ORAL ARGUMENT NOT YET SCHEDULED

No. 17-5012

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GORDON C. REID,
Plaintiff – Appellant pro se,

v.

MARK INCH, Director, Federal Bureau of Prisons,
Defendant – Appellees.

Appeal from the United States District Court
for the District of Columbia, No. 1:15-cv-00375-RMC
(Hon. Rosemary M. Collyer)

BRIEF OF APPOINTED *AMICUS CURIAE* IN SUPPORT OF APPELLANT REID

Erica Hashimoto
Director

Paola Pinto
Caleb P. Redmond
Sean Stein
Student Counsel

GEORGETOWN UNIVERSITY LAW CENTER
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, DC 20001
Tel: 202-662-9555
applit@law.georgetown.edu

Appointed Amicus Curiae in Support of Gordon C. Reid

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As called for by Circuit Rule 28, Amicus Curiae states:

A. PARTIES AND AMICI

The parties to this proceeding and in the proceedings before the district court are plaintiff-appellant Gordon C. Reid and defendant-appellee Mark Inch, Director, Federal Bureau of Prisons. This court appointed Erica Hashimoto, Director of the Appellate Litigation Program of the Georgetown University Law Center, as amicus curiae to present arguments in support of Mr. Reid in this proceeding only.

B. RULINGS UNDER REVIEW

Mr. Reid appeals a November 8, 2016 Order entered by the Honorable Rosemary M. Collyer of the United States District Court for the District of Columbia granting Appellees' motion to dismiss, JA120, and the district court's December 8, 2016 denial of his motion for reconsideration. JA121.

C. RELATED CASES

This case has not previously been before this or any court on review. No related cases are currently pending before this or any court of which Amicus is aware.

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GLOSSARY OF ABBREVIATIONS

AD: Administrative Detention
DS: Disciplinary Segregation
BOP: Bureau of Prisons
SHU: Special Housing Unit
USP: United States Penitentiary

STATEMENT OF JURISDICTION

Gordon C. Reid sued the Director of the Bureau of Prisons ("BOP") in his official capacity seeking equitable relief for BOP's informal policy and practice of denying Mr. Reid's regulatory rights to exercise and to receive subscription magazines.[1] *See generally* JA6. The Administrative Procedure Act provides the statutory basis for Mr. Reid's challenge to BOP's policy. *See* 5 U.S.C. § 702 (providing review for a "person suffering legal wrong because of agency action"); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (holding that "an official-capacity suit is . . . to be treated as a suit against the entity"). Thus, the district court had federal question jurisdiction under 28 U.S.C. § 1331. *Oryszak v. Sullivan*, 576 F.3d 522, 524–25 (D.C. Cir. 2009) (noting § 1331 "confers jurisdiction on federal courts to review agency action" (citation and punctuation omitted)).

[1] Congress waived sovereign immunity for equitable claims against agency action. *See Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006) (noting that plaintiff "limited the relief he seeks to a declaratory judgment and an injunction, and there is no doubt that § 702 waives the Government's immunity from actions seeking relief 'other than money damages.'" (quoting 5 U.S.C. § 702) (other citations and punctuation omitted)).

On November 8, 2016, the district court entered a final order dismissing Mr. Reid's case as moot, and on December 8, 2016, it denied Mr. Reid's timely motion for reconsideration. Mr. Reid timely filed his notice of appeal from both orders on January 25, 2017. Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in ruling on a mootness argument presented for the first time in BOP's reply to its motion to dismiss without providing Mr. Reid notice of his right to respond.

2. Whether Mr. Reid's claim for declaratory relief challenging BOP's ongoing policy of the remains a live controversy even after his transfer out of the Special Housing Units that initially gave rise to his claims.

3. Whether the consistent and ongoing threat of re-designation to SHU brings Mr. Reid's claims within mootness exceptions.

STATEMENT OF THE CASE

Between March 2008 and July 19, 2016, BOP confined Gordon Reid in a Special Housing Unit ("SHU") at least thirty times, in nine separate prisons. *See* JA83–89**.** On February 23, 2015, while at United States Penitentiary ("USP") Tucson and serving his twenty-sixth SHU confinement, Mr. Reid sued the Director of the Bureau of Prisons in his official capacity for declaratory, injunctive, and mandamus relief. *See* JA10. Mr. Reid alleged that in "each" prison facility that placed him in SHU, BOP officials maintained an informal "policy" and practice that deprived him of outside exercise for "minor transgressions," subscription magazines, and meaningful access to administrative remedies. *Id.* at 7–8 (mentioning BOP's "policy" six times). Mr. Reid alleged that such deprivations violated BOP regulations. *Id.*[2]

I. Procedural History

After Mr. Reid filed his complaint, BOP filed a motion to dismiss or, alternatively, for summary judgment, arguing that the case was moot because Mr. Reid had been transferred from the prison he was in when

[2] Mr. Reid alleges violations of 28 C.F.R § 540.71 and 28 C.F.R § 451.31(g).

he filed his complaint, USP Tucson, to a new BOP facility, USP Coleman. DC Doc.14 at 15–16 ("Plaintiff, however, is no longer confined at any of the facilities where the alleged incidents occurred.").[3] The district court informed Mr. Reid of the consequences of failing to respond to BOP's motion. JA51–55.

After some delay,[4] Mr. Reid filed a response and a cross motion for summary judgment. He argued the case was not moot because he was challenging an ongoing policy. DC Doc. 22 at 10. He further argued that even if he did not present a live case or controversy, his case evaded mootness because he had been repeatedly housed in SHU at each of the institutions in which he has been confined. *Id*. at 12. Additionally, he argued his term of confinement in each facility did not exceed two years before he was transferred to a facility in a differing jurisdiction. *Id.* Mr. Reid did not contest BOP's evidence that he had been transferred to a different facility, so he did not offer an affidavit on this point.

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[3] DC Doc. refers to the district court docket numbers.

[4] The district court initially did not receive Mr. Reid's response and granted BOP's motion. Mr. Reid then filed a motion to vacate the judgment, explaining that he had tried to respond to the court's order. JA57–58. The district court granted the motion to vacate on June 2, 2016. JA60.

BOP filed a reply, arguing that the case was moot because Mr. Reid was no longer confined in the SHU that gave rise to his claim. DC Doc. 26 at 9. It further argued that Mr. Reid's claims were linked exclusively to SHU and because Mr. Reid "has not been confined in SHU within the past year" and "has not alleged any continuing violations at USP Coleman," his claims were moot. *Id.* In support, BOP attached an affidavit stating that Mr. Reid was no longer housed in SHU and had been in general population at USP Coleman with the exception of one twelve-hour period. JA72–76. BOP also attached inmate records with nearly a year's worth of data it had not originally provided in support of its motion. JA83. Specifically, BOP's reply relied on Inmate History Quarters Assignment data from August 2015 through July 2016. *Id.*

On November 8, 2016, the district court granted BOP's motion to dismiss and denied Mr. Reid's cross motion for summary judgment. JA120. Relying on BOP's reply, the court held that the case was moot because "for the past straight year, [Mr. Reid] has not been confined to the Special Housing Units that gave rise to [his] claim." JA118–19 (last alteration in original).

II. Statement of Facts

Because much of this appeal turns on Mr. Reid's history of being transferred in and out of SHU, a description of that history follows.[5] Chart 1, compiled from records BOP filed with the district court in support of its motion and reply, shows Mr. Reid's thirty transfers in and out of SHU from his date of entry on August 1, 2007 through July 19, 2016, under either administrative detention ("AD") or disciplinary segregation ("DS") status.[6] As Chart 1 illustrates, Mr. Reid spent at least 764 days—a little more than two years—in SHU. *See* JA83–89. Chart 2, based on the same BOP records, depicts Mr. Reid's transfers from facility to facility. Notably, there are four periods in SHU that occurred *after* Mr. Reid filed his complaint, one of which took place after his transfer from USP Tucson to USP Coleman.

BOP places inmates in SHU either for administrative detention or for disciplinary reasons. 28 C.F.R. § 541.23. Administrative detention

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[5] Mr. Reid has approximately forty-eight months left on a 220-month sentence, imposed for interfering with commerce by threats of violence. DC Doc. 14 at 2.

[6] Both charts 1 and 2 are based on BOP records, but those records appear imprecise and unclear. The charts represent Amicus' understanding of those records.

occurs for a variety of non-punitive reasons, including pending classification or reclassification, investigation, and transfer. *Id*. BOP staff also can place prisoners in SHU under AD status for their own protection. *Id.* For example, BOP placed Mr. Reid in SHU partly because he required protection after being falsely labeled a "sex offender," a designation that subjected him to being "attacked and otherwise brutalized." DC Doc. 22 at 3.

CHART 1: TIME SPENT IN SEGREGATED CONFINEMENT[7]

	Institution	AD/ DS	Dates	Length of Time
1	Oklahoma City	AD	4/21/08 – 5/06/08	15 days
2*	Terre Haute	DS	4/15/10	15 days
3	Terre Haute	DS	8/05/10 – 8/06/10	1 day
4	Terre Haute	DS	9/01/10 – 9/08/10	7 days
5	Oklahoma City	AD	9/22/10 – 9/24/10	2 days
6	Pollock	AD	9/24/10 – 10/20/10	26 days

[7] *See* JA20–30, 83–89. The asterisks represent at least two instances marked in Mr. Reid's Inmate Disciplinary Data, JA20–30, with no corresponding record on the Inmate History quarters document, JA83–89.

7	Pollock	AD	9/22/11 – 9/26/11	4 days
8	Pollock	AD	10/25/11 – 12/21/11	57 days
9	Pollock	AD	1/23/12 – 1/28/12	5 days
10	Pollock	AD	4/23/12 – 4/23/12	1 day
11	Pollock Medium	AD	4/23/12 – 7/18/12	86 days
12	Pollock	AD	7/18/12 – 8/22/12	35 days
13	Atwater	AD	9/27/12 – 9/27/12	1 day
14	Atwater	AD	10/30/12 – 11/04/12	5 days
15	Atwater	DS	11/04/12 – 11/5/12	1 day
16	Atwater	DS	11/05/12 – 12/06/12	31 days
17	Atwater	AD	12/06/12 – 1/08/13	33 days
18	Atwater	AD	1/08/13 – 1/10/13	2 days
19	Atwater	AD	1/10/13 – 1/11/13	1 day
20*	Atwater	DS	4/03/13	30 days
21	Atwater	AD	5/03/13 – 6/27/13	55 days
22	Mendota	AD	6/27/13 – 7/18/13	21 days
23	Lee	AD	8/27/13 – 10/29/13	63 days
24	Tucson	AD	3/02/14 – 3/03/14	1 day
25	Tucson	AD	5/14/14 – 7/31/14	78 days
26	Tucson	AD	11/30/14 – 3/30/15	120 days (Complaint Filed: 2/23/15)
27	Tucson	AD	5/08/15 – 7/02/15	55 days

28	Oklahoma City	AD	7/02/15 – 7/08/15	6 days
29	Oklahoma City	DS	7/08/15 – 7/14/15	6 days
30	Coleman	AD	4/14/16 – 4/15/16	12 hours
		TOTAL: 23 AD SHU Confinements 7 DS SHU Confinements		**TOTAL:** 764 days

CHART 2: FACILITY TRANSFERS[8]

	Facility	**Dates Present**	**Amount of Time**
Initial	Devens	8/1/07 – 10/5/07	65 Days
	N/A[9]	10/5/07 – 3/7/08	154 Days
1	Brooklyn	3/7/08 – 4/2/08	26 Days
2	Lewisburg	4/2/08 – 4/21/08	19 Days
3	**Oklahoma City**	4/21/08 – 5/6/08	15 Days
4	McCreary	5/6/08 – 10/15/08	162 Days
6	**Terre Haute**	3/20/09 – 9/22/10	551 Days
7	**Oklahoma City**	9/22/10 – 9/24/ 10	2 Days

[8] *See* JA 83–89. The bolded facilities are those in which Mr. Reid was confined in SHU.

[9] There is a five-month span, from October 10, 2007, through March 7, 2008, during which BOP's records do not account for Mr. Reid's location. JA88. Whether he spent time in SHU during this period is unknown.

8	**Pollock**	9/24/10 – 4/23/12	608 Days
9	**Pollock Medium**	4/23/12 – 7/18/12	86 Days
10	**Pollock**	7/18/12 – 8/22/12	35 Days
11	Oklahoma City	8/22/12 – 8/23/12	1 Day
12	Victorville	8/23/12 – 9/7/12	15 Days
13	**Atwater**	9/7/12 – 6/27/13	293 Days
14	**Mendota**	6/27/13 – 7/18/13	21 Days
15	Victorville	7/18/13 – 8/15/13	28 Days
16	Oklahoma City	8/15/13 – 8/19/13	4 Days
17	Atlanta	8/19/13 – 8/20/13	1 Day
18	**Lee**	8/20/13 – 10/29/13	70 Days
19	Atlanta	10/29/13 – 10/31/13	2 Days
20	Oklahoma City	10/31/13 – 11/1/13	1 Day
21	**Tucson**	11/1/13 – 7/2/15	608 Days
22	**Oklahoma City**	7/2/15 – 7/14/15	12 Days
23	**Coleman**	7/14/15 – 4/15/16	276 Days

SUMMARY OF ARGUMENT

Without notifying Mr. Reid of his right to respond to a newly-raised argument and new evidence in BOP's reply, the district court improperly relied on this new evidence and argument to conclude that Mr. Reid's claims were moot. JA118 (finding Mr. Reid was no longer "confined to the Special Housing Units that gave rise to [his] claims" (alteration in original)). Both the reliance without notice and the mootness conclusion were wrong.

The district court had a duty to notify Mr. Reid of his right to respond to BOP's new argument—supported by new evidence—raised for the first time when replying to Mr. Reid's opposition to BOP's motion to dismiss. *See Neal v. Kelly*, 963 F.2d 453, 456–56 (D.C. Cir. 1992). It was not until its reply brief that BOP argued Mr. Reid's case was mooted by his removal from the SHU's that gave rise to his claim. Because Mr. Reid is a pro se incarcerated litigant, the district court had two options when faced with this new argument and evidence: (1) notify Mr. Reid of his right to respond with a sur-reply and/or evidence of his own, or (2) exercise its discretion to decline to consider BOP's argument raised for the first time in its reply. *See id.*; *Flynn v. Veazey Const. Corp.*, 310

F. Supp. 2d 186, 189 (D.D.C. 2004). The district court declined to exercise *either* option—instead ruling on the newly-raised argument without first notifying Mr. Reid of his right to respond. That was error.

Because BOP failed to establish that Mr. Reid's claim was moot, this Court need not remand for the district court to consider mootness on a properly constructed record. This Court should thus reverse. Mr. Reid's seeks declaratory relief as to BOP's ongoing policy or practice that deprives Mr. Reid of his claimed regulatory rights to exercise and to receive his subscription magazines. *See* JA7–9. As long as that practice continues, the purely legal question of its validity, as repeatedly applied to Mr. Reid, presents a live controversy. *Del Monte Fresh Produce Co. v. United States*, 570 F.3d 316, 321 (D.C. Cir. 2009) ("[A] plaintiff's challenge will not be moot where it seeks declaratory relief as to an ongoing policy." (citation omitted)).

Finally, even if Mr. Reid's case presents no live case or controversy, the district court erred in failing to recognize his case meets two mootness exceptions: voluntary cessation and capable of repetition, yet evading review. BOP has frequently transferred Mr. Reid and confined him at least thirty times in SHU, often for purely administrative reasons. These

consistent confinements, and subsequent deprivations, have both satisfied Mr. Reid's reasonable expectation of recurrence and made it impossible for BOP to show he will not be subject to the same illegal conduct.

Mr. Reid's case meets the voluntary cessation exception to mootness because he will likely suffer the same deprivations in the future. BOP's transfer of Mr. Reid to general population at a new prison does not alleviate the very real possibility of future segregated confinement with the accompanying deprivations. And because BOP cannot show with *absolute clarity* that its voluntary transfer of Mr. Reid quelled any reasonable expectation of recurrence—either by showing Reid cannot be placed in SHU again or by showing its policy of deprivation has ended and cannot be reinstated—the district court erred in dismissing his claim as moot. *See, e.g.*, *City of Erie v. Pap's A.M.,* 529 U.S. 277, 287–288 (2000).

Mr. Reid's case is also capable of repetition, yet evades review. In fact, the controversy is not only *capable* of repetition—it has been repeated. *See Doe v. Sullivan*, 938 F.2d 1370, 1378–79 (D.C. Cir. 1991). Mr. Reid's history of at least thirty instances of segregated confinement,

including confinement *after* his complaint, has given him a reasonable expectation of re-designation to SHU where he will suffer the same deprivations. And Mr. Reid has never stayed in SHU longer than four months which all but eliminates the possibility that he will ever "fully litigate" his case all the way through Supreme Court review before the deprivations stop. The controversy thus evades review. *See Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 369 (D.C. Cir. 1992) ("By ['evading review'], the Supreme Court has meant evading Supreme Court review.").

STANDARD OF REVIEW

This Court reviews *de novo* the district court's dismissal on mootness grounds, *Schmidt v. United States*, 749 F.3d 1064, 1068 (D.C. Cir. 2014), accepting all Mr. Reid's factual allegations as true, *see Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 49 (D.C. Cir. 2016). As a pro se litigant, Mr. Reid's pleadings must be "liberally construed." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citations and punctuation omitted).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THE CASE BASED ON A NEW ARGUMENT AND NEW EVIDENCE IN BOP'S REPLY WITHOUT NOTIFYING MR. REID OF HIS RIGHT TO RESPOND

The district court relied on a newly-integrated affidavit and ruled on a novel mootness argument in BOP's reply, finding Mr. Reid stated "nothing to the contrary" in response. JA118–19. Given the unique circumstances of this case—Mr. Reid's pro se status and BOP's eleventh-hour argument and evidence—the court should have notified him of the potential consequences of BOP's reply and allowed him the opportunity to assert something to the contrary before dismissing his case on those grounds. *See Neal*, 963 F.2d at 456–57; *see also Moore v. Agency for*

Intern. Dev., 994 F.2d 874, 876 (D.C. Cir. 1993) ("Mere time [for a *pro se* plaintiff to correct a defect] is not enough, if knowledge of the consequences of not making use of it is wanting."). Because Mr. Reid was entitled to notice that he did not receive, this Court should construe his pleadings especially liberally in considering the merits of Amicus' arguments that his claims are not moot. *See Erickson*, 551 U.S. at 94.

A. BOP's reply included new evidence supporting a new argument

BOP's reply to Mr. Reid's opposition to its motion to dismiss presented both a new argument that Mr. Reid's claims were moot and new evidence (a new affidavit and inmate records) to support that argument. DC Doc. 26 at 6–10; JA72–76. The district court provided Mr. Reid neither the direction he needed to contest BOP's new argument nor an opportunity to introduce evidence contesting that new argument before it ruled on that ground. *See Neal*, 963 F.2d at 457 ("[A] prisoner … not represented by counsel is entitled to receive notice of the consequences of failing to respond with affidavits to a motion for summary judgment." (citation omitted)).

In its motion to dismiss, BOP argued the case was moot because Mr. Reid had been transferred to a new prison facility. DC Doc 14 at 15–

16 ("Plaintiff, however, is no longer confined at any of the facilities where the alleged incidents occurred."). It emphasized that the capable-of-repetition-yet-evading-review exception only applies when "the *same* controversy will recur involving the *same* complaining party." *Id.* at 16.

In its reply, BOP supplemented its earlier argument with a *new* argument for mootness supported by *new* evidence. DC Doc. 26 at 9. It argued for the first time that Mr. Reid's claims were linked *exclusively* to SHU rather than the particular prison in which he was confined. *Id.* And because Mr. Reid "has not been confined in SHU within the past year" and "has not alleged any continuing violations at USP Coleman," his claims were moot. *Id.* In support, BOP filed a new affidavit, Declaration of An Tran dated July 21, 2016, asserting that Mr. Reid was no longer housed in SHU although he experienced a twelve hour period in SHU at USP Coleman. JA73. It also attached inmate records with nearly a year's worth of new data it had not presented in the motion to dismiss. JA83.

B. The district court should have notified Mr. Reid of his right to respond or amend his complaint before ruling on the new argument

The district court erred in dismissing this case on BOP's newly-raised mootness grounds without first providing Mr. Reid adequate guidance or an opportunity to respond with evidence or arguments to the contrary. *Cf. Pa. Elec. Co. v. Fed. Energy Regulatory Comm'n*, 11 F.3d 207, 209 (D.C. Cir. 1993) ("[O]rdinarily we will not consider arguments raised for the first time in a reply brief."). District courts routinely grant non-movants an opportunity to respond to new arguments raised in replies, especially after the introduction of new evidence. *See, e.g.*, *Flynn*, 310 F. Supp. 2d at 189 ("If the movant raises arguments for the first time in his reply to the non-movant's opposition, the court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply."). Indeed, in repeatedly declining to consider new arguments raised in reply briefs, this Court has recognized both the "manifest[] unfair[ness]" and the risk of "improvident or ill-advised" opinions if appellees do not have an opportunity to respond in writing. *See, e.g.*, *Herbert v. Nat'l Acad. of Sciences.*, 974 F.2d 192, 196 (D.C. Cir. 1992)

("This Court, of course, generally refuses to entertain arguments raised for the first time in an appellant's reply brief.").

In light of these "pragmatic and plain" reasons for allowing a pro se incarcerated litigant to respond to BOP's newly-raised arguments, *see id.,* the district court should have notified Mr. Reid of his right to respond. *See Neal*, 963 F.2d at 455–56; *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968) (noting the "handicaps" imposed by detention on prisoners unrepresented by counsel). In *Neal*, this Court came to the "inescapable" conclusion that the district court was required to give a pro se prisoner "notice of the consequence of failing to respond" to a motion to dismiss that, because of the court's reliance on matters "outside the pleadings," was treated as a motion for summary judgment. 963 F.2d at 455–56. It held that that if a pro se prisoner—subject to the "handicaps resulting from detention and indigency"—faces dismissal of his case, then "reasonable opportunity presupposes *notice*." *Id.* at 456 (emphasis added).

Just as the plaintiff in *Neal* was entitled to a reasonable opportunity to respond when facing dismissal of his case, so too Mr. Reid was entitled to the same reasonable opportunity before the district court

considered a new argument—based on a new affidavit—that would result in dismissal of his case. And because "reasonable opportunity presupposes notice," Mr. Reid was entitled to notice that he would face dismissal unless he responded to BOP's new argument and evidence. *See id*.

Accordingly, the district court should have either declined to consider BOP's new argument or notified Mr. Reid of his opportunity to respond with arguments and affidavits that contradict those newly-submitted by BOP.[10] *See Neal*, 963 F.2d at 456; *Moore*, 994 F.2d at 876; *Pettaway v. Teachers Ins. & Annuity Ass'n of Am.*, No. 16-7137, 2017 WL 2373078, at *1 (D.C. Cir. April 4, 2017) (ignoring argument raised in reply); *Flynn*, 310 F. Supp. 2d at 189. The district court's duty here was especially critical because Mr. Reid's right to respond to BOP's reply is

[10] At the very least, Mr. Reid could have submitted an affidavit or brief arguing that the prison records BOP submitted have flaws. For example, there is a period of 5 months between October 2007 and March 2008, where Mr. Reid's location is unaccounted for in the BOP prison records. JA57. Additionally, had the district court provided the requisite notice, Mr. Reid could have amended his complaint as of right. *See Moore,* 994 F.2d at 876–77 (holding that a pro se plaintiff should be given latitude to amend his complaint "when justice so requires").

rooted in case law and is not clear from the district court's rules. See Fed. R. Civ. P. 27 & 56.

In the absence of any notice to Mr. Reid, the district court should have declined to consider the new arguments in the reply. And because BOP's mootness argument utterly lacks merit even on its uncontested record, *see infra* Parts II and III, this Court should reverse the district court's holding that this case is moot, even though this Court often remands for further development of the record when a party has not been given proper notice of its opportunity to respond, *see*, *e.g.*, *Neal*, 963 F.2d at 458. This Court should proceed to consider all arguments in Amicus' brief, including those not fully raised before the district court, given that Mr. Reid was not given notice and therefore had no opportunity to raise these arguments in response to BOP's argument.

II. THE DISTRICT COURT ERRED IN DISMISSING MR. REID'S DECLARATORY JUDGMENT CLAIM AGAINST BOP'S ONGOING POLICY

In its two-paragraph decision, the district court held that Mr. Reid's claims were moot because Mr. Reid was no longer "confined to the Special Housing Units that gave rise to [his] claims." JA118–19. It continued: "And in the absence of 'a cognizable cause of action,' a plaintiff has 'no

basis upon which to seek declaratory relief.'" JA119 (quoting *Ali v. Rumsfeldi*, 649 F.3d 762, 778 (D.C. Cir. 2011). So holding, the court dismissed Mr. Reid's case.

To the extent the district court held that Mr. Reid did not have a cause of action for declaratory relief, the court erred. The Administrative Procedure Act provides the cause of action for Mr. Reid's suit against the BOP Director in his official capacity. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (holding that "an official-capacity suit is . . . to be treated as a suit against the entity"); *Koretoff v. Vilsack*, 614 F.3d 532, 536 (D.C. Cir. 2010) ("The Administrative Procedure Act establishes a cause of action for those 'suffering legal wrong because of agency action . . . .'") (quoting 5 U.S.C. § 702)). Mr. Reid claims that BOP's ongoing practice—of depriving him of exercise and his subscription magazines when in SHU—violates his regulatory rights. *See* JA6–8. Even if Mr. Reid's claim for injunctive relief was moot, the district court must independently consider Mr. Reid's claim for declaratory judgment. *See Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121–22 (1974) ("Clearly, the District Court had the duty to decide the appropriateness and the merits of the declaratory

request irrespective of its conclusion as to the propriety of the issuance of the injunction." (citation and punctuation omitted)).

To the extent the district court held that Mr. Reid's claim for declaratory judgment was itself mooted because Mr. Reid was no longer in the SHU's that gave rise to his claims, the court erred. Mr. Reid challenges more than past actions arising from particular SHU's: He disputes BOP's ongoing policy and practice denying him exercise and subscription magazines when in SHU. *See* JA7–8 (alleging BOP's "policy" of deprivation six times). Mr. Reid's claim for declaratory judgment on the validity of BOP's ongoing policy presents a live controversy, even if the specific deprivations that gave rise to his case stopped when BOP removed him from the particular SHU's mentioned in his complaint. *Del Monte,* 570 at 321 ("[T]hat the specific conduct that gave rise to the case has ceased does not mean that the challenge to the legality of that conduct is moot. [A] plaintiff's challenge will not be moot where it seeks declaratory relief as to an ongoing policy." (citation omitted)).

Payne Enterprises dictates that Mr. Reid's claim is not moot. *Payne Enterprises, Inc. v. United States*, 837 F.2d 486 (D.C. Cir. 1988). There,

the Air Force maintained an "informal" policy and practice of denying Payne Enterprises' frequent Freedom of Information Act (FOIA) requests. *Id.* at 491. The Air Force changed course and granted the company's requests before this Court reviewed the case, thereby mooting the company's claim for *previously*-requested information. But this Court held the company's claim for declaratory judgment not moot because the company "claims that an agency *policy or practice* will impair [its] lawful access to information in the future." *Id.*

Just as the Air Force granting Payne Enterprises' request did not moot the company's challenge to the Air Force's underlying policy or practice, BOP transferring Mr. Reid to a new prison and out of SHU does not moot his challenge to BOP's underlying policy that applies at all BOP facilities. Mr. Reid faces an agency's ongoing informal practice that deprives him of what he alleges the law guarantees him. When he filed his complaint, Mr. Reid had been confined to SHU twenty-six times, in eight different BOP prisons. *See* Chart 1, *supra* at 8–10. Each time, guards refused to deliver Mr. Reid's magazines and deprived him of outside exercise in violation of his regulatory rights. *See* JA7–8. Mr. Reid alleged BOP's systemic "*policy or practice* . . . will impair [his] lawful

access" to exercise and magazines when he is in SHU. *See Payne Enterprises*, 837 F.2d at 491. His case thus is a live controversy

III. MR. REID'S CASE FITS WITHIN EXCEPTIONS TO MOOTNESS

The district court dismissed Mr. Reid's action as moot because he was no longer "confined to the Special Housing Units that gave rise to [his] claims." JA118–19 (quoting BOP's reply). Even if that were true, Mr. Reid's case meets two exceptions to mootness: (A) voluntary cessation, and (B) capable of repetition, yet evading review. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000) (voluntary cessation); *Weinstein v. Bradford,* 423 U.S. 147, 149 (1975) (per curiam) (capable of repetition, yet evading review).[11] These doctrines protect against BOP's ability to force dismissal of claims brought against it by temporarily ceasing the illegal conduct or by relying on the fact that no isolated instance of deprivation while in SHU will last long enough to be fully litigated.

[11] The district court did not rule on either of these exceptions despite the fact that Mr. Reid raised the capable of repetition, yet evading review exception. *See* DC Doc. 22 at 11–13.

As relevant to both exceptions, BOP's decisions to deprive Mr. Reid of his rights while in SHU and then end those deprivations by transferring him out are voluntary actions within BOP's exclusive control. *City of Erie,* 529 U.S. at 287–88 (holding the voluntary-cessation exception considers the *acting party's* cessation); *James v. United States Dep't of HHS*, 824 F.2d 1132, 1136 (D.C. Cir. 1987) (holding capable-of-repetition exception does not apply if court must assume the plaintiff will violate valid law).

As of July 19, 2016, BOP had placed Mr. Reid in SHU thirty times, twenty-three of which were administrative detention rather than disciplinary segregation. *See* Chart 1, *supra* at 8–10. And he alleged similar deprivations at "each" of the facilities that housed him. *See* JA8. BOP can put Mr. Reid in AD for a variety of non-punitive reasons, most of which are *exclusively* within BOP's control. 28 C.F.R. § 541.22. These reasons include pending classification or reclassification, holdover status (during transfer to a designated institution or other destination), investigation, transfer, and protection cases. 28 C.F.R. § 541.23. All of these AD placements would have been at BOP's discretion and not as a consequence of Mr. Reid's conduct. Because Mr. Reid suffered

deprivations during each stay in SHU under AD status, those deprivations were voluntary actions within BOP's control.

A. The voluntary-cessation exception applies because the challenged action can reasonably be expected to recur

The district court erred in dismissing Mr. Reid's case as moot because BOP failed to show that its voluntary transfer of Mr. Reid from SHU to the general prison population represents a permanent cessation of the challenged activity. *See* JA119 (holding the case moot because Reid was not currently deprived of his rights). In *Friends of the Earth*, the Supreme Court emphasized that a defendant has the "heavy burden" of showing its voluntary action made it "*absolutely clear* that the allegedly wrongful behavior cannot reasonably be expected to recur." 528 U.S. at 189 (citation omitted) (emphasis added); *see also Aref v. Lynch*, 833 F.3d 242, 251 (D.C. Cir. 2016).

Assuming Mr. Reid was not in SHU when the district court dismissed his case, he likely was not suffering the alleged deprivations then. But this Court has held that a prisoner's relief from deprivations suffered in isolation may not render a case moot where, as here, there is a likelihood of the same harm recurring. *See Aref*, 833 F.3d at 251 (holding the challenged action—an allegedly unconstitutional curtailing

of communication in isolation—was reasonably expected to recur because the prisoners "point to the likelihood of redesignation" from general population to isolation). This remains true even if that removal from isolation happened years previously with no subsequent stays in a segregated unit. *Id.*

Further, under the voluntary cessation standard, BOP must show its transfer of Mr. Reid from SHU represents a *permanent* cessation of the challenged activity. *See Friends of the Earth*, 528 U.S. at 190 (holding that even "speculative" claims that the defendant will engage in or resume harmful conduct may be sufficient to "overcome mootness"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). In *Lyons*, the Court noted a citywide moratorium on police chokeholds—an action that diminished the likelihood that any particular individual would be choked by police—would not have mooted an otherwise valid claim for injunctive relief, because the moratorium by its terms was not permanent. *Id.*

Like the *Lyons* moratorium, BOP's voluntary cessation was not permanent. Quite the opposite. Although Mr. Reid was transferred out of SHU after he filed his complaint, BOP transferred him back into SHU at least four times between the filing of his complaint and the dismissal

of his case. *See* Chart 1, *supra* at 8–10. Given this background, BOP cannot show that its transfer of Mr. Reid to general population represents the kind of voluntary cessation that makes it *absolutely clear* the challenged action cannot reasonably be expected to happen again. Mr. Reid's claim meets the voluntary cessation exception to mootness.

B. The challenged conduct will likely happen again and cease before the case can be fully litigated

Even if the specific deprivations alleged by Mr. Reid have ceased, the district court failed to recognize that his claim meets the exception for cases that are capable of repetition, yet evading review. *See FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, 462–463 (2007); *Del Monte,* 570 F.3d at 321–22. Mr. Reid demonstrated that (1) he has a reasonable expectation that he will be subjected to the same challenged deprivations, and (2) the duration of that challenged action is too short to be fully litigated prior to its cessation. *FEC,* 551 U.S. at 462–63. Mr. Reid has thus demonstrated the "exceptional circumstance" required to show that his case is capable of repetition yet evading review. *Del Monte*, 570 F.3d at 321–22 (citation and punctuation omitted).

1. The deprivation of Mr. Reid's rights while housed in SHU is capable of repetition

BOP's actions are capable of repetition because Mr. Reid has a reasonable expectation that he will again be confined in SHU where he will likely suffer the same deprivations. *See Weinstein,* 423 U.S. at 149. Mr. Reid has demonstrated that BOP segregated him in almost every facility that confined him for longer than twenty-eight days, including four instances of segregation *after* he filed his complaint.[12] He therefore has demonstrated far more than "some likelihood" that he again will be confined in SHU and deprived of exercise and magazines. *See Doe v. Sullivan*, 938 F.2d 1370, 1378–79 (D.C. Cir. 1991) ("It is enough . . . that the litigant faces *some likelihood* of becoming involved in the same controversy in the future." (citations and punctuation omitted) (emphasis added)); *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988) (noting the "reasonable expectation" standard should be applied without excessive "stringency"). The Supreme Court does not require a recurrence to be more probable than not. Instead a challenged action may be found capable of repetition based on expectations that, while reasonable, are

[12] Reid's 162-day stay at USP McCreary serves as the only exception, and occurred almost a decade ago.

not "demonstrably probable." *Honig,* 484 U.S. at 318 n.6; *see Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (explaining that capable of repetition requires *either* a showing of "reasonable expectation" *or* "demonstrated probability").

If past is prologue, the challenged action in this case is not only *capable* of repetition for reasons outside of Mr. Reid's control, but more than *likely* to repeat given the pattern of at least twenty-three SHU confinements and deprivations. *See Olmstead v. LC. Ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999) (holding that post-complaint transfer did not moot patients' challenge to their confinement in segregated environment because "in view of the multiple institutional placements [they had] experienced, the controversy they brought to court [was] capable of repetition, yet evading review"); *cf. Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345 (2014) ("We have observed that past enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical." (citation and punctuation omitted)). This experienced history of repetitive conduct, including post-complaint deprivations, has given Mr. Reid a reasonable expectation that he will be subjected to the same challenged action.

2. The challenged action evades review

Mr. Reid filed his complaint during his longest stay in AD: 120 days. *See* Chart 1, *supra* at 8–10. Because that is nowhere near enough time to "fully litigate[]" his case, BOP's challenged action evades review. *District of Columbia v. Doe*, 611 F.3d 888, 894–95 (D.C. Cir. 2010) (noting that "there can be no doubt that a one-year placement order under the IDEA is, by its nature, too short [in duration] to be fully litigated prior to its … expiration") (internal citation and punctuation omitted) (alterations in original).

Mr. Reid's 120-day deprivation evades even district court review, let alone review by this Court and the Supreme Court. *See Christian Knights of Ku Klux Klan Invisible Empire*, 972 F.2d at 369 (defining "evading review" as "evading Supreme Court review" (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547 (1976)). In 2017, the average civil case in the District of Columbia district court took 219 days from filing to disposition. *See* Administrative Office of U.S. Courts, United States District Courts – National Judicial Caseload Profile, at 2 (2017), *archived at* https://perma.cc/5UJC-9HE9. In 2017, the average appeal in this Court took 350 days from filing notice of appeal to disposition. *See*

Administrative Office of U.S. Courts, U.S. Court of Appeals – Judicial Caseload Profile, at 4 (2017), *archived at* https://perma.cc/NVP6-NLM7. Even if Mr. Reid was placed in SHU on his very first day at USP Tucson, and remained there the majority of his stay, he would *still* have been transferred out, and would no longer be suffering deprivation, by the time his claim could be carried through this appeal. And these calculations do not include any length of time added for Supreme Court review.

Ultimately, because Mr. Reid has a reasonable expectation that he will again be subjected to the same action, and because that action cannot be full litigated before its expiration, the district court should have recognized that his claim is capable of repetition, yet evades review.

CONCLUSION

Because Mr. Reid's case is not moot, this Court should reverse the district court's orders and remand for consideration on the merits of his claim.

Respectfully Submitted,
/s/ Erica Hashimoto
Erica Hashimoto
Amicus Curiae on Behalf of
Appellant Gordon Reid
Georgetown Univ. Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555

March 2, 2018

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6365 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook, Size 14 in Microsoft Word (2013).

/s/ Erica Hashimoto
Erica Hashimoto, Director
GEORGETOWN LAW CENTER
Appellate Litigation Program
111 F Street, N.W., Suite 306
Washington, DC 20001
(202) 662-9555

Court-Appointed Amicus Curiae in Support of Appellant Gordon C. Reid.

Dated: March 2, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 2, 2018, I electronically filed the Opening Brief of Appointed Amicus Curiae in Support of the Appellant Gordon C. Reid and Joint Appendix with the Clerk of the Court. I certify that the following attorneys are registered CM/ECF participants for whom service will be accomplished electronically by the CM/ECF system and with hard copies provided by Federal Express: R. Craig Lawrence and Daniel Schaefer. I also certify that on this day I sent, by Federal Express, paper copies of the foregoing Opening Brief to Gordon C. Reid, appellant, at the following address:

Mr. Gordon Reid
BOP No. 02540-049
Lewisburg, USP
U.S. Penitentiary
Lewisburg, PA 17837

Dated: March 2, 2018

/s/ Erica Hashimoto
Erica Hashimoto, Director
GEORGETOWN LAW CENTER
Appellate Litigation Program
111 F Street, N.W., Suite 306
Washington, DC 20001
(202) 662-9555

Court-Appointed Amicus Curiae in Support of Appellant Gordon C. Reid.

STATUTORY ADDENDUM

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28 C.F.R § 540.71. Procedures

(a)(1) At all Bureau institutions, an inmate may receive hardcover publications and newspaper only from the publisher, from a book club, or from a bookstore.

(2) At medium security, high security, and administrative institutions, an inmate may receive softcover publications (for example, paperback books, newspaper, clippings, magazines, and other similar items) only from the publisher, from a book club, or from a bookstore.

(3) At minimum security and low security institutions, an inmate any receive softcover publications (other than newspapers) from any source.

(4) The Unit Manager may make an exception to the provisions of paragraphs (a)(1) and (2) of this section of the publication is no longer available from the publisher, book club, or bookstore. The Unit Manager shall require that the inmate provide written documentation that the publication is no longer available from these sources. The approval or disapproval of any request for an exception is to be documented, in writing, on an Authorization to Receive a Package form which will be used to secure the item.

(b) The Warden may reject a publication only if it is determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity. The Warden may not reject a publication solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant. Publications which may be rejected by a Warden include but are not limited to publications which meet one of the following criteria:

(1) It depicts or describes procedures for the construction or use of weapons, ammunition, bombs or incendiary devices;

(2) It depicts, encourages, or describes methods of escape from correctional facilities, or contains blueprints, drawings or similar descriptions of Bureau of Prisons institutions;

(3) It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs;

(4) It is written in code;

(5) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;
(6) It encourages or instructs in the commission of criminal activity;
(7) It is sexually explicit material which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates criminal activity.

(c) The Warden may not establish an excluded list of publications. This means the Warden shall review the individual publication prior to the rejection of that publication. Rejection of several issues of a subscription publication is not sufficient reason to reject the subscription publication in its entirety.

(d) Where a publication is found unacceptable, the Warden shall promptly advise the inmate in writing of the decision and the reasons for it. The notice must contain reference to the specific article(s) or material(s) considered objectionable. The Warden shall permit the inmate an opportunity to review this material for purposes of filing an appeal under the Administrative Remedy Program unless such review may provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity.

(e) The Warden shall provide the publisher or sender of an unacceptable publication a copy of the rejection letter. The Warden shall advise the publisher or sender that he may obtain an independent review of the rejection by writing to the Regional Director within 20 days of receipt of the rejection letter. The Warden shall return the rejected publication to the publisher or sender of the material unless the inmate indicates an intent to file an appeal under the Administrative Remedy Program, in which case the Warden shall retain the rejected material at the institution for review. In case of appeal, if the rejection is sustained, the rejected publication shall be returned when appeal or legal use is completed.

(f) The Warden may set limits locally (for fire, sanitation or housekeeping reasons) on the number or volume of publications an inmate may receive or retain in his quarters. The Warden may authorize an inmate additional storage space for storage of legal materials in accordance with the Bureau of Prisons procedures on personal property of inmates.

28 C.F.R § 451.31. Conditions of confinement in the SHU.

Your living conditions in the SHU will meet or exceed standards for healthy and humane treatment, including, but not limited to, the following specific conditions:

(a) Environment. Your living quarters will be well-ventilated, adequately lighted, appropriately heated, and maintained in a sanitary condition.

(b) Cell Occupancy. Your living quarters will ordinarily house only the amount of occupants for which it is designed. The Warden, however, may authorize more occupants so long as adequate standards can be maintained.

(c) Clothing. You will receive adequate institution clothing, including footwear, while housed in the SHU. You will be provided necessary opportunities to exchange clothing and/or have it washed.

(d) Bedding. You will receive a mattress, blankets, a pillow, and linens for sleeping. You will receive necessary opportunities to exchange linens.

(e) Food. You will receive nutritionally adequate meals.

(f) Personal hygiene. You will have access to a wash basin and toilet. You will receive personal items necessary to maintain an acceptable level of personal hygiene, for example, toilet tissue, soap, toothbrush and cleanser, shaving utensils, etc. You will ordinarily have an opportunity to shower and shave at least three times per week. You will have access to hair care services as necessary.

(g) Exercise. You will receive the opportunity to exercise outside your individual quarters at least five hours per week, ordinarily on different days in one-hour periods. You can be denied these exercise periods for a week at a time by order of the Warden if it is determined that your use of exercise privileges threatens safety, security, and orderly operation of a correctional facility, or public safety.

(h) Personal property. In either status, your amount of personal property may be limited for reasons of fire safety or sanitation.

(1) In administrative detention status you are ordinarily allowed a reasonable amount of personal property and reasonable access to the commissary.

(2) In disciplinary segregation status your personal property will be impounded, with the exception of limited reading/writing materials, and religious articles. Also, your commissary privileges may be limited.

(i) Correspondence. You will receive correspondence privileges according to part 540, subpart B.

(j) Telephone. You will receive telephone privileges according to part 540, subpart I.

(k) Visiting. You will receive visiting privileges according to part 540, subpart D.

(l) Legal Activities. You will receive an opportunity to perform personal legal activities according to part 543, subpart B.

(m) Staff monitoring. You will be monitored by staff assigned to the SHU, including program and unit team staff.

(n) Programming Activities. In administrative detention status, you will have access to programming activities to the extent safety, security, orderly operation of a correctional facility, or public safety are not jeopardized. In disciplinary segregation status, your participation in programming activities, e.g., educational programs, may be suspended.

(o) Administrative remedy program. You can submit a formal grievance challenging any aspect of your confinement in the SHU through the Administrative Remedy Program, 28 CFR part 542, subpart B.

28 C.F.R. § 541.22. Status when placed in the SHU.

When placed in the SHU, you are either in administrative detention status or disciplinary segregation status.

(a) Administrative detention status. Administrative detention status is an administrative status which removes you from the general population when necessary to ensure the safety, security, and orderly operation of correctional facilities, or protect the public. Administrative detention status is non-punitive, and can occur for a variety of reasons.

(b) Disciplinary segregation status. Disciplinary segregation status is a punitive status imposed only by a Discipline Hearing Officer (DHO) as a sanction for committing a prohibited act(s).

28 C.F.R. § 541.23. Administrative detention status.

You may be placed in administrative detention status for the following reasons:

(a) Pending Classification or Reclassification. You are a new commitment pending classification or under review for Reclassification.

(b) Holdover Status. You are in holdover status during transfer to a designated institution or other destination.

(c) Removal from general population. Your presence in the general population poses a threat to life, property, self, staff, other inmates, the public, or to the security or orderly running of the institution and:

(1) Investigation. You are under investigation or awaiting a hearing for possibly violating a Bureau regulation or criminal law;
(2) Transfer. You are pending transfer to another institution or location;
(3) Protection cases. You requested, or staff determined you need, administrative detention status for your own protection; or
(4) Post-disciplinary detention. You are ending confinement in disciplinary segregation status, and your return to the general population would threaten the safety, security, and orderly operation of a correctional facility, or public safety.

5 U.S.C. § 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.