No. 22-1716

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JERRY CINTRON,
Plaintiff-Appellee,
v.
PAUL BIBEAULT, in his official and individual capacity; RUI DINIZ, in his official and individual capacity; MATTHEW KETTLE, in his official and individual capacity; PATRICIA ANNE COYNE-FAGUE, in her individual capacity; WAYNE T. SALISBURY, JR., Interim Director, in his official capacity; SPECIAL INVESTIGATOR STEVEN CABRAL, in his official and individual capacity; JEFFREY ACETO, in his individual and official capacity; LYNNE CORRY, in her individual and official capacity,
Defendants-Appellants,

LT. HAYES, in his official and individual capacity; LT. MOE, in his official and individual capacity; LT. BUSH, in his official and individual capacity; JENNIFER CHAPMAN, in her official and individual capacity; "COUNSELOR" FRANCO, in her official and individual capacity,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BRIEF OF AMICUS CURIAE PROFESSOR JOHN F. STINNEFORD IN SUPPORT OF APPELLEE AND AFFIRMANCE

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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?*, 115 Nw. U. L. Rev. 9 (2020); *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 both the original public meaning of the Cruel and Unusual Punishments Clause of the Eighth Amendment, Rhode Island's historical understanding and treatment of solitary confinement, and the practice of long-term solitary confinement in the United States.

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[1] All parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or his counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents constitutional questions of exceptional importance regarding the permissible limits of long-term solitary confinement under the Eighth and Fourteenth Amendments. This brief is intended to offer historical context for the Court as it considers this appeal.

As a matter of original public meaning, the Eighth Amendment's Cruel and Unusual Punishments Clause was understood to prohibit cruel innovation in punishment. The word "cruel" was originally understood to mean "unjustly harsh" and the word "unusual" was understood to mean "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, either because they involve an inherently cruel method of punishment (such as torture) or because they are significantly disproportionate to the offender's culpability as measured against longstanding prior practice.

Judged against this original meaning, Respondent Jerry Cintron's subjection to solitary confinement in various forms for well over two-and-a-half years flagrantly violated the Eighth Amendment. History has

shown long-term solitary confinement to be a failed experiment that is both "cruel" and "unusual." This practice has not enjoyed anything close to "long usage." It was tried for a few decades in the nineteenth century but was then largely abandoned because it caused a high prevalence of severe harm to prisoners—including insanity, self-mutilation, and suicide. And in Rhode Island, solitary confinement was adopted for less than ten years because of these detrimental effects. This practice also never achieved universal reception. 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, 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 was originally understood to prohibit.

ARGUMENT

I. History Shows That Long-Term Solitary Confinement Clearly Violates the Eighth Amendment

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[2] and the English Bill of Rights of 1689.[3] 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 acceptance of the people. Conversely, new punishment practices are unjust in light of the traditional practices they replace or supplement—and thus cruel and

[2] Va. Decl. of Rts. § 9 (1776).

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

unusual—when they are significantly harsher than the baseline established by longstanding prior practice. *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1745-46 (2008) [hereinafter Stinneford, *Unusual*].

In the context of the Eighth Amendment, the word "unusual" was a term of art derived from the common law. 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) [hereinafter Stinneford, *Cruel*]; Stinneford, *Unusual*, at 1814. The core idea was that a practice or custom could attain the status of law if it was universally received ("used") throughout the jurisdiction for a very long time—for long usage showed that it was just, reasonable, and enjoyed the stable, multi-generational consent of the people. *See* Stinneford, *Cruel*, at 468-69 & n.167.

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 after having "'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 1770-71, 1813-15); and (2) they undermined common law rights established through long usage. *See* Stinneford, *Unusual*, at 1810-13.

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). 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, 43 (2019) [hereinafter Stinneford, *Experimental Punishments*]. Similarly, a once traditional 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 (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 late twentieth

century. After a short period 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) [hereinafter 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, the 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. *See* Stinneford, *Experimental Punishments*, at 60, 64.

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 (Auburn, N.Y., U.F. Doubleday 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[s] 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 (Francis Lieber trans., Philadelphia, Carey, Lea & Blanchard 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 1614-15. Prisoners quickly fell into poor health and had to be released from their cells. *Id.* at 1614. 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) [hereinafter Smith, *Effects*]. In 1847, Francis C. Gray compared a prison in Charlestown that did not use solitary confinement 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, 109-10 (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 Reports of the Prison Discipline Society of Boston* 300 (Boston, T. R. Marvin 1855)).

Rhode Island similarly adopted the Pennsylvania system of solitary confinement in 1838, but abolished the practice a few years later in 1843. *See* Gray, *Prison Discipline*, at 121-23. The Rhode Island prison warden, who was also a physician, noted "the numerous cases of insanity, produced there by separate confinement" and observed that "this insanity for the most part appeared after a confinement of from *six* to *eighteen* months." Gray, *Prison Discipline*, at 123 (emphasis original). In

1841, inspectors of the Rhode Island state prison reported that the effect of "the experiment of solitary confinement" was "to injure strong minds, and to produce imbecility or insanity in those that are weak." To the Honorable General Assembly of the State of Rhode Island at the October Session A.D. 1841. By 1843, the Committee on the Affairs of the State's Prison concluded that "experience ha[d] clearly proved" that solitary confinement was "a mistaken system of punishment." Report of the Committee on the Affairs of the State's Prison, Jan. 1843. In response to these experiences, Rhode Island eliminated mandatory solitary confinement in early 1843. *See* Act in Amendment of an Act Entitled an Act Concerning Crimes and Punishments. Drafted by the Committee on the Affairs of the State Prison, Passed January 18, 1843. Later that year, the physician to the state prison reported that "there has been no case of alarming sickness, nor has there been any case of Insanity in the Prison since the abolishment of solitary confinement." Report of Richmond Brownell, Physician to S.P., to the Hon. Gen. Assembly Providence Oct. 30th, 1843.

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* 100, 112-13 (Norval Morris & David J. Rothman eds., 1998); 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) [hereinafter 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 instead is

cruel and unusual. *See* Stinneford, *Experimental Punishments*, at 44-46; John F. Stinneford, *Is Solitary Confinement a Punishment?*, 115 Nw. U. L. Rev. 9 (2020); *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, the 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. 134 U.S. 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, a few decades of scattered acceptance cannot satisfy the historical standard. 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. *See id.* at 168 (noting that by 1860, solitary confinement had been found "too severe" for the American penal system); David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 Harv. L. Rev. 542, 576 (2019). 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 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 historical 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 79-85. These effects include extreme forms of psychopathology, suicidal thoughts, hallucinations, perceptual distortions, violent fantasies, talking to oneself, overall deterioration, mood swings, emotional flatness, chronic depression, social withdrawal, confused thought processes, oversensitivity to stimuli, irrational anger, and ruminations. *Id.* at 78-80 & nn.306-11.

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

CONCLUSION

The Court should affirm.

Dated: May 11, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) & (5) and 32(g), the undersigned counsel for amicus curiae certifies the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 3,311 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ Andrew Tutt
Andrew T. Tutt

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Amicus Curiae Professor John F. Stinneford in Support of Appellee and Affirmance was filed electronically on May 11, 2023 and will, therefore, be served electronically upon all counsel.

/s/ Andrew Tutt
Andrew T. Tutt