No. 18-2181

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CHARLES HAMNER;
Plaintiff-Appellant,

v.

DANNY BURLS, et al.,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Arkansas (No. 5:17-CV-79 JLH-BD)

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(3), amici, who are law professors, international human rights clinics and clinic directors, scholars of international human rights law, and nonprofit organizations that seek to enforce constitutional and human rights of incarcerated individuals, move the Court for leave to file a brief as amici curiae in support of Plaintiff-Appellant's petition for rehearing by panel and rehearing en banc. A proposed brief accompanies this motion.

1. This case involves the Plaintiff's rights to dignity, and freedom from cruel, inhuman and degrading treatment, as well as torture, matters on which amici have unique experience and expertise. Their participation as amici curiae will provide substantial assistance to the Court in deciding whether to grant rehearing. Because the Court's decision in this case will affect the rights of prisoners not only in Arkansas but also the rights of any prisoner that is in solitary confinement in Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, the amici have a substantial interest in the question presented.

2. The **Anti-Torture Initiative (ATI)** is a core project of the Center for Human Rights & Humanitarian Law at American University Washington College of Law. The ATI was created in 2011 to support the reach and practical implementation of the work of the former Special Rapporteur on

Torture. From 2011 to 2016, the ATI worked to complement the activities of the Rapporteurship; from November 2016 onwards, the ATI has continued its mission to prevent torture worldwide through programmatic and country-specific activities in key thematic areas.

3. **Sandra L. Babcock** is Clinical Professor of Law and Director of the International Human Rights Clinic at Cornell Law School. Professor Babcock's International Human Rights Clinic focuses in large part on access to justice for prisoners facing the death penalty in the United States and around the world, particularly in Sub-Saharan Africa. Professor Babcock is the Faculty Director of the Cornell Center on the Death Penalty Worldwide, and has been engaged in the defense of individuals facing the death penalty for the last 28 years.

4. **Caroline Bettinger-López** is a Professor of Law and Director of the Human Rights Clinic at the University of Miami School of Law, which she founded in 2010. She also serves as an Adjunct Senior Fellow at the Council on Foreign Relations. From 2015-2017, she served in the Obama Administration as the White House Advisor on Violence Against Women, a senior advisor to Vice President Joe Biden, and a member of the White House Council on Women and Girls. She is lead counsel on *Jessica Lenahan (Gonzales) v. U.S.* (Inter-American Commission on Human Rights, 2011), the

first international human rights case brought by a domestic violence victim against the U.S. She has worked extensively with advocates and government officials in Canada on issues of violence against Indigenous women and girls, challenged Stand Your Ground laws before the United Nations and the Inter-American Commission on Human Rights, collaborated with advocates in Miami and Haiti to stop U.S. deportations to post-earthquake Haiti, and litigated against the Dominican Republic for its mass expulsions of Haitian nationals and Dominicans of Haitian descent. Prior to joining Miami Law, Caroline taught at University of Chicago School of Law and Columbia Law School; and was a Skadden Fellow at the ACLU Women's Rights Project and law clerk in the Eastern District of New York. Recently, she received a Roddenberry Fellowship for her COURAGE (Community Oriented and United Responses to Address Gender Violence and Equality) in Policing Project and funding from the TIME'S UP Legal Defense Fund to start (with local community partners) the Voces Unidas/Vwa Ini Project, to support low-wage immigrant women workers experiencing workplace sexual misconduct or retaliation.

5. Sarah Dávila-Ruhaak is Assistant Professor of Law and Co-Founder and Director of the International Human Rights Clinic at The John Marshall Law School. She teaches International Human Rights, Transitional

Justice, and lectures on international topics. She also teaches the International Human Rights Clinic seminar. She has litigated human rights cases domestically and internationally and has engaged in impact advocacy at the United Nations. She has also worked on immigration detention conditions and solitary confinement. Dávila-Ruhaak has submitted shadow reports on the issue of solitary confinement in immigrant detention to the United Nations Human Rights Committee and Committee Against Torture. She has also presented in panels discussing the legality of the use of solitary confinement in the context of human rights.

6. **Vanessa Drummond** is Assistant Project Director of the Anti-Torture Initiative. Drummond previously supported the mandate of the former U.N. Special Rapporteur on Torture as researcher and legal analyst. She also served as a legal assistant for the Kovler Project Against Torture, conducting research on and identifying areas of non-compliance by States Parties to the U.N. Convention Against Torture.

7. **Ariel Dulitzky** is Clinical Professor of Law and Director of the Human Rights Clinic at the University of Texas at Austin School of Law. He is a leading expert in the Inter-American human rights system and on enforced disappearances. Between 2010 and 2017 he was one of the five experts of the United Nations Working Group on Enforced or Involuntary Disappearances

and elected as its Chair-Rapporteur in 2013 (2013-2015). Prior to joining the University of Texas, he was Assistant Executive Secretary of the Inter-American Commission on Human Rights (IACHR). He has been an advisor to the second edition of the Amnesty International Fair Trial Manual and a member of the advisory panel for the revision of the U.N. Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions. Previously, Professor Dulitzky was the Latin America Program Director at the International Human Rights Law Group and Co-Executive Director of the Center for Justice and International Law (CEJIL). Professor Dulitzky has directed the litigation of more than 100 cases in front of the Inter-American Commission and Inter-American Court of Human Rights.

8. The Exoneration Project is dedicated to restoring justice by investigating and petitioning courts to reverse wrongful convictions. The criminal justice system is not perfect. Innocent people are sometimes convicted of crimes they did not commit. When that occurs, the consequences for the lives of the wrongfully convicted and their families are truly devastating. Beyond assisting clients with their claims of actual innocence in court, the Exoneration Project also strives to shed light on the problems in the criminal legal system that allow innocent people to be convicted of crimes

they did not commit by advocating for greater accountability in the justice system.

9. Denise Gilman teaches and directs the Immigration Clinic at the University of Texas Law School. Professor Gilman also teaches a refugee law and policy seminar. She writes and practices extensively in the immigrants' rights and human rights fields, with a particular focus on immigration detention. Professor Gilman's scholarship includes: *Immigration Detention, Inc.*, 6 J. Migration & Hum. Sec. 145 (2018) (peer-reviewed) (co-authored with Luis A. Romero); *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 INDIANA L.J. 157 (2016); *Realizing Liberty: The Use Of International Human Rights Law To Realign Immigration Detention In The United States*, 36 FORDHAM INT'L L.J. 243 (2013). Before joining academia, she worked for the Washington Lawyers' Committee for Civil Rights and Urban Affairs, Human Rights First and the Inter-American Commission on Human Rights.

10. Peter Halewood is Gov. George E. Pataki Distinguished Professor of International Commercial Law at Albany Law School. He is Chair of the Association of American Law Schools Section on International Human Rights and Affiliated Faculty and Advisory Board member at the University at Albany's Global Institute for Health and Human Rights.

11. The **Innocence Project** is a non-profit organization and law school clinic dedicated primarily to providing pro bono legal services to indigent prisoners whose actual innocence may be established through post-conviction evidence. The Innocence Project has provided representation or assistance in most of the 367 DNA exonerations in the United States as well as numerous exonerations based on constitutional violations. The Innocence Project also seeks to prevent future miscarriages of justice by researching their causes, participating as amicus curiae in cases of broader significance to the criminal justice system, and pursuing reform initiatives designed to enhance the truth-seeking function of the criminal justice system. The Innocence Project's work both serves as a check on the awesome power of the state over criminal defendants and helps ensure a safer and more just society. The Innocence Project has expertise in bringing legal challenges to the constitutionality of procedures and practices that implicate the rights of incarcerated populations. As a leading national advocate for the imprisoned, which has represented numerous individuals who have spent years, even decades, in solitary confinement, the Innocence Project is dedicated to improving the criminal justice system, and has a compelling interest in ensuring the fundamental dignity of those held in our nation's prisons.

12. The **International Human Rights Clinic at Santa Clara University School of Law** works on cases and projects in the area of international human rights law in partnership with human rights organizations and experts, primarily in the United States and Latin America. The Clinic has extensive experience addressing the substantive issues underlying this brief through its research, litigation, fact-finding, policy, and advocacy work. The Clinic has submitted several reports on torture to various U.N. human rights bodies, as well as addressed criminal justice reform initiatives in the U.S. and abroad.

13. **Jenipher Jones** is an attorney and policy advocate at NDH LLC, a civil and human rights impact litigation law firm. Jenipher began her career in public interest as a Fellow at the Southern Poverty Law Center. Jenipher primarily handles prison litigation and law enforcement misconduct matters including claims of medical deliberate indifference, solitary confinement, excessive force, and grossly negligent conduct. She has litigated and argued a case of first impression nationally involving the use of algorithmic pretrial risk assessment tools. Jenipher began her litigation of these issues under the guidance of attorney Mario B. Williams, the President and Founder of NDH LLC. Both Mario and Jenipher have submitted written testimony to the United

States Commission On Civil Rights regarding incarcerated persons and mental health.

14. Sital Kalantry is Clinical Professor of Law at Cornell Law School where she directs the International Human Rights Policy Advocacy Clinic. Professor Kalantry writes in the fields of comparative feminist legal theory, international human rights, and empirical studies of courts. She has supervised projects to improve prison conditions for women in Argentina, New York, and in many states across the United States.

15. Juan E. Méndez is Professor of Human Rights Law in Residence at American University Washington College of Law (AUWCL) and Director of the Anti-Torture Initiative with the Center for Human Rights & Humanitarian Law at AUWCL. Méndez served as U.N. Special Rapporteur on the question of torture and other cruel, inhuman, or degrading treatment or punishment (Special Rapporteur on Torture) from 2010 to 2016. Méndez examined issues related to the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment under international law and provided recommendations to States and the international community on how to meet their legal obligations. Méndez was Co-Chair of the Human Rights Institute of the International Bar Association, London (2010 and 2011) and Special Advisor on Crime Prevention to the Prosecutor, International

Criminal Court, The Hague (mid-2009 to late 2010). Until May 2009, Méndez was the President of the International Center for Transitional Justice. Concurrently, Méndez was Kofi Annan's Special Advisor on the Prevention of Genocide (2004 to 2007). Between 2000 and 2003, Méndez was a member of the Inter-American Commission on Human Rights of the Organization of American States, and served as its President in 2002. In 2017, Méndez was appointed commissioner of the International Commission of Jurists.

16. The **National Lawyers Guild Mass Incarceration Committee** exists in recognition that the use of incarceration in the United States has reached epidemic proportions and is the foremost civil rights, racial justice, and human rights concern of our times. The Committee's mission is to challenge the prison industrial complex in all its forms; advocate for prison abolition and alternatives to incarceration; and protect the rights of people in prison.

17. **Project South** is a social justice organization devoted to movement building and movement support in the US and the Global South. Project South is actively working on documenting detention conditions in immigration detention centers in the U.S. and is involved in impact litigation against privately-operated detention centers. Project South is also involved in

Congressional and U.N. advocacy in an attempt to shine a light on the abusive conditions in immigration detention centers, including the arbitrary use of solitary confinement.

18. William Quigley has been a law professor for 28 years at Loyola University New Orleans where he directs the clinical programs and the Gillis Long Poverty Law Center. He has been pro bono counsel in numerous death penalty, habeas, and prison conditions cases. He has been active with the Center for Constitutional Rights, where he served as Legal Director, and the ACLU of Louisiana, where he served as General Counsel; and has litigated with most every other major civil rights organization including the NAACP Legal Defense and Educational Fund, Inc., the Southern Poverty Law Center, the Advancement Project, and the Lawyers Committee for Civil Rights Under Law.

19. Stephen A. Rosenbaum is a Visiting Researcher Scholar at University of California, Berkeley's Haas Institute for a Fair and Inclusive Society. He has taught professional skills courses at Berkeley Law, where he holds the title of Frank C. Newman Lecturer. While a Visiting Senior Lecturer at University of Washington, Rosenbaum co-founded a business and human rights clinic, and taught human rights advocacy. His scholarship has focused on international human rights, immigration, disability and legal education. As

a practicing lawyer, Rosenbaum has litigated anti-discrimination and other civil and human rights cases. He is currently plaintiffs' *pro bono* counsel for La Raza Centro Legal, *Flores v. Barr*, representing unaccompanied minors in United States custody.

20. Dinah L. Shelton is Manatt/Ahn Professor of International Law Emeritus at George Washington University Law School. In 2009, she became a member of the Inter-American Commission on Human Rights and served a four-year term, during which she went on to become President of the Commission. Professor Shelton is the author or editor of three prize-winning books: *Protecting Human Rights in the Americas* (winner of the 1982 Inter-American Bar Association book Prize and co-authored with Thomas Buergenthal); *Remedies in International Human Rights Law* (awarded the 2000 Certificate of Merit, American Society of International Law); and the three volume *Encyclopedia of Genocide and Crimes against Humanity* (awarded a "Best Research" book award by the New York Public Library).

21. Beth Van Schaack is the Leah Kaplan Visiting Professor of Human Rights at Stanford Law School and Acting Director of the Human Rights and Conflict Resolution Clinic. Professor Van Schaack recently stepped down as Deputy to the Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice of the U.S. Department of State. In

that capacity, she helped to advise the Secretary of State and the Under Secretary for Civilian Security, Democracy and Human Rights on the formulation of U.S. policy regarding the prevention of and accountability for mass atrocities, such as war crimes, crimes against humanity, and genocide. Professor Van Schaack writes and teaches in the areas of human rights, transitional justice, international criminal law, public international law, international humanitarian law, and civil procedure.

22. Deborah Weissman is the Reef Ivey II Distinguished Professor of Law at The University of North Carolina at Chapel Hill. Among other courses, Professor Weissman teaches the Human Rights Policy Lab and Forced Migration: Law & Practice. In addition to her scholarly publications, she is the co-author with her students on several human rights policy briefs including, *Understanding Accountability for Torture: The Domestic Enforcement of International Human Rights Treaties* (2017); *Assessing Recent Developments: Achieving Accountability for Torture* (2016); *Solitary Confinement as Torture* (2014); and *Obligations and Obstacles: Holding North Carolina Accountable for Extraordinary Rendition and Torture* (2013). She serves as legal advisor and an advisory board member to the North Carolina Commission of Inquiry on Torture.

23. The proposed amicus brief provides important information and arguments that inform the proper resolution of this issue. The *amici's* brief easily meets Fed. R. App. P. 29(a)(3)'s requirements of (1) an adequate interest, (2) desirability, and (3) relevance. *See Ryan v. Commodity Futures Trading Com'n,* 125 F.3d 1062, 1063 (7th Cir. 1997)(" An amicus brief should normally be allowed…when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide."). Based on amici's experience involving the rights of individuals who are incarcerated, rights to dignity and freedom from torture and cruel, inhumane, and degrading treatment, and given the relevance of international and foreign law and practice to the interpretation of the Eighth Amendment's prohibition on cruel and unusual punishment, the proposed amicus brief provides information and argument relevant to Plaintiff-Appellant's petition for rehearing en banc.

24. The brief sets out the international law and standards on solitary confinement and when solitary confinement amounts to torture or cruel, inhumane, and degrading treatment. The brief explains why international law and the law and practice of peer nations must inform the Eighth Amendment's prohibition on cruel and unusual punishment. The brief also identifies the law and practice of our peer nations. Peer nations, responding to the overwhelming

evidence of the harms of prolonged isolation and evolving international law and standards, restrict the duration of solitary confinement and impose requirements on the conditions of solitary confinement to mitigate the harms of isolation.

25. WHEREFORE, amici curiae respectfully request that this Court grant this motion for leave to file the attached brief in support of Plaintiff-Appellant's petition for rehearing en banc.

Dated: October 23, 2019

Respectfully Submitted,

s/ Claudia Flores
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VERIFICATION

Claudia Flores, attorney for *Amici Curiae*, verifies that the statements in this motion are true and correct to the best of her information and belief.

s/ Claudia Flores

CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2019, I electronically filed the foregoing Motion with the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Date: October 23, 2019

s/ Claudia Flores
Claudia Flores

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On Appeal from the United States District Court for the Eastern District of Arkansas (No. 5:17-CV-79 JLH-BD)

BRIEF OF *AMICI CURIAE* HUMAN RIGHTS CLINICS, LAW PROFESSORS, AND NON-PROFIT ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING BY PANEL AND REHEARING *EN BANC*

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INTEREST OF AMICI CURIAE

Amici are law professors, clinicians and scholars of human rights, and nonprofit organizations that seek to enforce international and constitutional rights. More detailed information on amici appears in the appendix and motion for leave to file.[1]

Because the Court's decision in this case will affect prisoners' rights to dignity, and freedom from cruel, inhuman and degrading treatment, as well as torture, not only in Arkansas but also any prisoner in any facility in Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, the amici have a substantial interest in the question presented.

SUMMARY OF ARGUMENT

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

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

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

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

ARGUMENT

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

In line with scientific research concerning the harms of solitary confinement, countries have adopted laws, policies and guidelines to mitigate and reduce the

harms caused by solitary confinement. Canada, England, France and Germany, for example, have limited the maximum duration of confinement and attempted to ensure prisoners are not deprived of meaningful human contact and mental stimulation.[2]

Meanwhile, the United States has not only failed to meaningfully restrict or regulate the use of solitary confinement but, since the 1990s, has actually expanded its use. *See* U.S. Department of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* (Jan. 2016), https://www.justice.gov/archives/dag/file/815551/download. The United States allows prisoners to be placed in solitary confinement at the discretion of individual correctional facilities. Whether, how and for how long to impose solitary confinement remains at the discretion of facilities and subject to few if any effective limits. *See* Sarah Baumgartel et al., Yale Law School & The Association of State Correctional Administrators, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-In-Cell*

[2] Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung [StVollzG] [Prison Act], Mar. 16, 1976, BUNDESGESETZBLATT I [BGBL] at 581, 2088, last amended by Gesetz [G], Oct. 30 2017, BGBL I at 3618, § 89 (Ger.) https://www.gesetze-im-internet.de/englisch_stvollzg/index.html; Living in Detention, French Prison Service, 6th Ed. Art. R57-7-62 (n.d.) at p. 48, 49, 51-53, http://www.justice.gouv.fr/art_pix/GUIDE_Je_suis_en_detention_6e_EDITION_ANGLAIS.pdf; The Prison Rules (1999), No. 728, Part II, Offenses Against Discipline, Rule 55(1)(e) (UK) http://www.legislation.gov.uk/uksi/1999/728/article/55/made.

(2018); Hope Metcalf, et al, *Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of States and Federal Correctional Policies: Public Law Working Paper*, Yale Law School (Jun. 2013). The United States holds significantly more people in prolonged and indefinite isolation than any of its peer nations; it does so for significantly longer periods of time; and has no meaningful measures in place to protect prisoners from the documented extreme mental, emotional and physical harm caused by the practice.

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

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

Meanwhile, England and Wales, Canada, France, and Ireland, hold perhaps dozens or, at most, a few hundred people in confinement and have worked to develop policies to mitigate the harms for those few prisoners. *See* Sharon Shalev & Klmmett Edgar, *Deep Custody: Segregation Unites and Close Supervision Centres in England and Wales* 148 (2015); Affleck & Barrison LLP, *Recent Stats Show Marked*

Drop in Use of Solitary Confinement Across Canada (Aug. 8, 2017), http://criminallawoshawa.com/recent-stats-show-marked-drop-in-use-of-solitary-confinement-across-canada/; Council of Europe, *Rapport au Gouvernement de la République française relative à la visite effectuée en France par le Comité européen pour la prevention de la torture et des peines ou traitements inhumains ou dégradants*, ¶ 70, CPT/Inf (2012) 13 (Apr. 19, 2012); Irish Penal Reform Trust, *The Facts*, (Apr. 2019), https://www.iprt.ie/prison-facts/.

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

In contrast, the Netherlands, Norway, France, England and Wales, Germany, South Africa, and Italy, all limit the initial duration of solitary confinement to thirty days or less. Additionally, while France and Germany authorize a thirty-day period of disciplinary confinement, the offenses justifying this duration are much more serious than those provided under United States law. *See* Code de Procedure Penale [C. PR. PEN.] [Criminal Procedure Code] art. R.57-7-47 (Fr.); StVollzG [Prison Act] at §103(1). For example, in federal prisons in the United States, three months of

solitary confinement are authorized for disciplinary violations that include being unsanitary, circulating a petition, or refusing to work or accept a program assignment. *See* 28 C.F.R. § 541.3. In France, thirty days of solitary confinement is authorized only for disciplinary violations such as physical violence or attempted escape. C. PR. PÉN. art. R.57-7-47, R.57-7-1. The same conduct could lead to decades of confinement in the United States. *See e.g. Grissom v. Roberts*, 902 F.3d 1162 (10th Cir. 2018). Similar to France, Germany permits 30 days of disciplinary detention only for "serious or repeated misconduct." StVollzG [Prison Act] at §103(2).

Peer nations also place concrete limits on the renewal of otherwise defined terms of solitary confinement, whereas the United States gives prisons discretion on whether to extend its duration. In the Netherlands and Germany, for example, solitary confinement cannot exceed four weeks per offender per year. *See* Penitentiaire beginselenwet van 18 juli 1998, Stb. 1998, art. 24(1) (Neth.); StVollzG [Prison Act] at § 103(1). South Africa allows extension of an initial seven-day period of segregation to thirty days. Correctional Services Act 111 of 1998 § 30(4)–(5) (S. Afr.). Spain allows an extension of an initial fourteen-day period of confinement to forty-two days. Ley Orgánica General Penitenciaria art. 42 (B.O.E. 1979, 239).

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

Programmatic measures have been shown to mitigate harms caused by confinement when such measures directly address the compounding effects of social isolation, deprivation of environmental stimulation, and severely restricted freedom of movement. Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOL. 285, 289, 294 (2018).

Peer nations have adopted measures to mitigate isolation and the deprivation of stimulation and movement. Canada guarantees four hours of daily out of cell activity, including for exercise. Corrections and Conditional Release Act, at § 36(1)(a). In the Netherlands, all cells have windows that provide natural light. Council of Europe, *Report to the Government of the Netherlands on the visit to the Netherlands*, CPT/Inf, 33-34 (Jan. 19, 2017). Prisoners in Brazil are given two hours of sun intake per day. *Joint Submission by relevant stakeholders on Human Rights Violations In Places of Deprivation of Liberty in Brazil*, 2nd Cycle Universal Periodic Review – Brazil (Nov. 28, 2011).

In contrast, in United States federal prisons, regulations call for prisoners to be provided with *five hours of time outside of their cells on a weekly basis*. These five hours can be confined to a two or three-day period, leaving prisoners in their cells for a twenty-four-hour period for as many as five consecutive days. Even this requirement does not guarantee inmates any access to open spaces or outdoor areas.

Inmates are regularly made to conduct exercise indoors in rooms similar to their cells or in small caged-in areas outdoors. Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124, 126 (2003).

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

Again, the United States, in contrast, requires prisoners to complete most activities in their cells. Even activities that would ordinarily provide some social

contact such as educational opportunities, mental health counseling, and religious activities, if they occur, are conducted through closed-circuit channels on an inmate's television or in brief interactions through the cell door. *See* Amnesty Int'l, *Entombed: Isolation in the US Federal Prison System* (Jul. 2014), at 12–16, https://www.amnestyusa.org/files/amr510402014en.pdf; *See also* Department of Justice, *supra*, 39, 40, 43.

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

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

and unusual punishment" and what we consider permissible forms of punishment and detention. *Simmons*, 543 U.S. at 575 (citing *Trop*, 356 U.S. at 102–03).

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

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

(May 21, 2015) [hereinafter Mandela Rules]. The Mandela Rules categorically prohibit prolonged and indefinite solitary confinement as practices that amount to torture or CIDT. Mandela Rules, at R 43(a)–(b).

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

CONCLUSION

Conditions of solitary confinement, including prolonged and indefinite isolation, violate the human dignity of prisoners and constitute cruel and inhumane treatment. Prison systems around the world are implementing regulations and employing strategies to limit the duration of solitary confinement and to ameliorate

harmful effects, such as sensory deprivation and social isolation. In contrast, in the United States, lack of effective regulation results in the widespread use of the practice. Each year, tens of thousands of prisoners across the country are held in solitary confinement, some for years and even decades. The Eighth Amendment's promise to protect and respect human dignity, as well as our parallel commitments under international law, compel the United States to take steps to mitigate the harms of and to strictly limit the use of prolonged and indefinite solitary confinement. For all the preceding reasons, the petition for rehearing by panel and en banc should be granted.

Date: October 23, 2019

Respectfully submitted,

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APPENDIX

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