No. 18-2323

In The
Supreme Court of the United States
October Term 2018

Stephen Marshall, et al.,
Petitioners

vs.

Winston Taylor and Brett Jones,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONERS

TEAM 233
BROOKLYN
PETITIONERS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The Eighth Amendment prohibits cruel and unusual punishment. Inmates in solitary confinement—often indefinitely—are deprived of social contact and environmental stimulation for a minimum of 23 hours per day and experience significant psychological damage, as well as staggering rates of self-mutilation and suicide. An emerging consensus among medical experts, professional organizations, and states suggests that solitary confinement should be substantially limited. Is prolonged solitary confinement cruel and unusual?

II. The Eighth Amendment prohibits cruel and unusual punishment. Adolescent inmates in solitary confinement experience chronic and irreversible psychological, physical, and developmental harms and are at increased risk for self-mutilation and suicide. Courts have consistently recognized in a variety of contexts that adolescents are legally distinct and developmentally different from adults. Is solitary confinement of adolescents tried and convicted as adults, absent any exigency, cruel and usual?

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JURISDICTIONAL STATEMENT

The Thirteenth Circuit entered judgment in favor of Respondents, Winston Taylor and Brett Jones. R. at 2. Petitioners timely filed their Petition for Writ of Certiorari, which this Court granted. R. at 31. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2012).

STATEMENT OF FACTS

Carson State Prison (the "Prison") is a 600-bed correctional facility that houses adult inmates, as well as adolescent inmates tried and convicted as adults. R. at 3. Inmates housed with the general population have access to "television, reading materials, a commissary, a law library, telephones, recreation, and religious services." R. at 3-4. In addition, many inmates have the opportunity to work within the Prison, and most inmates are allowed "two contact visits each week." R. at 4.

The Prison also, however, has a Segregated Housing Unit ("SHU"), where inmates are kept in solitary confinement. *See* R. at 4. By design, the SHU "increases isolation and decreases environmental stimulation." R. at 4. The SHU environment "emphasizes separation, restricted movement, and limited direct access to staff members and other inmates." R. at 4. For instance, meals are eaten alone in the cell. R. at 4. SHU inmates are denied access to television, as well as all work, rehabilitation, recreational, and other activities and programs. R. at 4. SHU inmates may shower three times per week, apart from one another. R. at 5. The SHU also is designed to prevent inmates from communicating with one another. R. at 4. In the SHU, "[c]onversations [between cells] are impossible." The only thing inmates can hear is other inmates scream. R. at 4.

Inmates in the SHU have limited visitation and are denied contact visitation. R. at 4. Even their interactions with guards and prison staff are significantly curtailed. R. at 4. Guards use a "distant, centrally located, glass-encased room" to monitor the inmates. R. at 4. A small portal at the cell front and a small metal slot are the only means by which inmates interact with prison staff. R. at 4. All services, even mental health services, are delivered through this portal, and the small metal slot serves as the sole delivery mechanism for food, medicine, and other tangible supplies. R. at 4.

In this solitary existence, inmates reside in a 60-square-foot concrete cell, equipped only with a bed, metal sink, toilet, and small window too high for inmates to see outside. R. at 4. The single light in each solitary cell stays on continuously and is dimmed only at night. R. at 4. Each weekday, inmates have one hour of exercise, either in a small fenced in concrete area outside or in a small room not unlike their solitary cell. R. at 4-5. On weekends and holidays, these conditions are the reality of an inmate in solitary confinement for 24 hours per day. R. at 5. On most weekdays, inmates are in solitary confinement for at least 23 hours each day. R. at 4.

The Prison places inmates in solitary confinement for either disciplinary or administrative reasons. R. at 5. Disciplinary placements result from rule violations followed by a hearing. R. at 5. An inmate may either waive the hearing in hopes of obtaining a lighter punishment or may participate in the hearing. R. at 5. If a violation is found or the inmate waives the hearing, a Department of Corrections ("DOC") official will determine the inmate's punishment. R. at 5. The more serious the infraction, the more likely the punishment will include at least a short stay in the SHU. R. at 5. Any rule violation, however, can lead to solitary confinement. R. at 5.

These disciplinary policies apply regardless of an inmate's age. R. at 5. An adolescent inmate is equally likely to be placed in solitary confinement and for the same length of time as an adult inmate. R. at 5. In fact, adolescent inmates, are placed in the SHU for disciplinary violations, including for minor infractions (e.g., back-talking a guard or failing to follow orders), at a higher rate than adult inmates. R. at 5. Disciplinary placements in the SHU have a fixed duration, and placements for minor infractions may last only 24 or 48 hours. R. at 5. Serious violations can lead to far longer stays. R. at 5. After disciplinary confinement, the inmate is returned to the general population unless there has been a determination that the inmate should be placed in administrative segregation. R. at 6.

The primary aim of administrative segregation is to "promote the orderly and safe operation of Carson State Prison." R. at 6. Respondents admit, however, that it often uses solitary confinement to address mere logistical concerns, such as holding inmates pending disciplinary hearings or in between transfers. R. at 6. In addition, sometimes the Prison places an inmate in solitary confinement because prison officials have determined that leaving the inmate in the general population poses a threat to staff, other inmates, or the individual. R. at 6.

Although the Prison claims administrative segregation is "non-punitive," the conditions of administrative segregation are identical to disciplinary segregation. R. at 6. The only distinction is that disciplinary segregation lasts a predetermined amount of time, while administrative segregation may be imposed indefinitely. R. at 6. Consequently, many inmates currently in the SHU for administrative reasons have been there for "well over a year, and some have been there as long as 8, 10, or even 12 years." R. at 7.

While prison officials review all SHU placements at quarterly meetings, Respondents admit that once the Prison places an inmate in administrative segregation, the segregation can continue "even without evidence of ongoing behavioral problems." R. at 7. Respondents also admit that "even an entire quarter of good behavior in the SHU would not necessarily result in a reassignment." R. at 7. Instead, the only question is "whether there is ongoing administrative justification for the placement." R. at 7. Consequently, some inmates endure the isolating conditions of administrative solitary confinement until their release date. R. at 7.

STATEMENT OF THE CASE

Petitioners commenced this class action suit against Respondents, in their official capacities as prison officials, under 28 U.S.C. sections 2201 through 2202 and 42 U.S.C. section 1983, challenging the Prison's use of solitary confinement. R. at 2-3. Petitioners allege that the Prison's use of solitary confinement violates their rights under the Eighth Amendment, as incorporated against the states through the Fourteenth Amendment, and request declaratory and injunctive relief. R at 2. Specifically, the class members' claims focus on the social isolation and deprivation of environmental stimulation that result from the use of solitary confinement. R. at 10.

Stephen Marshall represents the class of "all inmates who have been assigned to or are eligible for future assignment to the Segregated Housing Unit ('SHU') at Carson State Prison." R. at 3. The class argued before the district court that "*prolonged* solitary confinement constitutes cruel and unusual punishment" and urged the court to impose a 60-day limitation. R. at 8. The class includes a subclass of adolescent inmates aged 15 to 17 years, R. at 3, which argued that the use of solitary confinement on adolescents, absent any exigency,[1] also violates the Eighth Amendment, R. at 8.

Respondents moved for summary judgment, which the district court granted and which the Thirteenth Circuit affirmed. R. at 2. This Court has granted review. R. at 31.

[1] The record uses "emergent circumstances," "emergency circumstances," and "exigency"/ "exigencies" interchangeably, and all of these terms should be interpreted as conforming the plain meaning of "emergent," "arising unexpectedly; calling for prompt action." 2018-2019 R. Clarification. This brief uses "exigent circumstances" or "exigencies" for the purpose of consistency with the question this Court has posed to the Parties. *See* R. at 31 (referring to "immediate exigencies").

SUMMARY OF THE ARGUMENT

Carson State Prison employs both disciplinary and administrative solitary confinement for adult and adolescent inmates, placing inmates alone in a concrete cell for a minimum of 23 hours a day, with little to no human interaction or other stimulation. While disciplinary segregation lasts for a predetermined period, administrative segregation may be imposed indefinitely.

For more than a century, this Court has raised—and consistently reaffirmed—serious objections to solitary confinement. While this Court has not held that solitary confinement is flatly unconstitutional, it has held that solitary confinement can become unconstitutional by virtue of its duration and conditions. This case presents this Court with the opportunity to define the boundaries of the Eighth Amendment to protect vulnerable inmates from precisely the types of cruel and unusual punishments that the Amendment was designed to prevent. Thus, this Court should reverse the Thirteenth Circuit's grant of summary judgment and hold that (1) prolonged solitary confinement, defined as exceeding 60 days, is unconstitutional; and (2) solitary confinement of adolescent inmates, unjustified by some exigency, is unconstitutional.

The Eighth Amendment's interpretation is flexible, prohibiting punishments that contravene today's broad and idealistic concepts of dignity, civilized standards, humanity, and decency. This Court has settled upon a two-part test, "the *Farmer* test," for determining whether prison conditions are cruel and unusual. Prison officials violate the Eighth Amendment when (1) the deprivation alleged is objectively "sufficiently serious," and (2) the prison official has a sufficiently culpable state of mind or, put differently, is "deliberately indifferent" to inmate health or safety.

Because the second part of the *Farmer* test is not contested here, this Court must merely analyze whether the deprivation alleged—the deprivation of social contact and environmental

stimulation that is inherent in solitary confinement—is sufficiently serious. This Court can conduct this inquiry in one of two ways: First, it may assess whether the deprivation results in a risk so grave that exposure to that risk violates contemporary standards of decency. To determine what the standards of decency are, this Court may look to, for example, medical experts, professional organizations, state law, federal law, or international law. Or second, this Court may assess whether the deprivation is grossly disproportionate to the offense.

Prolonged solitary confinement is unconstitutional under both a standards of decency and proportionality analysis. First, standards of decency have evolved to recognize that the deprivation of social contact and environmental stimulation is sufficiently serious. Medical research overwhelmingly shows that prolonged solitary confinement can result in both psychological and physical harm, as well as increase the risk of self-mutilation and suicide. There is also a growing consensus among professional organizations that the use of solitary confinement should be vastly limited. A survey of state law also concludes that the modern trend is to minimize the use of solitary confinement, improving institutional and individual outcomes. The federal government has shown the same initiative to limit solitary confinement, marked by an executive order limiting solitary confinement in federal prisons and congressional hearings on solitary confinement. Finally, the international law community also opposes prolonged solitary confinement, characterizing the practice as cruel, inhuman, degrading, and, in some cases, torture.

Second, the deprivation of social contact and environmental stimulation is sufficiently serious under a proportionality analysis. Given that solitary confinement carries a grave risk of psychological and physical harm, and Respondents use solitary confinement in response to even minor infractions and to address logistical needs, the deprivation is grossly disproportionate to at least some of the inmates' offenses.

The case for a strict prohibition against the solitary confinement of adolescent inmates, absent any exigency, is even stronger. First, because medical research shows adolescents are developmentally more vulnerable to irreversible harm, the modern trend among professional organizations, states, the federal government, and the international law community is to dramatically reduce or eliminate solitary confinement of adolescents. This emerging consensus proves that the standards of decency have evolved even further regarding adolescents.

Second, just as with adult inmates, the deprivation of social contact and environmental stimulation is grossly disproportionate to at least some adolescents' offenses. With adolescents, however, the disproportionality is exacerbated in effect, due to the magnified risk of irreversible harm, and frequency, because adolescent inmates are placed in disciplinary segregation at higher rates than adults.

Because the deprivation alleged is sufficiently serious and thus unconstitutional, this Court should reverse the holding of the Thirteenth Circuit and empower the district court to fashion an appropriate equitable remedy.

ARGUMENT

Standard of Review

This Court reviews the grant of Respondents' summary judgment motion *de novo*. While "not bound by the Federal Rules of Civil Procedure," this Court uses Rule 56 as a guide. *Alabama v. North Carolina*, 560 U.S. 330, 344 (2010) (citing Sup. Ct. R.17.2; *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993)). This Court should therefore overturn the grant of summary judgment if, viewing the pleadings and record in the light most favorable to Petitioners as the nonmoving parties, genuine issues of disputed material fact preclude summary judgment as a matter of law. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 599 (1986) (citing Fed. R. Civil. P. 56).

Introduction

For more than a century, this Court has raised "serious objections" to the use of solitary confinement, acknowledging that it can cause prisoners to become "violently insane," as well as lead to suicide, prevent rehabilitation, and have irreversible psychological effects. *See In re Medley*, 134 U.S. 160, 168 (1890). This Court has consistently reaffirmed those objections, stating recently, for example, that the solitary confinement regime could bring a person "to the edge of madness, perhaps to madness itself." *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring). As a result, this Court has held solitary confinement is a form of punishment subject to scrutiny under Eighth Amendment standards. *Hutto v. Finney*, 437 U.S. 678, 685 (1978). In addition, this Court has held, while solitary confinement is not per se unconstitutional, solitary confinement can become unconstitutional by virtue of the duration and conditions of the isolation. *Id.* at 686.

The Eighth Amendment to the United States' Constitution provides that "excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*." U.S. CONST. amend VIII (emphasis added). The Eighth Amendment "proscribe[s] more than physically barbarous punishments" and "the unnecessary and wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976). This Court has interpreted the Amendment "in a flexible and dynamic manner[,]" *Gregg v. Georgia*, 428 U.S. 153, 171 (1976), holding that the prohibition against cruel and unusual punishments "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice[,]" *Weems v. United States*, 217 U.S. 349, 373 (1910).

Essentially, the Eighth Amendment prohibits punishments that contravene today's "broad and idealistic concepts of dignity, civilized standards, humanity, and decency[,]" *Estelle*, 429 U.S. at 102, and thus the Amendment "must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design[,]" *Trop v. Dulles*, 356 U.S. 86, 100–101 (1958) (plurality opinion). For this reason, "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual," and therefore the Eighth Amendment "'must draw its meaning from the evolving standards of decency that mark the process of a maturing society.'" *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop*, 356 U.S. at 101).

Through a series of landmark decisions, this Court has settled upon a two-part test for determining whether prison conditions are cruel and unusual. *See Farmer v. Brennan*, 511 U.S. 825 (1994). Prison officials violate the Eighth Amendment's prohibition against cruel and unusual punishment when: first, "the deprivation alleged [is], objectively, 'sufficiently serious[,]'" *id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)); and second, the "prison official [has] a

'sufficiently culpable state of mind[,]'" *id.* In cases challenging prison conditions, that state of mind is one of "'deliberate indifference' to inmate health or safety[.]" *Id.* (quoting *Wilson*, 501 U.S. at 297) (the "*Farmer* test").

In conducting the objective "sufficiently serious" inquiry, courts assess "whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Rhodes*, 452 U.S. at 347. This evolving standards of decency analysis can involve considerations such as whether prison policies produce conditions "that would be intolerable for prison confinement." *Id.* For instance, and notably for Petitioners' claims, a *mere risk* of serious injury is enough to satisfy this inquiry. *Helling v. McKinney*, 509 U.S. 25, 36 (1993). Significantly, the risked injury need not occur or be imminent to satisfy the objective prong of the *Farmer* test. *Id.*

Alternatively, the Eighth Amendment "prohibits penalties that are grossly disproportionate to the offense." *Weems*, 217 U.S. at 367. In some instances, this Court has therefore looked not to evolving standards of decency, but to the proportionality of the punishment to the offense. *See generally id.*

The second inquiry is a subjective one that is similar to criminal recklessness. *Farmer*, 511 U.S. at 839-40. A prison official is deliberately indifferent to inmate health or safety if "the official knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837. If the risk of harm is obvious, however, the subjective state of mind of the official is inferred. *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (citing *Farmer*, 511 U.S. 825).

Here, the subjective prong of the test is met. Respondents do not challenge the notion that solitary confinement produces harm or the risk of harm, nor do they claim that they were unaware of the harm or risk of harm. Rather, Respondents merely argue that "legitimate penal interests"

justify the use of solitary confinement. R. at 14. Even if this were not the case, it is sufficient that Respondents were on notice of the harms and potential harms associated with solitary confinement upon the filing of Petitioners' claims and continued the use of solitary confinement. *See Farmer*, 511 U.S. at 845 (in proving "the subjective factor" in an injunction case, the claimant may rely on the defendants' "attitudes and conduct at the time suit is brought and persisting thereafter").

Petitioners have alleged cognizable Eighth Amendment claims under the *Farmer* test. The class therefore asks this Court to declare that (1) prolonged solitary confinement violates the Constitution's prohibition against cruel and unusual punishment; and (2) the use of solitary confinement on adolescents tried and convicted as adults, absent any exigency, violates the Constitution's prohibition against cruel and unusual punishment. This Court should also empower the district court to issue a permanent structural injunction to protect vulnerable inmates and prevent future constitutional violations.

I. PROLONGED SOCIAL ISOLATION AND LACK OF ENVIRONMENTAL STIMULATION, INHERENT IN SOLITARY CONFINEMENT, VIOLATE THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

This Court has progressed far beyond the notion that cruel and unusual punishment requires a showing of serious physical injury, and thus it need not strain its jurisprudence to find an Eighth Amendment violation here. For instance, this Court has determined that prisoners cannot be denied "basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety." *Helling*, 509 U.S. at 32 (quoting *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 200 (1989)). Prison officials also may not expose prisoners to conditions that "pose an unreasonable risk of serious damage to [their] future health." *Id.* at 35.

The Honorable Justice Blackmun has also noted this Court's precedent does not preclude Petitioners' claims, pointing out that the plain meaning of "pain" includes psychological harm:

> As the Court makes clear, the Eighth Amendment prohibits the unnecessary and wanton infliction of "pain," rather than "injury." "Pain" in its ordinary meaning surely includes a notion of psychological harm. I am unaware of any precedent of this Court to the effect that psychological pain is not cognizable for constitutional purposes. If anything, our precedent is to the contrary.

Hudson v. McMillian, 503 U.S. 1, 17 (1992) (Blackmun, J., concurring) (citations omitted). This Court's Eighth Amendment jurisprudence consequently supports—or at the very least does not preclude—Petitioners' claims.

In addition, the honorable Justice Kennedy has commented specifically about the ills of solitary confinement, suggesting it was time for this Court to take up the issue to protect inmates:

> The human toll wrought by extended terms of isolation long has been understood, and questioned, by writers and commentators. Eighteenth-century British prison reformer John Howard wrote "that criminals who had affected an air of boldness during their trial, and appeared quite unconcerned at the pronouncing sentence upon them, were struck with horror, and shed tears when brought to these darksome solitary abodes."
>
> . . .
>
> There are indications of a new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular.
>
> . . .
>
> But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.
>
> . . .
>
> Over 150 years ago, Dostoyevsky wrote, "The degree of civilization in a society can be judged by entering its prisons." There is truth to this in our own time.

Davis, 135 S. Ct. at 2209–10 (Kennedy, J., concurring) (citations omitted).

Here, Petitioners present evidence, aligning with these sentiments, that society's standards of decency have evolved to recognize the cruelty of solitary confinement, meeting the objective prong of the *Farmer* test. Alternatively, Petitioners argue the effects of prolonged solitary confinement are disproportionate to some inmates' offenses, which also satisfies the objective

prong of the *Farmer* test. Petitioners therefore request a declaratory judgment that prolonged solitary confinement violates the Eighth Amendment and a permanent injunction imposing a 60-day limitation on solitary confinement.

A. Under either an evolving standards of decency or proportionality analysis, this Court should find that the prolonged deprivation of social contact and environmental stimulation is "sufficiently serious."

As standards of decency for the treatment of inmates evolve, this Court must also evolve in its interpretation of the Eighth Amendment. Evolving standards of decency therefore compel this Court to find the prolonged deprivation of social contact and environmental stimulation inherent in solitary confinement is "sufficiently serious," thus satisfying the objective prong of the *Farmer* test. *See generally Farmer*, 511 U.S. 825.

As mentioned, *supra, Introduction*, one inquiry into whether a deprivation is sufficiently serious is whether the deprivation results in a risk so grave that exposure to that risk violates contemporary standards of decency. *Helling*, 509 U.S. at 36. A lack of historical precedent is not outcome-determinative for this inquiry. In fact, this Court has consistently gone against its own jurisprudence as society has evolved. *See, e.g.*, *Penry v. Lynaugh*, 492 U.S. 302 (1989) (holding that there was no clear consensus against executing developmentally disabled convicted murderers); *but see Atkins v. Virginia*, 536 U.S. 304 (2002) (finding that standards of decency had evolved so the Eighth Amendment no longer permitted executing developmentally disabled defendants). Instead, courts look to more recently gathered evidence that provides a "significant and reliable objective index of contemporary values." *Gregg*, 428 U.S. at 181; *see also Atkins*, 536 U.S. 304 (discussing that this Court can draw on, for example, trends from states, legislatures, and contemporary practices in Eighth Amendment cases to analyze evolving standards of decency).

Here, prolonged solitary confinement is sufficiently serious because it poses an unreasonable risk of serious damage to inmates' future health. The sufficiently serious effects of prolonged solitary confinement on the psyche and body are undeniable and show that social contact and environmental stimulation are indeed minimal life necessities, just like food, sanitation, and medical care. *See generally* Craig Haney, *Restricting the Use of Solitary Confinement*, ANN. REV. OF CRIMINOLOGY 285 (2017). In addition, because of these deprivations' serious and often long-term detrimental effects on inmates, the imposition of solitary confinement is also disproportionate to many inmates' offenses. In conducting this analysis, this Court should look to the emerging consensus among medical experts and professional organizations, state prison reform efforts, actions of the federal government, and the international law community, as well as the proportionality of the effects of prolonged solitary confinement to the offense.

1. <u>There is an emerging consensus among medical experts and professional organizations that solitary confinement should be significantly limited.</u>

In determining whether treatment satisfies the objective prong of the *Farmer* test, this Court's current prevailing analysis of evolving standards of decency relies on reports from leading medical and professional organizations. *Moore v. Texas*, 137 S. Ct. 1039, 1041 (2017). *See also* Dominic Draye, *Death-penalty symposium: Evolving standards for "evolving standards"* (June 27, 2017), http://www.scotusblog.com/2017/06/symposium-evolving-standards-evolving-standards/ (discussing that this Court has changed its benchmark for measuring society's standards, looking to opinions of professional organizations like the American Psychological Association to determine what now transgresses the Eighth Amendment. "This deference to professional groups completes a 15-year arc of slowly turning away from the states and their enacted legislation as the gold standard for gauging society's views. Now the court's standard for determining society's standards appears to be the latest guidance for clinicians and medical professionals.").

The practice of solitary confinement persists in the United States despite that it "can cause significant psychological damage, including cognitive delays, increased suspicion and paranoia, increased anxiety, fear, aggression and hostility, heightened feelings of helplessness and depression, and increased thoughts and attempts at self-mutilation and suicide." Anna Conley, *Torture in US Jails and Prisons: An Analysis of Solitary Confinement under International Law*, 7 VIENNA J. ON INT'L CONST. L. 415, 415 (2013). These severe reactions occur "even after short durations of isolation (hours or days)[.]" Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 471 (2006). Various similar scientific conclusions "have led to an emerging consensus among correctional as well as professional, mental health, legal, and human rights organizations to drastically limit the practice." Haney, ***supra***, at 285.

Psychologist Craig Haney has conducted some of the most thorough research on the effects of solitary confinement, much of it in the early 1990s as part of the *Madrid vs. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995), case. Smith, *supra*, at 480. Haney assessed the psychological health of 100 inmates in a California supermax facility. *Id.* Haney's study individually assessed selected inmates in two different face-to-face interviews. *Id.* It found "[c]onsiderable and severe effects of solitary confinement" at high rates. *Id.* For instance, the study "found 91% suffering from heightened anxiety, 86% having hyperresponsivity to external stimuli, 84% having difficulty with concentration and memory, 84% having confused thought processes, 71% experiencing wide mood and emotional swings, 61% having aggressive fantasies, 44% suffering visual distortions, and 41% experiencing hallucinations." Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment*, 90 IND. L.J. 741, 757-58 (2015).

In the same study, more than half of the inmates experienced at least five of these symptoms, and 34% experienced all eight symptoms. *Id.* at 758.

The ongoing neuroscience research suggests the harms that solitary confinement inflicts are more than just psychological. *See generally id.* In fact, research shows that human beings require social interaction and stimulation and that deprivation of these necessities physically alters the brain, causing the severe psychological deterioration observed in inmates in solitary confinement. *See id.* at 763. These physical alterations of the brain also lead to what society would typically consider *physical harms,* such as "physical and mental disability and disease." *Id.*

These same effects occur in prolonged isolation outside the prison context, as well, showing these harms are traceable to solitary confinement and not merely attributed to the prison environment generally. For example, a NASA report on sensory deprivation concluded that "the prolonged stress consequences of [sensory deprivation] lead to detrimental neurological changes in the human brain, which can manifest in maladaptive behavior disorders." DIANA ARIAS & CHRISTIAN OTTO, DEFINING THE SCOPE OF SENSORY DEPRIVATION FOR LONG DURATION SPACE (2007), http://www.medirelax.com/v2/wp-content/uploads/2013/11/F.-Scope-of-Sensory-Deprivation-for-Long-Duration-Space-Missions.pdf ("NASA report").

Several studies also show that inmates in solitary confinement self-harm at disproportionate rates. One recent study showed inmates in solitary confinement account for nearly 50% of prison suicides but only 2 to 8% of the total prison population. Bennion, *supra,* at 757. Another study in the New York City Jail System found that 53.3% of acts of self-harm and 45% of acts of potentially fatal self-harm occurred among inmates in solitary confinement, despite those inmates accounting for only 7.3% of the prison population. Fatos Kaba et al., *Solitary Confinement and Risk of Self-Harm Among Jail Inmates,* 104 AM. J. OF PUB. HEALTH 443, 443 (2014),

https://ajph.aphapublications.org/doi/10.2105/AJPH.2013.301742. This robust body of scientific research proves that solitary confinement can and does have serious and often irreversible psychological and physical effects on inmates.

These scientific conclusions have garnered the attention of a host of professional organizations, which have in turn urged prison reforms related to solitary confinement. For instance, members of the American Psychological Association ("APA") have taken outspoken stances against the use of solitary confinement. *See, e.g.*, Kiersten Weir, *Alone, in 'the hole'*, AM. PSYCHOLOGICAL ASS'N (May 2012), https://www.apa.org/monitor/2012/05/solitary.aspx; Susan H. McDaniel, *Response to Article on Rethinking Solitary Confinement*, AM. PSYCHOLOGICAL ASS'N, (Jan. 28, 2016), https://www.apa.org/news/press/response/solitary-confinement.aspx (then President of the APA, Susan H. McDaniel, applauded President Obama's efforts to restrict the use of solitary confinement in federal prisons).

Organizations such as the National Commission on Correctional Health Care ("NCCHC"), an organization that sets standards for health services in correctional facilities, and the American Bar Association ("ABA") have followed suit, both recommending a 15-day limitation on solitary confinement. *See New Position Statement Provides Guidance on Solitary Confinement*, NAT'L COMM'N ON CORR. HEALTH CARE (Apr. 19, 2016), https://www.ncchc.org/solitary-confinement-position-statement ("prolonged (greater than 15 consecutive days) solitary confinement is cruel, inhuman and degrading treatment"); *see also* REPORT TO THE HOUSE OF DELEGATES: RESOLUTION, AM. BAR ASS'N CRIM. JUSTICE SECTION COMM'N ON DISABILITY RIGHTS (Feb. 2018) (recommending limiting solitary confinement to "exceptional cases as a measure of last resort, where less restrictive settings are insufficient, and for no longer than necessary to address the specific reason for placement, typically not to exceed 15 consecutive days").

Even correctional professionals are evolving on solitary confinement. The Association of State Correctional Administrators ("ASCA"), whose members are the head correctional official for each U.S. state and territory, as well as the armed forces, has released policy guidelines on solitary confinement. *See* RESTRICTIVE STATUS HOUSING POLICY GUIDELINES, ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS (Aug. 8, 2013), http://www.asca.net/pdfdocs/9.pdf. They include using "privileges as an incentive"; determining the length of stay in solitary based on "the nature and level of threat" to safety and order; providing access to visitation; and providing programming to aid transition back to the general population or community. *Id.* at 2.

As recently as last year, 36 jurisdictions reported they had reviewed their solitary confinement policies, ASS'N OF STATE CORR. ADMINISTRATORS, REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 5 (2018), and many of those jurisdictions have since relied on ASCA's recommendations, *id.* at 63. Of those jurisdictions, 25 reported that they relied on ASCA's recommended reforms when making policies, and 9 reported they considered the standards, relied on them in part, or used them as resource in making policies. *Id.*

In sum, medical research and the consensus among medical experts and professional organizations reflect that standards of decency have evolved to recognize that the deprivation of social contact and environmental stimulation is sufficiently serious. First, scientific evidence supports that social contact and environmental stimulation are indeed minimal life necessities, and the deprivation of such necessities has disastrous consequences on inmates' future psychological and physical health.

Second, various professional organizations have recognized these harmful consequences. The APA and ABA have recommended a 15-day limitation on solitary confinement, and

correctional professionals have recommended various other reforms, such as providing more individualized assessments of isolated inmates, incentives, social contact, environmental stimulation, and programming. These recommendations conflict with the Prison's policies. Respondents' policies allow for indefinite isolation with limited to no opportunity to return to the general population, and inmates are denied virtually all social contact and environmental stimulation, R. at 4-7. Thus, the objective prong of the *Farmer* test is met.

2. States have already placed significant constraints on solitary confinement, which also signifies that society has evolved and is continuing to evolve on this issue.

In evaluating evolving standards of decency, this Court has historically looked to state trends as evidence of a national consensus. *See, e.g.*, *Atkins*, 536 U.S. at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change."); *Penry*, 492 U.S. 302; *Roper v. Simmons*, 543 U.S. 551 (2005). Here, "[s]purred by growing budget deficits, costly litigation arising from unconstitutional treatment, and the public's objection to inhumane conditions, several states have begun to reform their prison systems to limit the use of long-term solitary confinement." *State Reforms to Limit the Use of Solitary Confinement*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/sites/default/files/field_document/stop_solitary_-_recent_state_reforms_to_limit_the_use_of_solitary_confinement.pdf (last visited Jan. 3, 2019).

Currently, at least 15 states have either enacted or proposed legislation that either eliminates solitary confinement, limits solitary confinement, abolishes solitary confinement for certain subclasses, or requires the state agency overseeing correctional facilities to consider changes to solitary confinement practices. *See generally*, *supra*, ASS'N OF STATE CORR. ADMINISTRATORS, REFORMING RESTRICTIVE HOUSING. Reports also show the number of inmates in solitary confinement has plunged from 2015 levels as states have implemented reforms. *Id.* at 95.

Some state prison reforms include closing supermax[2] facilities (e.g., Illinois), *State Reforms to Limit the Use of Solitary Confinement, supra*; eliminating administrative segregation, *id.*, and imposing a 15-day limitation on disciplinary segregation (e.g., Colorado), ASS'N OF STATE CORR. ADMINISTRATORS, WORKING TO LIMIT RESTRICTIVE HOUSING: EFFORTS IN FOUR JURISDICTIONS TO MAKE CHANGES 3 (2018), https://law.yale.edu/system/files/documents/pdf/Liman/asca_liman_2018_workingtolimit.pdf; providing access to group recreational and dining opportunities, televisions, radios, and reading materials (e.g., Maine), *Reassessing Solitary Confinement: the Human Rights, Fiscal and Public Safety Consequences: Hearing before the U.S. Senate Subcomm. On the Constitution, Civil Rights & Human Rights of the Comm. on the Judiciary*, 112th Cong. 143 (2012) (statement of the American Civil Liberties Union); and conducting individualized assessments and incentive programs to minimize how long inmates are in solitary confinement (e.g., Idaho, Maine, Mississippi), *Reassessing Solitary Confinement, supra*.

Here, several states having undertaken some level of reform is evidence that standards of decency have evolved to recognize that the deprivation of social contact and environmental stimulation is sufficiently serious. There is no evidence in the record that Carson State has undertaken any prison reforms, and thus inmates' only avenue to vindicate their rights is to seek equitable relief. Therefore, the objective prong of the *Farmer* test is met under a state law analysis, in addition to and independent of the framework discussed above.

[2] "Supermax" refers to a super-maximum security prison that provides long-term solitary confinement for 23 hours per day for the most violent and disruptive inmates. DANIEL MEARS, EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS, JUSTICE POLICY CTR., URBAN INST. ii (2006).

3. The federal government has already recognized the seriousness of psychological injuries inflicted by solitary confinement and has acted to address these ongoing harms.

In evaluating evolving standards of decency, courts may also look to federal law. *See Kennedy v. Louisiana*, 554 U.S. 407, 423 (2008), *opinion modified on denial of reh'g*, 554 U.S. 945 (2008). Here, the federal government's actions signify that society has evolved beyond this Court's jurisprudence on the use of solitary confinement. First, Congress and the executive branch have acknowledged that the deprivations alleged can and do lead to serious psychological and often physical harms. Second, Congress has made clear that psychological harms are cognizable under 42 U.S.C. section 1983, and, by extension, the Eighth Amendment.

While Congress has not yet passed legislation limiting solitary confinement, the Senate Judiciary Committee held its first hearing on solitary confinement in 2012. *See generally Reassessing Solitary Confinement*, *supra*. In 2013 and 2015, the House of Representatives issued statements seeking more information from the Attorney General's Office, *see* H.R. 3399, 114th Cong. (2015), and in 2018 the Senate proposed a bill directing the Bureau of Prisons to implement new guidelines that limit the use and extent of solitary confinement, *see* S. 2724, 115th Cong. (2018).

The executive branch has also gotten involved. In 2015, President Barack Obama ordered the Department of Justice (the "Department") to review what he called the "overuse of solitary confinement[.]" Barack Obama, Opinion, *Why we must rethink solitary confinement*, WASH. POST, Jan. 25, 2016, https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?utm_term=.db7b8be70c8b.

The Bureau of Prisons and the Department made recommendations to "accelerate this trend and change the conditions for thousands of inmates through a multi-pronged strategy." Press

Release, 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?utm_source=youth.gov&utm_medium=federal-links&utm_campaign=reports-and-resources. President Obama, announcing that he would adopt the reform recommendations through executive order, suggested that the use of administrative segregation "should be limited, applied with constraints and used only as a measure of last resort." Obama, *supra*.

In addition, Congress has enacted the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. section 1997e (2012), to, among other things, "provide for appropriate remedies for prison condition lawsuits." 141 Cong. Rec. S14408 (daily ed. Sept. 27, 1995) (statement of Sen. Dole). The PLRA precludes claims arising out of mental or emotional injuries "without a prior showing of physical injury." § 1997e(e). Notably, however, the requirement of physical injury only applies to claims for compensatory damages, not claims for declaratory or injunctive relief. § 1997e(e); s*ee also, e.g.*, *Herman v. Holiday*, 238 F.3d 660, 665 (5th Cir. 2001); *Harris v. Garner*, 190 F.3d 1279, 1288 (11th Cir. 1999); *Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803, 808 (10th Cir. 1999). This demonstrates that Congress and the courts recognized that prison conditions causing mental and emotional harms could give rise to cognizable constitutional claims. In other words, by enacting the PLRA, Congress intended to provide the very relief that Petitioners seek.

This movement on the federal front proves that society's standards of decency have evolved to recognize that a deprivation of social contact and environmental stimulation is sufficiently serious. Thus, the objective prong of the *Farmer* test is met here, in addition to and independent of the preceding analyses.

4. The international law community opposes prolonged solitary confinement, characterizing the practice as cruel, inhuman, and degrading treatment that can constitute torture.

For at least the last 60 years, this Court has also referred to "the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Roper*, 543 U.S. at 575 (citing *Trop*, 356 U.S. at 102-03). The global movement against solitary confinement is growing, conveying that standards of decency are evolving.

For example, last year, a British Columbia Supreme Court judge "found that the laws governing administrative segregation in Canada's federal prisons contravene the country's Charter of Rights and Freedoms." Anna Mehler Paperny, *Canada's solitary confinement practices unconstitutional: judge*, REUTERS (Jan. 17, 2018), https://ca.reuters.com/article/topNews/idCAKBN1F62ZS-OCATP. Canada already caps disciplinary segregation at 30 days, though before the court's holding, most inmates in solitary confinement were there for administrative reasons, potentially indefinitely. *Id.*

International human rights organizations have also taken strong positions on the use of solitary confinement. The United Nations ("U.N."), for example, has characterized solitary confinement as "cruel, inhuman and degrading treatment that can constitute torture," and has sought to end the practice altogether. Conley, *supra*, at 416. The U.N.'s Mandela Rules state that solitary confinement should be prohibited for an indefinite or prolonged, defined as exceeding 15 consecutive days. Economic and Social Council Res., U.N. Doc. E/CN.15/2015/L.6/Rev.1 (May 21, 2015), http://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_24/resolutions/L6_Rev1/ECN152015_L6Rev1_e_V1503585.pdf. Additionally, the World Health Organization ("WHO") European rules for treatment of prisoners direct health care

professionals to avoid facilitating the solitary confinement of inmates. HEALTH IN PRISONS: A WHO GUIDE TO THE ESSENTIALS IN PRISON HEALTH, WORLD HEALTH ORG. 12 (2007), http://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf.

Other international entities prohibit solitary confinement for "juveniles, prisoners with mental illness, and prisoners on death row or with life sentences." Paperny, *supra*. International tribunals have also imposed limitations on the practice, finding solitary confinement unlawful "where it constitutes incommunicado detention, where it is unnecessarily prolonged without justification, and where the totality of conditions of confinement cross a threshold into unacceptable cruelty." Conley, *supra*, at 415.

Finally, the Convention Against Torture ("CAT"), which the United States has ratified, explicitly prohibits as torture any intentional "severe pain or suffering, whether physical or mental . . . inflicted on a person for such purposes as . . . punishing him for an act he or a third person has committed or is suspected of having committed." *Id.* at 429. It bears mentioning, however, that in its ratification of the CAT, the United States entered reservations that narrowed the definition of torture so "only the handiwork of sadists could satisfy the definition." *Id.* at 432.

This increased outpouring of global opposition to solitary confinement indicates that contemporary standards of decency have evolved to recognize that a deprivation of social contact and environmental stimulation is sufficiently serious. Thus, the objective prong of the *Farmer* test is met here, as well.

5. Alternatively, independent of the evolving standards of decency analysis, prolonged solitary confinement, from a proportionality perspective, is sufficiently serious.

The Eighth Amendment "prohibits penalties that are grossly disproportionate to the offense." *Weems*, 217 U.S. at 367. In some instances, therefore, this Court has looked not to

evolving standards of decency, but to the proportionality of the punishment to the offense. *See generally id.*

Prolonged solitary confinement, along with constituting a denial of minimal life necessities and posing an unreasonable risk of serious damage to inmates' future health, is disproportionate to many inmates' offenses. Solitary confinement for disciplinary reasons occurs when an inmate violates a prison rule. R. at 5. Especially considering harms resulting from solitary confinement can range anywhere from anxiety to suicide, Smith, *supra*, at 270, solitary confinement for any duration is incredibly strong medicine for infractions as minor as "talking back to a guard or failing to get into line when told to do so[,]" R. at 5. Administrative segregation is perhaps more concerning because inmates are exposed to these same harms for no offense at all. *See* R. at 6 (noting the Prison often uses solitary confinement to address mere logistical concerns or threats to the isolated inmate's safety).

For this reason alone, this Court should find the deprivation of social contact and environmental stimulation is sufficiently serious. In other words, the objective prong of the *Farmer* test is also met under a proportionality analysis.

Because this Court's objective inquiry under *Farmer* is met—using any of the five frameworks discussed—as a matter of law, prolonged solitary confinement violates the Eighth Amendment's prohibition against cruel and unusual punishment. Thus, the lower court's grant of summary judgment was in error.

B. Because Petitioners have established a cognizable Eighth Amendment claim, a permanent structural injunction limiting solitary confinement to 60 days is appropriate and within the power of the district court.

Issuing a permanent structural injunction is within the district court's equitable power. To prevail on a claim for a permanent injunction, a plaintiff need only show that (1) he has suffered

(or will suffer) an irreparable harm; (2) remedies available at law are inadequate; (3) an equitable remedy is warranted, considering the balance of hardships between the parties; and (4) issuing an injunction would serve the public interest. *Ebay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

A permanent structural injunction is appropriate in cases involving constitutional violations, and in issuing such an injunction, courts undertake a supervisory role over institutional or systemic policies and procedures to prevent future violations from occurring. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). The scope of the injunction must merely fit the nature and scope of the constitutional violation alleged. *See generally Lewis v. Casey*, 518 U.S. 343 (1996). In addition, a court can enjoin behavior to remedy a resulting constitutional violation, even if the behavior alone is not a constitutional violation. *See generally Hutto*, 437 U.S. 678.

Because prolonged solitary confinement poses an objectively serious risk of harm, and especially because the PLRA precludes prisoners with solely mental or emotional injuries from recovering compensatory damages, *see* Part I(A)(3), the first two requirements for issuance of a permanent injunction are met. The only questions, then, provided this Court finds that the scope of the injunction requested is appropriate, are whether an equitable remedy is warranted given the balance of hardships and whether issuing an injunction would serve the public interest. First, issuing an injunction would not pose an undue hardship on Respondents because limiting solitary confinement would in fact advance important institutional policy goals. And second, issuing an injunction would serve the public interest because it would further policy goals that are important to society.

1. On balance, the requested limitation does not place an undue hardship on the Prison because it would advance important penal interests that the use of solitary confinement in fact fails to serve.

Limiting the use of solitary confinement places no undue burden on Respondents, particularly as compared to the harm and risk of harm the practice poses to Petitioners. This is supported by several prison systems changing their policies to restrict the use of solitary confinement. *See supra*, Part I(A)(2).

The unchecked use of solitary confinement fails to advance important penal interests, such as prison safety and fiscal policy. For example, studies show that inmates in disciplinary segregation reported more "feelings, thoughts, and actions of rage, anger, and aggression than [] the general prison population[.]" Smith, *supra*, at 455. Additionally, empirical evidence "does not show that solitary confinement reduces institutional violence." Bennion, *supra*, at 48. For example, a 2006 study found that solitary confinement "had no effect on prisoner-on-prisoner violence in Arizona, Illinois, and Minnesota and only limited effect on prisoner-on-staff violence in Illinois, no impact in Minnesota, and caused an increase in such violence in Arizona." *Id.* Likewise, a study in California found the use of solitary confinement was linked to "increased violence levels." *Id.*

On the other hand, prison reforms limiting the use of solitary confinement have either not impacted or decreased institutional violence levels. *Id.* For instance, Maine witnessed no increase in violence after eliminating 70% of its solitary units, and Mississippi saw a 50% decrease in violence after eliminating most solitary confinement units. *Id.* Thus, restricting the use of solitary confinement will make the prison environment safer.

Solitary confinement is also far costlier than the alternatives. *Id.* at 47. For instance, in California the annual cost of keeping a single inmate in solitary confinement costs $71,000 to $78,000, while housing an inmate in the general population for a year costs approximately

$58,000. *Id.* at 47-48. In Arizona, the annual cost per inmate in solitary confinement is $50,000 compared to $20,000; in Maryland and Illinois, solitary confinement costs about three times more per inmate; in Ohio and Connecticut, solitary confinement costs about twice as much; and in Texas, the cost of solitary confinement is 45% higher. *Id.* at 48. In states that have restricted solitary confinement, costs have plunged. *State Reforms to Limit the Use of Solitary Confinement*, *supra*.

The high cost of solitary confinement has many sources. Most obviously, solitary confinement requires more space. It also requires more personnel, particularly because prisoners in solitary confinement cannot work, and therefore solitary confinement requires more prison staff for tasks such as cooking and cleaning. *Id.* Of course, the toll solitary confinement inflicts on inmates also means increased medical costs, *id.*, and inevitably, increased costs of litigation. Even if solitary confinement were cost-efficient, however, fiscal policy is not a basis for denying minimal life necessities in violation of the Eighth Amendment. Bennion, *supra*, at 48. Consider, for example, a prison citing cost-efficiency as justification for starving its inmates. *Id.*

This demonstrates why the lower courts erred in placing "undue emphasis on deference to penological needs." *See* R. at 24 (Rose, J., dissenting). Typically, under *Turner v. Safley*, 482 U.S. 78, 89 (1987), "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Importantly, this Court has intentionally never applied *Turner*'s "reasonably related" standard to Eighth Amendment cases. *Johnson v. California*, 543 U.S. 499, 511 (2005). "This is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment." *Id.* (citing *Spain v. Procunier*, 600 F.2d 189, 193-194 (9th Cir. 1979) (Kennedy, J.) ("[T]he full protections of the eighth amendment most certainly remain in force [in prison]. The whole point of the amendment is to protect persons convicted of crimes . . . Mechanical deference to the findings of state prison

officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary"). Because the limitation Petitioners seek will likely better serve penological needs than the use of solitary confinement, and because this Court owes no deference to prison officials in the Eighth Amendment context, the grant of Petitioners' injunction would not pose an undue hardship on Respondents.

2. The requested limitation serves the public interest because deterring constitutional violations and furthering rehabilitation efforts are important to society.

A bright-line rule limiting the use of solitary confinement would serve the public interest because it would address policy concerns that are important to society, such as the deterrence of constitutional violations and furtherance of rehabilitation efforts. Currently, when it comes to solitary confinement, the boundaries of the Eighth Amendment are unclear. *See generally Apodaca v. Raemisch,* 139 S. Ct. 5 (2018) (denying certiorari). A bright-line limitation, however, would establish institutionalized awareness of the parameters of the Eighth Amendment, and presumably, the amount of litigation arising out of solitary confinement would then be reduced. Respondents, however, would rather this Court maintain its current case-by-case approach to the constitutionality of solitary confinement, but a case-by-case approach is inefficient, opening the floodgates to litigation in federal court.

It is also in society's best interest to return rehabilitated prisoners to the community—indeed, rehabilitation is the chief aim of imprisonment, *see, e.g.*, 51 A.L.R. 3d 111(2b), n.86 (2018) (citing AM. CORR. ASS'N MANUAL OF CORR. STANDARDS (3d ed 1966)). Not only does prolonged solitary confinement not serve a rehabilitative purpose—it works against it, making society less safe. *See* Smith, *supra*, at 466 (discussing studies that revealed that inmates in solitary confinement "went insane instead of being reformed"); *see also generally* Haney, *supra*.

For instance, prolonged solitary confinement makes it nearly impossible for inmates to function in society once released from prison. Isolated inmates often develop "ways of being that are functional to surviving the asocial world of solitary confinement, but profoundly dysfunctional when these prisoners are returned to a mainline prison or released, as most of them are, into the free world where they now must interact effectively with others or risk permanent marginalization." *Reassessing Solitary Confinement*, *supra*, at 21. This "enforced asociality . . . can significantly impede their post-prison adjustment, raising important concerns about the effect of solitary confinement on recidivism and public safety." *Id.*

Inmates in solitary confinement are also more likely to reoffend when released to the community—as much as 35% more likely than those leaving the general population. Christie Thompson, *From Solitary to the Street: What happens when prisoners go from complete isolation to complete freedom in a day?*, THE MARSHALL PROJECT (June 11, 2015), https://www.themarshallproject.org/2015/06/11/from-solitary-to-the-street. Data from Connecticut in 2001 revealed that 66% of regular inmates confined in the general population were rearrested in three years, compared to "a staggering 92% of inmates who were kept in solitary confinement[.]" Anjali Tsui, *Does Solitary Confinement Make Inmates More Likely To Reoffend?*, PBS (Apr. 18, 2017), https://www.pbs.org/wgbh/frontline/article/does-solitary-confinement-make-inmates-more-likely-to-reoffend/.

For these reasons, issuing an injunction would not pose an undue hardship on Respondents and would serve the public interest. Thus, this injunction should issue.

3. Imposing limitations on solitary confinement is not uncharted territory for this Court, and the particular limitations requested are appropriate in scope.

Petitioners' request is within the power of the district court. First, this Court has already affirmed as unconstitutional a practice of solitary confinement exceeding 30 days. In *Hutto*, 437

U.S. 678, a case involving an Eighth Amendment challenge not to solitary confinement itself, but to deplorable prison conditions, this Court upheld a structural injunction prohibiting "punitive isolation" beyond 30 days to correct constitutional shortfalls. This Court reasoned, while indeterminate sentences to punitive isolation do not, without more, constitute cruel and unusual punishment, the "length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards." Here, this Court has the opportunity to define the boundaries of *Hutto* by determining the length of confinement appropriate to meet constitutional standards.

Second, while some courts have prohibited solitary confinement of particularly vulnerable classes of people such as the mentally ill, *see, e.g.*, *Madrid*, 889 F. Supp. 1146, and while some populations are at a greater risk of harm than others, *see, e.g.*, *Solitary Confinement of Juvenile Offenders*, JUVENILE JUSTICE REFORM COMMITTEE, AM. ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY (Apr. 2012), https://www.aacap.org/aacap/policy_statements/2012/solitary_confinement_of_juvenile_offenders.aspx (discussing the vulnerability of youth), the use of solitary confinement is pervasive in the United States, and no person is immune to the serious risks that it poses, *see generally* Haney, *supra*. Limitations on solitary confinement should therefore not be reserved only for exceptionally vulnerable classes of people or cases involving the most severe confinement conditions. Because of the objectively serious risks posed to every inmate and because the use of solitary confinement is so widespread, a broad structural injunction establishing a bright-line rule limiting the inhumane practice is appropriate in scope.

Because Petitioners have established a claim for cruel and unusual punishment under the *Farmer* test, and because the injunction requested is within the power of the district court, the requested injunction should issue.

II. THE USE OF SOLITARY CONFINEMENT ON ADOLESCENTS TRIED AND CONVICTED AS ADULTS, ABSENT ANY EXIGENCY, VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

"Nowhere is the damaging impact of incarceration on vulnerable children more obvious than when it involves solitary confinement." ROBERT L. LISTENBEE, JR., ET AL., REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, OFFICE OF JUVENILE JUSTICE & DELIQUINCY PREVENTION, U.S. DEP'T OF JUSTICE 178 (2012), https://www.justice.gov/defendingchildhood/cev-rpt-full.pdf. For the same reasons prolonged solitary confinement is unconstitutional for adults, *see supra*, Part I, prolonged solitary confinement is also unconstitutional for adolescents tried and convicted as adults.

Contemporary standards of decency, however, have evolved to recognize that adolescents are legally distinct and developmentally different from adults and thus require different treatment. Moreover, the deprivation of social interaction and environmental stimulation inherent in solitary confinement poses a risk of irreversible psychological, physical, and developmental harm to adolescent inmates. Viewed in the context of the evolving standards of decency, this deprivation is sufficiently serious under *Farmer*. Alternatively, because of the developmental differences between adults and adolescents, solitary confinement is a disproportionate response to adolescent inmates' offenses when not required by exigent circumstances.

Thus, Petitioners request a declaratory judgment that solitary confinement of adolescents, absent any exigency, violates the Eighth Amendment, as well as a permanent structural injunction imposing a strict prohibition against solitary confinement of adolescent inmates in the absence of exigent circumstances.

A. With adolescents, under either an evolving standards of decency or a proportionality analysis, this Court should find that *any* deprivation of social contact and environmental stimulation unjustified by exigent circumstances is "sufficiently serious."

As mentioned, the proper inquiry into whether a deprivation is sufficiently serious is whether the deprivation results in a risk so grave that exposure to that risk violates contemporary standards of decency. *Helling*, 509 U.S. at 36. In conducting this inquiry, again, this Court should look to recent evidence that provides a "significant and reliable objective index of contemporary values." *Gregg*, 428 U.S. at 181.

Here, what was discussed in Part I(A) also applies to the solitary confinement of adolescent inmates. As Petitioners will discuss below, however, the need for limitations on the solitary confinement of adolescent inmates is even more dire because, with adolescents, the risks of solitary confinement are exacerbated. Petitioners therefore urge this Court again to look to the emerging consensus among medical experts and professional organizations, state prison reform efforts, actions of the federal government, and the international law community, as well as the proportionality of the effects of solitary confinement of adolescents to the offense.

1. <u>There is an emerging consensus among medical experts and professional organizations that solitary confinement of adolescents poses serious risks of irreversible psychological, physical, and developmental harm and thus should be eliminated.</u>

As noted above, in determining whether treatment satisfies the objective prong of the *Farmer* test, this Court's current prevailing analysis of evolving standards of decency relies on reports from leading medical and professional organizations. *Moore*, 137 S. Ct. at 1041. "Substantially less data are available on the prevalence of segregation in juvenile facilities or on the psychological impact on individual teenage detainees[,]" but "[t]he empirical research on youths in solitary confinement . . . has been disquieting." Andrew B. Clark, *Juvenile Solitary Confinement as a Form of Child Abuse,* 45 J. AM. PSYCHIATRY LAW 350, 352 (2017).

The harms of prolonged solitary confinement are well recognized, and the American Academy of Child & Adolescent Psychiatry has noted that adolescents, due to their "developmental vulnerability," are at particular risk of harm. *Solitary Confinement of Juvenile Offenders*, *supra*. "Psychologically, children are different from adults, making their time spent in isolation even more difficult and the developmental, psychological, and physical damage more comprehensive and lasting." *Solitary Confinement (Isolation)*, NAT'L COMM'N ON CORR. HEALTH CARE, https://www.ncchc.org/solitary-confinement (last visited Dec. 30, 2018).

Solitary confinement can cause any inmate to become "disoriented and even frightened" by social interaction or lead to "intolerable levels of frustration that, for some, turns to anger and then even to uncontrollable and sudden outbursts of rage." Tamar R. Birckhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 13 (2015). Empirical data also show that solitary confinement correlates with "high rates of . . . post-traumatic stress disorder ('PTSD'), depression, and future criminal activity." *Id.* at 10.

These effects of solitary confinement are magnified in adolescent inmates. *See generally id.* This is partially attributed to the fact that rates of mental health disorders are already higher among incarcerated youth, with studies finding up to 70% of incarcerated adolescents satisfying the criteria for one mental health disorder, and many suffering from multiple disorders. *Id.* at 13. In addition, a 2002 U.S. Department of Justice investigation showed that adolescents "experience symptoms of paranoia, anxiety, and depression even after very short periods of isolation." LISTENBEE, *supra*, at 178. This could be because children "experience time differently—a day for a child feels longer than a day to an adult—and have a greater need for social stimulation." *Solitary Confinement (Isolation)*, *supra.*

As with adults, the harms that solitary confinement causes are not limited to psychological harms. But with adolescent inmates, this Court must consider both physical and developmental harms. For instance, incarcerated youth often experience "chronic hunger due to meals that are nutritionally inadequate for adolescents, stunting growth and causing hair and weight loss." *Id.* at 14. This is particularly a problem in solitary confinement because inmates in isolation are prohibited from supplementing their meals by purchasing food items from the facility's commissary. *Id.* Moreover, female adolescent inmates can suffer from amenorrhea (loss of menstruation) as a result of inadequate nutrition, stress, and trauma. *Id.*

When considering where adolescents are in their brain development, solitary confinement is particularly inappropriate. Placing adolescents in solitary confinement means "they have nothing to rely on but their own, underdeveloped internal mechanisms . . . making it impossible for them to develop a healthy functioning adult social identity." *Id.* at 17. One expert suggested that placing adolescents in solitary confinement is like "taking someone who's in the process of finding out who they are and twisting their psyche in a way that will make it very, very difficult for them to recover." *Id.* Essentially, isolation of adolescents is "likely to result in the formation of an adult personality that is cognitively and socially impaired, essentially depriving the individual of any chance of functioning normally in society." Anthony Gianetti, Note, *The Solitary Confinement of Juveniles in Adult Jails and Prisons: A Cruel and Unusual Punishment?,* 30 BUFF. PUB. INT. L.J. 31, 47 (2011).

The adolescent developmental stage is critical because it is a "crucial and necessary period of plasticity when brain circuitry and behavior are beginning to be established." *Id.* at 45. These changes in the brain occur in "brain regions associated with response inhibition, planning, the calibration of risk and reward, and emotion regulation." *Id.* This emotional and cognitive

maturation cannot occur in social isolation. *Id.* at 46. Because the adolescent brain is underdeveloped, the risk of irreversible harm from solitary confinement is especially great. *Id.* "Once the developmental window passes for a juvenile, the brain cannot go back and redevelop at some point in the future"—these effects are likely permanent. *Id.* at 46-47. This stunted development "fundamentally alters [] cognitive abilities" and "significantly impacts social relationships and social identity." *Id.* at 47.

Solitary confinement can even affect the development of future generations of adolescents. Evidence has shown that "harmful changes in the environment for those between ages eleven and twenty-four impede cognition and impact behavior." Birckhead, *supra*, at 54. "This, in turn, influences brain structure" and can impact not just the affected adolescent but potentially "the next generation":

> Environment affects the growth and development of brain cells, impacts the wiring of these cells, and affects which cells live or die. More importantly, it is possible for changes engendered by the environment to be passed genetically to the next generation by "epigenesis," the ability of cells to turn genes on and off in response to the environmental influences experienced by those cells. Thus, activities and experiences impact the development and functioning of the brain, not just during the adolescent years, but for the long term, with implications for future generations.

Id.

Adolescents in solitary confinement are also more likely to self-harm. For instance, a study of all acts of self-harm in the New York City jail system between 2010 and 2012 found a strong correlation between self-harm and age (younger than 19 years) and assignment to solitary confinement. Clark, *supra*, at 352. The authors of that study speculated that "many of the lower lethality acts of self-harm by younger inmates were performed in an attempt to avoid placement in the solitary unit, perhaps speaking to their level of desperation at the prospect of isolation." *Id.*

Most disturbingly, adolescents who spend extended periods in solitary confinement also "are among the most likely to attempt or actually commit suicide." LISTENBEE, *supra*, at 178; *see also Solitary Confinement of Juvenile Offenders*, *supra* ("the majority of suicides in juvenile correctional facilities occur . . . in solitary confinement"). One national study found that half of suicide victims in juvenile facilities "were in isolation at the time they took their own lives," and "62% of victims had a history of solitary confinement." *Id.* Likewise, in a review of 100 completed suicides in juvenile detention facilities, 50% occurred at a time when the juveniles were confined to their rooms, and yet only 17% of those youths were on suicide watch at the time of their deaths. Clark, *supra*, at 352.

Numerous professional organizations have recognized the serious and irreversible detrimental effects of solitary confinement on adolescents and called for its elimination or significant limitation. For example, the American Academy of Child & Adolescent Psychiatry, the "leading national professional medical association dedicated to treating and improving the quality of life for children, adolescents, and families," *About us*, AM. ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY, https://www.aacap.org/aacap/About_Us/Home.aspx (last visited Jan. 6, 2019), "opposes the use of solitary confinement in correctional facilities for juveniles." *Solitary Confinement of Juvenile Offenders*, *supra.* Similarly, the NCCHC has recommended a complete prohibition on the solitary confinement of juveniles. *Solitary Confinement (Isolation)*, *supra*.

Given that scientific evidence shows social contact and environmental stimulation are indeed minimal life necessities and the deprivation of such necessities has disastrous consequences on adolescent inmates' future health, and given various professional organizations have widely accepted this evidence, standards of decency have evolved to recognize that, for adolescents, any

deprivation of social contact and environmental stimulation is sufficiently serious. Thus, the objective prong of the *Farmer* test is met here.

2. States have already placed significant constraints on solitary confinement of adolescents, which also signifies that society has evolved and is continuing to evolve on this issue.

Again, in evaluating evolving standards of decency, this Court has historically looked to state trends as evidence of a national consensus. *See, e.g.*, *Atkins*, 536 U.S. at 315. Here, among states, there is an emerging national consensus against the solitary confinement of adolescents.

For instance, according to the National Conference of State Legislatures, 17 states limit or prohibit the solitary confinement of juveniles. Anne Teigen, "*States that Limit or Prohibit Juvenile Shackling and Solitary Confinement*" (Aug. 16, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/states-that-limit-or-prohibit-juvenile-shackling-and-solitary-confinement635572628.aspx. Another survey of juvenile justice systems reveals that 20 jurisdictions "prohibit terms of solitary confinement that exceed twenty-for hours." Birckhead, *supra*, at 39.

State courts are also becoming a force for reform efforts. *See, e.g.*, *State ex rel. K.W. v. Werner*, 242 S.E.2d 907, 916 (W. Va. 1978) ("Solitary confinement is not to be used as a routine disciplinary procedure, but only in instances when physical restraint and isolation of a juvenile are absolutely necessary to enable him to gain personal control of himself."); Consent Decree at 9, *C.B. v. Walnut Grove Corr. Auth.*, No. 3:10-cv-663 (S.D. Miss. Mar. 25, 2012) (prohibiting solitary confinement of children); Settlement Agreement at 2-3, *Katka v. Montana*, No. BDV 2009-1163 (D. Mont. Apr. 12, 2012) (limiting the use of solitary confinement).

These state reform efforts show state attitudes are evolving to recognize the sufficiently serious and irreversible harms to adolescent inmates posed by the deprivation of social contact and

environmental stimulation. These evolving standards prove the objective prong of the *Farmer* test is met under a state law analysis, in addition to and independent of the framework discussed above.

3. The federal government has already recognized the cruelty of solitary confinement of adolescents and has acted to address and prevent these ongoing harms.

As stated, in evaluating evolving standards of decency, courts also may look to federal law. *See Kennedy*, 554 U.S. at 423. As mentioned, the executive branch has made substantial efforts to limit solitary confinement, and those efforts have focused significantly on the use of the practice with adolescents. *See* U.S. DEP'T OF JUSTICE, U.S. DEP'T OF JUSTICE REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING (2016), https://www.justice.gov/archives/dag/file/815551/download. In 2016, the U.S. Department of Justice (the "Department") issued non-binding "Guiding Principles" or "best practices" for American correctional facilities. *Id.* at 94.

The Guiding Principles state "juveniles should not be placed in [segregated] housing" except "[i]n very rare situations . . . as a temporary response to behavior that poses a serious and immediate risk of physical harm to any person." *Id.* at 101. Even then, isolation "should be brief, designed as a 'cool down' period, and done only in consultation with a mental health professional." *Id.* The Department's firm stance against placing juveniles in solitary confinement is compelling and reflects the national trend toward prohibiting this practice. As mentioned previously, upon review of this report, President Obama announced that he would adopt the Department's recommendations, which include banning the solitary confinement of juveniles. Obama, *supra.* The Bureau of Prisons followed suit. *See* Press Release, *supra.*

In addition, as recently as this year, Congress has considered legislation that would prohibit the solitary confinement of adolescents. *See* S. 1917, 115th Cong. § 5045(b)(1) (2017). The Sentencing Reform and Corrections Act of 2017 prohibits solitary confinement at a juvenile

facility for discipline, punishment, retaliation, or any reason other than as a temporary response to "behavior that poses a serious and immediate risk of physical harm to any individual, including the covered juvenile[.]" *Id.* Although this legislation has not passed, Congress has proposed it twice in three years, the bill's language tracking with the executive branch's efforts to limit adolescent solitary confinement to exigent circumstances.

This movement on the federal front signifies that society's standards of decency have evolved to recognize that, with adolescent inmates, any deprivation of social contact and environmental stimulation is sufficiently serious. Thus, the objective prong of the *Farmer* test is met here, again in addition to and independent of the preceding analyses.

4. The international law community opposes solitary confinement of adolescents.

This Court has also referred to "the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'" *Roper*, 543 U.S. at 575 (citing *Trop*, 356 U.S. at 102-03). The global movement against solitary confinement of adolescents has grown, revealing that standards of decency have evolved.

For instance, the U.N. has taken a strong position against solitary confinement of juveniles. U.N. "treaty bodies consistently recommend that juvenile offenders, children or minors should not be subjected to solitary confinement." U.N. GEN. ASSEMB., INTERIM REPORT PREPARED BY THE SPECIAL RAPPORTEUR OF THE HUMAN RIGHTS COUNCIL ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 18 (2011), https://archive.org/stream/452639-un-report-on-torture/452639-un-report-on-torture_djvu.txt.

In addition, the Special Rapporteur[3] holds the view "the imposition of solitary confinement, of any duration, on juveniles is cruel, inhuman or degrading treatment and violates article 7 of the International Covenant on Civil and Political Rights and article 16 of the Convention against Torture." *Id.* at 21. The Special Rapporteur also recommends that nations "abolish the use of solitary confinement for juveniles and persons with mental disabilities" and that nations take disciplinary measures "that do not involve the use of solitary confinement." *Id.* at 23.

Moreover, the U.N. Rules for the Protection of Juveniles Deprived of their Liberty "establish minimum standards for the protection of juveniles in correctional facilities." *Solitary Confinement of Juvenile Offenders*, *supra.* In 1990, the U.N. General Assembly approved a resolution that specifically prohibits solitary confinement of juvenile offenders, which the United States supported. *Id.* Section 67 states, "All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, *closed or solitary confinement* or any other punishment that may compromise the physical or mental health of the juvenile concerned." *Id.* (emphasis added).

This consensus among the international law community compels this Court to find that standards of decency have evolved to recognize that, with adolescent inmates, the deprivation of social contact and environmental stimulation is sufficiently serious. Thus, the objective prong of the *Farmer* test is met here as well.

[3] A Special Rapporteur is an independent expert appointed by the U.N. to examine and report on a specific human rights issue. *Special Rapporteur on the right to privacy*, OFFICE OF THE HIGH COMMISSIONER, U.N. HUMAN RIGHTS, https://www.ohchr.org/en/issues/privacy/sr/pages/srprivacyindex.aspx (last visited Dec. 30, 2018).

5. Alternatively, independent of the evolving standards of decency analysis, solitary confinement of adolescents, from a proportionality perspective, is sufficiently serious.

The Eighth Amendment "prohibits penalties that are grossly disproportionate to the offense." *Weems*, 217 U.S. at 367. Thus, in some instances, this Court has looked not to evolving standards of decency, but to the proportionality of the punishment to the offense. *See Graham v. Florida*, 560 U.S. 48, 59 (2010); *Montgomery v. Louisiana*, 136 S. Ct. 718, 726 (2016) (applying the proportionality analysis to sentencing juvenile offenders to life without parole).

Solitary confinement of adolescent inmates, as with adult inmates, is disproportionate to many inmates' offenses. With adolescents, however, this disproportionality is exacerbated both in effect and frequency. Because adolescents developmentally differ from adults, the effects of solitary confinement are magnified. *See id.* at 68 ("[D]evelopments in psychology and brain science continue to show fundamental difference between juvenile and adult minds."). Adolescents also are placed in the SHU for disciplinary violations, including for minor infractions, at a higher rate than adults. R. at 5.

For these reasons alone, the deprivation of social contact and environmental stimulation is sufficiently serious. Thus, the objective prong of the *Farmer* test is met under a proportionality analysis, as well.

Because this Court's objective inquiry under *Farmer* is met—under any of the five frameworks discussed—as a matter of law, prolonged solitary confinement violates the Eighth Amendment's prohibition against cruel and unusual punishment. Thus, the lower court's grant of summary judgment was in error.

B. Because Petitioners have established a cognizable Eighth Amendment Claim, an injunction imposing a strict prohibition, absent any exigency, on solitary confinement of adolescent inmates is appropriate.

Issuing a permanent structural injunction here is within the federal court's equitable power. To prevail on a claim for a permanent injunction, a plaintiff need only show: (1) he has suffered (or will suffer) an irreparable harm; (2) remedies available at law are inadequate; (3) an equitable remedy is warranted, considering the balance of hardships between the parties; and (4) issuing the injunction would serve the public interest. *Ebay Inc.*, 547 U.S. at 391. A court may issue a structural injunction as appropriate, as long as the scope of the injunction fits the nature and scope of the constitutional violation alleged. *See generally Lewis*, 518 U.S. 343. And as mentioned, a court can enjoin behavior that is itself lawful, if doing so would remedy a resulting constitutional violation. *See generally Hutto*, 437 U.S. 678.

Because solitary confinement for any length of time poses an objectively serious risk of harm to adolescents, and especially because the PLRA precludes prisoners with solely mental or emotional injuries from recovering compensatory damages, *see supra*, Part I(A)(3), the first two requirements for issuing a permanent injunction are met. The only questions, then, provided this Court finds the scope of the requested injunction appropriate, are whether an equitable remedy is warranted given the balance of hardships and whether the issuance of an injunction would serve the public interest. First, issuing an injunction would not pose an undue hardship on Respondents because limiting the solitary confinement of adolescents would in fact advance important institutional policy goals. Second, issuing an injunction would serve the public interest because it would further policy goals that are important to society.

1. On balance, the requested limitation does not place an undue hardship on the prison because it would advance important penal interests that solitary confinement in fact fails to serve.

For the same reasons cited above, *see supra*, Part I(B)(1), prohibiting solitary confinement of adolescent inmates in non-exigent circumstances places no undue burden on Respondents, particularly as compared to the harm and risk of harm the practice poses to adolescents. Petitioners concede the grant of an injunction would impose *some* hardship on the Prison, but in the long-term, the benefits of limiting solitary confinement of adolescents to exigent circumstances far outweigh the burden. *See, e.g.*, WILL HARRELL, ET AL., THE OHIO MODEL: A REPORT ON THE TRANSFORMATIONAL REFORM OF THE OHIO DEPARTMENT OF YOUTH SERVICES, 2007-2015 (2015), https://www.justice.gov/opa/file/799466/download.

For instance, in Ohio, following a court decision that held certain prison conditions, including some uses of solitary confinement, unconstitutional, the Department of Youth Services ("DYS") abolished disciplinary segregation. *Id.* at 18. Before this policy change, a 2007 investigation found that consequences for adolescents who violated facility rules were "excessively punitive" and "not effective at making the facility safer for youth and staff." *Id.* at 17. DYS also placed adolescents in seclusion "too frequently and for far too long" by not properly monitoring the use of solitary confinement. *Id*. Today, disciplinary sanctions involve restricting adolescent inmates' access to privileges and, in some cases, adding days to their time in custody. *Id.* A new grievance process has reduced youth-on-youth violence, *id.* at 8, improving institutional safety.

Sacramento County, California has also recently developed alternatives to the solitary confinement of adolescents, including "staff training, new youth recreational programs, and a multi-sensory de-escalation room (MSDR), dubbed 'the Cove' by staff and the youth they serve."

California, STOP SOLITARY FOR KIDS, http://www.stopsolitaryforkids.org/california/ (last visited Jan. 6, 2019). Since the reforms, the facility has had an "all-time record low for the fewest uses of force[,]" *id.*, again increasing institutional safety. Because the limitation Petitioners seek will likely better serve penological needs than the use of solitary confinement, the grant of Petitioners' injunction would not pose an undue hardship on Respondents.

2. The requested limitation serves the public interest because protecting vulnerable youth and furthering rehabilitation efforts are important to society.

A bright-line rule eliminating the solitary confinement of adolescents, absent exigent circumstances, would serve the public interest by addressing policy concerns that are important to society. Along with deterring constitutional violations, *see supra*, Part I(B)(2), the requested remedy would also protect vulnerable youth and promote their rehabilitation.

As mentioned, research has shown that adolescents that spend time in solitary confinement suffer psychological, developmental, and physical harms that may be irreversible. "Isolation of juveniles is likely to result in the formation of an adult personality that is cognitively and socially impaired, essentially depriving the individual of any chance of functioning normally in society." Gianetti, *supra*, at 47. It is in society's best interest to ensure that adolescents instead become healthy and productive adults.

It is also in society's best interest to return rehabilitated prisoners to the community. To begin, according to the Office of Juvenile Justice and Delinquency Prevention, there is little data available about recidivism rates of juveniles, due to tracking difficulties and privacy concerns. *See generally* NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT (2014). Even so, the available data show "[j]uveniles reoffend less if they are placed in less restrictive environments." Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 518 (2014).

For these reasons, issuing an injunction would not pose an undue hardship on Respondents and would serve the public interest. Thus, an injunction should issue.

3. Imposing a different standard for solitary confinement of adolescent inmates adheres to this Court's treatment of adolescents in the criminal context.

Throughout history, courts have consistently recognized that adolescents are legally distinct and developmentally different from adults and thus require different treatment under the law. *See generally* 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND. Over and over, this Court has applied that reasoning in the criminal context. *See Montgomery*, 136 S. Ct. 718 (Eighth Amendment life without parole analysis); *Miller v. Alabama*, 567 U.S. 460 (2012) (Eighth Amendment life without parole analysis); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (Fifth Amendment *Miranda* analysis); *Graham*, 560 U.S. 48 (Eighth Amendment life without parole analysis); *Roper*, 534 U.S. 551 (Eighth Amendment capital punishment analysis).

For instance, in *Roper v. Simmons*, 534 U.S. at 575, this Court held the Eighth Amendment prohibits sentencing juveniles to death for their crimes. This Court based its decision on trends in international and state law as well as medical science. *See id.* at 572-73, 575. This Court focused on three differences between adolescent and adult offenders. *Id.* at 569-70. First, anecdotal and empirical evidence confirmed that "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults" and that "these qualities often result in impetuous and ill-considered actions and decisions." *Id.* at 569. Second, this Court noted "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage")). This is due largely to the fact "juveniles have less control, or less experience with control, over their own environment." *Id.* (citing

Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003). Finally, this Court acknowledged that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Roper,* 543 U.S. at 570 (citing E. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)).

In *Miller v. Alabama*, 567 U.S. 460, 479 (2012), this Court held that the Eighth Amendment prohibited as cruel and unusual the imposition of mandatory minimum sentences to life without parole on juveniles. This Court followed its reasoning in *Roper*, having already determined that children constitutionally differ from adults for purposes of sentencing. *Id.* at 476.

In *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011), this Court determined that age was not only relevant in a sentencing context but was also relevant in a *Miranda* custody analysis, "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer." Again, this Court relied on medical science and its past decisions to hold that juveniles are constitutionally distinct from adult offenders. *Id.* at 275. This Court acknowledged "a reasonable child" being questioned by police "will sometimes feel pressured to submit when a reasonable adult would feel free to go." *Id.* at 272.

Perhaps most persuasive here, this Court noted that age is not just about chronology—age "is a fact that 'generates commonsense conclusions about behavior and perception.'" *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)). "Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge." *Id.* It is clear, therefore, that this reasoning . . . is relevant to the Eighth Amendment[.]" *Miller*, 567 U.S. at 473–74.

This Court continues to draw on what it called "commonsense conclusions" about children—conclusions that share an underlying assumption "that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *J.D.B*, 564 U.S. at 273 (citing 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND). "[T]he legal disqualifications placed on children as a class—*e.g.*, limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that *the differentiating characteristics of youth are universal*." *Id.* (emphasis added).

Because these characteristics in youth are always present, the Court's reasoning in *Roper* applies here, where adolescents are housed in prison with adults. That is, adolescents developmentally differ from adults—adolescents' brains are not as developed, they are immature and often irresponsible, and their personality traits are more transitory and less fixed—and thus courts treat them differently under the law. These fundamental differences between adolescents and adults remain constant and show precisely why the Prison's solitary confinement of adolescents is cruel and unusual punishment when unjustified by some exigency.

Because Petitioners have established a claim for cruel and unusual punishment under the *Farmer* test, and because the injunction requested is within the power of the district court, the requested injunction should issue.

CONCLUSION

For these reasons, this Court should reverse the holding of the Thirteenth Circuit and remand this case to the district court with instructions to issue the requested injunction.

Respectfully Submitted,

/s/ Team 233