

No. 18-3535

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MICHAEL JOHNSON,

Plaintiff-Appellant,

v.

SUSAN PRENTICE, *ET AL.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of Illinois
Civil Action No. 1:16-cv-1244
The Honorable Colin S. Bruce, *United States District Judge*

**CORRECTED BRIEF OF FORMER CORRECTIONS DIRECTORS & EXPERTS
AS AMICI CURIAE
IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

Laura Rovner
Danielle C. Jefferis¹
STUDENT LAW OFFICE – CIVIL RIGHTS CLINIC
University of Denver Sturm College of Law
2255 E. Evans Avenue
Denver, CO 80208
Office: 303.871.6441 | lrovner@law.du.edu

Counsel for Amici Curiae

May 2, 2019

¹ Not admitted to practice in this Court. Kira Case and Melody Joy Fields, Civil Rights Clinic students, assisted in the preparation of this Brief.

Appellate Court No: 18-3535

Short Caption: Johnson v. Prentice, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[✓] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Amici Curiae – Former Corrections Directors and Experts - Martin F. Horn, Justin Jones, Steve J. Martin, Richard Morgan, Dan Pacholke, Phil Stanley, Eldon Vail

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

University of Denver Sturm College of Law | Civil Rights Clinic

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Laura Rovner Date: May 2, 2019

Attorney's Printed Name: Laura Rovner

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes No

Address: 2255 E Evans Avenue, Suite 335
Denver, CO 80208

Phone Number: 303-871-6441 Fax Number: 303-871-6840

E-Mail Address: lrovner@law.du.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
RULE 29(A)(4)(E) STATEMENT	3
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. SOLITARY CONFINEMENT DID NOT REDUCE VIOLENCE WITHIN PRISON SYSTEMS BUT DID RAISE CONCERNS REGARDING ITS HARM TO PRISONERS.	4
II. LIMITING THE USE OF SOLITARY CONFINEMENT HAS REDUCED VIOLENCE WITHIN PRISON SYSTEMS AND IMPROVED SAFETY FOR CORRECTIONS OFFICERS.	8
III. LIMITING THE USE OF SOLITARY CONFINEMENT ALSO REDUCES COSTS.....	11
IV. STATES REDUCED THEIR USE OF SOLITARY CONFINEMENT BY LIMITING THE REASONS AND MANAGING THE BEHAVIORS THAT RESULT IN PRISONERS BEING SENT TO SOLITARY.	13
<i>A. States Reduced Solitary Confinement Populations by Limiting the Reasons and Managing the Behaviors that Resulted in Solitary Confinement.</i>	13
<i>B. States Created Alternative Housing for Prisoners with Mental Illness and Vulnerable Populations.</i>	20
V. STATES PROVIDE PROGRAMMING TO PREPARE PRISONERS IN SOLITARY CONFINEMENT TO RETURN TO GENERAL POPULATION HOUSING.	23
CONCLUSION.....	27
CERTIFICATE OF COMPLIANCE.....	29
CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

CASES

<i>Apodaca v. Raemisch</i> , 586 U. S. ____ (2018), 2018 WL 4866124.....	4, 6
<i>British Columbia Civil Liberties Assn. v. Canada (Attorney General)</i> , [2018] B.C.J. No. 53, (BCSC)	7
<i>Canadian Civil Liberties Assn. v. Canada (Attorney General)</i> , [2019] O.J. No. 1537, 2019 ONCA 243 (Can. Ont. C.A.)	7
<i>Davis v. Ayala</i> , 135 S. Ct. 2187 (2015).	6, 28
<i>Jones 'El v. Berge</i> , No. 00-C-421-C, 2002 WL 32362655 (W.D. Wis. 2002).....	6
<i>Joslyn v. Armstrong</i> , No. 3:01CR198(CFD), 2001 WL 1464780 (D. Conn. 2001).....	6
<i>Madrid v. Gomez</i> , 889 F.Supp. 1146 (N.D. Cal. 1995)	6
<i>Presley v. Epps</i> , 4:05cv148 (N.D. Miss. 2006).....	6
<i>Wilkinson v. Austin</i> , 545 U.S. 209 (2005).....	18, 19

OTHER AUTHORITIES

ACLU of Texas & Texas Civil Rights Project, <i>A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas</i> (2015)	6
ACLU, <i>Briefing Paper: The Dangerous Overuse of Solitary Confinement in the US</i> (2014).....	11, 12, 21, 22
Allen Beck, U.S. Department of Justice, <i>Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12</i> (2015)	5
Allison Hastings et al., National PREA Resource Center, <i>Keeping Vulnerable Populations Safe under PREA: Alternative Strategies to the Use of Segregation in Prisons and Jails</i> (2015).....	22
Andrew Oxford, <i>Gov. Lujan Grisham signs criminal justice legislation</i> , SANTA FE NEW MEXICAN, Apr. 3, 2019	7, 20

B. Steiner & C.M. Cain, U.S. Department of Justice, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of the Evidence, Restrictive Housing in the U.S.: Issues, Challenges, and Future Directions* (2016)..... 5, 16

Bernie Warner, Dan Pacholke & Carly Kujath, Washington State Department of Corrections, *Operation Place Safety: First Year in Review* (2014)*passim*

Byron Kline et al., Vera Institute of Justice, Center on Sentencing and Corrections, *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Virginia Department of Corrections* (2018)..... 17

Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 *Criminology* 1341 (2006) 5, 27

Cheryl Corley, *North Dakota Prison Officials Think Outside the Box to Revamp Solitary Confinement*, NPR Morning Edition (July 31, 2018, 5:01 a.m.)..... 10

Craig Haney, *Mental Health Issues in Long-term Solitary and “Supermax” Confinement*, 49 *Crime & Delinq.* 124 (2003)..... 5

Craig Haney, *Restricting the Use of Solitary Confinement*, 1 *Ann. Rev. Criminology* 285 (2018)..... 6, 13

Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 *Crime & Just.* 365 (2018)..... 24

Dan Pacholke & Sandy Felkey Mullins, J.D., U.S. Department of Justice, *More Than Emptying Beds: A Systems Approach to Segregation Reform* (2016)*passim*

David Shaw, Office of the Inspector General, *Special Review: Management of the California Department of Corrections and Rehabilitation’s Administrative Segregation Unit Population* (2009)..... 12

Eli Hager & Gerald Rich, *Shifting Away from Solitary: More states have passed solitary confinement reforms this year than in the past 16 years*, The Marshall Project (Dec. 12, 2014) 7

Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment*, 90 Ind. L.J. 741 (2015) 4, 5

Emmit Sparkman, *Mississippi DOC's Emmit Sparkman on Reducing the Use of Segregation in Prisons*, Think Justice Blog (Oct. 31, 2011)..... 24, 26

Erica Goode, *Rethinking Solitary Confinement*, N.Y. Times, March 11, 2012, at A1 5

Focused Deterrence Initiatives to Reduce Group Violence in Correctional Facilities: A Review of Operation Workplace Safety and Operation Stop Violence, ACA 2018 Winter Conference Seminar (2018) 9, 11

G.A. Res. 70/175, Rule 44, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* (Dec. 17, 2015) 7, 20

Hans Toch & Terry Kupers, *Violence in Prisons, Revisited*, 45.3 J. of Offender Rehabilitation 1 (2007) 13, 16, 24, 27

John Jay College of Criminal Justice, *Solitary Confinement: Ending the Over-Use of Extreme Isolation in Prisons* (2015). 26

Juan E. Mendez (Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment), ¶¶ 79-89, U.N. Doc. A/63/175 (28 July 2008) 7

Kenneth McGinnis et al., Report to the Federal Bureau of Prisons, *Federal Bureau of Prisons: Special Housing Unit Review and Assessment* (2014)..... 4

Leon Digard et al., Vera Institute of Justice, *Rethinking Restrictive Housing: Lessons from Five U.S. Jail and Prison Systems* (2018).....*passim*

Marc A. Levin, Esq., *Testimony Before the U.S Senate Judiciary Subcommittee on The Constitution, Civil Rights and Human Rights* (February 25, 2014)..... 9, 10, 23

Marie Gottschalk, *Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails*, 125 Yale L.J. Forum 253 (Jan. 15, 2016) 9

National Commission on Correctional Health Care, *Position Statement: Solitary Confinement (Isolation)* (2016). 15

National Conference of State Legislatures, *Administrative Segregation: State Enactments: January 2018* (2018) 7, 8, 20

Press Release, The White House, *Fact Sheet: Department of Justice Review of Solitary Confinement* (Jan. 25, 2016)..... 7

R.M. Labrecque, *The Effect of Solitary Confinement on Institutional Misconduct: A Longitudinal Evaluation* (Aug. 2015) (unpublished Ph.D. dissertation, Univ. of Cin.) 5

Rick Raemisch & Kellie Wasko, Colorado Department of Corrections, *Open the Door: Segregation Reforms in Colorado*, 3 (2015)..... 19, 23, 25

Rick Raemisch, *Putting an End to Long-Term Solitary*, N.Y. Times, Oct. 12, 2017, at A25 14

Rick Raemisch, remarks at Vera Institute of Justice, *Webinar: Rethinking Restrictive Housing: What’s Worked in Colorado?* (Sept. 17, 2018). 9, 10, 16, 17

Rick Raemisch, *Testimony Before the U.S. Senate Subcommittee on the Constitution, Civil Rights and Human Rights* 4 (February 25, 2014) 12

Sal Rodriguez, Solitary Watch, *Fact Sheet: The High Cost of Solitary Confinement* (2011)..... 12

Steve Mills, *Quinn’s Prison Plan Causes Stir*, Chicago Tribune, Feb. 23, 2012 12, 13

Terry Allen Kupers, *Solitary: The Inside Story of Supermax Isolation and How We Can Abolish It* (2017) 11, 16, 17, 21

Terry Kupers et al, *Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 Crim. Just. & Behavior 1037 (2009) *passim*

The American Correctional Association, *Restrictive Housing Performance Based Standards* (Aug. 2016) 8, 9

The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Numbers of Prisoners in*

<i>Restricted Housing and on the Potential of Policy Changes to Bring About Reforms</i> (2016)	8, 14, 20, 27
The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, <i>Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-In-Cell</i> (2018)	7, 8, 20, 25
The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, <i>Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison</i> (2015)	14
The United States Government Accountability Office, <i>Bureau of Prisons: Improvements Needed in Bureau of Prisons' Monitoring and Evaluation of Impact of Segregated Housing</i> (2013)	11, 13
U.S. Department of Justice, Report and Recommendations Concerning the Use of Restrictive Housing (2016).....	21, 23
Zachary Heiden, ACLU, <i>Change is Possible: A Case Study of Solitary Confinement Reform in Maine</i> 15 (2013).....	19

INTEREST OF *AMICI CURIAE*

Amici curiae are former corrections directors and experts with experience reducing the use of solitary confinement. *Amici* submit that prolonged isolation has proven dangerous and ineffective, whereas alternative prison management methods have successfully eliminated prolonged solitary confinement while decreasing prison violence. *Amici* provide this Court information demonstrating evidence-based alternatives to solitary confinement that have increased prison safety.

Amici are:

Martin F. Horn served as Secretary of Corrections of Pennsylvania from 1995 to 2000. He also served as Commissioner of the New York City Departments of Corrections and Probation for seven years. Horn has also served as Executive Director of the New York State Sentencing Commission.

Justin Jones spent thirty-six years with the Oklahoma Department of Corrections, where he served as Director from 2005 through 2013. As Director, he established programs to reduce solitary confinement. He also served as Commission Chair for the Accreditation and Standards Committee for the American Correctional Association, where he worked to decrease the use of solitary confinement on a national level.

Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system and has served in gubernatorial appointments in Texas on both a sentencing commission and a council for offenders with mental impairments. He coauthored *Texas*

Prisons, The Walls Came Tumbling Down, and has written numerous articles on criminal justice issues.

Richard Morgan was appointed Secretary of the Washington State Department of Corrections in 2016. He also was appointed to Washington State's Parole Board and elected to the Walla Walla City Council, and he has served on the Board of the Washington State Coalition to Abolish the Death Penalty since 2012.

Dan Pacholke is the former Secretary for the Washington State Department of Corrections. During his thirty-three-year career as a Correctional Officer, he worked in one of the first intensive management units (IMUs) in Washington State. Twenty-five years later, he led the effort to limit the use of IMUs, reducing system-wide violence by over thirty percent. That work is described in *More than Emptying Beds: A Systems Approach to Segregation Reform*.

Phil Stanley is the former Commissioner of the New Hampshire Department of Corrections, reporting directly to the Governor. His forty-two-year career in corrections includes terms as Director of Correctional Institutions, Regional Administrator, Probation Officer, and Youth Correctional Officer. He is currently a consultant for jail operations.

Eldon Vail served as Secretary of the Washington Department of Corrections from 2007 until 2011. As Director, he successfully reduced violence in the state prison system and implemented an intensive treatment program for people in prison with a mental illness and a step-down program for people held for long terms in solitary.

Amici have obtained the consent of Plaintiff-Appellant to file this brief. Defendants-Appellees do not consent to the filing of this brief but do not oppose its filing.

RULE 29(a)(4)(E) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that no party's counsel authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

As isolation's harmful effects on prisoners has become more well-known, many states have undertaken reforms to eliminate prolonged solitary confinement, especially for prisoners with mental illness. Additionally, many states have reformed conditions within solitary confinement so that prisoners are provided access to social skills development, outdoor exercise, and therapy, helping them return to general population housing. These reforming state correctional systems have demonstrated that eliminating prolonged solitary confinement and improving conditions within solitary—while simultaneously improving prison security and reducing operating costs—is possible through three interrelated types of reforms: 1) reducing the number of prisoners sent to solitary confinement, 2) providing rehabilitation that instills prosocial behaviors benefitting the prison as a whole, and 3) reducing the length of time prisoners spend in solitary. In light of the availability and success of these reforms, prison administrators can no longer assert a compelling interest for keeping prisoners in long-term solitary confinement, and “[c]ourts and corrections

officials must accordingly remain alert to the clear constitutional problems raised by keeping prisoners . . . in near-total isolation from the living world, in what comes perilously close to a penal tomb.”²

ARGUMENT

I. Solitary Confinement Did Not Reduce Violence Within Prison Systems But Did Raise Concerns Regarding Its Harm To Prisoners.

In the 1880s and for nearly a century after, America abandoned solitary confinement as a failed experiment begetting mental illness rather than rehabilitation.³ But in the 1980s, solitary confinement returned to America’s prisons, partly in reaction to exploding prison populations.⁴ The dismantling of state-run mental health hospitals, the “War on Drugs,” and the shift to mandatory minimum sentencing flooded prison systems with more people than cells could hold.⁵ The resulting overcrowded prisons were ill-equipped to address the epidemic of prisoners with mental illness, the growth of prison gangs, and the overall increase in violence.⁶

Correctional officials believed they could pinpoint the “troublemakers” and the “worst of the worst” who most frequently engaged in prison violence and put them in

² *Apodaca v. Raemisch*, 139 S.Ct. 5, 10 (2018) (Sotomayor, J., respecting denial of cert.) (internal quotation and citation omitted).

³ Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment*, 90 Ind. L.J. 741, 746-47 (2015).

⁴ *Id.*, at 747-50.

⁵ See, e.g., Kenneth McGinnis et al., Report to the Federal Bureau of Prisons, *Federal Bureau of Prisons: Special Housing Unit Review and Assessment 25-27* (2014).

⁶ Bennion, *supra* note 3, at 750.

isolation to restore order.⁷ Many states and the Federal Bureau of Prisons built solitary confinement units and “supermax” prisons.⁸ Officials expected that removing difficult prisoners from the general population would reduce prison violence.⁹ They were wrong.

The increased use of solitary confinement was “not associated with reductions in facility or systemwide misconduct and violence.”¹⁰ Unfortunately, with so many solitary confinement cells already built, isolation became an overused part of the correctional toolkit.¹¹ Punitive isolation became common for even minor offenses including disrespect, praying, and swearing.¹² Inevitably, as the practice continued, studies showed that “[p]risons with higher rates of restrictive housing had higher levels of facility disorder.”¹³ Psychologists demonstrated the social pathology caused by isolation led prisoners to “occupy this idle time by committing themselves to fighting against the system and the people that surround, provoke, deny, thwart, and oppress them.”¹⁴ Texas, for example,

⁷ Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 *Criminology* 1341, 1341-42 (2006).

⁸ Bennion, *supra* note 3, at 751-52.

⁹ Briggs, *supra* note 7, at 1342.

¹⁰ B. Steiner & C.M. Cain, U.S. Department of Justice, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of the Evidence, Restrictive Housing in the U.S.: Issues, Challenges, and Future Directions* 165, 179 (2016); *see also* R.M. Labrecque, *The Effect of Solitary Confinement on Institutional Misconduct: A Longitudinal Evaluation* (Aug. 2015) (unpublished Ph.D. dissertation, Univ. of Cin.).

¹¹ Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES, March 11, 2012, at A1.

¹² Leon Digard et al., Vera Institute of Justice, *Rethinking Restrictive Housing: Lessons from Five U.S. Jail and Prison Systems* 15 (2018).

¹³ Allen Beck, U.S. Department of Justice, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12* 1 (2015), <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>.

¹⁴ Craig Haney, *Mental Health Issues in Long-term Solitary and “Supermax” Confinement*, 49 *Crime & Delinq.* 124, 140 (2003).

experienced a 104 percent increase in prisoner assaults between 2008 and 2015, which correctional staff attributed directly to the overuse of solitary confinement.¹⁵

More recently, attitudes about solitary confinement began to shift. Additional research into the impact of long periods of isolation on prisoners' mental health confirmed that prolonged solitary confinement causes extensive harm.¹⁶ Citing research explaining that "common side-effects of solitary confinement include anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors," Justice Anthony Kennedy questioned the constitutionality of solitary confinement, and urged courts to consider whether correctional systems should be required to adopt alternatives.¹⁷ Justice Sonya Sotomayor noted that the deprivations associated with many supermax units—including the denial of outdoor exercise—deserve careful review by the courts, emphasizing that "to deprive a prisoner of any outdoor exercise for an extended period of time in the absence of an especially strong basis for doing so is deeply troubling—and has been recognized as such for many years."¹⁸ In state and federal prison systems across the United States, litigation has highlighted the risks to prisoners in isolation, particularly people with mental illness.¹⁹ The United States Senate and several states have

¹⁵ ACLU of Texas & Texas Civil Rights Project, *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas* 9 (2015).

¹⁶ Craig Haney, *Restricting the Use of Solitary Confinement*, 1 Ann. Rev. Criminology 285, 286 (2018).

¹⁷ *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

¹⁸ *Apodaca v. Raemisch*, *supra* note 2, at 5.

¹⁹ See, e.g., *Presley v. Epps*, 4:05cv148 (N.D. Miss. 2006); *Jones'El v. Berge*, No. 00-C-421-C, 2002 WL 32362655 (W.D. Wis. 2002); *Joslyn v. Armstrong*, No. 3:01CR198(CFD), 2001 WL 1464780 (D. Conn. 2001); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

commissioned studies of the impact of solitary confinement on prisoners and its effectiveness in managing violence.²⁰ At the same time, international condemnation of prolonged solitary confinement as torture has increased.²¹ In Canada, the Ontario Court of Appeals and the Supreme Court for British Columbia recently banned solitary confinement beyond fifteen days.²²

Mindful of isolation's harm to prisoners and its failure to reduce prison violence, twenty-one states and the federal government have undertaken solitary confinement reforms.²³ Seven states have passed legislation prohibiting placement of prisoners with a mental illness in solitary confinement.²⁴ Sixteen states passed legislation intended to limit

²⁰ Eli Hager & Gerald Rich, *Shifting Away from Solitary: More states have passed solitary confinement reforms this year than in the past 16 years*, The Marshall Project (Dec. 12, 2014) <https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary>; Press Release, The White House, *Fact Sheet: Department of Justice Review of Solitary Confinement* (Jan. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement>; The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-In-Cell* 87-88 (2018) (*ASCA-Liman 2018*).

²¹ Juan E. Mendez (Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment), ¶¶ 79-89, U.N. Doc. A/63/175 (28 July 2008), <http://www.refworld.org/docid/48db99e82.html>; G.A. Res. 70/175, Rule 44, *United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)* (Dec. 17, 2015).

²² *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, [2019] O.J. No. 1537, 2019 ONCA 243 (Can. Ont. C.A.); *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, [2018] B.C.J. No. 53, (BCSC).

²³ Hager & Rich, *supra* note 20; *ASCA-Liman 2018*, *supra* note 20, at 87-88.

²⁴ Those states are Colorado, Massachusetts, Nebraska, Nevada, New Mexico, New York, and Texas. National Conference of State Legislatures, *Administrative Segregation: State Enactments: January 2018* (2018), <https://www.leg.mt.gov/content/Committees/Interim/2017-2018/Law-and-Justice/Meetings/Mar-2018/Exhibits/sj25-state-enactments-2018-ncsl.pdf> (*State Enactments*); Andrew Oxford, *Gov. Lujan Grisham signs criminal justice legislation*, SANTA FE NEW MEXICAN, Apr. 3, 2019, https://www.santafenewmexican.com/news/legislature/gov-lujan-grisham-signs-criminal-justice-legislation/article_1dbf1aa7-f90e-5a41-b078-a04ddf6bd172.html.

the use of isolation, and many more have reformed correctional policies to reduce solitary confinement.²⁵ The American Correctional Association (ACA), the largest accrediting body in the United States for correctional institutions, proposed standards and guidelines recommending limits on the use of isolation, including prohibiting the placement of people with “serious mental illness in long-term solitary confinement” and ensuring prisoners in solitary have “opportunities to exercise outdoors.”²⁶ In 2016, a growing tendency toward reform was captured in a report published by the Association of State Correctional Administrators (ASCA) and the Arthur Liman Center for Public Interest Law at Yale Law School (Liman Center): “Instead of being cast as the solution to a problem, restricted housing has come to be understood by many as a problem in need of a solution.”²⁷

II. Limiting the Use of Solitary Confinement Has Reduced Violence Within Prison Systems and Improved Safety for Corrections Officers.

Over one-third of state correctional systems have initiated restrictions on solitary confinement. Nine states—Colorado, Idaho, Maine, Mississippi, Nebraska, North Carolina, North Dakota, Oregon, and Washington—report substantial, system-wide reforms, reducing the nationwide estimated population of prisoners in isolation from nearly 100,000 to approximately 60,000 in just four years.²⁸ Colorado reports reducing the

²⁵ *State Enactments*, *supra* note 24.

²⁶ The American Correctional Association, *Restrictive Housing Performance Based Standards*, 4-RH-0031, 4-RH-0025 (Aug. 2016), <https://www.asca.net/pdfdocs/8.pdf> (*ACA Standards*).

²⁷ The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms* 15 (2016) (*ASCA-Liman 2016*).

²⁸ *ASCA-Liman 2018*, *supra* note 20, at 5, 7.

population of prisoners in long-term solitary confinement from seven percent of the prison population to one percent.²⁹ In reforming states, prisoners who remain in solitary confinement now reportedly stay for days, not years, in compliance with ACA-recommended standards.³⁰ These states transformed their prisons by 1) reducing the number of prisoners sent to solitary confinement, 2) initiating prosocial training for prisoners in temporary isolation, and 3) reducing the length of time prisoners spend in solitary conditions.

Putting prisoners into isolation did not reduce violence, and the corollary also proved true: Letting prisoners out of solitary confinement did not increase violence. Instead, reforms limiting the use of solitary resulted in a dramatic *decrease* in prison violence.³¹ As solitary confinement populations plunged in Washington, Colorado, and Mississippi, assaults against staff declined by forty to fifty percent, and assaults against other prisoners declined by fifty to seventy percent.³²

²⁹ Marie Gottschalk, *Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails*, 125 Yale L.J. Forum 253, 263 (Jan. 15, 2016) <https://www.yalelawjournal.org/forum/reforming-solitary-confinement-in-us-prisons-and-jails>.

³⁰ *ACA Standards*, *supra* note 26, at 13-14.

³¹ See, e.g., Marc A. Levin, Esq., *Testimony Before the U.S. Senate Judiciary Subcommittee on The Constitution, Civil Rights and Human Rights* 3 (February 25, 2014), <https://www.judiciary.senate.gov/imo/media/doc/02-25-14LevinTestimony.pdf>; Rick Raemisch, remarks at Vera Institute of Justice, *Webinar: Rethinking Restrictive Housing: What's Worked in Colorado?* (Sept. 17, 2018), <https://www.safealternativestosegregation.org/webinar/rethinking-restrictive-housing-whats-worked-in-colorado/> (*Raemisch Remarks*); *Focused Deterrence Initiatives to Reduce Group Violence in Correctional Facilities: A Review of Operation Workplace Safety and Operation Stop Violence*, ACA 2018 Winter Conference Seminar (2018) 18-23 (on file with author) (*Deterrence*).

³² *Deterrence*, *supra* note 31, at 38; Levin, *supra* note 31, at 3; *Raemisch Remarks*, *supra* note 31.

In Mississippi, “the number of incidents requiring use of force plummeted (for example, spraying a prisoner with immobilizing gas or taking down a recalcitrant prisoner). Monthly statistics showed an almost seventy percent drop in serious incidents, both prisoner-on-staff and prisoner-on-prisoner.”³³ Similar broad measures of violence in the Colorado prison system, including the number of forced cell entries, decreased by approximately eighty percent post-reforms, and prisoner-on-staff assaults decreased by nearly fifty percent.³⁴ In North Dakota, extreme incidents such as suicide attempts and cell flooding used to occur three or more times every week in solitary; after dramatic reductions in the use of isolation, they now occur only a few times each year.³⁵

Barely a year after launching solitary confinement reforms in 2013, Maine prisons reported

substantial reductions in violence, reductions in use of force, reductions in use of chemicals, reductions in use of restraint chairs, reductions in inmates cutting [themselves] up — which was an event that happened every week or at least every other week . . . The cutting [has] almost been totally eliminated as a result of these changes.³⁶

³³ Terry Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 *Crim. Just. & Behavior* 1037, 1043 (2009) (*Beyond Supermax*).

³⁴ *Raemisch Remarks*, *supra* note 31.

³⁵ Cheryl Corley, *North Dakota Prison Officials Think Outside the Box to Revamp Solitary Confinement*, NPR Morning Edition (July 31, 2018, 5:01 a.m.), <https://www.npr.org/2018/07/31/630602624/north-dakota-prison-officials-think-outside-the-box-to-revamp-solitary-confineme>.

³⁶ Levin, *supra* note 31, at 3.

In Washington a dramatic drop in violence occurred following the adoption of solitary confinement reforms and a group violence deterrence strategy.³⁷ “In the model’s first year of implementation at its pilot facility, assaults against staff, the use of weapons, and multi-man fights were reduced by 50 percent.”³⁸ Between 2014 and 2017, violent incidents in the two high-security prisons utilizing the model decreased by nearly sixty percent and inmate-on-staff assaults decreased by nearly ninety percent.³⁹ Indeed, reduced numbers of isolated prisoners and reduced time in solitary confinement *improved* the security of prisons in these states.

III. Limiting the Use of Solitary Confinement Also Reduces Costs.

Limiting solitary confinement not only reduces violence, it also provides long-term cost savings. The Government Accountability Office calculated that solitary housing costs three times as much as general population housing.⁴⁰ The cost of constructing supermax prisons, built specifically to house prisoners in solitary confinement, can be as high as three times the cost to build a conventional prison.⁴¹ The facilities must be staffed more robustly because prisoners cannot do many of the jobs they would do in general population

³⁷ Dan Pacholke & Sandy Felkey Mullins, J.D., U.S. Department of Justice, *More Than Emptying Beds: A Systems Approach to Segregation Reform* 1, 5 (2016), <https://www.bja.gov/publications/MorethanEmptyingBeds.pdf>; *see generally*, Terry Allen Kupers, *Solitary: The Inside Story of Supermax Isolation and How We Can Abolish It* 171-211 (2017) (*Solitary*).

³⁸ Pacholke & Mullins, *supra* note 37, at 6.

³⁹ *Deterrence*, *supra* note 31.

⁴⁰ The United States Government Accountability Office, *Bureau of Prisons: Improvements Needed in Bureau of Prisons’ Monitoring and Evaluation of Impact of Segregated Housing* 29-33 (2013), <http://www.gao.gov/assets/660/654349.pdf> (*GAO Report*).

⁴¹ ACLU, *Briefing Paper: The Dangerous Overuse of Solitary Confinement in the US* 2 (2014), https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_updated_august_2014.pdf (*Dangerous Overuse*).

housing.⁴² Isolation units need a higher ratio of correctional officers to prisoners because policies require at least two officers be present to move prisoners between their cells, exercise areas, and showers.⁴³

Colorado estimated it costs over \$15,000 more per year to house a prisoner in isolation than in the general population, and spent \$20 million housing prisoners in solitary confinement in 2010 alone.⁴⁴ In 2009 the California Office of the Inspector General investigated the costs per prisoner in California's administrative segregation units and "estimated that the annual correctional staff cost of a standard [segregation] bed [was] at least \$14,600 more than the equivalent general population bed," amounting to "nearly \$130 million a year."⁴⁵

In 2013, Illinois closed its supermax prison, Tamms, which cost \$64,000 per prisoner per year, contrasted with \$21,000 per year for general population prisoners.⁴⁶ The governor's office projected that closing Tamms would save the state over \$48 million in

⁴² *Id.* at 11.

⁴³ *Id.*

⁴⁴ Rick Raemisch, *Testimony Before the U.S. Senate Subcommittee on the Constitution, Civil Rights and Human Rights* 4 (February 25, 2014), <https://www.judiciary.senate.gov/imo/media/doc/02-25-14RaemischTestimony.pdf>; Sal Rodriguez, Solitary Watch, *Fact Sheet: The High Cost of Solitary Confinement* (2011), <https://solitarywatch.org/wp-content/uploads/2011/06/fact-sheet-the-high-cost-of-solitary-confinement.pdf>.

⁴⁵ David Shaw, Office of the Inspector General, *Special Review: Management of the California Department of Corrections and Rehabilitation's Administrative Segregation Unit Population 3* (2009), <https://www.oig.ca.gov/media/reports/ARCHIVE/BOA/Reviews/Management%20of%20the%20California%20Department%20of%20Corrections%20and%20Rehabilitation's%20Administrative%20Segregation%20Unit%20Population.pdf>.

⁴⁶ Steve Mills, *Quinn's Prison Plan Causes Stir*, Chicago Tribune, Feb. 23, 2012, <http://www.chicagotribune.com/news/ct-xpm-2012-02-23-ct-met-illinois-state-budget-prisons-20120223-story.html#>.

2013 alone.⁴⁷ Mississippi saved nearly \$6 million a year by closing its supermax facility; Colorado estimated it saved over \$5 million after closing just one of its supermax prisons.⁴⁸ Louisiana and Washington have also closed supermax prisons.⁴⁹ In each state, reducing the use of solitary confinement also reduced ballooning corrections costs.

IV. States Reduced Their Use of Solitary Confinement by Limiting the Reasons and Managing the Behaviors that Result in Prisoners Being Sent to Solitary.

Recognizing that solitary confinement does not reduce prison violence, prison officials have developed strategies to reduce the influx of prisoners into isolation, including deterring the violent acts that resulted in solitary placement, eliminating punitive isolation for minor infractions, and creating alternative housing for prisoners who need mental health treatment or protective custody.⁵⁰

A. States Reduced Solitary Confinement Populations by Limiting the Reasons and Managing the Behaviors that Resulted in Solitary Confinement.

Prison officials began reform efforts by evaluating who was put in solitary confinement and why. They discovered that rather than housing “the worst of the worst,” isolation cells often were filled with people who were simply disruptive, had mental illness, or sought protective custody.⁵¹ The first ASCA-Liman report revealed that “the criteria for entry [into solitary confinement] were broad, as was the discretion accorded correctional

⁴⁷ *Id.*

⁴⁸ *GAO Report, supra* note 40, at 34-35.

⁴⁹ Haney, *Restricting the Use of Solitary Confinement, supra* note 16, at 303.

⁵⁰ Digard, *supra* note 12, at 28-29.

⁵¹ Hans Toch & Terry Kupers, *Violence in Prisons, Revisited* 45.3 *J. of Offender Rehabilitation* 1, 18 (2007); Digard, *supra* note 12, at 15.

officials when making individual decisions about placement.”⁵² Prison officials originally intended solitary confinement “to be a last resort for those who were too violent to be in a prison’s general population. But then we gradually included inmates who disrupted the efficient running of an institution . . . Inmates could be placed in solitary for almost any reason, and they were.”⁵³ In a 2014 ASCA survey, “several correctional experts discussed the risk of overuse based on . . . being ‘mad’ at a prisoner, as contrasted with being ‘scared’ of that individual.”⁵⁴

Self-reports from correctional departments indicated “[l]ow-level nonviolent offenses were among the most common infractions to result in disciplinary segregation sanctions,” and in some states, eighty percent of prisoners in solitary confinement had been diagnosed with a mental illness.⁵⁵ Before initiating reforms, Nebraska reported twenty-eight percent of prisoners in punitive isolation were there for “disobeying an order,” and another thirty-eight percent for “threatening language or gestures,” “swearing,” or “disruption.”⁵⁶ North Carolina reported fifty percent of its punitive isolation population was there for “disobeying an order,” “profane language,” or “unauthorized tobacco use.”⁵⁷

⁵² The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* i (2015), https://law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf (*ASCA-Liman 2014*).

⁵³ Rick Raemisch, *Putting an End to Long-Term Solitary*, N.Y. Times, Oct. 12, 2017, at A25.

⁵⁴ *ASCA-Liman 2014*, *supra* note 52, at 8.

⁵⁵ Digard, *supra* note 12, at 16; *ASCA-Liman 2016*, *supra* note 27, at 50.

⁵⁶ Digard, *supra* note 12, at 17.

⁵⁷ *Id.*

Five prison systems seeking to reform their isolation policies confirmed that between forty to sixty percent of prisoners in solitary had an identified serious mental health diagnosis.⁵⁸

Heeding policy expectations outlined by the National Commission on Correctional Health Care prohibiting the placement of people with mental illness in solitary confinement,⁵⁹ reforming states determined that assignment to solitary was inappropriate for these prisoners in the first place, and continued isolation was likely to cause long-term harm.⁶⁰ Mississippi screened its solitary confinement population for mental illness and type of infraction, and immediately transitioned eighty percent of the prisoners at its supermax facility into less restrictive housing.⁶¹ Instead of sending prisoners to solitary, reforming states withheld privileges from prisoners who committed less serious infractions.⁶² Officials could then reserve solitary confinement for prisoners who “pose a serious threat to the safety of others,” and “only when a less-restrictive setting is not sufficient.”⁶³

If prisoners could no longer be sent to isolation for “disruption,” officials needed to address conditions within their prison systems that led to disruptive behaviors in the first place.⁶⁴ Prison leadership sought to end the “cycle of hostility” between prisoners and

⁵⁸ *Id.* at 21-23.

⁵⁹ National Commission on Correctional Health Care, *Position Statement: Solitary Confinement (Isolation)* 4 (April 2016), <https://www.ncchc.org/filebin/Positions/Solitary-Confinement-Isolation.pdf>.

⁶⁰ *Id.* at 30-35.

⁶¹ *Beyond Supermax*, *supra* note 33, at 1041.

⁶² Digard, *supra* note 12, at 30-31.

⁶³ *Id.* at 32.

⁶⁴ Digard, *supra* note 12, at 31; Bernie Warner, Dan Pacholke & Carly Kujath, Washington State Department of Corrections, *Operation Place Safety: First Year in Review* 1, 10-11 (2014), <http://doc.wa.gov/docs/publications/reports/200-SR002.pdf> (*Place Safety*).

correctional staff by providing training in respectful interactions, ending prisoner idleness, and facilitating social connections.⁶⁵ Officials in reforming states developed alternative deterrence strategies and training to reduce “the violent acts posing the greatest risk to staff and offender safety,” such as violent assaults on corrections officers, use of weapons, and multi-party assaults.⁶⁶ “By looking at the pathways that lead inmates to be placed in segregation, an agency can begin to deter the behavior that leads to segregation placement and identify more effective responses.”⁶⁷ Washington State instituted a group violence deterrence strategy that limited group-motivated violence by “target[ing] specific violent acts with swift, certain, and meaningful consequences.”⁶⁸ These consequences included privilege restrictions, but also included help from trained staff to learn “pro-social alternatives to violence.”⁶⁹ Correctional staff were trained to de-escalate potentially violent incidents and prevent infractions that could result in solitary confinement placement.⁷⁰

Strategies to decrease violence in several states included providing incentives for good behavior, including increased recreation, commissary purchases, and education opportunities.⁷¹ Some prisons designated “de-escalation rooms” where agitated prisoners could choose to soothe themselves before they became too angry or acted out.⁷² Colorado

⁶⁵ Kupers, *Solitary*, *supra* note 37, at 172-74; *see generally* Toch & Kupers, *supra* note 51, at 17-18.

⁶⁶ *Place Safety*, *supra* note 64, at 13.

⁶⁷ *Id.*, at 13-16.

⁶⁸ *Id.*, at 2.

⁶⁹ *Id.*

⁷⁰ Pacholke & Mullins, *supra* note 37, at 8, 11; *see also*, Kupers, *Solitary*, *supra* note 37, at 171-211.

⁷¹ *ASCA-Liman 2018*, *supra* note 20, at 72-73.

⁷² *Raemisch Remarks*, *supra* note 31.

modified its use of segregation by “improving conditions of confinement, minimizing social isolation, . . . [and] providing meaningful opportunities for indoor and outdoor recreation,” as a way to decrease disruptive and violent behavior.⁷³ Virginia partnered with the Vera Institute of Justice to evaluate its solitary confinement conditions and determined that “minimal time outside of a cell is not healthy for the body or mind.”⁷⁴ Virginia concluded that to reduce idleness and improve prison management “[d]aily outdoor recreation should be provided—in spaces adequate for physical activity and with equipment for exercising—in addition to expanded opportunities for indoor recreation”⁷⁵ Providing opportunities for people to engage in exercise and programming proved to be a more effective method for addressing disruptive behaviors, and fewer disruptions occurred.⁷⁶

Officials in reforming states, particularly Washington, began to rethink old modalities of prison management, such as long-term lockdowns that kept general population prisoners sealed in their cells for days at a time.⁷⁷ “Lockdowns prevented staff from being able to run programs The violent acts committed by a few offenders were

⁷³ *Raemisch Remarks, supra* 31.

⁷⁴ Byron Kline et al., Vera Institute of Justice, Center on Sentencing and Corrections, *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Virginia Department of Corrections* 22 (2018) https://storage.googleapis.com/vera-web-assets/downloads/Publications/safe-alternatives-segregation-initiative-findings-recommendations/legacy_downloads/segregation-findings-recommendations-virginia-dept-corrections.pdf.

⁷⁵ *Id.*

⁷⁶ Kupers, *Solitary, supra* note 37, at 229-233; *Place Safety, supra* note 64, at 20-21; Digard, *supra* note 12, at 31-32.

⁷⁷ *Place Safety, supra* note 64, at 12, 14.

depriving the majority of offenders opportunities to serve their sentence in a productive way.”⁷⁸ Access to programming and exercise improved prison management, and lockdowns interfered with that successful management model.⁷⁹ In the same way prison officials had curtailed the list of infractions for which an individual could be sent to solitary, officials limited the use of lockdowns to the most serious violent incidents.⁸⁰ Officials in Washington limited the amount of time a unit could be on lockdown to thirty-six hours while a team determined who was responsible for an assault.⁸¹ Corrections staff instituted restrictions on certain privileges for the primary actors rather than maintain unit lockdowns.⁸² Clear expectations and swift discipline further reduced the need to rely on deprivation and isolation to maintain security.⁸³

Additionally, when staff did refer prisoners for placement in solitary, correctional officials provided prisoners prompt due process hearings to ensure placement was appropriate. Prior to reforms, despite the Supreme Court’s holding that placement in prolonged solitary confinement can create a liberty interest, due process protections for placement and retention in solitary were non-existent in many jurisdictions.⁸⁴ The 2014 ASCA-Liman Report states

⁷⁸ *Id.*, at 12.

⁷⁹ *Id.*

⁸⁰ *Id.*, at 13.

⁸¹ *Id.*, at 14.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See, Wilkinson v. Austin*, 545 U.S. 209, 220 (2005).

Some but not all jurisdictions provided notice to the prisoner of the grounds for the placement and an opportunity for a hearing. The kind of notice and what constituted a “hearing” varied substantially. In short . . . getting into segregation was relatively easy, and few policies focused on how people got out.⁸⁵

Lack of meaningful hearings enabled mass isolation of prisoners, such as in Nebraska where “44 percent of all incarcerated people had been placed in restrictive housing as punishment for an infraction or pending an investigation.”⁸⁶ Meaningful hearings ensure less-restrictive placements are considered whenever possible and return isolated prisoners to general population within days or weeks rather than months or years.⁸⁷ Prisoners were told exactly why they were being confined and for how long.⁸⁸ Maine requires senior leadership to review referrals to solitary within three days.⁸⁹ Washington requires a multidisciplinary team to review placement in solitary.⁹⁰ To date, twenty-one states have mandated similar meaningful panel reviews for each prisoner sent to isolation.⁹¹

Limits on the length of time a person could be held in isolation further improved prison management. People who have spent extensive time in segregation “require

⁸⁵ *ASCA-Liman 2014*, *supra* note 52, at i.

⁸⁶ Digard, *supra* note 12, at 17.

⁸⁷ *Id.*, at 32-33.

⁸⁸ Rick Raemisch & Kellie Wasko, Colorado Department of Corrections, *Open the Door: Segregation Reforms in Colorado*, 3 (2015) <https://drive.google.com/file/d/0B30yLI0I1yBRY2h2UDBCZ0Q5WIE/view> (*Open the Door*).

⁸⁹ Zachary Heiden, ACLU, *Change is Possible: A Case Study of Solitary Confinement Reform in Maine* 15 (2013).

⁹⁰ Pacholke & Mullins, *supra* note 37, at 6-7.

⁹¹ *ASCA-Liman 2018*, *supra* note 20, at 125 fn.171.

intensive work to re-integrate,” because isolation degrades mental health.⁹² Colorado reports limiting solitary confinement to fifteen days, which meets the international standard set by *The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)*.⁹³ Washington “start[s] with the assumption that disciplinary segregation should continue for no longer than [thirty] days.”⁹⁴

B. States Created Alternative Housing for Prisoners with Mental Illness and Vulnerable Populations.

States also reduced the influx of prisoners into isolation by creating alternative housing for prisoners who need mental health treatment. Although the ASCA-Liman Report found that correctional agencies’ view that seriously mentally ill prisoners “ought not to be in restricted housing is widely shared and longstanding,”⁹⁵ self-reports from jurisdictions throughout the United States established that isolation cells were filled with prisoners who needed mental health treatment or protective custody.⁹⁶ Several states—including Colorado, Massachusetts, Nebraska, New Mexico, New York, and Texas—passed legislation preventing the isolation of prisoners with serious mental illness, with New Mexico also excluding any prisoner who exhibits self-injurious or suicidal behaviors.⁹⁷ These seven states—along with Arizona, Mississippi, North Carolina, North Dakota, Pennsylvania, and Virginia, Washington, and the Federal Bureau of Prisons—

⁹² Terry Kupers, *Alternatives to Long-Term Solitary Confinement*, 38.3 *Correctional L. Rep.* 33, 45 (2016).

⁹³ *The Nelson Mandela Rules*, *supra* note 21, at Rule 44; *ASCA-Liman 2018*, *supra* note 20, at 67.

⁹⁴ Pacholke & Mullins, *supra* note 37, at 7.

⁹⁵ *ASCA-Liman 2016*, *supra* note 27, at 48.

⁹⁶ *ASCA-Liman 2016*, *supra* note 27, at 48-53; *ASCA-Liman 2018*, *supra* note 20, at 47-49.

⁹⁷ *State Enactments*, *supra* note 24; Oxford, *supra* note 24.

created policies for housing prisoners with mental illness in ways that do not exacerbate their illnesses.⁹⁸ Mississippi both excluded prisoners with mental illness from solitary confinement and designed high security mental health treatment centers.⁹⁹ Colorado reports it now diverts prisoners with severe mental illness to a secure treatment facility where they spend at least twenty hours per week outside their cells for medical treatment, therapy, and recreation, including time outdoors.¹⁰⁰

Additionally, prison officials in reforming states provided people with mental health treatment rather than referring them to solitary confinement if infractions were linked to their illness.¹⁰¹ People with severe mental illnesses (SMI) who went through such treatment programs and then went back to the general population had a “sharp decrease” in violent incidents, “which strongly supports a conclusion that prisoners with SMI tend to suffer psychiatric deterioration and get into disciplinary trouble in supermax administrative segregation.”¹⁰² At New York City’s Rikers Island, officials established the Clinical Alternatives to Segregation (CAPS) program, which provided prisoners “individual and group psychotherapy, art therapy, medication management, and community meetings.”¹⁰³ The program was successful enough to export to other mental health units.¹⁰⁴

⁹⁸ *Hager & Rich*, *supra* note 20; U.S. Department of Justice, Report and Recommendations Concerning the Use of Restrictive Housing 48-49 (2016), <https://www.justice.gov/archives/dag/file/815551/download>.

⁹⁹ *Beyond Supermax*, *supra* note 33, at 1042.

¹⁰⁰ *Open the Door*, *supra* note 88, at 4-6.

¹⁰¹ *Id.*, at 5.

¹⁰² *Beyond Supermax*, *supra* note 33, at 1047.

¹⁰³ Kupers, *Solitary*, *supra* note 37, at 233.

¹⁰⁴ *Id.*

States also reduced their solitary confinement populations by designating less-restrictive housing for vulnerable populations needing protective custody.¹⁰⁵ Reforming states report implementing screening policies to ensure vulnerable people are not placed with people known to be violent.¹⁰⁶ “Innovations in an increasing number of jurisdictions now demonstrate that agencies can safely reduce their use of segregation . . . by removing vulnerable, nonviolent individuals from segregation and considering alternative strategies as an initial response for those screened at risk of sexual victimization or abusiveness.”¹⁰⁷ Washington created “safe harbors” for specific populations, such as people with mental illness, veterans, and the elderly.¹⁰⁸ State officials found “at least [twelve] percent of the prison population had significant cognitive impairments,” and instead of placing them in protective isolation, created a “Skill Building Unit” to meet the needs of people with developmental and intellectual disabilities or traumatic brain injuries.¹⁰⁹ New York “remove[d] youth, pregnant women, and the developmentally disabled and intellectually challenged prisoners from extreme isolation.”¹¹⁰ Federal Bureau of Prisons’ policy requires it to screen prisoners for severe mental illness and divert them from supermax confinement to two secure mental health facilities “designed to help inmates better manage the

¹⁰⁵ Digard, *supra* note 12, at 34.

¹⁰⁶ Allison Hastings et al., National PREA Resource Center, *Keeping Vulnerable Populations Safe under PREA: Alternative Strategies to the Use of Segregation in Prisons and Jails* 7-8 (2015).

¹⁰⁷ *Id.* at 18-19.

¹⁰⁸ Pacholke & Mullins, *supra* note 37, at 6.

¹⁰⁹ Hastings, *supra* note 106, at 11.

¹¹⁰ *Dangerous Overuse*, *supra* note 41, at 13.

symptoms of mental illness, thereby decreasing the risk of violence and allowing inmates to transition back to general population (and, eventually, the community).”¹¹¹

Washington also began screening for gang affiliation, and rival gang members were housed in separate facilities to prevent potentially violent encounters.¹¹² “These units/facilities reduced the potential for victimization of inmates while lowering the violence levels within the system.”¹¹³ Wisconsin uses this model for people who have renounced gang affiliations, or who were former police officers—people whose safety could not be guaranteed in the general population.¹¹⁴ The Texas Department of Criminal Justice developed the Gang Renunciation and Disassociation Program in 2007, and in 2014 reported none of the graduates of the program had returned to solitary confinement.¹¹⁵

Improvements to prison discipline strategies and development of alternative housing prevented “difficult” prisoners from being sent to solitary confinement, and quickly shrunk the population of people in supermax facilities and isolation units in these states.¹¹⁶

V. States Provide Programming to Prepare Prisoners in Solitary Confinement to Return to General Population Housing.

Once correctional staff reduced the number of people entering solitary confinement, they prepared those already in isolation to get out and stay out. Research demonstrated

¹¹¹ U.S. Department of Justice, *supra* note 99, at 48.

¹¹² *Place Safety*, *supra* note 64, at 5.

¹¹³ Pacholke & Mullins, *supra* note 37, at 6.

¹¹⁴ Levin, *supra* note 31, at 6-7.

¹¹⁵ *Id.*, at 4.

¹¹⁶ *Open the Door*, *supra* note 88, at 3.

even short periods in solitary confinement created negative psychological effects, and states began to question the efficacy of penal isolation.¹¹⁷ Early attempts at reform moved people through “step-down” programs in which they would be moved from isolation into less-restrictive conditions, only to commit a small infraction and be returned to solitary confinement, making them feel there was no way to end the cycle.¹¹⁸ “In segregation, [the person is] mad and responds with more vulgarity. He gets another rule violation and we tack on [thirty] days. Soon you have a guy who has never used violence doing three to four years in segregation. He probably needs some anger management.”¹¹⁹ This cycle of isolation leading to further infractions and additional time in segregation prevented people from re-establishing the prosocial behaviors necessary for them to successfully transition out of solitary.¹²⁰ Without an opportunity to regain social skills after isolation, those who had been in solitary could not escape it for long.¹²¹

Providing rehabilitation and therapy opportunities for people in solitary confinement enabled the swift return of many to general population housing.¹²² Mississippi provided people in segregation with education, mental health services, and therapy, profoundly reducing the “rates of violence, disciplinary infractions, and use of force.”¹²³

¹¹⁷ Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 *Crime & Just.* 365, 383-84 (2018).

¹¹⁸ *Open the Door*, *supra* note 88, at 2.

¹¹⁹ Emmitt Sparkman, *Mississippi DOC's Emmitt Sparkman on Reducing the Use of Segregation in Prisons*, Think Justice Blog (Oct. 31, 2011), <https://www.vera.org/blog/mississippi-docs-emmitt-sparkman-on-reducing-the-use-of-segregation-in-prisons>.

¹²⁰ Toch & Kupers, *supra* note 51, at 17-18.

¹²¹ *Open the Door*, *supra* note 88, at 2.

¹²² Kupers, *Solitary*, *supra* note 37, at 224-33.

¹²³ *Beyond Supermax*, *supra* note 33, at 1039.

Mississippi's administrators also allowed formerly isolated prisoners to spend several unrestrained hours out of their cells each day for recreation and could eat meals together.¹²⁴ Colorado instituted "Thinking for a Change," a "program with a track record of significantly reducing recidivism rates."¹²⁵ "Staff began to witness successful, permanent transitions [out of segregation]. Even offenders serving death sentences were able to interact with other offenders and land prison jobs."¹²⁶ Louisiana also used Thinking for a Change and other therapeutic programs to reduce its use of long-term restrictive housing in two of its prisons.¹²⁷ The 416 restrictive housing beds this saved the state were, as of early 2018, under consideration to repurpose into assisted living and medical housing.¹²⁸ Washington's "Ceasefire" program increased staff and prisoner training on violence prevention and prosocial skill-building.¹²⁹ Both Colorado and Washington used desks with built-in restraints so potentially violent prisoners could safely engage in group activities and social interactions that eventually led to unrestrained group programming.¹³⁰

States employed individualized incentives to promote participation and develop prisoners' agency, leading them to value the training itself.¹³¹ Colorado also used therapy dogs to encourage people to engage with therapy opportunities.¹³²

¹²⁴ *Id.*, at 1040.

¹²⁵ *Open the Door*, *supra* note 88, at 5.

¹²⁶ *Id.*, at 7.

¹²⁷ *ASCA-Liman 2018*, *supra* note 20, at 107 fn.34.

¹²⁸ *Id.*

¹²⁹ *Place Safety*, *supra* note 64, at 12-13.

¹³⁰ Pacholke & Mullins, *supra* note 37, at 7; *Open the Door*, *supra* note 88, at 6.

¹³¹ Kupers, *Solitary*, *supra* note 37, at 176-184.

¹³² *Open the Door*, *supra* note 88, at 6.

You have to give a guy an incentive to do better—and what works with one person might not work with another. One guy may have been locked up for years and for the first time he's able to hug his mother. Another gets to play basketball with a group of offenders. Another gets to take his GED.¹³³

People in Mississippi's supermax participated in out-of-cell programming to positive effect: "[W]e gave them more freedoms, and we saw a huge decrease in violence in that unit."¹³⁴ Correctional experts from across the nation agreed that "allowing increased access to outdoor exercise and recreation, as well as increasing dayroom time and other privileges such as visitation and phone calls, are other areas where systems can enhance social interaction and environmental stimulation to lower the psychological stress of isolated confinement."¹³⁵ Multiple state correctional systems reported that together, the incentives, socialization, and therapy helped people develop prosocial strategies, enabling them to return to general population without threatening prison security.

This socialization and training prepared people who committed even the most serious violent offenses to return to general population housing.¹³⁶ Training that emphasizes mutual respect "decrease[s] negative behavior on the unit and reinforce[s] the concept that how inmates are treated has an impact on how they treat staff."¹³⁷ New prison management strategies created an environment where prisoners knew how to succeed and

¹³³ Sparkman, *supra* note 119.

¹³⁴ *Id.*

¹³⁵ John Jay College of Criminal Justice, Solitary Confinement: Ending the Over-Use of Extreme Isolation in Prisons 13 (2015), http://johnjaypri.org/wp-content/uploads/2016/08/LangelothReport_web.pdf.

¹³⁶ Pacholke & Mullins, *supra* note 37, at 7-8.

¹³⁷ *Id.*

were more equipped to do so.¹³⁸ People left solitary confinement to enter units supervised by staff trained in de-escalation strategies and supported by discipline policies that prisoners perceived as fair, enabling those who had been violent to re-integrate into general populations successfully.¹³⁹ Corrections officials have found these reforms work far better than solitary confinement ever did at reducing violence.

CONCLUSION

“Clearly, viable alternatives to supermax do exist.”¹⁴⁰ Leann Bertsch, Director of the North Dakota Department of Corrections and Rehabilitation and former President of ASCA, explained the logic behind North Dakota’s approach to reducing the use of prolonged solitary confinement, pointing out that “[r]estricted housing places substantial stress on both the staff working in those settings as well as the prisoners housed in those units. Our highest priority is to operate institutions that are safe for staff and inmates and to keep communities to which prisoners will return safe.”¹⁴¹ Reforming states have demonstrated that less harmful and more effective alternatives can prevail over long-term isolation. “Moreover, many of these alternative approaches to social control in prison systems do not have the dubious moral qualities, legal uncertainties, and costs that are associated with supermax prisons.”¹⁴² Knowing that “workable alternative systems for long-term [solitary] confinement exist,” the courts have no impediment to determining that

¹³⁸ *Id.*, at 5-9.

¹³⁹ Kupers, *Solitary*, *supra* note 37, at 212-14, 231-33.

¹⁴⁰ Briggs, *supra* note 7, at 1371.

¹⁴¹ *ASCA-Liman 2016*, *supra* note 27, at 2.

¹⁴² Briggs, *supra* note 7, at 1371.

“a correctional system should be required to adopt them.”¹⁴³ The alternatives to solitary confinement employed by a large and growing number of states have enhanced prison security, prisoner welfare, and societal safety, demonstrating there is no longer a penological interest in maintaining prisoners in prolonged solitary confinement. Minimizing the harm of solitary confinement is not only a moral imperative, but a practical imperative as well.

Respectfully submitted,

STUDENT LAW OFFICE

s/ Laura Rovner _____

Laura Rovner

University of Denver Sturm College of Law

2255 E. Evans Avenue, Suite 335

Denver, CO 80208

Tel: 303.871.6441 | Fax: 303.871.6847

Email: lrovner@law.du.edu

May 2, 2019

Counsel for Amici Curiae

¹⁴³ *Davis v. Ayala*, 135 S. Ct. at 2210.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FRAP 32(a)(7)(B) and Cir. R. 29 because it contains 6994 words, excluding the parts of the brief exempt by FRAP 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 27(d)(E) as outlined in Cir. R. 32(b) because this document has been prepared in a proportionally spaced typeface using Times New Roman in font size 13, and footnotes are in Times New Roman in font size 12.

Dated: May 2, 2019

Respectfully submitted,

s/ Laura Rovner
Laura Rovner

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh 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.

Dated: May 2, 2019

s/ Laura Rovner
Laura Rovner