22-2698

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMEL UPSON,

Plaintiff-Appellant,

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on appeal from the United States District Court
for the Northern District of New York

BRIEF AND SPECIAL APPENDIX
FOR PLAINTIFF-APPELLANT

NEW YORK CIVIL LIBERTIES UNION
FOUNDATION
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Dated: March 6, 2024
New York, New York

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v.

GERALDINE WILSON, Nurse, Upstate Correctional Facility,
ELIZABETH WHITE, Upstate Correctional Facility, FKA Nurse White,

Defendants-Appellees,

NURSE TRAVERSE, Upstate Correctional Facility, SHAWN WOODS, Correction Officer; Upstate Correctional Facility, JOHN DOE #1, C.O.; Upstate Correctional Facility, JOHN DOE #2, C.O.; Upstate Correctional Facility, DEBORAH SHIPMAN, Nurse, Upstate Correctional Facility,

Defendants.

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PRELIMINARY STATEMENT

On the evening of May 1, 2015, Jamel Upson was hospitalized with a life-threatening bowel obstruction — his fourth in just three years. This Eighth Amendment case arises from his claim that for over a day before he finally received emergency treatment, two prison nurses, Defendants Geraldine Wilson and Elizabeth White, shrugged off signs of his dire condition and spurned his pleas for help.

Below, the district court granted summary judgment to both Defendants, rejecting the notion that any rational jury could find either had shown deliberate indifference towards Mr. Upson. Appointing pro bono counsel on appeal, this Court has asked Mr. Upson to brief whether that outcome was correct. It was not, and this Court should reverse.

The parties do not agree on much here. They disagree whether Defendants Wilson and White knew the risk that Mr. Upson was seriously ill. And they disagree whether either Defendant took reasonable steps in response. A jury should have the opportunity to decide whom to believe. And because the record shows believing Mr. Upson would not be beyond reason, the district court should have denied summary judgment.

JURISDICTIONAL STATEMENT

The district court had original jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343 because Mr. Upson brought claims under the Eighth Amendment to the Constitution, seeking to vindicate his right to be free from the deliberate indifference of Defendants Wilson and White to his serious medical needs. *See* Compl., J.A. at 13.

The Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because Mr. Upson seeks review of the district court's order, dated September 30, 2022, granting summary judgment to Defendants Wilson and White and dismissing this action in full. *See* Mem.-Decision & Order, J.A. at 370.

This appeal is timely under Rule 4(a)(1) of the Federal Rules of Appellate Procedure because Mr. Upson filed his Notice of Appeal within thirty days after the district court entered judgment. *See* Notice of Appeal, J.A. at 389.

STATEMENT OF THE ISSUES

1. Whether it would be irrational for a jury, construing the record in the light most favorable to Mr. Upson and drawing reasonable

inferences and resolving ambiguities in his favor, to find Defendant Wilson

a. was aware of at least a substantial risk that Mr. Upson faced serious harm, and

b. failed to take reasonable measures to abate that risk.

2. Whether it would be irrational for a jury, construing the record in the light most favorable to Mr. Upson and drawing reasonable inferences and resolving ambiguities in his favor, to find Defendant White

a. was aware of at least a substantial risk that Mr. Upson faced serious harm, and

b. failed to take reasonable measures to abate that risk.

STATEMENT OF THE CASE

This Eighth Amendment case concerns a roughly 36-hour period before Plaintiff Jamel Upson was eventually hospitalized with a life-threatening bowel obstruction — his fourth in three years. Mr. Upson claims that in the lead-up to his hospitalization, Defendants Geraldine Wilson and Elizabeth White, two prison nurses, knowingly dismissed

indicia of Mr. Upson's dire condition, refusing to respond in any meaningful way to his repeated, increasingly desperate pleas for help.

On September 30, 2022, U.S. District Judge Lawrence E. Kahn of the U.S. District Court for the Northern District of New York granted summary judgment to Defendants Wilson and White, adopting in full the assigned magistrate judge's report and recommendation. *See* Mem.-Decision & Order, J.A. at 370; R. & R., J.A. at 326. The district court concluded that Mr. Upson had failed to show the existence of any triable issue as to either nurse's deliberate indifference and that both Defendants were entitled to judgment as a matter of law on Mr. Upson's Eighth Amendment claims. *See* J.A. at 370. This appeal followed. *See* Notice of Appeal, J.A. at 389.

On November 8, 2023, this Court appointed from its pro bono panel Christopher Dunn, Legal Director of the New York Civil Liberties Union Foundation, to serve as counsel to Mr. Upson on this appeal. *See* Order, Nov. 8, 2023, ECF No. 85. The Court instructed Mr. Upson's appointed counsel "to brief, among any other issues, whether the district court erred when it granted summary judgment to the Appellees, reasoning that neither Appellee acted with the requisite mental state to constitute a claim

for deliberate indifference to Appellant's medical needs under the Eighth Amendment." Mot. Order, Nov. 2, 2023, ECF No. 81 (citing *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998)).

The Facts of Mr. Upson's Case[1]

At around midday on April 30, 2015, while incarcerated at Upstate Correctional Facility, a prison operated by the New York State Department of Corrections and Community Supervision ("DOCCS"), Jamel Upson began experiencing telltale symptoms of what would later be confirmed as a life-threatening blockage of his small intestine. *See* Compl. ¶¶ 15–16, J.A. at 13; Upson Dep. 29:22–30:21, J.A. at 74–75; Upson Decl. ¶ 5, J.A. at 248. These symptoms — including severe stomach pain, repeated vomiting, dizziness, and profuse sweating — were immediately familiar to Mr. Upson, who had suffered three similar blockages in the prior three years, all requiring hospitalization. *See* Compl. ¶¶ 15–16, J.A. at 13; Upson Dep. 18:23–19:9, J.A. at 63–64; Upson Decl. ¶ 5, J.A. at 248.

Soon after his symptoms began, Mr. Upson flagged down a nearby

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[1] Unless otherwise noted, the relevant facts are drawn from Mr. Upson's verified complaint, J.A. at 13; submissions in opposition to summary judgment, J.A. at 227, 265; and deposition testimony, J.A. at 46.

correction officer to request an emergency sick call. Compl. ¶ 17, J.A. at 13; Upson Dep. 29:22–30:4, J.A. at 75; Upson Decl. ¶ 5, J.A. at 248. Mr. Upson told the officer about his stomach pain and vomiting and asked that the officer summon a nurse. *See* Compl. ¶ 17, J.A. at 15; Upson Dep. 30:19–21, J.A. at 75; Upson Decl. ¶ 5, J.A. at 248. The officer looked through the window of Mr. Upson's cell door to confirm there was vomit in Mr. Upson's toilet and then left. Upson Dep. 30:22–31:8, J.A. at 75–76.

About half an hour later, Defendant Wilson arrived at Mr. Upson's cell. *See* Compl. ¶ 18, J.A. at 13; Upson Dep. 31:15–25, J.A. at 76; Upson Decl. ¶ 5, J.A. at 248. Visibly angry, Defendant Wilson told Mr. Upson, "This better be an emergency," and began yelling at him, prompting Mr. Upson to ask her to calm down. Upson Dep. 31–35, J.A. at 76–80; Upson Decl. ¶¶ 5–6, J.A. at 248; Screahben Decl. ¶¶ 3–4, J.A. at 267. Less than a minute later, she left, ignoring pleas by Mr. Upson and others in neighboring cells to come back and help him. Upson Dep. 33–35, J.A. at 78–80; Upson Decl. ¶ 14, J.A. at 249; Screahben Decl.¶¶ 4–7, J.A. at 267–68.

The parties' accounts of this brief interaction diverge sharply. Defendant Wilson claims Mr. Upson was "laughing and joking" when she arrived at his cell. Wilson Decl. ¶¶ 8–9, J.A. at 34. She claims he "became

argumentative," refusing to turn on his light at her direction. *Id.*, at ¶ 8. And she denies having witnessed any signs that Mr. Upson was in distress. *Id.*, at ¶ 9. Mr. Upson, by contrast, claims he was hunched over in agony on his bed when Defendant Wilson arrived. Upson Dep. 34:3–16, J.A. at 79; Upson Decl. ¶ 7, J.A. at 248. He claims he described his symptoms to Defendant Wilson and showed her his vomit. Compl. ¶ 18, J.A. at 15; Upson Aff. ¶ 6, J.A. at 244; Upson Decl. ¶ 12, J.A. at 249. And though his "excruciating pain" made it difficult to stand, he claims he ultimately turned on his light — even though the bright sunlight in his cell made doing so unnecessary. Upson Dep. 36:7–16, J.A. at 81; Upson Decl. ¶¶ 11–16, J.A. at 249; Screahben Decl. ¶¶ 3–6, J.A. at 267.

About an hour after his initial encounter with Defendant Wilson, Mr. Upson again requested an emergency sick call. Wilson Decl. ¶ 12. At around 7:20 p.m., a correction officer escorted Mr. Upson from his cell to the nurses' office. *See* Compl. ¶ 19, J.A. at 15; Upson Decl. ¶¶ 18; Wilson Decl. ¶¶ 12, 15, J.A. at 34–35. Mr. Upson was hunched over in pain during the escort, unable to stand straight, and in such visible distress that the officer declined to place Mr. Upson in shackles, as was standard procedure for transporting individuals in the housing unit where Mr. Upson

was confined. Upson Decl. ¶¶ 16–17, J.A. at 249–50.

As soon as Mr. Upson arrived at the nurses' office, Defendant Wilson accused him of malingering, telling Mr. Upson there was nothing wrong with him.[2] Upson Dep. 39:23–40:7, J.A. 84–85; Upson Aff. ¶ 8, J.A. at 244; Upson Decl. ¶¶ 19–20, J.A. at 250. When Mr. Upson asked her to confirm the recent history of bowel obstructions reflected in his medical records, Defendant Wilson refused, responding that she "did not want to hear what [he] had to say." Upson Decl. ¶¶ 12–13, 21, J.A. at 249–50; Upson Dep. 64:24–66:7, J.A. at 109–111. Instead, Defendant Wilson took Mr. Upson's vital signs, confirmed the time of his most recent bowel movement (which roughly coincided with the onset of his symptoms), and prodded his stomach while listening with a stethoscope. *See* Compl. ¶ 19, J.A at 15–16; Upson Dep. 39:20–45:14, J.A. at 84–90; Upson Decl. ¶¶ 19–21, J.A. at 250. Though Mr. Upson flinched in pain during the examination and had struggled even to climb onto the examination table, Defendant Wilson was "adamant" that he did not seem to be in pain. Upson Dep.

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[2] Once again, the parties' accounts diverge: Defendant Wilson claims Mr. Upson was "smiling, laughing, and joking during the evaluation" and "did not appear to be in any distress." Wilson Decl. ¶ 21, J.A. at 35.

42:11–43:3, J.A. at 87–88; Upson Decl. ¶¶ 19–20, J.A. at 250. Dismissing the symptoms Mr. Upson described, she joked that he was "probably full of shit" and said, "I'm not giving you nothing for your pain, I'm not giving you nothing." Upson Dep. 40:23–41:7, 66:25–67:7, J.A. at 85–86, 111–12; Upson Decl. ¶¶ 19–20, J.A at 250. Without further examination, she sent Mr. Upson back to his cell, instructing him to show staff if he vomited, not to eat or drink, and that he could make a sick call request if he wanted. Compl. ¶ 19, J.A. 15–16; Wilson Decl. ¶¶ 25–27, J.A. at 29; Upson Dep. 42:16–43:3, J.A. at 87–88.

After his second encounter with Defendant Wilson, Mr. Upson was returned to his cell where the symptoms of his bowel obstruction continued to intensify over several hours. *See* Compl. ¶¶ 20, 24, J.A. at 16; Upson Dep. 47:20–48:9, J.A. at 92–93; Upson Decl. ¶ 22, J.A. at 241. As his condition worsened, Mr. Upson began slipping in and out of consciousness. Upson Dep. 48:3–9, J.A. at 93. Mr. Upson's cell neighbors resumed yelling for help, but nearby staff ignored those requests for the remainder of their shift. *See* Upson Decl. ¶¶ 22–23, J.A. at 251; Screahben Decl. ¶ 8, J.A. at 268.

Shortly after the evening shift change at 10 p.m., Mr. Upson flagged

down a passing correction officer to renew his request for medical attention in the hope that different staff would be less dismissive. Compl. ¶ 21, J.A. at 16; Upson Dep. 48:3–49:4, J.A. at 93–94; Upson Decl. ¶ 23, J.A. at 251; Screabhen Decl. ¶ 8, J.A. at 268. Once Mr. Upson explained his symptoms and showed the officer his vomit, the officer summoned a nurse, who arrived at Mr. Upson's cell within minutes. *See* Compl. ¶¶ 21–22, J.A. at 16; Upson Dep. 48:3–49:4, J.A. at 93–94; Upson Decl. ¶ 23, J.A. at 251. Mr. Upson re-explained his symptoms, described his history of bowel obstructions, and showed the nurse his vomit in the toilet. Compl. ¶ 22, J.A. at 16; Upson Dep. 48:3–49:4, J.A. at 93–94; Upson Decl. ¶ 23, J.A. at 251. The nurse told Mr. Upson she would review his medical records and return. Compl. ¶ 22, J.A. at 16; Upson Dep. 48:3–49:4, J.A. at 93–94; Decl. ¶ 22, J.A. at 251. Instead, an officer returned to Mr. Upson's cell sometime later, telling Mr. Upson the nurse had said his condition was not an emergency. Upson Dep. 48:3–49:4, J.A. at 93–94; Upson Decl. ¶ 24, J.A. at 251. Mr. Upson continued vomiting throughout the night, crying in pain while his neighbors yelled for prison staff to help to no avail: No other staff member came to Mr. Upson's cell for the remaining seven-plus hours of the overnight shift. Compl. ¶ 24, J.A. at 16; Upson Dep. 48:3–

49:22, J.A. at 93–94; Upson Decl. ¶¶ 24–25, J.A. at 251.

At around 6:20 the following morning — well over 12 hours after the onset of Mr. Upson's bowel obstruction symptoms — Defendant White came to Mr. Upson's cell during the routine daily sick call and medication run to dispense a medication unrelated to Mr. Upson's bowel obstruction. *See* Compl. ¶ 25, J.A. at 16; Upson Dep. 49:15–52:16, J.A. at 94–97; Upson Decl. ¶ 26, J.A. at 251. Mr. Upson told Defendant White he needed help, described his worsening bowel obstruction symptoms, and requested an emergency sick call. *See* Compl. ¶ 24, J.A. at 16; Upson Decl. ¶ 26, J.A. at 251; Screahben Decl. ¶ 12, J.A. at 268. Without further inquiry, Defendant White responded, "It's not an emergency," and denied Mr. Upson's emergency sick call request, noting that Mr. Upson had failed to make a written request for a *non*-emergency sick call. Compl. ¶ 24, J.A. at 16; Upson Dep. 52:10–24, J.A. 97; Upson Decl. ¶ 26, J.A. at 251. As Defendant White left his cell, Mr. Upson reiterated — in "adamant" terms — that his bowel obstruction was an emergency and pleaded with her to come back. Upson Dep. 52:20–24, J.A. at 97; Upson Decl. ¶ 27, J.A. at 251; Screahben Decl. ¶ 12, J.A. at 268. Mr. Upson's neighbors, too, resumed yelling for help for Mr. Upson, but neither Defendant White

nor any other staff member returned to Mr. Upson's cell for the rest of the shift. Compl. ¶¶ 24–25; Upson Dep. 49:4–54:3, J.A. 94–99; Screahben Decl. ¶ 12, J.A. at 268.

After a 3 p.m. shift change, Mr. Upson made yet another emergency sick call request, pleading with a passing officer for medical assistance. *See* Compl. ¶¶ 26–27, J.A. at 16; Upson Dep. 54:4–14, J.A. at 99; Upson Decl. ¶¶ 28–29, J.A. at 251–52. When a nurse came to his cell soon after, Mr. Upson once again described his symptoms and history of bowel obstructions. *See* Compl. ¶¶ 26–27, J.A. at 16; Upson Dep. 54:6–14, J.A. at 99; Upson Aff. ¶ 13, J.A. at 244. The nurse told Mr. Upson she would check his medical records and come back. *See* Upson Dep. 54:4–56:4. J.A. at 99–101; Upson Decl. ¶ 29, J.A. at 252. Within minutes, the nurse returned, confirmed she had reviewed Mr. Upson's medical records, and ordered that he be taken to the prison infirmary, where Mr. Upson met with a doctor via an emergency telemedicine appointment shortly after 7 p.m. *See* Upson Dep. 55:14–56:23, J.A. at 100–101; Upson Decl. ¶¶ 31–32; Upson Decl. Ex. C, J.A. at 192. The doctor confirmed the history of bowel obstructions reflected in Mr. Upson's medical records and, after Mr. Upson described his symptoms, ordered that Mr. Upson be taken to the

emergency room. *See* Upson Dep. 55:17–56:23, J.A. at 100–01; Upson Aff. ¶ 15, J.A. at 245; Upson Decl. ¶¶31–32, J.A. at 252.

Several hours later — roughly 36 hours after Mr. Upson's symptoms began — Mr. Upson was taken to a nearby hospital, where he received emergency treatment for a bowel obstruction. Compl. ¶¶ 28–30, J.A. at 16–17; Upson Dep. 56:7–58:25, J.A. at 101–03; Upson Decl. ¶ 32; Pl.'s Mr. Upson remained in inpatient care for five days, during which hospital staff pumped bodily waste from his gastrointestinal track, inserted a gastro-nasal tube in his stomach, and administered hydromorphone for Mr. Upson's severe pain. Compl. ¶¶ 19–21, J.A. at 16–17; Upson Dep. 59:1–61:8, J.A. at 104–06; Upson Decl., Ex. C., J.A. at 191–208.

The District Court's Opinion

On September 30, 2022, the district court issued an order and decision granting summary judgment to both Defendants Wilson and White. Mem.-Decision & Order, J.A. at 370. Adopting in full a report and recommendation of U.S. Magistrate Judge Christian F. Hummel, the court concluded no reasonable jury could find either Defendant had acted with deliberate indifference to Mr. Upson and that both Defendants were

entitled to judgment as a matter of law on Mr. Upson's Eighth Amendment claims. *See id.*; R. & R., J.A. at 326.

As for Defendant Wilson, the court discounted Mr. Upson's summary judgment testimony that Defendant Wilson had seen his vomit. Agreeing with the magistrate judge, the court found that evidence conflicted with Mr. Upson's prior deposition testimony. J.A. at 382–83. Disagreeing with the magistrate judge, the court recognized Mr. Upson had proffered evidence showing Defendant Wilson knew of his reported history of bowel obstructions. *See* J.A. at 383. Even so, the court concluded, that knowledge did not matter in any event, because the examination Defendant Wilson performed of Plaintiff's stomach foreclosed a finding that her conduct reflected deliberate indifference. J.A. at 383–84. And her refusal to review Mr. Upson's medical record, the court reasoned, amounted at most to a lack of care. *See* J.A. at 376–77.

As for Defendant White, the court first concluded Mr. Upson had proffered insufficient evidence that she was aware of his dire condition. *See* J.A. 385. The court agreed with the magistrate judge's reasoning that Mr. Upson's merely telling Defendant White that he "felt as though he was having an emergency and vomiting . . . does not suffice to prove that

these conditions actually existed." J.A. at 378 (quoting R. & R. at 14, J.A. 339). And, the court found, Mr. Upson had provided "*no* evidence" that Defendant White knew of his "vomiting or visible distress." J.A. at 385. The court also concluded Defendant White's refusing Mr. Upson's request for an emergency sick call did not reflect deliberate indifference. *See* J.A. at 385–86; R. & R. at 14, J.A. at 339. The court agreed with the magistrate judge, who reasoned that her merely failing to "adhere strictly" to DOCCS policy did not amount to a constitutional violation. R. & R. at 15, J.A. at 340 (cleaned up); *see also* J.A. at 386 (adopting report-recommendation in full). The court also agreed that the 8.5-hour delay caused by Defendant White's deviation from policy "was neither shown to be intentional, nor long enough to constitute deliberate indifference." J.A. at 372 (citing R. & R. at 15, J.A. at 340); *see also* J.A. 384–86.

SUMMARY OF THE ARGUMENT

The Court has asked Mr. Upson to brief "whether the district court erred when it granted summary judgment to the Appellees, reasoning that neither Appellee acted with the requisite mental state to constitute a claim for deliberate indifference to Appellant's medical needs under the Eighth Amendment." Mot. Order, Nov. 2, 2023, ECF No. 81 (citing 143

F.3d 698, 702 (2d Cir. 1998)). The answer is a clear "yes," and this Court should reverse. A rational jury, viewing the record in the light most favorable to Mr. Upson and drawing reasonable inferences and resolving ambiguities in his favor, could find that in dismissing Mr. Upson's pleas for help and other indicia of his life-threatening bowel obstruction, Defendants Wilson and White knowingly disregarded a substantial risk of serious harm to Mr. Upson.

As the district court itself acknowledged, Mr. Upson proffered evidence that Defendant Wilson knew of his recent history of bowel obstructions, including three in the prior three years alone. This alone suffices to establish her awareness of a substantial risk that Mr. Upson was experiencing a similar obstruction here. But even if it did not, Mr. Upson also proffered evidence of other indicia that, taken together, permit the reasonable conclusion that Defendant Wilson was aware of at least a substantial risk of serious harm to Mr. Upson. These include evidence that Defendant Wilson saw and was otherwise aware of his vomiting, that she saw signs of Mr. Upson's excruciating pain, and that Mr. Upson's cell neighbors loudly and collectively called out for Defendant Wilson to help Mr. Upson.

In granting summary judgment to Defendant Wilson, the district court ultimately concluded that a physical examination she performed of Mr. Upson's stomach categorically foreclosed any finding that she had acted with deliberate indifference. But that reasoning was legally and factually flawed—legally, because it has never been the case that merely performing a medical exam, whatever its legitimacy, insulates prison officials from further inquiry into whether their conduct nonetheless reflects deliberate indifference; and factually, because Mr. Upson offered testimony, discounted by the district court, from which a reasonable jury could find the examination that Defendant Wilson conducted here was indeed illegitimate.

The district court's decision also rested in part on the conclusion that Defendant Wilson's refusing to review Mr. Upson's medical records amounted, at most, to a lack of care, not deliberate indifference. But the district court failed to appreciate the distinction between a mere *failure* to review medical records, which courts have found may constitute mere inadvertence or negligence, and Defendant Wilson's *refusal* to do so, from which a jury may reasonably find she consciously disregarded the risk to Mr. Upson.

In granting summary judgment to Defendant White, the district court concluded Mr. Upson failed to establish her awareness of his dire condition, including because Mr. Upson failed to show she had seen his vomit or other signs of visible distress. But a reasonable jury could conclude Defendant White did see Mr. Upson's vomit. And visible distress aside, Mr. Upson proffered evidence of other indicia from which a reasonable jury could infer Defendant White's awareness of at least a substantial risk that he was seriously ill, including that she, too, saw Mr. Upson's vomit. And the surrounding context — a setting where staff presumably must share patient information from shift to shift — further strengthens the grounds for inferring Defendant White's awareness, because her encounter came only after Mr. Upson had pleaded for help from medical staff during prior shifts, including one who stated she would review his medical records.

The district court also concluded that Defendant White's refusal, in violation of DOCCS policy, to grant Mr. Upson's request for an emergency (i.e., unscheduled) sick call did not reflect deliberate indifference. The Court first reasoned that Defendant White's merely failing to follow prison policy did not amount to a constitutional violation. But this

misconstrued Mr. Upson's claim, which is that Defendant White acted with deliberate not because she violated DOCCS policy but because she failed to take modest measures, which DOCCS policy happened also to require, in response to the risk that Mr. Upson was experiencing a medical emergency.

The Court also reasoned that the 8.5-hour delay caused by Defendant White was not shown to be intentional. But a jury could infer Defendant White's intent from the fact that it would have been obvious that requiring Mr. Upson to wait until the next regular sick call rather than granting his request for an emergency sick call, would result in an hours-long delay in his receiving medical attention.

Finally, the Court reasoned that a delay of 8.5 hours was insufficiently long to establish Defendant White's deliberate indifference. But this Court has found deliberate indifference arising from treatment delays shorter than the one caused by Defendant White here. And the record permits the conclusion that the delay here, which caused Mr. Upson to endure hours of severe and unrelenting pain while he waited for emergency treatment, otherwise rose to constitutional proportions.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment without deference, "'construing the evidence in the light most favorable to the' non-moving party and 'drawing all reasonable inferences and resolving all ambiguities in [that party's] favor.'" *Elliott v. Cartagena*, 84 F.4th 481, 495 (2d Cir. 2023) (quoting *Darnell v. Pineiro*, 849 F.3d 17, 22 (2d Cir. 2017).

Courts must ordinarily afford "special solicitude" to pro se litigants, *Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010), "particularly where motions for summary judgment are concerned." *Jackson v. Fed. Express*, 766 F.3d 189, 195 (2d Cir. 2014). This is especially true for incarcerated litigants and those who assert civil rights claims. *See Tracy*, 623 F.3d at 102 (citing *Davis v. Goord*, 320 F.3d 346, 250 (2d Cir. 2003)); *see also Howard v. Cherish*, 575 F. Supp. 34, 35 (S.D.N.Y. 1983) ("The Court must be especially hesitant before employing summary judgment against an incarcerated party, who is limited in his ability to collect evidence supporting his claim.") (internal citation omitted).

ARGUMENT

The Court should reverse the judgment below because the district court improperly granted summary judgment to Defendants Wilson and White on Mr. Upson's Eighth Amendment claims. The record reveals ample grounds on which a rational jury, construing the evidence in the light most favorable to Mr. Upson and drawing reasonable inferences and resolving ambiguities in his favor, could find that Defendants Wilson and White each acted with deliberate indifference towards Mr. Upson's serious — indeed, life-threatening — medical condition. The district court erred in concluding otherwise.

Summary Judgment Standard

"Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Doninger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)).

"'The function of the district court in considering the motion for summary judgment is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute

exists.'" *Rupp v. Buffalo*, 91 F.4th 623, 634 (2d Cir. 2024) (quoting *Kaytor v. Electric Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010)); *see Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are jury functions, not those of a judge."); *see also Archer v. Dutcher*, 733 F.2d 14 (2d Cir. 1984) (recognizing that issue "may well be without merit" but still genuine).

On a motion for summary judgment, "the district court may not properly consider the record in a piecemeal fashion." *Rupp*, 91 F.4th at 634 (quoting *Kaytor*, 609 F.3d at 545); *see also McMahan & Co. v. Wherehouse Ent., Inc.*, 900 F.2d 576, 579 (2d Cir. 1990) (rejecting "atomistic consideration" of evidence on summary judgment). "[R]ather, it must review all of the evidence in the record." *Kaytor*, 607 F.3d at 545 (quoting *Reeves*, 530 U.S. at 150). "And in reviewing all of the evidence to determine whether judgment as a matter of law is appropriate, the court must *draw all reasonable inferences in favor of the nonmoving party*, even though contrary inference might reasonably be drawn." *Rupp*, 91 F.4th at 634 (quoting *Kaytor*, 607 F.3d at 545) (cleaned up). Judgment as a matter of law is appropriate only if the totality of the evidence shows

"there can be but one conclusion as to the verdict that reasonable juries could have reached." *Izzarelli v. R.J. Reynolds Tobacco*, 731 F.3d 164, 167 (2d Cir. 2013). If the admissible evidence instead makes it "arguable" that the non-movant's claim has merit, summary judgment is inappropriate. *Kaytor*, 609 F.3d at 545.

Eighth Amendment Deliberate Indifference Standard

The Eighth Amendment's prohibition on cruel and unusual punishment creates an "obligation [for the government] to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). Not every denial of custodial medical care rises to constitutional proportions. *See id.* at 116, n.13 (Stevens, J., dissenting). But the Supreme Court has long recognized that "deliberate indifference to serious medical needs of [incarcerated people] constitutes the 'unnecessary and wanton infliction of pain'" that the Eighth Amendment proscribes. *See Estelle*, 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

The Eighth Amendment's deliberate indifference standard includes both objective and subjective prongs: "First, the alleged deprivation must be, in objective terms, 'sufficiently serious.'" *Chance*, 143 F.3d at 702

(quoting *Hathaway v. Coughlin*, 37 F.3d 63, 66 (2d Cir. 1994)). Second, the defendant "must act with a sufficiently culpable state of mind," which "is a mental state equivalent to subjective recklessness, as that term is used in criminal law." *Salahuddin v. Goord*, 467 F.3d 263, 280, 281 (2d Cir. 2006) (citing *Farmer v. Brennan*, 511 U.S. 825, 839–40 (1994)). A prison official's inadvertent or careless mistake cannot satisfy the subjective prong. *Hathaway*, 99 F.3d at 554 (citing *Estelle*, 429 U.S. at 105–06). Instead, subjective recklessness requires that a prison official act or fail to act while aware of at least a substantial risk that serious harm will occur to an incarcerated person. *Salahuddin*, 467 F.3d at 280. A harm need not be "surely or almost certainly [to] result" for a risk to be considered "substantial." *Id.*

Whether a prison official had the requisite awareness of a substantial risk of serious harm is "a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer*, 511 U.S. at 842. For example, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842. A factfinder may also conclude that an official had culpable knowledge of a fact when the evidence shows

the official intentionally avoided confirming that fact. *See United States v. Quinones*, 635 F.3d 590 (2d Cir. 2011); *United States v. Gabriel*, 125 F.3d 89, 98 (2d Cir. 1997) ("A conscious avoidance instruction is appropriate when a defendant claims to lack some specific aspect of knowledge but where the evidence may be construed as deliberate indifference.").

When prison officials are aware of at least a substantial risk of serious harm to an incarcerated person, the Eighth Amendment does not oblige heroism in response. But it does require that they take at least "reasonable measures" to abate the risk. *Farmer*, 511 U.S. at 847. Their failure to do so reflects deliberate indifference. *See id.*; *see also Warren v. Goord*, 579 F. Supp. 2d 488, 496 (S.D.N.Y. 2008) (recognizing deliberate indifference exists where "prison officials 'had the ability to take some [reasonable] action that would have significant alleviated' the risk yet failed to do so") (quoting *Shepherd v. Hogan*, 181 F. App'x 93, 96 (2d Cir. 2006), *aff'd,* 368 F. App'x 161 (2d Cir. 2010)).

What measures are "reasonable" to abate such a risk will depend on the specific facts of the case. *Cash v. Cnty. of Erie*, 654 F.3d 324, 334 (2d Cir. 2011) (recognizing deliberate indifference "necessarily depends on a careful assessment of the facts at issue in a particular case"); *Chance*,

143 F.3d at 703. And a finder of fact need not isolate each of a prison official's acts in a separate vacuum, divorced from surrounding context, in determining culpability. *See Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 128–29 (2d Cir. 2004) (considering defendants' conduct "as a whole rather than as a series of unconnected acts" in finding a triable issue of fact as to deliberate indifference). Instead, a jury may find deliberate indifference based on an official's actions taken as a whole and based on the circumstances. *See id.; see also Est. of Jaquez v. City of New York*, 104 F. Supp. 3d 414, 438 (S.D.N.Y. 2015) ("[T]here are a number of facts that, *when taken together* and viewed in the light most favorable to plaintiffs as they must be, create a triable issue . . . .") (emphasis added), *aff'd sub nom. Est. of Jaquez by Pub. Adm'r of Bronx Cnty. v. City of New York*, 706 F. App'x 709 (2d Cir. 2017).

* * *

Applying these principles, Defendants Wilson and White were not entitled to summary judgment on Mr. Upson's Eighth Amendment claim, because the record permits the reasonable conclusion that Mr. Upson satisfies both prongs of the deliberate indifference standard. The objective seriousness of his life-threatening bowel obstruction is undisputed. And

the record exposes genuine questions about both Defendants' subjective states of mind, including their awareness of the risk to Mr. Upson and the reasonableness of their conduct in response. A jury, rather than the district judge, should have the opportunity to resolve those questions and the district court thus erred in granting Defendants' motion for summary judgment.

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT WILSON.

A. A Rational Jury Could Find Defendant Wilson Knew of at Least a Substantial Risk Mr. Upson Was Experiencing a Medical Emergency.

1. A Rational Jury Could Find Defendant Wilson Was Aware of Mr. Upson's History of Bowel Obstructions.

While purporting to adopt the magistrate judge's report-recommendation in its entirety, the district court disagreed with the magistrate judge's conclusion that Mr. Upson "did not testify . . . that he ever discussed his prior history with bowel obstructions with Wilson at any time." R. & R. at 13, J.A. 338; *see also* Mem.-Decision & Order at 14, J.A. at 383. As the district court recognized, Mr. Upson testified during his deposition — twice — that he had both reported his history of bowel obstructions to Defendant Wilson and notified her that history would be reflected in his

medical records. *See* Upson Dep. 65:10–66:7, 67:8–17, J.A. at 110–112. This was not a new revelation but one that tracked the allegations in Mr. Upson's verified complaint, which the district judge ought to have considered on summary judgment. *See* Compl. ¶ 18, J.A. at 15 ("Plaintiff explained his history to [Defendant Wilson]" and "told her it could be confirmed in his DOCCS medical records.")]; *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995) ("[A] verified complaint is to be treated as an affidavit for summary judgment purposes.").

Defendant Wilson's knowledge of this history alone would permit a jury, drawing reasonable inferences in Mr. Upson's favor, to conclude Defendant Wilson knew of at least a substantial risk that Mr. Upson was experiencing a similar bowel obstruction here.[3] *See, e.g.*, *Walker v. Schult*, No. 9:11-cv-287-LEK-DJS, 2016 WL 4203536, at *14 (N.D.N.Y. Aug. 9,

[3] Of course, Defendant's knowledge of Mr. Upson's reported medical history does not establish her certain knowledge of Mr. Upson's bowel obstruction. But the Eighth Amendment does not require certainty; It would be enough that Defendant Wilson was aware of at least a *substantial risk* that Mr. Upson's recent history of bowel obstructions portended a similar obstruction here. *See Salahuddin*, 467 F.3d at 280 (recognizing that harm need not be "surely or almost certainly [to] result" for a risk to be considered "substantial) (citing *Farmer*, 511 U.S. at 835, 842).

2016) (finding summary judgment inappropriate on Eighth Amendment claim where plaintiff's reports to prison officials created possibility they were aware of a substantial risk of harm). But even if it did not, the district court discounted evidence of other indicia that, when considered together and not in a "piecemeal fashion," *Rupp*, 91 F.4th at 634, permit the reasonable conclusion that Defendant Wilson knew of a substantial risk that Mr. Upon was experiencing a medical emergency.

2. A Rational Jury Could Find Defendant Wilson Was Aware of Mr. Upson's Profuse Vomiting.

The district court concluded that Defendant Wilson saw no "objective signs" of Mr. Upson's "bowel obstruction or other medical emergency." Mem.-Decision & Order at 14, J.A. at 383. In particular, the court found "no dispute of material fact as to whether Wilson saw Plaintiff's vomit." J.A. at 382. But the admissible evidence provides grounds on which a reasonable jury could find otherwise, and the district court thus erred in concluding no triable dispute existed on this question of central relevance to Defendant Wilson's awareness.

To begin, Mr. Upson testified in his verified complaint that he "pointed out that he had been vomiting" to Defendant Wilson during their

first encounter at his cell.[4] Compl. ¶ 18, J.A. at 15. Later, in opposing summary judgment, he confirmed the same. *See* Upson Decl. ¶¶ 8–9, J.A. at 248 ("[P]laintiff pointed to the toilet to show RN Wilson the vomit that was still in the toilet bowl . . . . RN Wilson looked in the toilet bowl."); Pl.'s Aff. ¶ 6, J.A. at 244 ("He made RN Wilson aware of his . . . constant vomiting, and even showed her the vomit which was still in the toilet.").

In discounting Mr. Upson's testimony on this issue, the district court agreed with the magistrate judge's conclusion that Mr. Upson's submissions in opposition to summary judgment contradicted his prior deposition testimony and were thus an after-the-fact attempt to manufacture a factual dispute. *See* Mem.-Decision & Order at 14, J.A. at 383. But this misapplies the "sham issue of fact" doctrine, which "prohibits a party from defeating summary judgment simply by submitting an affidavit that contradicts the party's previous sworn testimony," in two ways. *In re Fosamax Prods. Liab. Litig.*, 707 F.3d 189, 193 (2d Cir. 2013).

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[4] Though "pointed out" might reasonably mean either "showed" or "told," the district court's obligation on Defendants' motion for summary judgment was to resolve that ambiguity in Mr. Upson's favor. *See Heim v. Daniel*, 81 F.4th 212, 221 (2d Cir. 2023).

First, Mr. Upson's submissions in opposition to summary judgment did not manufacture a dispute that "arose after" Defendants Wilson and White moved for summary judgment, as is required for the doctrine to apply. *Id.* at 191. Rather, his summary judgment opposition underscores the claims first raised in Mr. Upson's verified complaint well beforehand. *See* Compl. ¶ 18, J.A. at 15; *Patterson v. County of Oneida*, 375 F.3d 206, 219 (2d Cir. 2004) ("[A] verified pleading ... has the effect of an affidavit and may be relied upon to oppose summary judgment.").

Second, Mr. Upson's submissions in opposition to summary judgment only "arguably" contradict his deposition testimony, *Hayes v. New York City Dep't of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996), falling far short of the "real, unequivocal, and inescapable" contradiction that must exist for the "sham issue of fact" doctrine to apply. *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 22–23 (2d Cir. 2014).

It is true, as the district court noted, that Mr. Upson testified during his deposition that the "only" thing he told Defendant Wilson during their first encounter was to "calm down." Mem.-Decision & Order at 13, J.A. at 382 (quoting Upson Dep. at 33, J.A. at 78). Yet other aspects of Mr. Upson's testimony cast doubt on whether that response, viewed in context,

should be understood literally.[5] Later in the same deposition, for example, Mr. Upson testified he could not fully recall his conversation with Defendant Wilson because he was in such excruciating pain at the time. *See* Upson Dep. 33:14–18, 34:11–16, J.A. at 33. And elsewhere, in describing a conversation with Defendant Wilson during their second encounter, Mr. Upson offered the following statement about their first encounter: "I told her I've been vomiting since before I – before I – before I – before – meaning, *when she came to my cell earlier, and I told her that I have been vomiting constantly*." Upson Dep. 44:12–16, J.A. at 89 (emphasis added). Defense counsel declined at any point in the deposition to clarify the apparent tension between these statements. *See NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, No. 10 Civ. 5762 (PAE), 2016 WL 3098842, at *11 (S.D.N.Y. June 1, 2016) (noting the doctrine "generally does not apply to seemingly conflicting statements within the same deposition").

Defendant Wilson's further claim that Mr. Upson failed to turn on his light at her request does not alter the conclusion that a triable issue

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[5] Even Defendant Wilson herself suggests Mr. Upson's interaction with her during their first encounter was not strictly limited to telling her to calm down. *See* Wilson Decl. ¶ 8, J.A. at 34 (describing Mr. Upson as "joking" and "being argumentative" during their initial interaction).

of fact exists as to whether she saw his vomit. In the first place, that claim is contested. The magistrate judge's finding that Mr. Upson "admits" he did not turn on his cell light misreads the record. R. & R. at 4, J.A. at 329. Though conceding he was in too much pain to stand when first told to turn on the light, *see* Upson Dep. 34:3–8, J.A. at 79, Mr. Upson never conceded he did not ultimately comply. *See generally* Upson Dep. 32–37, J.A. at 77–82. To the contrary, in his summary judgment submissions, Mr. Upson and Alex Screahben, who was confined in a neighboring cell, both testify that he did so. *See* Upson Decl. ¶ 13, J.A. at 249; Screahben Decl. ¶¶ 3–5, J.A. at 267. Moreover, Mr. Upson provided testimony from which a factfinder could infer the room was sunlit, even if his cell light had not been turned on. *See* Upson Decl. ¶¶ 4, 10, J.A. at 247–48; Upson Dep. 36:11–16, J.A. at 81 ("I don't really understand . . . the significance of turning the light on, 'cause it was a bright and sunny day that day, I remember that").

Moreover, no matter the *conversation* between Mr. Upson and Defendant Wilson, the deposition gives no indication — let alone an unequivocal or inescapable one — that Mr. Upson did not *show* Defendant Wilson his vomit during their encounter at his cell. To the contrary, other

aspects of Mr. Upson's deposition testimony give ample grounds for a jury to infer Defendant Wilson did see Mr. Upson's vomit. Mr. Upson testified that his cell was brightly lit. *See* Upson Dep. 36:11–16, J.A. at 81; that there was a clear view inside his toilet from the window of cell, *id.* 30:22–31:14, J.A. at 75–76; and that a correction officer summoned Defendant Wilson just after observing the vomit in Mr. Upson's toilet, *see id.* Mr. Upson even testified that Defendant Wilson saw him "starting to throw up." *Id.* 64:15–66:7, J.A. at 110–11. Defense counsel's failure to inquire specifically whether Mr. Upson *showed* Defendant Wilson his vomit — despite extensive questioning about what Mr. Upson *told* her — does not render Mr. Upson's deposition testimony inconsistent with his testimony in the verified complaint and in opposition to summary judgment.

And regardless of whether Defendant Wilson personally saw vomit, drawing reasonable inferences in Mr. Upson's favor, a rational jury could conclude all the same she was aware he had vomited. In his deposition, Mr. Upson testified that he alerted a correction officer to his symptoms, including that he was "throwing up." *Id.* 30:16–21, J.A. at 75. The officer looked "looked to the toilet to see if . . . what [Mr. Upson] said was true," and then, after verifying the presence of vomit, said he would summon a

nurse. *Id.* 30:22–31:3, J.A. at 75–75. Though a reasonable jury could infer the correction officer summoned Defendant Wilson without explanation, it could also infer he told Defendant Wilson that Mr. Upson had been vomiting. In the face of these competing plausible inferences, a genuine issue exists whether Defendant Wilson was aware of Mr. Upson's vomiting, regardless of whether she saw it. *See Sloley v. VanBramer*, 945, F.3d 30, 44 (2d Cir. 2019) ("[T]he [movants] are not entitled to the benefit of [one permissible] inference on their motion for summary judgment in light of [the non-movant's] competing plausible inference.").

3. Other Indicia Reinforce the Grounds for Inferring Defendant Wilson Knew of a Substantial Risk Mr. Upson Was Experiencing a Medical Emergency.

The district court also erred to the extent it underweighted additional indicia from which a jury could glean Defendant Wilson's awareness that Mr. Upson was seriously ill.

Foremost is evidence that Mr. Upson was experiencing other telltale bowel obstruction symptoms during his encounters with Defendant Wilson. It is uncontested that Mr. Upson told Defendant Wilson about

these symptoms.[6] *See* Wilson Decl. ¶ 17, J.A. at 35. And according to Mr. Upson, many manifested visibly: Defendant Wilson witnessed him doubled over in pain, *see* Upson Dep. 34:11–16, 64:15–66:7, J.A. at 79, 110–11; saw his profuse sweating, *see* Upson Decl. ¶ 37, J.A. at 249; Upson Decl. 65:10–18, J.A. at 110, ; watched as he struggled in pain to climb onto an examination table, *see* Upson Decl. ¶ 19, J.A. at 250; and saw him "tense[] up in pain" when she touched his stomach, *id.* ¶¶ 19–20, J. A. at 250; *see also* Upson Dep. 42:11–16, J.A. at 87. Viewed alongside other indicia of Mr. Upson's condition, it would not be irrational for a jury to conclude that the seriousness of Mr. Upson's condition was obvious to Defendant Wilson. *See Farmer*, 511 U.S. at 842 ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.").

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[6] Whether he told Defendant Wilson during their first encounter *is* contested. The magistrate judge discounted Mr. Upson's summary judgment testimony that he disclosed his symptoms during the first encounter, concluding that evidence contradicted Mr. Upson's deposition testimony. *See* R. & R. at 13, J.A. at 338. But Mr. Upson's summary judgment submissions on that point merely confirmed the allegations in his verified complaint, and thus were improperly disregarded. *See* Compl. ¶ 18, J.A. at 15, at ¶ 18; *see also supra* at 30 (discussing "sham issue of fact" doctrine).

For her part, Defendant Wilson suggests she believed, based on Mr. Upson's demeanor, that he was malingering. *See* Wilson Decl. ¶¶ 9, 38, J.A. at 34, 37.[7] But the parties' sharply conflicting testimony raises a factual dispute over the sincerity of that belief. And it is for a jury to decide whether Mr. Upson — who we now know was several hours into a life-threatening bowel obstruction — was "smiling," "laughing," and "joking," as Defendant Wilson claims, *id.* ¶¶ 8, 21, 38, J.A. at 34, 35, 37, or was in fact "hunched over in agony," Upson Decl. ¶ 6, J.A. at 248, "continuously throwing up," Upson Dep. 67:12–17, J.A. at 112, and pleading for treatment for his excruciating stomach pain, Upson Decl. ¶¶ 12–14, J.A. at 249, as Mr. Upson claims. *See Reeves*, 540 U.S. at 150 ("Credibility determinations . . . are jury functions, not those of a judge.").

And the record also contains evidence that an entire group of individuals in Mr. Upson's cell gallery loudly and collectively pleaded with

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[7] Mr. Upson himself testified he suspected Defendant Wilson did not believe him. *See* Upson Dep. 55:9–13, J.A. at 100. But that statement, which reflects pure speculation in the absence of personal knowledge, is not properly considered on summary judgment. *See Porter v. Quarantillo*, 722 F.3d 94, 97 (2d Cir. 2013) ("[O]nly admissible evidence need be considered by the trial court in ruling on a motion for summary judgment.") (quotation marks omitted).

Defendant Wilson to provide Mr. Upson help after she left his cell following their first encounter. Upson Dep. 35:5–15, J.A. at 35; Screahben Decl. ¶ 7, J.A. at 268. At his deposition, Mr. Upson testified that, after Defendant Wilson left his cell following their first encounter, "the guy's that's in the other cells on gallery who had heard [Mr. Upson] asking for help . . . started just yelling, saying for her to come back . . . ." Upson Dep. 35:5–14, J.A. at 80. This account is corroborated by Alexander Screahben. *See* Screabhen Decl. ¶ 7, J.A. at 268.

B. A Rational Jury Could Find Defendant Wilson Refused to Take Reasonable Measures to Abate the Risk of Harm to Mr. Upson.

The district court's summary judgment grant to Defendant Wilson hinged on the flawed conclusion that her examination of Mr. Upson's stomach foreclosed a finding of deliberate indifference. Mem.-Decision & Order 14, J.A. at 383. But the legitimacy of that examination is disputed, and Defendant Wilson's refusing to review Mr. Upson's medical records provides grounds on which a reasonable jury could otherwise find that she "fail[ed] to take reasonable measures to abate" the risk that Mr. Upson was experiencing a medical emergency — or in other words, that she acted with deliberate indifference. *Farmer,* 511 U.S. at 847.

1. The Examination Performed by Defendant Wilson Does Not Preclude Further Inquiry into Her Deliberate Indifference.

In granting summary judgment to Defendant Wilson, the district court reasoned that the physical exam she performed on Mr. Upson foreclosed a finding of her deliberate indifference. *See* Mem.-Decision & Order at 14–15, J.A. at 383–84.

But this Court has never accepted that just any examination will do. It is *not* the case that providing *some* medical treatment — of *any* character and no matter its legitimacy — insulates prison officials from constitutional liability. Indeed, this Court has repeatedly found the opposite. In *Hathaway*, for example, even frequent medical examinations by a prison doctor did not preclude a finding of deliberate indifference where the "course of treatment was largely ineffective and [he] declined to do anything more to improve [the plaintiff's] situation. 37 F.3d at 68. And in *Chance*, the Court recognized a prison dentist may act with deliberate indifference by choosing a less effective treatment plan — there, a tooth extraction instead of a filling. *See* 143 F.3d at 703. Together, these cases stand for the proposition that merely going through the motions of performing tasks associated with medical care but without providing

actual care can evince deliberate indifference. *See Tolliver v. Sidorowicz*, 714. F. App'x 73, 74 (2d Cir. 2018) (summary order) (citing *Chance*, 143 F.3d at 703) (recognizing that physicians may act with deliberate indifference by choosing a course of treatment they know will be ineffective); *Ruffin v. Deperio*, 97 F. Supp. 2d 346, 353 (W.D.N.Y. 2000) (stating that deliberate indifference could be pleaded despite frequent treatment by prison doctors where treatment was "cursory" or evidenced "apathy"); *Hudak v. Miller,* 28 F. Supp. 2d 827, 833 (S.D.N.Y. 1998) (denying summary judgment because a rational jury could decide, based on the facts and testimony of witnesses, that defendant doctor "must have known something was seriously wrong but chose not to investigate or test further"); *cf. Rouse v. Bolden*, 36 F. Supp. 2d 204, 205 (S.D.N.Y. 1999) (allegations that an employer conducted a "*pro forma* investigation [of allegations of sexual harassment], one largely intended to create a paper record, but not intended as a meaningful remedial inquiry" and "laughed at [complainant's] concerns" sufficient to survive summary judgment on deliberate indifference claim).

Here, the district court's categorical view of medical examinations ignores the genuine factual issue Mr. Upson has raised as to the

legitimacy of the stomach examination Defendant Wilson performed. Mr. Upson testifies that Defendant Wilson told him at the time of the examination that she "did not want to hear anything [he] had to say," Upson Decl. ¶ 21, J.A. at 250; that she did not care about the symptoms he described to her, Upson Dep. 67:12, J.A. at 112; and, from the very outset of the examination, that she would not be giving him any medication, *see* Upson Dep 66:25–67:7, J.A. at 111–12. Mr. Upson also testifies that she "immediately began to make light of his situation" when he entered Defendant Wilson's office during their second encounter, Upson Decl. ¶ 19, J.A. at 250; began "laughing really har[d]" at him, Upson Dep. 67:1–7, J.A. at 112; and told him he was "full of shit."[8] Upson Dep. 67:4–5, J.A. at 112; Upson Decl. ¶ 19, J.A. at 250.

Viewed in the light most favorable to Mr. Upson and drawing all reasonable inferences and resolving ambiguities in his favor, this testimony provides ample basis from which a reasonable jury could find Defendant Wilson's physical examination served no legitimate diagnostic

[8] Whether telling a patient who complains of a bowel obstruction that they are "full of shit" evidenced animus or contempt rising to the level of deliberate indifference is itself an additional triable factual issue.

goal but was instead a cover by which Defendant Wilson went through the motions of performing an exam whose result — denying treatment — was a *fait accompli* from the outset. In that sense, Mr. Upson's testimony reflects not "mere disagreement with Wilson's medical judgment," as the district court concluded. *See* Mem.-Decision & Order at 15, J.A. at 384. Rather, he has proffered evidence from which a reasonable jury could conclude Defendant Wilson's physical examination did not involve meaningful medical judgment at all. *See, e.g.*, *Ruffin*, 97 F. Supp. at 354 ("[A]ttempts to characterize plaintiff's allegations as mere negligence or disagreement over a course of treatment are unpersuasive. Plaintiff does not argue that he requested a specific type of medical care and was refused. Rather, he argues that the defendants' failure to act on his repeated complaints . . . combined with . . . obvious symptoms of serious medical problems . . . constitutes deliberate indifference . . . .").

Accordingly, the district court erred in finding that Defendant Wilson's medical examination of Mr. Upson precluded a finding of deliberate indifference.

2. A Rational Jury Could Find Defendant Wilson's Refusal to Review Mr. Upson's Medical Records Evinced Deliberate Indifference.

The district court also adopted the magistrate judge's reasoning that Defendant Wilson's failure to review Mr. Upson's medical records, even if proven, reflected at most a "lack of care," not deliberate indifference. Mem.-Decision & Order at 2 (quoting R. & R. at 12, J.A. at 337). But this misconstrues and understates the gravamen of Mr. Upson's testimony, which is not that Defendant Wilson merely *failed* to review his medical records but that she *refused* to do so despite his repeated requests and his description of specific aspects of those records that would confirm three prior bowel obstructions in recent years — all during his incarceration in DOCCS custody. *See* Upson Dep. 64:24–66:7, J.A. at 109–111; Upson Decl. at ¶¶ 12–13, 21–22, J.A. 249–50.

It is precisely this distinction — between failing and refusing to take action — that separates this case from those on which the magistrate judge relied in concluding that Defendant Wilson's conduct amounted to no more than negligence. *See* R. & R. at 12, J.A. at 337. In *Griffin v. Capra*, the court found the plaintiff failed to state a deliberate indifference claim where he alleged only that jail medical staff *failed* to

review his medical records, 18-CV-10405, 2021 WL 1226428, at *6 (S.D.N.Y. Mar. 31, 2021) — not, as Mr. Upson testifies here, that they refused. And in *Holmes v. Fell*, the plaintiff claimed prison nursing staff administered an inappropriate test after "intentionally disregard[ing]" information in his medical records. 856 F. Supp. 181, 183 (S.D.N.Y. 1994). Yet as the court there found in rejecting the plaintiff's deliberate indifference claim, the plaintiff conceded he never told the nursing staff about the relevant information in his records. *Id.* The same is not true for Mr. Upson. *See* Compl. ¶ 18, J.A. at 15; Upson Dep. 64:24–66:7, J.A. at 109–111; Upson Decl. at ¶¶ 12–13, 21–22, J.A. 249–50.

Viewing the record in the light most favorable to Mr. Upson and drawing reasonable inferences and resolving ambiguities in his favor, it would not be unreasonable for a jury to conclude that Mr. Upson's recent, extensive history of bowel obstructions was of obvious relevance to evaluating his present condition, involving symptoms he described as identical to those he experienced during his prior three bowel obstructions. *See* Compl. ¶ 16, J.A. at 15; Upson Dep. 64:24–66:7, J.A. at 109–111; Upson Decl. ¶ 21, J.A. at 250; *see also Farmer*, 511 U.S. at 842 ("[A] factfinder may conclude that a prison official knew of a substantial risk from the

very fact that the risk was obvious."). Nor then, would it be unreasonable for a jury to conclude that Defendant Wilson's *refusal* to confirm that history — beyond a mere failure — following Mr. Upson's repeated requests evinced not just carelessness but "a conscious disregard of a substantial risk of serious harm" to Mr. Upson. *Hathaway*, 99 F.3d at 553 (2d Cir. 1996); *see Ceparano v. Suffolk Cnty. Dep't of Health*, 485 F. App'x 505, 508 (2d Cir. 2012) (reversing dismissal of deliberate indifference claim where nurse, among other things, refused to obtain medical records from detainee's medical provider).[9]

And inferring deliberate indifference from Defendant Wilson's refusal to review Mr. Upson's medical records also aligns with how culpability is typically assessed under the criminal law doctrine of conscious avoidance.[10] Consistent with that doctrine, a factfinder may conclude a

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[9] *Ceparano*, involving the deliberate indifference claim of a pretrial detainee, was decided at a time when the courts of this circuit still evaluated such claims under the subjective deliberate indifference standard that applies here. *See* 485 F. App'x at 507 (citing *Caiozzo v. Koreman*, 581 F.3d 63, 69 (2d Cir. 2009), *overruled by Darnell*, 849 F3d. at 34–35)).

[10] As this Court has acknowledged, a "sufficiently culpable state of mind" for deliberate indifference under the Eighth Amendment "is a mental state equivalent to subjective recklessness, as that term is used in

"defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming that fact." *See Quinones*, 635 F.3d at 594; *see also Gabriel*, 125 F.3d at 98 ("A conscious avoidance instruction is appropriate when a defendant claims to lack some specific aspect of knowledge but where the evidence may be construed as deliberate indifference.").

Here, the conscious avoidance doctrine underscores the conclusion that Defendant Wilson acted with deliberate indifference, because the record supports the reasonable inference that, in rebuffing Mr. Upson's request that she review highly relevant medical history in his readily accessible medical records, Defendant Wilson intended to avoid learning information that would have substantiated Mr. Upson's claims, leaving her little choice but to do more.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT WHITE.

Mr. Upson also brought an Eighth Amendment claim against a second nurse, Elizabeth White. That claim centered on Defendant White's

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criminal law." *Salahuddin*, 467 F.3d at 280 (citing *Farmer*, 511 U.S. at 839–40).

refusal, in violation of DOCCS policy, to grant Mr. Upson's request for an emergency (i.e., unscheduled) sick call, resulting in an hours-long delay in the emergency treatment he ultimately would need. In granting summary judgment to Defendant White, the district court concluded that no evidence showed that she was aware of Mr. Upson's dire condition; and that her conduct in response could not constitute deliberate indifference in event. But as the record reflects, neither of these conclusions was correct, and the district court thus erred in granting summary judgment to Defendant White.

A. A Rational Jury Could Find Defendant White Knew of at Least a Substantial Risk Mr. Upson Was Experiencing a Medical Emergency.

The district court's decision granting summary judgment to Defendant White rested primarily on the conclusion that Mr. Upson failed to establish Defendant White's awareness of his dire condition. *See* Mem.-Decision & Order at 16, J.A. at 385. But to the contrary, Mr. Upson proffered evidence from which a reasonable jury could find Defendant White was aware of at least a substantial risk that Mr. Upson was seriously ill; and the record evidence in Defendant White's favor was thus not "so

overwhelming" on this point as to warrant summary judgment. *Hathaway*, 37 F.3d at 68.

Mr. Upson proffered evidence that he notified Defendant White — in "adamant" terms — he was having an emergency, Upson Dep. 52:20–24, J.A. at 97; Screahben Decl. ¶ 12, J.A. at 268; Compl. ¶ 24, J.A. at 16;[11] told her his symptoms, including that he'd been throwing up all night, *see* Upson Dep. 53:11–14, J.A. at 98; yelled after her as she walked away that he was suffering a bowel obstruction, *see* Upson Decl. ¶ 27, J.A. at 251; Screahben Decl. ¶¶ 12, J.A. at 268; and that others in the cell gallery joined in, yelling for her to help. *See* Screahben Decl. ¶ 12, J.A. at 268.

Discounting all this, the district court emphasized that Mr. Upson proffered no proof of "visible distress." Mem.-Decision & Order at 16, J.A. at 385. "[E]ven assuming Upson communicated that he felt as though he was having an emergency and vomiting," the court reasoned, "the mere fact that Mr. Upson made this statement does not suffice to prove that

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[11] A jury might reasonably find that Mr. Upson, who had frequent, routine contact with White, was not in the habit of pleading for emergency assistance related to bowel obstructions. *See* Upson Dep. 18:2–3, J.A. at 63; Upson Decl. ¶ 26, J.A. at 251.

these conditions actually existed." *Id.* at 15 (quoting R. & R. at 14, J.A. at 339).

But the Eighth Amendment imposes no "visible distress" requirement. It would suffice for a deliberate indifference claim that Defendant White knew of at least a *substantial risk* to Mr. Upson, which does not require Defendant White's certain knowledge that an emergency existed. *See Salahuddin*, 467 F.3d at 280 ("A harm need not be "surely or almost certainly [to] result" for a risk to be considered "substantial.").

Nor, in any event, is it beyond dispute that Defendant White saw no signs of Mr. Upson's visible distress: Defendant White spoke with Mr. Upson through the same cell door, with the same window through which Mr. Upson claims a correction officer and Defendant Wilson both saw his vomit. *See* Upson Dep. 51:19–52:6, J.A. at 96–97. It would not be beyond reason for a jury to conclude that Defendant White, too, could see Mr. Upson's vomit through that window.

And visible distress aside, a jury could infer Defendant White's knowledge from the surrounding circumstances. *See Farmer*, 511 U.S. at 842 (identifying "inference from circumstantial evidence" as a "usual way" in which a prison official's culpable knowledge is determined). By the

time he saw Defendant White, Mr. Upson had pleaded for treatment from multiple correction officers and no fewer than two other nurses. *See generally* Compl., J.A. at 13; Upson Aff., J.A. at 243; Upson Decl., J.A. at 247. One of those nurses, whose shift directly preceded Defendant White's, confirmed she would review his medical records. Compl. ¶ 22; J.A. at 16; Upson Dep. 48:21–49:9, J.A. at 93–94; Upson Aff. ¶¶ 10–11, J.A. at 244. A jury could find that Defendant White knew nothing of all this. But it would not be irrational for the jury instead to draw a contrary conclusion instead: that in an institutional like a prison, where continuity of medical care presumably depends on the routinized exchange of patient information between staff from shift to shift, Defendant White would have known from staff on prior shifts about Mr. Upson's pleas for aid and of the information reflected in his medical records. *See Slolely v. VanBramer*, 945 F.3d 30, 44 (2d Cir. 2019) (concluding summary judgment inappropriate because movants were not entitled to benefit of one permissible inference because competing plausible inference existed); *see also Domenech v. Parts Auth, Inc.*, 653 F. App'x 26, 28 (2d Cir. 2016) (summary order) ("The district court erred in picking between competing

plausible inferences that could have been draw from the evidence submitted.").

A factfinder assessing Defendant White's awareness of the risk of harm to Mr. Upson need not confine itself to considering any one piece of evidence alone. *See Rupp*, 91 F.4th at 634 (recognizing impropriety of "piecemeal" consideration of the record on summary judgment) (quoting *Kaytor*, 609 F.3d at 537). Assessing *all* the relevant evidence here, it would not be unreasonable for a jury to infer Defendant White was aware of a substantial risk that Mr. Upson was experiencing the bowel obstruction for which he sought assistance.

B. A Rational Jury Could Find Defendant White Refused to Take Reasonable Measures to Abate the Risk of Harm to Mr. Upson.

Adopting the magistrate judge's reasoning in full, the district court also concluded that Defendant White's refusal, in violation of DOCCS policy, to grant Mr. Upson's emergency sick-call request did not — and could not — reflect deliberate indifference, even if she had been aware of Mr. Upson's condition. But the court's conclusion misconstrues Mr. Upson's claim here and reflects a series of other legal and factual errors, any

which would justify reversal of the court's summary judgment grant to Defendant White.

1. Mr. Upson's Deliberate Indifference Claim Against Defendant White Is About More Than a Mere Technical Violation of Prison Policy.

The district court found no deliberate indifference in Defendant White's responding to Mr. Upson's request for an emergency sick call by instructing him to submit a regular sick call instead, resulting in an 8.5-hour delay in Mr. Upson's treatment. Mem.-Decision & Order at 3, 15–17, J.A. at 372, 384–86. Though conceding this instruction violated DOCCS policy requiring that Mr. Upson be able to make an unscheduled emergency request, the court adopted the magistrate judge's reasoning that "White's failure to 'adhere strictly to state or institutional policy' is 'not sufficient to establish a constitutional violation.'" R. & R. at 15, J.A. at 340 (quoting *H'shaka v. O'Gorman*, 444 F. Supp. 3d 355, 373 (N.D.N.Y. 2020)); Mem.-Decision & Order at 15–17, J.A. 384–86.

But this misunderstands the thrust of Mr. Upson's claim against Defendant White, which is that her denying Mr. Upson an emergency sick call evinced deliberate indifference not because it violated DOCCS policy but because it markedly and unnecessarily delayed his access to

treatment for a life-threatening emergency, thereby creating a substantial risk he would suffer serious harm. *See Farmer*, 511 U.S. at 847 (holding that "failing to take reasonable measures to abate" a known and substantial risk of harm reflects deliberate indifference).

Though mere violations of DOCCS policy do not suffice to establish an Eighth Amendment violation, this does not foreclose the possibility that conduct violating DOCCS policy may also reflect deliberate indifference. *See, e.g.*, *Steele v. Ayotte*, 3:17-cv-1370 (CSH), 2018 WL 731796, at *9 (D. Conn. Feb. 6, 2018) (finding prison staff's failure to adhere to seatbelt policy both violated prison policy and stated an Eighth Amendment). Here, the record supports the conclusion that by denying Mr. Upson's request for an emergency sick call, Defendant Wilson not only violated DOCCS policy but also refused to take "reasonable measures" in response to the risk that Mr. Upson required urgent medical attention. *See Farmer*, 511 U.S. at 847. The district court failed to appreciate this, and thus erred in concluding that Defendant White's refusal to grant Mr. Upson's emergency sick call request could not have reflected deliberate indifference.

2. A Rational Jury Could Find That Defendant White's Causing an Hours-Long Delay in Mr. Upson's Access to Emergency Medical Care Reflected Deliberate Indifference.

The district court also adopted the magistrate judge's conclusion that the 8.5-hour delay in Mr. Upson's access to emergency treatment for his bowel obstruction was "neither shown to be intentional, nor long enough to constitute deliberate indifference." Mem.-Decision & Order at 3 (citing R. & R. at 15, J.A. at 340), 15, 17, J.A. at 372, 384–86. Neither conclusion is correct.

First, the intentionality of the delay caused by Defendant White is, at the very least, a triable issue. It is obvious on its face, and would have been apparent to Defendant White, that requiring Mr. Upson to wait until the next regular sick call, rather than addressing his concern immediately, would result in a delay in his receiving treatment. *See Farmer*, 511 U.S. at 842 ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."). A jury concluding that Defendant White was aware of a substantial risk that Mr. Upson was experiencing a medical emergency could thus reasonably conclude she knew the life-threatening potential consequences of denying Mr. Upson's emergency sick call request.

Second, the notion that an 8.5-hour delay in emergency treatment for Mr. Upson's bowel obstruction could not support his deliberate indifference claim is groundless, both legally and factually. As this Court has recognized, deliberate indifference can arise from shorter delays in treatment than Defendant White caused here. *See, e.g.*, *Bass v. Jackson*, 790 F.2d 260, 263 (2d Cir. 1986) (finding five-to-six-hour delay in medical care could constitute deliberate indifference); *Archer*, 744 F.2d at 16–17 (denying summary judgment and noting that a five-hour delay could constitute deliberate indifference).

Whether a delay in treatment amounts to deliberate indifference "necessarily depends on a careful assessment of the facts at issue in a particular case." *Cash*, 654 F.3d at 334. This Court has recognized that denials of treatment causing lesser pain and lesser exposure to imminent danger than Mr. Upson endured here can nonetheless rise to the level of deliberate indifference. *See, e.g., Brock v. Wright* 315 F.3d 158, 163 (2d Cir. 2003) ("We do not . . . require an [incarcerated person] to demonstrate that he or she experiences pain that is at the limit of the human ability to bear, nor do we require a showing that his or her condition will degenerate into a life-threatening one."). The record here thus gives ample

basis for a jury to conclude that the 8.5-hour delay here, which caused severe and unrelenting pain to Mr. Upson in the as he awaited emergency treatment for a life-threatening bowel obstruction, reflected Defendant White's deliberate indifference.

CONCLUSION

For all these reasons, a reasonable jury could find that Defendants Wilson and White each acted with deliberate indifference to Mr. Upson's serious medical needs. This Court should reverse the decision below granting their motion for summary judgment on Mr. Upson's Eighth Amendment claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The Brief for Plaintiff-Appellant complies with the word limit of Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Rule 32(f) of the Federal Rules of Appellate Procedure ("FRAP"), the brief contains 12,294 words.

The brief also complies with the typeface and typestyle requirements of FRAP Rules 32(a)(5) and 32(a)(6) because it was prepared in 14-point font in Century Schoolbook typeface using Microsoft Word.

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