*, 300 F.3d at 974 (holding no Eighth Amendment violation because the deprivations "are not necessary for a civilized life" in case where plaintiff alleged "numerous hardships," including lack of access to television and commissary, being prohibited from possessing certain items like ballpoint pens and batteries, and being deprived of outdoor yard privileges for several months); *see also Hunnewell*, 19 F.3d 7 ("Plaintiff's complaints about the lighting, ventilation, and placement of his mirror do not allege deprivations sufficiently extreme to establish a cognizable Eighth Amendment claim.").

Moreover, whereas the plaintiff in *Rahman X* was not permitted to go outdoors but was permitted to go to a day room to exercise three times a week, Plaintiff pleads he was permitted outdoors and had at least "45-60 minutes of out-of-cell time each day on Mondays through Fridays." A.024, ¶62; *see Hunnewell*, 19 F.3d 7 (inmate's allegation that he was locked up in a closed cell and isolated 23 hours a day did not allege deprivation sufficiently extreme to establish a cognizable Eighth Amendment claim); *O'Brien*, 489 F.2d at 944 (segregated

confinement for twenty-three hours a day did not constitute cruel and unusual punishment); *see also Jackson v. Meachum*, 699 F.2d 578, 583 (1st Cir. 1983) ("review of federal appellate decisions during the past decade which have focused on the factor of segregated confinement and lack of inmate contact reveals to us a widely shared disinclination to declare even very lengthy periods of segregated confinement beyond the pale of minimally civilized conduct on the part of prison authorities").

Plaintiff complains about a lack of programming in disciplinary confinement, but "the courts have not recognized a constitutional right to rehabilitation for prisoners." *Lovell v. Brennan*, 566 F. Supp. 672, 689 (D. Me. 1983), aff'd, 728 F.2d 560 (1st Cir. 1984); *see also Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976) (regarding "prisoner classification and eligibility for rehabilitative programs . . . Congress has given federal prison officials full discretion to control these conditions of confinement, . . . and petitioner has no legitimate statutory or constitutional entitlement sufficient to invoke due process"). Having limitations on the availability of programming "do[es] not inflict pain, much less unnecessary and wanton pain; deprivations of this kind simply are not punishments." *Rhodes*, 452 U.S. at 348. One federal court has explained that "[w]hile there can be little doubt of the desirability of maintaining a meaningful schedule of programmed activity for inmates, the courts have never found that a failure to provide rehabilitative

programs to be objectionable on constitutional grounds." *Jaben v. Moore*, 788 F. Supp. 500, 505 (D. Kan. 1992); *see also Jackson*, 699 F.2d at 583 (declining to find a constitutional right to preventive therapy where psychological deterioration threatens). Plaintiff also acknowledges he had access to a social worker during his disciplinary confinement. A.028, ¶85. Here, the alleged deprivations are comparable or less than the deprivations in other cases where this Court and other federal courts have determined the Eighth Amendment was not violated.

(2) Plaintiff failed to plead that each Defendant engaged in conduct that implicates the Eighth Amendment or acted with deliberate indifference

"It is axiomatic that the liability of persons sued in their individual capacities under section 1983 must be gauged in terms of their own actions." *Leavitt v. Correctional Medical Services, Inc.*, 645 F.3d 484, 502 (1st Cir. 2011). Likewise, as an individual defense, "it is well-settled that qualified immunity must be assessed in the context of each individual[ ] [officer's] specific conduct." *Taylor v. Davidson County Sheriff's Dep't*, 832 F. App'x 956, 959 (6th Cir. 2020). "The doctrine of qualified immunity requires an individualized analysis as to each officer . . . because a person may be held personally liable for a constitutional violation only if his [or her] own conduct violated a clearly established constitutional right[.]" *Manning v. Cotton*, 862 F.3d 663, 668 (8th Cir. 2017) (internal quotation marks and citations omitted); *see also Camilo-Robles*, 151 F.3d

at 14-15 (performing separate qualified immunity analyses for multiple appellants); *Taylor*, 832 F. App'x at 959 (citation omitted) ("This individualized analysis is particularly important when the merits of the underlying constitutional claim depend on the subjective intent of each officer.").

Similarly, deliberate indifference is an essential component of an Eighth Amendment claim and requires a significant showing of a subjective intent to cause harm that is particular to each named Defendant. *See Giroux v. Somerset County*, 178 F.3d 28, 32 (1st Cir. 1999) ("the official involved must have had 'a sufficiently culpable state of mind,' described as 'deliberate indifference' to inmate health or safety" (citing *Farmer*, 511 U.S. at 839-40)). "[O]nly the unnecessary and wanton infliction of pain implicates the Eighth Amendment." *Farmer*, 511 U.S. at 834 (internal citations omitted). In order to state a claim and implicate the Eighth Amendment, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837. "[T]his standard, requiring an actual, subjective appreciation of risk, has been likened to the standard for determining criminal recklessness." *Burrell v. Hampshire Cty.*, 307 F.3d 1, 8 (1st Cir. 2002).

As a threshold matter, Plaintiff failed to plead conduct by each particular Defendant that implicates the Eighth Amendment. Plaintiff did not allege that any of the Defendants adjudicated his disciplinary bookings or determined his

disciplinary sentences. Neither did he allege that any Defendants were personally aware of or responsible for any of the particular conditions about which he complains, such as not being given a desk or an MP3 player. Rather, the allegations against Defendants all stem from them either participating in the investigation that led to the bookings, not suspending Plaintiff's disciplinary time early, or simply being a supervisor. Plaintiff also fails to allege facts showing that any Defendant acted with deliberate indifference or that his stay in disciplinary confinement was the result of anything other than a good faith judgment call by prison administrators based on Plaintiff's conduct, the need to safeguard institutional security, and federal court precedent. The insufficiency of the allegations against each Defendant will be discussed in turn.

Plaintiff's allegations against Defendants Bibeault and Cabral solely relate to the investigation into Plaintiff's possession and trafficking of narcotics and Defendant Bibeault's issuance of disciplinary bookings to Plaintiff related to those offenses. Plaintiff does not allege these Defendants adjudicated him guilty of any disciplinary offenses, imposed any punishment upon him, controlled the length of his disciplinary sentence, or implemented the conditions in disciplinary confinement. Additionally, Plaintiff has admitted to ingesting and trafficking narcotics and "did not and does not challenge in this proceeding the validity of the guilty verdict or sanction resulting from the booking[s]" he received from

Defendant Bibeault. *See supra* p.5-6, 33. Plaintiff does not plead that Investigator Cabral even issued a booking to Plaintiff. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676, (2009) ("Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution.") (emphasis added). Plaintiff has not pleaded facts that could be the basis for an Eighth Amendment claim against Defendants Bibeault or Cabral.

Plaintiff pleads in conclusory terms that Director Coyne-Fague "authorized or condoned" "the denial of adequate mental health care, and [Plaintiff's] placement in a correctional setting that was, and continues to be, harmful to his health." A.017, ¶14. Plaintiff's allegations are meaningless because he does not plead any *facts* to support those highly generalized accusations. *See Iqbal*, 556 U.S. at 678 (pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of 'further factual enhancement"); *id.* at 680-81 (discounting allegations baldly alleging that "petitioners knew of, condoned, and willfully and maliciously agreed to subject [him] to harsh conditions of confinement as matter of policy" and that Ashcroft was the "principal architect" of this policy) (internal citations omitted).

The Complaint is devoid of factual allegations that Coyne-Fague was involved in or aware of the issues alleged in the Complaint or exhibited deliberate indifference regarding Plaintiff. Nor does Plaintiff plead that the Director oversaw any particular policy or custom that caused the alleged violation. Liability cannot rest on Coyne-Fague's position of authority alone. *See Justiniano v. Walker*, 986 F.3d 11, 20 (1st Cir. 2021) ("a supervisor's liability must be premised on his [or her] own acts or omissions and does not attach automatically even if a subordinate is found liable"); *Penate*, 944 F.3d at 367 (rejecting argument for relaxed pleading standard and reversing denial of motion to dismiss where plaintiff failed to plead facts establishing "that his or her constitutional injury resulted from the direct acts or omissions of the official, or from indirect conduct that amounts to condonation or tacit authorization").[9]

Regarding now-retired Assistant Director Kettle, Plaintiff similarly pleads in cookie-cutter fashion that Kettle "authorized or condoned" "the denial of adequate mental health care, and [Plaintiff's] placement in a correctional setting that was, and continues to be, harmful to his health." A.016-17, ¶13. These unadorned, conclusory allegations are insufficient for the same reasons discussed above with regard to Coyne-Fague. Plaintiff also pleads that Kettle approved his classification

[9] Plaintiff's failure to plead an Eighth Amendment violation against the Director under the first qualified immunity prong is inextricably intertwined with his failure to plead any violation by Interim Director Salisbury, who was substituted for the Director in his official capacity only.

downgrade from medium security, A.022, ¶¶45-46, but none of Plaintiff's claims allege that his classification status was unconstitutional or that his downgrade was improper in the wake of Plaintiff's disciplinary convictions for multiple narcotics-related offenses. *See Letourneau v. Wall*, No. CA 12-848-M, 2013 WL 2181294, at *4 (D.R.I. May 20, 2013) (under Rhode Island law, "an inmate has no statutory liberty interest in his . . . classification").

Plaintiff also pleads that Kettle denied Plaintiff's appeals of his disciplines, *see* A.028, ¶83, but does not plead why doing so was unconstitutional, especially given Plaintiff's profession that he is not challenging the disciplinary convictions. Regardless, Plaintiff's own pleading showcases the careful and thoughtful approach Kettle takes when reviewing disciplines:

> "I review the appeal, I look at every case, I listen to it… Anyone doing long-term disciplinary confinement has the ability to write to the Warden and have their time suspended. I will look at it, I review it, and I talk to the staff members, how are they doing, I will suspend some of their time. … If Mental Health writes me and says that being housed in disciplinary confinement has been detrimental to that inmate's health, automatically we're releasing them and moving them out because something is going on."

A.027, ¶80. Rather than evincing deliberate indifference, Kettle's statements show that inmates' disciplinary confinements are periodically, thoughtfully reviewed and that inmates can have their disciplinary confinement suspended when appropriate.

Regarding Deputy Warden Diniz, Plaintiff pleads that he asked Diniz to suspend his discipline in November 2019 and the request was denied. A.028, ¶84.

Plaintiff does not plead facts demonstrating that he had a constitutional right to have his discipline suspended just several months after he conveyed fentanyl into the ACI, or that Diniz was aware that Plaintiff was allegedly experiencing any harm related to the conditions of his confinement or acted with deliberate indifference.

Regarding retired Warden Aceto, Plaintiff pleads he wrote letters to Aceto "telling him about his mental health breakdowns and appealing for his remaining time in segregation to be suspended" and that Aceto refused. A.028, ¶86. However, Plaintiff acknowledges that during that same time period, he experienced difficult personal events unrelated to his confinement, including the death of his grandfather and the suicide of his young niece. *See* A.025-26, ¶71. As such, even assuming Aceto was aware that Plaintiff claimed to be experiencing mental health problems, that does not sufficiently plead that Aceto was subjectively aware that Plaintiff's conditions of confinement were the cause. *See Scarver v. Litscher*, 434 F.3d 972, 975 (7th Cir. 2006) (finding no Eighth Amendment violation where prison officials knew inmate was in distress but there was no evidence they attributed it to prison conditions). Plaintiff also acknowledges he had access to a social worker while in disciplinary confinement. A.028, ¶¶85, 88.

Plaintiff believes Aceto should have suspended his disciplinary time early, but admits that after initially being placed in disciplinary confinement for the

offenses that are the subject of this lawsuit, he continued to commit additional infractions and accumulate additional bookings. A.026, ¶74. Plaintiff acknowledges that even while in the more restrictive setting of disciplinary confinement, he still managed to obtain and abuse substances, although at least then he was abusing medication as opposed to consuming fentanyl as he had when he was in the general population. A.026, ¶74.

Courts have repeatedly recognized the difficulty, expertise, and judgment calls that go into day-to-day decisions regarding managing prisons. *See, e.g., Sandin v. Conner*, 515 U.S. 472, 482 (1995) (describing "the view expressed in several of our cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment"); *Scarver*, 434 F.3d at 976 ("Federal judges must always be circumspect in imposing their ideas about civilized and effective prison administration on state prison officials."). Plaintiff does not plead facts showing that the decision to not suspend his disciplinary time was anything more than one of those judgment calls made in good faith in light of Plaintiff's repeated refusals to follow prison rules, especially when Plaintiff's conduct jeopardized institutional security and inmate lives, including his own. *See Wilkinson v. Austin*, 545 U.S. 209, 227 (2005) (noting that prisons have an obligation "to ensure the safety of guards and prison personnel, the public, and the prisoners themselves"); *Wood v. Clemons*, 89 F.3d 922, 928 (1st

Cir. 1996) (observing how in "the volatile context of a prison, the need to preserve internal security is very strong" and that "a generous amount of deference is given to prison officials on matters of prison safety, security, and discipline").

Given Plaintiff's troubling pattern of conduct, Plaintiff fails to allege that his disciplinary confinement was "unnecessary" and "wanton" and the product of deliberate indifference. Even accepting Plaintiff's factual allegations as true, he has not demonstrated that Aceto had a constitutional obligation to release him from disciplinary confinement early upon Plaintiff asking him to do so or that simply not doing so constituted deliberate indifference.

Regarding Warden Corry, Plaintiff pleads that he wrote asking for the remainder of his disciplinary time to be suspended and she responded:

> "I understand that you are going through things at this time however the way to suspend your discipline time is as easy as stop being disciplined. This is a difficult time for all, and sacrifices must be made for the greater health of all around us. Occupy your time by writing letters, journal things and share with Social Worker Ferro are a few suggestions to occupy your time. Your actions and behavior are what is holding you back from a discipline time suspension."

A.028, ¶88. Far from alleging unconstitutional behavior, Plaintiff's pleading demonstrates that Corry empathetically and thoughtfully considered and responded to Plaintiff's request to suspend his disciplinary time. Her response shows that the chief reason Corry declined to suspend Plaintiff's time was because Plaintiff was continuing to break prison rules. Corry noted that Plaintiff's own "actions and

behavior" were what was holding him back from having his disciplinary time suspended and provided suggestions for how Plaintiff could progress, including by working with his social worker. In these circumstances, and for the same reasons discussed above regarding Warden Aceto, Plaintiff has not alleged facts showing a constitutional violation by Corry, never mind deliberate indifference.

Plaintiff's attempt to sue prison staff for holding him accountable for his conduct and trying to prevent him from repeating it is an affront to Defendants' duty to maintain prison order, discipline inmates for serious offenses they commit, and combat narcotics consumption and trafficking that risks inmates' lives.

ii) Failure to Demonstrate Clearly Established Right

Many of the considerations discussed above regarding Plaintiff's failure to plead sufficiently serious deprivations or deliberate indifference also demonstrate why Plaintiff failed to plead the violation of a clearly established constitutional right. *See Camilo-Robles*, 151 F.3d at 7 ("discerning whether a particular appellant's behavior passes the context-specific test of objective legal reasonableness to some extent collapses the separate 'qualified immunity' and 'merits' inquiries into a single analytic unit"). Defendants incorporate those arguments and will not repeat them here.

Plaintiff has not identified any caselaw that would have established beyond question that a prison official was required to suspend an inmate's disciplinary

sentence in circumstances where that inmate committed multiple, serious disciplinary offenses, and after being placed in restrictive housing continued to commit disciplinary offenses and consume illicit substances. Indeed, *Harris* — which was decided by the Rhode Island District Court just four years prior to the conduct alleged in this case and was approvingly quoted by multiple Rhode Island District Court decisions issued roughly a year before the conduct alleged in this case — found that a 365-day disciplinary sentence for trafficking narcotics that was identical to the one Plaintiff received did not violate the Eighth Amendment. *See Harris*, 2015 WL 4879042, at *6; *Paye v. Wall*, No. CV 17-193 WES, 2018 WL 4639119, at *3 (D.R.I. Sept. 27, 2018) ("[d]isciplinary segregation, even for periods as long as twenty six months, does not constitute cruel and unusual punishment" (quoting *Harris*, 2015 WL 4879042, at *6)); *Rodriguez v. Cabral*, No. CV 16-203 WES, 2018 WL 1449515, at *2 (D.R.I. Mar. 23, 2018) (quoting *Harris* and dismissing Eighth Amendment claim based on approximately fifteen months of time spent in punitive and administrative solitary confinement that plaintiff alleged worsened his mental health). Defendants were entitled to rely upon the Rhode Island District Court's precedent at the time these allegations arose.

In light of this precedent, there is absolutely ***no*** support for the proposition that Plaintiff's disciplinary sentence violated a clearly established constitutional

right such that every official would know that it violated the constitution and would be required to suspend Plaintiff's disciplinary time. *See Eves*, 927 F.3d at 584 (defendant entitled to qualified immunity where law on which plaintiff relied was not "placed beyond doubt" in plaintiff's favor and there was no "controlling authority" or even a "consensus of cases of persuasive authority"); *Justiniano*, 986 F.3d at 26 ("a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it, i.e., existing precedent must have placed the statutory or constitutional question' confronted by the official beyond debate") (internal citations and quotations omitted); *Parker v. Gerrish*, 547 F.3d 1, 12 (1st Cir. 2008) (even if a constitutional right has been clearly established, a defendant may nonetheless be protected by qualified immunity if a reasonable official in the defendant's position could have believed (even wrongly) that the at-issue conduct was not violative of a constitutional right).

Plaintiff's Opposition did not raise any substantive argument disputing that Defendants are entitled to qualified immunity on Plaintiff's Eighth Amendment claim.

3) <u>Defendants Should Be Granted Judgment on All Counts</u>

If Defendants are granted qualified immunity on Plaintiff's damages claims, they should be granted judgment in their individual capacities because there are no

other claims for relief against them in their individual capacities. *See Howe v. Bank for Intern. Settlements*, 194 F.Supp. 2d 6, 19 (D. Mass. 2002) (holding that suit seeking to retrain or compel the government from acting must be an official-capacity suit) (citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963)).

To the extent this Court determines that qualified immunity applies to any of the counts pursuant to the first prong of the qualified immunity analysis, namely failure to plead the violation of a constitutional right, then that, a fortiori, requires dismissing the count entirely.

Plaintiff's only remaining requests for relief seek official capacity damages on his § 1983 claims and injunctive relief. It is black letter law that Defendants in their official capacities cannot be sued for damages pursuant to § 1983. *Will,* 491 U.S. at 71; *Johnson v. Rodriguez*, 943 F.2d 104, 108 (1st Cir. 1991). Strikingly, the District Court did not dismiss these official capacity damages claims even though Plaintiff agreed "*Will v. Michigan* forecloses damages against Defendants in their official capacities[.]" A.463. Dismissing the § 1983 damages claims against the Defendants in their official capacities promotes efficiency and clarity, especially as Plaintiff agrees the claims are legally barred.

Resolving this issue now is also appropriate because the application of *Will* is inextricably intertwined with and derived from the immunity afforded by the Eleventh Amendment. *See Will*, 491 U.S. at 66 ("Section 1983 . . . does not

provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits[.]"). It is well-settled that the protections afforded by the Eleventh Amendment may be vindicated on an interlocutory basis. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *see also Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 124 (1st Cir. 2003) (holding that *Will* barred § 1983 damages claim and noting that "our jurisdiction extends to the issue whether damages are available at all because that issue is inextricably intertwined with the issue of Eleventh Amendment immunity, which arises only if such damages are available"); *cf.* 15A Wright and Miller, Fed. Prac. & Proc. § 3914.10.7 (3d ed. 2022) ("so long as [interlocutory] appeals are allowed it will be desirable to allow resolution of as many related issues as are fit for immediate decision if immediate decision promises to advance ultimate disposition of the case"). The combination of qualified immunity and *Will* resolves ***all*** damages claims against Defendants in all capacities.

The only remaining aspect of the case — assuming the counts are not dismissed in their entirety for failing to plead the violation of a constitutional right under the first prong of the qualified immunity analysis — pertains to Plaintiff's requests for injunctive relief against the Defendants in their official capacities, but Plaintiff lacks standing to pursue that relief. *See Asociacion De Subscripcion*

Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1, 20 n.22 (1st Cir. 2007) ("appellate jurisdiction extends to issues of standing on interlocutory appeal of a denial of immunity").

In connection with his Eighth Amendment claim, Plaintiff sought the injunctive relief of being removed from disciplinary confinement. A.034. However, Plaintiff is no longer in disciplinary confinement in connection with the discipline that is the subject of this lawsuit and "Plaintiff agrees that his request for removal from restrictive housing is now moot[.]" A.316; A.023, 026, ¶¶55, 75; *see CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc.*, 48 F.3d 618, 621 (1st Cir. 1995) (requested relief "is rendered moot when the act sought to be enjoined has occurred"); *see also Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 68 (1997) ("Mootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).") (quotation omitted). Plaintiff likewise did not dispute that he has already been reclassified, and none of the counts in the Complaint even alleged that his classification was unconstitutional. A.302. Accordingly, Plaintiff's Eighth Amendment-related claim for injunctive relief is non-justiciable. *See e.g., Oakville Dev. Corp. v. F.D.I.C.*, 986 F.2d 611, 613 (1st Cir. 1993) ("It is well established that, in

circumstances where a court cannot provide effectual relief, no justiciable case remains[.]").

That leaves just one remaining asserted claim for relief in this case, which is tied to Plaintiff's retaliation-based claims against Defendants Bibeault, Cabral, and Diniz: Plaintiff's vague request for "a preliminary and permanent injunction prohibiting Defendants from further retaliation against Plaintiff." A.034. Plaintiff failed to even plead a claim for past retaliation as discussed above regarding Counts 2 and 7. There are certainly no factual allegations demonstrating a future risk of retaliation or supporting the broad forward-looking injunction Plaintiff seeks.

To have standing to seek relief and demonstrate an injury in fact, Plaintiff "must show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the challenged ... conduct and the injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) (internal quotations omitted). In *Eves v. LePage*, this Court dismissed a request for injunctive relief preventing the governor from engaging in future threatening behavior, finding the plaintiff "has not 'credibly allege[d] ... a realistic threat' of future retaliation from Governor LePage." 842 F.3d 133, 145 (1st Cir. 2016), reh'g en banc, 927 F.3d 575 (1st Cir. 2019) (dismissing claims for equitable relief). This Court likewise noted that "the

Supreme Court has been reluctant to afford private citizens standing to enjoin hypothetical future government conduct." *Id.* (citing *Lyons*, 461 U.S. at 101-02); *see also Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976) (the government must be granted the "widest latitude in the dispatch of its own internal affairs"); *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974) ("proper balance in the concurrent operation of federal and state courts counsels restraint against the issuance of injunctions against state officers").

Where, as here, Plaintiff's sole remaining request for injunctive relief is on its face overbroad and unsupported by factual allegations, the claim should be dismissed, especially where doing so entirely eliminates the injunctive relief aspect of Plaintiff's lawsuit and warrants dismissal of the entire action as the damages claims are resolved by qualified immunity and *Will*. *See Eves*, 842 F.3d at 145 (affirming dismissal where plaintiff has "not pleaded facts sufficient to prove his entitlement to an injunction"); *see also California v. Texas*, 141 S. Ct. 2104, 2113 (2021) ("A plaintiff has standing only if he can allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."). The "Relief Requested" in the Complaint does not include declaratory relief, but to the extent the Complaint can be read as seeking such relief, it is likewise barred by lack of standing. *See Efreom v. McKee*, 46 F.4th 9, 21 (1st Cir. 2022) ("it is plain that plaintiffs lack standing to seek

declaratory relief with respect to a past injury when such relief cannot redress the injury").

CONCLUSION

Defendants should be granted qualified immunity and judgment should be entered in their favor on each count in both their official and individual capacities.

Respectfully submitted,

DEFENDANTS-APPELLANTS,

By,

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/s/ Katherine Connolly Sadeck
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Dated: January 20, 2023

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I hereby certify that I filed this Brief and Addendum with the Clerk of the United States Court of Appeals for the First Circuit via the CM/ECF system this 20th day of January, 2023 and the same is available for viewing and downloading by counsel of record who are registered as an ECF filer and will be served by the CM/ECF system:

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Addendum

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From: cmecf@rid.uscourts.gov
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Subject: Activity in Case 1:19-cv-00497-JJM-PAS Cintron v. Bibeault et al Order on Motion for Judgment on the Pleadings
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Docket Text:
TEXT ORDER granting in part and denying in part [50] Motion for Judgment on the Pleadings: The Court has reviewed and studied the extensive and excellent briefing by all parties on the Defendants' Motion for Judgment on the Pleadings [50]. First, by consent, the Court dismisses Counts 3, 4, and 5. Second, as to Count 1, this Court has found allegations like those made by Mr. Cintron, state an actionable claim for a violation of Eight Amendment rights against cruel and unusual punishment for his time in disciplinary segregation. Third, Mr. Cintron pleads an actionable claim for deprivation of his First Amendment rights in Counts 2 and 7. Finally, Mr. Cintron has pleaded an actionable state law claim for Abuse of Process in Count 6. In summary, the Court GRANTS IN PART AND DENIES IN PART Defendants' Motion for Judgment on the Pleadings the Court DENIES the Motion as to Counts 1, 2, 6, and 7, and GRANTS the Motion as to Counts 3, 4, and 5. So Ordered by Chief Judge John J. McConnell, Jr. on 8/22/2022. (Jackson, Ryan)

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