UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CHARLES HAMNER, Plaintiff-Appellant, v. DANNY BURLS, et al. Defendants-Appellees.	No. 18-2181 Appeal from the United States District Court for the Eastern District of Arkansas (No. 5:17-CV-79 JLH-BD)

MOTION OF PROFESSOR JOHN F. STINNEFORD FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING AND/OR REHEARING *EN BANC*

NICHOLAS M. MCLEAN

CADES SCHUTTE LLP
1000 Bishop Street, 12th Floor
Honolulu, HI 96813
(808) 521-9262
nmclean@cades.com
Attorney for Proposed Amicus Curiae
Professor John F. Stinneford

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Pursuant to Rule 29, Federal Rules of Appellate Procedure, Professor John F. Stinneford ("Movant" or "Professor Stinneford") respectfully requests leave to file the accompanying brief *amicus curiae* in support of Plaintiff-Appellant's petition for panel rehearing and/or rehearing *en banc*, filed herein on October 16, 2019. Movant, through counsel, has conferred with counsel for Plaintiff-Appellant and counsel for Defendants-Appellees. Plaintiff-Appellant, through counsel, has consented to the filing of the proposed *amicus* brief, while Defendants-Appellees, through counsel, have not consented to the filing of the proposed *amicus* brief.

Proposed *amicus curiae* John F. Stinneford is a professor of law at the University of Florida Levin College of Law who has written extensively on the history of the Eighth Amendment and, in particular, the original public meaning of the Cruel and Unusual Punishments Clause. His work has been published in numerous scholarly journals including the *Georgetown Law Journal*, the *Northwestern University Law Review*, the *Virginia Law Review*, the *Notre Dame Law Review*, and the *William & Mary Law Review*. Pertinent to the legal questions at issue in this case, Professor Stinneford's published works include: *Experimental Punishments*, 95 Notre Dame L. Rev. (forthcoming 2019), *available at*

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3474090; *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441 (2017); and *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739 (2008).

Professor Stinneford proposes to submit the enclosed brief in order to offer historical context for this Court regarding the original public meaning of the Cruel and Unusual Punishments Clause of the Eighth Amendment, and regarding the history of the practice of long-term solitary confinement in the United States. As such, the proposed *amicus* brief is intended to alert the Court to the broader historical context associated with Plaintiff-Appellant's claims, and thus to provide additional information that may be of service to the Court and that is relevant to the disposition of this case.

CONCLUSION

For the foregoing reasons, Movant respectfully requests leave from this Court to file a brief *amicus curiae* in support of the petition for panel rehearing and/or rehearing *en banc* filed by Plaintiff-Appellant Charles Hamner.

Date: October 23, 2019

/s/ Nicholas M. McLean

NICHOLAS M. MCLEAN
Counsel of Record

CADES SCHUTTE LLP
1000 Bishop Street, 12th Floor
Honolulu, HI 96813
(808) 521-9262
nmclean@cades.com
Attorney for Proposed Amicus Curiae
Professor John F. Stinneford

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

CADES SCHUTTE LLP

Date: October 23, 2019

/s/ Nicholas M. McLean
NICHOLAS M. MCLEAN
Attorney for Proposed Amicus Curiae
Professor John F. Stinneford

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BRIEF *AMICUS CURIAE* OF PROFESSOR JOHN F. STINNEFORD IN SUPPORT OF THE PETITION OF PLAINTIFF-APPELLANT CHARLES HAMNER FOR REHEARING BY PANEL AND/OR REHEARING *EN BANC*

NICHOLAS M. MCLEAN
Counsel of Record

CADES SCHUTTE LLP
1000 Bishop Street, 12th Floor
Honolulu, HI 96813
(808) 521-9262
nmclean@cades.com
Attorney for Amicus Curiae *Professor John F. Stinneford*

RULE 29(c)(5) STATEMENT

No counsel for a party authored this brief in whole or in part.

No counsel or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amicus curiae* or his counsel contributed money that was intended to fund the preparation or submission of this brief.

Date: October 23, 2019

/s/ Nicholas M. McLean

NICHOLAS M. MCLEAN
Counsel of Record

CADES SCHUTTE LLP
1000 Bishop Street, 12th Floor
Honolulu, HI 96813
(808) 521-9262
nmclean@cades.com
Attorney for Amicus Curiae *Professor John F. Stinneford*

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Professor John F. Stinneford respectfully submits this brief *amicus curiae* contingent on the granting of the accompanying motion for leave. The brief urges the Court to grant the petition for panel rehearing and/or rehearing *en banc* filed by Plaintiff-Appellant Charles Hamner.

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae John F. Stinneford is a law professor at the University of Florida Levin College of Law who has written extensively on the history and original meaning of the Eighth Amendment. His published works include: *Experimental Punishments*, 95 Notre Dame L. Rev. (forthcoming 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3474090 [Stinneford, *Experimental Punishments*]; *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441 (2017) [Stinneford, *Cruel*]; and *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739 (2008) [Stinneford, *Unusual*].[1] Professor Stinneford submits this brief to offer historical context for the Court regarding the original public meaning of the Cruel and Unusual Punishments Clause of the Eighth Amendment, and regarding the history of the practice of long-term solitary confinement in the United States.

[1] Parts of this brief have been drawn and adapted from the above-referenced articles.

SUMMARY OF ARGUMENT

This case presents constitutional questions of exceptional importance regarding the permissible limits of the practice of long-term solitary confinement[2] under the Eighth and Fourteenth Amendments. This brief is intended to offer historical context for the Court as it considers whether to grant Plaintiff-Appellant's request for panel rehearing and/or rehearing *en banc*.

As a matter of original public meaning, the Eighth Amendment's Cruel and Unusual Punishments Clause was understood to prohibit cruel innovation in punishment. The word "cruel" was originally understood to mean "unjustly harsh" and the word "unusual" was understood to mean "contrary to long usage." Taken as a whole, the Clause was originally understood to prohibit punishments that are unjustly harsh in light of longstanding prior practice, either because they involve a barbaric or unduly severe method of punishment or because they are significantly disproportionate to the offender's culpability as measured against longstanding prior practice. Under the original meaning of the Clause, a punishment can only be considered "usual"—that is, firmly part of the constitutional tradition—if it enjoys universal, public reception over a very long period of time.

[2] Although the panel decision uses the term "administrative segregation," this brief—like the Petition itself (*see* Pet. at 2 n.1) uses the phrase "solitary confinement." *See id.* (observing that "[a]dministrative segregation 'is better known as solitary confinement'" (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring)).

Judged against this original meaning, the long-term solitary confinement to which Charles Hamner was subjected likely violates the Eighth Amendment. History has shown long-term solitary confinement to be a failed experiment that is both "cruel" and "unusual." This practice has not enjoyed anything close to "long usage." It was tried for several decades in the nineteenth century but was then largely abandoned because its effects—insanity, self-mutilation, and suicide—were extraordinarily harsh and severe. It also never achieved universal reception. It was never used in all American jurisdictions, and for much of its life in the nineteenth century it was confined to Pennsylvania and a small number of other states. Accordingly, the controversial reintroduction of the practice of long-term solitary confinement in the 1980s and 1990s represents the very sort of cruel innovation in punishment that the Cruel and Unusual Punishments Clause was originally understood to prohibit.

ARGUMENT

I. Under Its Original Public Meaning, The Cruel and Unusual Punishments Clause Prohibits Punishments That Are Unjustly Harsh In Light Of Longstanding Practice.

The text of the Eighth Amendment—"[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"—was drawn, with minor alterations, from the Virginia Declaration of Rights of 1776[3]

[3] Va. Decl. of Rts. § 9 (1776).

and the English Bill of Rights of 1689.[4] Historical evidence suggests that the drafters and ratifiers of all three of these provisions considered themselves to be restating a longstanding common-law prohibition that was common to both England and the United States. Under its original meaning, the Cruel and Unusual Punishments Clause prohibits cruel innovations—punishments that are unjustly harsh in light of longstanding prior practice. The Clause is premised on the idea that the longer a punishment is used, and the more universally it is received, the more likely it is to be just, reasonable, and to enjoy the consent of the people. New punishment practices that are significantly harsher than the baseline established by longstanding prior practice are cruel and unusual because they are unjust in light of the traditional practices they are replacing or supplementing. *See* Stinneford, *Experimental Punishments*, at 103-04.

In the context of the Eighth Amendment, the word "unusual" was a term of art derived from the common law. Although most lawyers today think of the common law as judge-made law, it was traditionally described as the law of "custom" and "long usage." *See* Stinneford, *Cruel*, at 468-71; Stinneford, *Unusual*, at 1768-71. A central idea was that a practice or custom could attain the status of law if it were used throughout the jurisdiction for a very long time. Characteristics such as universality and long usage justified legal enforcement of a practice. *Id.*

[4] An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne (1689), in 6 *The Statutes of the Realm* 142, 143 (1819).

Conversely, "Americans in the late 18th and early 19th centuries described as 'unusual' governmental actions that had 'fall[en] completely out of usage for a long period of time[.]'" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (citing and quoting Stinneford, *Unusual*, at 1770-17, 1814). In 1769, for example, the Virginia House of Burgesses described Parliament's attempt to revive a long-defunct statute that would permit the trial of American protesters in England—in derogation of rights to venue and vicinage—as "new, *unusual*, … unconstitutional and illegal." Journals of the House of Burgesses, 1766-1769, at 215 (John Pendleton Kennedy ed., 1906) (emphasis added). Likewise, in the Declaration of Independence, the Continental Congress complained of the recent English practice of calling colonial legislatures at "places unusual." The Declaration of Independence para. 6 (1776).

Read in light of its original meaning, the Cruel and Unusual Punishments Clause would not prohibit all new punishments. A new punishment practice that is not significantly harsher than the traditional practices it replaces would not be cruel and unusual. And a punishment's usage over time may be instructive. Usage over time reveals two types of information relevant to this inquiry. First, it shows how society responds to the punishment over time. Some punishments achieve universal reception and maintain this status over a period of numerous generations; others do not. Second, usage over time reveals characteristics of the punishment that may not

be obvious at the time of adoption—in particular, the harshness of the suffering the punishment inflicts relative to the harshness of the traditional punishments it replaced.

II. The History Of Long-Term Solitary Confinement Indicates that the Practice Is Both "Unusual" and "Cruel" Within the Original Meaning of the Eighth Amendment.

The first American prisons were built in the late eighteenth century. *See* Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 L. & Soc. Inquiry 1604, 1612 (2018) [Rubin & Reiter, *Continuity*]. Initially, solitary confinement was not a dominant feature of incarceration. Over time, however, prison reformers started turning toward the idea of solitary confinement of large numbers of prisoners on the theory that the practice might foster rehabilitation and help ensure order in prison. Over the course of the nineteenth century, prison achieved universal reception as corporal and shaming punishments fell away. But long-term solitary confinement, after an initial phase of popularity, came to be rejected by the 1860s because of its cruel effects. It survived at the very margins of penal practice during the twentieth century before being revived in the 1980s and 1990s.

In 1821, New York engaged in a major experiment in systematic long-term solitary confinement at its Auburn State Prison. The state legislature passed an act authorizing prison inspectors to "select a class of convicts to be composed of the

oldest and most heinous offenders, and to confine them constantly in solitary cells" in the hope that these offenders would be reformed. Gershom Powers, *A Brief Account of the Construction, Management, and Discipline &c. &c. of the New-York State Prison at Auburn* 32 (1826) [Powers, *Account*]. The result of this experiment was devastating. In their famous study of the American penitentiary system, Beaumont and Tocqueville described the Auburn experiment as follows:

> This trial, from which so happy a result had been anticipated, was fatal to the greater part of the convicts: in order to reform them, they had been submitted to complete isolation; but this absolute solitude, if nothing interrupt [sic] it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills.
>
> The unfortunates, on whom this experiment was made, fell into a state of depression, so manifest, that their keepers were struck with it; their lives seemed in danger, if they remained longer in this situation; five of them, had already succumbed during a single year; their moral state was not less alarming; one of them had become insane; another, in a fit of despair, had embraced the opportunity when the keeper brought him something, to precipitate himself from his cell, running the almost certain chance of a mortal fall.

G. de Beaumont & A. de Toqueville, *On the Penitentiary System in the United States, and Its Application in France* 5 (1833) (citations omitted); *see also* Powers, *Account*, at 36 ("[O]ne [prisoner was] so desperate, that he sprang from his cell, when his door was opened, and threw himself from the fourth gallery, upon the pavement … . Another beat and mangled his head against the walls of his cell, until he destroyed one of his eyes."). The results of this initial experiment were so

dire that New York dropped it after less than two years and gave most of the prisoners pardons. *Id.*

Problems similar to those that occurred at Auburn also arose several years later in the Pennsylvania prison system, which had also attempted total isolation of prisoners. Rubin & Reiter, *Continuity*, at 1614-17. Prisoners quickly fell into poor health and had to be released from their cells. *Id.* By the late 1830s, reports started surfacing that the system was causing "hallucinating prisoners, 'dementia,' and 'monomania.'" Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 456-57 (2006) [Smith, *Effects*]. In 1847, Francis Gray compared an Auburn model prison in Charlestown to the Eastern State Penitentiary at Cherry Hill, and noted that both death and insanity rates at Cherry Hill far outstripped those seen at Charlestown. *See* Francis C. Gray, *Prison Discipline in America* 106, 109 (London, John Murray 1847). He concluded that "it appears that the system of constant separation [according to the Pennsylvania plan] … even when administered with the utmost humanity, produces so many cases of insanity and of death as to indicate most clearly, that its general tendency is to enfeeble the body and the mind." *Id*. at 181.

Other states that instituted long-term solitary confinement experienced problems similar to those described above. For example, the physician for the New

Jersey Penitentiary, which initially followed the Pennsylvania model, reported that total isolation led to "many cases of insanity." Smith, *Effects*, at 459 (quoting *Eighteenth Report, in* 2 *Reports of the Prison Discipline Society, Boston* 300 (Boston, T. R. Marvin 1855)).

By the 1860s, the tide had turned against long-term solitary confinement. Penologists rejected the idea that either isolation or silence could assist in the reform of prisoners. *See* David J. Rothman, *Perfecting the Prison: United States, 1789-1865, in The Oxford History of the Prison* 111, 124-25 (Norval Morris & David J. Rothman eds., 1995); Smith, *Effects*, at 465. Rather, such practices were seen as pointless exercises that significantly harmed the well-being of prisoners for no good reason. Thus, "[t]he founding nation of the modern prison systems—the United States—was among the first to abandon large scale solitary confinement." Smith, *Effects*, at 465; *see also* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 487 (1997) [Haney & Lynch, *Regulating*] (noting that by the early twentieth century, the use of long-term solitary confinement "in actual practice … had largely ended"). "[B]y the turn of the nineteenth century, the experiment with widespread use of solitary appeared to be over[.]" Alexander A. Reinert, *Solitary Troubles*, 93 Notre Dame L. Rev. 927, 939 (2018).

The history of the practice of long-term solitary confinement in the United States demonstrates that it is not a "usual" method of punishment within the original meaning of the Cruel and Unusual Punishments Clause, and it is likely a cruel and unusual one. *See* Stinneford, *Experimental Punishments*, at 139-40; *see also, e.g.*, Merin Cherian, Note, *Cruel, Unusual, and Unconstitutional: An Originalist Argument for Ending Long-Term Solitary Confinement*, 56 Am. Crim. L. Rev. 1759, 1774-78 (2019). As discussed above, a punishment can only be considered "usual"—that is, firmly part of the constitutional tradition—if it enjoys universal, public reception over a very long period of time. Although the precise period of time necessary to establish a punishment as "usual" cannot be defined with precision, history indicates that it would likely need to be a century or more of universal reception.

Long-term solitary confinement has not enjoyed anything close to "long usage." It was tried for several decades in the nineteenth century but was then largely abandoned because its effects were too harsh. It was never used in all American jurisdictions, and for much of its life in the nineteenth century it was confined to Pennsylvania and a small number of other states. Accordingly, it never achieved universal reception, and the reception it did receive lasted well under one hundred years. Having essentially fallen out of use prior to its controversial reintroduction in the 1980s and 1990s, the current practice of long-term solitary

confinement represents an unjustly severe departure from traditional punishment practices. Today, moreover, the lessons of historical experience are further reinforced by a substantial scholarly consensus documenting the devastating effects of long-term solitary confinement. *See, e.g.*, Stinneford, *Experimental Punishments*, at 142 n.316 (citing sources). Whether considered in light of that modern expert consensus or judged against the original public meaning of the Cruel and Unusual Punishments Clause, the sort of conditions to which Hamner was subjected should not be tolerated.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that the petition for panel rehearing and/or rehearing *en banc* should be granted.

Date: October 23, 2019

/s/ Nicholas M. McLean

NICHOLAS M. MCLEAN
Counsel of Record

CADES SCHUTTE LLP
1000 Bishop Street, 12th Floor
Honolulu, HI 96813
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Date: October 23, 2019

/s/ Nicholas M. McLean
NICHOLAS M. MCLEAN
Attorney for Amicus Curiae *Professor John F. Stinneford*

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/s/ Nicholas M. McLean
NICHOLAS M. MCLEAN
Attorney for Amicus Curiae *Professor John F. Stinneford*

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