No. 19-1291

In the Supreme Court of the United States

CHARLES HAMNER, PETITIONER,

v.

DANNY BURLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PROFESSOR JOHN F. STINNEFORD AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether qualified immunity is an affirmative defense that state actors must assert, as nine circuits hold, or whether federal appellate courts may raise the defense *sua sponte,* as three circuits hold.

2. Whether the Court should overrule *Pearson v. Callahan,* 555 U.S. 223 (2009), and hold that courts must first consider whether an official's conduct violated a constitutional right before determining whether an official is nonetheless not liable for violating the right because the right was not clearly established.

TABLE OF CONTENTS

Page

Interest of *Amicus Curiae* 1

Introduction and Summary of Argument 1

Argument 4

I. The Questions Presented Are Exceptionally Important 4

A. Qualified Immunity Doctrine Should Be Reformed to Recognize Liability in Cases Where Government Agents Violate the Constitution's Original Public Meaning 4

B. At Minimum, the Court Should Free Originalist Challenges to Solitary Confinement From *Pearson*'s "Constitutional Catch-22" 6

II. History Shows That the Underlying Eighth Amendment Violation Is Clear 10

A. Under Its Original Public Meaning, the Cruel and Unusual Punishments Clause Prohibits Punishments That Are Unjustly Harsh in Light of Longstanding Prior Practice 10

B. The History of Long-Term Solitary Confinement Demonstrates That the Practice Is Both "Unusual" and "Cruel" Within the Original Meaning of the Eighth Amendment 13

Conclusion 18

TABLE OF AUTHORITIES

Cases Page(s)

Aamer v. Obama,
742 F.3d 1023 (D.C. Cir. 2014) 8

Apodaca v. Raemisch,
139 S. Ct. 5 (2018) 9

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,
403 U.S. 388 (1971) 8

Bucklew v. Precythe,
139 S. Ct. 1112 (2019) 5, 11, 12

Camreta v. Greene,
563 U.S. 692 (2011) 5, 7, 9

Cty. of Sacramento v. Lewis,
523 U.S. 833 (1998) 7

Davis v. Ayala,
135 S. Ct. 2187 (2015) 1, 7, 9

Harden-Bey v. Rutter,
524 F.3d 789 (6th Cir. 2008) 8

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 5, 7

In re Medley,
134 U.S. 160 (1890) 3, 16, 17

Jamerson v. Heimgartner,
372 P.3d 1236 (Kan. 2016) 8, 9

Ogden v. Saunders,
25 U.S. (12 Wheat.) 213 (1827) 4

Pearson v. Callahan,
555 U.S. 223 (2009) 2, 5, 8

Porter v. Clarke (Porter I),
852 F.3d 358 (4th Cir. 2017) 9

Porter v. Clarke (Porter II),
923 F.3d 348 (4th Cir. 2019) 9

Cases—Continued Page(s)

Ruiz v. Texas,
137 S. Ct. 1246 (2017) 9

Spencer v. Haynes,
774 F.3d 467 (8th Cir. 2014) 8

Trop v. Dulles,
356 U.S. 86 (1958) 4

Wilkinson v. Austin,
545 U.S. 209 (2005) 8

Young v. Armontrout,
795 F.2d 55 (8th Cir. 1986) 8

Statutes & Rules

Va. Decl. of Rts. § 9 (1776) 10

An Act Declaring the Rights and Liberties of the Subject and Setleing the Succession of the Crowne (1689), in 6 *The Statutes of the Realm* (1819) 10

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Aaron L. Nielson & Christophe J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1 (2015) 5

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Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 L. & Soc. Inquiry 1604 (2018) 13, 15

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John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 Wm. & Mary L. Rev. 531 (2014) 12

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John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441 (2017) 11

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Francis C. Gray, *Prison Discipline in America* (London, John Murray 1847).....15

Gershom Powers, *A Brief Account of the Construction, Management, and Discipline &c. &c. of the New-York State Prison at Auburn* (1826).....14, 15

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae John F. Stinneford is a law professor at the University of Florida Levin College of Law who has written extensively on the history and original meaning of the Eighth Amendment. His published works include: *Is Solitary Confinement a Punishment?*, Nw. U. L. Rev. (forthcoming 2020), *draft available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3605517; *Experimental Punishments*, 95 Notre Dame L. Rev. 39 (2019); *The Original Meaning of 'Cruel'*, 105 Geo. L.J. 441 (2017); and *The Original Meaning of 'Unusual': The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739 (2008). Parts of this brief have been drawn and adapted from the above-referenced articles. Professor Stinneford submits this brief to provide the Court with historical context regarding the original public meaning of the Cruel and Unusual Punishments Clause of the Eighth Amendment, and regarding the practice of long-term solitary confinement in the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents constitutional questions of exceptional importance regarding the permissible limits of the practice of long-term solitary confinement under the Eighth and Fourteenth Amendments.[2] This brief is intended (1) to explain that qualified immunity doctrine

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation of or submission of this brief. No one other than the *amicus curiae* or his counsel made a monetary contribution to the preparation or submission of this brief. The parties were given timely notice and consented to this filing.

[2] Although the panel decision used the term "administrative segregation," this brief uses the phrase "solitary confinement." *See Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring)

should be reformed to protect constitutional rights clearly established as a matter of the Constitution's original public meaning; and (2) to provide historical context for the Court as it considers whether to grant the petition in this case.

As an initial matter, *Pearson*'s qualified immunity analysis is upside-down. *Pearson v. Callahan*, 555 U.S. 223 (2009). It favors recent judicial decisions (even incorrect ones) over the Constitution's indisputably clear text and history. That is perverse. Qualified immunity can serve its purpose of protecting public officials while still ensuring the protection of rights clearly established by the original public meaning of the Constitution's text. At minimum, this Court should grant certiorari to hold that in determining whether long-term solitary confinement violates a "clearly established" right, the court below should have addressed the original public meaning of the Eighth Amendment rather than focusing exclusively on recent precedent that fails to take this meaning into account.

As a matter of original public meaning, the long-term solitary confinement to which Charles Hamner was subjected violates the Eighth Amendment. The Cruel and Unusual Punishments Clause was originally understood to prohibit cruel innovation in punishment. Under the original meaning of the Clause, the word "cruel" means "unjustly harsh" and the word "unusual" means "contrary to long usage." Taken as a whole, the Clause was originally understood to prohibit punishments that are unjustly harsh in light of longstanding prior practice. On this account, a punishment can only be considered "usual"—

(observing that "[a]dministrative segregation … is better known [as] solitary confinement'").

that is, firmly part of the constitutional tradition—if it enjoys universal, public reception over a very long period of time.

Judged against this original meaning, the government's actions in this case clearly violated the Eighth Amendment. The troubled history of long-term solitary confinement—a history marked by experimentation and resounding penological failure—demonstrates that it is not a "usual" method of punishment within the original meaning of the Cruel and Unusual Punishments Clause, but a cruel and unusual one. Long-term solitary confinement has not enjoyed anything close to "long usage." It enjoyed a brief vogue for several decades in the nineteenth century but was abandoned because its effects were too harsh and contrary to American punishment traditions. As this Court noted in *In re Medley* (1890), the result of the nineteenth century experiment with long-term solitary confinement was that "[a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community …. [S]ome 30 or 40 years ago … solitary confinement was found to be too severe."[3] Accordingly, the controversial reintroduction of the practice of long-term solitary confinement in the 1980s and 1990s represents the very sort of cruel innovation in punishment that the Cruel and Unusual Punishments Clause, on its original meaning, was publicly understood to prohibit.

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[3] *In re Medley*, 134 U.S. 160, 168 (1890).

ARGUMENT

I. The Questions Presented Are Exceptionally Important

A. Qualified Immunity Doctrine Should Be Reformed to Recognize Liability in Cases Where Government Agents Violate the Constitution's Original Public Meaning

Originalism is now widely accepted by scholars and jurists as the foremost method of constitutional interpretation—but this Court's qualified immunity precedents have stunted its impact on the law today. Although courts have sought to ascertain the original meaning of the Constitution since the founding era, *see, e.g.*, *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J.) ("To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them nor contemplated by its framers, is to repeat what has already been said."), constitutional law became unmoored from this practice during the twentieth century. *See* Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 Studies in American Political Development 191–247 (1997). This has been particularly true with respect to this Court's approach to the Cruel and Unusual Punishments Clause, which explicitly disclaimed for half a century any reliance on the original meaning of the Clause, focusing instead on the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Over the past few decades, judges, practitioners, and academics have sought to recover a jurisprudence based

on the original meaning of the Constitution. *See, e.g*, *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (deciding case with reference to the "original and historical understanding of the Eighth Amendment" rather than "evolving standards of decency"). But Originalism's tangible impact shaping adjudication of constitutional cases will remain stunted so long as this Court's qualified immunity doctrine allows judges to avoid answering constitutional questions in damages cases. This is no trivial matter. A substantial number of constitutional questions, including the Eighth Amendment issue at the heart of this case, *see infra* I.B., arise almost exclusively in cases where a qualified immunity defense is available. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Entire subsets of constitutional law thus remain undeveloped and untethered from the Constitution's original meaning as a consequence of *Pearson's* holding that courts may avoid deciding constitutional questions once a defendant has invoked qualified immunity as a defense. By revisiting *Pearson*, this Court can ensure that the "vindication of constitutional guarantees" is shaped by the Constitution's original meaning. *Id.*

Pearson leaves little room for this Court to recover and enforce the original meaning of the Constitution in the areas in which this methodology was largely abandoned during the early twentieth century. This Court has acknowledged that *Pearson* "may frustrate 'the development of constitutional precedent.'" *Camreta v. Greene*, 563 U.S. 692, 706 (2011) (quoting *Pearson*, 555 U.S. at 237). Once a theoretical concern, "constitutional stagnation" now has a substantial empirical foundation—with at least one study showing that federal courts of appeals exercise their discretion under *Pearson* to avoid deciding constitutional issues *most of the time*. Aaron L. Nielson & Christophe J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 33-34 (2015); *see* Pet. at 16. And as courts

continue to sidestep constitutional questions, they narrow the window through which they can recover the principles that the Constitution originally embodied. The upshot is that incorrect precedents—and the interpretive methodologies underlying them—dominate constitutional law in qualified immunity cases.

This is precisely backward. It cannot be correct that qualified immunity protects a panoply of rights newly discovered by courts in the 20th century, but fails to protect a panoply of rights clearly established by the Constitution's original public meaning. At minimum, government officials should respect those rights understood to be guaranteed to every person by the constitution as it was originally understood. Qualified immunity should at least be reformed to ensure that government agents have no immunity where they violate rights clearly established by the original meaning of the Constitution.

B. At Minimum, the Court Should Free Originalist Challenges to Solitary Confinement From *Pearson*'s "Constitutional Catch-22"

As this brief explains, *infra* Part II, long-term solitary confinement clearly violates the original public meaning of the Eighth Amendment because it is unjustly harsh in light of longstanding prior practice. The Court should—at the very least—grant review in this case to clarify that the court below should reach the question whether solitary confinement violates the Constitution's original public meaning before deciding whether to dismiss the case on the basis of qualified immunity, rather than relying on solely non-Originalist precedents to duck the proper constitutional inquiry. By requiring lower courts to *at least* consider the Constitution's original public meaning before granting qualified immunity, this Court can free constitutional adjudication from *Pearson*'s trap, in which rights that are clearly established by the Constitution's text are

treated as though they were not clearly established because a court has not written an opinion saying so.

This Court has recognized that, in some "situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814. Solitary confinement is one such situation. For individuals like Mr. Hamner who seek to challenge their solitary confinement, overcoming qualified immunity in a civil rights action is the *only* realistic avenue for Eighth Amendment vindication. Accordingly, "qualified immunity … threatens to leave standards of official conduct permanently in limbo." *Camreta*, 563 U.S. at 706. And with those standards, it threatens to leave the original (and the correct) meaning of the Eighth Amendment perpetually unenforced.

First, an individual's Eighth Amendment challenge to solitary confinement must be collateral. Unlike other constitutional rights, the issue cannot "arise in a case in which qualified immunity is unavailable—for example, 'in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding.'" *Camreta*, 563 U.S. at 706 n. 5 (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998)). Rather, as Justice Kennedy recognized, "[t]here is no accepted mechanism … for [sentencing judges] to take into account, when sentencing a defendant, whether the time in prison will or should be served in solitary." *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

Because solitary confinement is not part of a prisoner's judicially imposed sentence, there are no avenues for direct judicial review. Thus, familiar procedural vehicles such as suppression motions, *Batson* challenges, or competence hearings serve no use protecting an individual's Eighth Amendment rights. *See Lewis*, 523 U.S. at 841 n.5 (noting certain avenues for judicial review "would

not necessarily be open"). Instead, the decision to impose solitary confinement begins and ends with prison officials.[4]

Second, in the Eighth Circuit—and in a majority of other circuits—habeas corpus is not available to challenge a prisoner's "conditions of confinement." *See Spencer v. Haynes*, 774 F.3d 467, 470-71 (8th Cir. 2014) (acknowledging circuit split and holding that "a habeas petition is not the proper claim to remedy" a conditions-of-confinement injury).[5] This means that the only *possible* collateral remedy is a civil rights action, in which the official (or, as here, the court) is likely to raise a qualified immunity defense. *See id.* at 468 (liberally construing habeas petition as claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)); *see Young v. Armontrout*, 795 F.2d 55, 56 (8th Cir. 1986) (construing habeas petition as a complaint filed under 42 U.S.C. § 1983). To reach the merits of an Eighth Amendment solitary confinement claim, therefore, a prisoner will almost invariably need to grapple with *Pearson* before presenting the merits of a solitary confinement grievance.

Third, in suits seeking non-monetary relief, mootness is an ever-present obstacle to judicial review. In *Jamerson v. Heimgartner*, 372 P.3d 1236, 1238 (Kan. 2016), for example, the petitioner litigated his case through the Kansas court system while he remained in solitary confinement. He was released to the general prison population

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[4] Some cases have acknowledged that the conditions and duration of solitary confinement can create a liberty interest requiring minimal due process protection. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005); *Harden-Bey v. Rutter*, 524 F.3d 789, 795 (6th Cir. 2008). Those cases do address the Eighth Amendment question presented here.

[5] *But see Aamer v. Obama*, 742 F.3d 1023, 1035-37 (D.C. Cir. 2014) (outlining circuit split and holding that conditions-of-confinement claims may be brought in habeas corpus petitions).

only *after* the Kansas Supreme Court granted his petition for review. *See id.* Acknowledging that petitioner's release mooted the case and that its opinion was pure dictum, the court nonetheless took the opportunity to "remind tribunals that isolation from human contact may constitute an especially harsh condition of incarceration." *Id.* at 1241.

In other cases, the question of mootness—and the related doctrine of voluntary cessation—is hotly contested. *See Porter v. Clarke (Porter I)*, 852 F.3d 358, 360 (4th Cir. 2017) (reversing because "Defendants' voluntary cessation of the challenged practice has not yet mooted this action"). And for prisoners awaiting capital sentences, their execution may, of course, negate their claims. *See Porter v. Clarke (Porter II)*, 923 F.3d 348, 354 n.1 (4th Cir. 2019) (noting that one of the plaintiffs had been executed while the case was pending).

Given these procedural realities, it should come as no surprise that this Court has never explored the Eighth Amendment's original meaning in the context of solitary confinement. *See Camreta*, 563 U.S. at 706 n.5 (noting avenues for constitutional challenges that are unavailable for prisoners' Eighth Amendment solitary confinement claims). Instead, when members of this Court have expressed concerns about solitary confinement in recent years, they have done so only in cases where the issue was not squarely presented. *See Apodaca v. Raemisch*, 139 S. Ct. 5, 8 (2018) (Sotomayor, J., statement respecting denial of certiorari); *Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting from denial of stay of execution); *Ayala*, 135 S. Ct. at 2208-10 (Kennedy, J., concurring).

II. History Shows That the Underlying Eighth Amendment Violation Is Clear

A. Under Its Original Public Meaning, the Cruel and Unusual Punishments Clause Prohibits Punishments That Are Unjustly Harsh in Light of Longstanding Prior Practice

The text of the Eighth Amendment—"[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"—was drawn from the Virginia Declaration of Rights of 1776[6] and the English Bill of Rights of 1689.[7] Historical evidence shows that the drafters and ratifiers of all three provisions considered themselves to be restating a longstanding common law prohibition that was common to both England and the United States. Under its original meaning, the Cruel and Unusual Punishments Clause prohibits cruel innovations—punishments that are unjustly harsh in light of longstanding prior practice. The Clause is premised on the idea that the longer a punishment is used, and the more universally it is received, the more likely it is to be just, reasonable, and to enjoy the consent of the people. Conversely, new punishment practices that are significantly harsher than the baseline established by longstanding prior practice are cruel and unusual because they are unjust in light of the traditional practices they replace or supplement. *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739 (2008) [Stinneford, *Unusual*].

In the context of the Eighth Amendment, the word "unusual" was a term of art derived from the common law.

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[6] Va. Decl. of Rts. § 9 (1776).

[7] An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne (1689), in 6 *The Statutes of the Realm* 142, 143 (1819).

Although most lawyers today think of the common law as judge-made law, it was traditionally described as the law of "custom" and "long usage." *See* John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441, 468-71 (2017) [Stinneford, *Cruel*]; Stinneford, *Unusual* at 1814. The core idea was that a practice or custom could attain the status of law if it were universally received ("used") throughout the jurisdiction for a very long time—for these characteristics showed that it was just, reasonable, and enjoyed the stable, multi-generational consent of the people.

Conversely, Americans in the late 18th and early 19th centuries described as 'unusual' governmental actions that had two qualities: (1) They were new (or revived old practices that had "'fall[en] completely out of usage for a long period of time,'" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019) (citing and quoting Stinneford, *Unusual*, at 1770-17, 1814)); and (2) they undermined common law rights established through long usage. In 1769, for example, the Virginia House of Burgesses described Parliament's attempt to revive a long-defunct statute that would permit the trial of American protesters in England—in derogation of cherished rights to venue and vicinage—as "new, *unusual*, … unconstitutional and illegal." Journals of the House of Burgesses, 1766-1769, at 215 (John Pendleton Kennedy ed., 1906) (emphasis added). Likewise, in the constitutional ratification debates, Patrick Henry complained that the entire federal government would be "unusual" because Congress would not be required to respect common law rights. 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, at 172 (Jonathan Elliot ed., Philadelphia, J. B. Lippincott & Co. 2d ed. 1881) ("Were your health in danger, would you take new medicine? I need not make use of these exclamations: for every member in this

committee must be alarmed at making new and unusual experiments in government."). The oft-repeated Anti-Federalist complaint that the Constitution did not require the government to protect common law rights led directly to the adoption of the Bill of Rights, which enshrined some of those rights—including the right against cruel and unusual punishments—in the constitutional text.

The Eighth Amendment does not prohibit all new punishments, nor does it permit all old ones. Under the original public meaning of the Cruel and Unusual Punishments Clause, a new punishment practice that is not significantly harsher than the traditional practices it replaces is not cruel and unusual. John F. Stinneford, *Experimental Punishments*, 95 Notre Dame L. Rev. 39, 42 (2019) [Stinneford, *Experimental Punishments*]. Similarly, an old punishment practice that falls out of usage for multiple generations is no longer "usual" because it has not withstood the test of time. *See Bucklew*, 139 S. Ct. at 1123-24 (discussing original meaning of "cruel and unusual" and noting that "unusual" government actions included those that have "fall[en] completely out of usage for a long period of time" (quoting Stinneford, *Unusual* at 1770-71, 1814); *see also* John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 Wm. & Mary L. Rev. 531, 538 (2014) ("If a once traditional punishment falls out of usage long enough to show a stable, multigenerational consensus against it, this punishment may appropriately be called cruel and unusual."). If such a punishment is later revived, it is a new punishment and is to be judged against the tradition as it has survived to today.

With respect to new punishment practices, usage over time reveals two types of information that may not be apparent at the time the punishment is adopted. First, it shows how society responds to the punishment over time. Some punishments achieve universal reception and

maintain this status over a period of numerous generations; others do not. Second, usage over time reveals characteristics of the punishment that may not be obvious at the time of adoption—particularly, the harshness of the suffering the punishment inflicts relative to the harshness of the traditional punishments it replaced. Stinneford, *Experimental Punishments* at 45.

B. The History of Long-Term Solitary Confinement Demonstrates That the Practice Is Both "Unusual" and "Cruel" Within the Original Meaning of the Eighth Amendment.

Solitary confinement has never become a "usual" punishment. Rather, it is a failed experiment that enjoyed a vogue for several decades in the nineteenth century before being largely abandoned due to its cruel effects. It survived at the very margins of American penal practice before being revived with the rise of "supermax" prisons in the 1980s. After thirty-plus years of renewed experimentation, we have learned once again of its extraordinarily cruel effects on prisoners' mental and physical health.

The first prisons were built in the 1790s. *See* Ashley T. Rubin & Keramet Reiter, *Continuity in the Face of Penal Innovation: Revisiting the History of American Solitary Confinement*, 43 L. & Soc. Inquiry 1604, 1612 (2018) [Rubin & Reiter, *Continuity*]. Initially, solitary confinement was not a dominant feature of incarceration. Over time, however, prison reformers started turning toward the idea of solitary confinement for large numbers of prisoners on the theory that the practice might foster rehabilitation and help ensure order in prison.

Over the course of the nineteenth century, prison achieved universal reception, as previously dominant corporal and shaming punishments fell away. Solitary confinement, on the other hand, enjoyed a brief vogue and was then rejected because of its cruel effects.

In 1821, New York engaged in a major experiment in systematic long-term solitary confinement at its Auburn State Prison. The state legislature passed an act authorizing prison inspectors to "select a class of convicts to be composed of the oldest and most heinous offenders, and to confine them constantly in solitary cells" in the hope that these offenders would be reformed. Gershom Powers, *A Brief Account of the Construction, Management, and Discipline &c. &c. of the New-York State Prison at Auburn* 32 (1826) [Powers, *Account*]. The result of this experiment was devastating. In their famous study of the American penitentiary system, Beaumont and Tocqueville described the Auburn experiment as follows:

> This trial, from which so happy a result had been anticipated, was fatal to the greater part of the convicts: in order to reform them, they had been submitted to complete isolation; but this absolute solitude, if nothing interrupt it, is beyond the strength of man; it destroys the criminal without intermission and without pity; it does not reform, it kills.
>
> The unfortunates, on whom this experiment was made, fell into a state of depression, so manifest, that their keepers were struck with it; their lives seemed in danger, if they remained longer in this situation; five of them, had already succumbed during a single year; their moral state was not less alarming; one of them had become insane; another, in a fit of despair, had embraced the opportunity when the keeper brought him something, to precipitate himself from his cell, running the almost certain chance of a mortal fall.

G. de Beaumont & A. de Toqueville, *On the Penitentiary System in the United States, and Its Application in France* 5 (1833) (citations omitted); *see also* Powers, *Account*, at 36 ("[O]ne [prisoner was] so desperate, that he sprang from his cell, when his door was opened, and threw

himself from the fourth gallery, upon the pavement …. Another beat and mangled his head against the walls of his cell, until he destroyed one of his eyes."). The results of this initial experiment were so dire that New York dropped it after less than two years and gave most of the prisoners pardons. *Id.*

Problems similar to those that occurred at Auburn arose several years later in the Pennsylvania prison system, which had also attempted total isolation of prisoners. Rubin & Reiter, *Continuity*, at 1614-17. Prisoners quickly fell into poor health and had to be released from their cells. *Id.* By the late 1830s, reports started surfacing that the system was causing "hallucinating prisoners, 'dementia,' and 'monomania.'" Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 457 (2006) [Smith, *Effects*]. In 1847, Francis C. Gray compared an Auburn-model prison in Charlestown to the Eastern State Penitentiary at Cherry Hill, and noted that both death and insanity rates at Cherry Hill far outstripped those seen at Charlestown. *See* Francis C. Gray, *Prison Discipline in America* 106, 109 (London, John Murray 1847). He concluded that "it appears that the system of constant separation [according to the Pennsylvania plan] … even when administered with the utmost humanity, produces so many cases of insanity and of death as to indicate most clearly, that its general tendency is to enfeeble the body and the mind." *Id.* at 181.

Other states that instituted long-term solitary confinement experienced problems similar to those described above. For example, the physician for the New Jersey Penitentiary, which initially followed the Pennsylvania model, reported that total isolation led to "'many cases of insanity.'" Smith, *Effects*, at 459 (quoting *Eighteenth Report*, *in* 2 *Reports of the Prison Discipline Society, Boston* 300 (Boston, T. R. Marvin 1855)).

By the 1860s, the tide had turned against long-term solitary confinement. Penologists rejected the idea that either isolation or silence could assist in the reform of prisoners. *See* David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, *in The Oxford History of the Prison* 111, 124-25 (Norval Morris & David J. Rothman eds., 1995); Smith, *Effects*, at 465. Rather, such practices were seen as pointless exercises that significantly harmed the well-being of prisoners for no good reason. Thus, "[t]he founding nation of the modern prison systems—the United States—was among the first to abandon large-scale solitary confinement." Smith, *Effects*, at 465; *see also* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change 477, 487 (1997) [Haney & Lynch, *Regulating*] (noting that by the early twentieth century, the use of long-term solitary confinement "in actual practice … had largely ended"). "[B]y the turn of the nineteenth century, the experiment with widespread use of solitary appeared to be over." Alexander A. Reinert, *Solitary Troubles*, 93 Notre Dame L. Rev. 927, 939 (2018).

The history of the practice of long-term solitary confinement in the United States demonstrates that it is not a "usual" method of punishment within the original meaning of the Eighth Amendment but is cruel and unusual. *See* Stinneford, *Experimental Punishments* at 44-46; John F. Stinneford, *Is Solitary Confinement a Punishment?*, Nw. U. L. Rev. (forthcoming 2020), [Stinneford, *Punishment*], *draft available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3605517; *see also, e.g.*, Merin Cherian, Note, *Cruel, Unusual, and Unconstitutional: An Originalist Argument for Ending Long-Term Solitary Confinement*, 56 Am. Crim. L. Rev. 1759, 1774-78 (2019). To begin, solitary confinement is unequivocally *punishment*. In 1890, this Court held in *In re*

Medley, 134 U.S. 160, that the transfer of a condemned offender from a county jail to solitary confinement in a penitentiary prior to execution was a new punishment for constitutional purposes for two reasons: solitary confinement was historically used as a heightened form of punishment, and it inflicts substantial suffering beyond what is normally imposed by a prison sentence. *Id.* at 167-70. The fact that the government's purpose in imposing solitary confinement on Medley was regulatory rather than penal was irrelevant to the Court's analysis.

Solitary confinement is also an *unusual* punishment. As discussed above, a punishment can only be considered "usual"—that is, firmly part of the constitutional tradition—if it enjoys universal, public reception over a very long period of time. Although the period of time necessary to establish a punishment as "usual" cannot be defined with precision, history indicates that it would likely need to be a century or more of universal reception. Today, long-term solitary confinement has not enjoyed anything close to "long usage." It was tried for several decades in the nineteenth century but was then largely abandoned because its effects were too harsh. It was never used in all American jurisdictions, and for much of its life in the nineteenth century it was confined to Pennsylvania and a small number of other states. Accordingly, it never achieved universal reception, and the reception it did receive lasted well under one hundred years.

Finally, long-term solitary confinement is clearly a cruel and unusual punishment because its effects are extremely harsh in comparison to traditional punishment practices. This is clear not only from the nineteenth century record, but also from current studies of its effects. Numerous studies performed over the past forty years show that the harmful effects of solitary confinement are extreme, not just as an absolute matter, but also in comparison to the effects of imprisonment generally. *See*

Stinneford, *Experimental Punishments* at 79-84. These effects include extreme forms of psychopathology, suicidal thoughts, hallucinations, perceptual distortions, violent fantasies, talking to one's self, overall deterioration, mood swings, emotional flatness, chronic depression, social withdrawal, confused thought processes, oversensitivity to stimuli, irrational anger, and ruminations. *Id.* at 78-79 & nn.306-11.

Having essentially fallen out of use prior to its controversial reintroduction in the 1980s and 1990s, the current practice of long-term solitary confinement represents an unjustly severe departure from traditional punishment practices. The long-term solitary confinement to which Hamner was subjected clearly violates the original public meaning of the Cruel and Unusual Punishments Clause.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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