

No. 21-15839, 22-15345

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TODD ASHKER, ET AL.,
Plaintiffs-Appellees,
v.

GAVIN NEWSOM, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California

No. 4:09-cv-05796-CW (RMI)
The Honorable Claudia Wilken, District Judge

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN
SUPPORT OF PETITION FOR REHEARING *EN BANC***

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29-2, the Prison Law Office, California Collaborative for Immigrant Justice, California Families to Abolish Solitary Confinement, Civil Rights Corps, the Council on American-Islamic Relations, Dignity and Power Now, Disability Rights California, Disability Rights Washington, Fair Chance Project, Families United to End LWOP, Harvard Prison Legal Assistance Project, Human Rights Defense Center, Immigrant Defense Advocates, National Religious Campaign Against Torture, NextGen Policy, Rights Behind Bars, Rosen Bien Galvan & Grunfeld LLP, Silicon Valley De-Bug, Sister Warriors Freedom Coalition, Social Workers & Allies Against Solitary Confinement, Solitary Watch, the Southern Poverty Law Center, UnCommon Law, Underground Scholars Initiative-UC Berkeley, the Unlock the Box Campaign, and the Uptown People's Law Center and legal academics Andrea Armstrong, Chesa Boudin, Erwin Chemerinsky, Sharon Dolovich, Avlana Eisenberg, Dr. Brittany Friedman, Emma Kaufman, Aaron Littman, Keramet Reiter, Judith Resnik, and Carter C. White respectfully move this Court for leave to file the brief submitted herewith, as *amicus curiae* in support of the Petition for Rehearing *En Banc* in this matter.

The proposed *amici* are not parties to this action. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that the brief was not authored, in

whole or in part, by either party's counsel; no party or party's counsel contributed money to fund the preparation or submission of the brief; and they know of no person who contributed money that was intended to fund preparing or submitting the brief.

Amici's proposed brief is timely because *amici* are filing the brief within the time provided in the Court's order granting an extension of time. Dkt. 98. *Amici's* proposed brief complies with Ninth Circuit Rule 29-2(c) because it does not exceed fifteen pages.

Amici endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for permission to file the proposed brief. Plaintiffs-Petitioners consent to the filing from the proposed *amici*; Defendants-Respondents do not consent.

INTEREST OF THE *AMICI CURIAE* AND BASIS OF MOTION FOR LEAVE TO FILE BRIEF

Amici are legal and advocacy organizations that represent and advocate for the rights of incarcerated people in California and nationwide and legal academics who research and write about the rights of incarcerated people. The constituents and clients of *amici* are subject to the problematic disciplinary practices at issue in the panel opinion and to the widespread practice of solitary confinement in prisons and jails. The panel opinion negatively impacts the rights of the communities that *amici* serve. It also undermines the ongoing work of *amici* to reform disciplinary

practices in the correctional context and improve conditions of confinement for incarcerated people. Review is necessary.

I. STATEMENTS OF INTEREST OF *AMICI CURIAE*

A. Legal and Advocacy Organizations

Prison Law Office (PLO) is a nonprofit public interest law firm founded in 1978 that engages in class action and other impact litigation to improve the conditions in prisons and jails for adults and children, represents individual incarcerated persons, educates the public about prison conditions, and provides technical assistance to attorneys throughout the country. The PLO has litigated numerous large-scale prison and parole class actions for the last 30 years, including successfully arguing before the U.S. Supreme Court in *Brown v. Plata*, 563 U.S. 493 (2011) (holding the court-mandated population limit for California prisons was necessary to remedy violations of incarcerated persons' constitutional rights to adequate medical and mental health care) and *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998) (unanimously holding the ADA applies to people in state prison). The PLO has appeared before this Court in numerous cases involving rights of incarcerated people, both as direct counsel and as *amicus curiae*. The PLO's interest in the matter relates to the organization's advocacy on behalf of all incarcerated persons in prisons, jails, and immigration detention centers. Through their class action cases, PLO represents tens of thousands of

people in California and Arizona prisons and county jails. In those cases, PLO advocates for transparency and integrity in correctional disciplinary systems and to curb the use of solitary confinement in prisons and county jails.

California Collaborative for Immigrant Justice (CCIJ) fights for the liberation of immigrants in detention through coordination, advocacy and legal services. CCIJ envisions a world where everyone's right to a life free from fear, incarceration (physical or electronic), or family separation is respected. CCIJ is active in a statewide coalition to reform the use of solitary confinement in prisons, jails, and immigration detention centers.

California Families to Abolish Solitary Confinement (CFASC) is an organization whose mission is to stop the inhumane treatment of prisoners within the California penal system, especially those held in solitary confinement and administrative housing units. CFASC is comprised of formerly incarcerated people and loved ones of people who have been incarcerated, in many cases for decades, under conditions widely recognized as torture. CFASC formed in July 2011 to support the statewide prisoner hunger strike demanding an end to unconstitutional conditions in solitary units. CFASC's ultimate vision is an end to solitary confinement.

Civil Rights Corps (CRC) is a nonprofit organization dedicated to challenging systemic injustice in the United States' legal system, a system that is

built on white supremacy and economic inequality. CRC works to shift power to community-led movements, particularly those led by Black, Brown and poor people who are most affected by this legal system, so they can build sufficient power to create structural change. CRC works with individuals accused and convicted of crimes, their families and communities, people currently or formerly incarcerated, activists, organizers, judges and government officials to challenge mass human caging, to create a legal system that promotes equality and freedom, and to dismantle white supremacy. CRC engages in advocacy and public education and specializes in innovative, systemic civil rights litigation with the goal of re-sensitizing the legal system and the culture to the injustice and brutality that characterizes the contemporary U.S. legal system.

The Council on American-Islamic Relations (CAIR) was founded in 1994 with the purpose of securing civil rights, promoting justice, empowering American Muslims, and enhancing society's understanding of Islam. As the nation's largest Muslim civil rights and advocacy organization, it advocates and brings lawsuits in support of incarcerated Muslims seeking such routine religious rights as the right to attend regular congregational prayer consistent with their sincere religious beliefs.

Dignity and Power Now (DPN) is a Los Angeles-based grassroots nonprofit organization founded in 2012 that fights for the dignity and power of all

incarcerated people, their families, and communities. DPN's mission is to build a Black- and Brown-led abolitionist movement rooted in community power towards the goal of achieving transformative justice and healing justice for all incarcerated people, their families, and communities.

Disability Rights California (DRC) is California's protection and advocacy agency and the nation's largest nonprofit disability rights law firm, mandated under state and federal law to advocate for the rights of people with disabilities. DRC challenges discriminatory actions under federal and state anti-discrimination laws and investigates allegations of abuse and neglect of people with disabilities. Since its founding in 1978, Disability Rights California has represented people with disabilities in numerous individual and class action cases involving their right to be free from discrimination, including unnecessary and harmful segregation in facilities such as jails, prisons, and immigration detention. DRC's interest in this matter relates to the organization's interest in preventing practices that disproportionately harm disabled people.

Disability Rights Washington (DRW) is the nonprofit statewide protection and advocacy system designated by the governor of the state of Washington to protect and advocate for the rights of Washington State residents with disabilities. Because of the high percentage of people with disabilities involved in the criminal legal system, DRW created a program dedicated to protecting the rights of people

with disabilities experiencing incarceration. This program is called AVID, which stands for Amplifying Voices of Incarcerated Individuals with Disabilities. AVID has talked to thousands of people incarcerated in Washington State prisons and understands the Washington prison policies and procedures related to infractions, disciplinary hearings, and investigations and the devastating effects to incarcerated people when those processes are essentially shams. AVID also has expansive knowledge of the practice of solitary confinement in Washington State prisons and has advocated with the Washington State Department of Corrections and the state legislature for the end of this tortuous practice.

Fair Chance Project (FCP) is an organization led by liberated lifers (formerly incarcerated men and women), prisoners, and loved ones of term-to-life prisoners who advocate for just sentencing laws and fair parole practices. FCP also helps formerly incarcerated men and women integrate back into society and enables them to give back and to help build strong, self-sustaining communities. FCP's work is made significantly more challenging by the overuse of solitary confinement in the prison and jail system.

Families United to End LWOP (FUEL) is an organization that educates the community by bringing awareness about Life Without the Possibility of Parole (LWOP). It does so by uniting friends and families of people sentenced to LWOP

to help bring forth lifers' stories, humanize them, and give them a voice towards the eventual elimination of LWOP.

Harvard Prison Legal Assistance Project (Harvard PLAP) is a student practice organization at Harvard Law School, founded by students over fifty years ago. Participating students represent incarcerated individuals, primarily in prison disciplinary hearings within the Massachusetts Department of Correction. Harvard PLAP also represents prisoners in prison classification hearings, certain types of parole hearings, commutation petitions, and certain other matters. Harvard PLAP frequently represents clients in disciplinary hearings involving confidential informants, where the consequence of a guilty finding can include solitary confinement, loss of communication with the outside world, and lost opportunities for sentence reductions. In these cases, clients and their student advocates have repeatedly highlighted the potential for abuse with untested or unreliable informant information and the fact that reliance on such information, by turning the disciplinary process into a sham, actually undermines safety in prisons rather than improving it.

Human Rights Defense Center (HRDC) is a nonprofit charitable organization headquartered in Florida that advocates on behalf of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile

facilities, and military prisons. HRDC engages in state and federal court litigation on prisoner rights issues, including public records, class actions, and Section 1983 civil rights litigation concerning the First Amendment rights of prisoners and their correspondents. HRDC's advocacy efforts include publishing two monthly publications, Prison Legal News, which covers national and international news and litigation concerning prisons and jails, as well as Criminal Legal News, which is focused on criminal law and procedure and policing issues. HRDC also publishes and distributes self-help and legal reference books for prisoners.

Immigrant Defense Advocates (IDA) is a project of the nonprofit Social Good Fund, with a focus on immigrants' rights policy and advocacy in the state of California. This includes issues related to detention conditions, public health and legal access. IDA is part of a broader coalition of civil rights organizations involved in advocating for limiting the use of solitary confinement in jails, prisons and immigrant detention facilities.

National Religious Campaign Against Torture (NRCAT) is a membership organization committed to ending torture and cruel, inhuman, and degrading treatment in the United States. Since its formation in January 2006, more than 320 religious organizations have joined NRCAT, and over 75,000 individual people of faith have participated in its activities. These participants include evangelical Christians, Roman Catholics, Orthodox Christians, mainline Protestants, Muslims,

Jews, Sikhs, Hindus, Baha'is, and Buddhists. Member organizations include national denominational and faith group bodies, regional entities such as state ecumenical agencies, and local religious organizations and congregations. NRCAT advances interfaith principles of dignity, community, and restorative justice to guide its work related to the United States prison system. NRCAT is committed to ending the torture of solitary confinement in prisons, jails, and immigrant detention centers. NRCAT's interest in the matter relates to the interfaith organization's advocacy to end the immoral torture of prolonged solitary confinement.

NextGen Policy (NGP) is a California-based nonprofit organization dedicated to supporting and advocating for progressive policy, legislative, and programmatic issues in the areas of: climate, affordable housing, voting rights, healthcare, criminal justice reform, education, natural resources, income inequality, mental health, consumer protection, and veteran affairs. NGP is involved in the statewide movement to reform the use of solitary confinement because everyone deserves to be treated with dignity and respect.

Rights Behind Bars (RBB) legally advocates for people in prison to live in humane conditions and contributes to a legal ecosystem in which such advocacy is more effective. RBB seeks to create a world in which people in prison do not face large structural obstacles to effectively advocating for themselves in the courts. RBB helps incarcerated people advocate for their own interests more effectively

and through such advocacy push towards a world in which people in prison are treated humanely.

Rosen Bien Galvan & Grunfeld LLP (RBGG) is a law firm in San Francisco, California that represents tens of thousands of class members incarcerated in state prison facilities and county jails. In *Coleman v. Newsom*, Case No. 2:90-CV-00520 (E.D. Cal.), RBGG seeks to ensure that constitutional levels of mental health care are provided to approximately 33,000 class members incarcerated in California prisons who have serious mental illness. In *Armstrong v. Newsom*, Case No. 4:94-cv-02307 (N.D. Cal.), RBGG advocates for disability access for approximately 10,000 class members with disabilities who are incarcerated in California prisons. RBGG represents classes of people incarcerated in county jail facilities in *Babu v. Alameda County*, Case No. 5:18-cv-007677 (N.D. Cal.), *Hernandez v. County of Monterey*, Case No. 5:13-cv-02354 (N.D. Cal.), *Chavez v. County of Santa Clara*, Case No. 1:15-cv-05527 (N.D. Cal.), and *Hedrick v. Grant* (Yuba County), Case 2:76-cv-00162 (E.D. Cal.). RBGG's clients are frequently subjected to false and retaliatory disciplinary proceedings, which at times rely upon confidential information and sources.

Silicon Valley De-Bug is a nonprofit organization committed to criminal justice reform and prisoner's human rights advocacy in Santa Clara County. Silicon Valley De-Bug has been empowering system-impacted folks and families

to organize campaigns around criminal justice reform since 2001. Led by families and individuals directly impacted by the court system, De-Bug paves an accessible avenue for affected communities to engage with legal institutions. The organization also empowers prisoners and families by communicating directly with correctional administration to support grievances related to jail conditions, such as mistreatment, insufficient clothing, lack of medical care and denied time out of cell. In 2019, Silicon Valley De-Bug played a major role in supporting prisoners in Santa Clara County Jail with their class action lawsuit to end indefinite solitary confinement based solely on classification in Santa Clara County Jail (*Chavez v. County of Santa Clara*, Case No. 1:15-cv-05527 (N.D. Cal.)). In 2021, Silicon Valley De-Bug had a major role in the language and lobbying for A.B. 333, Gang Enhancement Reform Law, to end the prosecutors' ability to claim that people are gang members because they are from the same community, related, or know one another, require direct evidence of current gang activity by the defendant, and separate gang allegations from underlying charges at trial. In 2021, Silicon Valley De-Bug had a major role in the language and campaign to pass the California Racial Justice Act (RJA), A.B. 2542. RJA is a law that gives people convicted of an offense the opportunity to raise issues of bias or discrimination based on race, ethnicity, or national origin.

Sister Warriors Freedom Coalition has a membership base of women and trans people of all genders who have been incarcerated, have experienced violence, poverty, or living/working on the streets who stand to end the criminalization and incarceration of women and girls. The Coalition is committed to collective liberation and creating safe, healthy thriving communities. Its work is grounded in the four pillars of its Freedom Charter: deep investment in our people, family and communities; keeping families together; ending prison system profits; and ending extreme sentencing.

Social Workers & Allies Against Solitary Confinement (SWASC) is a national organization committed to abolishing the practice of solitary confinement. Since its founding in 2014, SWASC has supported social workers and others who have worked or are working in corrections, advocated for people who are currently incarcerated and survivors of solitary, and educated students, professionals, and the general public about solitary confinement and its harms. Since 2021, SWASC has also been the leader of a coalition working to pass a groundbreaking piece of New York state legislation that would preclude healthcare professionals from taking part in torture and mistreatment of incarcerated people, aiding in the implementation of the HALT Solitary Confinement Act. SWASC's interest in this matter relates to the organization's commitment to upholding the human rights and dignity of all

people who are incarcerated, with specific interest in advocating for those in solitary confinement.

Solitary Watch is a nonprofit watchdog organization that works to uncover the truth about solitary confinement and other harsh prison conditions in the United States by producing high-quality investigative journalism, accurate information, and authentic storytelling from both sides of prison walls. Solitary Watch's mission is to generate public debate and inform policy change on an underreported humanitarian crisis by promoting awareness, creating accountability, and shifting narratives. Solitary Watch has played a pivotal role in increasing public awareness, mainstream media attention, and evidence-based policymaking about the use of solitary confinement.

The Southern Poverty Law Center (SPLC) is a nonprofit organization that is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. The SPLC's Decarceration and Decriminalization practice uses litigation and advocacy to reform the criminal legal system by ending unjust detention and challenging unconstitutional and racially discriminatory law enforcement and criminal justice practices. This work includes the representation of incarcerated people to ensure that they are not subjected to unconstitutional and inhumane conditions of confinement.

UnCommon Law is an Oakland-based, nonprofit legal services organization that supports people navigating California's discretionary parole process through trauma-informed legal representation, mental health counseling, legislative and policy advocacy, and in-prison programming led by those who have been through the process themselves. For decades, UnCommon Law has represented clients who have either been through disciplinary processes made impossible by confidential information or who have been unjustly denied parole because of it. To allow the panel's decision to stand would undermine the few due process protections our clients currently rely on.

Underground Scholars Initiative (USI), UC Berkeley, is a student-run organization that creates a pathway for incarcerated, formerly incarcerated, and system-impacted individuals into higher education. USI works to build a prison-to-school pipeline through recruitment, retention, advocacy, wellness, and career services. Many of USI's members have experienced solitary confinement firsthand and work to dismantle it through advocacy and legislative action.

The Unlock the Box Campaign is a coalition of organizations and movement leaders who partner with state and local campaigns across the United States with the common goal of ending the use of solitary confinement for all people. The organization pursues this goal by working simultaneously on national, state, and local levels with solitary survivors, family members, advocates,

community and faith groups, legislators, and others dedicated to ending state-sponsored torture.

The Uptown People's Law Center (UPLC) provides legal representation, advocacy, and education for poor and working people in Chicago, and legal assistance to people housed in Illinois prisons in cases related to their confinement. UPLC has provided direct representation to over 100 persons confined in Illinois prisons pertaining to their civil rights, including in five pending class-action or putative class-action cases. As particularly relevant to this case, UPLC is counsel for a certified class of prisoners challenging Illinois use of solitary confinement, including a challenge that the procedures used to send prisoners to solitary violate the due process guarantees of the Fourteenth Amendment. *Davis v Hughes*, 16-cv-600, pending in the United States District Court for the Southern District of Illinois.

B. LEGAL ACADEMICS*

Andrea Armstrong is the Dr. Norman C. Francis Distinguished Professor of Law at Loyola University New Orleans. She is a 2023 MacArthur Fellow for her research and scholarship on incarceration law and policy. She also leads the Incarceration Transparency Project, which documents and memorializes deaths behind bars in Louisiana.

* All institutional affiliations are for identification purposes only.

Chesa Boudin is the founding executive director of the Criminal Law & Justice Center at the University of California Berkeley School of Law. He previously served as a public defender where he tried dozens of cases to jury verdict and as the elected district attorney in San Francisco. He has published widely on legal issues and the rights of incarcerated people and their loved ones, including articles in *The Yale Law Journal*, *The Journal of Criminal Law and Criminology*, *The Yale Law & Policy Review*, *The Rutgers Law Review*, and *The New York Times*. In addition to his professional and scholarly work, he is personally impacted by these issues: his parents spent a combined 62 years in prison, including time in solitary confinement.

Erwin Chemerinsky is the Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law. Before being named Dean of Berkeley Law, he was the founding Dean and Distinguished Professor of Law, and the Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law. Dean Chemerinsky previously taught at Duke Law School for four years and at the University of Southern California for 21 years. Dean Chemerinsky is a nationally prominent expert on constitutional law and civil liberties and is the author of eight books—including his treatise *Constitutional Law: Principles and Policies*, the casebook *Constitutional Law*, and more than 200 articles in top law reviews. He frequently argues cases

before the nation's highest courts and also serves as a commentator on legal issues for national and local media. In 2016, Dean Chemerinsky was named a fellow of the American Academy of Arts and Sciences. And in 2017, National Jurist magazine again named Dean Chemerinsky as the most influential person in legal education in the United States.

Sharon Dolovich is a Professor of Law at University of California, Los Angeles (UCLA) School of Law, the Faculty Director of the UCLA Prison Law and Policy Program, and the Director of the UCLA Law Behind Bars Data Project. For more than 20 years, Professor Dolovich has taught and written extensively in the field of prisons and prison law, including on the topic of solitary confinement.

Avlana Eisenberg is an Associate Professor at Boston College Law School.

Dr. Brittany Friedman is an Assistant Professor of Sociology at the University of Southern California and an Affiliated Scholar of the American Bar Foundation. Friedman has published extensively on incarceration, prison conditions, and prisoner-officer abuse of power dynamics. In particular, her forthcoming book is on the history of racialization and violence within California prisons and its relationship to the unequal use of disciplinary measures against targeted prisoner populations. She is on the editorial board of Theoretical Criminology and her work has been published in Sociological Forum, RSF:

Russell Sage Foundation Journal of the Social Sciences, Journal of Contemporary Criminal Justice, among others.

Emma Kaufman is a Professor of Law at New York University Law School, where she teaches and writes about criminal law, constitutional law, and the administrative state. Her recent work focuses on criminal jurisdiction. Her scholarship, including on prisons and American prison law, has appeared in peer-reviewed academic journals and leading law reviews.

Aaron Littman is an assistant professor of law at University of California, Los Angeles (UCLA) School of Law. He is a scholar and teacher of the constitutional and regulatory law of incarceration and directs a prisoners' rights clinic.

Keramet Reiter is a professor of Criminology and Law at the University of California, Irvine, and an expert in the use of solitary confinement in the United States and Europe, including the law, history, and lived experience of solitary confinement.

Judith Resnik is an Arthur Liman Professor of Law at the Yale Law School.

Carter C. White has been the supervising attorney of the King Hall Civil Rights Clinic at the University of California, Davis School of Law for more than 24 years. For 30 years, the Civil Rights Clinic has represented indigent clients in

civil rights cases, including scores of prisoner cases referred by the Pro Bono Panels of this Court and the United States District Court for the Eastern District of California. The primary emphasis of Mr. White's work as a trial and appellate lawyer for over 36 years has been protecting the civil rights of incarcerated people. Mr. White is committed to and has advocated for advancing the rights of incarcerated people and reducing the use of solitary confinement in prisons and jails. In 2021, the United States District Court for the Eastern District of California awarded Mr. White the Joe Ramsey Award for Excellence in Pro Bono Service.

II. THE COURT SHOULD ALLOW AMICI TO FILE THEIR BRIEF IN SUPPORT OF *EN BANC* REHEARING

Amici's proposed brief will advance the Court's understanding of the legal and practical issues at stake in the panel opinion. The brief describes the profound ways in which the panel opinion conflicts with the settled due process law of this Circuit. It highlights the real-world implications of the panel opinion, including as it relates to the use of solitary confinement throughout the Ninth Circuit.

The proposed *amici* are familiar with the issues in this case. *Amici* are uniquely positioned to advise the Court about the use and abuse of confidential information in the prison disciplinary context due to their experience representing and writing about the realities of prison life and discipline. *Amici* are also highly familiar with and deeply concerned about the harms of solitary confinement in prisons and jails.

CONCLUSION

Based on the foregoing, the Prison Law Office, California Collaborative for Immigrant Justice, California Families to Abolish Solitary Confinement, Civil Rights Corps, the Council on American-Islamic Relations, Dignity and Power Now, Disability Rights California, Disability Rights Washington, Fair Chance Project, Families United to End LWOP, Harvard Prison Legal Assistance Project, Human Rights Defense Center, Immigrant Defense Advocates, National Religious Campaign Against Torture, NextGen Policy, Rights Behind Bars, Rosen Bien Galvan & Grunfeld LLP, Silicon Valley De-Bug, Sister Warriors Freedom Coalition, Social Workers & Allies Against Solitary Confinement, Solitary Watch, the Southern Poverty Law Center, UnCommon Law, Underground Scholars Initiative-UC Berkeley, the Unlock the Box Campaign, and the Uptown People's Law Center and legal academics Andrea Armstrong, Chesa Boudin, Erwin Chemerinsky, Sharon Dolovich, Avlana Eisenberg, Dr. Brittany Friedman, Emma Kaufman, Aaron Littman, Keramet Reiter, Judith Resnik, and Carter C. White respectfully request permission to file their brief *amici curiae* and the Court's consideration of the issues raised in the accompanying brief.

Dated: October 10, 2023

Respectfully submitted,

/s/ Patrick Booth

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ORGANIZATIONS AND LEGAL ACADEMICS IN SUPPORT OF
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INTEREST OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* legal organizations, advocates, and legal academics urge the Court to grant Petitioners' Petition for *En Banc* Rehearing. The panel opinion departs sharply from the law of this Circuit as to core due process rights in the prison disciplinary context. The opinion impacts people in prisons and jails throughout the Ninth Circuit and stands to expand the use of solitary confinement based on unreliable, secret information. *Amici* are organizations and individuals devoted to advancing the rights of incarcerated people and reducing the use of solitary confinement in prisons and jails. *Amici* thus respectfully submit this brief to advise the Court of the stakes of the panel opinion and the importance of *en banc* rehearing.

INTRODUCTION

In prisons and jails across the country, people are suffering in solitary confinement, locked in concrete cells without access to sensory stimulation, social interaction, or even sunlight and fresh air. The harms of solitary confinement are vast and well known. To limit the number of people subjected to those serious harms, courts have established significant due process protections in the prison disciplinary process.

The panel opinion in this matter radically undermines these basic protections. The panel opinion disregards settled law in this Court and dismantles the core protections of the prison disciplinary process. By doing so, the opinion stands to subject incarcerated people to extended terms of solitary confinement on account of careless and abusive correctional practices. *En banc* rehearing is essential to safeguard the rights of people behind bars, hold correctional officials to basic standards of fairness, and prevent the senseless and dangerous overuse of solitary confinement in prisons and jails.

ARGUMENT

I. *EN BANC* REHEARING IS ESSENTIAL BECAUSE THE PANEL OPINION UNDERMINES CRITICAL DUE PROCESS PROTECTIONS FOR INCARCERATED PEOPLE

Nearly 50 years ago, the Supreme Court outlined the core due process protections that must be afforded to incarcerated people during disciplinary

proceedings. *See Wolff v. McDonnell*, 418 U.S. 539 (1974). Among those rights is the right to notice of the claimed violation “to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are.” *Id.* at 564. Only two years ago, this Court reaffirmed and delineated those due process rights in *Melnik v. Dzurenda*, 14 F.4th 981 (9th Cir. 2021), holding that an incarcerated person’s right to access evidence in preparing a defense was “clearly established.” *Id.* at 990.

The panel opinion significantly erodes those rights by making it nearly impossible for incarcerated people to mount a meaningful defense in disciplinary hearings in which confidential information is used. The opinion stacks the deck against incarcerated people and undercuts long-established due process rights. First, the panel’s decision allows correctional officials to alter evidence, including in ways that make the evidence more inculpatory, without violating a person’s due process rights. Second, the panel’s decision allows correctional officials to withhold important information from incarcerated people before disciplinary hearings, even when that information could be material in marshaling a defense. These changes remove essential procedural due process safeguards.

The panel’s decision permits correctional administrators to provide misleading, altered, or incorrect evidence to incarcerated people in prison disciplinary hearings without violating due process. In reaching that conclusion,

the panel mischaracterized and ignored evidence in the record demonstrating that Defendants systemically misused confidential information in prison disciplinary hearings.

The correctional conduct at issue was egregious. In one case, Defendants provided false evidence to four incarcerated people accused of conspiring to commit murder. 1-ER-42.¹ Correctional officials represented to the accused that an informant had attributed incriminating statements to the four individuals, but the informant did not actually make the statement that was presented in the evidence. *Id.* In another case, evidence provided to an incarcerated person indicated that two confidential sources provided identical, inculcating information. *Id.* In reality, the two informants provided inconsistent information. *Id.* In both cases, the accused were found guilty of the rule violation and sent to solitary confinement as a result.

The panel held that these clear misrepresentations of evidence did not violate due process. Instead, these falsifications were “partially misstated,” “exaggerat[ions],” and “discrepancies.” Opinion at 22.² But that erroneous conclusion virtually guarantees that an incarcerated person will be unable to defend himself in a disciplinary hearing and be found guilty based on unreliable evidence.

¹ The Excerpts of Record (ER) vols. 1-3 are at Doc. No. 17. The Supplemental Excerpts of Record (SER) vols. 4-9 (under seal) are at Doc. Nos. 31-4 to 31-9.

² The Opinion subject to this petition is docketed in two appeals: No. 21-15839, Doc. No. 90-1; and No. 22-15345, Doc. No. 75-1. All citations to the record and briefing in this petition are to No. 21-15839.

The panel also ignored volumes of evidence demonstrating that Defendants provided false information to incarcerated people during disciplinary hearings. For example, correctional officials told an incarcerated person that a confidential informant had identified him in a photographic line-up, but the informant had not actually identified him. 4-SER-493, 502, 512, 521, 546–548. The accused was unable to present this evidence in his own defense because it was never provided to him. And the panel opinion did not address this case at all.

Allowing correctional officials to provide summaries of confidential information to incarcerated people that are materially inaccurate is an abuse of power and serves no penological interest.³ When a confidential informant provides information in a prison disciplinary hearing, the charged person cannot cross-examine that informant. The person is wholly reliant on correctional officials' representation of that information. If correctional officials can falsify evidence before providing it to the charged person and use that false evidence against the person, the incarcerated person has no ability to mount a defense. The panel's

³ The panel asserts that Defendants' failure to provide relevant evidentiary information to incarcerated people serves a legitimate penological interest. Opinion at 26 ("Safeguarding confidential and sensitive information is a legitimate penological reason for limiting inmates' access to evidence."). But, in their briefing, Defendants acknowledged that their withholding of that evidence was not to serve a penological interest; it was "human error." 1-ER-34, 45. Human error is not a legitimate penological interest.

decision nullifies *Wolff* and *Melnik*'s protections in disciplinary cases involving confidential information.

The panel's decision also allows correctional officials to withhold important documentary evidence from incarcerated people during disciplinary hearings, in contradiction of this Court's clear holding in *Melnik*. In *Wolff*, the Supreme Court held that an incarcerated person facing prison disciplinary charges has the right to present documentary evidence in his defense. 418 U.S. at 566. Applying *Wolff*, this Court held that "it necessarily follows that [an incarcerated person] must have some right to prepare" to present evidence in his defense, *Melnik*, 14 F.4th at 985, and that right to prepare "include[s] the ability to obtain that documentary evidence in the first place," *id.* at 986. "[I]f a prisoner is to be able to respond to evidence presented against him, as a general proposition he should be allowed to know what it is and to examine it, unless there is reason to the contrary." *Id.* Documentary evidence "may prove exculpatory" or "corroborate a prisoner's version of events, which may be invaluable in presenting a defense." *Id.*

The panel disregarded *Melnik*, concluding instead that correctional officials can withhold material evidence from incarcerated people. Once again, the panel contorted the District Court's findings to support its misapplication of *Melnik*. The District Court found "many instances in which disclosure forms failed to disclose confidential information that was exculpatory or that class members could have

used during their disciplinary hearings to defend themselves against the charges against them.” 1-ER-40. The District Court then detailed several examples in which Defendants failed to provide material evidence to people facing serious disciplinary charges. 1-ER-41-43.

But the panel characterized Defendants’ widespread practice of failing to include exculpatory and other material evidence in confidential disclosure forms as “minor and immaterial.” Opinion at 27.⁴ Such a conclusion is dangerous and undermines the legitimacy of prison disciplinary hearings. An incarcerated person is unable to defend himself in a disciplinary hearing if he is prevented from accessing material evidence. If the Court does not rehear this case *en banc*, the law of the Circuit will permit a correctional official to alter a confidential informant’s witness statement to make it inculpatory, intentionally withhold exculpatory information that the informant gave, provide the charged person with only that

⁴ In addition to minimizing the importance of the evidence that correctional officials withheld, the panel again supplied a justification for Defendants’ conduct that Defendants themselves did not advance. The panel concluded that Defendants had a legitimate penological interest in withholding evidence because “summarizing information to ensure the safety of confidential informants, other inmates, and prison personnel necessarily requires generalizations and omissions.” Opinion at 27. But Defendants were not summarizing and did not argue that they failed to provide exculpatory evidence because of a legitimate penological interest. Withholding exculpatory evidence and altering that evidence to make it more inculpatory serves no penological interest.

altered, incomplete statement, and still satisfy due process requirements. That outcome makes due process in prison disciplinary hearings a sham.

II. *EN BANC* REHEARING IS ESSENTIAL BECAUSE THE PANEL OPINION SUBJECTS INCARCERATED PEOPLE TO THE PROFOUND AND HARMFUL CONSEQUENCES OF SOLITARY CONFINEMENT

The stakes of the panel opinion are high. By undermining the core due process protections of *Melnik*, the panel opinion exposes people to the unnecessary and harmful use of solitary confinement in prisons and jails throughout the Ninth Circuit. The opinion stands to erroneously deprive incarcerated people of access to rehabilitative programming, diminish their likelihood of success in obtaining parole, and extend their terms in prison. It also undermines the legitimacy of prison disciplinary processes by permitting corrupt conduct by correctional officials.

Procedural protections in the prison disciplinary system exist to ensure that people have an opportunity to mount a meaningful defense against disciplinary charges and that they are not erroneously subjected to disciplinary sanctions. When people are unable to challenge the evidence against them or when altered evidence is used against them, they are more likely to be found guilty of disciplinary charges and to serve extended periods of time in solitary confinement as a result.

This has profound implications for human lives. In the California prison system, people in segregation units are guaranteed just ten hours per week out of their cells—leaving them in locked concrete cells for more than 22 hours of each

day. Cal. Code Regs. tit. 15 § 3343(h) (2023).⁵ People in solitary confinement spend their days in a series of locked cages, including for outdoor recreation, which takes place in small caged spaces lined up on pavement.⁶ Mental health treatment takes place in locked phone-booth-sized “modules,” in which patients have to shout across plexiglass to be heard. Access to religious services is sharply limited, and congregate prayer activity is prohibited. People in solitary confinement units are handcuffed every time they leave their cells—when they go to the small cage for recreation yard, when they go to health care appointments, when they meet with their lawyers, even when they go to the shower.

⁵ California Governor Gavin Newsom has recognized the “deep need to reform California’s use of segregated confinement.” Office of the Governor, *Governor’s Veto Statement, Assembly Bill 2632* (Sept. 29, 2022), <https://www.gov.ca.gov/wp-content/uploads/2022/09/AB-2632-VETO.pdf?emrc=ccbc61>. Regulations that are currently pending would expand the minimum number of out-of-cell hours in solitary confinement units to 20 hours per week. Cal. Dep’t of Corr. & Rehab., *CDCR Files Regulations to Reform Use of Restricted Housing in the State’s Prisons* (Oct. 5, 2023), <https://www.cdcr.ca.gov/news/2023/10/05/cdcr-files-regulations-to-reform-use-of-restricted-housing-in-the-states-prisons/>. Even if these regulations are enacted, people in solitary units in California would still be locked in their cells for more than 21 hours per day.

⁶ Photos and a description of conditions in these outdoor recreation cages can be found in a recent *Los Angeles Times* article. See Hannah Wiley, *The Fight To Limit Solitary Confinement in California Prisons Is Set To Roil Sacramento Again*, L.A. Times (Apr. 20, 2023), <https://www.latimes.com/california/story/2023-04-20/solitary-confinement-segregated-gavin-newsom-california-prison-jail-torture-safety>.

People in prisons across the Ninth Circuit routinely spend years in solitary confinement pursuant to disciplinary charges.⁷ The California Department of Corrections and Rehabilitation's disciplinary matrix provides for extremely long terms of placement in solitary confinement. *See* Cal. Code Regs. tit. 15 § 3341.9(e) (2023). Under current regulations, for example, the presumptive penalty for distribution of a controlled substance is 12 months in solitary confinement and can be as high as 18 months. Cal. Code Regs. tit. 15 § 3341.9(e)(5) (2023).⁸

Nearly every empirical study on this issue has concluded that long-term solitary confinement profoundly impacts an individual's mental and physical health. People in solitary confinement often experience anxiety, panic, irritability, aggression, rage, paranoia, ruminations, cognitive dysfunction, hypersensitivity to stimuli, and hallucinations.⁹ Solitary confinement aggravates existing mental

⁷ *See* Ass'n of State Corr. Adm'rs & Liman Ctr. for Pub. Interest L. at Yale L. Sch., *Time-In-Cell: A 2021 Snapshot of Restricted Housing* 11 (2022) (documenting that hundreds of people in state prisons in the Ninth Circuit have spent over one consecutive year in restrictive housing).

⁸ For context, the United Nations General Assembly has prohibited the use of solitary confinement for more than 15 consecutive days on the grounds that it constitutes torture. *See* G.A. Res. 70/175, annex, The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) Rule 44 (Dec. 17, 2015), https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf.

⁹ Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 298 (2018) (reviewing studies related to the physical and emotional impact of solitary confinement).

illness and can cause individuals without existing mental health needs to experience new symptoms.¹⁰ The rates of suicide and instances of self-harm increase in solitary confinement conditions.¹¹ The symptoms that individuals experience while in solitary confinement often persist even after they are released back into general population or into the community.¹²

The implications of dismantling core procedural protections in the disciplinary system extend beyond the psychological and physiological effects of solitary confinement. People in solitary confinement units are deprived of educational, rehabilitative, and self-help programming available to others. They are prohibited from engaging in a full range of mental health programming or benefitting from substance abuse treatment and recovery opportunities.

Disciplinary violations like those at issue here also extend people's terms of incarceration. People serving disciplinary terms are prohibited from earning good-time credits. Cal. Code Regs. tit. 15 § 3044(b)(6) (2023) (describing how

¹⁰ Keramet Reiter et al., *Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017–2018*, AMERICAN J. OF PUBLIC HEALTH 110, 56 (2020).

¹¹ Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, AMERICAN J. OF PUBLIC HEALTH 104, 3 (2014).

¹² Stanford Univ. Human Rights in Trauma Mental Health Lab, *Mental Health Consequences Following Release from Long-Term Solitary Confinement in California: Consultative Report Prepared for the Center for Constitutional Rights* 15-25 (2017).

incarcerated people in the Security Housing Unit are ineligible to receive good-time credits). They frequently lose the good-time credits they have already earned as part of their disciplinary sanction. Cal. Code Regs. tit. 15 § 3323 (2023) (outlining CDCR’s disciplinary credit forfeiture schedule, which allows people to lose up to 360 days of already-earned good-time credit). And people with adjudicated rule violations are less likely to be granted parole by the Board of Parole Hearings. Cal. Code Regs. tit. 15 § 2281(c)(6) (2023) (listing circumstances that demonstrate unsuitability for parole, including prison misconduct).

The crippling effects of the panel opinion are not limited to people in California state prisons. If left to stand, the panel opinion could erode the integrity of the disciplinary process in correctional systems and facilitate the expanded use of solitary confinement throughout the Ninth Circuit. In many jurisdictions, the use of solitary confinement is already in a state of crisis. In Arizona, for example, a federal court recently found that the Department of Corrections systematically places people at higher security levels than necessary, subjects people to profound levels of isolation, and holds people in restrictive housing for excessively long periods of time. *Jensen v. Shinn*, 609 F. Supp. 3d 789, 886-892 (D. Ariz. 2022), *amended*, No. CV-12-00601-PHX-ROS, 2022 WL 2910835 (D. Ariz. July 18, 2022). The court found that the DOC “confined many prisoners in their cells for 168 straight hours and provided them with only a few meals for the entire week.”

Id. at 899. Similarly, in many county jails, the use of solitary confinement is vast and unregulated, and disciplinary practices already lack consistency and reliability.¹³

Subjecting people to these harmful consequences on the basis of incomplete, inaccurate, or altered evidence is inhumane and harmful. It undermines values of public health and public safety. It erodes the legitimacy of the prison disciplinary system when correctional officials are not held to basic standards of integrity and reliability.

CONCLUSION

In sum, rehearing is essential because the panel opinion conflicts with settled precedent and renders due process a hollow promise for people in prisons and jails.

¹³ See, e.g., Monitoring Report on Restrictive Housing, Discipline, and Classification Practices in the Sacramento County Jails, Doc. 156-1 (July 19, 2022) *Mays v. County of Sacramento*, Case No. 18-02081 (E.D. Cal) (documenting serious abuses in the use of solitary confinement and the conditions in jail solitary confinement units); Ltr. from J. Stark, Disability Rights California & D. Specter et al., Prison Law Office, to Captain S. Cortez et al., San Joaquin County Sheriff's Office, Abuse/Neglect Investigation and Request for Corrective Action: San Joaquin County's Use of Solitary Confinement and Mental Health System (Mar. 29, 2023), <https://www.disabilityrightsca.org/latest-news/abuse-neglect-investigation-and-request-for-corrective-action-san-joaquin-countys-use> (same); Ltr. from J. Stark, Disability Rights California & D. Specter et al., Prison Law Office, to Captain F. Dal Porto, San Mateo County Sheriff's Office (April 12, 2023), Abuse/Neglect Investigation and Request for Corrective Action: San Mateo County's Use of Solitary Confinement and Mental Health System, <https://www.disabilityrightsca.org/latest-news/abuse-neglect-investigation-and-request-for-corrective-action-san-mateo-countys-use-of> (same).

See Wolff, 418 U.S. at 558 (“The touchstone of due process is protection of the individual against arbitrary action of government[.]”) (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)).

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