No. 18-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CHARLES HAMNER,

Plaintiff-Appellant,

v.

DANNY BURLS, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Arkansas
Case No. 5:17-CV-79 JLH-BD
The Honorable Judge James Leon Holmes

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, Movants Current and Former Prosecutors, Judges, and Department of Justice Officials respectfully request leave to participate as amici curiae and to file a brief in support of Plaintiff-Appellant's petition for panel rehearing and rehearing en banc.[1]

[1] All parties were timely notified of proposed amici's intent to file this amicus curiae brief. Plaintiff-Appellant has consented to the filing of the brief. Defendants-Appellees have declined to consent.

Proposed amici are current and former federal, state, and local prosecutors, judges, and Department of Justice officials. Amici have an interest in the fair administration of the criminal justice system and believe that the just administration of criminal punishment enhances community trust in the fairness of the criminal justice system and, in turn, safeguards individuals' willingness to participate in that system. Amici also have an interest in ensuring that inmates are given the opportunity to successfully rejoin society and avoid recidivism. Finally, amici have an interest in furthering international law enforcement cooperation, which depends upon the administration of humane punishment in the United States.

The proposed amicus brief presents a supplemental perspective to the parties regarding the reasons the Court should grant rehearing in this case. First, the brief urges the Court to grant rehearing en banc to address the critical constitutional issues raised in this appeal in order to provide guidance regarding the appropriate use of solitary confinement. Second, the brief explains why the constitutional issues arising out of solitary confinement are of particular importance to amici and should be addressed. In particular, it argues that the overuse of solitary confinement impedes the ability of prosecutors and law enforcement officials to protect public safety, undermines the criminal justice system's rehabilitative goals, and is detrimental to amici's ability to work with foreign nations.

For the foregoing reasons, this Court should grant leave for Movants to file an amicus curiae brief in support of Plaintiff-Appellant's petition for panel rehearing and rehearing en banc.

October 23, 2019

Respectfully Submitted,

/s/ Amy L. Marshak

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October, 2019, I electronically transmitted the foregoing Motion for Leave to File an Amicus Curiae Brief in Support of Plaintiff-Appellant's Petition for Panel Rehearing and Rehearing En Banc using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants who have appeared in this case.

/s/ Amy L. Marshak

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BRIEF OF AMICI CURIAE CURRENT AND FORMER PROSECUTORS, JUDGES, AND DEPARTMENT OF JUSTICE OFFICIALS IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING

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INTEREST OF AMICI CURIAE[1]

Amici are current and former federal, state, and local prosecutors, judges, and Department of Justice officials. Amici recognize that the development of constitutional principles through litigation provides critical guidance for the fair administration of the criminal justice system. Amici have an interest in supporting humane conditions of incarceration to enhance community trust in the fairness of the criminal justice system and, in turn, to safeguard individuals' willingness to participate in that system. As stewards of public safety, amici also have an interest in ensuring that inmates—the vast majority of whom eventually are released from incarceration—are given the opportunity to successfully rejoin society and avoid recidivism. Finally, amici have an interest in furthering international law enforcement cooperation, which depends upon the administration of humane punishment in the United States.

INTRODUCTION

Amici urge this Court to grant rehearing en banc to address the critical constitutional issues raised in this appeal. Amici take no position on the ultimate disposition of the case, including whether defendants are entitled to qualified immunity. But amici believe the Court should take this opportunity to provide much

[1] 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.

needed guidance to officials charged with the fair and just administration of criminal punishment. As Judge Erickson recognized in his concurrence, "the time has come" to address "the known negative effects of segregation and isolation." *Hamner v. Burls*, 937 F.3d 1171, 1181 (8th Cir. 2019) (Erickson, J., concurring).

The constitutional issues in this case are particularly important to amici. 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 quotations 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 aspects of the criminal justice system to offend principles of fundamental fairness and human dignity. Amici believe that, although the limited use of solitary confinement may be appropriate in certain circumstances, its overuse impedes the ability of prosecutors and law enforcement officials to protect public safety, undermines the criminal justice system's rehabilitative goals, and is detrimental to amici's ability to work with foreign nations. Amici therefore urge the Court to grant rehearing en banc to address the constitutional issues raised in this appeal.

ARGUMENT

I. THE COURT SHOULD REACH THE CONSTITUTIONAL ISSUES PRESENTED

In this case, the panel affirmed the dismissal of plaintiffs' Eighth and Fourteenth Amendment claims on the ground that defendants were entitled to qualified immunity. Although qualified immunity was neither addressed by the district court nor raised by defendants, the panel held that the officials' conduct—segregating Mr. Hamner in highly restrictive conditions of solitary confinement for 203 days with little or no explanation or process and despite his history of serious mental illness—did not violate any clearly established constitutional right. *Hamner*, 937 F.3d at 1178–80.

As the panel explained here, "[t]o overcome a claim of qualified immunity, Hamner must establish that (1) the facts alleged in the complaint make out a constitutional violation and (2) that the right violated was 'clearly established.'" *Id.* at 1176 (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). Because of the importance of the constitutional issues presented, amici urge the panel to grant review en banc to address whether Mr. Hamner's constitutional rights were violated.

The Supreme Court has long recognized that deciding a question of qualified immunity solely on the basis of whether a constitutional right was clearly established risks stunting the development of the law. In *County of Sacramento v. Lewis*, the Court acknowledged that, if courts focus solely on whether the constitutional right

was "clearly settled," "standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals." 523 U.S. 833, 841 n.5 (1998). Even while holding that courts may decide the clearly established prong of the qualified immunity test first, the Court recognized that addressing both elements is "often beneficial" because it "promotes the development of constitutional precedent." *Pearson*, 555 U.S. at 236; *see also Camreta v. Greene*, 563 U.S. 692, 706 (2011) (by addressing solely the clearly established prong, courts "fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements").

It is particularly important to address the constitutional questions where, as here and in many cases challenging solitary confinement, a claim for injunctive relief—not subject to qualified immunity—is mooted by the time the prisoner exhausts the claim and reaches the court. *See Pearson*, 555 U.S. at 236 ("[T]he two-step procedure . . . is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."); *Chambers v. Pennycook*, 641 F.3d 898, 904–05 (8th Cir. 2011) (addressing both prongs where resolution of the constitutional question would "give guidance to officials about how to comply with legal requirements"; "[t]he question is unlikely to be resolved in" other contexts; and it was fully briefed).

Scientific understanding and public opinion regarding the use of prolonged periods of solitary confinement have changed significantly in recent years, even as constitutional law in this area has remained stagnant. *See Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) ("consideration of these issues [presented by solitary confinement] is needed.") (Kennedy, J., concurring); *Hamner*, 937 F.3d at 1181 (Erickson, J., concurring) (questioning circuit precedent in light of "the developing science of mental health and what is now known—that is, the profound detrimental and devastating impact solitary confinement has on an inmate's psyche, particularly an inmate with pre-existing mental illnesses"). Having already received briefing regarding the significant constitutional questions in this case, the Court should take this opportunity to answer those questions now.

II. OVERUSE OF SOLITARY CONFINEMENT IS DETRIMENTAL TO THE CRIMINAL JUSTICE SYSTEM

A. Prolonged Solitary Confinement Damages Public Trust

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 truthfully as witnesses, or sitting as fair and impartial jurors. That trust is undermined when the public believes that conditions of incarceration are unfair, cruel, or inhumane. It is therefore imperative that courts address the constitutional questions surrounding solitary confinement.

Imposing prolonged periods of solitary confinement violates norms of fundamental fairness and can lead to severe health consequences. As the facts of this case and the information presented by other amici demonstrate, prolonged solitary confinement exacts a terrible price. Inmates are typically restricted to a "windowless cell no larger than a typical parking spot," with "little or no opportunity for conversation or interaction with anyone." *Ayala*, 135 S. Ct. at 2208 (Kennedy, J. concurring). Even periods far shorter than the 203 days that Mr. Hamner spent in solitary confinement can have long-lasting psychological and emotional consequences, including increasing the risk of self-harm and suicide—especially for those who already suffer from mental illness, like Mr. Hamner. *See, e.g.*, 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.

At the same time, while separating inmates from the general population may be appropriate in limited circumstances, prolonged segregation does not meaningfully improve prison security. There is no reliable evidence that placing inmates in solitary confinement for extended periods of time actually improves safety for correctional officers or other inmates. *See, e.g.*, Benjamin Steiner & Calli M. Cain, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation*, *in* Restrictive Housing in the U.S.: Issues, Challenges, and Future Directions 165, 181 (2016), https://perma.cc/D7MR-HN5C. And states

that have undertaken reforms to reduce their use of solitary confinement have reported no increase in inmate violence. *See* U.S. Dep't of Justice, Report and Recommendations Concerning the Use of Restrictive Housing 75–78 (2016), https://perma.cc/WXU4-MRXU.

The use of prolonged solitary confinement has faced increasing public scrutiny and criticism in the last decade. *See, e.g.*, N.Y. Times Editorial Board, *Solitary Confinement Is Cruel and All Too Common*, N.Y. Times, Sept. 2, 2015, https://perma.cc/8RAR-M2ZX; George F. Will, *The Torture of Solitary Confinement*, Wash. Post, Feb. 20, 2013, https://perma.cc/A9L7-TFQ2.

Recent tragedies also have provoked public outrage. The death of Kalief Browder, who took his own life after being kept in solitary confinement at Riker's Island in New York City for two years as a teenager, 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/9E83-6TRU. 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. Magazine, Feb. 21, 2014, https://perma.cc/P4UF-2L98. And in communities across the country, people have protested against solitary

confinement. *See, e.g.*, Nathaniel Lee, *Protestors rally against solitary confinement*, Phila. Trib., June 21, 2017, https://perma.cc/SLB9-65FK.

As prosecutors and judges, amici recognize that the criminal justice system must respond to such deeply felt concerns to maintain public confidence. 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 law enforcement officials.

B. Protective Solitary Confinement Disincentivizes Witness Cooperation

The use of solitary confinement as a method of protective custody for cooperating witnesses unfairly punishes those who assist prosecutorial efforts and could reduce defendants' willingness to cooperate with law enforcement. Prosecutors often rely on cooperating witnesses 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 (1999). Prosecutors also rely on inmates to provide information regarding crimes occurring within prison walls.

In order to protect cooperating witnesses from other inmates, 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). That appears to be what happened to Mr. Hamner: after reporting another inmate's planned assault, thereby preventing injury to a correctional officer, Mr. Hamner was placed in solitary confinement, despite his lack of any disciplinary record.

Placing cooperating witnesses like Mr. Hamner 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 cooperating with prosecutors and discourages inmates from cooperating in investigations of crime occurring in prisons.

C. Solitary Confinement Interferes with Inmate Reentry

One of the criminal justice system's primary goals is to rehabilitate individuals serving their sentences so that when they are released—as over 95 percent of the prison population eventually is—they may successfully reintegrate into society. *See* Timothy Hughes & Doris James Wilson, Bureau of Justice Statistics, *Reentry Trends in the United States*, https://perma.cc/5NXV-JYK6 (last revised Oct. 21, 2019). Providing inmates with educational and vocational programming and opportunities to maintain family relationships—and continuing to support those individuals upon release—can reduce recidivism and promote public safety. *See* U.S. Dep't of Justice, Roadmap to Reentry 3–4 (2016), https://perma.cc/SGJ9-8MMF. Solitary confinement frustrates these objectives.

First, like Mr. Hamner, many prisoners in solitary confinement have no access to job training and educational programs, even though such programs are among "the most effective ways to reduce recidivism." *Id.* at 4. 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. *See* Joseph Shapiro, *From Solitary to the Streets*, NPR, June 11, 2015, https://perma.cc/6UYT-WSKW.

Moreover, restrictive visitation rules in solitary confinement can undermine the positive effect that strong familial bonds have for reintegration. *See* Roadmap to Reentry, *supra*, at 4. Inmates held in solitary confinement often are allowed only "no-contact visits," during which they are physically separated from family members, and prisoners' number of visits and phone calls may be limited. ACLU of Texas & Tex. Civil Rights Project—Houston, *A Solitary Failure* 14 (2015), https://perma.cc/4QGG-R3YP. These restrictions—along with the severe mental health consequences of prolonged solitary confinement—make it difficult for inmates in solitary confinement to maintain the close family ties that can support their reentry.

Finally, in many instances, inmates in solitary confinement "max out" of their sentences and therefore are less likely to be placed on supervision than other prisoners. *See* Shapiro, *supra*. Releasing inmates directly from solitary confinement

into the community without further support makes it extraordinarily difficult for these individuals to adjust to life outside of prison.

The result has been that those who have served time in solitary confinement have higher rates of recidivism than those held in the general prison population. In Florida, for example, inmates who served time in solitary confinement had "substantially higher rates of any recidivism," and particularly of violent recidivism, than those who did not spend time in solitary confinement. Daniel P. Mears & William D. Bales, *Supermax Incarceration and Recidivism*, 47 Criminology 1131, 1150 (2009) (Florida); *see also, e.g.*, David Lovell et al., *Recidivism of Supermax Prisoners in Washington State*, 53 Crime & Delinq. 633, 644 (2007) (inmates released from solitary confinement in Washington commit new felonies at a rate 35 percent higher than those released from the general population). Amici's mission to protect public safety is imperiled by unnecessary solitary confinement and the resulting increased recidivism.

D. Solitary Confinement Undercuts the United States' Ability to Secure Extradition

The continued reliance on prolonged periods of solitary confinement in the federal and state criminal justice systems runs contrary to a growing international consensus against the practice. *See, e.g.*, United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 43(a) & (b), E/CN.15/2015/L.6/Rev.1 (May 21, 2015), https://perma.cc/783K-ZV9T (prohibiting indefinite and prolonged solitary

confinement as a form of "cruel, inhuman or degrading treatment or punishment"). Prosecutors often work with 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 all who violate U.S. laws and jeopardize the nation's safety and security are brought to justice.

The use of prolonged periods of solitary confinement in U.S. prisons already has interfered with prosecutors' ability to secure this important form of international cooperation. Foreign judges in the European Union have refused to extradite some defendants because of the possibility that the accused may be held in solitary confinement in U.S. custody. *See, e.g.*, *Att'y Gen. v. Damache* [2015] IEHC 339 (Ir.) (refusing extradition of Jihadist recruiter Ali Damache); *Love v. Gov't of the United States of America* [2018] EWHC 172 (Admin) (denying extradition of hacker Lauri Love, who was accused of felony hacking and theft for his alleged participation in computer crimes targeting, *inter alia*, the Federal Reserve, the U.S. military, NASA, and the FBI). Denial of extradition is particularly harmful where the defendant has been accused of crimes that implicate serious national security interests.

CONCLUSION

For the reasons stated herein, amici urge the Court to address the constitutional issues presented in this appeal.

Dated: October 23, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Amy L. Marshak, hereby certify that the foregoing Brief of Amici Curiae Prosecutors, Judges, and Department of Justice Officials in Support of Plaintiff-Appellant's Petition for Rehearing complies with type-volume limits because, excluding the parts of the document exempted by Rule 32(f) of the Federal Rules of Appellate Procedure, the brief contains 2,585 words, and is proportionately spaced using a roman style typeface of 14-point.

/s/ Amy L. Marshak

Dated: October 23, 2019

CERTIFICATE OF SERVICE

I, Amy L. Marshak, hereby certify that on October 23, 2019, I electronically filed the foregoing Brief of Amici Curiae Prosecutors, Judges, and Department of Justice Officials in Support of Plaintiff-Appellant's Petition for Rehearing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

/s/ Amy L. Marshak