

No. 16-7358

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

ERIC JOSEPH DEPAOLA,

Plaintiff-Appellant,

and

DENNIS RIVERA; LUIS VELAZQUEZ,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.,

Defendants-Appellees,

and

EXTERNAL REVIEW TEAM, ET AL.,

Defendants.

On Appeal from the United States District Court
for the Western District of Virginia, Roanoke Division

**BRIEF OF *AMICI CURIAE* CORRECTIONAL EXPERTS IN
SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 7

ARGUMENT..... 8

 I. Solitary confinement causes devastating harm to inmates’ mental and physical health. 8

 II. OP 830 provides no meaningful opportunity for inmates like Mr. DePaola to progress out of solitary confinement or avoid its devastating consequences. 20

 A. Solitary confinement must be tempered by recurring, meaningful opportunities to progress out of it or, alternatively, by compensatory social accommodations. 21

 B. OP 830 does not provide inmates such as Mr. DePaola a meaningful review or opportunity to reenter the general prison population. 24

 C. OP 830 does not provide inmates such as Mr. DePaola compensatory social interactions if they are denied the opportunity to reenter the general prison population..... 28

 III. Feasible alternatives exist to solitary confinement..... 29

CONCLUSION..... 32

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Casey v. Lewis</i> , 834 F. Supp. 1477 (D. Ariz. 1993)	8
<i>Coleman v. Brown</i> , 28 F. Supp. 3d 1068 (E.D. Cal. 2014).....	7
<i>Coleman v. Schwarzenegger</i> , No. Civ S 90-0520 LKK-JFM P, 2008 WL 8697735 (E.D. Cal. Sept. 29, 2008)	14
<i>Coleman v. Wilson</i> , 912 F. Supp. 1282 (E.D. Cal. 1995).....	8
<i>Davis v. Ayala</i> , 135 S. Ct. 2187 (2015) (Kennedy, J., concurring)	11
<i>Glossip v. Gross</i> , 135 S. Ct. 2726 (2015) (Breyer, J., dissenting).....	12
<i>In re Medley</i> , 134 U.S. 160 (1890)	11
<i>Ind. Prot. & Advocacy Servs. Comm’n v. Commissioner</i> , 1:08- cv-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind., Dec. 31, 2012).....	17
<i>Isby v. Brown</i> , 856 F.3d 508, 528 (7th Cir. 2017)	25–27
<i>Johnson v. Wetzel</i> , 209 F. Supp. 3d 766 (M.D. Pa. 2016)	29
<i>Jones ‘El v. Berge</i> , 164 F. Supp. 2d 1096 (W.D. Wis. 2001).....	17
<i>Madrid v. Gomez</i> , 889 F. Supp. 1146 (N.D. Cal. 1995)	18
<i>Palakovic v. Wetzel</i> , 854 F.3d 209 (3d Cir. 2017).....	11, 13
<i>Ruiz v. Johnson</i> , 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999).....	17
<i>T.R. v. S.C. Dep’t Corr.</i> , C/A No. 2005-CP-40-2925 (Richland Cty. Ct. of C.P. 5th Jud. Cir. Jan. 8, 2014)	18

<i>Williams v. Sec’y Pa. Dep’t of Corr.</i> , 848 F.3d 549 (3d Cir. 2017).....	11–14, 29
--	-----------

Rules

FED. R. APP. PROC. 29(a)(2)	1
FED. R. APP. PROC. 29(a)(4)(E).....	1

Other Authorities

Am. Bar Ass’n, <i>ABA Standards for Criminal Justice: Treatment of Prisoners</i> §§ 23-26(a) and 23-3.8 (3d ed. 2011).....	23
Am. Correctional Assoc., <i>Restrictive Housing Performance Based Standards</i> (August 2016).....	21
Angela Browne, et al., <i>Prisons Within Prisons: The Use of Segregation in the United States</i> , 24 FED. SENT’G REP. 46 (Oct. 2011).....	31
Anne Kearney, <i>Mitigating Risks to Psychological and Behavioral Health in Long-Duration Spaceflight: Towards a Portfolio of Countermeasures</i> (NASA 2016)	22
Assoc. of State Corr. Adm’rs, <i>Guiding Principles for Restrictive Housing</i> , 2 (Aug. 9, 2013)	22
Bruce A. Arrigo & Jennifer Leslie Bullock, <i>The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and What Should Change</i> , 52 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 622 (2008).....	13

Craig Haney & Mona Lynch, <i>Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement</i> , 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997).....	13
Craig Haney, <i>Mental Health Issues in Long-Term Solitary and “Supermax” Confinement</i> , 49 CRIME & DELINQ. 124 (2003).....	12
Craig Haney, <i>The Social Psychology of Isolation: Why Solitary Confinement is Psychologically Harmful</i> , 12 PRISON SERV. J. 12 (2009)	12
Dep’t of Justice, <i>Report and Recommendations Concerning the Use of Restrictive Housing</i> (2016).....	22–23, 30
Elizabeth Bennion, <i>Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment</i> , 90 IND. L. J. 741 (2015).....	12
Richard Korn, <i>Follow-up Report on the Effects of Confinement in the High Security Unit at Lexington</i> , 15 SOC. JUST. 20 (1988).....	15
Letter from J. Samuels, Acting Assistant Att’y Gen., U.S. Dep’t of Justice to Tom Corbett, Gov. of Pennsylvania, <i>Investigation of the Pennsylvania Department of Corrections’ Use of Solitary Confinement on Prisoners with Serious Mental Illness and/or Intellectual Disabilities</i> (Feb. 24, 2014).....	8
Hans Toch, <i>Mosaic of Despair: Human Breakdowns in Prison</i> (1992).....	15
Henrik Andersen et al., <i>A Longitudinal Study of Prisoners on Remand: Repeated Measures of Psychopathology in the Initial Phase of Solitary Versus Nonsolitary Confinement</i> , 26 INT’L J. L. & PSYCHIATRY 165 (2003)	15

Holly A. Miller & Glenn R. Young, <i>Prison Segregation: Administrative Detention Remedy or Mental Health Problem?</i> , 7 CRIM. BEHAV. & MENTAL HEALTH 85 (1997)	15
Homer Venters et al., <i>Solitary Confinement and Risk of Self-Harm Among Jail Inmates</i> , 104:3 AM. J. PUB. HEALTH 442 (March 2014)	14
Ida Koch, <i>Mental and Social Sequelae of Isolation: The Evidence of Deprivation Experiments and of Pretrial Detention in Denmark</i> , THE EXPANSION OF EUROPEAN PRISON SYSTEMS, WORKING PAPERS IN EUROPEAN CRIMINOLOGY, No. 7 (Bill Rolston & Mike Tomlinson eds., 1986).....	15
Jeffrey L. Metzner, M.D., et al., <i>Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics</i> , 38 J. AM. ACAD. PSYCHIATRY & L. 104 (2010)	12, 15
John Jay College of Criminal Justice Colloquium Report, <i>Solitary Confinement: Ending the Over-Use of Extreme Isolation in Prison and Jail</i> (2015)	21
Katharine Bachman et al., <i>Countermeasures to Mitigate the Negative Impact of Sensory Deprivation and Social Isolation in Long-Duration Space Flight</i> (NASA 2012)	16, 22
Kristin Cloyes et al., <i>Assessment of Psychosocial Impairment in a Supermaximum Security Unit Sample</i> , 33 CRIM. JUST. & BEHAV. 760 (2006).....	13
Mark Cunningham et al., <i>Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri</i> , 23 BEHAV. SCI. & L. 307 (2005)	30
Michael Bauer et al., <i>Long-Term Mental Sequelae of Political Imprisonment in East Germany</i> , 181 J. NERVOUS & MENTAL DISEASE 257 (1993)	15

Natasha A. Frost & Carlos E. Monteiro, <i>Administrative Segregation in U.S. Prisons</i> , National Institute of Justice (March 2016)	19
Paul Gendreau et al., <i>Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement</i> , 79 J. ABNORMAL PSYCHOL. 54 (1972)	16
Peter Smith, <i>The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature</i> , 34 CRIME & JUST. 441 (2006)	13
Peter Suedfeld et al., <i>Reactions and Attributes of Prisoners in Solitary Confinement</i> , 9 CRIM. JUST. & BEHAV. 303 (1982).....	15
Richard Korn, <i>The Effects of Confinement in the High Security Unit at Lexington</i> , 15 SOC. JUST. 8 (1988).....	15
Richard Kozar, <i>John McCain: Overcoming Adversity</i> (Chelsea House 2001)	11
Richard Walters et al., <i>Effect of Solitary Confinement on Prisoners</i> , 119 AM. J. PSYCHIATRY 771 (1963).....	16
Stanley L. Brodsky & Forrest R. Scogin, <i>Inmates in Protective Custody: First Data on Emotional Effects</i> , 1 FORENSIC REP. 267 (1988).....	15
Stuart Grassian, <i>Psychiatric Effects of Solitary Confinement</i> , 22 WASH. U. J. L. & POL'Y 325 (2006)	16, 28–29
Stuart Grassian & Nancy Friedman, <i>Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement</i> , 8 INT'L J. L. & PSYCHIATRY 49 (1986)	15
Stuart Grassian & Terry Kupers, <i>The Colorado Study vs. the Reality of Supermax Confinement</i> , 13 CORRECTIONAL MENTAL HEALTH REP. 1 (2011)	14

Stuart Grassian, <i>Psychopathological Effects of Solitary Confinement</i> , 140 AM. J. PSYCHIATRY 1450 (1983)	12
Terry Kupers et al., <i>Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs</i> , 36 CRIM. JUST. & BEHAV. 1037 (2009).....	31
Thomas B. Benjamin & Kenneth Lux, <i>Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison</i> , 9 CLEARINGHOUSE REV. 83 (1975)	14–15
<i>U.N. Standard Minimum Rules for the Treatment of Prisoners</i> (“Mandela Rules”), Economic and Social Council Res. 2015/20 (May 21, 2015).....	19

INTEREST OF AMICI CURIAE¹

Corrections experts Martin F. Horn, Toni Bair, Ned Benton, Robert Brown, Jr., Kathleen Dennehy, Brian Fischer, Steve Martin, Chase Riveland, Eldon Vail, Roger Werholtz, and Jeanne Woodford respectfully submit this brief as *amici curiae* in support of Appellant Eric DePaola.

Martin F. Horn served as Secretary of Corrections of Pennsylvania from 1995 to 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. He is currently the Distinguished Lecturer in Corrections at the John Jay College of Criminal Justice, City University of New York, and serves as the Executive Director of the New York State Sentencing Commission.

Toni V. Bair's extensive experience includes supervising Virginia's death row as Warden of Mecklenburg Correctional Center. Bair also served as Regional Administrator supervising the Wardens of Virginia's seven adult prisons from 1986 to 1990. Bair has also worked

¹ *Amici curiae* submit this brief with the consent of all parties pursuant to Federal Rule of Appellate Procedure 29(a)(2). Counsel for *amici curiae* state pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) 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.

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 served as Director of the Oklahoma Department of Corrections from 1975 to 1979. He is a nationally recognized corrections consultant and monitor and has held leadership positions in the American Correctional Association (“ACA”) and the Association of State Correctional Administrators (“ASCA”). He is a professor at John Jay College of Criminal Justice.

Robert Brown, Jr. is the former Director of the Michigan Department of Corrections where he worked for thirty years, first as a prison counselor and later as a parole officer, a Deputy Warden, a Deputy Director, and, ultimately, as the Director. He is currently a criminal justice consultant and has worked with the prison systems of Connecticut, Illinois, and Pennsylvania. He has also been appointed by a federal district court to serve as a Consent Agreement Monitor. Brown has been active in the ACA, formerly serving as its President and currently as an auditor. He is the recipient of the ACA’s Edward R. Cass Award, which honors the most dedicated correctional professionals.

Kathleen M. Dennehy worked for the Massachusetts Department of Corrections for more than thirty years in roles including divisional director, prison superintendent, Deputy Commissioner, and ultimately serving as Commissioner from 2004 to 2007. Dennehy has worked as an expert and consultant for organizations including the Department of Justice (“DOJ”), the California Department of Justice, the National Institute of Corrections, and the National Council on Crime and Delinquency. She was recently appointed as a federal court monitor in a DOJ settlement agreement related to a southern State’s prison system.

Brian Fischer spent forty-four years in corrections, serving as Commissioner of the New York State Department of Corrections from 2007 to 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.

Steve J. Martin is former General Counsel and 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 a

prosecutor. As a corrections expert for the DOJ and as a consultant in over forty states, Martin has visited or inspected more than 700 confinement facilities.

Chase Riveland served from 1986 to 1997 as Secretary of the Washington State Department of Corrections. Previously, he served as the Executive Director of Colorado's Department of Corrections from 1983 to 1986, and for nineteen years in the Wisconsin Department of Corrections. His published work includes the DOJ's publication *Supermax Prisons: Overview and General Considerations* (1999).

Eldon Vail worked in juvenile and adult corrections in the State of Washington for thirty-five years. He served as the Deputy Secretary for seven of those years and as the Secretary for four years, retiring in 2011. Since his retirement, he has been retained as an expert witness or correctional consultant over forty times in state, local, and federal jurisdictions. He has helped to achieve settlements resulting in efforts to reform segregation practices in New York, Delaware, and Arizona.

Roger Werholtz served as the Secretary of Corrections of Kansas from 2002 until his retirement in 2010. He has also served as the Deputy Secretary of Corrections of Kansas and has supervised all three divisions

of the Kansas Department of Corrections: Community and Field Services, Programs and Staff Development, and Facilities Management. He has community mental health experience and served on the Governor's Mental Health Services Planning Council. He also served as the Midwest Regional Representative on the Executive Committee of the ASCA. He is the recipient of the 2009 Michael Franke Award, given in recognition of outstanding correctional administration.

Jeanne Woodford served as a California correctional officer for nearly thirty years, culminating in her role as the Acting Director and Director of California's Department of Corrections and Rehabilitation from 2004 to 2006. Previously, she served as Warden of California's San Quentin State prison, which houses the nation's largest death row, where she successfully developed and implemented the first reentry program in a California prison. Woodford is currently a Senior Fellow at the Berkeley Center for Criminal Justice and lectures at various universities.

Amici have extensive first-hand experience and substantial knowledge, training, and education in safely managing prisons including maximum-security prison populations. Collectively, they have decades of experience administering and operating state prisons and prison systems

(including in Virginia), serving as monitors and expert witnesses in litigation around the country, and investigating, establishing, and promulgating correctional best practices. As explained more fully below, it is their view that the Virginia Department of Corrections' ("VDOC") Operating Procedure 830.A ("OP 830.A") fails to comport with these best practices, is constitutionally deficient, has significant adverse effects on inmates' mental and physical health, and fails to accomplish its stated purpose of increasing the safety of the prison system. They respectfully submit this brief to set forth the basis for these views.

SUMMARY OF THE ARGUMENT

This Court should reverse the District Court's erroneous conclusion that the conditions of Mr. DePaola's confinement are constitutionally permissible and that VDOC's illusory reviews of his status are constitutionally adequate. To the contrary, the facts before the District Court and the overwhelming consensus of the medical, academic, and scientific literature is that such conditions are sufficient to, at minimum, raise genuine issues of material fact whether Mr. DePaola's permanent isolation from any meaningful human interaction while being subjected to constant sensory deprivation and simultaneous sensory overload are sufficiently cruel and unusual to give rise to an Eighth Amendment violation. Likewise, the facts before the District Court were sufficient to establish Mr. DePaola has been denied a procedurally adequate process to review and relieve these deprivations of liberty in violation of the Fourteenth Amendment.

The opinion and experience of penology experts including *amici* is that the only scenario in which extended solitary confinement is constitutionally permissible is when such confinement is tempered by (1) a regularly recurring, meaningful review process that provides

inmates with the opportunity to return to the general prison population, and (2) the provision of adequate, compensatory social interactions for those prisoners who are denied a return to the general prison population. These requirements are feasible and not unduly burdensome to guard against the abuse of indefinite solitary confinement. Because the VDOC policy at issue in this appeal provides neither of these mitigating mechanisms, it is, in the opinion of *amici*, constitutionally impermissible.

ARGUMENT

Solitary confinement in the VDOC prison system, as in others, is characterized by nearly total deprivation, isolation, and dehumanization. As explained below, such conditions cause pervasive and catastrophic harm to inmates subjected to them for even relatively brief periods of time. There are practicable means to safeguard against these pervasive and sometimes permanent harms, and the imposition of solitary confinement in the absence of these safeguards is cruel, unusual, penologically unnecessary, and unjustifiable.

I. Solitary confinement causes devastating harm to inmates' mental and physical health.

Solitary confinement causes serious and permanent mental and physical harm. Inmates in solitary confinement (or “Administrative

Segregation” as it is sometimes known) spend twenty-three or more hours per day alone in a concrete and steel cell not much larger than a king size bed. *See Hearing on Solitary Confinement Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Right*, 112th Cong. 4 (2012) (statement of Craig Haney, Professor of Psychology, University of California, Santa Cruz), <https://www.judiciary.senate.gov/download/testimony-of-craig-haney-pdf> (last visited June 21, 2017). The cell is enclosed by a solid steel door, is windowless or nearly windowless, and is constantly illuminated by bright artificial lights. *Id.* at 4–5. It contains a bunk, a toilet, a sink—all within a few feet of each other—and all of the inmate’s scant worldly possessions. *Id.* In this room, an inmate eats, sleeps, defecates, and exists alone. *Id.*

Inmates in solitary confinement have nothing meaningful to do with their time, have extraordinarily limited opportunities for mental engagement, and have no opportunities for normal or meaningful human interaction. *Id.* at 6. Visitation is typically so limited and restricted as to

be non-existent,² access to books and other materials is strictly limited,³ and the inability to participate in any group activities, including meals, is utterly prohibited.

Prisoners get no reprieve from these conditions. *Id.* at 5. On the rare instances an inmate is permitted to leave his cell for occasional showers or “exercise,” he may do so only after submitting to an invasive body cavity strip search and when bound by multiple shackles and restraints. Even when an inmate leaves his cell for an hour of “exercise” several times per week, he is carefully isolated from any human contact other than the two guards who escort him alone to an empty concrete and metal cage, which is not much larger than his cell, and which typically is wholly or partially shielded to prevent any view of the surrounding area. *Id.* at 5–6.

² In this case, for example, Mr. DePaola and other inmates in the VDOC’s “Intensive Management” segregation are permitted one hour of non-contact visitation (*i.e.*, through a plexiglass barrier while restrained) per week. *See* J.A. 178 (OP 830.A, App. F). Visitation, however, is permitted only on Wednesdays, making it nearly impossible for most visitors—who live many hours away and who are constrained by weekday work schedules—to attend frequently if at all.

³ For example, inmates such as Mr. DePaola who have been placed in OP 830.A’s “Intensive Management” status are permitted two to five library books per week depending on the level of “privileges” they are given. *See* J.A. 178 (OP 830.A, App. F).

Our courts have long recognized that inmates subjected to such deprivation and isolation not infrequently become insane or suicidal. *See, e.g., Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (noting that “the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself”); *In re Medley*, 134 U.S. 160, 168 (1890) (noting many prisoners placed in solitary confinement for even relatively short periods of time “became violently insane” or “committed suicide”). According to Senator John McCain—who spent years in solitary confinement as a prisoner of war in Vietnam—solitary confinement “crushes your spirit and weakens your resistance more effectively than any other form of mistreatment. Having no one else to rely on, to share confidences with, to seek counsel from, you begin to doubt your judgment and your courage.” Richard Kozar, *John McCain: Overcoming Adversity*, at 53 (Chelsea House 2001).

Extensive and often permanent physical and psychological damage is a virtual certainty for inmates in solitary confinement. *See Palakovic v. Wetzel*, 854 F.3d 209, 225 (3d Cir. 2017) (noting the “devastating mental health consequences caused by long-term isolation in solitary confinement”); *Williams v. Sec’y Pennsylvania Dep’t of Corr.*, 848 F.3d

549, 566 (3d Cir. 2017) (recognizing the “unmistakable conclusion” that solitary confinement is “psychologically painful, can be traumatic and harmful and puts many of those who have been subjected to it at risk of long-term . . . damage” and that “virtually everyone” exposed to such confinement “is affected in some way”) (citation omitted); *see also Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (“[I]t is well documented that . . . prolonged solitary confinement produces numerous deleterious harms.”) (citations omitted).

The academic, medical, and scientific literature likewise indisputably establishes the psychological and psychiatric horrors of solitary confinement.⁴ Indeed, the Third Circuit recently concluded

⁴ *See, e.g.*, Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment*, 90 INDIANA L. J. 743, 756–63 (2015) (summarizing research on psychiatric harms of solitary isolation); Jeffrey L. Metzner, M.D., et al., *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY & LAW 104, 104 (2010) (“[P]sychological stressors such as isolation can be as clinically distressing as physical torture”); 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, and perceptual distortions); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1450–54 (1983) (finding “strikingly consistent” symptoms among Maine prisoners in isolation including massive anxiety, hallucinations, cognitive difficulties, memory lapses, and thought disturbances such as paranoia, aggressive fantasies and impulse-control problems); Craig Haney, *The Social Psychology of Isolation: Why Solitary Confinement is Psychologically Harmful*, 12

“[t]here is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects” such as “stupor, difficulties with thinking and concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli.” *Williams*, 848 F.3d at 566 (citations omitted). *See also Palakovic*, 854 F.3d at 226–26 (noting the academic and scientific consensus that solitary confinement “can cause severe and traumatic psychological damage, including anxiety, panic, paranoia, depression, post-traumatic stress disorder, psychosis, and even a disintegration of the basic sense of self identity”).

Further, the mental and ontological harms caused or exacerbated by solitary confinement lead to immediately obvious physiological harm and physical injury, including self-mutilation and suicide:

As if psychological damage was not enough, the impact of the deprivation does not always stop there.

PRISON SERV. J., 12 (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 & COMP. CRIMINOLOGY 622 (2008); Kristin Cloyes et al., *Assessment of Psychosocial Impairment in a Supermaximum Security Unit Sample*, 33 CRIMINAL JUSTICE & BEHAVIOR 760–81 (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); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 500 (1997).

Physical harm can also result. Studies have documented high rates of suicide and self-mutilation amongst inmates who have been subjected to solitary confinement. These behaviors are believed to be maladaptive mechanisms for dealing with the psychological suffering that comes from isolation. In addition, the lack of opportunity for free movement is associated with more general physical deterioration.

Williams, 848 F.3d at 567–68 (citations omitted). Indeed, half of prison suicides occur in solitary confinement. See Stuart Grassian & Terry Kupers, *The Colorado Study vs. the Reality of Supermax Confinement*, 13 CORRECTIONAL MENTAL HEALTH REP. 1, 11 (2011). Detainees in solitary confinement in New York City jails were nearly seven times more likely to harm themselves than those in general population, and in California prisons in 2004, isolation units accounted for 73% of all suicides. See Homer Venters et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates*, 104:3 AM. J. PUBLIC HEALTH 442, 442–47 (March 2014); Expert Report of Craig Haney filed in *Coleman v. Schwarzenegger* at 45–46 n.119, 2008 WL 8697735 (ECF No. 3061) (filed Sept. 29, 2008). This is not a surprising result. As *amici* have witnessed in their years of experience, it 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. See also Thomas B. Benjamin &

Kenneth Lux, *Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine Prison*, 9 CLEARINGHOUSE REV. 83, 84–90 (1975) (describing prisoners who nearly died from loss of blood after cutting themselves with broken light bulbs, swallowed glass, or attempted hanging, several successfully).⁵

⁵ Research has documented a wide range of gravely detrimental physiological manifestations of the psychological reactions to solitary confinement including 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. *See, e.g.*, Jeffrey L. Metzner, *Solitary Confinement and Mental Illness in U.S. Prisons*, 38 J. AM. ACAD. PSYCHIATRY & LAW at 104–08 (summarizing the deleterious effects of solitary confinement on prisoners); Michael Bauer et al., *Long-Term Mental Sequelae of Political Imprisonment in East Germany*, 181 J. NERVOUS & MENTAL DISEASE 257–62 (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 JUSTICE 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 (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 303–40 (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 165–77 (2003); Stuart Grassian & N. Friedman, *Effects of Sensory Deprivation in Psychiatric Seclusion and Solitary Confinement*, 8 INT’L J. L. & PSYCHIATRY 49, 53 (1986); Hans Toch, *Mosaic of Despair: Human Breakdowns in Prison* (1992) (finding that “isolation panic” causes symptoms of rage, panic, loss of control, psychological regression, and physiological and psychic tension leading to

These documented harms are not merely abstract or unsupported psychological theories. Neurological research has confirmed the dangerous impact of solitary confinement and sensory deprivation on the human brain. For example, researchers have found a correlation between solitary confinement and depressed brain function, observing EEG changes in the brain after only seven days in isolation. See 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 toward an abnormal pattern characteristic of stupor and delirium.”); Paul Gendreau et al., *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. ABNORMAL PSYCHOLOGY 54, 57-58 (1972). Similarly, a 2012 NASA report concluded that “[p]rolonged sensory deprivation has been linked to biological changes to the neurological structure of the brain and to several behavioral outcomes including hallucinations and anxiety.” Katharine Bachman et al., *Countermeasures to Mitigate the Negative Impact of Sensory Deprivation*

self-mutilation); Richard Walters et al., *Effect of Solitary Confinement on Prisoners*, 119 AM. J. PSYCHIATRY 771–73 (1963).

and Social Isolation in Long-Duration Space Flight at 2 (2012) (citations omitted), <https://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/20120002722.pdf> (last visited June 21, 2017). The longer an individual is subjected to sensory deprivation, the greater the risk of these behavioral consequences. *Id.* at 4 and 11. Sensory deprivation can also reduce brain activity and cause negative brain plasticity processes, which create a self-reinforcing downward spiral of degraded brain function. *Id.* at 6.

The significant and detrimental harms of solitary confinement are so well documented 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.⁶ The same reasoning can and should apply with equal force

⁶ 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 of prisoners with serious mental illness in segregation); *Ind. Protection & Advocacy Servs. Comm'n v. Commissioner*, 2012 WL 6738517 (S.D. Ind., Dec. 31, 2012) (holding the Indiana Department of Corrections' 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.

to Mr. DePaola and all other inmates placed in prolonged solitary confinement who, even if they were not previously afflicted with or diagnosed with a serious mental illness, will almost undoubtedly incur devastatingly severe mental or physiological harm *caused by* the conditions of their confinement.

Indeed, organizations including the National Institute of Justice and the United Nations have noted the need to avoid or significantly limit the use of solitary confinement. *See, e.g.,* Natasha A. Frost & Carlos E.

Cal. 1995) (“[D]efendants’ 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., C/A No. 2005-CP-40-2925* (S.C. Ct. 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).

The United States Department of Justice has also opined that conditions of solitary confinement can violate the Eighth Amendment rights of mentally ill prisoners. *See* Letter from Jocelyn Samuels, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, Civil Rights Div. 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), http://www.prisonpolicy.org/scans/DOJ_Findings_Letter_Issued_by_DOJ_2_24_2014.pdf (opining 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).

Monteiro, *Administrative Segregation in U.S. Prisons*, National Institute of Justice, 16 (March 2016) (“Without question, a substantial body of work has established that solitary confinement can have damaging psychological effects, particularly when that confinement involves near complete isolation and sensory deprivation, or when the term of such confinement is extended. Moreover, . . . most agree that extended confinement under extreme conditions of isolation in some segregation units is indeed harmful and should be avoided where possible.”); *U.N. Standard Minimum Rules for the Treatment of Prisoners* (“Mandela Rules”), U.N. Econ. & Soc. Comm. on Crime Prevention & Criminal Justice, 24th Sess., U.N. Doc. E/CN.15.2015/L.6/Rev.1 (May 21, 2015) (prohibiting the use of indefinite and prolonged solitary confinement because such incarceration “amount[s] to torture or other cruel, inhuman or degrading treatment or punishment”).

Because there is no question that solitary confinement—in contrast to incarceration in the general prison population—causes devastating harm to inmates’ mental and physical health, *amici* respectfully assert that the prolonged and indefinite solitary confinement of Mr. DePaola and other prisoners pursuant to OP 830.A is a cruel and unusual

punishment that constitutes a sufficiently serious deprivation to give rise to an Eighth Amendment violation.

II. OP 830.A provides no meaningful opportunity for inmates like Mr. DePaola to progress out of solitary confinement or to avoid its devastating consequences.

In light of the grave dangers discussed above, there is a growing consensus among scientific, academic, and correctional experts such as *amici* that prolonged or indefinite involuntary solitary confinement can be rendered humane and constitutionally permissible if the inmates thus confined receive the benefits of two safeguards. First, they must be entitled to and actually receive a regular, meaningful review of their status that provides them with a realistic opportunity to progress out of solitary confinement and to reenter the general prison population. Second, if the outcome of the review is to deny a return to the general prison population, the inmates must be provided with some form of compensatory social interactions to mitigate against the numerous and significant harms discussed in Part I, *supra*. As it is applied to inmates like Mr. DePaola, the policy at issue in this appeal—OP 830.A—lacks both of these mitigating mechanisms.

A. Solitary confinement must be tempered by recurring, meaningful opportunities to progress out of it or, alternatively, by compensatory social accommodations.

Medical, scientific, legal, and penology experts agree that the humane use of solitary confinement requires (among other things) the periodic, meaningful review of each inmate so confined to determine whether he may be returned to a less restrictive environment such as the general prison population, and that if such progress is denied to an inmate, he must be provided with compensatory social interactions. *See* John Jay College of Criminal Justice Colloquium Report, *Solitary Confinement: Ending the Over-Use of Extreme Isolation in Prison and Jail*, 2 and 30–31 (2015) (noting there must be “attainable means for the individual to transition back to the general population of the prison” and that “[w]herever and whenever possible, opportunities to relieve the social isolation of the confined individual should be employed”), http://cloud.quallsbenson.com/uploads/john-jay_langeloth_report.pdf (last visited June 21, 2017); Am. Correctional Assoc., *Restrictive Housing Performance Based Standards*, 32 and 37 (August 2016) (proposing requirement that “step down programs are offered to Extended Restrictive Housing inmates to facilitate the reintegration of the inmate

into general population” and that inmates held in prolonged solitary confinement “have access to programs and services that include . . . educational services, . . . religious guidance, and recreational programs”), <http://www.asca.net/pdffdocs/8.pdf> (last visited June 21, 2017); Assoc. of State Corr. Adm’rs, *Guiding Principles for Restrictive Housing*, 2 (Aug. 9, 2013) (advising periodic review of inmates’ readiness to reenter general population), <http://www.asca.net/pdffdocs/9.pdf> (last visited June 21, 2017).⁷

Indeed, the Department of Justice likewise advises that an inmate’s placement in solitary confinement “should be regularly reviewed” with a “plan for returning that inmate to less restrictive conditions as promptly as possible,” and encourages efforts “to increase the minimum amount of time that inmates in restrictive housing” have access to “recreation, education, . . . and social interaction with staff and other inmates.” *See*

⁷ Researchers and experts in other fields have likewise recognized the need for compensatory social and mental accommodations to counteract the effects of isolation and confinement. *See, e.g.,* Anne Kearney, *Mitigating Risks to Psychological and Behavioral Health in Long-Duration Spaceflight: Towards a Portfolio of Countermeasures* (NASA 2016), https://ston.jsc.nasa.gov/collections/TRS/_techrep/TM-2016-219275.pdf (last visited June 21, 2017); Katharine Bachman et al., *Countermeasures to Mitigate the Negative Impact of Sensory Deprivation and Social Isolation in Long-Duration Space Flight* (NASA 2012), <https://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/20120002722.pdf> (last visited June 21, 2017).

Department of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing*, 99 and 106 (Jan. 2016), <https://www.justice.gov/dag/file/815551/download> (last visited June 21, 2017).

The American Bar Association's standards for the use of solitary confinement similarly stipulates that such confinement "should be for the briefest term and under the least restrictive conditions practicable," should include "meaningful forms of mental, physical, and social stimulation," and forbids in all instances "extreme isolation," which is defined to "include a combination of sensory deprivation, lack of contact with other persons, enforced idleness, minimal out-of-cell time, and lack of outdoor recreation." See Am. Bar Ass'n, *ABA Standards for Criminal Justice: Treatment of Prisoners* §§ 23-26(a) and 23-3.8 (3d ed. 2011), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102i.authcheckdam.pdf (last visited June 21, 2017).

In sum, *amici* concur with the foregoing multidisciplinary experts and organizations that the decent and humane use of solitary confinement requires its deprivation and isolation to be mitigated by the provision of a periodic and meaningful opportunity for review and return

to the general prison population, and that if such progress is denied to an inmate, the provision of compensatory social interactions.

B. OP 830.A does not provide inmates such as Mr. DePaola a meaningful review or opportunity to reenter the general prison population.

Based on the record available, it appears that “Intensive Management” (“IM”) inmates like Mr. DePaola in the VDOC system do not receive any actual review that is open to the possibility of inmates moving out of solitary confinement. *See* J.A. 172 (OP 830.A at IV(F)(6)(a)) (noting the “Step-Down program is for previously *SM* offenders” and stating “IM offenders are not currently eligible for Step-Down” to the general population); J.A. 166 (OP 830.A (III)) (opining that IM inmates’ dispositions are immutable behavior characteristics that cannot be “eliminated despite the offender’s institutional adjustment even when providing more than a year of compliant, polite, and cooperative behavior and attitude”).

Instead, the only relief that *might* be afforded to an IM inmate as a result of a periodic review is a minor change in privileges. For example, an inmate who is moved from IM-0 (which is the most restrictive status within IM solitary confinement) to IM-1 or IM-2 (slightly less restrictive

statuses in IM solitary confinement) gains only marginal benefits, such as the ability to have a few more library books per week and more commissary purchases. J.A. 382 (Dist. Ct. Or. p. 5). The IM-1 and IM-2 inmates still live in utter isolation in squalid cells devoid of meaningful human interaction. These “privileges” are insignificant when compared to the relative freedoms enjoyed by general population inmates, and the “review” afforded within the IM pathway are thus meaningless and illusory.

Moreover, based on the Record evidence available, it appears that inmates who succeed in completing the progression through all the IM stages do not progress back into general population. Instead, the farthest they can “step down” is into the IM-SL6 “Closed Pod.” See J.A. 172 (OP 830.A(IV)(G)). Closed Pod inmates, however, are still subjected to “single celled housing, segregated recreation, and out of cell restraints.” *Id.* Thus, the SL6 Closed Pod—which is the best outcome IM inmates can hope to achieve—is nothing but solitary confinement by another name.

At least one federal court has addressed the meaningfulness of a review of a prisoner’s solitary confinement status. In *Isby v. Brown*, the Seventh Circuit noted that an “actual review” is “one open to the

possibility of a different outcome.” 856 F.3d 508, 528 (7th Cir. 2017). The court further noted the inmate’s confinement in administrative segregation may have been based entirely on misconduct that occurred in the distant past and there was a genuine factual dispute “as to whether the thirty-day reviews take into account any updated circumstances in evaluating the need for continued confinement, given the length of Isby’s segregation, his long stretches of time without any disciplinary issues, and the rote repetition of the same two boilerplate sentences following each review.” *Id.* Accordingly, the court held the ongoing solitary confinement “reviews may not be frozen in time, forever rehashing information addressed at the inmate’s initial determination.” *Id.* Rather, “prison officials must look to the inmate’s present and future behavior and consider new events to some degree to ensure that prison officials do not use past events alone to justify indefinite confinement.” *Id.*

Like the inmate in *Isby*, Mr. DePaola is subjected to recurring sham “reviews” in which he is permitted to make a statement and then is told that there will be no change in his status. *See* J.A. 267–77 (DePaola Declr. at 5–15). The justification given for the decision is often based upon misconduct committed by Mr. DePaola years ago—particularly his 2009

assault of a guard—despite a lack of any substantive recent infractions. *See* J.A. 272–73 (DePaola Declr. at 10–11). Mr. DePaola cannot undo his 2009 actions. But he can and has complied with prison behavioral norms in the present and future. Because VDOC’s decision to keep Mr. DePaola in solitary confinement is based solely on the fact that he is a “dangerous” inmate as indicated by the 2009 incident, he is doomed to solitary confinement for the remaining decades of his sentence. As the Third Circuit noted in *Isby*, there must be an *actual* review that is open to the possibility of a different outcome. 856 F.3d at 528. The reviews of Mr. DePaola’s classification are not open to the possibility of a different outcome if his 2009 actions remain a justification for keeping him in solitary confinement.

Because reviews of Mr. DePaola’s status are based primarily on conduct that occurred long ago, and because those reviews cannot and will not result in any tangible change in his isolation, current VDOC procedures do not provide him with a meaningful opportunity to obtain greater social interactions and less state control. The Fourteenth Amendment, best penology practices, and recognition of human rights and dignity demand more.

C. OP 830.A does not provide inmates such as Mr. DePaola compensatory social interactions if they are denied the opportunity to reenter the general prison population.

Amici acknowledge there are instances (though Mr. DePaola is assuredly not one of them) in which it may be necessary to keep an inmate in solitary confinement for a prolonged period of time and that some inmates in solitary confinement will commit serious infractions while confined that prohibit them from soon reentering the general population. Accordingly, *amici* recognize that even if IM inmates are provided meaningful reviews, a step down may realistically be denied. In that scenario, inmates must not be placed back into their cells for twenty-three hours a day in continued extreme isolation for year after year. Instead, they must be given compensatory social interactions, either with a counselor, other staff, or other inmates. *See* Part II.A, *supra*, and authorities cited therein.

As the research cited throughout this brief shows, isolation and lack of social contact are the most dangerous aspects of solitary confinement for an inmate's health and welfare. *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL. 325, 354 (2006) ("The restriction of environmental stimulation and social isolation

associated with confinement in solitary are strikingly toxic to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances.”). In *Williams*, the Seventh Circuit noted “psychological stressors such as isolation can be as clinically distressing as physical torture,” and an expert who examined an inmate in one case concluded the inmate “deteriorated to the point of social *death* as a direct result of his continued isolation.” 848 F.3d at 574 (citing *Johnson v. Wetzel*, 209 F. Supp. 3d 766, 778–79 (M.D. Pa. 2016)). Thus, to prevent severe long-term mental problems and to preserve the possibility that an inmate will meet behavioral standards and return to general population, he *must* be provided with opportunities for social interaction. OP 830.A’s failure to do so violates the constitutional requirement and diverges from widely-accepted correctional standards designed to promote the humane treatment of segregated inmates.

III. Feasible alternatives exist to solitary confinement.

In reaction to the growing recognition that long-term solitary confinement is dangerous, expensive, and counterproductive, numerous states and the federal government are investigating options to reduce the use of solitary confinement. Efforts at state reforms have been attempted

both by legislatures and state agencies. *See* Department of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing*, 72–77 (Jan. 2016) (noting several States’ self-reported claims to be undertaking reform efforts), <https://www.justice.gov/dag/file/815551/download> (last visited June 21, 2017). Colorado and Illinois have closed entire supermax prisons, and Colorado stopped automatically classifying death-sentenced prisoners to solitary confinement.

Voluntary state-level reforms of this sort are increasingly common for at least three reasons. First, solitary confinement is substantially more expensive to administer than general population units. *See* Mark Cunningham et al., *Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri*, 23 BEHAV. SCI. L. 307, 317 (2005). Texas illustrates the point: in 2002, the average cost to confine an inmate in solitary confinement was 50% more than in the general population. *Id.*

Second, solitary confinement subjects prisoners to psychologically-damaging experiences without providing meaningful rehabilitative services. Thus, if inmates attempt to transition from solitary confinement back to general population—or back to the free world—they have lost the ability to connect to other people and are significantly handicapped in

their attempt to reenter society. Inmates emerge from solitary confinement units severely damaged and functionally disabled. Therefore, the recidivism rates of inmates who have endured solitary confinement are higher than those who remain in general population.⁸

Third, reduction or elimination of the use of solitary confinement leads to a *reduction* in inmate behavior problems. For example, Mississippi's prison system experienced an overall reduction in misconduct and violence system-wide when it drastically reduced the number of prisoners whom it housed in solitary confinement by transferring them to mainline prisons.⁹

In sum, solitary confinement is unnecessary in all but the most extreme cases. In the majority of situations, solitary confinement does significantly more harm than good. Therefore, VDOC should mitigate

⁸ *Hearing on Solitary Confinement Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Right*, 112th Cong. 4 (2012) (statement of Craig Haney, Professor of Psychology, University of California, Santa Cruz) at 15, <https://www.judiciary.senate.gov/download/testimony-of-craig-haney-pdf> (last visited June 21, 2017).

⁹ *Id.* at 16 (citing T. Kupers, T. Dronet et al., *Beyond Supermax Administrative Segregation: Mississippi's Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 CRIMINAL JUSTICE AND BEHAVIOR 1037–50 (2009)); see also Angela Browne, et al., *Prisons Within Prisons: The Use of Segregation in the United States*, FEDERAL SENTENCING REPORTER, at 49 (Oct. 2011) (noting in the mid-2000s, Ohio and Mississippi reduced their supermax populations by 89% and 85%, respectively, while decreasing violence and disruption).

that harm by providing meaningful, regular opportunities for inmates in solitary confinement to progress out of solitary confinement before suffering irreversible harm.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court reverse the ruling of the District Court and remand for further consideration. The prolonged use of solitary confinement without the feasible mitigating factors discussed above raises, at minimum, genuine issues of material fact whether VDOC and its implementation of OP 830.A have violated Mr. DePaola's constitutional rights.

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June 30, 2017

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