

Nos. 13-8021, 14-6226

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

ALFREDO PRIETO,
Plaintiff-Appellee,

v.

HAROLD C. CLARKE, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Virginia

**BRIEF OF *AMICI CURIAE* CORRECTIONAL EXPERTS
IN SUPPORT OF APPELLEE**

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Corrections experts Toni Bair, Kathleen Dennehy, F. Warren Benton, Brian Fischer, Martin Horn, Steve Martin, Chase Riveland, Reginald Wilkinson, and Jeanne Woodford respectfully submit this brief as *amici curiae* in support of Appellee Alfredo Prieto.¹

Toni V. Bair's extensive experience includes supervising Virginia's death row as Warden of Mecklenburg Correctional Center. He also served as Regional Administrator supervising the Wardens of Virginia's seven adult prisons from 1986-1990. Bair has also worked as Unit Manager directing a team responsible for Death Row at Utah State Prison and Assistant Commissioner for the New York City Department of Correction.

F. Warren Benton was Director of the Oklahoma Department of Corrections from 1975-1979. He is a nationally recognized corrections consultant and monitor and has held leadership positions within the American Correctional Association (ACA) and the Association of State Correctional Administrators (ASCA). He is a professor at John Jay College of Criminal Justice.

Kathleen M. Dennehy worked for the Massachusetts Department of Corrections for over 30 years, serving as Commissioner from 2004-2007. Dennehy

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

has worked as an expert and consultant for organizations including the National Institute of Corrections and the National Council on Crime and Delinquency.

Brian Fischer spent forty-four years in corrections, serving as Commissioner of the New York State Department of Corrections from 2007-2013. Prior to retiring, he consolidated the Division of State Parole and the Department of Correction into the Department of Corrections and Community Supervision, downsizing the agency by closing prison farms, annexes, camps, and several medium-security prisons.

Martin F. Horn served as Secretary of Corrections of Pennsylvania—a state with one of the nation’s largest death-row populations—from 1995-2000. He also served as Commissioner of the New York City Department of Correction and of the New York City Department of Probation for seven years. Horn is Executive Director of the New York State Sentencing Commission.

Steve J. Martin is former General Counsel/Chief of Staff of the Texas prison system. He has worked as a correctional officer, including on death row, and also as a probation and parole officer and prosecutor. As a corrections expert for the U.S. Department of Justice (DOJ) and as a consultant in over forty states, Martin has visited or inspected more than 700 confinement facilities.

Chase Riveland served from 1986-1997 as Secretary of the Washington State Department of Corrections, from 1983-1986 as Executive Director of

Colorado's Department of Corrections, and for nineteen years in the Wisconsin Department of Corrections. His publications include the DOJ publication *Supermax Prisons: Overview and General Considerations* (1999).

Dr. Reginald A. Wilkinson served as Director of the Ohio Department of Rehabilitation and Correction from 1991-2006; he also served as a Warden. Wilkinson is a former President of ACA and ASCA.

Jeanne Woodford was Director of California's Department of Corrections (2004-2005) and Acting Secretary of the California Department of Corrections and Rehabilitation (2005-2006). She served as Warden of California's San Quentin State prison, which houses the nation's largest death row, from 1999-2004.

Amici have first-hand experience in safely managing death-sentenced and other maximum-security populations. Collectively, *amici* have decades of experience running state prison systems and individual prisons (including in Virginia), serving as monitors and expert witnesses around the country, and investigating, establishing, and following correctional best practices. It is *amici's* view that the Virginia Department of Corrections policy of automatically and permanently placing death-sentenced prisoners in solitary confinement is a violation of prisoners' due process rights and serves no correctional purpose. They respectfully submit this brief to set forth the basis for these views.

ARGUMENT

INTRODUCTION

The district court ruled that Virginia’s automatic placement of death-sentenced prisoners in solitary confinement—without any process in which prisoners could challenge that placement, and without addressing dangerousness, misconduct, or any other individualized reason—violates the right to due process guaranteed by the Fourteenth Amendment to the U.S Constitution.² The extreme isolation on Virginia’s death row constitutes the deprivation of a liberty interest under *Sandin v. Conner*³ and *Wilkinson v. Austin*⁴ by “impos[ing] an atypical and significant hardship within the correctional context.”⁵ The court found that Virginia’s death row conditions are extreme and severely isolating and that automatic, indefinite solitary confinement of death-sentenced prisoners is not “well calibrated to further legitimate safety- and resource-related goals.”⁶

Amici’s experience as corrections professionals, and the experience of their colleagues, has led to a broad understanding that automatic placement of death-sentenced prisoners in solitary confinement is harmful and unnecessary to institutional safety. This brief supports two factual premises related to the *Sandin*

² See *Prieto v. Clarke*, 2103 U.S. Dist. LEXIS 161783 (E.D. Va. Nov. 12, 2013), J.A. 844 [hereinafter cited by Joint Appendix (“J.A.”) page].

³ 515 U.S. 472 (1995).

⁴ 545 U.S. 209 (2005).

⁵ See *Prieto v. Clarke*, J.A. 842.

⁶ *Id.* J.A. 840.

and *Wilkinson* test: 1) the conditions of solitary confinement on Virginia's death row are a uniquely mentally and physically debilitating form of incarceration; and 2) safe, effective alternatives to *automatic* solitary confinement for death-sentenced prisoners exist.

Solitary confinement creates enormous risks. Many states limit their use of the practice, and some no longer automatically house death-sentenced prisoners in solitary confinement. Yet in Virginia, prisoners sentenced to death must live permanently in conditions of extreme isolation. This automatic isolation inflicts gratuitous pain and debilitation without serving any correctional purpose. Death-sentenced prisoners can be safely classified based on recognized correctional principles, and can be managed safely without automatic solitary confinement.

I. AUTOMATIC SOLITARY CONFINEMENT OF DEATH-SENTENCED PRISONERS UNNECESSARILY RISKS SERIOUS HARM TO THEIR MENTAL AND PHYSICAL HEALTH.

The district court correctly found that the conditions of long-term, indefinite, harsh isolation on Virginia's death row supported Appellee's due process claim. Virginia's death row exemplifies conditions of solitary confinement that research has shown to be extremely damaging to human beings.

a. Solitary confinement is well defined.

Solitary confinement is the practice of placing a person alone in a cell for 22 to 24 hours a day with little human contact or interaction; reduced or no natural

light; severe constraints on visitation; and the inability to participate in group activities, including meals. A prisoner in solitary typically spends 23 hours a day alone in a small cell with a solid steel door, a bunk, a toilet, and a sink.⁷ Human contact is restricted to brief interactions with corrections officers and, occasionally, healthcare providers or attorneys.⁸ Family visits are limited; almost all human contact occurs while the prisoner is in restraints, behind a partition.⁹ Many prisoners are only allowed one visit per month, if any.¹⁰

While specific conditions and terminology differ across jurisdictions, accepted definitions of solitary confinement exist. The U.S. Department of Justice defines “isolation” or “solitary confinement” as “the state of being confined to one’s cell for approximately 22 hours per day or more, alone or with other prisoners, that limits contact with others.”¹¹ In 2005, the U.S. Supreme Court described solitary confinement as limiting human contact for 23 hours per day.¹²

⁷ For a general description of solitary confinement conditions, see Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 395 (2001). Copies of this and other sources not available online are on file with counsel, available upon request.

⁸ *See id.* at 396-97.

⁹ *See id.*

¹⁰ *See id.* at 389.

¹¹ *See* Letter from Thomas E. Perez, U.S. Dept. of Justice & David J. Hickton, U.S. Att’y, W.D. Penn., to Governor Tom Corbett, Investigation of the State Correctional Institution at Cresson and Notice of Expanded Investigation, at 5 (May 31, 2013), available at http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf.

¹² *See* *Wilkinson v. Austin*, 545 U.S. 209, 214, 224 (2005).

Recognizing the dangers of solitary confinement, many professional organizations have promulgated standards that strictly limit the practice. According to the American Bar Association's *Standards for Criminal Justice, Treatment of Prisoners*, death-sentenced prisoners may be separated from other prisoners, but should be housed in conditions comparable to those in general population. Solitary confinement should be used only for brief periods for reasons related to discipline, security, or crime, and must follow adequate process.¹³ The Society of Correctional Physicians, the American Psychiatric Association, the American Public Health Association, and the National Alliance on Mental Illness have all issued formal policy statements opposing long-term solitary confinement, especially for prisoners with mental illness.¹⁴

¹³ ABA Crim. Just. Standards on the Treatment of Prisoners, Standards 23-2.6.(a), 23-2.9 (2010), available at <http://www.abanet.org/crimjust/policy/midyear2010/102i.pdf>.

¹⁴ See AMERICAN PSYCHIATRIC ASSOCIATION, POSITION STATEMENT ON SEGREGATION OF PRISONERS WITH MENTAL ILLNESS (2012), available at http://www.psych.org/File%20Library/Learn/Archives/ps2012_PrisonerSegregation.pdf (“Prolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates.”); AMERICAN PUBLIC HEALTH ASSOCIATION, SOLITARY CONFINEMENT AS A PUBLIC HEALTH ISSUE, POLICY NO. 201310 (2013), available at <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1462> (detailing the public-health harms of solitary confinement; urging authorities to “eliminate solitary confinement for security purposes unless no other less restrictive option is available to manage a current, serious, and ongoing threat to the safety of others”; asserting that “[p]unitive segregation should be eliminated”); NATIONAL ALLIANCE ON MENTAL ILLNESS, PUBLIC POLICY PLATFORM SECTION 9.8, available at http://www.nami.org/Template.cfm?Section=NAMI_Policy_Platform&Template=/

b. Virginia houses death-sentenced prisoners in solitary confinement.

As the district court correctly found, Virginia’s death row conditions “amount to a form of solitary confinement,” more confining than maximum-security conditions at the same facility.¹⁵ All death-sentenced prisoners, like Mr. Prieto, spend at least 23 hours per day alone in their cells. They are only allowed out one hour per day, five days per week, to exercise in a small, outdoor cell with no exercise equipment.¹⁶ The only other time death-sentenced prisoners regularly leave their cells is for a ten-minute shower three times per week.¹⁷

In-cell activities are also limited. If a prisoner has the funds, he may purchase a television and compact disc player for in-cell use; he may request books from the law library.¹⁸ His cell measures 71 square feet,¹⁹ and its only window is narrow and mesh-covered. All day and night, a light remains on in every prisoner’s

[ContentManagement/ContentDisplay.cfm&ContentID=38253](#) (“oppos[ing] the use of solitary confinement and equivalent forms of extended administrative segregation for persons with mental illnesses”); 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> (“acknowledg[ing] that prolonged segregation of inmates with serious mental illness, with rare exceptions, violates basic tenets of mental health treatment,” and recommending against holding these prisoners in segregated housing for more than four weeks).

¹⁵ Prieto v. Clarke, J.A. 823.

¹⁶ See *id.* at J.A. 823.

¹⁷ See *id.*

¹⁸ See *id.* at J.A. 837.

¹⁹ *Id.* at J.A. 823.

cell and in the pod immediately outside of it, resulting in 24-hour illumination.²⁰

The district court noted, “[p]erhaps the most significant restrictions are those depriving plaintiff of human contact. He must spend almost all of his time alone. Although death row houses seven other inmates, they are separated by at least two (and often many more) empty cells within the 44–unit pod.”²¹ The cells’ solid metal doors have no openings apart from small slits, blocking communication.²² Visitation is limited to non-contact visits with immediate family in a room with a glass partition.²³ Appellee’s only regular source of human contact is prison staff, including those administering in-cell medical and mental-health services.²⁴

These conditions are automatic and last for the death-sentenced prisoner’s entire confinement, typically more than six years.²⁵ As Director Clarke acknowledged, “we expect that [prisoners will live on death row for] anywhere from seven . . . to ten years.”²⁶ Appellee has already spent more than five years in these conditions, and faces several more as he exhausts his legal remedies.²⁷

²⁰ See Defs.’ Response to Plaintiff’s First Set of Interrogatories, Prieto v. Clarke, J.A. 344.

²¹ See Prieto v. Clarke, J.A. 824.

²² See *id.*

²³ See *id.*; see also Grassian Report, J.A. 413.

²⁴ See Prieto v. Clarke, J.A. 824.

²⁵ See *id.*

²⁶ Clarke Dep., J.A. 679.

²⁷ See Prieto v. Clarke, JA 837-38.

c. The adverse health effects of solitary confinement are well documented.

i. Solitary confinement causes devastating health effects.

Solitary confinement can cause serious and permanent harm.²⁸ Research consistently shows that solitary confinement is painful, stressful, and psychologically harmful.²⁹ Such outcomes are well known to mental health practitioners in corrections. As a prison staff psychiatrist told Human Rights Watch in 2002, “[i]t’s a standard psychiatric concept, if you put people in isolation, they

²⁸ See generally Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment* 18-23, INDIANA L.J. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411845 (summarizing the research on psychiatric harms of solitary).

²⁹ For research on the cognitive and mental-health impairments that solitary confinement causes, see Craig Haney, *The Social Psychology of Isolation: Why Solitary Confinement is Psychologically Harmful*, 12 Prison Serv. J., at n. 1 (2009); B. Arrigo & J. Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and What Should Change*, 52 INT’L J. OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 622-40 (2008); Kristin Cloyes et al., *Assessment of Psychosocial Impairment in a Supermaximum Security Unit Sample*, 33 CRIMINAL JUSTICE & BEHAVIOR 760-781 (2006); Peter Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUSTICE 441-528 (2006), available at http://www.insidetime.org/resources/Publications/Solitary_Confinement_PSJ181.pdf; Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 Crime & Delinquency 124, 127 (2003) (finding high psychological-trauma rates including more than 80% of prisoners suffering from anxiety, headaches, troubled sleep, or lethargy; 25% reporting suicidal ideation; and over 50% reporting symptoms including heart palpitations, obsessive ruminations, confusion, irrational anger, withdrawal, violent fantasies, chronic depression, hallucinations, perceptual distortions, emotional flatness, and depression); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450, 1450-54 (1983) (finding “strikingly consistent” symptoms, including massive anxiety, perceptual disturbances such as hallucinations, cognitive difficulties, memory lapses, and thought disturbances such as paranoia, aggressive fantasies and impulse-control problems among Maine prisoners in isolation).

will go insane. . . Most people in isolation will fall apart.”³⁰

Prisoners’ physiological and psychological reactions to solitary confinement include negative affect, insomnia, anxiety, panic, withdrawal, hypersensitivity to stimuli, ruminations, cognitive dysfunction, hallucinations, loss of control, aggression, rage, paranoia, hopelessness, lethargy, depression, self-mutilation, and suicidal ideation and behavior.³¹ Researchers have also found a correlation

³⁰ HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 149 n. 513 (2003), available at <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf>.

³¹ See Michael Bauer et al., *Long-Term Mental Sequelae of Political Imprisonment in East Germany*, 181 J. NERVOUS & MENTAL DISEASE 257-262 (1993) (studying persons who had spent at least six weeks in political imprisonment, with periods of solitary confinement); Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 Social J. 8, 8-19 (1988); Richard Korn, *Follow-up Report on the Effects of Confinement in the High Security Unit at Lexington*, 15 SOCIAL JUSTICE 20-29 (1988); 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); Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 Criminal Behaviour & Mental Health 85, 85-94 (1997); Peter Suedfeld et al., *Reactions and Attributes of Prisoners in Solitary Confinement*, 9 CRIMINAL JUSTICE & BEHAVIOR 303-340 (1982); S.L. Brodsky & F.R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 Forensic Reports 267, 267-80 (1988); 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 165-177 (2003); Grassian, *supra* note 29; Stuart Grassian & N. Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT’L J. L. & Psychiatry 49-65 (1986); Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, *supra* note 29; HANS TOCH, MOSAIC OF DESPAIR: HUMAN BREAKDOWN IN PRISON (1992) (finding that “isolation panic” causes symptoms of rage, panic, loss of control, psychological regression, and

between solitary confinement and depressed brain function, observing EEG changes in the brain after only seven days in isolation.³²

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. Less significant factors included electric-shock torture and extreme cold.³³

Evidence of solitary confinement's devastating effects is remarkably

physiological and psychic tension leading to self-mutilation); Richard Walters et al., *Effect of Solitary Confinement on Prisoners*, 119 AM. J. PSYCHIATRY 771-773 (1963); G. Scott & M. Gendreau, *Psychiatric Implications of Sensory Deprivation in a Maximum Security Prison*, 14 CANADIAN PSYCHIATRIC ASSOC. J. 337-341 (1969); Peter Suedfeld & Chunilal Roy, *Using Social Isolation to Change the Behavior of Disruptive Inmates*, 19 INTERNATIONAL JOURNAL OF OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 90-99 (1975); 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) (one prisoner nearly died from loss of blood after cutting himself with his broken light bulb, another swallowed glass, numerous others attempted hanging, several successfully).

³² Paul Gendreau et al., *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. ABNORMAL PSYCHOLOGY 54, 57-58 (1972); see also Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. & Pol'y 325, 325 (2006) (“[E]ven a few days of solitary confinement will predictably shift the electroencephalogram (EEG) pattern [of the brain] toward an abnormal pattern characteristic of stupor and delirium.”).

³³ A. Vrca, V. Bozиков. Z. Brzovic, R. Fuchs, M. Malinar, *Visual Evoked Potentials in Relation to Factors of Imprisonment in Detention Camps*, 109 INT. J. LEGAL MED. 114-115 (1996).

uniform. In a 2005 submission to the U.S. Supreme Court, a group of psychologists and psychiatrists explained that “no study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects.”³⁴ That consistency, the *amici* noted, was “striking.”³⁵

Neurological studies confirm the psychological research. Sensory deprivation—the lack of exposure to stimuli that interact with any of the five senses—is extremely harmful to the human brain, sometimes causing permanent damage. A 2011 report for NASA concluded, “[t]he prolonged stress consequences of [sensory deprivation] lead to detrimental neurological changes in the human brain, which can manifest in maladaptive behaviors and disorders.”³⁶ The longer an individual is subjected to sensory deprivation, the greater the risk of these behavioral consequences.³⁷ In response to sensory deprivation, the body may produce increased cortisol, a stress reaction resulting in neurological problems

³⁴ Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent, *Wilkinson v. Austin*, 545 U.S. 209, No. 04-495, 2005 WL 539137, at *4 (March 3, 2005) [hereinafter *Wilkinson Amicus*]. In *Wilkinson*, a unanimous court concluded that the conditions in Ohio’s supermax, Ohio State Penitentiary, gave rise to a liberty interest in avoiding them: “we are satisfied that assignment to OSP imposes an atypical and significant hardship under any plausible baseline.” 545 U.S. at 223.

³⁵ *Wilkinson Amicus*, *supra* note 34, at *23.

³⁶ DIANA ARIAS & CHRISTIAN OTTO, DEFINING THE SCOPE OF SENSORY DEPRIVATION FOR LONG DURATION SPACE MISSIONS 6, 11, NASA (2011), available at <http://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/20110014527.pdf> (internal citations omitted).

³⁷ *Id.* at 11 (“[S]tudies suggest that increased duration increases the intensity and likelihood of maladaptive behaviors.”).

including lapses in spatial and verbal memory and cognitive processes, increases in anxiety, paranoia, withdrawal, and territorial behavior.³⁸ Sensory deprivation can also reduce brain activity, and cause negative brain plasticity processes, which create a self-reinforcing “downward spiral” of degraded brain function.³⁹

The prevalence of suicide and self-harm in isolation housing units graphically illustrates the dangers of solitary confinement. Approximately 50% of prisoner suicides occur among prisoners housed in solitary confinement.⁴⁰ Detainees in solitary confinement in New York City jails were nearly seven times more likely to harm themselves than those in general population; in California prisons in 2004, 73% of all suicides occurred in isolation units.⁴¹ This is not a surprising result; many prisoners in solitary deteriorate dramatically. As *amici* have witnessed in their years of experience, is not unusual for prisoners in solitary confinement to swallow razors, smash their heads into walls, compulsively cut their flesh, and try to hang themselves.⁴²

³⁸ *Id.* at 38.

³⁹ *Id.* at 40.

⁴⁰ See Stuart Grassian & Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, 13 CORRECTIONAL MENTAL HEALTH REPORT 1, 9 (2011).

⁴¹ See Homer Venters et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104:3 AM. J. PUBLIC HEALTH 442, 442-447 (March 2014), available at <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301742>; Expert Report of Craig Haney at 45-46 n. 119, *Coleman v. Schwarzenegger*, 2008 WL 8697735 (ED. Cal 2010) (No: Civ S 90-0520 LKK-JFM P).

⁴² For a general assessment of the deleterious effects of solitary confinement on prisoners' mental health, see Jeffrey Metzner & Jamie Fellner, *Solitary*

These extensive harms are so well known that federal and state courts have repeatedly held that placing individuals with serious mental illness in solitary confinement violates the Eighth Amendment's ban on cruel and unusual punishment.⁴³ The U.S. Department of Justice has also found that conditions of solitary confinement can violate the Eighth Amendment.⁴⁴

Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics, 38 J. AM. ACAD. PSYCHIATRY LAW 104-108 (2010), available at <http://www.jaapl.org/content/38/1/104.full.pdf>.

⁴³ See, e.g., Order, *Coleman v. Brown*, Case 2:90-cv-00520-LKK-DAD, Doc. 5131 (E.D. Cal. Apr. 10, 2014) (finding ongoing Eighth Amendment violations in the conditions of confinement of California prisoners with mental illness, and placing major restrictions on the placement prisoners with serious mental illness in segregation); *Indiana Protection & Advocacy Services Commission v. Commissioner*, 2012 WL 6738517 (S.D. Ind., Dec. 31, 2012) (holding that the Indiana DOC's practice of placing prisoners with serious mental illness in segregation constituted cruel and unusual treatment violating the Eighth Amendment); *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1101-02 (W.D. Wis. 2001) (granting a preliminary injunction requiring the removal of prisoners with serious mental illness from "supermax" prison); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975 (S.D. Tex. 2001) ("Conditions in TDCJ-ID's administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs' class made up of mentally-ill prisoners"); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320-21 (E.D. Cal. 1995) ("defendants' present policies and practices with respect to housing of [prisoners with serious mental disorders] in administrative segregation and in segregated housing units violate the Eighth Amendment rights of class members"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995) (ruling that housing prisoners with mental illness or those at a high risk for suffering mental health injury in "Security Housing Unit" is unconstitutional); *Casey v. Lewis*, 834 F. Supp. 1477, 1549-50 (D. Ariz. 1993) (finding Eighth Amendment violation when "[d]espite their knowledge of the harm to seriously mentally ill inmates, ADOC routinely assigns or transfers seriously mentally ill inmates to [segregation units]"); *Morrie et al. v. S.C. Dept. of Corrections*, C/A No. 2005-CP-40-2925 (S.C. Ct.

The evidence before the district court was consistent with the literature describing the harms of solitary confinement and with the collective experience of *amici*. Dr. Stuart Grassian, an expert on the psychiatric effects of solitary confinement, found that the conditions on death row at Sussex I State Prison “lead to a bevy of deleterious effects, including difficulties with thinking, concentration and memory, dissociative episodes, difficulties with sleep regulation, intrusive and obsessional preoccupations, stress, fear, terror and general mental agony.”⁴⁵

VDOC officials admit that the conditions of Virginia death row are isolating in potentially harmful ways. Sussex I Warden Keith Davis acknowledged that social activity is vital to human health: “[T]here is real importance to that of getting out and being with other people, I agree, and not being 24/7 in a cell. I would even say in my readings about prisoner of war deprivation, being separated

Comm. Pleas 5th J. Cir. Jan. 8, 2014) (finding major deficiencies in the conditions, including solitary confinement, endured by prisoners with mental illness, and ordering defendants to submit a remedial plan).

⁴⁴ See Letter from Jocelyn Samuels, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div. & David J. Hickton, U.S. Att’y, U.S. Att’y’s Office, W.D. Penn. to Tom Corbett, Gov. of Pennsylvania, Re: Investigation of the Pennsylvania Department of Corrections’ Use of Solitary Confinement on Prisoners with Serious Mental Illness and/or Intellectual Disabilities (Feb. 24, 2014), available at http://www.prisonpolicy.org/scans/DOJ_Findings_Letter_Issued_by_DOJ_2_24_2014.pdf (finding that state prisons across Pennsylvania “use[] solitary confinement in ways that violate the rights of prisoners with [serious mental illness and intellectual disabilities],” citing “conditions that are often unjustifiably harsh,” and detailing a number of other Eighth Amendment violations stemming from the practice of holding prisoners with serious mental illness in solitary confinement).

⁴⁵ Grassian Report, J.A. 406.

and alone from human contact, that we—as humans, we don’t survive very well that way with lack of human contact.”⁴⁶

d. Prisons are limiting solitary confinement due to its human and fiscal costs and negative outcomes.

Across the country, numerous states and the federal government have initiated policies to investigate, monitor, and reduce the use of solitary confinement, building on a growing recognition that long-term isolation is dangerous, counterproductive, and costly. Two U.S. Senate hearings have been held to reassess the practice; legislation was recently introduced in the House of Representatives to establish a commission to study solitary confinement and develop national standards limiting its use.⁴⁷ Meanwhile, the federal Bureau of Prisons (BOP)—the nation’s largest prison system—recently introduced a policy that creates a presumption against housing prisoners with serious mental illnesses in ADX (supermax) prisons or in Special Management Units.⁴⁸ BOP is also reviewing its use of solitary confinement more generally.⁴⁹

⁴⁶ Davis Dep. 69:18-24 (Ex. 14).

⁴⁷ See Solitary Confinement Study and Reform Act of 2014, H.R. 4618 (introduced May 8, 2014), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr4618ih/pdf/BILLS-113hr4618ih.pdf> (proposing to “develop and implement national standards for the use of solitary confinement to ensure that it is used infrequently and only under extreme circumstances”).

⁴⁸ See U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 5310.16 (May 1, 2014), available at <http://www.bop.gov/PublicInfo/execute/policysearch?todo=query#> (detailing “SMU/ADX Exclusionary Criteria” and

States are also limiting solitary confinement. Many state reforms have been undertaken by corrections officials; others have been legislative, with statutes requiring substantive reform or studies on the impact of solitary confinement.⁵⁰ Colorado and Illinois both recently closed entire supermax prisons.⁵¹ Among other major reforms,⁵² Colorado recently stopped automatically classifying death-

presumption against placing prisoners with serious mental illness in segregated housing assignments).

⁴⁹ Press Release, Sen. Dick Durbin (D-IL), Durbin Statement on Federal Bureau of Prisons, Assessment of its Solitary Confinement Practices (Feb. 4, 2013), <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=07260483-4972-4720-8d43-8fc82a9909ac>. The audit's findings have yet to be published.

⁵⁰ For an overview of the many recent reforms around the country, see Written Statement of the ACLU Before the U.S. Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights, Hearing on Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences, at 7-8 (Feb. 25, 2014), https://www.aclu.org/sites/default/files/assets/aclu_testimony_for_solitary_ii_hearing-final.pdf (describing reforms in Massachusetts, Colorado, New York, Illinois, New Mexico, Mississippi, Maine, Michigan, Nevada, West Virginia, Texas, and Virginia).

⁵¹ See News Release, Colo. Dep't of Corr., The Department of Corrections Announces the Closure of Colorado State Penitentiary II (March 19, 2012), available at <http://www.doc.state.co.us/sites/default/files/Press%20release%20CSP%20II%20close%20%20Feb%201%202013.pdf>; *Tamms Supermaximum Security Prison Now Closed*, AMNESTY INT'L, Jan. 10, 2013, <http://www.amnestyusa.org/our-work/latest-victories/tamms-supermaximum-security-prison-now-closed>.

⁵² See Memorandum from Lou Archuleta, Interim Director of Prisons, Colorado DOC, to Wardens (Dec. 10, 2013) (directing wardens to no longer refer prisoners with "major mental illness" or "MMI Qualifiers" to administrative segregation, and reproducing wording of the new administrative code section describing the policy), available at <http://aclu-co.org/sites/default/files/Memo%20Mental%20Health%20Qualifiers%20Ad%20Seg%20MEMO%20%282%29.pdf>.

sentenced prisoners to solitary confinement.⁵³

Virginia has taken initial steps to join this national trend. Facing mounting public scrutiny,⁵⁴ VDOC has reportedly reduced the number of high-security prisoners in solitary confinement at Red Onion State Prison by more than 50% between 2011 and 2013.⁵⁵ These recent efforts demonstrate that VDOC itself recognizes that even prisoners in the highest security classifications can be safely moved to non-solitary units.

II. SAFE AND CONSTITUTIONAL ALTERNATIVES TO AUTOMATIC, INDEFINITE PLACEMENT IN SOLITARY CONFINEMENT EXIST FOR DEATH-SENTENCED PRISONERS.

In its holding that the automatic and permanent assignment of death-sentenced prisoners to solitary confinement violated due process rights and satisfied the “atypical and significant hardship” test set forth in *Sandin* and

⁵³ See Executive Directive Regarding “Administrative Segregation” – Levels IVA and IVB, from Rick Raemisch, Executive Director, Colorado Dept. of Corrections, to Colorado Dept. of Corrections (April 1, 2014) (on file with counsel).

⁵⁴ See Adam Ebbin, Charniele Herring & Patrick Hope, *Why All Virginians Should Care About Overuse of Solitary Confinement*, WASH. POST, Jan. 20, 2012, available at http://www.washingtonpost.com/opinions/why-all-virginians-should-care-about-the-overuse-of-solitary-confinement/2012/01/19/gIQAnTeuEQ_story.html.

⁵⁵ According to VDOC, between 2011 and August 2013 the number of prisoners in administrative segregation at Red Onion State Prison dropped from 468 to 179; VDOC also claims that “incidents” and filed grievances have declined. See Virginia Dept. of Corrections, Southern Legislative Conference Power Point at slide 6, Program Description (on file with counsel); Patrick A. Hope & Adam P. Ebbin, *Virginia turns away from solitary confinement*, WASH. POST, Sept. 6, 2013, available at http://www.washingtonpost.com/opinions/virginia-turns-away-from-solitary-confinement/2013/09/06/376e0502-14d7-11e3-880b-7503237cc69d_story.html.

Wilkinson, the district court found that VDOC’s death row policies are *not* “well calibrated to further legitimate safety- and resource-related goals.”⁵⁶ Indeed, VDOC’s insistence that its automatic-solitary policy for death row advances institutional safety and security finds no support in sound correctional practice, research, or the record.

a. Research and the record demonstrate that existing classification procedures may be used to house death-sentenced prisoners safely.

Virginia can safely classify death-sentenced prisoners using classification procedures similar to its existing policy for non-capital prisoners, who are initially classified into a risk-level category based on a combination of eight factors, including history of institutional violence, escape history, length of time remaining to serve, and the severity of the offense of conviction.⁵⁷ After initial assignment based on these factors, non-capital offenders may be re-assessed at any time; they receive annual classification reviews; and their security level may be adjusted based on behavior.⁵⁸ Warden Davis acknowledged that some of VDOC’s death-sentenced prisoners could “handle a situation that was less restrictive and not be a security threat,”⁵⁹ and that VDOC safely houses other high security prisoners in

⁵⁶ *Prieto v. Clarke*, J.A. 840.

⁵⁷ *See id.*, J.A. 825.

⁵⁸ *See id.*, J.A. 826.

⁵⁹ *Davis Dep.*, J.A. 286.

general population.⁶⁰ This is not surprising; modern correctional classification uses individualized risk assessments based on objective factors, resulting in safer prisoner management. These factors, such as age and disciplinary history, are far more predictive for security purposes than the conviction status Virginia currently uses to automatically and permanently isolate all death-sentenced prisoners.⁶¹

b. Death-sentenced prisoners can be safely managed without automatic, indefinite solitary confinement.

i. Incentive-based prison management works—even for death-sentenced prisoners.

Correctional best practices would classify death-sentenced prisoners using the same objective system used for other prisoners. In *amici*'s professional experience, risk-based assessment and incentive-based management are essential to well-run facilities. The U.S. Department of Justice's National Institute of Corrections has established that the essential elements of safe and secure facilities include risk-assessment classification, and defining and conveying expectations for

⁶⁰ Davis Dep., J.A. 29.

⁶¹ See JAMES AUSTIN, FINDINGS IN PRISON CLASSIFICATION AND RISK ASSESSMENT, NATIONAL INSTITUTE OF CORRECTIONS 5 (2003), available at http://www.jfa-associates.com/publications/pcras/10_Findings_2003.pdf; see also JAMES AUSTIN & KENNETH MCGINNIS, CLASSIFICATION OF HIGH-RISK AND SPECIAL MANAGEMENT PRISONERS, NATIONAL INSTITUTE OF CORRECTIONS (2004), available at <http://static.nicic.gov/Library/019468.pdf>; D.J. Simourd, *Use of Dynamic Risk/Need Assessment Instruments Among Long-Term Incarcerate Offenders*, 3 CRIM JUSTICE & BEHAVIOR 31, 306-323.

behavior, including positive-behavior incentives.⁶² Staff should “demonstrate that they expect inmates to behave well by interacting extensively with them, treating them with respect and consideration, and ensuring that inmate living areas are maintained in good order.”⁶³ Nothing about death-sentenced prisoners excludes them from this widely accepted theory of management. As VDOC’s director of offender management services admitted, death-sentenced prisoners, “very well could” be motivated by positive-behavior incentives, such as special privileges or the possibility of facility transfer.⁶⁴

ii. The severity of a prisoner’s commitment offense does not predict violence in prison.

A comprehensive 2002 literature review concluded that “the majority of death row inmates do not exhibit serious violence within the structured context of institutional confinement.”⁶⁵ Analyzing more than ten years of data from Missouri, where death-sentenced prisoners are classified the same way as other prisoners and may be integrated into the general population, the study found that death-sentenced

⁶² VIRGINIA HUTCHINSON ET AL., INMATE BEHAVIOR MANAGEMENT: THE KEY TO A SAFE AND SECURE JAIL 8-9, U.S. DEPARTMENT OF JUSTICE NATIONAL INSTITUTE OF CORRECTIONS (2009), available at <https://s3.amazonaws.com/static.nicic.gov/Library/023882.pdf>.

⁶³ *Id.* at 9.

⁶⁴ Parks Dep., J.A. 755.

⁶⁵ Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behav. Sci. Law 191, 202-03 (2002), available at <http://www.deathpenaltyinfo.org/documents/CunninghamDeathRowReview.pdf>.

prisoners had rates of institutional violence equivalent to life-without-parole prisoners, and much lower than those of parole-eligible prisoners.⁶⁶ The extensive corrections management experience of *amici* confirms this data.

Similarly, persons convicted of murder are not more violent in prison than those convicted of other crimes. In one study, researchers found that, “relative to the other groups of inmates, murderers convicted of various degrees of homicide were not overly involved . . . in violent or assaultive rule infractions The frequency and prevalence of their involvement in institutional violence was below or near the mean for the entire inmate cohort on all of these measures.”⁶⁷ This study supports the conclusion that prison officials should not assume that homicide offenses are predictors of “future dangerousness”; classification systems based solely on a prisoner’s commitment offense do not correlate with improved institutional security.⁶⁸

iii. Death-sentenced prisoners do not behave as if they have “nothing to lose.”

Defendants claim that death-sentenced prisoners have “nothing to lose” and

⁶⁶ Mark D. Cunningham et al., *Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri*, 23 *Behav. Sci. Law* 307, 316-19 (2005).

⁶⁷ Jon Sorensen & Mark D. Cunningham, *Conviction Offense and Prison Violence: A Comparative Study of Murderers and Other Offenders*, 56 *Crime & Delinquency* 103, 114 (2008).

⁶⁸ *Id.*

are therefore more dangerous.⁶⁹ Research shows just the opposite. In one study, prisoners who had been sentenced to death appeared motivated to make the most of their time, responding well to incentive programs and work opportunities.⁷⁰ Death-sentenced prisoners were also notably less violent than parole-eligible prisoners—a fact that researchers found directly refutes the “nothing to lose” argument.⁷¹

Death-sentenced prisoners do not, in fact, have nothing to lose. They spend years appealing their convictions and sentences. Many in Virginia have won relief; since 1975, twenty-five of the 149 prisoners sentenced to death in Virginia have won relief and left death row.⁷² Indeed, Director Clarke testified that men on Virginia’s death row do not generally behave as if they have nothing to lose.⁷³

⁶⁹ See Defendants’ Brief on Appeal, 31; see also Clarke Dep. at J.A. 639 (claiming that prisoners on death row have “nothing to lose”).

⁷⁰ See Cunningham et al., *Is Death Row Obsolete?*, *supra* note 66.

⁷¹ *Id.* at 316.

⁷² Of these, eight received clemency. See <http://leg2.state.va.us/DLS/h&sdocs.nsf/Search+All/?SearchView&SearchOrder=4&query=clemency>. The remaining prisoners won relief during the automatic appeals process or post-conviction proceedings. See, e.g., (Terry) Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000); Williams v. Taylor, 529 U.S. 420, 120 S.Ct. 1479 (2000); Atkins v. Virginia, 536 US 304, 122 S.Ct. 2242 (2002); Jones v. Virginia, 544 U.S. 901, 125 S.Ct. 1589 (2005); Wolfe v. Clarke 691 F.3d 410 (4th Cir. 2012); Winston v. Kelly, 784 F.Supp.2d 623 (W.D.Va. 2012); Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980); Johnson v. Commonwealth, 221 Va. 736, 273 S.E.2d 784 (1981) (noting reversal of death sentence in Johnson v. Commonwealth, 220 Va. 146, 255 S.E.2d 525 (1979), and imposition of life sentence on retrial); Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981); 1985 WLNR 1508535; Frye v. Commonwealth, 231 Va. 370, 345 S.E.2d 267 (1986); Jackson v. Commonwealth, 259 Va. 566, 529 S.E.2d 587 (2000); Lily v. Commonwealth, 258 Va. 548, 523 S.E.2d 208 (1999); Thomas v. Commonwealth, 263 Va. 216, 559

c. Other states have mainstreamed death-sentenced prisoners or are moving to eliminate automatic solitary confinement.

Several states have successfully mainstreamed death-sentenced prisoners or eliminated automatic solitary confinement. In Missouri, prisoners sentenced to death have been classified according to the same criteria as all other prisoners since 1991, with many death-sentenced prisoners mainstreamed into general population.⁷⁴ Between 1991 and 2002, Missouri's death-sentenced prisoners, who are eligible for numerous incentives programs,⁷⁵ neither committed nor attempted any inmate or staff homicides, and had institutional violence rates similar to those of life-without-parole prisoners, and well below those of parole-eligible prisoners.⁷⁶ Because Missouri's death-sentenced population's characteristics are comparable to those of other states, and the architecture and security procedures of its prisons are similar to most systems, scholars believe that Missouri's successful mainstreaming is highly replicable.⁷⁷

S.E.2d 652 (2002); *Morrisette v. Commonwealth*, 270 Va. 188, 613 S.E.2d 551 (2005); *Burns v. Commonwealth*, 279 Va. 243, 688 S.E.2d 263 (2010); *Andrews v. Commonwealth*, 280 Va. 231, 699 S.E.2d 237 (2010).

⁷³ 79:1-80:16, JA 655-66.

⁷⁴ See Cunningham et al., *Is Death Row Obsolete?*, *supra* note 66, at 307.

⁷⁵ See *id.* at 312.

⁷⁶ See *id.*

⁷⁷ See Andrea D. Lyon & Mark D. Cunningham, "Reason Not the Need": Does the Lack of Compelling State Interest in Maintaining a Separate Death Row Make It Unlawful?, 33 AM. J. CRIM. L. 1, 7 (2005).

Other states are also mainstreaming death-sentenced prisoners. California's two-track system allows for behavior-based classification; many death-sentenced prisoners live in conditions much less restrictive than solitary confinement.⁷⁸ California has maintained the two-track approach even after the consent decree mandating it expired.⁷⁹ North Carolina and Colorado have also abandoned automatic solitary confinement for death-sentenced prisoners. North Carolina prisoners sentenced to death are not automatically placed in conditions of solitary confinement, receiving out-of-cell and group time and opportunities for work assignments, programming, and group exercise.⁸⁰ Colorado recently announced that it would no longer automatically place death-sentenced prisoners in solitary confinement; death-sentenced prisoners now have privileges including up to four hours per day out-of-cell for social recreation activities.⁸¹ And in Pennsylvania, death-sentenced prisoners may leave their cells to visit the law library for up to six

⁷⁸ See Condemned Manual 15, § 301 (describing the two-track system), 130, § 825 (p. 130) (describing violations and other instances that may result in Grade B program placement), San Quentin Operational Procedure, No. 608 (2013) (on file with counsel).

⁷⁹ See Consent Decree at 4, *Thompson v. Enomoto*, No. 79-1630-SAW (N.D. Cal. Oct. 23, 1990) (describing the two-track classification system to be implemented).

⁸⁰ See, e.g., State of North Carolina, Dept. of Correction, Div. of Prisons, Policy & Procedures, Ch. C § .1200 Conditions of Confinement at .1216(b) (p. 17), .1218(a) (p.18) (including death-sentenced prisoners in work-assignment policies). (Nov. 1, 2011), available at http://www.doc.state.nc.us/dop/policy_procedure_manual/C1200.pdf.

⁸¹ See Executive Directive Regarding "Administrative Segregation", *supra* note 53; Email from Kellie Wasko, Colorado Dept. of Corrections (Mar. 26, 2014) (describing the executive order for DOC staff) (on file with the ACLU).

hours a week, may exercise in pairs, and may participate in work assignments based on good behavior.⁸²

From 1985 until the late 1990s, under a consent decree,⁸³ Texas' Department of Criminal Justice implemented changes in the management of death-sentenced prisoners, classifying about one-third as "death row work-capable."⁸⁴ These death-sentenced prisoners lived in two-man cells, ate in a common area, had jobs, and received more recreation, programming, and out-of-cell privileges.⁸⁵ The program was highly successful,⁸⁶ but was terminated by 1999; all death-sentenced prisoners in Texas are now subject to indefinite solitary confinement.⁸⁷ The largest correctional officers' union in Texas has joined recent calls for reform, arguing that

⁸² See Pennsylvania DOC, Policy Statement, Access to Provided Legal Services, DC-ADM 007, §1B(3) at 6-7 (2009), available at http://www.cor.state.pa.us/portal/server.pt/community/doc_policies/20643; Riley Yates, *Life on Death Row*, The Morning Call, Aug. 4, 2012, available at http://articles.mcall.com/2012-08-04/news/mc-pennsylvania-death-row-tour-20120804_1_solitary-confinement-junius-burno-death-row (describing conditions witnessed on a reporter's tour of Pennsylvania death row); Pennsylvania DOC, Policy Statement, Administrative Custody Procedures, DC-ADM 802, §3A(9) at 14-15 (2013) (on file with counsel).

⁸³ Cunningham & Vigen, *supra* note 65, at 205.

⁸⁴ *Id.*

⁸⁵ *See id.*

⁸⁶ *See* JAMES W. MARQUART, SHELDON EKLAND-OLSON & JONATHAN SORENSEN, THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990, at 140-41 (1994); Cunningham & Vigen, *supra* note 65, at 205.

⁸⁷ *See* Steve J. Martin, *Texas Should End Solitary Confinement on Death Row*, HOUSTON CHRON. (Feb. 8, 2014), available at <http://www.chron.com/opinion/outlook/article/Martin-Texas-should-end-solitary-confinement-on-5217201.php>.

automatic death row solitary confinement is unnecessary and actually creates safety problems that hinder officers in their work.⁸⁸

CONCLUSION

Sound prison management and constitutional due process require some form of individualized classification system, rather than the current practice of automatic and permanent solitary confinement of all death-sentenced prisoners. Solitary confinement places prisoners at serious risk, and is entirely unnecessary to safe, effective management of many death-sentenced prisoners. The record of other states confirms what *amici* have learned from their decades of experience: this population can be safely and effectively managed without automatic solitary confinement. The judgment below should be affirmed.

⁸⁸ See Letter from Lance Lowry, President, AFSCME Texas Correctional Employees Local 3807 (Jan. 20, 2014), available at <http://www.texasobserver.org/texas-prison-guard-union-calls-curtailement-solitary-confinement-death-row/>; Alex Hannaford, Texas Observer, Prison Guard Union Calls on Texas to Curtail Solitary Confinement on Death Row (Jan. 28, 2014), available at <http://www.texasobserver.org/texas-prison-guard-union-calls-curtailement-solitary-confinement-deathrow/>; Martin, *supra* note 87 (“A broad coalition of organizations—including security experts, correctional officers, religious leaders and lawyers—has called on the Texas Department of Criminal Justice to abolish permanent solitary confinement for all death row inmates.”).

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**CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)**

Counsel for Amici Curiae hereby certifies that:

1. This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief contains 6,996 words (as calculated by the word processing system used to prepare this brief), excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This Brief complies with the type face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The Brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June, 2014, I filed the foregoing BRIEF OF *AMICI CURIAE* CORRECTIONAL EXPERTS IN SUPPORT OF APPELLEE with the Clerk of Court using the ECF system, which will automatically send copies to all counsel of record.

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