

No. 16-2444

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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JWAINUS PERRY,

Plaintiff-Appellant,

v.

LUIS S. SPENCER, THOMAS DICKHAUT, ANTHONY MENDONSA, JAMES  
SABA, ABBE NELLIGAN, PATRICK TOOLIN, KRISTIE LADOUCEUR,  
CAROL MICI, THOMAS NEVILLE,

Defendants-Appellees,

JENS SWANSON,

Defendant.

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On Appeal from the United States District Court  
for the District of Massachusetts, No. 1:12-cv-12070, Hon. M. Page Kelley

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**BRIEF OF CURRENT AND FORMER PROSECUTORS AND  
DEPARTMENT OF JUSTICE OFFICIALS AS AMICI CURIAE IN  
SUPPORT OF PLAINTIFF-APPELLANT**

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Mary B. McCord  
Kelsi Brown Corkran  
Amy Marshak  
Seth Wayne  
Shelby Calambokidis  
INSTITUTE FOR CONSTITUTIONAL  
ADVOCACY AND PROTECTION  
Georgetown University Law Center  
600 New Jersey Ave., N.W.  
Washington, D.C. 20001  
(202) 661-6607  
mbm7@georgetown.edu

*Attorneys for Amici Curiae*

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## TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICI CURIAE .....	1
INTRODUCTION.....	1
ARGUMENT .....	3
I. Prolonged Solitary Confinement Damages Public Trust in Law Enforcement.....	4
II. Protective Solitary Confinement Discourages Witness Cooperation.....	12
III. Solitary Confinement Interferes with Reentry After Prison.....	13
IV. Solitary Confinement Undercuts the United States’ Ability to Secure Extradition.....	17
APPENDIX: LIST OF AMICI.....	21
CERTIFICATE OF SERVICE .....	25

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>Apodaca v. Raemisch</i> , 139 S. Ct. 5 (2018) .....	5, 9
<i>Att’y Gen. v. Damache</i> [2015] IEHC 339 (Ir.).....	18
<i>Braggs v. Dunn</i> , 257 F. Supp. 3d 1171 (M.D. Ala. 2017) .....	5, 6, 7
<i>Davis v. Ayala</i> , 576 U.S. 257 (2015) .....	5, 9
<i>Gallina v. Wilkinson</i> , 988 F.3d 137 (2d Cir. 2021).....	9
<i>Gov’t of the United States v. Julian Paul Assange</i> [2021] EW Misc. (Magis. Ct.) 1 (Eng.), <a href="https://perma.cc/B2PC-32AQ">https://perma.cc/B2PC-32AQ</a> .....	19
<i>Gov’t of the United States v. Julian Paul Assange</i> [2021] EWHC (Admin) 3313 (Eng.) .....	19
<i>Grisson v. Roberts</i> , 902 F.3d 1162 (10th Cir. 2018) .....	9
<i>Hammer v. Burls</i> , 937 F.3d 1171 (8th Cir. 2019) .....	9
<i>In re Medley</i> , 134 U.S. 160 (1890) .....	6
<i>Incumaa v. Stirling</i> , 791 F.3d 517 (4th Cir. 2015) .....	9
<i>Lauri Love v. Gov’t of the United States of America</i> [2018] EWHC (Admin) 172 (Eng.) .....	19
<i>Lockhart v. McCree</i> , 476 U.S. 162 (1986) .....	1
<i>Perry v. Spencer</i> , 751 F. App’x 7 (1st Cir. 2018).....	3, 4
<i>Porter v. Pa. Dep’t of Corr.</i> , 974 F.3d 431 (3d Cir. 2020).....	9

*Ruiz v. Texas*,  
137 S. Ct. 1246 (2017) ..... 9

*Wilkinson v. Austin*,  
545 U.S. 209 (2005) ..... 4

*Williams v. Sec’y Pa. Dep’t of Corr.*,  
848 F.3d 549 (3d Cir. 2017)..... 5

**UNITED NATIONS RESOLUTIONS**

G.A. Res. 70/175, annex, United Nations Standard Minimum Rules for the  
Treatment of Prisoners (Dec. 17, 2015) ..... 17

**OTHER AUTHORITIES**

ACLU of Tex. & Tex. Civil Rights Project—Houston, *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas* (2015),  
<https://perma.cc/ETK6-GRP6>.....14, 15, 16

Alan Travis & Owen Bowcott, *Gary McKinnon Will Not Be Extradited to US, Theresa May Announces*, *The Guardian* (Oct. 16, 2012),  
<https://perma.cc/3JXA-3HGS> ..... 19

Amy Fettig & David Fathi, Opinion, *As Debates Over Police Reform Rage, It’s Time to End Solitary Confinement*, *Phila. Inquirer* (July 1, 2020),  
<https://perma.cc/6LW3-PH9U> ..... 11

Anjali Tsui, *Does Solitary Confinement Make Inmates More Likely to Reoffend?*, *Frontline* (Apr. 18, 2017), <https://perma.cc/KYG4-3ZC2>..... 16

Benjamin Steiner & Calli M. Cain, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation, in Restrictive Housing in the U.S.* (2016), <https://perma.cc/D7MR-HN5C>..... 11

Benjamin Wallace-Wells, *The Plot from Solitary*, *N.Y. Mag.* (Feb. 21, 2014),  
<https://perma.cc/P4UF-2L98>..... 10

Christie Thompson, *From Solitary to the Street*, *The Marshall Project* (June 11, 2015),  
<https://perma.cc/KWA5-HPS3> ..... 14, 15

Christopher Wildeman & Lars H Andersen, *Solitary Confinement Placement and Post-Release Mortality Risk Among Formerly Incarcerated Individuals*, *5 Lancet Pub. Health* 107 (2020), <https://perma.cc/55VQ-2QBS> ..... 7

Corr. Leaders Ass’n & Arthur Liman Ctr. for Pub. Int. at Yale Law Sch.,  
*Time-in-Cell 2019: A Snapshot of Restrictive Housing* (2020),  
<https://perma.cc/55WX-S374> ..... 8

Daniel P. Mears & William D. Bales, *Supermax Incarceration and Recidivism*, 47  
*Criminology* 1131 (2009)..... 16

David Lovell et al., *Recidivism of Supermax Prisoners in Washington State*, 53 *Crime &  
Delinq.* 633 (2007) ..... 16

Ellen Yaroshefsky, *Cooperation with Federal Prosecutors*, 68 *Fordham L. Rev.* 917  
(1999)..... 12

Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*,  
104 *Am. J. Pub. Health* 442 (2014), <https://perma.cc/SQ4F-3JGW>..... 6

George F. Will, Opinion, *The Torture of Solitary Confinement*, *Wash. Post*  
(Feb. 20, 2013), <https://perma.cc/A9L7-TFQ2> ..... 10

Hannah Pullen-Blasnik et al., *The Population Prevalence of Solitary Confinement*, 7 *Sci.  
Advance*, no. 48, Nov. 26, 2021, at 1, <https://perma.cc/RTN2-C33C> ..... 8

Ian Manuel, Opinion, *I Survived 18 Years in Solitary Confinement*, *N.Y. Times*  
(Mar. 25, 2021), <https://perma.cc/36XL-2J7L> ..... 6

Ian Patel, *The Impossible Injustice of Talha Ahsan’s Extradition and Detention*, *New  
Statesman* (Feb. 21, 2013), <https://perma.cc/9PT8-TFLK>..... 19

Jason M. Breslow, *What Does Solitary Confinement Do to Your Mind?*, *Frontline*  
(Apr. 22, 2014), <https://perma.cc/A5HT-8WVD>..... 5

Justin D. Strong et al., *The Body in Isolation*, *PLOS ONE*, Oct. 2020, at 1,  
<https://perma.cc/S3TF-J28C>..... 8

Lauren Brinkley-Rubinstein et al., *Association of Restrictive Housing During  
Incarceration with Mortality After Release*, *JAMA Network Open*, Oct. 2019, at 1,  
<https://perma.cc/QVW4-6TSF>..... 7

*Lauri Love Case: Hacking Suspect Wins Extradition Appeal*, *BBC News* (Feb. 5, 2018),  
<https://perma.cc/VA2W-W6R5>..... 18

Lois M. Davis et al., *Rand Corp.*, *Evaluating the Effectiveness of Correctional Education*  
(2013), <https://perma.cc/546A-GTCB>..... 14

Maurice Chammah, *Stepping Down from Solitary Confinement*, *The Atlantic*  
(Jan. 7, 2016), <https://perma.cc/T44Q-3JR2> ..... 11

Michael Barajas, *Texas Prisons Lead the Nation in Long-Term Solitary Confinement*,  
*Tex. Observer* (Oct. 10, 2018), <https://perma.cc/49ZH-GAPR> ..... 10

Michael P. Harrington, *Methodological Challenges to the Study and Understanding of Solitary Confinement*, 79 Fed. Prob. 45 (2015) ..... 12

Michael Schwartz et al., *The Scourge of Racial Bias in New York State’s Prisons*, N.Y. Times (Dec. 3, 2016), <https://perma.cc/L3LQ-C8TN> ..... 8

N.Y. Times Editorial Bd., *Solitary Confinement Is Cruel and All Too Common*, N.Y. Times (Sept. 2, 2015), <https://perma.cc/8RAR-M2ZX> ..... 9

Nicholas Turner & Jeremy Travis, Opinion, *What We Learned From German Prisons*, N.Y. Times (Aug. 6, 2015), <https://perma.cc/U57P-NS9X> ..... 18

Paola Loriggio, *Court of Appeal for Ontario Sets 15-Day Cap on Solitary Confinement*, Global News (Mar. 28, 2019), <https://perma.cc/AS67-9TXY> ..... 18

Peter Holley, *Kalief Browder Hanged Himself After Jail Destroyed Him. Then ‘A Broken Heart’ Killed His Mother.*, Wash. Post (Oct. 18, 2016), <https://perma.cc/3AHH-BMSW> ..... 10

Physicians for Human Rights, *Buried Alive: Solitary Confinement in the US Detention System* (2013), <https://perma.cc/WBY9-PD4H> ..... 5, 6

Tammie Gregg & Donna Lieberman, Opinion, *Prolonged Solitary Confinement Is Torture. It’s Time for All States to Ban It.*, Wash. Post (Apr. 28, 2021), <https://perma.cc/5GUG-6M5M> ..... 8

Terry A. Kupers, *What to Do with the Survivors? Coping with the Long-Term Effects of Isolated Confinement*, 35 Crim. Just. & Behav. 1005 (2008), <https://perma.cc/7LS9-WFX9> ..... 5, 6, 7

Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 Denv. U. L. Rev. 1 (2012) ..... 7

Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States*, Bureau of Just. Stat. (last revised Sept. 10, 2020), <https://perma.cc/TN76-ZCB8> ..... 13

Timothy Williams, *Prison Officials Join Movement to Curb Solitary Confinement*, N.Y. Times (Sept. 2, 2015), <https://perma.cc/WC55-DPPL> ..... 10

U.S. Dep’t of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* (2016), <https://perma.cc/WXU4-MRXU> ..... 11

U.S. Dep’t of Justice, *Roadmap to Reentry: Reducing Recidivism Through Reentry Reforms at the Federal Bureau of Prisons* (2016), <https://perma.cc/SGJ9-8MMF> ..... 13, 14, 15

## INTEREST OF AMICI CURIAE<sup>1</sup>

Amici are 45 current and former federal, state, and local prosecutors, state attorneys general, and Department of Justice officials with experience prosecuting and establishing policies for prosecuting serious crimes. Amici recognize that humane conditions of incarceration are important to the community’s trust in the fairness of the criminal justice system and, in turn, to individuals’ willingness to report crimes, act as witnesses, and serve as fair and impartial jurors. As stewards of public safety, amici also have an interest in ensuring that incarcerated people—the vast majority of whom are eventually released—are given the opportunity to rejoin society successfully and refrain from committing new offenses. Finally, amici have an interest in promoting international law enforcement cooperation, which depends upon the administration of humane punishment in the United States.

## INTRODUCTION

Amici have a special interest in “preserving public confidence in the fairness of the criminal justice system.” *Lockhart v. McCree*, 476 U.S. 162, 174–75 (1986) (internal quotation mark omitted). Without the public’s trust and cooperation, prosecutors and law enforcement officials cannot effectively protect public safety. That trust is undermined when community members perceive that aspects of the criminal justice

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<sup>1</sup> Counsel for amici certify that no party’s counsel authored this brief in whole or in part and that no person other than amici and their counsel funded the preparation or submission of this brief.

system offend principles of fundamental fairness and human dignity. Although the use of solitary confinement may be appropriate in certain circumstances, amici believe that its overuse impedes the ability of prosecutors and law enforcement officials to protect public safety; undermines the rehabilitative goals of the criminal justice system; and hinders law enforcement's ability to work with foreign nations.

There is increasing scientific consensus and growing public awareness about the long-term detrimental psychological effects of prolonged solitary confinement. Especially in light of this expanding recognition, excessive use of solitary confinement harms communities' perceptions that the criminal justice system is fair and just, ultimately undermining prosecutorial efforts and the effective enforcement of the law. Moreover, the use of solitary confinement as a method of protective custody for cooperating witnesses has the effect of unfairly punishing those who assist prosecutorial efforts and can reduce defendants' willingness to cooperate with law enforcement.

Most of the prison population eventually will be released, and those who have served their sentences must be prepared to reenter society successfully and avoid recidivism. Forcing prisoners to remain in solitary confinement for prolonged periods of time—sometimes extending up to the time of release from incarceration—reduces opportunities for educational and vocational programming that can help prisoners prepare for reentry. It also makes it more difficult for them to maintain close family relationships that can provide critical support upon reintegration to the community. Moreover, releasing people directly from solitary confinement into the community



without further supervision or support makes it difficult for these individuals to adjust to life outside prison, especially if they suffer from mental health issues. In the experience of amici, prisoners who have been denied the opportunity to engage with programming, who have been estranged from important relationships, and who are left without continuing support are those most likely to reoffend—an experience borne out by the heightened recidivism rates among those held in solitary confinement. A practice that contributes to increased recidivism is inconsistent with amici’s mission to protect the public.

Finally, the continued reliance on prolonged periods of solitary confinement in both the federal and state criminal justice systems runs contrary to a growing international consensus against the practice. Prosecutors often work with foreign partners to prosecute crimes that cross international boundaries and to seek extradition of defendants who have caused harm in the United States and to U.S. interests. Foreign judges have refused to extradite some defendants because of the possibility that the accused may be held in solitary confinement in U.S. jails and prisons.

## **ARGUMENT**

The overuse of solitary confinement is a human rights crisis occurring in prisons throughout the country, including in Massachusetts, where Mr. Perry spent nearly two years housed in solitary confinement without basic procedural due process protections, including an opportunity to be heard on his placement or to appeal it. *See Perry v. Spencer*, 751 F. App’x 7, 8 (1st Cir. 2018), *reh’g en banc granted, opinion withdrawn*, 21 F.4th 207 (1st

Cir. 2022). Recognizing that prolonged confinement in conditions that present “atypical and significant hardship” implicates a protected liberty interest subject to due process protections, the panel nevertheless affirmed the district court’s application of qualified immunity after concluding that it was not clearly established at the time of Mr. Perry’s confinement at what point such a liberty interest arises and what level of process is due. *Id.* at 10–11 (quoting *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005)). The prolonged use of solitary confinement, as in this case, undermines the public-safety efforts of law enforcement officials like amici by reducing the public’s faith in our criminal justice system and increasing the risk of recidivism among formerly incarcerated people.

### **I. Prolonged Solitary Confinement Damages Public Trust in Law Enforcement.**

Amici know that fostering public confidence is critical to the effective functioning of the criminal justice system. Community members must trust the system before they are willing to take part in it—whether they are reporting a crime, testifying as witnesses, or serving as jurors. That trust is undermined when the public believes that conditions of incarceration are unfair, cruel, or inhumane.

Subjecting prisoners to prolonged periods of solitary confinement is not aligned with public understanding of fair and humane punishment. Prisoners held in solitary confinement are typically restricted to a “windowless cell no larger than a typical parking spot for 23 hours a day,” with “little or no opportunity for conversation or interaction

with anyone.” *Davis v. Ayala*, 576 U.S. 257, 287 (2015) (Kennedy, J., concurring). Even the limited time outside of one’s spartan cell is usually spent pacing in a metal cage or restricted to a small space for “recreation,” still alone. See, e.g., *Apodaca v. Raemisch*, 139 S. Ct. 5, 6 (2018) (Sotomayor, J., statement respecting the denial of certiorari); Jason M. Breslow, *What Does Solitary Confinement Do to Your Mind?*, Frontline (Apr. 22, 2014), <https://perma.cc/A5HT-8WVD>.

This kind of prolonged, extreme isolation “exact[s] a terrible price.” *Davis*, 576 U.S. at 289 (Kennedy, J., concurring). It has “crippling consequences for mental health,” *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1236 (M.D. Ala. 2017), imprinting “a wide range of psychological scars” on “those that it clutches,” *Apodaca*, 139 S. Ct. at 9 (Sotomayor, J., statement respecting the denial of certiorari). Many in solitary confinement find themselves tortured by obsessive thoughts, panic attacks, hallucinations, and paranoia. Physicians for Human Rights, *Buried Alive: Solitary Confinement in the US Detention System* (2013), <https://perma.cc/WBY9-PD4H>. Periods as short as three months—a fraction of the nearly two years that Mr. Perry has spent in solitary confinement—can have long-lasting psychological and emotional consequences, including “full-blown psychosis and functional disability.” Terry A. Kupers, *What to Do with the Survivors? Coping with the Long-Term Effects of Isolated Confinement*, 35 *Crim. Just. & Behav.* 1005, 1005–06 (2008), <https://perma.cc/7LS9-WFX9>; see also *Williams v. Sec’y Pa. Dep’t of Corr.*, 848 F.3d 549, 566 (3d Cir. 2017) (citing research that found “negative psychological effects” in every recorded study of solitary

confinement lasting for more than ten days); *id.* at 574 (“[R]esearchers have observed that psychological stressors such as isolation can be as clinically distressing as physical torture.” (internal quotation mark omitted)).<sup>2</sup>

Prisoners placed in solitary confinement also face an increased risk of self-harm and suicide. *See* Physicians for Human Rights, *supra* (“self-harm and suicide are more common in solitary . . . as a result of the psychological trauma inmates suffer”); Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104 Am. J. Pub. Health 442, 447 (2014), <https://perma.cc/SQ4F-3JGW> (solitary confinement is an “important and independent predictor[] of self-harm in jail”); *see also, e.g.*, Ian Manuel, Opinion, *I Survived 18 Years in Solitary Confinement*, N.Y. Times (Mar. 25, 2021), <https://perma.cc/36XL-2J7L>. And given the potential long-term effects of prolonged isolation, this risk can persist long after a person leaves solitary confinement. *See Braggs*, 257 F. Supp. 3d at 1236 (citing expert report of Dr. Craig Haney, who has studied the psychological effects of solitary confinement for more than 30 years); *see also* Lauren Brinkley-Rubinstein et al., *Association of Restrictive Housing During Incarceration with Mortality*

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<sup>2</sup> These severe mental health consequences have been recognized for centuries. *See In re Medley*, 134 U.S. 160, 168, 170 (1890) (noting that solitary confinement was historically treated as an additional punishment imposing “a further terror and peculiar mark of infamy” upon those sentenced to death under an English law that was later repealed due to public sentiment decrying the practice, and citing “serious objections” to the practice in early American prisons, wherein “[a] considerable number” fell into “a semi-fatuous condition” after even a short period, while “others became violently insane” or “committed suicide”).

*After Release*, JAMA Network Open, Oct. 2019, at 1, <https://perma.cc/QVW4-6T5F>; Christopher Wildeman & Lars H Andersen, *Solitary Confinement Placement and Post-Release Mortality Risk Among Formerly Incarcerated Individuals*, 5 Lancet Pub. Health 107 (2020), <https://perma.cc/55VQ-2QBS>.

These risks are even more acute for prisoners who already suffer from mental illness, like Mr. Perry. “The serious psychological harm stemming from segregation is even more devastating for those with mental illness,” as they are “highly likely to decompensate in such an isolated environment.” *Braggs*, 257 F. Supp. 3d at 1237; see Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with a Mental Illness*, 90 Denv. U. L. Rev. 1, 38–39 (2012); see also Kupers, *supra*, at 1009 (“When . . . prisoners with serious mental illness are condemned to long stints in isolated confinement with little or no mental health treatment, two things happen: Their mental condition deteriorates, . . . and they are at risk of becoming part of the shocking statistic that as many as 50% of completed suicides occur among the much smaller proportion of prisoners in segregation at any given time.”).

Moreover, the “terrible price” of prolonged solitary confinement is borne widely, but not evenly. According to nationwide estimates from 2019, at least 55,000 prisoners “were held in-cell for twenty-two hours or more per day on average for fifteen days or more,” including “[m]ore than 3,000 people with serious mental illness.” Corr. Leaders Ass’n & Arthur Liman Ctr. for Pub. Int. at Yale Law Sch., *Time-in-Cell 2019: A Snapshot*

*of Restrictive Housing* 5 (2020), <https://perma.cc/55WX-S374>. Black and Latino prisoners “are often over-represented in solitary confinement relative to their (over)representation in the general prison population.” Justin D. Strong et al., *The Body in Isolation*, PLOS ONE, Oct. 2020, at 1, 2–3, <https://perma.cc/S3TF-J28C>. Among the jurisdictions that provided data on their prison populations in 2019, the average percentage of prisoners in solitary confinement “who were Black, Native American, or Alaskan Native was higher than in the total custodial population, as was the percentage of male Hispanic prisoners.” Corr. Leaders Ass’n & Arthur Liman Ctr. for Pub. Int. at Yale Law Sch., *supra*, at 5. Indeed, in Massachusetts, where Mr. Perry was held in solitary confinement, Black males made up 38.6% of the restrictive housing population, but only 28.5% of the general prison population. *Id.* at 30–31 tbl. 12. And other states, including one in this Circuit, reported similar statistics. *See id.*<sup>3</sup>

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<sup>3</sup> *See also, e.g.*, Michael Schwirtz et al., *The Scourge of Racial Bias in New York State’s Prisons*, N.Y. Times (Dec. 3, 2016), <https://perma.cc/L3LQ-C8TN> (finding that Black and Latino prisoners in New York were sent to solitary confinement “more frequently and for longer durations” than white prisoners); Strong et al., *supra*, at 13 (finding that Washington prisoners who self-identified as Latino or an “Other/Unknown” ethnicity were over-represented in solitary confinement when compared to their representation in the general prison population); *cf.* Tammie Gregg & Donna Lieberman, Opinion, *Prolonged Solitary Confinement Is Torture. It’s Time for All States to Ban It.*, Wash. Post (Apr. 28, 2021), <https://perma.cc/5GUG-6M5M> (in Connecticut, “Black and Hispanic or Latinx people make up just 29 percent of the population, [but] represented 85 percent of those held in solitary confinement as of 2019”); Hannah Pullen-Blasnik et al., *The Population Prevalence of Solitary Confinement*, 7 Sci. Advance, no. 48, Nov. 26, 2021, at 1, 3, <https://perma.cc/RTN2-C33C> (in Pennsylvania, Black men were 8 times more likely, and Latino men were 2.5 times more likely, to be placed in solitary confinement by age 32 than white men).

In the last decade, the use of prolonged solitary confinement has come under increasing scrutiny. Multiple members on the U.S. Supreme Court have called attention to the trauma inflicted by prolonged solitary confinement. *See, e.g., Apodaca*, 139 S. Ct. at 6–10 (Sotomayor, J., statement respecting the denial of certiorari); *Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting from denial of stay of execution); *Davis*, 576 U.S. at 287–90 (Kennedy, J., concurring). Likewise, numerous Courts of Appeals have cited the mounting scientific consensus regarding the profound harms inflicted by long periods of solitary confinement.<sup>4</sup>

In the public sphere, commentators across the political spectrum have called for a reduction in the use of solitary confinement. *See, e.g.,* N.Y. Times Editorial Bd., *Solitary Confinement Is Cruel and All Too Common*, N.Y. Times (Sept. 2, 2015), <https://perma.cc/8RAR-M2ZX>; George F. Will, Opinion, *The Torture of Solitary*

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<sup>4</sup> *See, e.g., Porter v. Pa. Dep't of Corr.*, 974 F.3d 431, 441 (3d Cir. 2020) (“It is well established in both case law and scientific and medical research that prolonged solitary confinement . . . poses a substantial risk of serious psychological and physical harm[.]”); *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015) (“Prolonged solitary confinement exacts a heavy psychological toll that often continues to plague an inmate’s mind even after he is resocialized.”); *see also Hammer v. Burks*, 937 F.3d 1171, 1181 (8th Cir. 2019) (Erickson, J., concurring) (recognizing that we “now know[] . . . the profound detrimental and devastating impact solitary confinement has on an inmate’s psyche, particularly an inmate with pre-existing mental illnesses”); *Grissom v. Roberts*, 902 F.3d 1162, 1177 (10th Cir. 2018) (Lucero, J., concurring in the judgment) (noting that “solitary confinement, even over relatively short periods, renders prisoners physically sick and mentally ill,” and that its persistent and potentially permanent harms “become more severe the longer a person is exposed”); *cf. Gallina v. Wilkinson*, 988 F.3d 137, 148 (2d Cir. 2021) (Pooler, J., dissenting) (“Prolonged solitary confinement is one of the true horrors of the modern-day penal system.”).

*Confinement*, Wash. Post (Feb. 20, 2013), <https://perma.cc/A9L7-TFQ2>. So, too, have state correctional administrators, who “are largely responsible for the growth in solitary confinement in recent decades.” Timothy Williams, *Prison Officials Join Movement to Curb Solitary Confinement*, N.Y. Times (Sept. 2, 2015), <https://perma.cc/WC55-DPPL>.

Recent tragedies also have provoked public outrage. The death of Kalief Browder—who took his own life after being kept, while still a teenager, in solitary confinement at Riker’s Island in New York City for two years—inspired widespread public outcry and local and federal reforms. See Peter Holley, *Kalief Browder Hanged Himself After Jail Destroyed Him. Then ‘A Broken Heart’ Killed His Mother.*, Wash. Post (Oct. 18, 2016), <https://perma.cc/3AHH-BMSW>. In California, a hunger strike involving over 30,000 prisoners brought national attention to the issue of solitary confinement, inspiring reforms in multiple states. See Benjamin Wallace-Wells, *The Plot from Solitary*, N.Y. Mag. (Feb. 21, 2014), <https://perma.cc/P4UF-2L98>. In Texas, the mandatory isolation of all death-row inmates after a few attempted to escape has been criticized by both activists and correctional officers. See Michael Barajas, *Texas Prisons Lead the Nation in Long-Term Solitary Confinement*, Tex. Observer (Oct. 10, 2018), <https://perma.cc/49ZH-GAPR>. And the current national movement for criminal justice reform includes a renewed push to end the use of prolonged solitary confinement. See, e.g., Amy Fettig & David Fathi, Opinion, *As Debates Over Police Reform*



*Rage, It's Time to End Solitary Confinement*, Phila. Inquirer (July 1, 2020), <https://perma.cc/6LW3-PH9U>.

\* \* \*

As current and former prosecutors and Department of Justice officials, amici recognize that the criminal justice system must respond to such deeply felt concerns if it is to maintain public confidence, and thereby public safety.<sup>5</sup> When community members do not trust the state to administer humane punishment, they are less inclined to participate in the criminal justice system, directly impeding the work of prosecutors and police. As the nation faces widespread protests and unrest evincing mistrust of law enforcement in many communities, it is more critical than ever to foster the perception that our justice system can be fair.

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<sup>5</sup> Amici acknowledge that in limited circumstances, it may be appropriate to separate prisoners from the general population to maintain *institutional* safety. See U.S. Dep't of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* 1, 4 (2016) ("DOJ Report"), <https://perma.cc/WXU4-MRXU>. But notably, even when it comes to institutional safety within prisons, there is no reliable evidence that prolonged segregation has led to meaningful improvements. In fact, a 2016 meta-review conducted by the National Institute of Justice concluded that, across various studies, placement in segregation did not affect offenders' likelihood of institutional misconduct, and that "using segregation at a higher rate or opening a supermax facility ha[d] little effect on rates of misconduct and violence." See Benjamin Steiner & Calli M. Cain, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation, in Restrictive Housing in the U.S.* 165, 181 (2016), <https://perma.cc/D7MR-HN5C>. At the same time, states that have reduced their use of solitary confinement have reported no increase in inmate violence, see DOJ Report, *supra*, at 74–78, and some have even reported a *decrease* in such violence, see, e.g., Maurice Chammah, *Stepping Down from Solitary Confinement*, The Atlantic (Jan. 7, 2016), <https://perma.cc/T44Q-3JR2>.

## II. Protective Solitary Confinement Discourages Witness Cooperation.

In addition to eroding public faith in the criminal justice system, solitary confinement, when used as a method of protective custody for detained cooperating witnesses, unfairly punishes those who assist prosecutorial efforts and disincentivizes cooperation with law enforcement. Prosecutors often rely on the cooperation of defendants facing criminal charges to obtain evidence and secure convictions, especially in complex cases involving drug-trafficking conspiracies, organized crime, and terrorism. *See* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors*, 68 Fordham L. Rev. 917, 921, 932, 934 (1999). Prosecutors also rely on inmates to provide information regarding crimes occurring within prison walls.

To protect cooperating witnesses from other prisoners, some jails and prisons place cooperators in solitary confinement because the facilities lack “the operational capacity to offer opportunities for protective custody inmates to congregate.” Michael P. Harrington, *Methodological Challenges to the Study and Understanding of Solitary Confinement*, 79 Fed. Prob. 45, 46 (2015). Placing cooperating witnesses in solitary confinement—even for their own protection—punishes those witnesses and subjects them to long-term adverse health consequences *because* of their valuable assistance. Such treatment disincentivizes others from assisting prosecutors and also discourages them from cooperating in investigations of crime occurring in prisons.

Although Mr. Perry was not placed in solitary confinement as a cooperating witness, such witnesses face the same harms as those, like Mr. Perry, who were placed

in solitary confinement as punishment or for other reasons. Constitutional limitations on the use of solitary confinement guide prison administrators' decisions for all prisoners.

### **III. Solitary Confinement Interferes with Reentry After Prison.**

One of the criminal justice system's primary goals must be to rehabilitate individuals serving their sentences so that when they are released—as over 95% eventually are—they may successfully reintegrate into society. *See* Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States*, Bureau of Just. Stat. (last revised Sept. 10, 2020), <https://perma.cc/TN76-ZCB8>. Amici appreciate that preparing people for release while they are in prison and supporting them once they return to the community can reduce recidivism and promote public safety.

As the Department of Justice has identified, the correctional system can support successful reentry by: (a) offering education, employment training, and other evidence-based programs “that target [prisoners'] criminogenic needs and maximize their likelihood of success upon release”; (b) providing prisoners with “the resources and opportunity to build and maintain family relationships, strengthening the support system available to them upon release”; and (c) ensuring that individuals transitioning back to the community receive “continuity of care” to support their successful reentry. U.S. Dep't of Justice, *Roadmap to Reentry: Reducing Recidivism Through Reentry Reforms at the Federal Bureau of Prisons* 3–4 (2016) (“*Roadmap to Reentry*”), <https://perma.cc/SGJ9-8MMF>. Solitary confinement frustrates each of these objectives.

First, many prisoners in solitary confinement have no access to job training or educational programs, even though such programs are among “the most effective ways to reduce recidivism.” *Id.* at 4; *see also* Lois M. Davis et al., Rand Corp., *Evaluating the Effectiveness of Correctional Education* 29 (2013), <https://perma.cc/546A-GTCB> (concluding that most studies agreed that participation in correctional education programs reduced the risk of recidivating and increased the odds of obtaining post-release employment). Texas prisons, for example, have “exclude[d] people in solitary confinement from all rehabilitative programs,” including educational programs, job training, substance abuse treatment, and anger management counseling, which help people prepare for life after release. ACLU of Tex. & Tex. Civil Rights Project—Houston, *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas* 36 (2015) (“*A Solitary Failure*”), <https://perma.cc/ETK6-GRP6>.

Compounding this lack of programming, the debilitating mental health effects of solitary confinement can make it much more difficult for the formerly incarcerated to maintain employment. Some states have introduced “step-down” programs to improve prisoners’ ability to interact with others and to reintroduce prisoners in solitary confinement to the general population before their ultimate release from prison. *See* Christie Thompson, *From Solitary to the Street*, The Marshall Project (June 11, 2015), <https://perma.cc/KWA5-HPS3>. But such programs are not available in many states, and thousands of individuals are released into the community directly from solitary confinement each year. *See id.* Returning from prison to the community is difficult

under any circumstances. Attempting to reenter society immediately after a prolonged period of near-total isolation—without reintegration support or programming to promote positive rehabilitation—poses nearly insurmountable challenges.

Second, restrictive visitation rules in solitary confinement can undermine the positive effect that strong familial bonds have for reintegration. “Research shows that close and positive family relationships reduce recidivism, improve an individual’s likelihood of finding and keeping a job after leaving prison, and ease the harm to family members separated from their loved ones.” *Roadmap to Reentry, supra*, at 4. Despite these benefits, many held in solitary confinement are allowed only no-contact visits, during which they are physically separated from family members, and their allotted number of visits and phone calls may be limited. *See A Solitary Failure, supra*, at 7. These restrictions—along with the severe mental health consequences of prolonged solitary confinement—make it difficult for prisoners in solitary confinement to maintain the close family ties that can support their reentry.

Finally, in many instances, people housed in solitary confinement “max out” of their sentences and therefore are less likely to be placed on post-release supervision than other prisoners. *See Thompson, supra*. This can be particularly problematic for prisoners with mental illness, who do not receive the same referrals to treatment providers upon release as those who are released under supervision. *See id.* Releasing people directly from solitary confinement into the community without further support makes it extraordinarily difficult to adjust to life outside of prison.

The result has been that those who have served time in solitary confinement, and especially those released directly from solitary confinement into the community, have higher rates of recidivism than those held in the general prison population. *See, e.g., A Solitary Failure, supra*, at 8 (in Texas, prisoners released directly from solitary confinement were rearrested within three years of release at a rate twenty-five percent higher than those released from the overall prison population); Anjali Tsui, *Does Solitary Confinement Make Inmates More Likely to Reoffend?*, Frontline (Apr. 18, 2017), <https://perma.cc/KYG4-3ZC2> (citing similar statistics from Connecticut); David Lovell et al., *Recidivism of Supermax Prisoners in Washington State*, 53 *Crime & Delinq.* 633, 643–45 (2007) (in Washington, prisoners released directly from solitary confinement were significantly more likely to commit new felonies than those released from the general population); Daniel P. Mears & William D. Bales, *Supermax Incarceration and Recidivism*, 47 *Criminology* 1131, 1150–51 (2009) (Florida prisoners who served at least three months in solitary confinement at any point had an eighteen percent higher rate of violent recidivism than those who did not spend time in solitary confinement). While the data do not prove causation, they nonetheless suggest that holding prisoners in solitary confinement for prolonged periods of time does not improve public safety after their release.

Many of the amici, as current and former prosecutors, have had the good fortune to learn, sometimes years after a prosecution, that someone they prosecuted has reentered the community, gone on to college or other higher education, obtained

meaningful work, and become a responsible family member and contributor to society. Achieving this success—capitalizing on second chances—is a goal that those subjected to prolonged solitary confinement rarely can be expected to achieve.

#### **IV. Solitary Confinement Undercuts the United States’ Ability to Secure Extradition.**

Prosecutors rely on the cooperation of foreign partners to prosecute crimes that cross international boundaries and to seek extradition of defendants located abroad who have been charged with crimes in the United States. Extradition is critical to ensuring that those who violate U.S. laws and jeopardize the safety and security of U.S. persons and U.S. national security are brought to justice, wherever they might be located. The continuing use of prolonged solitary confinement in U.S. prisons has interfered with prosecutors’ ability to secure this important form of international cooperation.

Holding prisoners in prolonged periods of solitary confinement runs contrary to a growing international consensus against the practice. In 2015, the United Nations passed a resolution adopting the “Nelson Mandela Rules,” which, inter alia, prohibit solitary confinement for more than 15 consecutive days as a form of “cruel, inhuman or degrading treatment or punishment.” G.A. Res. 70/175, annex, United Nations Standard Minimum Rules for the Treatment of Prisoners, Rules 43 & 44 (Dec. 17, 2015). And America’s close allies have limited the use of solitary confinement within their own borders. *See, e.g., Paola Loriggio, Court of Appeal for Ontario Sets 15-Day Cap on*

*Solitary Confinement*, Global News (Mar. 28, 2019), <https://perma.cc/AS67-9TXY> (noting that the Court of Appeal for Ontario concluded that isolation over 15 days amounts to cruel and unusual punishment); Nicholas Turner & Jeremy Travis, Opinion, *What We Learned From German Prisons*, N.Y. Times (Aug. 6, 2015), <https://perma.cc/U57P-NS9X> (noting that solitary confinement in Germany is rare and limited to a maximum of four weeks).

Considering solitary confinement to be cruel and inhumane, European courts have denied extradition to the United States in some cases, even in the face of serious crimes. For example, in refusing to extradite jihadist recruiter Ali Damache in 2015, the Irish High Court wrote: “being denied the opportunity for meaningful contact with others, the prisoner in solitary confinement is prevented from being fully human. . . . To prevent another from being fully human is by definition inhuman and degrading treatment.” *Att’y Gen. v. Damache* [2015] IEHC 339, ¶¶ 11.5.63, 11.11.12 (Ir.). That same year, a British court denied the extradition of Lauri Love, who was accused of felony hacking and theft for his alleged participation in computer crimes targeting the Federal Reserve, the U.S. military, NASA, and the FBI, among others. *See Lauri Love Case: Hacking Suspect Wins Extradition Appeal*, BBC News (Feb. 5, 2018), <https://perma.cc/VA2W-W6R5>.

As particularly relevant to Mr. Perry’s case, in denying the extradition request for Lauri Love, the court emphasized testimony that “mentally ill inmates [in the United States are] often put in solitary confinement where they cannot access mental health



services.” *Lauri Love v. Gov’t of the United States of America* [2018] EWHC (Admin) 172 [79] (Eng.). And British courts have cited similar grounds in denying other high-profile extradition requests from the United States. *See* Alan Travis & Owen Bowcott, *Gary McKinnon Will Not Be Extradited to US, Theresa May Announces*, *The Guardian* (Oct. 16, 2012), <https://perma.cc/3JXA-3HGS> (noting denial of extradition of hacker Gary McKinnon, who had engaged in the “biggest military computer hack of all time”); *Gov’t of the United States v. Julian Paul Assange* [2021] EW Misc. (Magis. Ct.) 1 (Eng.), <https://perma.cc/B2PC-32AQ> (denying request to extradite Wikileaks founder Julian Assange on espionage charges).<sup>6</sup>

Even where extradition has not been denied, the foreign press has levied harsh criticism against the United States, presenting a challenge for American prosecutors’ ability to collaborate with foreign partners. *See, e.g.*, Ian Patel, *The Impossible Injustice of Talha Absan’s Extradition and Detention*, *New Statesman* (Feb. 21, 2013), <https://perma.cc/9PT8-TFLK> (decrying as unjust the extradition to the United States of a defendant on material support to terrorism charges because of the mental health risks posed by solitary confinement). As foreign governments ban or limit the practice of solitary confinement in their own countries, the United States is likely to continue to

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<sup>6</sup> The Assange decision was ultimately overturned by the High Court, but only based on assurances by the United States that Assange would not be held in solitary confinement. *See generally Gov’t of the United States v. Julian Paul Assange* [2021] EWHC (Admin) 3313 (Eng.).

face such criticism and be denied extraditions, thereby harming public safety and security within our borders.

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Respectfully submitted,

/s/ Mary B. McCord

Mary B. McCord  
Kelsi Brown Corkran  
Amy Marshak  
Seth Wayne  
Shelby Calambokidis  
INSTITUTE FOR CONSTITUTIONAL  
ADVOCACY AND PROTECTION  
Georgetown University Law Center  
600 New Jersey Ave., N.W.  
Washington, D.C. 20001  
(202) 661-6607  
mbm7@georgetown.edu

*Attorneys for Amici Curiae*

## APPENDIX: LIST OF AMICI

### **Roy L. Austin, Jr.**

Former Deputy Assistant to the President for the Office of Urban Affairs, Justice, and Opportunity

Former Deputy Assistant Attorney General for the Civil Rights Division

Former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Columbia

### **Sherry Boston**

District Attorney, Stone Mountain Judicial Circuit (DeKalb County), Georgia

### **Chesa Boudin**

District Attorney, San Francisco, California

### **Michael R. Bromwich**

Former Inspector General, U.S. Department of Justice

Former Chief, Narcotics Unit, U.S. Attorney's Office for the Southern District of New York

### **Mary Patrice Brown**

Former Deputy Assistant Attorney General for the Criminal Division and Counsel for the Office of Professional Responsibility, U.S. Department of Justice

Former Assistant U.S. Attorney and Chief, Criminal Division, U.S. Attorney's Office for the District of Columbia

### **A. Bates Butler III**

Former U.S. Attorney for the District of Arizona

### **Kami N. Chavis**

Former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Columbia

### **Kimberly B. Cheney**

Former Attorney General, State of Vermont

### **John Choi**

Ramsey County Attorney, Minnesota

### **W.J. Michael Cody**

Former U.S. Attorney for the Western District of Tennessee

Former Attorney General, State of Tennessee

**Alexis Collins**

Former Deputy Chief of the Counterterrorism Section in the National Security Division and Counsel to the Assistant Attorney General for National Security, U.S. Department of Justice  
Former Assistant U.S. Attorney, U.S. Attorney's Office for the Eastern District of New York

**Michael Cotter**

Former U.S. Attorney for the District of Montana

**William B. Cummings**

Former U.S. Attorney, Eastern District of Virginia

**Parisa Dehghani-Tafti**

Commonwealth's Attorney for Arlington County and the City of Falls Church, Virginia

**Michael H. Dettmer**

Former U.S. Attorney for the Western District of Michigan

**Michael T. Dougherty**

District Attorney, Twentieth Judicial District (Boulder County) Colorado

**George C. Eskin**

Former Judge, Santa Barbara County Superior Court, California  
Former Assistant District Attorney, Ventura and Santa Barbara Counties, California  
Former Chief Assistant City Attorney, Criminal Division, City of Los Angeles, California

**John P. Flannery II**

Former Assistant U.S. Attorney, U.S. Attorney's Office for the Southern District of New York

**Gil Garcetti**

Former District Attorney, Los Angeles County, California

**John Geise**

Former Chief of the Professional Misconduct Review Unit, U.S. Department of Justice  
Former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Columbia  
Former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Maryland

**Sarah F. George**

State's Attorney, Chittenden County, Vermont

**John Hummel**

District Attorney, Deschutes County, Oregon

**Miriam Aroni Krinsky**

Former Assistant U.S. Attorney and Chief, Criminal Appeals Section, U.S. Attorney's Office for the Central District of California

Former Chair, Solicitor General's Advisory Group on Appellate Issues

**Corinna Lain**

Former Assistant Commonwealth's Attorney, Richmond, Virginia

**Steven H. Levin**

Former Assistant U.S. Attorney and Deputy Chief, Criminal Division, U.S. Attorney's Office for the District of Maryland

Former Assistant U.S. Attorney, U.S. Attorney's Office for the Middle District of North Carolina

**J. Alex Little**

Former Assistant U.S. Attorney, Middle District of Tennessee

Former Assistant U.S. Attorney, District of Columbia

**Rory K. Little**

Former Associate Deputy Attorney General, U.S. Department of Justice

Former Assistant U.S. Attorney and Chief, Appellate Section, U.S. Attorney's Office for the Northern District of California

Former Trial Attorney, Organized Crime & Racketeering Strike Force, U.S. Department of Justice

**Beth McCann**

District Attorney, 2nd Judicial District (Denver County), Colorado

**Mary B. McCord**

Former Acting Assistant Attorney General and Principal Deputy Assistant Attorney General for National Security, U.S. Department of Justice

Former Assistant U.S. Attorney and Chief, Criminal Division, U.S. Attorney's Office for the District of Columbia

**Barbara L. McQuade**

Former U.S. Attorney, Eastern District of Michigan

**Jerome O'Neill**

Former Acting U.S. Attorney, District of Vermont

Former Assistant U.S. Attorney, U.S. Attorney's Office for the District of Vermont

**Wendy Olson**

Former U.S. Attorney for the District of Idaho

**Terry L. Pechota**

Former U.S. Attorney for the District of South Dakota

**Richard Pocker**

Former U.S. Attorney for the District of Nevada

**Karl A. Racine**

Attorney General for the District of Columbia

**Ira Reiner**

Former District Attorney, Los Angeles County, California

Former City Attorney, City of Los Angeles, California

**Stephen D. Rosenthal**

Former Attorney General, Commonwealth of Virginia

**Marian T. Ryan**

District Attorney, Middlesex County, Massachusetts

**Carol A. Siemon**

Prosecuting Attorney, Ingham County, Michigan

**Neal R. Sonnett**

Former Assistant U.S. Attorney and Chief, Criminal Division, U.S. Attorney's Office for the Southern District of Florida

**Shannon Taylor**

Commonwealth's Attorney, Henrico County, Virginia

**Mary Sue Terry**

Former Attorney General, Commonwealth of Virginia

**Raúl Torrez**

District Attorney, Bernalillo County, New Mexico

**Joyce White Vance**

Former U.S. Attorney for the Northern District of Alabama

**Seth Waxman**

Former Solicitor General of the United States

### CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Mary B. McCord  
Mary B. McCord