

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

No. SJC-12015

ROBERT CANTELL, ET AL.,
PLAINTIFFS-APPELLANTS,

v.

LUIS S. SPENCER, ET AL.,
DEFENDANTS-APPELLEES.

ON APPEAL FROM ORDERS OF THE SUPERIOR COURT DISMISSING THE CLAIMS OF
PLAINTIFFS-APPELLANTS AND DENYING CLASS CERTIFICATION

**BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES
UNION, THE AMERICAN CIVIL LIBERTIES UNION OF
MASSACHUSETTS, AND THE MENTAL HEALTH LEGAL ADVISORS
COMMITTEE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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INTRODUCTION

More than a century ago, the United States Supreme Court recognized that even “a short confinement” in solitary confinement caused prisoners to become “violently insane,” “commit[] suicide,” or lose the “mental activity” necessary “to be of any subsequent service to the community.” In re Medley, 134 U.S. 160, 168 (1890). In recognition of the severe negative health effects that “can occur after only a few days in solitary confinement,” the U.N. Special Rapporteur on Torture recently held that “any imposition of solitary confinement beyond 15 days constitutes torture, or cruel, inhuman or degrading treatment or punishment.”¹ Given these grave consequences, it is unclear whether solitary confinement – or “segregation,” as it is euphemistically called in Massachusetts – can ever be lawfully employed. But, at a minimum, it must be used in only the most limited of circumstances: when no alternatives are available, for no longer than necessary, and in the least restrictive environment.²

¹ See Special Rapporteur on Torture, Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, delivered to the General Assembly, U.N. Doc. A/66/268, at 17, 21 (Aug. 5, 2011) [hereinafter Special Rapporteur Report].

² See, e.g., ABA STANDARDS FOR CRIM. JUSTICE: TREATMENT OF PRISONERS, Standard 23-2.6 (3D ED. 2011), available at

Consistent with this understanding – which has been embraced by a growing national consensus – and Massachusetts’ case law, this Court should reverse the decision below and hold that the Department of Corrections’ (DOC) Departmental Segregation Unit (DSU) regulations apply here.

ISSUE PRESENTED

Whether prisoners are entitled to the procedural protections of the DSU regulations before being confined to the Special Management Unit (SMU) on awaiting action status in circumstances substantially similar to the DSU.³

INTERESTS OF AMICI

Amici are organizations that have substantial experience concerning: (a) disciplinary and administrative segregation regimes; (b) the effects of solitary confinement; and (c) efforts to reform segregation practices in the United States.

The **American Civil Liberties Union (ACLU)** is a nationwide, non-profit, nonpartisan organization of

americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html.

³ This brief will not address whether the Trial and Appeals Courts had discretion to dismiss this action as moot. Amici agree with Appellants that this matter is not moot and that courts do not have discretion to dismiss a class action while putative class members are affected by challenged practices, particularly where, as here, the defendants voluntarily ceased the alleged bad conduct toward the named plaintiffs.

more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation (NPP) was established in 1972 to protect and promote the civil and constitutional rights of prisoners. The NPP has decades of experience in complex prisoners' rights class action suits. Courts across the country have repeatedly recognized the special expertise of the NPP in conditions of confinement cases. See, e.g., Plyler v. Evatt, 902 F.2d 273, 278 (4th Cir. 1990); Palmigiano v. Garrahy, 707 F.2d 636, 637 (1st Cir. 1983). Much of NPP's litigation has focused on conditions in solitary confinement. See, e.g., Gates v. Cook, 376 F.3d 323 (5th Cir. 2004); Jones 'El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001), 172 F. Supp. 2d 1128 (W.D. Wis. 2001), 374 F.3d 541 (7th Cir. 2004); Parsons v. Ryan, No. CV-2:12-CV-00601-NVW-MEA (D. Ariz. Oct. 9, 2014).

The **American Civil Liberties Union of Massachusetts (ACLUM)**, an affiliate of ACLU, is a statewide membership organization dedicated to the principles of liberty and equality embodied in the constitutions and laws of the Commonwealth and of the United States. ACLUM has a longstanding commitment to protect the rights of prisoners and has provided direct representation of prisoners before this Court

as well as participating as amicus curiae. See LaChance v. Commissioner of Correction, 463 Mass. 767 (2012) (amicus); Torres v. Commissioner of Correction, 427 Mass. 611 (1998) (direct representation).

The **Mental Health Legal Advisors Committee (MHLAC)** was established by the General Court in 1973 under for the purpose of advocating for the rights of persons with mental disabilities. A central tenet of MHLAC's work is to ensure that individuals with mental health related disabilities confined to programs and facilities are protected against abuse. In accordance with a widely acknowledged state and national trend, MHLAC clients are disproportionately maintained in solitary confinement. Procedural protections are essential to assure that prisoners with mental illness are not harshly punished for behavior that is outside their control.

STATEMENT OF THE CASE

Amici rely on Appellants' statement of the case.

STATEMENT OF FACTS

Amici rely on Appellants' statement of the facts.

BACKGROUND

I. The DSU regulations.

The current DSU regulations arose nearly thirty years ago from a class action lawsuit brought by prisoners held in solitary confinement in the DSU. See

Hoffer v. Comm'r of Corr., SJC No 85-71, (March 3, 1988) Pl.'s Record Appendix ("RA") 132-186; see also Hoffer v. Comm'r of Corr., 412 Mass. 450 (1992). The prisoners "spent twenty-three and one-half hours a day in isolation," were allowed to leave their cell "for only three one-hour periods of exercise and two ten-minute periods of exercise and two ten-minute periods for showering each week," and were restricted to less than one visit per month. Hoffer, 412 Mass. at 451-52.

Recognizing that such confinement "results in a significant reduction of [a] resident's libert[y]," a single Justice of this Court required the DOC to adopt regulations "to ensure that residents will not be unnecessarily or arbitrarily retained in the DSU" in solitary confinement. Id. at 455. At the essence of these regulations is a fundamental notion: a deprivation as harsh and damaging as solitary confinement should not be imposed without substantial reasons of which the prisoner is clearly notified, including the steps she must take to obviate the risk she poses and to obtain release. To that end, the regulations incorporated procedural protections to limit when and how solitary confinement could be used.⁴

⁴ Specifically, these protections included: (1) A prisoner may be held in a DSU only after a hearing before an impartial Board, 103 Code Mass. Regs ("CMR") 421.12, and a finding based on "substantial evidence" that the prisoner poses a "substantial threat" to the

These regulations "have not been repealed," and still "have the full force of law." Haverty v. Commissioner of Correction, 437 Mass. 737, 740 (2002).⁵

II. Application of the DSU regulations to substantially similar conditions.

Although the DSU regulations originated in a case involving solitary confinement in the DSU, the animating concerns for the procedural protections were the *conditions* of a prisoner's confinement, not the *name* of the unit in which she was confined. As a result, this Court held that the DSU regulations apply whenever solitary confinement occurs in a unit whose conditions are "substantially similar" to the DSU. Haverty, 437 Mass. at 756-57, 759-60 (applying the DSU

safety of herself, or others, or to the operation of the facility, 103 CMR 421.09; (2) Absent extraordinary circumstances, this hearing must be held within 15 days of confinement, or 30 days if the prisoner is being investigated or charged in relation to a disciplinary hearing, 103 CMR 421.08(3); (3) A prisoner confined in the DSU must be given a conditional release date of no longer than 6 months, absent extraordinary circumstances, and must be given conditions which will entitle the prisoner to release if met, 103 CMR 421.20; and (4) A prisoner confined in the DSU shall have at least 5 one-hour periods of exercise per week, and shall generally have the same access to reading material, canteen and visitation rights as the general population, 103 CMR 421.20.

⁵ A single Justice enjoined the Commissioner's unsuccessful repeal of the DSU regulations in 1995. Haverty, 437 Mass. at 738. This Court made clear that amendment of the injunction "would not be warranted" until and unless the Commissioner presented "meritorious grounds" to do so. Id. at 739.

regulations to prisoners held in solitary confinement in the East Wing of MCI-Cedar Junction) (cited in LaChance, 463 Mass. at 774). This ensures that “the Department and the Commissioner may not sidestep statutory and regulatory provisions stating the rights of an inmate as to his placement in a DSU by assigning as a pretext another name to such a unit.” Haverty, 437 Mass. at 755 (quoting Longval v. Comm’r of Corr., 404 Mass. 325, 328-29 (1989)).

III. Solitary Confinement in the SMU.

Plaintiffs in this case were held in solitary confinement in the SMU on awaiting action status. When the Amended Complaint was filed, all of the Plaintiffs had been in solitary for at least five months, three for over a year, and one for over two years. RA 45. These durations are generally in accord with the average length of solitary confinement in SMUs in Massachusetts. According to a recent Boston Globe article,

Inmates at the units at the Souza-Baranowski Correctional Center in Shirley had been held an average of 139 days at one point in September 2012. One prisoner had been there for 662 days. At MCI Cedar Junction in Walpole, inmates had been in the specialized management units an average of 114 days, with one inmate having been there for 430 days.

Milton Valencia, Solitary Confinement Comes Under New Scrutiny, BOS. GLOBE (May 7, 2013).⁶

Prisoners in the SMU are limited to one-hour of recreation, five days a week, in a small outdoor cage, and two non-contact visits of one-hour per week. LaChance, 463 Mass. at 771. At all other times, they are shackled when they are outside of their cell. Id. Their library and canteen privileges are significantly curtailed, and they are unable to participate in any of the educational, religious, vocational or rehabilitative programming available to the general population. Id. This Court has found that these conditions are “essentially equivalent” to those in the DSU. Id. at 774.

SUMMARY OF ARGUMENT

Any Massachusetts prisoner held in solitary confinement, including those in the SMU, should be afforded the protections of the regulations governing the DSU. The DOC’s contrary argument would allow it to evade the DSU regulations’ “full force of law” merely by giving different titles to its units that hold human beings in solitary. Haverty, 437 Mass. at 758. Not only does the DOC’s approach defy logic and precedent, it is also strikingly at odds with the

⁶ Available at <http://www.bostonglobe.com/metro/2013/05/06/use-segregation-prisons-comes-under-new-scrutiny/6HtnI5l8i8MthcQf88wP2L/story.html>.

increasing national understanding that solitary confinement must be reformed and that alternatives are practicable.

I. The Superior Court determined that the SMU conditions “are substantially similar to conditions found to be equivalent to a DSU.” Pl. Addendum (“Pl. Add.”) 3. Under this Court’s unbroken line of cases applying the DSU regulations to solitary confinement in any unit whose “conditions are substantially similar to those of a DSU,” LaChance, 463 Mass. at 774; Haverty, 437 Mass. at 759-60, these regulations must also protect those held in solitary confinement at the SMU. (Pgs. 12-14).

II. Hoffer placed Massachusetts in the vanguard of solitary confinement reform when it ordered the DOC to adopt the DSU regulations in 1988. It would be peculiar for this Court to suddenly defer to the DOC’s attempts to elide these protections at the exact time that a growing national consensus is embracing procedures consistent with the DSU regulations to limit solitary confinement.⁷

⁷ See, e.g., THE LIMAN PROGRAM, YALE LAW SCH. & ASS’N OF STATE CORR. ADM’RS, TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON (2015), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2655627. Compare 103 CMR 421.09, with U.S. DEP’T. OF JUSTICE, U.S. DEPARTMENT OF JUSTICE REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 2 (2016), available at <http://www.justice.gov/dag/file/815551/download> [hereinafter DOJ REPORT AND RECOMMENDATIONS]; Compare 103

The President, the Department of Justice, and numerous federal and state courts and legislators have all opposed the overuse of this practice. These developments have also caught the attention of a member of the United States Supreme Court. Writing in a *Batson* case where the Petitioner happened to have been held in solitary confinement, Justice Kennedy concurred separately to stress “the human toll wrought by extended terms of isolation” and the need for judicial consideration “of the many issues solitary confinement presents.” Davis, 135 S. Ct. at 2209, 2210 (Kennedy, J., concurring). Allowing the DOC to avoid basic protections for inmates by renaming segregation units would transform Massachusetts from a state that led reform in the 20th century to one that lags behind in the 21st. (Pgs. 14-22).

III. The national outcry for reform largely stems from the ever-increasing body of research about the negative consequences of solitary confinement. Deferring to the DOC’s attempt to evade the protections of the DSU regulations would be particularly inappropriate given the growing body of scientific evidence confirming that solitary

CMR 421.15, and 103 CMR 421.18, with DOJ REPORT AND RECOMMENDATIONS, supra, at 94, 105, and DOJ REPORT AND RECOMMENDATIONS, supra, at 95, 106.

confinement is extremely damaging to the individual and brings no benefit to society.

The United State Supreme Court's stark depictions of the human costs of solitary confinement in the 19th century have since been buttressed by decades of documentation. Indeed, "[n]o study of the effects of solitary[] confinement that lasted longer than 60 days failed to find evidence of negative psychological effects." Brief for Professors & Practitioners of Psychology & Psychiatry as Amici Curiae Supporting Respondent at 4, Wilkinson v. Austin, 545 U.S. 209 (2005) (No. 04-495).

What is more, this heavy individual toll does not lead to a public benefit. To the contrary, this practice threatens both public coffers and public safety. Solitary confinement is the most costly form of incarceration, and there is little evidence that it achieves its stated goals to decrease prison violence and recidivism. Instead, studies show that the practice can *increase* violence in the prison system and the risk of recidivism. This off-kilter cost-benefit analysis casts doubt on the entire enterprise of solitary confinement, and, at the very least, makes clear that this Court should not limit the application of the DSU regulations here. (Pgs. 22-37).

IV. This Court's clear precedent is dispositive: the DSU regulations must apply to Plaintiffs. The same

justifications that undergird these regulations, however, also suggest that this Court should give real teeth to the constitutional protections it recognized in LaChance. That decision held that solitary confinement “implicate[s] due process concerns,” 463 Mass. at 775, but only “broadly sketch[ed] out the due process rights that the DOC had to provide[.]” Pl. Add. 10.

As Justice Kennedy urged, further “consideration of these issues is needed.” Davis, 135 S. Ct. at 2210 (Kennedy, J., concurring). Whether in this case or another, this Court will soon be required “to determine whether workable alternative systems for long-term [solitary] confinement exist, and if so, whether a correctional system should be required to adopt them.” Id. To properly guard the vital constitutional interests at stake this Court should use this opportunity to provide more guidance on this issue. (Pgs 37-39).

ARGUMENT

I. Under this Court’s clear case law, the DSU regulations apply to the SMU.

This Court’s precedent mandates that the DSU regulations apply to the SMU. This Court’s precedent mandates that the DSU regulations apply to the SMU. See Pl. Br. 18-29. This Court has consistently held that these procedural protections must apply to

prisoners held in solitary confinement under circumstances substantially similar to the DSU. Longvall, 404 Mass. at 328-29; Haverty, 437 Mass. at 760.

LaChance did not break with this clear line of authority. There, the Court addressed the *federal due process* requirements for prisoners solitarily confined on awaiting action status *irrespective of the conditions of their confinement*. Cf. 463 Mass. at 776-77; see also Pl. Add. 22-23. Nevertheless, LaChance reiterated that “indefinite confinement in any unit where conditions are substantially similar to those of a DSU entitles an inmate *to the protections afforded by the DSU regulations*.” 463 Mass. at 774 (emphasis added); see also Haverty, 437 Mass. at 740 (holding DSU regulations applied to solitary confinement in the “substantially similar” East Wing unit as a matter of regulatory law without reaching constitutional claims).

That is the situation presented in this case. Plaintiffs were held in administrative (or non-disciplinary) segregation in the SMU, whose conditions were “substantially similar” to the DSU. Pl. Add. 3. In failing to apply the DSU regulations here, the Commonwealth “would ignore that the regulations have the full force of law.” Haverty, 437 Mass. at 758. This Court must not do so. It should reject the

government's argument and hold that the DSU regulations apply.

II. This Court should not defer to the DOC and retreat from enforcing the DSU regulations when there is a growing national consensus to reform solitary confinement.

The DSU regulations presaged the current national trend to curtail solitary confinement by several decades. This Court should not defer to the DOC's effort to evade these protections when the rest of the country has finally caught up and, in some instances, pushed even further for reform. As detailed below, individuals at all levels and branches of government are increasingly both aware of the need to reform solitary confinement and taking action to do so. Justice Kennedy recognized this critical shift, stating, "the condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest" in the past, but there is "a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular." Davis, 135 S.Ct. at 2209-10 (Kennedy, J., concurring). In the face of these significant changes, enabling the DOC to circumvent the DSU regulations by renaming its segregation units would be an erroneous, and ill-timed, step backwards.

A. The Executive Branch.

On January 26, 2016, President Barack Obama publicly denounced solitary confinement, asking:

How can we subject prisoners to unnecessary solitary confinement, knowing its effects, and then expect them to return to our communities as whole people? It doesn't make us safer. It's an affront to our common humanity.⁸

Transforming the President's words into action, the Attorney General released a national review of solitary confinement practices and alternatives that same day.⁹ The report's recommendations—adopted by the President—set forth over 50 general guiding principles for solitary reform and specific policy changes for the federal Bureau of Prisons (BOP). The recommendations largely track the protections of the DSU regulations. For instance, both require that solitary confinement can only occur upon an evidentiary showing of a real threat, compare DOJ Report and Recommendation at 98, with 103 CMR 421.09, and both require a return to non-solitary confinement as soon as possible, compare DOJ Report and Recommendation at 98, with 103 CMR 421.20. DOJ's

⁸ Barack Obama, *Opinion, Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.

⁹ See generally DOJ REPORT AND RECOMMENDATIONS, supra note 7.

reforms also include: a ban on youth solitary, diversion of those with serious mental illness, prohibitions on the use of solitary confinement for low-level disciplinary infractions, and shortened mandatory lengths of stay in solitary confinement units. These latest reform efforts build upon former Attorney General Eric Holder's 2014 critique of juvenile solitary confinement¹⁰ and several years of Civil Rights Division litigation challenging solitary confinement.¹¹

¹⁰ Press Release, U.S. Dep't of Justice, Attorney General Holder Criticizes Excessive Use of Solitary Confinement for Juveniles with Mental Illness (May 14, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-criticizes-excessive-use-solitary-confinement-juveniles-mental>.

¹¹ See, e.g., Letter from Preet Bharara, U.S. Att'y for the S. Dist. of N.Y., to Mayor Bill de Blasio, Comm'r Joseph Ponte, and Zachary Carter Re: CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island 3, 46, 62 (Aug. 4, 2014), available at <http://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf>; Statement of the Interest of the United States of America, G.F. v. Contra Costa County, Case No. 3:13-cv-03667-MEJ (Feb. 13, 2014 N.D. Cal.), available at http://www.justice.gov/crt/about/spl/documents/contractaosta_soi_2-13-14.pdf; Letter from Thomas E. Perez, Letter from Thomas E. Perez, Asst. Att'y Gen., U.S. Dep't of Justice, Civ. Rights Div. to Tom Corbett, Gov. of Pa., Re: Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation (May 31, 2013), available at http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf.

B. Congress.

National reform efforts have also attracted strong allies in the United States Congress. In 2012 and 2014, Senator Dick Durbin held the first ever congressional hearings on solitary confinement. In his closing remarks, Senator Durbin declared that solitary confinement is over-utilized and should never be used against children, pregnant women, and people with serious mental illness.¹² In response to the resulting Congressional pressure, the BOP reduced its segregated population and underwent a comprehensive, independent assessment of its use of solitary confinement.¹³ The audit identified dangerous deficiencies in the treatment and care of prisoners in solitary confinement,¹⁴ ultimately leading to the Department of Justice reforms discussed above.

¹² See Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Const., Civ. Rts. and Human Rts., 113th Cong. (2014), available at <http://www.judiciary.senate.gov/meetings/reassessing-solitary-confinement-ii-the-human-rights-fiscal-and-public-safety-consequences>.

¹³ Press Release, Office of Sen. Durbin, Durbin Statement on Federal Bureau Of Prisons Assessment of its Solitary Confinement Practices (Feb. 4, 2013), <http://www.durbin.senate.gov/newsroom/press-releases/durbin-statement-on-federal-bureau-of-prisons-assessment-of-its-solitary-confinement-practices>.

¹⁴ KENNETH MCGINNIS ET AL., CNA ANALYSIS & SOLUTIONS, FEDERAL BUREAU OF PRISONS: SPECIAL HOUSING UNIT REVIEW AND ASSESSMENT 22 (2014), available at http://www.bop.gov/resources/news/20150226_cna_shu_review-assessment.jsp.

C. Federal Courts.

Federal courts are also driving systems reform and exposing the harms solitary wreaks on incarcerated people. Recent settlements and court orders have ended or significantly reformed the use of solitary confinement for mentally ill,¹⁵ pregnant,¹⁶ and juvenile prisoners¹⁷ in states throughout the country. In late 2015, New York and California announced federal class action settlements of an even broader nature, mandating system-wide reforms of their use of solitary confinement. California agreed to immediately release prisoners who have spent more than ten years in solitary to a general population setting; create a secure alternative to solitary confinement; severely limit all prolonged solitary confinement; and provide

¹⁵ Disability Law Ctr. v. Mass. Dep't of Corr., 960 F. Supp. 2d 271 (D. Mass. 2012); Coleman v. Brown, 28 F. Supp. 3d 1068 (E.D. Cal. 2014); Order, Disability Rts. Network of Pa. v. Wetzel, No. 1:13-cv-00635-JEJ (M.D. PA. Jan. 9, 2015); Order, Parsons v. Ryan, No. CV-12-00601-PHX-DJH (D. AZ. Feb 25, 2015), ECF No. 1458; Press Release, ACLU of Ind., ACLU of Indiana, Indiana Protection & Advocacy Services Announce Settlement with Department of Correction (Jan. 27, 2016), <http://www.aclu-in.org/news/36-news-with-photos/387-aclu-of-indiana-indiana-protection-advocacy-services-announce-settlement-with-department-of-correction>.

¹⁶ Stipulation for a Stay with Conditions, Peoples v. Fischer, No. 211-CV-02694-SAS (S.D.N.Y. Feb. 19, 2014).

¹⁷ Agreed Order, S.H. v. Reed, No.: 2:04-CV-1206 (S.D. OH, May 20, 2014); Order Approving Certain Policies, R.J. v. Jones, No. 12-CV-07289 (N.D. IL. Apr. 24, 2015).

significantly more out of cell time.¹⁸ Notably, the state announced that these reforms are expected to save \$28 million.¹⁹ New York similarly committed itself to reducing solitary by removing more than 1,100 people from traditional solitary conditions, limiting the length of solitary sentences, and abolishing many dehumanizing aspects of isolated confinement.²⁰

D. States.

Since 2010, legislative campaigns to reform solitary confinement have emerged in eighteen states.²¹ Nine states - Texas, Maine, Massachusetts, New Mexico, New Jersey, Nevada, Colorado, Delaware and Nebraska - ultimately passed legislation to either restrict solitary confinement or study how to reduce its use.²²

¹⁸ Press Release, Ctr. for Const. Rights, Landmark Agreement Ends Indeterminate Long-Term Solitary Confinement in California (Sep. 1, 2015), <http://ccrjustice.org/home/press-center/press-releases/landmark-agreement-ends-indeterminate-long-term-solitary>.

¹⁹ Sal Rodriguez, California Expects to Save \$28 Million By Reducing Solitary Confinement, SOLITARY WATCH (Jan. 8, 2015), <http://solitarywatch.com/2016/01/08/california-expects-to-save-28-million-by-reducing-solitary-confinement/>.

²⁰ Press Release, N.Y. Civ. Lib. Union, Historic Settlement Overhauls Solitary Confinement in New York (Dec. 16, 2015), <http://www.nyclu.org/news/historic-settlement-overhauls-solitary-confinement-new-york>.

²¹ Specifically, Texas, Arizona, Maine, Massachusetts, Delaware, New Jersey, New York, Ohio, Illinois, Virginia, Florida, New Mexico, Nevada, Nebraska, Montana, Colorado, Maryland, and California.

²² See S.B. 14-064, 69th Gen. Assemb., 2nd Reg. Sess. (Colo. 2014); HJR 5 (Del. 2015); H.B. 4545, 188th

Departments of Correction have also joined the growing ranks for reform. According to the ASCA-Liman 2014 report, correction officials “nationwide” are committed “to change the conditions” in solitary confinement and reduce its use “dramatically.”²³

Local correctional leaders in Massachusetts were among the earliest reformers, adopting significant reforms in the segregation units in Hampden County. These included changes to the classification scheme to limit the numbers in segregation, weekly meetings to develop corrective action plans for each prisoner, increased exercise and socialization opportunities, reduced sentences for good behavior, and step-down programs in general population. Hampden County’s reforms resulted in fewer prisoners in segregation with no increase in violence in the general population and fewer incidents in segregation.²⁴

Leg., 1st Sess. (Mass. 2015); Resolve Chapter 213, LD 1611, 124th Leg., 2nd Reg. Sess. (Me. 2010); S.B. 2003, 216th Leg., Reg. Sess. (N.J. 2015); Senate Memorial 40, 50th Leg, 1st Sess. (N.M. 2011); Nev. Rev. Stat §62B.215 (2013); L.B. 598, 104th Leg., 1st Sess. (Neb. 2015); S.B. 1003, 83rd Leg., Reg. Sess. (Tex. 2013); and H.B. 1266, 83rd Leg., Reg. Sess. (Tex. 2013).

²³ THE LIMAN PROGRAM, YALE LAW SCHOOL & ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS, supra note 7, at iii.

²⁴ RICHARD MCCARTHY, NAT’L INST. OF CORR., DEPARTMENT IMPLEMENTS INNOVATIVE IMPROVEMENTS TO DISCIPLINARY SEGREGATION UNIT (2011),

Other states have followed suit with similarly positive results. For example, the Maine Department of Corrections enacted a series of policy changes to reduce its use of solitary, including an incentive system that allows prisoners to earn access to more recreation while in solitary and earlier release.²⁵ Coupled with tighter approval requirements on the use of solitary confinement, these reforms led to solitary reductions of over 50%.²⁶ Mississippi also revolutionized its use of solitary confinement, reducing the segregation population of one institution from 1000 to 150 before it eventually closed the entire unit.²⁷ Prison officials estimate that diverting

available at <http://nicic.gov/Library/025243>; DOJ REPORT AND RECOMMENDATIONS, *supra* note 7, at 77-78. Notably, the Hampden County Sheriff's Department responsible for these reforms has been singled out as an entity engaged in best practices that reduce recidivism. LEN ENGEL, CRIME AND JUSTICE INST., PRIORITIES & PUBLIC SAFETY: REENTRY AND THE RISING COSTS OF OUR CORRECTIONS SYSTEM 22 (2009), available at http://www.crj.org/cji/entry/publication_correctionscosts.

²⁵ Zachary Heiden, CHANGE IS POSSIBLE: A CASE STUDY OF SOLITARY CONFINEMENT REFORM IN MAINE, AM. CIV. LIB. UNION OF ME. 18-26 (2013), available at <http://www.aclumaine.org/changeispossible>.

²⁶ Lance Tapley, Reform comes to the supermax, PORTLAND PHX, May 25, 2011, <http://portland.thephoenix.com/news/121171-reform-comes-to-the-supermax/>.

²⁷ John Buntin, Exodus: How America's Reddest State - And Its Most Notorious Prison - Became a Model of Corrections Reform, 23 GOVERNING 20, 27 (2010), available at <http://www.governing.com/topics/public-justice-safety/courts-corrections/mississippi-correction-reform.html>; Terry A. Kupers et al., Beyond Supermax Administrative Segregation: Mississippi's

prisoners from solitary confinement under Mississippi's new model saved about \$8 million annually,²⁸ while changes in the management of the solitary confinement population reduced violence levels by 70%.²⁹ Finally, correctional leaders in Michigan reformed administrative segregation practices through incentive programs that have reduced the length of stays in isolation, the number of prisoners subject to administrative segregation, and the number of incidents of violence and other misconduct.³⁰

III. There is growing evidence of the enormous individual and public harms of solitary confinement.

The single Justice initially ordered the adoption of the DSU regulations in the 1980s based on his findings that solitary confinement in those conditions had a "severe" impact on the prisoner and caused a "substantial diminution of liberty." RA 158. In the intervening decades, our understanding of the dire consequences of the practice - both for the individual

Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs, 36 CRIM. JUST. & BEHAV. 1041 (2009), available at https://www.aclu.org/files/images/asset_upload_file359_41136.pdf.

²⁸ Tr. of Proceedings at 8, Presley v. Epps, No. 4:05-CV-00148-JAD (N.D. Miss. Aug. 2, 2010).

²⁹ Kupers, et al., supra note 27, at 1043.

³⁰ Maurice Chammah, Stepping Down from Solitary Confinement, THE ATLANTIC (Jan. 7, 2016), <http://www.theatlantic.com/politics/archive/2016/01/solitary-confinement-reform/422565/>.

prisoner and the general public - has only increased. It is this growing body of evidence that largely spurred the national movement for reform described above. If our more limited understanding of the harms caused by solitary confinement was already sufficient to require the DSU regulations nearly thirty years ago, this Court should not now defer to the DOC's efforts to reduce these procedural protections after we know even more about its costs.

A. Solitary Confinement Harms Individuals.

i. Scientific evidence of harms.

"It's a standard psychiatric concept, if you put people in isolation, they will go insane."³¹ Indeed, prisoners in isolation can "become so desperate for relief that they would set their mattresses afire," "tear[] their sinks and toilets from the walls, rip[] their clothing and bedding, and destroy[] their few personal possessions" "to escape the torture of their own thoughts and despair."³²

There is broad consensus among mental health experts that long-term solitary confinement is

³¹ HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 149 (2003), available at <https://www.hrw.org/reports/2003/usa1003/usa1003.pdf>.

³² Frank Rundle, *The Roots of Violence at Soledad*, in *THE POLITICS OF PUNISHMENT: A CRITICAL ANALYSIS OF PRISONS IN AMERICA* 167 (Erik Olin Wright, ed., 1973), available at <https://www.ssc.wisc.edu/~wright/Published%20writing/op.c8.pdf>.

psychologically harmful.³³ Confinement for as little as 15 days can cause severe - and potentially irreversible - psychological effects.³⁴ Studies confirm that prisoners consistently exhibit a variety of negative reactions to solitary confinement including: negative attitudes and affect;³⁵ insomnia;³⁶ anxiety;³⁷

³³ See, e.g., S.L. Brodsky and F.R. Scogin, Inmates in Protective Custody: First Data on Emotional Effects, 1 FORENSIC REPORTS 267 (1988); Stuart Grassian, Psychopathological Effects of Solitary Confinement, 140 AM. J. OF PSYCHIATRY 1450 (1983); Craig Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 CRIME & DELINQUENCY 124 (2003); Richard Korn, The Effects of Confinement in the High Security Unit at Lexington, 15 SOCIAL JUSTICE 8 (1988); Holly A. Miller & Glenn R. Young, Prison Segregation: Administrative Detention Remedy or Mental Health Problem?, 7 CRIMINAL BEHAVIOUR AND MENTAL HEALTH 85 (1997); HANS TOCH, MOSAIC OF DESPAIR: HUMAN BREAKDOWN IN PRISON (American Psychological Association, 1992).

³⁴ Special Rapporteur Report, supra note 1, at 9; see also Haney, supra note 33. These harms are so grave as to cause the U.N. Special Rapporteur on Torture to call on the international community "to impose an absolute prohibition on solitary confinement exceeding 15 days." Special Rapporteur Report, supra note 1, at 20.

³⁵ See Michael Bauer, et al., Long-Term Mental Sequelae of Political Imprisonment in East Germany, 181 J. NERVOUS & MENTAL DISEASE 257, 257-62 (1993); Ida Koch, Mental and Social Sequelae of Isolation: The Evidence of Deprivation Experiments and of Pretrial Detention in Denmark, in THE EXPANSION OF EUROPEAN PRISON SYSTEMS, WORKING PAPERS IN EUROPEAN CRIMINOLOGY No. 7 119 (Bill Rolston & Mike Tomlinson eds. 1986); Korn, supra note 33, at 8-19; Richard Korn, Follow-up Report on the Effects of Confinement in the High Security Unit at Lexington, 15 SOCIAL JUSTICE 20, 20-29 (1988); Miller & Young, supra note 33, at 85-94; Peter Suedfeld, et al., Reactions and Attributes of Prisoners in Solitary Confinement, 9 CRIMINAL JUSTICE & BEHAVIOR 303-340 (1982).

panic;³⁸ withdrawal;³⁹ hypersensitivity to stimuli;⁴⁰
ruminations;⁴¹ cognitive dysfunction;⁴²
hallucinations;⁴³ loss of control;⁴⁴ irritability,

³⁶ See Bauer et al., supra note 35; Koch, supra note 35; Korn, supra note 33.

³⁷ See Henrik Andersen, et al., A Longitudinal Study of Prisoners on Remand: Repeated Measures of Psychopathology in the Initial Phase of Solitary Versus Nonsolitary Confinement, 26 INT'L J. L. & PSYCHIATRY 165, 165-177 (2003); Brodsky & Scogin, supra note 33; Grassian, supra note 33; Stuart Grassian & N. Friedman, Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement, 8 INT'L J. L. & PSYCHIATRY 49-65 (1986); Haney, supra note 33; Koch, supra note 35; Korn, supra note 33; Toch, supra note 33; Richard Walters, et al., Effect of Solitary Confinement on Prisoners, 119 AM. J. PSYCHIATRY 771, 771-773 (1963).

³⁸ See Toch, supra note 33.

³⁹ See Bruno M. Cormier & Paul J. Williams, Excessive Deprivation of Liberty, 11 CANADIAN PSYCHIATRIC ASSOC. J. 470, 470-484 (1966); Haney, supra note 33; Miller & Young, supra note 33; G. Scott & M. Gendreau, Psychiatric Implications of Sensory Deprivation in a Maximum Security Prison, 14 CANADIAN PSYCHIATRIC ASSOC. J. 337, 337-341 (1969); Toch, supra note 33.

⁴⁰ See Grassian, supra note 33; Haney, supra note 33.

⁴¹ See Brodsky & Scogin, supra note 33; Haney, supra note 33; Korn, supra note 33; Miller & Young, supra note 33.

⁴² See Brodsky & Scogin, supra note 33; Grassian, supra note 33; Haney, supra note 33; Koch, supra note 35; Korn, supra note 33; Miller & Young, supra note 33; Peter Suedfeld & Chunilal Roy, Using Social Isolation to Change the Behavior of Disruptive Inmates, 19 INT'L J. OF OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 90, 90-99 (1975).

⁴³ See Brodsky & Scogin, supra note 33; Grassian, supra note 33; Haney, supra note 33; Koch, supra note 35; Korn, supra note 33; Suedfeld & Roy, supra note 42.

⁴⁴ See Grassian, supra note 33; Haney, supra note 33; Suedfeld & Roy, supra note 42; Toch, supra note 33.

aggression and rage;⁴⁵ paranoia;⁴⁶ hopelessness;⁴⁷ lethargy;⁴⁸ depression;⁴⁹ a sense of impending emotional breakdown;⁵⁰ self-mutilation;⁵¹ suicidal ideation and behavior;⁵² and lower levels of brain function, including a decline in electroencephalogram (EEG) activity.⁵³ Notably, EEG changes were observed after only seven days of isolation.⁵⁴ An assessment of

⁴⁵ See Rundle, supra note 32; Bauer et al., supra note 35; Brodsky & Scogin, supra note 33; Cormier & Williams, supra note 39; Grassian, supra note 33; Haney, supra note 33; Koch, supra note 35; Miller & Young, supra note 33; Suedfeld et al., supra note 35; Toch, supra note 33.

⁴⁶ See Cormier & Williams, supra note 39; Grassian, supra note 33.

⁴⁷ See Haney, supra note 33.

⁴⁸ See Brodsky & Scogin, supra note 33; Haney, supra note 33; Koch, supra note 35; Scott & Gendreau, supra note 39; Suedfeld and Roy, supra note 42.

⁴⁹ See Andersen, et al., supra note 37; Brodsky & Scogin, supra note 33; Haney, supra note 33; Korn, supra note 33.

⁵⁰ See Brodsky & Scogin, supra note 33; Grassian, supra note 33; Haney, supra note 33; Koch, supra note 35; Korn, supra note 33; Toch, supra note 33.

⁵¹ See Thomas B. Benjamin & Kenneth Lux, Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine Prison, 9 CLEARINGHOUSE REVIEW 83-90 (1975); Benjamin & Lux, supra note 51; Grassian, supra note 33; Toch, supra note 33.

⁵² See Benjamin & Lux, supra note 51; Cormier & Williams, supra note 39; Grassian, supra note 33; Haney, supra note 33.

⁵³ Paul Gendreau, et al., Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement, 79 J. OF ABNORMAL PSYCHOLOGY 54, 57-58 (1972).

⁵⁴ Id.; see also Stuart Grassian, supra note 33, at 325, 331.

Massachusetts prisoners kept in isolation found similar “strikingly consistent” symptoms.⁵⁵

The danger of solitary confinement is illustrated all too well by the prevalence of suicide. On average, 50% of completed prisoner suicides occur among the 2-8% of prisoners who are housed in solitary confinement.⁵⁶ A February 2014 study in the American Journal of Public Health found that detainees in solitary confinement in New York City jails were nearly seven times more likely to harm themselves than those in general population, and that the effect was particularly pronounced for youth and people with severe mental illness.⁵⁷ In California prisons in 2004, 73% of all suicides occurred in isolation units - though these units accounted for less than 10% of the state’s total prison population.⁵⁸ Massachusetts

⁵⁵ Grassian, supra note 33, at 1452. See also Grassian & Friedman, supra note 37, at 8.

⁵⁶ Stuart Grassian & Terry Kupers, The Colorado Study vs. the Reality of Supermax Confinement, 13 CORR. MENTAL HEALTH REPORT 1, 9 (May/June 2011); see also Jennifer R. Wynn & Alisa Szatrowski, Hidden Prisons: Twenty-Three-Hour Lockdown Units in New York State Correctional Facilities, 24 PACE L. REV. 497, 516 (2004) (a study of isolated confinement in New York prisons).

⁵⁷ See Homer Venters et al., Solitary Confinement and Risk of Self-Harm Among Jail Inmates, 104 AM. J. PUBLIC HEALTH, 442, 445 (2014), available at <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742>.

⁵⁸ Expert Report of Professor Craig Haney at 45-46 n.119, Coleman v. Schwarzenegger, 2008 WL 8697735 (E.D. Cal 2010) (No. CIV S-90-0520 LKK JFM P). Another study examined the impact of solitary

solitary confinement units similarly reflect numerous incidents of suicide and self-mutilation. See Complaint, DLC v. Department of Correction, No. 07-10463, (D. Mass. Mar. 8, 2007).⁵⁹

Medical research has demonstrated that solitary confinement impairs brain functioning even *after* release. In a 1992 study of prisoners of war released from detention camps in the former Yugoslavia, scientists found that the two factors that had the most significant effect on brain activity were solitary confinement and physical trauma to the head resulting in loss of consciousness.⁶⁰

In light of these striking - and strikingly consistent - harms,⁶¹ major U.S. health organizations, including the American Psychiatric Association, Mental Health America, the American Public Health Association, the National Alliance on Mental Illness,

confinement on the amount of time that passes between incidents in which prisoners harm themselves and found that prisoners in solitary harm themselves on average 17 months earlier than prisoners in general population. See Eric Lanes, The Association of Administrative Segregation Placement and Other Risk Factors with the Self-Injury-Free Time of Male Prisoners, 48 J. OF OFFENDER REHABILITATION 539-540 (2009).

⁵⁹ Available at <http://www.centerforpublicrep.org/images/stories/docs/Complaint-FINAL.pdf>.

⁶⁰ A. Vrca, et al., Visual Evoked Potentials in Relation to Factors of Imprisonment in Detention Camps, 109 INT. J. LEGAL MED. 114-115 (1996).

⁶¹ See Peter Scharff Smith, The Effects of Solitary Confinement on Prison Inmates: A Brief History of the Literature, 34 CRIME & JUSTICE 441 (2006).

and the Society of Correctional Physicians, have all issued formal policy statements opposing long term solitary confinement, especially for prisoners with mental illness.⁶²

ii. Judicial recognition of harms.

Courts have recognized and reiterated these consequences. In Davenport v. DeRobertis, 844 F.2d 1310, 1316, 1316 (7th Cir. 1988), the Seventh Circuit noted the “medical and psychological literature concerning the ill effects of solitary confinement” before concluding “the record shows,” that solitary confinement “month after month can cause substantial psychological damage, even if the isolation is not

⁶² American Psychiatric Association, Position Statement on Segregation of Prisoners with Mental Illness (2012), available at http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06c_APA_ps2012_PrizSeg.pdf; American Public Health Association, Solitary Confinement as a Public Health Issue, Policy No. 201310 (2013), available at <http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue>; Mental Health America, Seclusion and Restraints, Policy Position Statement 24 (2011), retrieved from <http://www.nmha.org/positions/seclusion-restraints>; National Alliance on Mental Illness, Public Policy Platform, Section 9.8, available at <http://www.nami.org/policy>; Society of Correctional Physicians, Position Statement, Restricted Housing of Mentally Ill Inmates (2013), available at <http://societyofcorrectionalphysicians.org/resources/position-statements/restricted-housing-of-mentally-ill-inmates>.

total.”⁶³ A Wisconsin federal court similarly found that solitary confinement is:

known to cause severe psychiatric morbidity, disability, suffering and mortality [even among those] who have no history of serious mental illness and who are not prone to psychiatric decompensation[.]

Jones ‘El v. Berge, 164 F. Supp. 2d 1096, 1101 (W.D. Wis. 2001); see also Koch v. Lewis, 216 F. Supp. 2d 994, 1001 (D. Ariz. 2001) (experts agreed that extended isolation causes “heightened psychological stressors and creates a risk for mental deterioration”), vacated

⁶³ See also Miller ex rel. Jones v. Stewart, 231 F.3d 1248, 1252 (9th Cir. 2000) (“[I]t is well accepted that conditions such as those present in the SMU II . . . can cause psychological decompensation to the point that individuals may become incompetent”); Comer v. Stewart, 215 F.3d 910, 915 (9th Cir. 2000) (“[W]e and other courts have recognized that prison conditions remarkably similar to [SMU II] can adversely affect a person’s mental health”); Lee v. Coughlin, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998) (“The effect of prolonged isolation on inmates has been repeatedly confirmed in medical and scientific studies”); McClary v. Kelly, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998) (“[The notion that] prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science”); Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (“[M]any, if not most, inmates in the SHU experience some degree of psychological trauma in reaction to their extreme social isolation and the severely restricted environmental stimulation in SHU”); Bono v. Saxbe, 450 F. Supp. 934, 946 (E.D. Ill. 1978) (“Plaintiffs’ uncontroverted evidence showed the debilitating mental effect on those inmates confined to the control unit”), aff’d in part and remanded in part on other grounds, 620 F.2d 609 (7th Cir. 1980).

as moot, Koch v. Schriro 399 F.3d 1099 (9th Cir. 2005); Baraldini v. Meese, 691 F. Supp. 432, 446-47 (D.D.C. 1988) (citing expert testimony on sensory disturbance, perceptual distortions, and other psychological effects of isolation), rev'd on other grounds sub nom, Baraldini v. Thornburgh, 884 F.2d 615 (D.C. Cir. 1989).

Courts have also recognized the potential constitutional implications of these harms. See, e.g., Madrid v. Gomez, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995). Madrid detailed the effects of the Security Housing Unit (SHU) of California's Pelican Bay State Prison, where prisoners were isolated in windowless cells for 22 1/2 hours a day. It found that for prisoners "at a particularly high risk for suffering very serious or severe injury to their mental health," placement in the SHU was "the mental equivalent of putting an asthmatic in a place with little air to breathe." Id. at 1265. As a result, the court held that, for these prisoners, solitary confinement violated evolving standards of decency:

[S]ubjecting individuals to conditions that are "very likely" to render them psychotic or otherwise exacerbate a serious mental illness cannot be squared with evolving standards of humanity or decency, especially when certain aspects of those conditions appear to bear little relation to security concerns. A risk this grave

- this shocking and indecent - simply has no place in civilized society.

Id. at 1266.

B. Solitary Confinement Harms the General Public.

i. Solitary confinement does not reduce, and may increase, violence in prison.

The generally stated goal of solitary confinement is to decrease violence within the prison.⁶⁴ Yet research confirms that the practice is at best ineffective, and at worst counterproductive. As the Vera Institute of Justice recently noted, although the “most widely accepted and cited reason for using segregated housing is to ensure safety, order, and control within a prison . . . there is little evidence to support the claim that segregated housing increases facility safety or that its absence would increase in-prison violence.”⁶⁵

Indeed, a 2006 study found that opening a supermax prison or SHU had no effect on prisoner-on-

⁶⁴ See, e.g., Leena Kurki and Norval Morris, The Purposes, Practices, and Problems of Supermax Prisons, 28 CRIME AND JUSTICE 391 (2001).

⁶⁵ ALISON SHAMES, ET AL., VERA INST. OF JUSTICE, SOLITARY CONFINEMENT: COMMON MISCONCEPTIONS AND EMERGING SAFE ALTERNATIVES 18 (2015), available at <http://www.vera.org/pubs/solitary-confinement-misconceptions-safe-alternatives> (finding that a significant proportion of the segregated population is placed there for being neither violent nor dangerous; in some jurisdictions “nuisance prisoners” constitute the majority of people in disciplinary segregation).

prisoner violence in Arizona, Illinois and Minnesota.⁶⁶ The same study found that creating such isolation in prisons had only limited impact on prisoner-on-staff violence in Illinois, none in Minnesota, and actually increased violence in Arizona.⁶⁷ A similar study in California found that supermax or administrative segregation prisons had increased, rather than decreased, overall violence in the prison system.⁶⁸

These findings make sense because, contrary to the assumption that prison-violence is largely attributable to the “worst of the worst” prisoners, researchers have shown that prison violence is most often related to the way prisoners are treated and how prisons have been managed and staffed.⁶⁹ As a result, *limiting* the use of solitary confinement has been shown to decrease violence in prison. According to the Michigan Department of Corrections, a reduction in the number of prisoners in segregation resulted in a decline in violence and other misconduct.⁷⁰ Similarly, Mississippi saw a 70% reduction in violence levels

⁶⁶ Chad S. Briggs, et al., The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence, 41 CRIMINOLOGY 1341, 1341-42 (2006).

⁶⁷ Id. at 1365-66.

⁶⁸ Keramet Reiter, Parole, Snitch, or Die: California's Supermax Prisons & Prisoners, 1987-2007, at 44-46 (Inst. for the Study of Soc. Change, Working Paper No. 2009-2010.42, 2010).

⁶⁹ Kurki & Morris, supra note 64, at 416-17.

⁷⁰ Chammah, supra note 30.

when it closed an entire solitary confinement unit,⁷¹ and after Colorado decreased its use of solitary confinement by 85% its rate of prisoner on staff assaults plummeted.⁷²

ii. Solitary confinement increases recidivism.

In addition to evidence that solitary confinement makes prisons less safe, there is also reason to believe that the practice threatens public safety. Research from California suggests that rates of return to prison are 20% higher for solitary confinement prisoners.⁷³ A 2001 study in Connecticut found that 92% of prisoners who had been held at the state's supermax prison were rearrested within three years of release, compared with 66% of prisoners who had not been held in administrative segregation.⁷⁴

Recidivism becomes even more pronounced when prisoners are released directly from solitary confinement.⁷⁵ Ten years ago, a blue ribbon expert

⁷¹ Kupers et al., supra note 27, at 1037, 1041; Buntin, supra note 27, at 20, 27.

⁷² SHAMES, ET AL., supra note 65, at 18.

⁷³ Reiter, supra note 68, at 50.

⁷⁴ LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMM., RECIDIVISM IN CONNECTICUT 41 (2001).

⁷⁵ As of 2015, at least 10,000 prisoners are directly released to the streets from isolation units in the 24 states that keep such data. Christie Thompson, From Solitary to the Street, THE MARSHALL PROJECT (Jun. 11, 2015), <https://www.themarshallproject.org/2015/06/11/from-solitary-to-the->

panel examining national prison conditions raised serious public safety concerns regarding the practice of releasing prisoners directly from segregation settings to the community.⁷⁶ That same year, a major psychiatric study of prisoners in solitary confinement noted that such conditions may “severely impair[] the inmate’s capacity to reintegrate into the broader community upon release from imprisonment.”⁷⁷

The data bears out these concerns. Connecticut prisoners released directly from segregation had much higher recidivism rates compared to individuals who first transitioned from segregation to general population before their release (64% compared with 41%).⁷⁸ In Colorado, two-thirds of prisoners released directly from solitary confinement returned to prison within three years; by contrast, prisoners who first transitioned from solitary confinement to the general prison population were 6% less likely to recidivate in the same period.⁷⁹

street?utm_campaign=communications&utm_source=solitary
&utm_medium=email&utm_term=solitary.

⁷⁶ COMM’N ON SAFETY AND ABUSE IN AM.’S PRISONS, CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS 55 (2006), http://www.vera.org/download?file=2845/Confronting_Confinement.pdf (Hon. John J. Gibbons and Nicholas de B. Katzenbach, Co-Chairs).

⁷⁷ Grassian, supra note 54, at 325, 333.

⁷⁸ Legislative Program Review and Investigations Committee, supra note 74, at 44.

⁷⁹ MAUREEN L. O’KEEFE, COLORADO DEP’T OF CORR., ANALYSIS OF COLORADO’S ADMINISTRATIVE SEGREGATION 25 (2005) (noting that

Perhaps most troubling, directly releasing individuals from solitary confinement to the community has been shown to potentially increase re-offense specifically for violent crimes. A Washington State study tracking 8,000 former prisoners upon release found that those who were released directly from segregation were not only more likely to reoffend, but also more likely to commit violent crimes.⁸⁰

iii. Solitary confinement is unduly costly to taxpayers.

Although there is little evidence that solitary confinement is an effective prison management tool, there is ample evidence that it is the most costly form of incarceration. Supermax prisons and segregation units are considerably more costly to build and operate, sometimes costing two or three times as much as conventional facilities.⁸¹ Staffing costs are much higher--prisoners are usually required to be escorted by two or more officers any time they leave their cells, and work that in other prisons would be performed by prisoners (such as cooking and

Colorado also releases about 40% of its supermax population directly to the community).

⁸⁰ See REPORT ON SAFE & ABUSE IN AMERICA'S PRISONS, supra note 76, at 55.

⁸¹ CAROLINE ISAACS & MATTHEW LOWEN, AM. FRIENDS SERV. COMM., BURIED ALIVE: SOLITARY CONFINEMENT IN ARIZONA'S PRISONS AND JAILS 14 (2007); Daniel P. Mears & Jamie Watson, Towards a Fair and Balanced Assessment of Supermax Prisons, 23 JUSTICE Q. 233, 260 (2006).

cleaning) must be done by paid staff. Solitary confinement therefore represents an enormous investment of public resources.

The extraordinary costs of solitary confinement are well documented. For example, a 2007 estimate from Arizona put the annual cost of holding a prisoner in solitary confinement at approximately \$50,000 compared to only about \$20,000 for the average prisoner.⁸² In Maryland and Illinois, the cost of housing a prisoner in the state's segregation units is on average three times greater than in a general population facility; in Ohio and Connecticut it is twice as much; and in Texas the costs are 45% greater.⁸³

IV. This Court should give real force to the due process rights it recognized in *LaChance*.

This case can be decided simply on the basis of regulatory language and precedent. Because the conditions in the SMU are "substantially similar" to the DSU, and because the DSU regulations retain the

⁸² ISAACS & LOWEN, supra note 81, at 4.

⁸³ MEARS, supra note 81, at 20, 26, 33; CONNECTICUT DEPARTMENT OF CORRECTION: AVERAGE DAILY EXPENDITURE PER INMATE, <http://www.ct.gov/doc/cwp/view.asp?a=1505&q=265600>. Steve Mills, Quinn's Prison Plan Causes Stir, CHICAGO TRIBUNE (Feb. 23, 2012), http://articles.chicagotribune.com/2012-02-23/news/ct-met-illinois-state-budget-prisons-20120223_1_super-max-maximum-security-prison-maximum-security-inmates; Dave McKinney, Quinn Closes Super-max Downstate Tamms Prison, LAKE COUNTY NEWS-SUN, (Feb. 21, 2012), <http://newssun.suntimes.com/10790998-417/quinn-close-super-max-downstate-tamms-prison.html>.

full force of law, this Court's case law makes clear that the DSU regulations must apply. Haverty, 437 Mass. at 740. Notably, however, the nationwide consensus and increasing knowledge that make it particularly inappropriate to break with this precedent at this time also render it entirely proper for this Court to now flesh out the constitutional concerns raised in LaChance.

LaChance held that extended solitary confinement in awaiting action status "gave rise to a liberty interest that was entitled to the protection of due process." 463 Mass. at 775-76.⁸⁴ But it went on to only "broadly sketch[]" the required protections. Pl. Add. 10. Three and a half years later, it has become clear that more judicial direction is necessary to ensure the vitality of these constitutional protections. Cf. Davis, 135 S.Ct. at 2209-10 (Kennedy, J., concurring).

The Standard Operating Procedures (SOPs) adopted by the DOC in response to LaChance do not meet even the Court's broadly sketched benchmarks: rather than conducting an individualized assessment, the SOPs subject all prisoners to 90 days of isolation before hearing, compare 463 Mass. at 776-77 with Pl. Add. 9-

⁸⁴ LaChance did not articulate the threshold period to trigger these protections, but did hold that "in no circumstances may an inmate be held in segregated confinement on awaiting action status for longer than ninety days without a hearing." 463 Mass. at 777.

10, and they fail to notify the prisoner of steps they can take to mitigate the length of time in isolation, see 463 Mass. at 776. The DOC's recalcitrance flies in the face of the growing national consensus that solitary confinement should be used only - if ever - in the most limited circumstances subject to the strongest possible procedural protections. Further clarification of the constitutional requirements is entirely justified given this increasing awareness of the severe and counterproductive impact of solitary confinement and the DOC's obstruction.

In the past, "the public may have assumed lawyers and judges were engaged in a careful assessment of correctional policies, while most lawyers and judges assumed these matters were for the policy makers and correctional experts." Davis, 135 S.Ct. at 2209-10 (Kennedy, J., concurring). Justice Kennedy emphasized that it is now the time for judges to analyze the serious legal concerns regarding solitary confinement, to consider the limits of its use and to address the enforceability of its alternatives. Id. at 2210. This Court should do so here.

CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's order and hold that the DSU regulations apply.

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February 23, 2016

CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Massachusetts Rule of Appellate Procedure 16(k), I hereby certify that the foregoing brief complies in all material respects with the Massachusetts Rules of Appellate Procedure pertaining to briefs.

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