

No. 20-4032

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

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JANET CRANE, as Administrator of the Estate of  
BROCK TUCKER,

Plaintiff-Appellant,

v.

UTAH DEPARTMENT OF CORRECTIONS, ALFRED BIGELOW,  
RICHARD GARDEN, DON TAYLOR, OFFICER COX, BRENT  
PLATT, SUSAN BURKE, FUTURES THROUGH CHOICES, INC.,  
UNIVERSAL HEALTH SERVICES, INC., and JEREMY COTTLE,

Defendants-Appellees.

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On Appeal from the United States District Court  
for the District of Utah  
Civil Action No. 2:16-cv-11103-DN  
The Honorable David Nuffer, *United States District Judge*

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**MOTION FOR LEAVE TO FILE  
BRIEF OF CORRECTIONS EXPERTS AS *AMICI CURIAE* IN SUPPORT  
OF PLAINTIFF-APPELLANT AND REVERSAL**

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June 10, 2020

Pursuant to Federal Rule of Appellate Procedure 29(b), Martin F. Horn, Steve J. Martin, Richard Morgan, Dan Pacholke, and Eldon Vail (collectively, “*amici*”) move respectfully for leave to file an *amicus curiae* brief in support of Plaintiff-Appellant, Janet Crane, and reversal in this matter.

1. *Amici curiae* are corrections experts with experience reducing the use of solitary confinement. *Amici* are concerned the use of long-term solitary confinement has been perpetuated under a misguided belief that prisons have no viable alternative for ensuring security.

2. The issues before this Court focus on the placement of Brock Turner, a person with a serious mental illness and intellectual disability, in long-term solitary confinement until he died by suicide. *Amici* assert prison security can be maintained without the use of isolation, and stress prisoners with mental illnesses who are placed in solitary confinement are often more disruptive and less management *because of* their isolation. *Amici* present data that show that for years eliminating solitary confinement in favor of alternative prison management methods lead to safer and more efficient prisons. This information is directly relevant to the disposition of this case.

3. *Amici* are:

Martin F. Horn served as Secretary of Corrections of Pennsylvania from 1995 to 2000. He also served as Commissioner of the New York City Departments of

Corrections and Probation for seven years. Horn has also served as Executive Director of the New York State Sentencing Commission.

Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system and has served in gubernatorial appointments in Texas on both a sentencing commission and a council for offenders with mental impairments. He coauthored *Texas Prisons, The Walls Came Tumbling Down*, and has written numerous articles on criminal justice issues.

Richard Morgan was appointed Secretary of the Washington State Department of Corrections in 2016. He also was appointed to Washington State's Parole Board and elected to the Walla Walla City Council, and he has served on the Board of the Washington State Coalition to Abolish the Death Penalty since 2012.

Dan Pacholke is the former Secretary for the Washington State Department of Corrections. During his thirty-three-year career as a Correctional Officer, he worked in one of the first intensive management units (IMUs) in Washington State. Twenty-five years later, he led the effort to limit the use of IMUs, reducing system-wide violence by over thirty percent. That work is described in *More than Emptying Beds: A Systems Approach to Segregation Reform*.

Eldon Vail served as Secretary of the Washington Department of Corrections from 2007 until 2011. As Director, he successfully reduced violence in the state prison system and implemented an intensive treatment program for people in prison

with a mental illness and a step-down program for people held for long terms in solitary.

4. *Amici* have an interest in the outcome of this case. Collectively, they have decades of experience reducing and eliminating the use of solitary confinement, including for prisoners with serious mental illnesses and intellectual disabilities. Their experience has demonstrated that prison systems do not have to rely on long-term isolation to maintain security and run efficiently.

5. Plaintiff-Appellant consents to this brief's filing. Counsel for Defendants-Appellees Utah Department of Corrections, Alfred Bigelow, Richard Garden, Don Taylor, Officer Cox, Brent Platt, and Susan Burke do not oppose this brief's filing. Counsel for Defendant-Appellee Jeremy Cottle does not take a position on this brief's filing, and undersigned counsel was unable to obtain the position of Defendant-Appellee Futures Through Choices.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it contains 578 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a) and Tenth Circuit Rule 32(A) because this document has been prepared in a proportionally spaced typeface using Times New Roman in font size 14.

Dated: June 10, 2020

*s/ Danielle C. Jefferis*  
Danielle C. Jefferis

### **CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that with respect to the foregoing:

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Dated: June 10, 2020

*s/ Danielle C. Jefferis*  
Danielle C. Jefferis

### **CERTIFICATE OF SERVICE**

I hereby certify that on June 10, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

*s/ Danielle C. Jefferis*  
Danielle C. Jefferis

No. 20-4032

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### OTHER AUTHORITIES

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National Conference of State Legislatures, <i>Administrative Segregation: State Enactments: January 2018</i> (2018).....	8, 23

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Rick Raemisch, remarks at Vera Institute of Justice, <i>Webinar: Rethinking Restrictive Housing: What’s Worked in Colorado?</i> (Sept. 17, 2018).....	10, 11, 19
Rick Raemisch, <i>Testimony Before the U.S. Senate Subcommittee on the Constitution, Civil Rights and Human Rights</i> 4 (February 25, 2014).....	13
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The American Correctional Association, <i>Restrictive Housing Performance Based Standards</i> (Aug. 2016) .....	9, 10
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The Association of State Correctional Administrators & The Liman Center  
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(2018)..... passim

The Association of State Correctional Administrators & The Liman Center  
for Public Interest Law at Yale Law School, *Time-In-Cell: The ASCA-  
Liman 2014 National Survey of Administrative Segregation in Prison*  
(2015).....15, 16

The United States Government Accountability Office, *Bureau of Prisons:  
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U.S. Department of Justice, Report and Recommendations Concerning the  
Use of Restrictive Housing (2016). .....23, 26

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### INTEREST OF *AMICI CURIAE*

*Amici curiae* are corrections experts with experience reducing the use of solitary confinement. *Amici* are concerned the use of long-term solitary confinement has been perpetuated under a misguided belief that prisons have no viable alternative for ensuring security. *Amici* assert prison security can be maintained without the use of isolation, and stress prisoners with mental illnesses who are placed in solitary confinement are often more disruptive and less management *because of* their isolation. *Amici* present data that show that for years eliminating solitary confinement in favor of alternative prison management methods lead to safer and more efficient prisons.

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Plaintiff-Appellant consents to this brief's filing. Counsel for Defendants-Appellees Utah Department of Corrections, Alfred Bigelow, Richard Garden, Don Taylor, Officer Cox, Brent Platt, and Susan Burke do not oppose this brief's filing. Counsel for Defendant-Appellee Jeremy Cottle does not take a position on this

brief's filing, and undersigned counsel was unable to obtain the position of Defendant-Appellee Futures Through Choices.

### **RULE 29(a)(4)(E) STATEMENT**

*Amici* certify no party's counsel authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to this brief's preparation and submission.

### **SUMMARY OF ARGUMENT**

Aware of isolation's harmful effects, many states have undertaken reforms to eliminate prolonged solitary confinement, especially for prisoners with mental illness. Additionally, many states have reformed conditions within solitary confinement so that prisoners are provided access to social skills development, outdoor exercise, and therapy, helping them return to general population housing. These reforming state correctional systems have demonstrated that eliminating prolonged solitary confinement and improving conditions within solitary—while simultaneously improving prison security and reducing operating costs—is possible through three interrelated types of reforms: 1) reducing the number of prisoners sent to solitary confinement, 2) providing rehabilitation that instills prosocial behaviors benefitting the prison as a whole, and 3) reducing the length of time prisoners spend in solitary. In light of the availability and success of these reforms, prison administrators can no longer assert a compelling interest for keeping prisoners in



long-term solitary confinement, and “[c]ourts and corrections officials must accordingly remain alert to the clear constitutional problems raised by keeping prisoners . . . in near-total isolation from the living world, in what comes perilously close to a penal tomb.”<sup>1</sup>

## ARGUMENT

### **I. Solitary Confinement Did Not Reduce Violence Within Prison Systems but Did Raise Concerns Regarding Its Harm to Prisoners.**

In the 1880s and for nearly a century after, America abandoned solitary confinement as a failed experiment begetting mental illness rather than rehabilitation.<sup>2</sup> But in the 1980s, solitary confinement returned to America’s prisons, partly in reaction to exploding prison populations.<sup>3</sup> The dismantling of state-run mental health hospitals, the “War on Drugs,” and the shift to mandatory minimum sentencing flooded prison systems with more people than cells could hold.<sup>4</sup> The resulting overcrowded prisons were ill-equipped to address the epidemic of prisoners with mental illness, the growth of prison gangs, and the overall increase in violence.<sup>5</sup>

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<sup>1</sup> *Apodaca v. Raemisch*, 139 S.Ct. 5, 10 (2018) (Sotomayor, J., respecting denial of cert.) (internal quotation and citation omitted).

<sup>2</sup> Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment*, 90 Ind. L.J. 741, 746-47 (2015).

<sup>3</sup> *Id.* at 747-50.

<sup>4</sup> See, e.g., Kenneth McGinnis et al., Report to the Federal Bureau of Prisons, *Federal Bureau of Prisons: Special Housing Unit Review and Assessment* 25-27 (2014).

<sup>5</sup> Bennion, *supra* note 2, at 750.

Correctional officials believed they could pinpoint the “troublemakers” and the “worst of the worst” who most frequently engaged in prison violence and put them in isolation to restore order.<sup>6</sup> Many states and the Federal Bureau of Prisons built solitary confinement units and “supermax” prisons.<sup>7</sup> Officials expected that removing difficult prisoners from the general population would reduce prison violence.<sup>8</sup> They were wrong.

The increased use of solitary confinement was “not associated with reductions in facility or systemwide misconduct and violence.”<sup>9</sup> Unfortunately, with so many solitary confinement cells already built, isolation became an overused part of the correctional toolkit.<sup>10</sup> Punitive isolation became common for even minor offenses including disrespect, praying, and swearing.<sup>11</sup> Inevitably, as the practice continued, studies showed that “[p]risons with higher rates of restrictive housing had higher

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<sup>6</sup> Chad S. Briggs et al., *The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence*, 41 *Criminology* 1341, 1341-42 (2006).

<sup>7</sup> Bennion, *supra* note 2, at 751-52.

<sup>8</sup> Briggs, *supra* note 6, at 1342.

<sup>9</sup> B. Steiner & C.M. Cain, U.S. Department of Justice, *The Relationship Between Inmate Misconduct, Institutional Violence, and Administrative Segregation: A Systematic Review of the Evidence, Restrictive Housing in the U.S.: Issues, Challenges, and Future Directions* 165, 179 (2016); see also R.M. Labrecque, *The Effect of Solitary Confinement on Institutional Misconduct: A Longitudinal Evaluation* (Aug. 2015) (unpublished Ph.D. dissertation, Univ. of Cin.).

<sup>10</sup> Erica Goode, *Prisons Rethink Isolation, Saving Money, Lives and Sanity*, N.Y. TIMES, March 11, 2012, at A1.

<sup>11</sup> Leon Digard et al., Vera Institute of Justice, *Rethinking Restrictive Housing: Lessons from Five U.S. Jail and Prison Systems* 15 (2018).

levels of facility disorder.”<sup>12</sup> Psychologists demonstrated the social pathology caused by isolation led prisoners to “occupy this idle time by committing themselves to fighting against the system and the people that surround, provoke, deny, thwart, and oppress them.”<sup>13</sup> Texas, for example, experienced a 104 percent increase in prisoner assaults between 2008 and 2015, which correctional staff attributed directly to the overuse of solitary confinement.<sup>14</sup>

Since then, attitudes about solitary confinement have shifted dramatically. Additional research into the impact of long periods of isolation on prisoners’ mental health has confirmed that prolonged solitary confinement causes extensive harm.<sup>15</sup> Citing research explaining that “common side-effects of solitary confinement include anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors,” Justice Anthony Kennedy questioned the constitutionality of solitary confinement, and urged courts to consider whether correctional systems should be required to adopt alternatives.<sup>16</sup> Justice Sonya Sotomayor noted that the

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<sup>12</sup> Allen Beck, U.S. Department of Justice, *Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12* 1 (2015), <https://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>.

<sup>13</sup> Craig Haney, *Mental Health Issues in Long-term Solitary and “Supermax” Confinement*, 49 *Crime & Delinq.* 124, 140 (2003).

<sup>14</sup> ACLU of Texas & Texas Civil Rights Project, *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas* 9 (2015).

<sup>15</sup> Craig Haney, *Restricting the Use of Solitary Confinement*, 1 *Ann. Rev. Criminology* 285, 286 (2018).

<sup>16</sup> *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

deprivations associated with many supermax units—including the denial of outdoor exercise—deserve careful review by the courts, emphasizing that “to deprive a prisoner of any outdoor exercise for an extended period of time in the absence of an especially strong basis for doing so is deeply troubling—and has been recognized as such for many years.”<sup>17</sup> In state and federal prison systems across the United States, litigation has for many years highlighted the risks to prisoners in isolation, particularly people with mental illness.<sup>18</sup> The United States Senate and several states have commissioned studies of the impact of solitary confinement on prisoners and its effectiveness in managing violence.<sup>19</sup> At the same time, international condemnation of prolonged solitary confinement as torture has increased.<sup>20</sup> In

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<sup>17</sup> *Apodaca v. Raemisch*, *supra* note 1, at 5.

<sup>18</sup> See, e.g., *Presley v. Epps*, 4:05cv148 (N.D. Miss. 2006); *Jones’El v. Berge*, No. 00-C-421-C, 2002 WL 32362655 (W.D. Wis. 2002); *Joslyn v. Armstrong*, No. 3:01CR198(CFD), 2001 WL 1464780 (D. Conn. 2001); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995).

<sup>19</sup> Eli Hager & Gerald Rich, *Shifting Away from Solitary: More states have passed solitary confinement reforms this year than in the past 16 years*, The Marshall Project (Dec. 12, 2014), <https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary>; Press Release, The White House, *Fact Sheet: Department of Justice Review of Solitary Confinement* (Jan. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/01/25/fact-sheet-department-justice-review-solitary-confinement>; The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Reforming Restrictive Housing: The 2018 ASCA-Liman Nationwide Survey of Time-In-Cell* 87-88 (2018) (*ASCA-Liman 2018*).

<sup>20</sup> Juan E. Mendez (Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment), ¶¶ 79-89, U.N. Doc. A/63/175 (28 July 2008), <http://www.refworld.org/docid/48db99e82.html>; G.A.

Canada, the Ontario Court of Appeals and the Supreme Court for British Columbia recently banned solitary confinement beyond fifteen days.<sup>21</sup>

Mindful of isolation's harm to prisoners and its failure to reduce prison violence, twenty-one states and the federal government have undertaken solitary confinement reforms.<sup>22</sup> Seven states have passed legislation prohibiting placement of prisoners with a mental illness in solitary confinement.<sup>23</sup> Sixteen states passed legislation intended to limit the use of isolation, and many more have reformed correctional policies to reduce solitary confinement.<sup>24</sup> The American Correctional Association (ACA), the largest accrediting body in the United States for correctional institutions, proposed standards and guidelines recommending limits on the use of isolation, including prohibiting the placement of people with "serious mental illness

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Res. 70/175, Rule 44, *United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)* (Dec. 17, 2015).

<sup>21</sup> *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, [2019] O.J. No. 1537, 2019 ONCA 243 (Can. Ont. C.A.); *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, [2018] B.C.J. No. 53, (BCSC).

<sup>22</sup> Hager & Rich, *supra* note 19; *ASCA-Liman 2018*, *supra* note 19, at 87-88.

<sup>23</sup> Those states are Colorado, Massachusetts, Nebraska, Nevada, New Mexico, New York, and Texas. National Conference of State Legislatures, Administrative Segregation: State Enactments: January 2018 (2018), <https://www.leg.mt.gov/content/Committees/Interim/2017-2018/Law-and-Justice/Meetings/Mar-2018/Exhibits/sj25-state-enactments-2018-ncsl.pdf> (*State Enactments*); Andrew Oxford, *Gov. Lujan Grisham signs criminal justice legislation*, SANTA FE NEW MEXICAN, Apr. 3, 2019, [https://www.santafenewmexican.com/news/legislature/gov-lujan-grisham-signs-criminal-justice-legislation/article\\_1dbf1aa7-f90e-5a41-b078-a04ddf6bd172.html](https://www.santafenewmexican.com/news/legislature/gov-lujan-grisham-signs-criminal-justice-legislation/article_1dbf1aa7-f90e-5a41-b078-a04ddf6bd172.html).

<sup>24</sup> *State Enactments*, *supra* note 23.

in long-term solitary confinement” and ensuring prisoners in solitary have “opportunities to exercise outdoors.”<sup>25</sup> In 2016, a growing tendency toward reform was captured in a report published by the Association of State Correctional Administrators (ASCA) and the Arthur Liman Center for Public Interest Law at Yale Law School (Liman Center): “Instead of being cast as the solution to a problem, restricted housing has come to be understood by many as a problem in need of a solution.”<sup>26</sup>

## **II. Limiting the Use of Solitary Confinement Has Reduced Violence Within Prison Systems and Improved Safety for Corrections Officers.**

Over one-third of state correctional systems have initiated restrictions on solitary confinement. Nine states—Colorado, Idaho, Maine, Mississippi, Nebraska, North Carolina, North Dakota, Oregon, and Washington—report substantial, system-wide reforms, reducing the nationwide estimated population of prisoners in isolation from nearly 100,000 to approximately 60,000 in just four years.<sup>27</sup> Colorado reports reducing the population of prisoners in long-term solitary confinement from

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<sup>25</sup> The American Correctional Association, *Restrictive Housing Performance Based Standards*, 4-RH-0031, 4-RH-0025 (Aug. 2016), <https://www.asca.net/pdfdocs/8.pdf> (*ACA Standards*).

<sup>26</sup> The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Aiming to Reduce Time-In-Cell: Reports from Correctional Systems on the Numbers of Prisoners in Restricted Housing and on the Potential of Policy Changes to Bring About Reforms* 15 (2016) (*ASCA-Liman 2016*).

<sup>27</sup> *ASCA-Liman 2018*, *supra* note 19, at 5, 7.

seven percent of the prison population to one percent.<sup>28</sup> In reforming states, prisoners who remain in solitary confinement now reportedly stay for days, not years, in compliance with ACA-recommended standards.<sup>29</sup> These states transformed their prisons by 1) reducing the number of prisoners sent to solitary confinement, 2) initiating prosocial training for prisoners in temporary isolation, and 3) reducing the length of time prisoners spend in solitary conditions.

Putting prisoners into isolation did not reduce violence, and the corollary also proved true: Letting prisoners out of solitary confinement did not increase violence. Instead, reforms limiting the use of solitary resulted in a dramatic *decrease* in prison violence.<sup>30</sup> As solitary confinement populations plunged in Washington, Colorado,

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<sup>28</sup> Marie Gottschalk, *Staying Alive: Reforming Solitary Confinement in U.S. Prisons and Jails*, 125 Yale L.J. Forum 253, 263 (Jan. 15, 2016) <https://www.yalelawjournal.org/forum/reforming-solitary-confinement-in-us-prisons-and-jails>.

<sup>29</sup> *ACA Standards*, *supra* note 25, at 13-14.

<sup>30</sup> See, e.g., Marc A. Levin, Esq., *Testimony Before the U.S. Senate Judiciary Subcommittee on The Constitution, Civil Rights and Human Rights* 3 (February 25, 2014), <https://www.judiciary.senate.gov/imo/media/doc/02-25-14LevinTestimony.pdf>; Rick Raemisch, remarks at Vera Institute of Justice, *Webinar: Rethinking Restrictive Housing: What's Worked in Colorado?* (Sept. 17, 2018), <https://www.safealternativestosegregation.org/webinar/rethinking-restrictive-housing-whats-worked-in-colorado/> (*Raemisch Remarks*); *Focused Deterrence Initiatives to Reduce Group Violence in Correctional Facilities: A Review of Operation Workplace Safety and Operation Stop Violence*, ACA 2018 Winter Conference Seminar (2018) 18-23 (on file with author) (*Deterrence*).



and Mississippi, assaults against staff declined by forty to fifty percent, and assaults against other prisoners declined by fifty to seventy percent.<sup>31</sup>

In Mississippi, “the number of incidents requiring use of force plummeted (for example, spraying a prisoner with immobilizing gas or taking down a recalcitrant prisoner). Monthly statistics showed an almost seventy percent drop in serious incidents, both prisoner-on-staff and prisoner-on-prisoner.”<sup>32</sup> Similar broad measures of violence in the Colorado prison system, including the number of forced cell entries, decreased by approximately eighty percent post-reforms, and prisoner-on-staff assaults decreased by nearly fifty percent.<sup>33</sup> In North Dakota, extreme incidents such as suicide attempts and cell flooding used to occur three or more times every week in solitary; after dramatic reductions in the use of isolation, they now occur only a few times each year.<sup>34</sup>

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<sup>31</sup> *Deterrence*, *supra* note 30, at 38; Levin, *supra* note 30, at 3; Raemisch Remarks, *supra* note 30.

<sup>32</sup> Terry Kupers et al., *Beyond Supermax Administrative Segregation: Mississippi’s Experience Rethinking Prison Classification and Creating Alternative Mental Health Programs*, 36 Crim. Just. & Behavior 1037, 1043 (2009) (*Beyond Supermax*).

<sup>33</sup> Raemisch Remarks, *supra* note 30.

<sup>34</sup> Cheryl Corley, *North Dakota Prison Officials Think Outside the Box to Revamp Solitary Confinement*, NPR Morning Edition (July 31, 2018, 5:01 a.m.), <https://www.npr.org/2018/07/31/630602624/north-dakota-prison-officials-think-outside-the-box-to-revamp-solitary-confineme>.



Barely a year after launching solitary confinement reforms in 2013, Maine prisons reported substantial reductions in violence and uses of force.<sup>35</sup> In Washington a dramatic drop in violence occurred following the adoption of solitary confinement reforms and a group violence deterrence strategy.<sup>36</sup> “In the model’s first year of implementation at its pilot facility, assaults against staff, the use of weapons, and multi-man fights were reduced by 50 percent.”<sup>37</sup> Between 2014 and 2017, violent incidents in the two high-security prisons utilizing the model decreased by nearly sixty percent and inmate-on-staff assaults decreased by nearly ninety percent.<sup>38</sup> Indeed, reduced numbers of isolated prisoners and reduced time in solitary confinement *improved* the security of prisons in these states.

### **III. Limiting the Use of Solitary Confinement Also Reduces Costs.**

Limiting solitary confinement not only reduces violence, it also provides long-term cost savings. The Government Accountability Office calculated that solitary housing costs three times as much as general population housing.<sup>39</sup> The cost of

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<sup>35</sup> Levin, *supra* note 30, at 3.

<sup>36</sup> Dan Pacholke & Sandy Felkey Mullins, J.D., U.S. Department of Justice, *More Than Emptying Beds: A Systems Approach to Segregation Reform* 1, 5 (2016), <https://www.bja.gov/publications/MorethanEmptyingBeds.pdf>; *see generally*, Terry Allen Kupers, *Solitary: The Inside Story of Supermax Isolation and How We Can Abolish It* 171-211 (2017) (*Solitary*).

<sup>37</sup> Pacholke & Mullins, *supra* note 36, at 6.

<sup>38</sup> *Deterrence*, *supra* note 30.

<sup>39</sup> The United States Government Accountability Office, *Bureau of Prisons: Improvements Needed in Bureau of Prisons’ Monitoring and Evaluation of Impact*

constructing supermax prisons, built specifically to house prisoners in solitary confinement, can be as high as three times the cost to build a conventional prison.<sup>40</sup>

The facilities must be staffed more robustly because prisoners cannot do many of the jobs they would do in general population housing.<sup>41</sup> Isolation units need a higher ratio of correctional officers to prisoners because policies require at least two officers be present to move prisoners between their cells, exercise areas, and showers.<sup>42</sup>

Colorado estimated it costs over \$15,000 more per year to house a prisoner in isolation than in the general population, and spent \$20 million housing prisoners in solitary confinement in 2010 alone.<sup>43</sup> In 2009 the California Office of the Inspector General investigated the costs per prisoner in California's administrative segregation units and "estimated that the annual correctional staff cost of a standard [segregation]

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*of Segregated Housing* 29-33 (2013), <http://www.gao.gov/assets/660/654349.pdf> (GAO Report).

<sup>40</sup> ACLU, *Briefing Paper: The Dangerous Overuse of Solitary Confinement in the US* 2 (2014), [https://www.aclu.org/sites/default/files/assets/stop\\_solitary\\_briefing\\_paper\\_update\\_d\\_august\\_2014.pdf](https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_update_d_august_2014.pdf) (*Dangerous Overuse*).

<sup>41</sup> *Id.* at 11.

<sup>42</sup> *Id.*

<sup>43</sup> Rick Raemisch, *Testimony Before the U.S. Senate Subcommittee on the Constitution, Civil Rights and Human Rights* 4 (February 25, 2014), <https://www.judiciary.senate.gov/imo/media/doc/02-25-14RaemischTestimony.pdf>; Sal Rodriguez, Solitary Watch, *Fact Sheet: The High Cost of Solitary Confinement* (2011), <https://solitarywatch.org/wp-content/uploads/2011/06/fact-sheet-the-high-cost-of-solitary-confinement.pdf>.

bed [was] at least \$14,600 more than the equivalent general population bed,” amounting to “nearly \$130 million a year.”<sup>44</sup>

In 2013, Illinois closed its supermax prison, Tamms, which cost \$64,000 per prisoner per year, contrasted with \$21,000 per year for general population prisoners.<sup>45</sup> The governor’s office projected that closing Tamms would save the state over \$48 million in 2013 alone.<sup>46</sup> Mississippi saved nearly \$6 million a year by closing its supermax facility; Colorado estimated it saved over \$5 million after closing just one of its supermax prisons.<sup>47</sup> Louisiana and Washington have also closed supermax prisons.<sup>48</sup> In each state, reducing the use of solitary confinement also reduced ballooning corrections costs.

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<sup>44</sup> David Shaw, Office of the Inspector General, *Special Review: Management of the California Department of Corrections and Rehabilitation’s Administrative Segregation Unit Population* 3 (2009), [https://www.oig.ca.gov/media/reports/ARCHIVE/BOA/Reviews/Management%20of%](https://www.oig.ca.gov/media/reports/ARCHIVE/BOA/Reviews/Management%20of%20the%20California%20Department%20of%20Corrections%20and%20Rehabilitation's%20Administrative%20Segregation%20Unit%20Population.pdf)

[20the%20California%20Department%20of%20Corrections%20and%20Rehabilitation's%20Administrative%20Segregation%20Unit%20Population.pdf](https://www.oig.ca.gov/media/reports/ARCHIVE/BOA/Reviews/Management%20of%20the%20California%20Department%20of%20Corrections%20and%20Rehabilitation's%20Administrative%20Segregation%20Unit%20Population.pdf).

<sup>45</sup> Steve Mills, *Quinn’s Prison Plan Causes Stir*, Chicago Tribune, Feb. 23, 2012, <http://www.chicagotribune.com/news/ct-xpm-2012-02-23-ct-met-illinois-state-budget-prisons-20120223-story.html#>.

<sup>46</sup> *Id.*

<sup>47</sup> GAO Report, *supra* note 39, at 34-35.

<sup>48</sup> Haney, *Restricting the Use of Solitary Confinement*, *supra* note 15, at 303.

#### **IV. States Reduced Their Use of Solitary Confinement by Limiting the Reasons and Managing the Behaviors that Result in Prisoners Being Sent to Solitary.**

Recognizing that solitary confinement does not reduce prison violence, prison officials have developed strategies to reduce the influx of prisoners into isolation, including deterring the violent acts that resulted in solitary placement, eliminating punitive isolation for minor infractions, and creating alternative housing for prisoners who need mental health treatment or protective custody.<sup>49</sup>

##### *A. States Reduced Solitary Confinement Populations by Limiting the Reasons and Managing the Behaviors that Resulted in Solitary Confinement.*

Prison officials began reform efforts by evaluating who was put in solitary confinement and why. They discovered that rather than housing “the worst of the worst,” isolation cells often were filled with people who were simply disruptive, had mental illness, or sought protective custody.<sup>50</sup> The first ASCA-Liman report revealed that “the criteria for entry [into solitary confinement] were broad, as was the discretion accorded correctional officials when making individual decisions about placement.”<sup>51</sup> Prison officials originally intended solitary confinement “to be

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<sup>49</sup> Digard, *supra* note 11, at 28-29.

<sup>50</sup> Hans Toch & Terry Kupers, *Violence in Prisons, Revisited* 45.3 J. of Offender Rehabilitation 1, 18 (2007); Digard, *supra* note 11, at 15.

<sup>51</sup> The Association of State Correctional Administrators & The Liman Center for Public Interest Law at Yale Law School, *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* i (2015), [https://law.yale.edu/system/files/documents/pdf/asca-liman\\_administrative\\_segregation\\_report\\_sep\\_2\\_2015.pdf](https://law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf) (*ASCA-Liman 2014*).

a last resort for those who were too violent to be in a prison's general population. But then we gradually included inmates who disrupted the efficient running of an institution . . . Inmates could be placed in solitary for almost any reason, and they were.”<sup>52</sup> In a 2014 ASCA survey, “several correctional experts discussed the risk of overuse based on . . . being ‘mad’ at a prisoner, as contrasted with being ‘scared’ of that individual.”<sup>53</sup>

Self-reports from correctional departments indicated “[l]ow-level nonviolent offenses were among the most common infractions to result in disciplinary segregation sanctions,” and in some states, eighty percent of prisoners in solitary confinement had been diagnosed with a mental illness.<sup>54</sup> Before initiating reforms, Nebraska reported twenty-eight percent of prisoners in punitive isolation were there for “disobeying an order,” and another thirty-eight percent for “threatening language or gestures,” “swearing,” or “disruption.”<sup>55</sup> North Carolina reported fifty percent of its punitive isolation population was there for “disobeying an order,” “profane language,” or “unauthorized tobacco use.”<sup>56</sup> Five prison systems seeking to reform

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<sup>52</sup> Rick Raemisch, *Putting an End to Long-Term Solitary*, N.Y. Times, Oct. 12, 2017, at A25.

<sup>53</sup> *ASCA-Liman 2014*, *supra* note 51, at 8.

<sup>54</sup> Digard, *supra* note 12, at 16; *ASCA-Liman 2016*, *supra* note 27, at 50.

<sup>55</sup> Digard, *supra* note 11, at 17.

<sup>56</sup> *Id.*

their isolation policies confirmed that between forty to sixty percent of prisoners in solitary had an identified serious mental health diagnosis.<sup>57</sup>

Heeding policy expectations outlined by the National Commission on Correctional Health Care prohibiting the placement of people with mental illness in solitary confinement,<sup>58</sup> reforming states determined that assignment to solitary was inappropriate for these prisoners in the first place, and continued isolation was likely to cause long-term harm.<sup>59</sup> Mississippi screened its solitary confinement population for mental illness and type of infraction, and immediately transitioned eighty percent of the prisoners at its supermax facility into less restrictive housing.<sup>60</sup> Instead of sending prisoners to solitary, reforming states withheld privileges from prisoners who committed less serious infractions.<sup>61</sup> Officials could then reserve solitary confinement for prisoners who “pose a serious threat to the safety of others,” and “only when a less-restrictive setting is not sufficient.”<sup>62</sup>

If prisoners could no longer be sent to isolation for “disruption,” officials needed to address conditions within their prison systems that led to disruptive

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<sup>57</sup> *Id.* at 21-23.

<sup>58</sup> National Commission on Correctional Health Care, *Position Statement: Solitary Confinement (Isolation)* 4 (April 2016), <https://www.ncchc.org/filebin/Positions/Solitary-Confinement-Isolation.pdf>.

<sup>59</sup> *Id.* at 30-35.

<sup>60</sup> *Beyond Supermax*, *supra* note 32, at 1041.

<sup>61</sup> Digard, *supra* note 11, at 30-31.

<sup>62</sup> *Id.* at 32.

behaviors in the first place.<sup>63</sup> Prison leadership sought to end the “cycle of hostility” between prisoners and correctional staff by providing training in respectful interactions, ending prisoner idleness, and facilitating social connections.<sup>64</sup> Officials in reforming states developed alternative deterrence strategies and training to reduce “the violent acts posing the greatest risk to staff and offender safety,” such as violent assaults on corrections officers, use of weapons, and multi-party assaults.<sup>65</sup> “By looking at the pathways that lead inmates to be placed in segregation, an agency can begin to deter the behavior that leads to segregation placement and identify more effective responses.”<sup>66</sup> Washington State instituted a group violence deterrence strategy that limited group-motivated violence by “target[ing] specific violent acts with swift, certain, and meaningful consequences.”<sup>67</sup> These consequences included privilege restrictions, but also included help from trained staff to learn “pro-social alternatives to violence.”<sup>68</sup> Correctional staff were trained to de-escalate potentially

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<sup>63</sup> Digard, *supra* note 11, at 31; Bernie Warner, Dan Pacholke & Carly Kujath, Washington State Department of Corrections, *Operation Place Safety: First Year in Review* 1, 10-11 (2014), <http://doc.wa.gov/docs/publications/reports/200-SR002.pdf> (*Place Safety*).

<sup>64</sup> Kupers, *Solitary*, *supra* note 36, at 172-74; *see generally* Toch & Kupers, *supra* note 50, at 17-18.

<sup>65</sup> *Place Safety*, *supra* note 63, at 13.

<sup>66</sup> *Id.* at 13-16.

<sup>67</sup> *Id.*, at 2.

<sup>68</sup> *Id.*

violent incidents and prevent infractions that could result in solitary confinement placement.<sup>69</sup>

Strategies to decrease violence in several states included providing incentives for good behavior, including increased recreation, commissary purchases, and education opportunities.<sup>70</sup> Some prisons designated “de-escalation rooms” where agitated prisoners could choose to soothe themselves before they became too angry or acted out.<sup>71</sup> Colorado modified its use of segregation by “improving conditions of confinement, minimizing social isolation, . . . [and] providing meaningful opportunities for indoor and outdoor recreation,” as a way to decrease disruptive and violent behavior.<sup>72</sup> Virginia partnered with the Vera Institute of Justice to evaluate its solitary confinement conditions and determined that “minimal time outside of a cell is not healthy for the body or mind.”<sup>73</sup> Virginia concluded that to reduce idleness and improve prison management “[d]aily outdoor recreation should be provided—

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<sup>69</sup> Pacholke & Mullins, *supra* note 36, at 8, 11; *see also*, Kupers, *Solitary*, *supra* note 36, at 171-211.

<sup>70</sup> *ASCA-Liman 2018*, *supra* note 19, at 72-73.

<sup>71</sup> *Raemisch Remarks*, *supra* note 30.

<sup>72</sup> *Id.*

<sup>73</sup> Byron Kline et al., Vera Institute of Justice, Center on Sentencing and Corrections, *The Safe Alternatives to Segregation Initiative: Findings and Recommendations for the Virginia Department of Corrections* 22 (2018) [https://storage.googleapis.com/vera-web-assets/downloads/Publications/safe-alternatives-segregation-initiative-findings-recommendations/legacy\\_downloads/segregation-findings-recommendations-virginia-dept-corrections.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/safe-alternatives-segregation-initiative-findings-recommendations/legacy_downloads/segregation-findings-recommendations-virginia-dept-corrections.pdf).



in spaces adequate for physical activity and with equipment for exercising—in addition to expanded opportunities for indoor recreation . . . .”<sup>74</sup> Providing opportunities for people to engage in exercise and programming proved to be a more effective method for addressing disruptive behaviors, and fewer disruptions occurred.<sup>75</sup>

Officials in reforming states, particularly Washington, began to rethink old modalities of prison management, such as long-term lockdowns that kept general population prisoners sealed in their cells for days at a time.<sup>76</sup> “Lockdowns prevented staff from being able to run programs . . . . The violent acts committed by a few offenders were depriving the majority of offenders opportunities to serve their sentence in a productive way.”<sup>77</sup> Access to programming and exercise improved prison management, and lockdowns interfered with that successful management model.<sup>78</sup> In the same way prison officials had curtailed the list of infractions for which an individual could be sent to solitary, officials limited the use of lockdowns to the most serious violent incidents.<sup>79</sup> Officials in Washington limited the amount of time a unit could be on lockdown to thirty-six hours while a team determined who

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<sup>74</sup> *Id.*

<sup>75</sup> Kupers, *Solitary*, *supra* note 36, at 229-233; *Place Safety*, *supra* note 63, at 20-21; Digard, *supra* note 11, at 31-32.

<sup>76</sup> *Place Safety*, *supra* note 63, at 12, 14.

<sup>77</sup> *Id.* at 12.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 13.

was responsible for an assault.<sup>80</sup> Corrections staff instituted restrictions on certain privileges for the primary actors rather than maintain unit lockdowns.<sup>81</sup> Clear expectations and swift discipline further reduced the need to rely on deprivation and isolation to maintain security.<sup>82</sup>

Additionally, when staff did refer prisoners for placement in solitary, correctional officials provided prisoners prompt due process hearings to ensure placement was appropriate. Prior to reforms, despite the Supreme Court's holding that placement in prolonged solitary confinement can create a liberty interest, due process protections for placement and retention in solitary were non-existent in many jurisdictions.<sup>83</sup> Lack of meaningful hearings enabled mass isolation of prisoners, such as in Nebraska where "44 percent of all incarcerated people had been placed in restrictive housing as punishment for an infraction or pending an investigation."<sup>84</sup> Meaningful hearings ensure less-restrictive placements are considered whenever possible and return isolated prisoners to general population within days or weeks rather than months or years.<sup>85</sup> Prisoners were told exactly why

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<sup>80</sup> *Id.* at 14.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *See Wilkinson v. Austin*, 545 U.S. 209, 220 (2005).

<sup>84</sup> Digard, *supra* note 11, at 17.

<sup>85</sup> *Id.* at 32-33.

they were being confined and for how long.<sup>86</sup> Maine requires senior leadership to review referrals to solitary within three days.<sup>87</sup> Washington requires a multidisciplinary team to review placement in solitary.<sup>88</sup> To date, twenty-one states have mandated similar meaningful panel reviews for each prisoner sent to isolation.<sup>89</sup>

Limits on the length of time a person could be held in isolation further improved prison management. People who have spent extensive time in segregation “require intensive work to re-integrate,” because isolation degrades mental health.<sup>90</sup> Colorado reports limiting solitary confinement to fifteen days, which meets the international standard set by *The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)*.<sup>91</sup> Washington presumes “disciplinary segregation should continue for no longer than [thirty] days.”<sup>92</sup>

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<sup>86</sup> Rick Raemisch & Kellie Wasko, Colorado Department of Corrections, *Open the Door: Segregation Reforms in Colorado* 3 (2015) <https://drive.google.com/file/d/0B30yLI0I1yBRY2h2UDBCZ0Q5WIE/view> (*Open the Door*).

<sup>87</sup> Zachary Heiden, ACLU, *Change is Possible: A Case Study of Solitary Confinement Reform in Maine* 15 (2013).

<sup>88</sup> Pacholke & Mullins, *supra* note 36, at 6-7.

<sup>89</sup> *ASCA-Liman 2018*, *supra* note 19, at 125 n.171.

<sup>90</sup> Terry Kupers, *Alternatives to Long-Term Solitary Confinement*, 38.3 Correctional L. Rep. 33, 45 (2016).

<sup>91</sup> *The Nelson Mandela Rules*, *supra* note 20, at Rule 44; *ASCA-Liman 2018*, *supra* note 19, at 67.

<sup>92</sup> Pacholke & Mullins, *supra* note 36, at 7.

*B. States Created Alternative Housing for Prisoners with Mental Illness and Vulnerable Populations.*

States also reduced the influx of prisoners into isolation by creating alternative housing for prisoners who need mental health treatment. Although the ASCA-Liman Report found that correctional agencies' view that seriously mentally ill prisoners "ought not to be in restricted housing is widely shared and longstanding,"<sup>93</sup> self-reports from jurisdictions throughout the United States established that isolation cells were filled with prisoners who needed mental health treatment or protective custody.<sup>94</sup> Several states—including Colorado, Massachusetts, Nebraska, New Mexico, New York, and Texas—passed legislation preventing the isolation of prisoners with serious mental illness, with New Mexico also excluding any prisoner who exhibits self-injurious or suicidal behaviors.<sup>95</sup> These seven states—along with Arizona, Mississippi, North Carolina, North Dakota, Pennsylvania, and Virginia, Washington, and the Federal Bureau of Prisons—created policies for housing prisoners with mental illness in ways that do not exacerbate their illnesses.<sup>96</sup> Mississippi both excluded prisoners with mental illness from solitary confinement

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<sup>93</sup> *ASCA-Liman 2016*, *supra* note 26, at 48.

<sup>94</sup> *ASCA-Liman 2016*, *supra* note 27, at 48-53; *ASCA-Liman 2018*, *supra* note 20, at 47-49.

<sup>95</sup> *State Enactments*, *supra* note 23; Oxford, *supra* note 23.

<sup>96</sup> *Hager & Rich*, *supra* note 20; U.S. Department of Justice, Report and Recommendations Concerning the Use of Restrictive Housing 48-49 (2016), <https://www.justice.gov/archives/dag/file/815551/download>.

and designed high security mental health treatment centers.<sup>97</sup> Colorado reports it now diverts prisoners with severe mental illness to a secure treatment facility where they spend at least twenty hours per week outside their cells for medical treatment, therapy, and recreation, including time outdoors.<sup>98</sup>

Additionally, prison officials in reforming states provided people with mental health treatment rather than referring them to solitary confinement if infractions were linked to their illness.<sup>99</sup> People with severe mental illnesses (SMI) who went through such treatment programs and then went back to the general population had a “sharp decrease” in violent incidents, “which strongly supports a conclusion that prisoners with SMI tend to suffer psychiatric deterioration and get into disciplinary trouble in supermax administrative segregation.”<sup>100</sup> At New York City’s Rikers Island, officials established the Clinical Alternatives to Segregation (CAPS) program, which provided prisoners “individual and group psychotherapy, art therapy, medication management, and community meetings.”<sup>101</sup> The program was successful enough to export to other mental health units.<sup>102</sup>

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<sup>97</sup> *Beyond Supermax*, *supra* note 32, at 1042.

<sup>98</sup> *Open the Door*, *supra* note 87, at 4-6.

<sup>99</sup> *Id.* at 5.

<sup>100</sup> *Beyond Supermax*, *supra* note 32, at 1047.

<sup>101</sup> Kupers, *Solitary*, *supra* note 36, at 233.

<sup>102</sup> *Id.*

States also reduced their solitary confinement populations by designating less-restrictive housing for vulnerable populations needing protective custody.<sup>103</sup> Reforming states report implementing screening policies to ensure vulnerable people are not placed with people known to be violent.<sup>104</sup> “Innovations in an increasing number of jurisdictions now demonstrate that agencies can safely reduce their use of segregation . . . by removing vulnerable, nonviolent individuals from segregation and considering alternative strategies as an initial response for those screened at risk of sexual victimization or abusiveness.”<sup>105</sup> Washington created “safe harbors” for specific populations, such as people with mental illness, veterans, and the elderly.<sup>106</sup> State officials found “at least [twelve] percent of the prison population had significant cognitive impairments,” and instead of placing them in protective isolation, created a “Skill Building Unit” to meet the needs of people with developmental and intellectual disabilities or traumatic brain injuries.<sup>107</sup> New York “remove[d] youth, pregnant women, and the developmentally disabled and intellectually challenged prisoners from extreme isolation.”<sup>108</sup> Federal Bureau of

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<sup>103</sup> Digard, *supra* note 11, at 34.

<sup>104</sup> Allison Hastings et al., National PREA Resource Center, *Keeping Vulnerable Populations Safe under PREA: Alternative Strategies to the Use of Segregation in Prisons and Jails* 7-8 (2015).

<sup>105</sup> *Id.* at 18-19.

<sup>106</sup> Pacholke & Mullins, *supra* note 36, at 6.

<sup>107</sup> Hastings, *supra* note 105, at 11.

<sup>108</sup> *Dangerous Overuse*, *supra* note 40, at 13.

Prisons’ policy requires it to screen prisoners for severe mental illness and divert them from supermax confinement to two secure mental health facilities “designed to help inmates better manage the symptoms of mental illness, thereby decreasing the risk of violence and allowing inmates to transition back to general population (and, eventually, the community).”<sup>109</sup>

Improvements to prison discipline strategies and development of alternative housing prevented “difficult” prisoners from being sent to solitary confinement, and quickly shrunk the population of people in supermax facilities and isolation units in these states.<sup>110</sup>

#### **V. States Provide Programming to Prepare Prisoners in Solitary Confinement to Return to General Population Housing.**

Once correctional staff reduced the number of people entering solitary confinement, they prepared those already in isolation to get out and stay out. Research demonstrated even short periods in solitary confinement created negative psychological effects, and states began to question the efficacy of penal isolation.<sup>111</sup> Early attempts at reform moved people through “step-down” programs in which they would be moved from isolation into less-restrictive conditions, only to commit a small infraction and be returned to solitary confinement, making them feel there was

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<sup>109</sup> U.S. Department of Justice, *supra* note 98, at 48.

<sup>110</sup> *Open the Door*, *supra* note 87, at 3.

<sup>111</sup> Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 Crime & Just. 365, 383-84 (2018).

no way to end the cycle.<sup>112</sup> “In segregation, [the person is] mad and responds with more vulgarity. He gets another rule violation and we tack on [thirty] days. Soon you have a guy who has never used violence doing three to four years in segregation. He probably needs some anger management.”<sup>113</sup> This cycle of isolation leading to further infractions and additional time in segregation prevented people from re-establishing the prosocial behaviors necessary for them to successfully transition out of solitary.<sup>114</sup> Without an opportunity to regain social skills after isolation, those who had been in solitary could not escape it for long.<sup>115</sup>

Providing rehabilitation and therapy opportunities for people in solitary confinement enabled the swift return of many to general population housing.<sup>116</sup> Mississippi provided people in segregation with education, mental health services, and therapy, profoundly reducing the “rates of violence, disciplinary infractions, and use of force.”<sup>117</sup> Mississippi’s administrators also allowed formerly isolated prisoners to spend several unrestrained hours out of their cells each day for recreation

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<sup>112</sup> *Open the Door*, *supra* note 87, at 2.

<sup>113</sup> Emmitt Sparkman, *Mississippi DOC's Emmitt Sparkman on Reducing the Use of Segregation in Prisons*, Think Justice Blog (Oct. 31, 2011), <https://www.vera.org/blog/mississippi-docs-emmitt-sparkman-on-reducing-the-use-of-segregation-in-prisons>.

<sup>114</sup> Toch & Kupers, *supra* note 50, at 17-18.

<sup>115</sup> *Open the Door*, *supra* note 87, at 2.

<sup>116</sup> Kupers, *Solitary*, *supra* note 36, at 224-33.

<sup>117</sup> *Beyond Supermax*, *supra* note 32, at 1039.



and could eat meals together.<sup>118</sup> Colorado instituted “Thinking for a Change,” a “program with a track record of significantly reducing recidivism rates.”<sup>119</sup> “Staff began to witness successful, permanent transitions [out of segregation]. Even offenders serving death sentences were able to interact with other offenders and land prison jobs.”<sup>120</sup> Louisiana also used Thinking for a Change and other therapeutic programs to reduce its use of long-term restrictive housing in two of its prisons.<sup>121</sup> The 416 restrictive housing beds this saved the state were, as of early 2018, under consideration to repurpose into assisted living and medical housing.<sup>122</sup> Washington’s “Ceasefire” program increased staff and prisoner training on violence prevention and prosocial skill-building.<sup>123</sup> Both Colorado and Washington used desks with built-in restraints so potentially violent prisoners could safely engage in group activities and social interactions that eventually led to unrestrained group programming.<sup>124</sup>

States employed individualized incentives to promote participation and develop prisoners’ agency, leading them to value the training itself.<sup>125</sup> Colorado also

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<sup>118</sup> *Id.* at 1040.

<sup>119</sup> *Open the Door*, *supra* note 87, at 5.

<sup>120</sup> *Id.* at 7.

<sup>121</sup> *ASCA-Liman 2018*, *supra* note 19, at 107 n.34.

<sup>122</sup> *Id.*

<sup>123</sup> *Place Safety*, *supra* note 63, at 12-13.

<sup>124</sup> Pacholke & Mullins, *supra* note 36, at 7; *Open the Door*, *supra* note 87, at 6.

<sup>125</sup> Kupers, *Solitary*, *supra* note 36, at 176-184.

used therapy dogs to encourage people to engage with therapy opportunities.<sup>126</sup> People in Mississippi's supermax participated in out-of-cell programming to positive effect: "[W]e gave them more freedoms, and we saw a huge decrease in violence in that unit."<sup>127</sup> Correctional experts from across the nation agreed that "allowing increased access to outdoor exercise and recreation, as well as increasing dayroom time and other privileges such as visitation and phone calls, are other areas where systems can enhance social interaction and environmental stimulation to lower the psychological stress of isolated confinement."<sup>128</sup> Multiple state correctional systems reported that together, the incentives, socialization, and therapy helped people develop prosocial strategies, enabling them to return to general population without threatening prison security.

This socialization and training prepared people who committed even the most serious violent offenses to return to general population housing.<sup>129</sup> Training that emphasizes mutual respect "decrease[s] negative behavior on the unit and reinforce[s] the concept that how inmates are treated has an impact on how they treat staff."<sup>130</sup> New prison management strategies created an environment where prisoners

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<sup>126</sup> *Open the Door*, *supra* note 87, at 6.

<sup>127</sup> *Id.*

<sup>128</sup> John Jay College of Criminal Justice, Solitary Confinement: Ending the Over-Use of Extreme Isolation in Prisons 13 (2015), [http://johnjaypri.org/wp-content/uploads/2016/08/LangelothReport\\_web.pdf](http://johnjaypri.org/wp-content/uploads/2016/08/LangelothReport_web.pdf).

<sup>129</sup> Pacholke & Mullins, *supra* note 36, at 7-8.

<sup>130</sup> *Id.*

knew how to succeed and were more equipped to do so.<sup>131</sup> People left solitary confinement to enter units supervised by staff trained in de-escalation strategies and supported by discipline policies that prisoners perceived as fair, enabling those who had been violent to re-integrate into general populations successfully.<sup>132</sup>

## CONCLUSION

“Clearly, viable alternatives to supermax do exist.”<sup>133</sup> Reforming states have demonstrated that less harmful and more effective alternatives can prevail over long-term isolation. Knowing that “workable alternative systems for long-term [solitary] confinement exist,” the courts have no impediment to determining that “a correctional system should be required to adopt them.”<sup>134</sup> The alternatives to solitary confinement employed by a large and growing number of states have enhanced prison security, prisoner welfare, and societal safety, demonstrating there is no longer a penological interest in maintaining prisoners in prolonged solitary confinement. Minimizing the harm of solitary confinement is a moral and practical imperative.

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<sup>131</sup> *Id.* at 5-9.

<sup>132</sup> Kupers, *Solitary*, *supra* note 36, at 212-14, 231-33.

<sup>133</sup> Briggs, *supra* note 6, at 1371.

<sup>134</sup> *Davis v. Ayala*, 135 S. Ct. at 2210.

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,500 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f).

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Dated: June 10, 2020

s/ Danielle C. Jefferis  
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I hereby certify that on June 10, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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