

No. 19-2624

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

RODERICK JOHNSON;
Plaintiff-Appellant,

v.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of
Pennsylvania, No. 4:18-CV-01924
Before the Hon. Matthew W. Brann, District Judge

**BRIEF OF *AMICI CURIAE* HUMAN RIGHTS CLINICS, LAW
PROFESSORS, AND NON-PROFIT ORGANIZATIONS IN SUPPORT OF
PLAINTIFF-APPELLANT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

LIST OF AMICI vii

INTEREST OF AMICI CURIAE1

SUMMARY OF ARGUMENT.....1

ARGUMENT.....3

I. The United States is Unique Among Its Peers in its Failure to Regulate the Use of Solitary Confinement and Refusal to Mitigate the Harms it Causes to the Imprisoned Population3

A. Peer Nations to the United States have Placed Limits on the Use and Duration of Solitary Confinement.....4

B. Peer Nations to the United States Have Adopted Measures to Mitigate the Harms of Solitary Confinement7

II. The Practice of Peer Nations Conforms to International Law and Evolving International Standards, which like the Eighth Amendment, Prohibit Torture and Cruel and Unusual Punishment.....10

III. Regional Human Rights Tribunals Also Limit the Duration of Solitary Confinement and Emphasize the Need to Mitigate the Impact of Isolation.....13

CONCLUSION.....15

TABLE OF AUTHORITIES

Cases

A.B. v. Russia, App. No. 1439/06, Eur. Ct. H.R. (2010).13

Achutan v. Malawi, Comm. 64/92, 68/92, 78/92, 8th ACHPR AAR Annex VI (1994–1995).....13

Atkins v. Virginia, 536 U.S. 304 (2002).....10

Coker v. Georgia, 433 U.S. 584 (1977).....10

De La Cruz-Flores v. Peru, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 115 (Nov. 18, 2004).....13

Enmund v. Florida, 458 U.S. 782 (1982).10

Grissom v. Roberts, 902 F.3d 1162 (10th Cir. 2018)6

Iorgov v. Bulgaria, App. No. 40653/98, Eur. Ct. H.R. (2004).....13

Lackey, et al v. United States, Inter-Am. Comm. H.R., Merits, Report No. 52/13 (Jul. 15, 2013)14

Malawi African Ass’n v. Mauritania, Comm. 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, 13th ACHPR AAR Annex V (1999–2000)..... 13, 14

Onoufriou v. Cyprus, App. No. 24407/04, Eur. Ct. H.R. (2010).....14

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012 I.C.J. 422 (Jul. 20)11

Roper v. Simmons, 543 U.S. 551 (2005).....10

Thompson v. Oklahoma, 487 U.S. 815 (1988).....10

Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion).10

<i>Velázquez-Rodríguez v. Honduras</i> , Merits, Inter-Am. Ct. H.R. (ser. C) No. 4 (Jul. 29, 1988).....	13, 14
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Statutes

An Act to amend the Corrections and Conditional Release Act and another Act, S.C. 2019, c. 27 (Can.).....	8, 9
Code de Procedure Penale [C. PR. PEN.] [Criminal Procedure Code] art. R.57-7-47 (Fr.).....	6
Correctional Services Act 111 of 1998 § 30(4)–(5) (S. Afr.).....	7
Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung [StVollzG] [Prison Act], Mar. 16, 1976, BUNDESGESETZBLATT I [BGBL] at 581, 2088, last amended by Gesetz [G], Oct. 30, 2017, BGBL I at 3618, § 103(1) (Ger.).....	3, 6, 7, 9
Ley Orgánica General Penitenciaria art. 42 (B.O.E. 1979, 239) (Spain).....	7
Penitenciaire beginselenwet van 18 juli 1998, Stb. 1998, art. 24(1) (Neth.)	6
The Prison Rules (1999), No. 728, Part II, Offenses Against Discipline, Rule 55(a)(e)(UK)	3

Other Authorities

Affleck & Barrison LLP, <i>Recent Stats Show Marked Drop in Use of Solitary Confinement Across Canada</i> (Aug. 8, 2017).....	5
Amnesty Int'l, <i>Entombed: Isolation in the US Federal Prison System</i> (Jul. 2014).....	9
Committee Against Torture, <i>Written Replies by the Government of Germany to the List of Issues (CAT/C/DEU/Q/5) to be Taken up in Connection with the Consideration of the Fifth Periodic Report of Germany (Cap/C/DEU/5),</i> ¶ 113, U.N. Doc. CAT/C/DEU/Q/5/Add.1 (Sept. 12, 2011)	9

Council of Europe, <i>Report to the Government of the Netherlands on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)</i> , CPT/Inf, 33-34 (Jan. 19, 2017)	8
Council of Europe, <i>Rapport au Gouvernement de la République française relative à la visite effectuée en France par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants</i> , CPT/Inf (2012) 13 (Apr. 19, 2012).....	5
Craig Haney, <i>Mental Health Issues in Long-Term Solitary and “Supermax” Confinement</i> , 49 CRIME & DELINQ. 124 (2003).....	8
Craig Haney, <i>Restricting the Use of Solitary Confinement</i> , 1 ANN. REV. CRIMINOL. 285 (2018).....	7, 10
Expert Report of Juan E. Mendez, <i>Ashker v. Governor of the State of California</i> , No. 4:09-cv-05796-CW (N.D. Cal. Mar. 6, 2015).....	12
Federal Bureau of Prisons, <i>Restricted Housing</i> (last updated Sept. 19, 2019).....	4
Hope Metcalf, et al. <i>Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of States and Federal Correctional Policies: Public Law Working Paper</i> , Yale Law School (Jun. 2013)	4
Irish Penal Reform Trust, <i>The Facts</i> (Apr. 2019).	5
<i>Joint Submission by relevant stakeholders on Human Rights Violations In Places of Deprivation of Liberty in Brazil, 2nd Cycle Universal Periodic Review -- Brazil</i> (Nov. 28, 2011).	8
Juan E. Mendez et al. <i>Seeing into Solitary: A Review of the Laws and Policies of Certain Nations Regarding Solitary Confinement of Detainees</i> (2016)..	9
Living in Detention, French Prison Service, 6 th Ed. Art. R57-7-62 (n.d.) at p. 48, 49, 51-53	3
Matthew J. Hertenstein, et al., <i>Touch Communicates Distinct Emotions</i> , 6 EMOTION 528 (2006).....	10

Sarah Baumgartel et al., Yale Law School & The Association of State
Correctional Administrators, *Time-in-Cell: The ASCA-Liman 2014 National
Survey of Administrative Segregation in Prison* (2015)4

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Correctional Administrators, *Reforming Restrictive Housing: The 2018
ASCA-Liman Nationwide Survey of Time-In-Cell* (2018).4, 5

Sharon Shalev & Klmmett Edgar, *Deep Custody: Segregation Units and Close
Supervision Centres in England and Wales* (2015).....5

U.S. Department of Justice, *Report and Recommendations Concerning the
Use of Restrictive Housing* (Jan. 2016)3, 10

International Conventions and Standards

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85
(entered into force Jun. 26, 1987).....11

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Dec. 16, 1966, 999 U.N.T.S. 171(entered into force Mar. 23, 1976).....11

Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment, *Interim Rep. of the Special Rapporteur on Torture
and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc.
A/66/268 (Aug. 5, 2011).....12

U.N. Human Rights Comm., General Comment No. 20: Article 7 (Prohibition of
Torture, or Other Cruel, Inhuman, or Degrading Treatment or Punishment),
U.N. Doc. No. A/44/40 (Mar. 10, 1992).....11

United Nations Standard Minimum Rules for the Treatment of Prisoners, U.N.
Doc. E/CN.15/2015/L.6/REV.1 (May 21, 2015).....11

Regulations

28 C.F.R. § 541.23(4).5

28 C.F.R. § 541.36

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INTEREST OF AMICI CURIAE ¹

Amici are law professors, clinicians and scholars of human rights, and nonprofit organizations that seek to enforce international and constitutional rights. More detailed information on amici appears in the list of amici above.²

Because the court's decision in this case will affect the prisoners' rights to dignity, and freedom from cruel, inhuman and degrading treatment, as well as torture, not only in Pennsylvania but also any prisoner that is incarcerated in facilities in Delaware and New Jersey, the amici have a substantial interest in the question presented.

SUMMARY OF ARGUMENT

An estimated sixty to a hundred thousand people in the United States are held in solitary confinement every year. Despite the documented harms caused by this form of isolation, the practice has become widespread in the United States and remains largely unregulated. The decision of how long and whether to isolate a prisoner is left to the discretion of individual facility management and correctional officers. As a result, prisoners are often held in solitary confinement for prolonged or indefinite periods of time.

¹ All parties have consented in writing to this timely filing.

² No counsel for a party authored any part of this brief and no person other than amici curiae and their counsel made a monetary contribution for the preparation or submission of this brief.

There is now substantial evidence of the harm of such prolonged confinement. As a consequence, our peer nations have increasingly restricted the use of solitary confinement, regulating and placing constraints on this practice to mitigate the harms of isolation. The United States is now alone among its peers in its continued widespread and unregulated use of solitary confinement. Its use of the practice is out of step with global best practices and undermines its long-held commitment to the protection of human dignity more broadly.

The Supreme Court has explained that the Eighth Amendment's prohibition on cruel and unusual punishment must be interpreted in light of "evolving standards of decency" and respect for human dignity and that such standards are often reflected in international and foreign law and practice. Today, evolving standards of decency, as reflected by research findings and global practice, mandate regulation and restriction of solitary confinement. Prolonged and indefinite confinement violates the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishment and violates the fundamental dignity of those held in our prisons.

ARGUMENT

I. The United States is Unique Among Its Peers in its Failure to Regulate the Use of Solitary Confinement and Refusal to Mitigate the Harms it Causes to the Imprisoned Population

In line with scientific research concerning the harms of solitary confinement, countries have adopted laws, policies and guidelines to mitigate and reduce the harms caused by solitary confinement. Canada, England, France and Germany, for example, have limited the maximum duration of confinement and attempted to ensure prisoners are not deprived of meaningful human contact and mental stimulation.³

Meanwhile, the United States has not only failed to meaningfully restrict or regulate the use of solitary confinement but, since the 1990s, has actually expanded its use. See U.S. Department of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* (Jan. 2016), <https://www.justice.gov/archives/dag/file/815551/download>. The United States allows prisoners to be placed in

³ Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung [StVollzG] [Prison Act], Mar. 16, 1976, BUNDESGESETZBLATT I [BGBL] at 581, 2088, last amended by Gesetz [G], Oct. 30 2017, BGBL I at 3618, § 89 (Ger.) https://www.gesetze-im-internet.de/englisch_stvollzg/index.html; Living in Detention, French Prison Service, 6th Ed. Art. R57-7-62 (n.d.) at p. 48, 49, 51-53, http://www.justice.gouv.fr/art_pix/GUIDE_Je_suis_en_detention_6e_EDITION_A_NGLAIS.pdf; The Prison Rules (1999), No. 728, Part II, Offenses Against Discipline, Rule 55(1)(e)(UK) <http://www.legislation.gov.uk/ukxi/1999/728/article/55/made>.

solitary confinement at the discretion of individual correctional facilities. Whether, how and for how long to impose solitary confinement remains at the discretion of facilities and subject to few if any effective limits. *See* Sarah Baumgartel et al., Yale Law School & The Association of State Correctional Administrators, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-In-Cell* (2018); Hope Metcalf, et al, *Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of States and Federal Correctional Policies: Public Law Working Paper*, Yale Law School (Jun. 2013). The United States holds significantly more people in prolonged and indefinite isolation than any of its peer nations; it does so for significantly longer periods of time; and has no meaningful measures in place to protect prisoners from the documented extreme mental, emotional and physical harm caused by the practice.

A. Peer Nations to the United States have Placed Limits on the Use and Duration of Solitary Confinement

The lack of regulation of solitary confinement and wide discretion granted to prison officials in the United States results in far more people being held in solitary confinement than in other countries, sixty to a hundred thousand a year, and for much longer periods of time. Sarah Baumgartel et al., Yale Law School & The Association of State Correctional Administrators, *Time-in-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* (2015) 3. Federal Bureau of Prisons,

Restricted Housing (last updated Sep. 19, 2019), https://www.bop.gov/about/statistics/statistics_inmate_shu.jsp.

Meanwhile, England and Wales, Canada, France, and Ireland, hold perhaps dozens or, at most, a few hundred people in confinement and have worked to develop policies to mitigate the harms for those few prisoners. See Sharon Shalev & Klmmett Edgar, *Deep Custody: Segregation Units and Close Supervision Centres in England and Wales* 148 (2015); Affleck & Barrison LLP, *Recent Stats Show Marked Drop in Use of Solitary Confinement Across Canada* (Aug. 8, 2017), <http://criminallawoshawa.com/recent-stats-show-marked-drop-in-use-of-solitary-confinement-across-canada/>; Council of Europe, *Rapport au Gouvernement de la République française relative à la visite effectuée en France par le Comité européen pour la prevention de la torture et des peines ou traitements inhumains ou dégradants*, ¶ 70, CPT/Inf (2012) 13 (Apr. 19, 2012); Irish Penal Reform Trust, *The Facts* (Apr. 2019), <https://www.iprt.ie/prison-facts/>.

Laws and practices on the length of solitary confinement vary, but the United States is an outlier on this as well. In 2017, twenty-five jurisdictions in the United States reported more than 3,500 individuals were held in isolation for more than three years. Baumgartel et al., *Reforming Restrictive Housing*, *supra*, at 5. In our federal prisons, solitary confinement can legally be used for an unlimited duration. See 28 C.F.R. § 541.23.

In contrast, the Netherlands, Norway, France, England and Wales, Germany, South Africa, and Italy, all limit the initial duration of solitary confinement to thirty days or less. Additionally, while France and Germany authorize a thirty-day period of disciplinary confinement, the offenses justifying this duration are much more serious than those provided under United States law. *See* Code de Procedure Penale [C. PR. PEN.] [Criminal Procedure Code] art. R.57-7-47 (Fr.); StVollzG [Prison Act] at §103(1). For example, in federal prisons in the United States, three months of solitary confinement are authorized for disciplinary violations that include being unsanitary, circulating a petition, or refusing to work or accept a program assignment. *See* 28 C.F.R. § 541.3. In France, thirty days of solitary confinement is authorized only for disciplinary violations such as physical violence or attempted escape. C. PR. PÉN. art. R.57-7-47, R.57-7-1. The same conduct could lead to decades of confinement in the United States. *See e.g. Grissom v. Roberts*, 902 F.3d 1162 (10th Cir. 2018). Similar to France, Germany permits thirty days of disciplinary detention only for “serious or repeated misconduct.” StVollzG [Prison Act] at §103(2).

Peer nations also place concrete limits on the renewal of otherwise defined terms of solitary confinement, whereas the United States gives prisons discretion on whether to extend the duration of solitary confinement. In the Netherlands and Germany, for example, solitary confinement cannot exceed four weeks per offender per year. *See* Penitenciaire beginselenwet van 18 juli 1998, Stb. 1998, art. 24(1)

(Neth.); StVollzG [Prison Act] at § 103(1). South Africa allows extension of an initial seven-day period of segregation to thirty days. Correctional Services Act 111 of 1998 § 30(4)–(5) (S. Afr.). Spain allows an extension of an initial fourteen-day period of confinement to forty-two days. Ley Orgánica General Penitenciaria art. 42 (B.O.E. 1979, 239).

B. Peer Nations to the United States Have Adopted Measures to Mitigate the Harms of Solitary Confinement

Programmatic measures have been shown to mitigate harms caused by confinement when such measures directly address the compounding effects of social isolation, deprivation of environmental stimulation, and severely restricted freedom of movement. For example, measures that provide inmates with daily access to outdoor exercise areas in the company of other prisoners can ensure positive environmental stimulation and social contact to counteract the effects of isolation. Opportunities to work in groups, or to attend group religious services, have also been shown to mitigate the effects of social isolation. Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOL. 285, 289, 294 (2018). Finally, regular contact visits and educational opportunities can further increase positive stimulation.

Peer nations have adopted measures to mitigate isolation and the deprivation of stimulation and movement. Canada guarantees four hours of daily out of cell

activity, including for exercise. An Act to amend the Corrections and Conditional Release Act, at § 36(1)(a). In the Netherlands, all cells have windows, providing natural light. Council of Europe, *Report to the Government of the Netherlands on the visit to the Netherlands*, CPT/Inf, 33-34 (Jan. 19, 2017). Prisoners in Brazil are provided two hours of sun intake per day. *Joint Submission by relevant stakeholders on Human Rights Violations In Places of Deprivation of Liberty in Brazil*, 2nd Cycle Universal Periodic Review--BRAZIL (Nov. 28th, 2011).

In contrast, United States federal prisons, regulations call for prisoners to be provided with *five hours of time outside of their cells on a weekly basis*. Moreover, these five hours can be confined to a two or three day period leaving prisoners in their cells for a twenty-four-hour period for as many as five consecutive days. Even this requirement does not guarantee inmates any access to open spaces or outdoor areas. Inmates are regularly made to conduct any exercise indoors in rooms similar to their cells or in small caged-in areas outdoors. Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 126 (2003). These exercise cells, referred to as "dog runs," provide neither the space needed for physical stimulation nor relief from the constant sensory deprivation and social isolation confinement in isolation causes. *Id.*

Various countries have instituted practices to ensure prisoners confined in solitary conditions have opportunities for human contact and interaction. In

Germany, for example, a prisoner placed in disciplinary detention for thirty days has the right to have visitors, attend religious services, and spend their leisure time with others. *See* StVollzG [Prison Act] at §§ 17, 54, 104; Committee Against Torture, *Written Replies by the Government of Germany to the List of Issues (CAT/C/DEU/Q/5) to be Taken up in Connection with the Consideration of the Fifth Periodic Report of Germany (Cap/C/DEU/5)*, ¶ 113, U.N. Doc. CAT/C/DEU/Q/5/Add.1 (Sept. 12, 2011). *See also* Juan E. Mendez et al. *Seeing into Solitary: A Review of the Laws and Policies of Certain Nations Regarding Solitary Confinement of Detainees* (2016). Canada requires that prisoners in ‘structured intervention units’ be provided with “an opportunity for meaningful human contact and ...participat[ion] in programs”, and that “the opportunity to interact through human contact is not mediated or interposed by physical barriers such as bars, security glass, door hatches or screens.” An Act to amend the Corrections and Conditional Release Act, at § 32.

Again, the United States, in contrast, requires prisoners to complete most activities in their cells. Even activities that would ordinarily provide some social contact such as educational opportunities, mental health counseling, and religious activities, if they occur, occur through closed-circuit channels on a prisoner’s television or in brief interactions through the cell door. *See* Amnesty Int’l, *Entombed: Isolation in the US Federal Prison System* (Jul. 2014), at 12–16,

<https://www.amnestyusa.org/files/amr510402014en.pdf>; Department of Justice, *supra*, 39, 40, 43. With little to no physical human contact, prisoners in confinement are deprived of an element considered “central to human social life.” Haney, *Restricting the Use*, *supra*, at 297 (citing Matthew J. Hertenstein, et al., *Touch Communicates Distinct Emotions*, 6 EMOTION 528, 528 (2006)).

II. The Practice of Peer Nations Conforms to International Law and Evolving International Standards, which like the Eighth Amendment, Prohibit Torture and Cruel and Unusual Punishment

The protections provided by the Eighth Amendment, the Supreme Court has explained, are “not static,” *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), but draw upon “evolving standards of decency that mark the progress of a maturing society.” *Id.* at 100–01. The Court has long turned to foreign and international law to determine global and prevailing evolving standards of decency to guide its interpretation of Eighth Amendment protections. *See, e.g., Id.* at 102–03; *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005); *Atkins v. Virginia*, 536 U.S. 304, 317–18 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988); *Enmund v. Florida*, 458 U.S. 782, 796–97 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 (1977). Thus, international authorities and laws and practice of peer nations provide important guidance when evaluating our own constitutional prohibitions on “cruel and unusual punishment” and what we consider permissible forms of punishment and detention. *Simmons*, 543 U.S. at 575 (citing *Trop*, 356 U.S. at 102–03).

The prohibition of torture and cruel, inhumane and degrading treatment (CIDT) under the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Convention Against Torture (UNCAT), are consistent and long standing and have achieved universal status, becoming peremptory norms from which no derogation is permissible and by which all states are bound. *See Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 2012 I.C.J. 422, 457 (Jul. 20, 2012). The United States has ratified both treaties. The ICCPR and UNCAT prohibitions against torture and CIDT have long been interpreted to include the use of prolonged and indefinite solitary confinement. Beginning in 1992, the U.N. Human Rights Committee recognized that solitary confinement could violate Article 7 of the ICCPR in certain circumstances where the isolation was prolonged and indefinite. *See* U.N. Human Rights Comm., General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman, or Degrading Treatment or Punishment), U.N. Doc. No. A/44/40 (Mar. 10, 1992).

Four years ago, the international community updated international standards on the treatment of prisoners to reflect the most recent advancements in scientific research and evolving standards on solitary confinement. This effort resulted in the United Nations Standard Rules for the Treatment of Prisoners (Mandela Rules), adopted by the U.N. General Assembly in 2015. United Nations Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. E/CN.15/2015/L.6/REV.1, Rule 44

(May 21, 2015) [hereinafter Mandela Rules]. The aim of the Mandela Rules is to humanize criminal justice and “[t]ak[e] into account the progressive development of international law.” The Mandela Rules categorically prohibit prolonged and indefinite solitary confinement as practices that amount to torture or CIDT. Mandela Rules, at R 43(a)–(b).

Under current international law, *indefinite* solitary confinement is defined in two ways: first, when “no fixed term is imposed on its use,” and second, “when it can be extended for many consecutive periods.” Expert Report of Juan E. Mendez at 33, *Ashker v. Governor of the State of California*, No. 4:09-cv-05796-CW, ¶ 12 (N.D. Cal. Mar. 6, 2015) [hereinafter Mendez Expert Report]. The definition of *prolonged* solitary confinement is more fact-specific. The Mandela Rules define prolonged solitary confinement as “solitary confinement for a time period in excess of 15 consecutive days.” Mandela Rules, at R 44; *see also* Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/66/268 at ¶ 79 (Aug. 5, 2011); Mendez Expert Report, at ¶¶ 12, 33.

III. Regional Human Rights Tribunals Also Limit the Duration of Solitary Confinement and Emphasize the Need to Mitigate the Impact of Isolation

Regional human rights courts have similarly interpreted the prohibition against torture to prohibit the use of prolonged and indefinite solitary confinement and require mitigation of isolation. In particular, regional courts have held that solitary confinement constitutes torture or CIDT when the physical and mental suffering it causes extends beyond that inherent in detention. *See, e.g., Iorgov v. Bulgaria*, App. No. 40653/98, Eur. Ct. H.R., ¶ 86 (2004); *Velázquez-Rodríguez v. Honduras*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 156, 187 (Jul. 29, 1988); *De La Cruz-Flores v. Peru*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 115, ¶¶ 130–31 (Nov. 18, 2004); *Achutan v. Malawi*, Comm. 64/92, 68/92, 78/92, 8th ACHPR AAR Annex VI (1994–1995). The Inter-American Court of Human Rights has found that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment.” *Velázquez-Rodríguez*, at ¶ 156. *See also Malawi African Ass’n v. Mauritania*, Comm. 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, 13th ACHPR AAR Annex V, ¶ 124 (1999–2000). Further, the justification for the use of solitary confinement must be “increasingly detailed and compelling” as time goes on. *A.B. v. Russia*, App. No. 1439/06, Eur. Ct. H.R., ¶ 108 (2010).

Moreover, based on the evidence of the consequences of isolation, regional courts have found that specific conditions of confinement amount to torture or CIDT. The European Court of Human Rights and the African Commission on Human and People' Rights, for example, have emphasized the suffering caused by greater levels of isolation such as that brought about by restrictions on visitors, especially visits from family, or going outside, or removing access to group work or activities. *See e.g. Onoufriou v. Cyprus*, App. No. 24407/04, Eur. Ct. H.R., ¶ 80 (2010); *Malawi African Ass'n v. Mauritania*, Comm. 54/91, 61/91, 98/93, 164/97, 196/97, 210/98, 13th ACHPR AAR Annex V, ¶ 124 (1999–2000). These restrictions reduce human contact, confine an individual within his or her own mind, and limit the social and environmental stimulation necessary to prevent trauma. Similarly, the Inter-American Court of Human Rights based its finding that prolonged and indefinite solitary confinement constitute torture or CIDT on the fact that these practices are “harmful to the psychological and moral integrity of the person and [violate] the right of any detainee to respect for his inherent dignity as a human being.” *Velázquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4 at ¶ 156. The Inter-American Commission on Human Rights has found U.S. use of prolonged and indefinite isolation to constitute inhumane treatment and a violation of the American Declaration. *See Lackey, et al v. United States*, Inter-Am. Comm. H.R., Merits, Report No. 52/13, ¶ 237 (Jul. 15, 2013).

CONCLUSION

Conditions of solitary confinement, including prolonged and indefinite isolation, violate the human dignity of prisoners and constitute cruel and inhumane treatment. Prison systems around the world are implementing regulations and employing strategies to limit the duration of solitary confinement and to ameliorate harmful effects, such as sensory deprivation and social isolation. In contrast, in the United States, lack of effective regulation results in the widespread use of the practice. Each year, tens of thousands of prisoners across the country are held in solitary confinement, some for years and even decades. The Eighth Amendment's promise to protect and respect human dignity, as well as our parallel commitments under international law, compel the United States to take steps to mitigate the harms of and to strictly limit the use of prolonged and indefinite solitary confinement. For all the preceding reasons, the appellant's motion to vacate the district court's order granting Defendant's motion to dismiss for failure to state claim should be granted.

Date: December 2, 2019

Respectfully submitted,

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Pursuant to Third Circuit Local Appellate Rule 46.1(e), I certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

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