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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 16-2444

JWAINUS PERRY,
Plaintiff-Appellant,

v.

LUIS S. SPENCER, Commissioner, THOMAS DICKAUT, Former Superintendent, ANTHONY M. MENDOSA, Former Deputy of Classification, JAMES J. SABA, ABBE NELLIGAN, Deputy of Classification, PATRICK TOOLIN, Correctional Program Officer, KRISTIE LADOUCEUR, CAROL A. MICI, THOMAS N. NEVILLE,
Defendants-Appellees,

JENS B. SWANSON, Property Officer,
Defendant.

On Appeal from the United States District Court for the District of Massachusetts
Case No. 1:12-cv-12070

BRIEF OF PROFESSOR JOHN F. STINNEFORD AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae John F. Stinneford is the Edward Rood Eminent Scholar Chair and Professor of Law at the University of Florida Levin College of Law. He is a recognized authority on the history and original meaning of the Constitution, particularly with respect to issues of criminal procedure and punishment. Professor Stinneford's scholarship has been cited by the Supreme Court and by a number of other federal and state appellate courts.[2] His publications include: *Is Solitary Confinement a Punishment?*, 115 Nw. U. L. Rev. 9 (2020); *Experimental Punishments*, 95 Notre Dame L. Rev. 39 (2019); *The Original Meaning of 'Cruel'*, 105 Geo. L.J. 441 (2017); and *The Original Meaning of 'Unusual': The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739 (2008).

Professor Stinneford submits this brief to provide the Court with context regarding the nation's history with solitary confinement and the limitations that our laws and constitutional norms placed on its imposition from the Founding.

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[1] As stated in Professor Stinneford's concurrently filed motion for leave to participate as *amicus curiae*, Plaintiff-Appellant consents to the filing of this brief, and Defendants-Appellees do not oppose the filing of this brief. No counsel for any party authored this brief in whole or in part, and no party, counsel, or person other than *amicus* and his counsel contributed money to fund the preparation or submission of this brief.

[2] *E.g.*, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019); *United States v. Grant*, 9 F.4th 186, 197 (3d Cir. 2021) (en banc); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 9 F.4th 1167, 1173 n.3 (9th Cir. 2021); *Gibson v. Collier*, 920 F.3d 212, 226 n.10 (5th Cir. 2019); *State v. Santiago*, 122 A.3d 1, 73 n.110 (Conn. 2015).

INTRODUCTION

For two years, Massachusetts prison officials kept Jwainus Perry in near-continuous solitary confinement without affording him any meaningful opportunity to contest that decision. The question presented is whether a reasonable prison official would have known that Mr. Perry was entitled to minimal due process. As Mr. Perry's brief to the *en banc* Court demonstrates, decisions in recent decades by the Supreme Court and federal appellate courts across the country answer yes to that question. *See* Perry Suppl. En Ban Br. at 17-30. So even on an analysis limited to recent judicial opinions, Defendants are not entitled to qualified immunity.

But the analysis need not stop there, nor are those cases necessary to reach the same result in this case. An exclusive focus on modern case law obscures just how radically Mr. Perry's mistreatment violates the original understanding of the Constitution's safeguards against unlawful punishment. That originalist understanding bears significantly on the qualified-immunity analysis. Nothing could be more clearly established than the fact that public officials are bound by the original public meaning of the Constitution's text and centuries of tradition.

Tradition and text are unequivocal on the question presented. At the time of the Founding, the rule of *nulla poena sine lege*—no punishment without law—was already long established. The Constitution and Bill of Rights embody that ancient principle and provide a panoply of express protections against unlawful punishment.

One kind of unlawful punishment the Founders intended the Constitution and Bill of Rights to guard against is the imposition of additional conditions beyond the terms of a prisoner's original sentence—in effect, a *new punishment* on top of the first one. Long-term solitary confinement that is imposed as a matter of bureaucratic discretion, without express authorization by statute or a court-ordered sentence, is such an additional punishment triggering constitutional scrutiny.

The Founders understood this, as the treatment of solitary confinement in the early Republic shows. Administrators could exercise discretion to place prisoners in solitary confinement only for days or, at most, weeks. And that limited discretion was further cabined by rigorous supervision from legislatures, the courts, and high-ranking executive officers. Terms of solitary confinement for any longer were rare and imposed only by statutorily authorized sentences entered by courts. *See generally* David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 Harv. L. Rev. 542 (2019) ("Shapiro, *Solitary Confinement*").

Developments in the century after the Founding offer further confirmation. When States began permitting discretionary imposition of long-term solitary confinement in the nineteenth century, the practice was quickly recognized to be a disastrous mistake. The Supreme Court agreed and reaffirmed the traditional rule that long-term solitary confinement is a distinct and severe punishment triggering constitutional scrutiny. *In re Medley*, 134 U.S. 160 (1890).

The practice of allowing imposition of long-term solitary confinement as a matter of bureaucratic discretion in recent decades cannot be squared with this original understanding and longstanding tradition. The constitutional violation Mr. Perry asserts has been clearly established for two centuries, not merely a handful of years.

ARGUMENT

I. The Original Public Meaning Of The Constitution And Longstanding Tradition Inform The Qualified-Immunity Analysis.

Qualified immunity does not apply where an official's "conduct violated a clearly established constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). The district court assumed that a constitutional right can only be "clearly established" by directly controlling recent opinions from the Supreme Court or other appellate courts. Dist. Ct. op. at 31-32. That was wrong. Recent judicial opinions are *one* way to show a right is clearly established, but not the *only* way—particularly where, as here, the right at issue is established by the original public meaning of the Constitution and traditions going back to the Founding.

1. The Supreme Court has repeatedly warned against hunting for a perfectly authoritative opinion on the precise factual context at issue—but that is precisely what the district court did. The Court has stressed that "[i]t is not necessary, of course, that the very action in question has previously been held unlawful," and "an officer might lose qualified immunity even if there is no reported

case directly on point." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866-67 (2017) (citation and internal quotation marks omitted). When, for instance, the violation alleged is "obvious" under the Constitution's plain meaning and common sense, a search for supporting precedents is superfluous. *E.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam).[3]

A constitutional violation is obvious when it contravenes the original public meaning of the Constitution and long tradition. If the understanding of a constitutional protection has been settled since the late eighteenth century, a reasonable police officer in the twenty-first century should be expected to know it. Likewise, if there is a relevant practice around the right at issue stretching back to the Founding, an official should be held to that standard. There is no stronger authority for what is clearly established under the law than the original meaning of the Constitution's text and abiding tradition.

And where there is an originalist answer to the relevant legal question, the concerns animating a case-centered qualified-immunity analysis are not as pressing. The "focus" of the qualified-immunity inquiry "is on whether the officer had fair notice that her conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). It makes sense to require applicable precedent where the right at issue is

[3] *See also, e.g.*, *Truman v. Orem City*, 1 F.4th 1227, 1240 (10th Cir. 2021); *Cantu v. City of Dothan*, 974 F.3d 1217, 1233 (11th Cir. 2020).

newly recognized, the product of a modern, judge-made doctrine. For those kinds of claims, shielding defendants with qualified immunity if there is not a controlling opinion on the books "allows courts to embrace innovation without the potentially paralyzing cost of full remediation for past practice." John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L.J. 87, 99-100 (1999). Indeed, the qualified-immunity analysis in its current form was arguably developed in response to the dramatic *expansion* of constitutional rights through section 1983 actions in the middle of the twentieth century—not enforcement of rights established since the Founding. *Cf.* Pamela S. Karlan*, Foreword: Democracy and Disdain*, 126 Harv. L. Rev. 1, 61-62 (2012). There can be no unfair surprise to a defendant if the source of the right asserted is the original meaning of the Constitution's text and practice stretching back to the 1790s.

2. The practical realities of suits challenging solitary confinement also counsel against a cramped view of the qualified-immunity analysis. The case law on solitary confinement is underdeveloped because solitary confinement is one of those "situations of abuse of office" in which "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Today, as Mr. Perry's case illustrates, long-term solitary confinement is imposed as a matter of bureaucratic discretion, not through sentencing. *See also* Section II.C, *infra*. A prisoner cannot seek direct

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review of solitary confinement through suppression motions, *Batson* challenges, or competence hearings. In most circuits that have reached the issue, a prisoner's "conditions of confinement" also cannot be challenged through habeas proceedings. *Wilborn v. Mansukhani*, 795 F. App'x 157, 163 (4th Cir. 2019) (collecting authority).

A section 1983 action like Mr. Perry's accordingly will often be the only vehicle for litigating a solitary-confinement claim. As a result, qualified immunity will also almost always be asserted as a defense. Under these circumstances, an inflexible analysis requiring a recent opinion on the books to demonstrate a right is clearly established will create a vicious circle. The issue will keep coming up only in the qualified-immunity context, courts will keep cursorily concluding the right is not clearly established for lack of a perfect precedent (even where, as here, that determination is wrong), and they will keep declining to answer the constitutional question. *Cf. Pearson*, 555 U.S. at 237 (allowing courts to avoid constitutional question if it is not clearly established). The resulting "constitutional stagnation" is not merely a theoretical concern, but an empirical reality. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 33-34 (2015).

A robust view of the qualified-immunity analysis that makes full use of the tools of originalism avoids this Catch-22. At the very least, given the limited

procedural contexts in which solitary-confinement cases arise, the Court should reach the constitutional question and answer it in light of the Constitution's original public meaning and tradition.

II. Discretionary Long-Term Solitary Confinement Violates The Original Public Meaning Of The Constitution And Longstanding Tradition.

A. Following Longstanding Tradition, the Founders Built a Range of Protections Against Unlawful Punishment into the Constitution.

1. The immemorial principle of *nulla poena sine lege*, or no punishment without law, was a bedrock of the English legal tradition. Jerome Hall, *Nulla Poena Sine Lege*, 47 Yale L.J. 165 (1937) (tracing the concept from antiquity through to the common-law tradition); John Stinneford, *Is Solitary Confinement a Punishment?*, 115 Nw. U. L. Rev. 9, 10 (2020) ("Stinneford, *Punishment*"). A corollary of the principle is that the government can only inflict punishments authorized by law at the time of the offense. That limitation was expressly incorporated into the Magna Carta, which later commentators such as Edward Coke recognized as enshrining a broad guarantee of due process.[4] Stinneford, *Punishment*

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[4] *The Third Great Charter of King Henry the Third* (Richard Thomson trans., 1829) (1225), *reprinted in The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* 335, 347-48 (Ellis Sandoz ed., Liberty Fund, Inc. 2008) ("No Free-man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land."); Edward Coke, *The Second Part of the Institutes of the Laws of England* 50 (6th ed. 1681).

at 24-25. This limitation was reinforced by later statutes, such as the Habeas Corpus Act of 1640, which abolished the Court of the Star Chamber on the grounds that it had exercised "arbitrary power" by inflicting punishment that exceeded traditional limitations. 16 Car. c. 10 (Eng.); Stinneford, *Punishment* at 25. The Habeas Corpus Act of 1679 provided further protection, codifying the right to challenge incarceration through the writ of habeas corpus. 31 Car. 2 c. 2 (Eng.); Stinneford, *Punishment* at 31.

English law developed a number of additional substantive and procedural protections against unlawful punishment. Substantively, certain categories of punishment like torture were recognized as categorically out of bounds, and punishments could not be disproportionate to the offense. Stinneford, *Punishment* at 26-27. Procedurally, defendants were protected by "the right to indictment by grand jury, to jury trial in the vicinage of the offense, to confront witnesses, and to seek a writ of habeas corpus." *Id.* at 27. Jurisdictional rules prevented courts of equity from hearing criminal cases, lest they use their broad equitable powers "to construe the law otherwise than according to the letter" and impose a punishment beyond statutory limits. 1 St. George Tucker, *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Law, of the Federal Government of the United States; and of the Commonwealth of Virginia* (1803) at 92 ("*Tucker's Blackstone*"); Stinneford, *Punishment* at 28.

The power to order and carry out punishments was also carefully divided between the branches of government. Punishment by death offers an example. The great eighteenth-century jurist William Blackstone explained that, under English law, a sentence of death could only be entered by a judge acting pursuant to a lawful commission, and the sentence itself could only be carried out by the appropriate officer. *Tucker's Blackstone* at 178-79; Stinneford, *Punishment* at 28. Because the officer carrying out the sentence was performing a "merely ministerial" task, he could not vary the punishment or the method of carrying it out; if he did, he himself would be guilty of murder. *Id.*

As the example makes clear, the limits on executive discretion in carrying out punishments were especially stringent. There was a reason: In exercising its traditional function of carrying out the law, the executive is often in closest contact with the people, and so most susceptible to the temptation to use punishment to enforce immediate obedience and stifle opposition. *See* Stinneford, *Punishment* at 13, 31. So the English common-law tradition drew firm boundaries around the executive's power to punish. Indeed, commenting on the Habeas Corpus Act of 1679, Blackstone maintained that habeas corpus's check on arbitrary executive punishment was a fundamental safeguard for "all other rights and immunities" under the common law. *Tucker's Blackstone at* 135-36; Stinneford, *Punishment* at 32.

2. The Founders were keenly aware of the historical examples discussed above and used these examples to craft the Nation's constitutional norms. John Adams, for example, suggested that a proposal to give an English Admiralty Court criminal jurisdiction over Americans would expose Americans to abuses of the kind practiced by the Star Chamber Court, the infamous prerogative court abolished by the Habeas Corpus Act of 1640. Stinneford, *Punishment* at 29; *see also supra* at 9. A couple decades later, similar concerns were raised about the Constitution in its original form. Members of the ratifying conventions in the States—for example, Abraham Holmes in Massachusetts and Patrick Henry in Virginia—warned that because the Constitution lacked express protections for a number of traditional common-law rights, the federal government could exercise the kind of tyrannical power the common-law tradition guarded against. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1802-07 (2008). These objections paved the way for the Bill of Rights. *Id.* at 1807-09.

As augmented by the Bill of Rights, the Constitution enshrines a panoply of traditional protections against unlawful punishment. In addition to guaranteeing that "[n]o person … shall be … deprived of life, liberty, or property, without due process of law," the Fifth Amendment prohibits double jeopardy and compelled self-incrimination. U.S. Const. amend. V. Among other protections, Article I preserves

the right to habeas corpus and prevents punishment *ex post facto*, *id.* art. I, §§ 9-10; the Sixth Amendment preserves the right of criminal defendants to be informed of the charges made against them, to confront witnesses, and to have counsel, and it requires criminal punishments to be proven beyond a reasonable doubt to a jury, *id.* amend. VI; and the Eighth Amendment forbids cruel and unusual punishments, *id.* amend. VIII.

More generally, the Founders understood the Constitution and Bill of Rights to incorporate traditional structural protections against unlawful punishment. A punishment could be handed down only by a court of competent jurisdiction pursuant to statutory limitations crafted by the legislature; the executive's task was to carry out the punishment as ordered, not to modify or augment it. Where the government exceeded those limits and the executive attempted to mete out punishments of its own design, defendants could assert the full arsenal of procedural and substantive protections described above. Stinneford, *Punishment* at 28-32. As Justice Story put it, while the President and executive officers had the responsibility and power to "take care that the laws be faithfully executed," that did not include authority to "punish for a crime, without any trial by jury." Joseph Story, *A Familiar Exposition of the Constitution of the United States* 177-78 (1840). To understand the Constitution otherwise "would be to clothe [the executive branch] with an

absolute despotic power over the lives, the property, and the rights of the whole people." *Id.*

B. The Founders Considered Long-Term Solitary Confinement a Rare and Severe Punishment Subject to Significant Scrutiny.

As they adapted traditional safeguards against unlawful punishment to the new Constitution, the Founding generation also began experimenting with solitary confinement. The Founders treated this new punishment as exactly that—a punishment, subject to the full arsenal of procedural and substantive protections afforded to criminal defendants, rigorous separation of powers, and careful control of executive discretion. The practices related to solitary confinement at the Founding show this; developments in the following century offer further confirmation.

1. Solitary confinement in America began in Pennsylvania after the end of the Revolutionary War. Shapiro, *Solitary Confinement* at 552. Before that time, incarceration was rare, and a range of physical punishment, from the stock to the gallows, was far more common. *Id.* Once the war concluded, however, a group of reformers in Philadelphia called the Pennsylvania Prison Society—influenced by the writings of John Howard, a well-known English sheriff and prison reformer—began advocating for replacing most corporal and capital punishment with imprisonment. *Id.* at 548-52.

Solitary confinement was part of the new scheme the Philadelphia Prison Society proposed in essays published across the 1780s and early 1790s. *Id.* at 553. Members of the Society advocated for solitary confinement as a punishment aimed at reforming serious offenders through contemplation, not a tool of convenience for prison administration. *Id.* at 551-57. They argued that the amount of solitary confinement should be proportional to the offense, controlled by the statute and sentence, subject to careful oversight, and not prolonged. *Id*.

The Philadelphia legislature did not just listen to these calls for reform, but asked the Pennsylvania Prison Society to codify their theories into law. In 1790, members of the Pennsylvania Prison Society drafted the Act to Reform the Penal Laws of this State, which the legislature passed the same year. *See* Act of Apr. 5, 1790, ch. MDV (1790), *reprinted in* 2 *Laws of the Commonwealth of Pennsylvania, 1700-1800*, at 531 (Philadelphia, John Bioren 1810) ("1790 Act"); Shapiro, *Solitary Confinement* at 561-63. At the broadest level, the 1790 Act "turned the Walnut Street Jail" in Philadelphia "into both a jail and a state prison—a facility for both holding pretrial detainees to prevent flight and punishing convicted prisoners with incarceration." Shapiro, *Solitary Confinement* at 561. The 1790 Act also began an extensive monitoring system for the prison, with one prison inspector visiting daily, two inspectors visiting weekly, and a cadre of high-level executive and judicial officials (the Philadelphia mayor, the Pennsylvania governor, justices from the

Pennsylvania Supreme Court, and all judges from the city and county courts) visiting four times a year. *Id.* at 561-62.

Most importantly, the 1790 Act contemplated the use of solitary confinement but strictly cabined prison officials' discretion over it. If prisoners violated regulations, a jailor could punish the prisoners "by confining such offenders in the dark cells [special solitary-confinement cells] or dungeons [basement] of the said gaol, and by keeping them upon bread and water only, for any term *not exceeding two days*." 1790 Act, § XXI, at 537 (emphasis added). Solitary confinement for more than two days "by reason of the enormity of the offense" could only be imposed if the jailor convinced two inspectors to "certify the nature and circumstances" justifying the extraordinary term to the mayor, and even then the maximum term of solitary confinement could not exceed six days. *Id.*[5]

Having limited imposition of discretionary solitary confinement by executive officials to a handful of days, the Pennsylvania legislature next made clear that long-term solitary confinement could only be imposed through a sentence authorized by a statute and ordered by a court. In 1794, the legislature passed a statute limiting the

[5] The legislature expanded the maximum discretionary term for solitary confinement a few years later, but not by much. A 1795 statute allowed jailors to put a prisoner in solitary confinement for up to ten days for the first violation of prison rules, and up to fifteen days for further offenses, but the requirement for certification from two inspectors to the mayor remained. Act of Apr. 18, 1795, ch. MDCCL, § III, reprinted in 3 *Laws of the Commonwealth of Pennsylvania 1700-1810*, at 247 (Philadelphia, John Bioren 1810); Shapiro, *Solitary Confinement* at 565.

death penalty to a few serious offenses and replacing it in all other cases with incarceration, including incarceration with periods of solitary confinement. Act of Apr. 22, 1794, ch. MDCCLXVI (1794), *reprinted in* 3 *Laws of the Commonwealth of Pennsylvania* 1700-1810, at 186 (Philadelphia, John Bioren 1810) ("1794 Act"); Shapiro, *Solitary Confinement* at 563. The 1794 Act limited the imposition of solitary confinement to the most serious offenses—generally crimes that had previously been punished by death, such as "arson, burglary, murder, rape, and robbery." Shapiro, *Solitary Confinement* at 563-64; *accord* 1794 Act §§ X, XI, at 189. The statute also limited how much of the sentence could be served in solitary confinement: "not [] less than one-twelfth, nor more than one half, of the total sentence." Shapiro, *Solitary Confinement* at 564; *accord* 1794 Act § XI, at 189. The solitary-confinement portion of the sentence was not meant to be served in one go; rather, the inspectors were "to direct the infliction at such intervals, and in such manner, as they shall judge best." 1794 Act § XI, at 189; *see also* Shapiro, *Solitary Confinement* at 564, n.183 (collecting sources confirming that, under the 1794 Act, solitary-confinement portion of sentences were imposed in intervals, not all at once).

Historical data suggest solitary confinement was used even more sparingly than the limited circumstances the 1794 Act provided. Where judges did impose solitary confinement as part of a prisoner's sentence, they "usually sentenced closer to the minimum ratio of one-twelfth of the sentence than to the maximum ratio of

one-half of the sentence." Shapiro, *Solitary Confinement* at 567. As late as 1827, Pennsylvania prison inspectors wrote that "[w]e have known a convict to have been confined within a solitary cell upwards of sixteenth months, and this is longest time."[6]

Summing up, at the Founding, long-term solitary confinement could only be imposed in a court-ordered sentence that was authorized by statute. Prison administrators had no power to impose long-term solitary confinement; their discretion was limited to sending a prisoner to solitary confinement for a few days or weeks, and that narrow discretion was supervised by high-level executive and judicial officers. In other words, long-term solitary confinement was treated by the Founders as a distinct punishment, and so was subject to the myriad constitutional protections the Founders had crafted to enforce traditional prohibitions against unlawful punishment.

2. A few decades after the Founding, practices concerning long-term solitary confinement temporarily shifted. Again, Pennsylvania led the way in the trend. From 1817-1829, Pennsylvania constructed a series of new prisons with

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[6] Documents Accompanying the Commissioners' Report on Punishment & Prison Discipline: Answer of the Inspectors to Questions Proposed by the Commissioners (Apr. 19, 1828), *reprinted in* 1 *The Register of Pennsylvania: Devoted to the Preservation of Facts and Documents, and Every Other Kind of Useful Information Respecting the State of Pennsylvania* 206, at 241 (Samuel Hazard ed., Philadelphia, W.F. Geddes 1828).

significantly increased capacity for solitary confinement. Shapiro, *Solitary Confinement* at 569. The Commonwealth also amended its criminal laws in 1829 so that solitary confinement was imposed for the full duration of the sentence for serious crimes. *Id.* at 569, nn. 211-12 (citing Act of Apr. 23, 1829, no. 204, 1828-29 Pa. Laws 341, 341-42). The result was a system of "absolute solitary confinement," in which prisoners spent years in conditions of near-total isolation and sensory deprivation. G. de Beaumont & A. de Toqueville, *On the Penitentiary System in the United States, and Its Application in France* 5 (Francis Lieber ed. & trans., Philadelphia, Carey, Lea & Blanchard 1833) ("Beaumont & Toqueville, *Penitentiary System*"). Soon, other states like New York followed suit and created similar long-term solitary-confinement regimes. Stinneford, *Punishment* at 40. Some of these regimes, like New York's, permitted prison inspectors to determine which prisoners should be placed in long-term isolation. Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 L. & Soc. Inquiry 1604, 1614 (2018).

The result was a "disaster." *Id*. Cells were often too small for even minimal exercise and caused prisoners' physical health to collapse. *Id*. Even worse were the effects on the prisoners' mental health—many suffered total nervous breakdowns and engaged in drastic self-harm. *Id*.; *see also* John Stinneford, *Experimental Punishments*, 95 Notre Dame L. Rev. 39, 61-63 (2019). Visitors were appalled.

Among them were distinguished men of letters, who published their outraged impressions. Alexis de Toqueville and Gustave Beaumont concluded that solitary confinement "destroys the criminal without intermission and without pity,"[7] and Charles Dickens denounced it as "worse than any torture."[8] Some penitentiaries, such as the Auburn State Prison in New York, experienced deteriorating consequences "so dire that New York dropped [the solitary-confinement regime at the prison] after less than two years and gave most of the prisoners [who were subjected to solitary confinement] pardons." Stinneford, *Experimental Punishments* at 62. More generally, only a handful of decades after it had begun, this experiment in widespread long-term solitary confinement had been judged a failure and was largely abandoned. Stinneford, *Punishment* at 40-41; Shapiro, *Solitary Confinement* at 572.

3. At the end of the century, the Supreme Court summarized these lessons. In the 1890 case *In re Medley*, James J. Medley, a prisoner who had been sentenced to death for murder, applied to the Court for a writ of habeas corpus. 134 U.S. 160, 161 (1890). Medley was being held in solitary confinement pending his execution. *Id.* at 162. When Medley committed his crime in Colorado, state law did not provide

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[7] Beaumont & Toqueville, *Penitentiary System*, at 5.

[8] Charles Dickens, *American Notes for General Circulation* 123-24 (Paris, A. & W. Galignani & Co. 1842).

that a prisoner sentenced to death should await execution in solitary confinement; but soon *after* Medley's commission of the crime, Colorado changed the law to mandate, among other things, solitary confinement for prisoners awaiting execution. *Id.*

Medley argued that application of the law to him violated the Constitution's prohibition against *ex post facto* punishment, and the Supreme Court agreed. The Court stressed that "perhaps the most important" element of the new law was its imposition of solitary confinement for prisoners awaiting execution. *Id.* at 167. That requirement was not "a mere unimportant regulation as to the safe-keeping of the prisoner," but rather "an infamous punishment." *Id.* at 167, 169. Traditional "experience" with solitary confinement in both England and America "demonstrated that there were serious objections" to the punishment. *Id.* at 168. Solitary confinement had been authorized during the reign of George II to bring "further terror and [a] particular mark of infamy" to the death sentence, but the law was repealed when "[i]n Great Britain, as in other countries, public sentiment revolted against this severity." *Id.* at 170 (citation omitted). While solitary confinement burgeoned for a few decades, it was soon judged a failure:

> A considerable number of prisoners fell, even after a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

Id. at 168. The Court concluded that the imposition of solitary confinement on Medley by the new law was "an additional punishment of the most important and painful character, and is therefore forbidden by [the *ex post facto* clause]." *Id*. at 171.

In re Medley reaffirmed the traditional understanding that long-term solitary confinement is a distinct punishment subject to the full range of constitutional protections. That was how the Founders treated it. Temporary deviation from this understanding in the first half of the nineteenth century only confirmed the soundness of the traditional rule.

C. The Recent Rise in Discretionary Long-Term Solitary Confinement Is Contrary to Settled Constitutional Practice and Tradition.

In recent decades, practices around solitary confinement have departed radically from traditions going back to the Founding. Long-term solitary confinement is now imposed by bureaucrats as a measure of discretionary prison management, not as a punishment authorized by statute and ordered by a court. Mr. Perry's case shows what the new regime produces at the extremes—arbitrary detention for long periods in severe conditions of near-total isolation on the basis of vague allegations.

1. Starting in the 1980s, "supermax" prisons—penitentiaries that can "house prisoners in virtual isolation and subject them to almost complete idleness

for extremely long periods of time"[9]—began opening across the country, largely in response to concerns about prison safety and high-profile attacks on prison guards. Shapiro, *Solitary Confinement* at 574.

Facilities capable of housing prisoners in long-term solitary confinement now exist in many states. Yet most jurisdictions have not passed statutes expressly authorizing use of long-term solitary confinement in *any* circumstances; as of 2018, three States authorized it for only death-row prisoners, and only another four authorized it outside the death-penalty context. Alexander A. Reinert, *Solitary Troubles*, 93 Notre Dame L. Rev. 927, 959-60 (2018); Stinneford, *Punishment* at 39.

2. At the Founding, long-term solitary confinement was tempered by proportionality and oversight. Not so now. The punishment is meted out by prison administrators for vague reasons and arbitrary terms, and supervision is minimal.

Typically, solitary confinement is imposed in one of two forms in today's prisons. The first is "disciplinary segregation," imposed when a prisoner violates regulations. Shapiro, *Solitary Confinement* at 584. In some prisons, disciplinary segregation can be imposed for almost any perceived misbehavior. Prisoners can be subject to solitary confinement for engaging in "insubordination," defined by one State as "acting in a sullen, uncooperative, or disrespectful manner toward any

[9] Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinquency 124, 126 (2003).

employee." Ga. Dep't of Corr., *Orientation Handbook for Offenders* 27, http://www.dcor.state.ga.us/sites/all/files/pdf/GDC_Inmate_Handbook.pdf. Prisoners face disciplinary segregation not just for serious misbehavior, but also for actions like "writing to another prisoner to offer help with a legal case or sending a written complaint about prison conditions to an official." Shapiro, *Solitary Confinement* at 586. They can be isolated for engaging in "insolence" such as "'reckless eyeballing' or 'body posture deemed disrespectful.'" *Id.* (citation omitted). Or they can be sent to solitary confinement for "having a small amount of cash, or underwear not issued by the prison." *Id.* No proportionality requirements constrain disciplinary segregation: The isolation can last for months or, in some instances, even years. *Id.*

The second form of long-term solitary confinement is "administrative segregation, a form of seclusion designed to separate inmates believed to pose a safety risk to officers or other prisoners." Shaprio, *Solitary Confinement*, at 584. Corrections officer need only provide "very general reasons" for placing prisoners in administrative segregation. *Id.* at 585 (citation omitted). A prison official may, for example, conclude that a prisoner is a threat because the official thinks the prisoner is a gang member, based on as little as "correspondence with gang members or tattoos associated with the gangs." *Id.* at 587. In some jurisdictions, prison officials "do not even inform prisoners why they have been placed in administrative segregation." *Id.* at 584. Again, proportionality does not constrain the punishment.

Solitary confinement from administrative segregation "may continue for years on end." *Id*.

These conditions are meted out as a matter of virtually unfettered bureaucratic discretion. And that enormous power is wielded capriciously. Shapiro, *Solitary Confinement* at 594. The data bear this out. Black prisoners are disproportionately isolated. *Id*. at 585. Even within the same prison, the same offense results in widely disparate terms of solitary confinement. *Id*. This arbitrary imposition of solitary-confinement by prison administrators goes largely unchecked. *Id.* at 594.

The terms of isolation resulting from this arbitrary regime of solitary confinement can be astonishingly severe—longer than anything the Founders could have conceived. The maximum known solitary-confinement term in the early Republic was sixteen months. *See supra* at 17. The figures at the higher end of the spectrum today are longer. Prisoners have been kept in solitary confinement for years, as in Mr. Perry's case—and in some instances, even for upwards of half a century.[10]

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[10] *See, e.g.*, Sam Roberts, *Thomas Silverstein, Killer and Most Isolated Inmate, Dies at 67*, N.Y. Times (May 21, 2019), https://nyti.ms/2WWME9X (36 years in solitary); Helen Vera, *After 42 Years in Solitary, Herman Wallace Dies a Free Man*, ACLU (Oct. 4, 2013, 1:29 PM), https://www.aclu.org/blog/smart-justice/mass-incarceration/after-42-years-solitaryherman-wallace-dies-free-man (42 years in solitary).

3. In some of the worst cases, like Mr. Perry's, conditions of solitary confinement today are every bit as brutal as the ones that brought choruses of protest in the nineteenth century, during America's previous brief experiment with discretionary long-term solitary confinement. *See supra* at 18-19. At one prison in California, prisoners are locked "in a cell approximately the size of a parking spot" for 23 hours each day; only "[f]or about an hour each day, the prisoner would be let into a caged exercise area, resembling a dog run." Stinneford, *Punishment* at 41. Food is "served through a slot in the door," "[p]risoners [are] shackled during all interactions with guards," and visits from outsiders are "rare" and "conducted through thick glass windows." *Id.* at 41-42. A warden summarized conditions as "virtual total deprivation, including, insofar as possible, deprivation of human contact." *Madrid v. Gomez*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995).

In *Medley*, the Supreme Court observed that similar conditions destroyed prisoners, reducing them to "a semi-fatuous condition" or "violent[] insan[ity]" if they were not driven to outright "suicide." *In re Medley*, 134 U.S. at 168. The same is happening now. Typically, suffering from imprisonment levels off as prisoners adjust to their circumstances. Stinneford, *Punishment* at 42. But not when prisoners endure prolonged isolation. Suffering in those conditions only worsens, and brings increasing "suicidal thoughts, hallucinations, perceptual distortions, violent fantasies, talking to one's self, overall deterioration, mood swings, emotional

flatness, chronic depression, social withdrawal, confused thought processes, oversensitivity to stimuli, irrational anger, and ruminations." *Id.* at 43.

As before, prisoners who are able to survive the severe psychological and physical harm of long-term solitary confinement "were not generally reformed." *In re Medley*, 134 U.S. at 168. Indeed, studies have provided little to suggest that long-term solitary confinement even improves prison security. *See* Shapiro, *Solitary Confinement* at 579 (summarizing studies). Some research shows the opposite. The Department of Justice acknowledges evidence that "[p]risons with higher rates of restrictive housing [have] higher levels of facility disorder." Allen Beck, U.S. Dep't of Justice, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12*, at 1 (2015). And "[w]hen Maine dramatically decreased the use of solitary confinement, violence, prisoner misbehavior, and injuries to prison employees decreased." Shapiro, *Solitary Confinement* at 579 (citing *Why Reducing Solitary Confinement Helps Inmates, Makes Prisons Safer*, CorrectionsOne (Feb. 5, 2016), https://www.correctionsone.com/facility-design-andoperation/articles/72195187-why-reducing-solitary-confinement-helps-inmates-makes-prisons-safer).

4. One sees the results of the regime at its extremes in this case. Mr. Perry was not *sentenced* to solitary confinement. Rather, prison officials placed him in administrative segregation and isolated him in their own discretion. The basis was anonymous allegations of his supposed plans to engage in gang activities. Mr. Perry

disputed those accusations, but prison officials did not even bother to interview him about the matter. Perry was likewise effectively shut out of the "administrative reviews" of his solitary confinement—reviews that the record suggests were entirely *pro forma* and without substance. See Perry Suppl. En Banc Br. at 3-5.

As a result, Mr. Perry languished in solitary confinement for two years, isolated for 23-24 hours a day "in a windowless cell" that was "so small he could stand in the middle of it, stretch out his arms, and touch both sides of the cell." Dkt. 127 at 9, n.8. His only significant movement came from five one-hour periods of shackled exercise in a "cage" each week. *Id.* at 9. His only real human interaction came through two one-hour "non-contact" visits and fifteen minutes of phone calls a week. *Id.* at 10. His already fragile mental health further deteriorated. Dkt. 51 at 26, 28; Dkt. 127 at 9.

This result would have been unimaginable to the Founders. The basic procedural due process right Mr. Perry asserts would have been just one of the full arsenal of constitutional protections afforded him in the 1790s. Those rights remain today. Mr. Perry's mistreatment violated law that was so clearly established it was part of this Nation's original constitutional traditions and understanding. The district court's conclusion to the contrary was wrong.

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CONCLUSION

The judgment below should be vacated and the case should be remanded to the District Court for a trial on Mr. Perry's due process claim.

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on March 11, 2022.

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