



July 29, 2019

Mr. Scott Crow, Interim Director
Oklahoma Department of Corrections
3400 Martin Luther King, Jr. Ave.
Oklahoma City, OK 73111

RE: Conditions for Death-Sentenced People Incarcerated at H-Unit

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Dear Mr. Crow,

We write to inform you of unconstitutional policies and practices of the DOC with regard to condemned persons incarcerated at H-Unit of the Oklahoma State Penitentiary (OSP) in McAlester, Oklahoma, that subject them to dangerous and injurious conditions. We are a coalition of national and local civil rights organizations and law firms who have investigated these conditions for more than two years and concluded that the policies that automatically sentence condemned people to permanent solitary confinement raise serious constitutional, human rights, and human dignity questions.

In reaching these conclusions, we interviewed and corresponded with many condemned persons incarcerated in H-Unit, and reviewed documents including public reports and investigations, prisoner grievances and responses, court filings, media accounts, ODC policies, and official documents received in response to Open Records Act requests.

While we are ready to fully litigate this matter in federal court, we believe that it would be in the best interests of all parties to resolve these violations through a consent decree. At the conclusion of this letter, we propose a framework for remedying the unlawful policies and practices, and for scheduling meetings to discuss remedies that would avoid the expense and delay of protracted litigation.

I. DOC's Automatic Classification Policy Incarcerating All Condemned Men in the Maximum Security Setting of H-Unit Subjects Them To Cruel and Inhumane Conditions.

DOC automatically incarcerates all condemned men in H-Unit at OSP-McAlester by virtue of their death sentence, regardless of in-custody behavior. *See* Okla. Dep't of Corrs. OP 060103(M)-Male Custody Assessment Procedures, subsections 1-B-1 and 1-C-2. H-Unit is a super-maximum custody facility that opened in November 1991. The unit is constructed entirely of concrete with living accommodations that effectively constitute a dim underground bunker; there are no windows to the outside world from the cells and thus no natural light or air. H-Unit is an electronically controlled facility designed to minimize contact between the men incarcerated in the unit and prison staff. The cells are 7'7" by 15'5" and have two poured concrete bunks on either side of an uncovered toilet and sink. The cell walls are unpainted concrete, and cell doors are solid metal, except for the upper portion with a plexiglass window and thick bars to the outside, and "bean holes" through which people receive their meals and insert body parts for shackling by officers before they can leave the cell. Most condemned men are alone in their cells. Death Row is one section of H-Unit; the other three sections, or quads, house prisoners who have maximum custody classifications and are serving determinate or life sentences. The non-condemned prisoners, if they behave, can eventually work their way out of H-Unit. The condemned men, on the other hand, can leave H Unit only with an overturned sentence or upon death.

The condemned men are locked in their cells 22 to 24 hours a day. By policy they are offered a 15-minute shower three times a week and one hour of solitary exercise five times a week in an enclosed concrete room of 20 feet by 20 feet that has an opaque skylight-ceiling that obstructs any view of the sky or sun. People with approved family visitors may have noncontact visits on Fridays and weekends, behind plexiglass and over a phone. The facility offers no form of congregate activity or time outside of cells, with no programs, educational services, or work opportunities. Due to a May 2009 blanket policy implemented by OSP Warden Randall Workman, men on Death Row are denied any congregate religious services, in violation of their religious rights. (See page 12). Human contact is limited to the "bean holes" on cell doors when meals are delivered and through which prisoners are shackled each time they leave their cells.

One condemned man we met with described his indefinite confinement in H-Unit as being "buried alive." The inhumane and oppressive conditions in H-Unit have led to suicides and suicide attempts,

most recently in June 2018 when a death-sentenced man died by suicide.¹ But it is not just the condemned who commit suicide due to these conditions: between 2012 and 2015, nine prisoners at OSP-McAlester died by suicide, giving the prison the highest suicide rate in the state, six times higher than the prison with the second highest rate. OSP's suicides in those four years represented 35% of all suicides of people in DOC custody, even though OSP houses only three percent of the state's prisoners.² DOC's chief mental health officer, Dr. Jana Morgan, told *Oklahoma Watch* that the extreme isolation at the prison was a "possible driver of higher suicide rates," because "[a]s people are locked down more and in maximum security settings, the risk goes up."³

In December 1991, less than a month after H-Unit opened, Amnesty International informed the Director of DOC that the conditions would have a detrimental effect on the physical and mental health of people in the unit. Amnesty International delegates visited H-Unit in March 1994 (at the Director's invitation) and concluded the conditions under which the men were incarcerated constituted cruel, inhumane, or degrading treatment in violation of international standards.⁴ In 2011, a reporter from the McAlester News-Capital visited the unit and described it as "surreal" and

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¹ *Oklahoma death row inmate found dead in apparent suicide*, The Oklahoman, (June 14, 2018), <https://oklahoman.com/article/5598206/oklahoma-death-row-inmate-found-dead-in-apparent-suicide>; see also Rachel Peterson, *OSP's H-Unit, Life on Death Row*, McAlester News Capital, (Dec. 6, 2011), ("Warden's assistant Terry Crenshaw told of a time when a condemned man had once obtained a harmful drug on the day of his execution. The inmate was rushed to the hospital only hours before his scheduled execution. His stomach was pumped, his life was saved and then he was taken back to H-unit where his court ordered execution was carried out — a few hours late."), https://www.mcalesternews.com/news/local_news/osp-s-h-unit-life-on-death-row/article_1fe445ba-3c8b-5843-a129-ef06d00367fc.html.

² Clifton Adcock, *Bleak House: Suicides in the Penitentiary*, Oklahoma Watch (Feb. 13, 2017), <https://oklahomawatch.org/2017/02/13/bleak-house-suicides-in-the-penitentiary/>.

³ *Id.*

⁴ *Conditions for Death Row Prisoners in H-Unit, Oklahoma State Penitentiary, USA*, Amnesty International, (Apr. 30, 1994), <https://www.amnesty.org/en/documents/amr51/035/1994/en/>.

“where men live in cement rooms no bigger than most people’s bathrooms and some people’s closets.”⁵

II. There Is No Penological Reason to Automatically Segregate All Death-Sentenced People in Solitary Confinement.

Solitary confinement causes serious and permanent harm.⁶ Research shows it is painful, stressful, and extremely psychologically harmful to people with and without pre-existing mental health conditions.⁷ While Oklahoma’s condemned prisoners pursue appeals, they spend many years suffering the devastating effects of solitary confinement. In Oklahoma,

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⁵ Peterson, *supra* note 1.

⁶ See generally Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment* 90 INDIANA L.J. 741, 753-61 (2015) (summarizing research on psychiatric harms of solitary confinement).

⁷ For research on the cognitive and mental health impairments that solitary confinement causes, see Craig Haney, *The Social Psychology of Isolation: Why Solitary Confinement is Psychologically Harmful*, 181 Prison Serv. J. 12, at n. 1 (2009), <https://tinyurl.com/y5axbneq>; B. Arrigo & J. Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and What Should Change*, 52 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 622-40 (2008); Kristin Cloyes et al., *Assessment of Psychosocial Impairment in a Supermaximum Security Unit Sample*, 33 CRIM. JUST. & BEHAV. 760-781 (2006); Peter Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441-528 (2006); Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 127 (2003) (finding high psychological trauma rates including more than 80% of prisoners suffering from anxiety, headaches, troubled sleep, or lethargy; 25% reporting suicidal ideation; and over 50% reporting symptoms including heart palpitations, obsessive ruminations, confusion, irrational anger, withdrawal, violent fantasies, chronic depression, hallucinations, perceptual distortions, emotional flatness, and depression); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1450-54 (1983) (finding “strikingly consistent” symptoms, including massive anxiety, perceptual disturbances such as hallucinations, cognitive difficulties, memory lapses, and thought disturbances such as paranoia, aggressive fantasies and impulse-control problems among prisoners in isolation).

condemned men will be broken due to the years they spend in solitary confinement – their minds and bodies irreparably damaged before (a) the State executes them, (b) they die due to natural causes or suicide, or (c) they are exonerated and/or their sentences are overturned.⁸ All suffer needlessly due to an unreasonable policy unsupported by any valid penological justification.

Numerous states and the federal government have initiated policies to investigate, monitor, and reduce the use of solitary confinement, building on a growing recognition that long-term isolation is dangerous, counterproductive, and costly. The DOC must start reforming its isolation practices for death-sentenced prisoners. Oklahoma can manage these prisoners without automatic, permanent solitary confinement. Instead, the state can safely classify death-sentenced prisoners using classification procedures similar to its existing policy for non-capital prisoners. This is not surprising; modern correctional classification uses individualized risk assessments based on objective factors, resulting in safer prisoner management. Factors such as age and disciplinary history are far more predictive for security purposes than the conviction status Oklahoma currently uses to automatically and permanently isolate all death-sentenced prisoners.⁹

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⁸ The fact that DOC in the past has double-celled death-sentenced prisoners, and could do so again, does not change the reality that extreme isolation—regardless of whether the person is alone or with another—constitutes solitary confinement, and has the same deleterious impacts on the brain. The U.S. Department of Justice defines extreme isolation to include situations in which the prisoner may be incarcerated with a cellmate. *See U.S. Dep’t of Justice Report & Recommendations Concerning the Use of Restrictive Housing*, U.S. Dep’t of Just., (Jan. 2016) (“For the purposes of this report, we define “restrictive housing” as any type of detention that involves: (1) removal from the general inmate population, whether voluntary or involuntary; (2) placement in a locked room or cell, whether alone or with another inmate; and (3) inability to leave the room or cell for the vast majority of the day, typically 22 hours or more.”), <https://www.justice.gov/archives/dag/file/815551/download>.

⁹ *See* James Austin, *Findings in Prison Classification and Risk Assessment*, U.S. Dep’t of Just., Nat’l Inst. of Corrs., (June 25, 2003), http://www.jfa-associates.com/publications/pcras/10_Findings_2003.pdf; *see also* James Austin & Kenneth McGinnis, *Classification of High-Risk and Special Management Prisoners*, U.S. Dep’t of Justice, Nat’l Inst. of Corrs., (June 2004),

Correctional best practices classify death-sentenced prisoners using the same objective system used for other prisoners. The U.S. Department of Justice's National Institute of Corrections established that the essential elements of safe and secure facilities include defining and conveying expectations for behavior, including positive-behavior incentives.¹⁰ Staff should "demonstrate that they expect inmates to behave well by interacting extensively with them, treating them with respect and consideration, and ensuring that inmate living areas are maintained in good order."¹¹ Nothing about death-sentenced prisoners excludes them from this widely accepted theory of management.

A comprehensive 2002 literature review concluded that "the majority of death row inmates do not exhibit serious violence within the structured context of institutional confinement."¹² Analyzing more than ten years of data from Missouri, where death-sentenced prisoners are classified the same way as other prisoners and may be integrated into the general population, one study found that death-sentenced prisoners had *lower* rates of institutional violence than the general population of parole-eligible prisoners and that the State's classification system worked appropriately for this subset of prisoners.¹³

Similarly, persons convicted of murder are not more violent in prison than those convicted of other crimes. In a 1990s challenge to DOC restrictions on condemned prisoners' in-person contact with their attorneys

<https://s3.amazonaws.com/static.nicic.gov/Library/019468.pdf>; D.J. Simourd, *Use of Dynamic Risk/Need Assessment Instruments Among Long-Term Incarcerated Offenders*, CRIM. JUST. & BEHAV. 31(3), 306-323 (2004), <https://psycnet.apa.org/record/2004-14452-003>.

¹⁰ Virginia Hutchinson et al., *Inmate Behavior Management: The Key To A Safe And Secure Jail*, U.S. Dep't of Just., Nat'l Inst. of Corrs., at 8-9 (2009), <https://s3.amazonaws.com/static.nicic.gov/Library/023882.pdf>.

¹¹ *Id.* at 9.

¹² Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. LAW 191, 202-03 (2002), <http://www.deathpenaltyinfo.org/documents/CunninghamDeathRowReview.pdf>.

¹³ Mark D. Cunningham, *Is Death Row Obsolete? A Decade of Mainstreaming Death-Sentenced Inmates in Missouri*, 23 Behav. Sci. Law 307, 316-19 (2005).

at H-Unit, the Tenth Circuit affirmed the district court's finding of "significant evidence" that "death row inmates present no greater security risk than any other high-maximum security inmate ... and less of a management problem than many offenders convicted of less serious crimes."¹⁴ The district court had found, "Institutional behavior is generally better for death row inmates because such behavior may be used as evidence in mitigation or commutation proceedings."¹⁵ In one study, researchers found that "relative to the other groups of inmates, murderers convicted of various degrees of homicide were not overly involved ... in violent or assaultive rule infractions The frequency and prevalence of their involvement in institutional violence was below or near the mean for the entire inmate cohort on all of these measures."¹⁶ This study supports the conclusion that prison officials should not assume that capital homicide offenses are predictors of future dangerousness; a classification system based solely on a prisoner's commitment offense does not correlate with improved institutional security.¹⁷

Several states have had success mainstreaming death-sentenced people or eliminating automatic solitary confinement for them. As mentioned above, in Missouri, people sentenced to death have been classified according to the same criteria as all other prisoners since 1991, with many death-sentenced prisoners mainstreamed into general population.¹⁸ Between 1991 and 2002, Missouri's death-sentenced prisoners in general population neither committed nor attempted any prisoner or staff homicides, and had institutional violence rates similar to those of life-without-parole prisoners, and well below those of parole-eligible prisoners.¹⁹ Because Missouri's death-sentenced population's characteristics are comparable to those of other states, and the architecture

¹⁴ *Mann v. Reynolds*, 46 F.3d 1055, 1058 (10th Cir. 1995) (citations omitted).

¹⁵ *Mann v. Reynolds*, 828 F. Supp. 894, 901 (W.D. Okla. 1993).

¹⁶ Jon Sorensen & Mark D. Cunningham, *Conviction Offense and Prison Violence: A Comparative Study of Murderers and Other Offenders*, 56 *Crime & Delinquency* 103, 114 (2008).

¹⁷ *Id.*

¹⁸ Cunningham, *supra* note 13, at 307.

¹⁹ *See id.*

and security procedures of its prisons are similar to most systems, scholars believe that Missouri's successful mainstreaming is highly replicable.²⁰

Multiple states have voluntarily replicated Missouri's model of mainstreaming death-sentenced people with similar success. North Carolina, Colorado, and Delaware have abandoned automatic solitary confinement for death-sentenced people. North Carolina prisoners sentenced to death are not automatically placed in conditions of solitary confinement, and they receive out-of-cell and group time and opportunities for work assignments, programming, and group exercise.²¹ Colorado reformed its housing policies for death-sentenced prisoners in 2014, as part of its general reforms to reduce the use of solitary confinement, isolation, and administrative segregation in the entire system.²² Colorado announced it would no longer automatically place condemned people in solitary confinement; part of the impetus for these reforms was the long period that condemned prisoners would likely spend in prison.²³ As of spring 2015, death-sentenced people were classified to the lower security level of close custody and mainstreamed with non-condemned people.²⁴ Three years ago, Delaware announced it was disbanding its death row and transferring those people to other housing units where they have much more out-of-cell time and are integrated with non-death-sentenced prisoners.²⁵ Secretary Coupe stated that the reasons for the change included not only the American Correctional Association (ACA) standards related to restrictive housing but

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²⁰ See Andrea D. Lyon & Mark D. Cunningham, "Reason Not the Need": Does the Lack of Compelling State Interest in Maintaining a Separate Death Row Make It Unlawful?, 33 AM. J. CRIM. L. 1, 7 (2005).

²¹ See North Car. Dep't. of Corrs., Div. of Prisons, Policy & Procedures, Ch. C § .1200 Conditions of Confinement at 17-18, (death-sentenced prisoners included in work-assignment policies), (Nov. 1, 2011), http://www.doc.state.nc.us/dop/policy_procedure_manual/C1200.pdf.

²² See Celina Adapte, et al., *Rethinking Death Row: Variations in the Housing of Individuals Sentenced to Death*, Arthur Liman Public Interest Program, Yale Law School, at 15 (2016).

²³ *Id.*

²⁴ *Id.* at 16.

²⁵ Randall Chase, "Delaware Quietly Disbands Death Row," Times Union, (Dec. 9, 2016), <http://www.timesunion.com/news/crime/article/APNewsBreak-Delaware-quietly-disbands-death-row-10786242.php>.

also that the change is “humane” and beneficial to both incarcerated people and prison management.²⁶

Numerous states moved away from automatic solitary confinement after facing litigation – or pursuant to legislation – on the issue. For example, Virginia made substantial changes to the conditions for death-sentenced people, including increased outdoor recreation; contact visits; and congregate group activities after being sued.²⁷ The prisoners had previously spent “almost all of their time alone—approximately twenty-three hours per day—in seventy-one square-foot prison cells furnished with only a steel bed, a small desk, and a single fixture that doubled as a commode and a sink,” that “required separation of each Plaintiff from other death row inmates by at least one cell,” and “visitation opportunities were limited to non-contact visits ... separated by plexi-glass.”²⁸ Also in 2017 in response to litigation, the Arizona Department of Corrections ended its policy of automatically and indefinitely placing all condemned people in solitary confinement until their execution dates, and created a two-tiered program similar to that used in California. Condemned men with clean disciplinary records were moved to a new close custody housing unit that allows increased out-of-cell time, in-person family and legal visits, outdoor group recreation, and job and programming opportunities.²⁹ Condemned women were integrated fully into Arizona’s medium and close custody units and live with and interact with non-death-sentenced women. In California, as a result of a lawsuit settled in 1990, the state implemented a two-track system that allows for behavior-based classification for death-sentenced people at San Quentin State Prison (men) and Central California Women’s Facility (women), pursuant to which many condemned people live in conditions that are less restrictive than administrative segregation.³⁰

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²⁶ *Id.*

²⁷ Frank Green, *Virginia Death Row Conditions Lawsuit to be Argued in Appeals Court Wednesday*, Richmond Times Dispatch, (Jan. 24, 2017), http://www.richmond.com/news/article_5ee16952-173c-5b91-bbcc-aac70e558255.html?mode=story

²⁸ *Porter v. Clarke*, 852 F.3d 358, 360 (4th Cir. 2017)

²⁹ Settlement, ECF No. 39, *Nordstrom v. Ryan*, No. CV-15-02176-PHX-DGC (D. Ariz. March 3, 2017).

³⁰ *See* San Quentin Op. Proc., Condemned Manual, No. 608 at 15, § 301 (describing the two-track system) and at 131, § 825 (p. 130) (describing violations and other instances that may result in Grade B program placement), (2013); Consent Decree, *Thompson v. Enomoto*, No.

In addition, in 2016, California voters approved Proposition 66, which requires, among other things, that people under judgment of death be integrated into general population and that they could be housed at any state prison.³¹

States as diverse as Louisiana, Nevada, Tennessee, and South Carolina also have allowed condemned people more time out of their cells, more congregate programming, and access to jobs.³² Officials at Louisiana State Penitentiary at Angola—one of the nation’s most notoriously harsh prisons—began loosening restrictions on death row in May 2017 in the face of a federal class action lawsuit filed by condemned people who alleged that the punitive conditions, many of which were similar to those at H-Unit, constituted a “severe denial of human fundamental needs.”³³

III. Courts Have Found the Long-Term Use of Solitary to be Unconstitutional.

More than a century ago, the U.S. Supreme Court recognized the adverse consequences to incarcerated persons’ mental health due to prolonged detention in conditions akin to solitary confinement. The Court held that “experience demonstrated” that the “complete isolation of the prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction,” had the result that

79-1630-SAW (N.D. Cal. Oct. 23, 1990) (describing the two-track classification system).

³¹ Death Penalty Procedures (Initiative Statute), Calif. Prop. 66 (2016), https://repository.uchastings.edu/ca_ballot_props/1359.

³² Gabriella Robles, *Condemned to Death – And Solitary Confinement*, The Marshall Project, (July 23, 2017), <https://www.themarshallproject.org/2017/07/23/condemned-to-death-and-solitary-confinement>; John Monk, *SC death row inmates in new (and nicer) home after quiet, high security move*, Greenville News, (July 12, 2019), <https://www.greenvilleonline.com/story/news/2019/07/12/sc-death-row-inmates-new-facility-after-quiet-high-security-move-department-corrections/1714794001/>

³³ *Id*; see also Complaint, ECF 1, *Hamilton, et al., v. Vannoy, et al.*, No. 3:17-cv-00194-SDD-RLB, 2017 WL 1196204, at *30, (M.D. La. March 29, 2017).

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.³⁴

In *Wilkinson v. Austin*, the Supreme Court held that conditions at a “supermax” facility in Ohio were so severe that they gave rise to a state-created due process-protected liberty interest not to be subjected to those conditions, absent procedural protections ensuring that such confinement was appropriate.³⁵ The Supreme Court based this liberty interest on its finding that “[i]nmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day” and “[a]ll meals are taken alone in the inmate’s cell instead of in a common eating area.”³⁶ In California, the state’s use of long-term solitary on thousands of prisoners based solely upon gang affiliation was dismantled due to a settlement that has already led to the reintegration of a significant portion of the state’s segregation population into general population.³⁷ Recent federal court decisions and settlements in states like Massachusetts, California, Arizona, and Pennsylvania have exposed the harm that solitary confinement wreaks on incarcerated people, especially seriously mentally ill and cognitively disabled people, and have led to the development of alternative approaches to population management.³⁸

Courts also are increasingly determining that permanent incarceration in solitary confinement simply by virtue of a death sentence violates the Eight Amendment. In 2019, the U.S. Court of Appeals for the Fourth Circuit affirmed a lower court ruling that the “challenged Virginia

³⁴ *In re Medley*, 134 U.S. 160, 168 (1890).

³⁵ *Wilkinson v. Austin*, 545 U.S. 209, 223-24 (1995).

³⁶ *Id.* at 214.

³⁷ Settlement Agreement, *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal. Aug. 31, 2015), http://ccrjustice.org/sites/default/files/attach/2015/09/2015-09-01-ashker-Settlement_Agreement.pdf

³⁸ *Disability Law Center, Inc. v. Mass. Dep’t of Corr., et al.*, 960 F.Supp.2d 271 (D. Mass. 2012); *Coleman v. Brown*, 28 F.Supp.3d 1068 (E.D. Cal. 2014); Order, ECF 1458, *Parsons v. Ryan*, No. CV-12-00601-PHX-DJH (D. Ariz. Feb 25, 2015); *Johnson v. Wetzel*, 209 F.Supp.3d 766 (M.D. Pa. 2016); *Shoatz v. Wetzel*, No. 2:13-cv-0657, 2016 WL 595337, at *12, (W.D. Pa. Feb. 12, 2016).

procedures and regulations [that] place death row inmates in solitary confinement based on their sentence alone and [that] do not provide death row inmates with an avenue for removing themselves from segregation” violated the Eighth Amendment.³⁹ In 2017, the U.S. Court of Appeals for the Third Circuit held that two prisoners who were incarcerated on Pennsylvania’s death row in solitary confinement—after their death sentences were vacated and for several years before they were resentenced—had a clearly established due process right under the Fourteenth Amendment to avoid unnecessary and unexamined solitary confinement on death row.⁴⁰ The Court of Appeals explained:

[A]lthough dangerousness is certainly relevant to Defendants’ decisions about where to place inmates, it does not control the outcome of our due process analysis. It is the conditions themselves that determine whether a liberty interest is implicated and procedural protections must be in place to determine if the level of dangerousness justifies the deprivations imposed.⁴¹

The court also noted that the prisoners “could have been the most compliant inmates in a given facility, and exhibited no signs they would endanger themselves or others. They would still have been relegated to death row indefinitely. . . .”⁴²

Multiple United States Supreme Court justices have called attention to the practice of putting death-sentenced people in indefinite isolation. In 2017, Justice Breyer dissented from the denial of a stay of execution of a Texas prisoner, stating that the evidence demonstrated the petitioner “ha[d] developed symptoms long associated with solitary confinement, namely severe anxiety and depression, suicidal thoughts, hallucinations, disorientation, memory loss, and sleep difficulty.”⁴³ In a 2015 case involving a condemned prisoner, Justice Kennedy noted that the petitioner had resided in solitary confinement for the majority of his time in custody and observed that, while the physical and psychological toll of isolation is

³⁹ *Porter v. Clarke*, 923 F.3d 348, 359 (4th Cir. 2019).

⁴⁰ *Williams v. Sec’y, Penn. Dep’t of Corrs.*, 848 F.3d 549, 562-64, 574 (3d Cir. 2017), *cert. denied sub nom. Williams v. Farnan*, 138 S.Ct. 357 (2017), *and cert denied sub nom. Williams v. Wentzel*, 138 S.Ct. 357 (2017).

⁴¹ *Id.* at 566.

⁴² *Id.* at 562.

⁴³ *Ruiz v. Texas*, 137 S.Ct. 1246, 1247 (2017) (Breyer, J., dissenting)

well-documented, there is insufficient public attention to the issue. Justice Kennedy described a “new and growing awareness” about the problems associated with solitary confinement and, most notably, appeared to invite a case to address these problems directly: “In a case that presented the issue, the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”⁴⁴

Also in 2015, in *Glossip v. Gross*, Justice Breyer wrote a dissenting opinion that focused on the use of solitary confinement for death-sentenced people. While the case involved the constitutionality of the execution drugs used by Oklahoma DOC, Justice Breyer, joined by Justice Ginsburg, went beyond that specific issue to reexamine the death penalty generally.⁴⁵ Since correctional systems in Oklahoma and “nearly all death penalty States keep death row inmates in isolation for 22 or more hours a day” while awaiting execution, and “it is well documented that such prolonged solitary confinement produces numerous deleterious harm,” the “dehumanizing effect of solitary confinement” contributes to the “special constitutional difficulties” of the death penalty.⁴⁶

In 2009, the U.S. Supreme Court declined review in *Thompson v. McNeil*, but three Justices issued strongly worded statements about the importance of the legal issue raised. Mr. Thompson had been on Florida’s death row for 32 years. He claimed the excessive time he spent on death row amounted to cruel and unusual punishment under the Eighth Amendment. Justice Stevens, in an opinion respecting the denial of *certiorari*, called the treatment of Mr. Thompson during his 32 years on death row “dehumanizing,” and noted that he “has endured especially severe conditions of confinement, spending up to 23 hours per day in isolation in a 6-by 9-foot cell.”⁴⁷

We believe that the DOC can find a workable alternative system to automatic, permanent solitary confinement for death-sentenced prisoners

⁴⁴ *Davis v. Ayala*, 135 S.Ct. 2187, 2208 (2015) (Kennedy, J., concurring).

⁴⁵ *Glossip v. Gross*, 135 S.Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

⁴⁶ *Id.* at 2765.

⁴⁷ *Thompson v. McNeil*, 129 S.Ct. 1299, 1299 (2009) (Statement of Stevens, J.).

without the need for court intervention. As discussed above, there are a number of successful approaches used by other states that Oklahoma can consider.

IV. DOC’s Blanket Denial of Congregate Religious Worship Services Violates Condemned Persons’ Right to Freely Exercise Their Religion.

As noted above, under a blanket policy implemented in May 2009, the men on Death Row are denied any congregate religious services. Before 2009, condemned men were permitted to worship communally two times per month, although they were caged and shackled to separate them from outside volunteers who led the services. Attendees were able to sing, pray, and study the Bible together. We understand that these worship services occurred without incident.

The current ban on group religious worship violates the condemned men’s rights under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. § 2000cc *et seq.* Under RLUIPA, the government is prohibited from imposing a “substantial burden on the religious exercise” of any person “residing in or confined to an institution,” including state prisons, unless the government demonstrates that the burden imposed “is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000cc-1(a).

As a threshold matter, courts have “little difficulty in concluding that an outright ban on a particular religious exercise is a substantial burden on that religious exercise.”⁴⁸ The U.S. Supreme Court has recognized that sincere religious exercise often involves “physical acts such as assembling with others for a worship service”⁴⁹ Barring prisoners from taking part in such congregate worship—as DOC has here—thus imposes the very type of substantial burden that implicates RLUIPA’s religious-freedom protections.⁵⁰

⁴⁸ *Greene v. Solano Cty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008).

⁴⁹ *Cutter v. Wilkinson*, 544 U.S. 709, 710 (2005) (*citing Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)).

⁵⁰ *See, e.g., Greene*, 513 F.3d at 988 (holding that jail’s refusal to allow maximum-security prisoner to attend group religious worship services substantially burdened his ability to exercise his religion); *see also, e.g., Cavin v. Mich. Dep’t of Corr.*, 927 F.3d 455, 458 (6th Cir. 2019)

The DOC's burden in justifying its ban on congregate worship is heavy: RLUIPA "demands much more" than "prison officials' mere say-so" that they are unable to accommodate certain forms of religious exercise.⁵¹ First, DOC must demonstrate that imposing a substantial burden on condemned men's ability to take part in communal worship furthers a compelling governmental interest. "Broadly formulated interests," such as generalized assertions relating to safety and security,⁵² will not suffice.⁵³ Rather, RLUIPA "contemplates a more focused inquiry and requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law *to the person*—the particular claimant whose sincere exercise of religion is being substantially burdened."⁵⁴ Moreover, DOC officials would be required to provide specific, detailed, non-conclusory evidence that the policy *actually* serves these goals. Given that death-sentenced prisoners are automatically incarcerated in the H-unit with no individualized assessment of security

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(policy barring Wiccan prisoner from group worship on Wiccan holiday imposed substantial burden on his religious exercise). Whether a prisoner has other avenues of religious exercise is irrelevant under RLUIPA and cannot be considered by courts. *See Cavin*, 927 F.3d at 459; *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) ("RLUIPA's 'substantial-burden' inquiry asks whether the government has substantially burdened religious exercise . . . not whether the RLUIPA claimant is able to engage in other forms of religious exercise.").

⁵¹ *See Holt*, 135 S. Ct. at 866.

⁵² Nor would generalized assertions regarding cost or inadequate staffing be an excuse. *See, e.g., Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013) (rejecting unsupported assertions by Florida Department of Corrections that cost of providing kosher meals to prisoners was prohibitive). Indeed, RLUIPA expressly states that the statute "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. § 2000cc-3.

⁵³ *See Holt*, 135 S. Ct. at 863 (internal quotation marks and citations omitted); *see also Rich*, 716 F.3d at 533 ("[P]olicies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the [A]ct's requirements") (citation omitted); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1318 (10th Cir. 2010) (declining to hold that governmental interests asserted on appeal were compelling absent record evidence).

⁵⁴ *Holt*, 135 S. Ct. at 863 (internal quotation marks and citations omitted) (emphasis added).

risk, and that the ban on congregate worship for these prisoners is universal (regardless of prisoner behavior), DOC can hardly demonstrate that the ban actually furthers a compelling interest.

Even if DOC could show that a blanket ban on group religious services for condemned men actually furthers a compelling government interest, the policy is *not* the least restrictive means available to prison officials, as illustrated by other states' strategies for managing death-row units in a less restrictive manner that allows for congregate worship. For example, in North Carolina, the state's unit for death-sentenced prisoners offers weekly Christian and Muslim congregate worship services and "a ninety-minute Bible-study class every Tuesday morning."⁵⁵ Death-row prisoners are also permitted to dine together and spend up to sixteen hours each day in a common room. The prison's deputy director has expressed "unequivocal support" for this policy.⁵⁶

Similarly, in Oregon, prisoners "on death row status" are afforded the "opportunity for reasonable access to religious activities" including "religious group meetings."⁵⁷ And, in 2015, Virginia established a day room "for congregate religious services, behavioral programming, and additional employment opportunities for Death Row Offenders."⁵⁸ Other states likewise have provided group religious services for death-sentenced prisoners, including Indiana, Tennessee, and Kentucky.⁵⁹ "While not necessarily controlling, the policies followed at other well-run institutions

⁵⁵ Adalpe, *supra* note 22, at 10. North Carolina has more than three times the number of death-sentenced prisoners in its custody than Oklahoma. *Id.* at 9 (North Carolina has 153 of 156 death-sentenced prisoners at a single facility in Raleigh).

⁵⁶ *Id.* at 10.

⁵⁷ Or. Admin. R. §§ 291-093-0015 (7), 291-143-0080 (2018).

⁵⁸ See *Porter v. Clarke*, 290 F. Supp. 3d 518, 524 (E.D. Va. 2018), *aff'd*, 923 F.3d 348 (4th Cir. 2019).

⁵⁹ See *Wrinkles v. Davis*, 311 F. Supp. 2d 735, 740 (N.D. Ind. 2004) (explaining that Indiana prison had resumed group religious services for death-row prisoners after temporary suspension due to security incident); *State v. Carter*, 114 S.W.3d 895, 901 (Tenn. 2003) (noting that death-row prisoner in Tennessee "participates in twice-weekly Christian worship services"); *Meece v. Commonwealth of Ky., Dep't of Corr.*, No. 2011-CA-001231-MR, 2013 WL 132638, at *2 (Ky. Ct. App. Jan. 11, 2013) (congregate worship services are held for death-row prisoners, though Jewish plaintiff had none because he was the only Jewish prisoner on death row).

[are] relevant to a determination of the need for a particular type of restriction.”⁶⁰ These states’ success in implementing such policies— notwithstanding the security, cost, or other concerns that many prisons face when it comes to death-row prisoners—strongly suggests that Oklahoma could also adopt a much less restrictive option for accommodating death-sentenced prisoners’ religious exercise: DOC could simply permit death-sentenced prisoners to congregate for the purpose of religious worship, as it did before, or in the same manner that other states permit.

V. Preservation of Evidence and Framework for Ameliorating the Illegal Policies Regarding Condemned People in H-Unit

Based on information gained during our investigation and review of public documents, we see no basis for DOC to dispute that its policies and practices fail to comply with federal constitutional and statutory requirements. We are prepared to litigate these policies on a class-wide basis on behalf of all condemned persons, and believe that we would prevail in any such litigation. As you know, this potential litigation triggers DOC’s duty to preserve all relevant, material evidence.⁶¹ This letter is sufficient under federal law to put you on notice that litigation is reasonably foreseeable, and the duty to preserve evidence relevant to that dispute is triggered.⁶² Therefore, we ask that you—and all of your agents with responsibilities that impact the conditions of confinement in H-Unit—take all necessary steps to avoid the destruction of relevant evidence, including the immediate issuance of a litigation hold.

We hope that once you have had a chance to review this letter, you will agree that an early resolution of this case would be worth exploring. To that end, we ask that you enter into a tolling agreement that waives both the relevant statutes of limitations and the exhaustion requirement while we engage in negotiations regarding the substance of the concerns set forth in this letter. We would be happy to provide you with a proposed agreement. We would like to meet with you as soon as possible to determine if there is

⁶⁰ See *Holt*, 135 S. Ct. at 866 (citing *Proconier v. Martinez*, 416 U.S. 396, 414, n. 14 (1974)).

⁶¹ See *Burlington N. & Santa Fe Ry. Co.*, 505 F.3d 1013, 1032 (10th Cir. 2007) (“[A] party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent”) (citation omitted).

⁶² *Cousino v. Mass. Mutual Life Ins. Co.*, No. 12-CV-532-JHP-TLW, 2014 WL 11532284, at *7 (N.D. Okla. July 9, 2014); *Hinshaw v. Dolgen Corp., LLC*, No. CIV-12-277-D., 2013 WL 5596802, at *3 (W.D. Okla. Oct. 11, 2013).

sufficient common ground to engage in negotiations aimed at resolving these issues through a consent decree. Please let us know no later than August 12, 2019, if you are amenable to entering into such an agreement and negotiations.

Sincerely yours,

/s/ Megan Lambert

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