Nos. 23-3060 & 24-1696

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JANE DOE,
Plaintiff-Appellee/Cross-Appellant,
v.

MARGARET BURKE ET AL.,
Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Central District of Illinois
No. 3:18-cv-03191-SEM-KLM
Hon. Sue E. Myerscough

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS ET AL., IN SUPPORT OF PLAINTIFF-APPELLEE/CROSS-APPELLANT JANE DOE AND AFFIRMANCE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 23-3060 & 24-1696

Short Caption: Doe v. Burke

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: ~~23-3060 , 24-1696~~

Short Caption: ~~Jane Doe v. Margaret Burke, et al~~

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Attorney's Printed Name: Samantha Reed

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Attorney's Printed Name: Ameri Klafeta

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Attorney's Signature:  Date: 1/29/25

Attorney's Printed Name: Camille Bennett

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INTEREST OF *AMICI CURIAE*[1]

The **American Civil Liberties Union** ("ACLU") is a nationwide, non-profit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the U.S. Constitution and this Nation's civil rights laws. The ACLU established the National Prison Project ("NPP") in 1972 to protect and promote the civil and constitutional rights of incarcerated people. The NPP has decades of experience in complex prisoners' rights class action suits and since 1990 has represented incarcerated people in five cases before the U.S. Supreme Court. Courts across the country have repeatedly recognized the special expertise of the NPP in conditions of confinement cases.[2] Through its

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party, party's counsel, or person, other than the *amici*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief. Plaintiff-Appellee/Cross-Appellant has consented to the filing of this brief. Defendants-Appellants/Cross-Appellees do not object to the filing of this brief.

[2] *See, e.g., Plyler v. Evatt*, 902 F.2d 273, 278 (4th Cir. 1990); *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983); *Parsons v. Ryan*, No. CV-12-0601-PHX-DKD, 2018 WL 3239692, at *3 (D. Ariz. June 22, 2018), *aff'd in part, rev'd in part and remanded on other grounds*, 949 F.3d 443 (9th Cir. 2020); *Duvall v. O'Malley*, No. CV ELH-94-2541, 2016 WL 3523682, at *9 (D. Md. June 28, 2016); *Dockery v. Fischer*, 253 F. Supp. 3d 832, 856 (S.D. Miss. 2015); *Riker v. Gibbons*, No. 3:08-CV-00115-

Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, the ACLU has taken a leading role advocating for the rights of survivors of gender-based violence.

The **American Civil Liberties Union of Illinois** is the ACLU's Illinois state affiliate, with more than 47,000 members and supporters across Illinois. The ACLU of Illinois is a statewide, non-profit, non-partisan organization dedicated to protecting and defending civil rights and civil liberties and promoting fairness and dignity for all people in Illinois. The ACLU of Illinois has appeared before numerous courts, including this Court, in a wide range of cases on behalf of persons in custody. *See, e.g.*, *Lippert v. Jeffreys*, No. 1:10-cv-04603 (N.D. Ill.) (class action on behalf of Illinois state prisoners with physical healthcare needs); *Monroe v. Jeffreys*, No. 3:18-cv-00156-NJR-MAB (S.D. Ill.) (class action on behalf of transgender prisoners in Illinois state prisons). The ACLU of Illinois also challenges policies and practices that facilitate or perpetuate gender-based violence and harassment across society.

LRH, 2010 WL 4366012, at *4 (D. Nev. Oct. 28, 2010); *Diaz v. Romer*, 801 F. Supp. 405, 410 (D. Colo. 1992), *aff'd*, 9 F.3d 116 (10th Cir. 1993).

Ascend Justice is a non-profit organization based in Chicago, Illinois, whose mission is to empower individuals and families impacted by gender-based violence or the child welfare system to achieve safety and stability through legal advocacy and system reform. Formerly known as the Domestic Violence Legal Clinic, Ascend Justice has served survivors of gender-based violence with free legal services for more than forty years. Ascend Justice also offers the holistic legal advocacy necessary for survivors of gender-based violence to become safer and more independent, ranging from representation in child custody and support cases, immigration, housing, employment and consumer matters, and family defense issues. In recognition of the criminalization of survivors of gender-based violence, as well as the high proportion of incarcerated women who are survivors of gender-based violence, Ascend Justice launched a project to serve incarcerated survivors in 2021.

Chicago Alliance Against Sexual Exploitation ("CAASE") is a not-for-profit that opposes sexual harm by directly addressing the culture, institutions and individuals that perpetrate, profit from, or support such harms. CAASE engages in direct legal services, prevention education, community engagement, and policy reform. CAASE's legal

department provides advice and representation to survivors of sexual violence, including individuals who have experienced sexual abuse or assault while incarcerated in Illinois prisons.

The **Illinois Coalition Against Sexual Assault** ("ICASA") is a statewide non-profit organization comprised of 31 community-based sexual assault crisis centers working together to end sexual violence. The centers provide 24-hour crisis intervention services, and counseling and advocacy for victims of sexual assault and their significant others. Each center also presents prevention education programs in its local schools and communities. Many ICASA centers provide sexual assault counseling and advocacy for survivors in Illinois Department of Corrections facilities and local jails. ICASA supports all survivors of sexual violence, including survivors of sexual abuse in prisons and jails.

The **Illinois Prison Project** ("IPP") is a non-profit organization that fights for and with incarcerated people and their loved ones to end mass incarceration in Illinois through advocacy, public education, and legal representation of thousands of needlessly incarcerated people. IPP sees first-hand how experiences of gender-based violence, including sexual assault, impact its clients, especially women and members of the

LGBTQ+ community. IPP's Women & Survivors Project represents dozens of incarcerated survivors in Illinois, including survivors who have experienced sexual violence behind bars. The Women & Survivors Project is nationally recognized for its expertise in post-conviction advocacy for incarcerated gender-based violence survivors.

Just Detention International ("JDI") is the only organization in the world dedicated exclusively to ending sexual abuse behind bars. JDI works to hold government officials accountable for prisoner rape, promote public attitudes that value the dignity and safety of people in detention, and ensure that survivors of this violence get the help they need. JDI trains staff on sexual abuse prevention and response, educates prisoners about their rights, and creates policies that increase safety for LGBT and other especially vulnerable prisoners.

Life Span was established more than 40 years ago to provide comprehensive services to victims of domestic and sexual violence in Cook County, Illinois. Life Span's core services include criminal court advocacy, counseling, and legal representation in protective order, family law, and immigration cases. Life Span also has a specialized program providing counseling, advocacy, and legal services to survivors

of human trafficking who have experienced domestic or sexual violence. Life Span has supported thousands of survivors navigating the criminal legal system as both complaining witnesses and as defendants. Life Span uses the experience and knowledge gained from working with individual clients to inform systemic advocacy, including providing the courts with education about the dynamics of domestic and sexual violence and the effects of trauma.

Resilience is a non-profit organization established in 1974 that provides crisis intervention, individual and group trauma therapy, and medical and legal advocacy in the greater Chicago metropolitan area to thousands of survivors of sexual assault and abuse each year. Resilience also provides public education and institutional advocacy in order to improve the treatment of sexual assault survivors and to effect positive change in policies and public attitudes toward sexual assault. Resilience partners with the Cook County Department of Corrections and Metropolitan Correctional Center under the Prison Rape Elimination Act to provide advocacy support to incarcerated survivors, and has advocated for laws to protect survivors of sexual abuse by law enforcement.

The **Women's Justice Institute** ("WJI") is a dynamic national "think and do" tank based in Chicago that works to end women's mass incarceration, reduce harm to system-impacted women, their children and families, and improve health, well-being and outcomes among them. Centered on the lived experiences and leadership of system-impacted women and gender expansive people, WJI designs, develops and implements cutting-edge assessments, tools and solutions with the goal of transforming systems with/for women most impacted by them. The WJI has assessed women's prison and parole systems, as well as local jails, in multiple states for gender responsive, trauma-informed and family-centered policies, practices, and procedures; provides training and technical assistance for systems and stakeholders that impact women's justice trajectories before, during, and after incarceration; and has created tools designed to support decarceration strategies across the gender justice continuum. The WJI's work is centered on the Women's Justice Pathways Model, which defines "real" justice through the Five Rights & Needs: Relationship Safety, Health & Well-Being, Supported Families, Safe & Stable Housing, and Economic Security & Empowerment.

INTRODUCTION

There is no question that sexual abuse "is simply not part of the penalty that criminal offenders pay for their offenses against society." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks and citation omitted). This Court has held that the risks of staff sexual abuse of incarcerated women "in the confinement setting are obvious[.]" *J.K.J. v. Polk Cnty.*, 960 F.3d 367, 384 (7th Cir. 2020) (en banc). Officials therefore have a well-established obligation to protect incarcerated people from staff sexual abuse. *See id.* at 381 (citing *Farmer*, 511 U.S. at 834).

Amici submit this brief to address a question of first impression in this Court: To what extent, if any, is evidence of an incarcerated person's purported consent relevant to a claim of custodial sexual abuse under the Eighth Amendment?

In answering the question, this Court must be guided by the Eighth Amendment's evolving standards of decency. The Prison Rape Elimination Act ("PREA")—as the "clearest and most reliable objective evidence" of the Eighth Amendment's evolving standards—makes clear that consent is irrelevant to an Eighth Amendment claim of custodial

sexual abuse. PREA's implementing standards, now adopted by nearly every state, define sexual abuse of an incarcerated person by prison staff as a range of sexual acts "with or without consent[.]" 28 C.F.R. § 115.6 (2012). And PREA reflects and responds to the power inequities and coercion inherent in custodial settings, which render evidence of consent irrelevant.

The outcome of this case will have significant implications for people who are incarcerated. In 2020 alone, correctional administrators reported 36,264 allegations of sexual victimization in prisons, jails, and other adult correctional facilities.[3] Most sexual abuse goes unreported, however, making the actual number of incidents significantly higher. From 2016–2018, sexual abuse by staff accounted for more than half (56%) of all sexual abuse allegations in adult correctional facilities.[4]

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[3] Emily D. Buehler, Bureau of Justice Statistics, U.S. Dep't of Just., Sexual Victimization Reported by Adult Correctional Authorities, 2019–2020, at 1 (2024), https://bjs.ojp.gov/document/svraca1920st.pdf [https://perma.cc/9KTV-FS9Z].

[4] Emily D. Buehler, Bureau of Justice Statistics, U.S. Dep't of Just., Sexual Victimization Reported by Adult Correctional Authorities, 2016–2018, at 1 (2021), https://bjs.ojp.gov/content/pub/pdf/svraca1618.pdf [https://perma.cc/4FNF-L3DS].

Incarcerated people in women's facilities are particularly vulnerable to staff sexual abuse.[5] Although women constitute only 7% of the incarcerated population in federal and state facilities, they disproportionately account for 33% of sexual abuse by staff.[6] In local jails where women comprise only 13% of the population, 67.2% of survivors of substantiated staff sexual abuse are women.[7]

Amici therefore urge this Court to rely on PREA to inform its application of the Eighth Amendment's evolving standards of decency, to hold that evidence of consent is irrelevant to civil claims of custodial sexual abuse, and to affirm the jury verdict and the district court's denial of Appellants' motions for judgment as a matter of law and for a new trial.

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[5] This heightened vulnerability applies to all people who may be incarcerated in a women's prison facility, including cisgender women, transgender men, transgender women, and gender non-conforming people.

[6] Allen J. Beck et al., Bureau of Justice Statistics, U.S. Dep't of Just., Sexual Victimization Reported by Adult Correctional Authorities, 2009–11, at 1 (2014), https://bjs.ojp.gov/content/pub/pdf/svraca0911.pdf [https://perma.cc/7P6S-7W8V].

[7] *Id.* at 12.

ARGUMENT

The precise contours of the Eighth Amendment are not fixed. Relying on the Amendment's text, history, and tradition, the Supreme Court has "established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005) (quoting *Trop v. Dulles,* 356 U.S. 86, 100–01 (1958) (plurality opinion)).

To determine this evolving standard, courts first look to objective factors, with legislative enactments being the "clearest and most reliable objective evidence of contemporary values[.]" *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (internal quotation marks and citation omitted).

Second, a court's "own judgment is brought to bear, by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." *Id.* at 313 (internal quotation marks and citation omitted).

At both steps, courts rely on experts in the relevant field—professionals who "use their learning and skills to study and consider" the question at issue. *Hall v. Florida*, 572 U.S. 701, 710 (2014); *see also Miller v. Alabama*, 567 U.S. 460, 471 (2012) ("Our decisions rested not only on common sense . . . but on science and social science as well."). This expert evidence "informs" the determination of "whether there is a consensus that instructs how to decide the specific issue presented here[,]" as well as the "exercise of independent judgment [that] is the Court's judicial duty." *Hall*, 572 U.S. at 710, 721.

Here, application of the Eighth Amendment's evolving standards of decency demonstrates that consent is irrelevant to civil claims of custodial sexual abuse.

I. Objective Factors Demonstrate that Evidence of Consent Is Irrelevant to Civil Claims of Custodial Sexual Abuse Under the Eighth Amendment.

Objective factors—including federal legislation and state practice—establish that evidence of consent is irrelevant to civil liability for custodial sexual abuse under the Eighth Amendment. In the context of custodial sexual abuse, PREA provides the "clearest and most reliable objective evidence" of contemporary standards of decency. *See*

Atkins, 536 U.S. at 312 (internal quotation marks and citation omitted). PREA contains no consent exception to its prohibition on custodial sexual abuse. And PREA's definition of staff sexual abuse is clear: Sexual abuse includes a range of sexual acts "with or without consent" from the incarcerated person. 28 C.F.R. § 115.6 (2012). State policy and practice—mirroring the PREA standards—only confirms the societal consensus.

A. PREA Provides the Clearest and Most Reliable Objective Evidence of Contemporary Standards of Decency.

Congress unanimously passed PREA in 2003 to address the "epidemic" of sexual abuse in prisons and jails. 34 U.S.C. §§ 30301–09. The significance of PREA cannot be overstated—it is the first and only piece of national legislation governing conditions in all federal and state correctional facilities in the United States.

Congress determined that by conservative estimates "at least 13 percent of the inmates in the United States have been sexually assaulted in prison[,]" and that many incarcerated people "have suffered repeated assaults." *Id.* § 30301(2). Congress found that in the 20 years prior to 2003, the total number of incarcerated people who had

been sexually assaulted likely exceeded one million. *Id.* It also found that "[p]rison rape often goes unreported" with "victims often receiv[ing] inadequate treatment for the severe physical and psychological effects of sexual assault—if they receive treatment at all." *Id.* § 30301(6). And despite the rampant nature of carceral sexual abuse, Congress found that "[m]embers of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates." *Id.* § 30301(12).

In light of these findings, Congress enacted PREA to "establish a zero-tolerance standard" for prison rape; to "develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape;" to "increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;" and to "protect the Eighth Amendment rights of Federal, State, and local prisoners[.]" *Id.* § 30302.

Through PREA, Congress also established the National Prison Rape Elimination Commission (the "Commission") to carry out a "comprehensive legal and factual study" of carceral sexual abuse in the United States and to develop recommended national standards for

reducing incidents of abuse. *Id.* § 30306. The Commission was comprised of and consulted with experts in correctional administration, carceral sexual abuse, psychology, human rights, and the law. *See* Nat'l Prison Rape Comm'n, National Prison Rape Commission Report vii-x, 239 (June 2009). The Commission published extensive findings and recommendations in 2009. *See generally id.*

PREA directed the Attorney General to promulgate standards for the detection, prevention, reduction, and punishment of carceral sexual abuse, based on the Commission's recommendations. 34 U.S.C. § 30307. Those standards, promulgated in 2012, set out clear regulations regarding training, prevention, reporting, and responding to sexual abuse. National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106 (June 20, 2012) (codified at 28 C.F.R. § 115) [hereinafter "PREA Standards"]. The standards also reiterated Congress' "zero tolerance" mandate for carceral sexual abuse.[8] 28 C.F.R.

[8] The PREA Standards differentiate between sexual abuse of an incarcerated person by another incarcerated person, and sexual abuse of an incarcerated person by staff. Relevant here, sexual abuse of an incarcerated person by a staff member is defined by a range of sexual acts "with or without consent" of the incarcerated person. 28 C.F.R. § 115.6.

§ 115.11. All states are required to adopt and comply with the PREA Standards, or they risk losing certain federal funding. 34 U.S.C. § 30307(2).

More than a decade later, nearly all U.S. states and territories have submitted statements of compliance or assurances that they have implemented the PREA Standards.[9] Illinois, for example, has incorporated the PREA Standards into its policies governing all Illinois Department of Corrections Facilities. *See* Ill. Dep't of Corrs., *Sexual Abuse and Harassment Prevention and Intervention Program*, 04.01.301 (2021), https://idoc.illinois.gov/content/dam/soi/en/web/idoc/programs/

[9] *See* Bureau of Justice Assistance, U.S. Dep't of Just., FY 2024 List of Certification and Assurance Submissions for Audit Year 1 of Cycle 4, https://bja.ojp.gov/doc/fy24-prea-certification-assurance-submissions.pdf [https://perma.cc/UZS5-WSRG]. Governors may either certify that their jurisdiction is in full compliance with the PREA Standards, or submit an assurance that "(1) commits that not less than five percent of certain DOJ grant funds will be used solely for the purpose of enabling the jurisdiction to achieve and certify full compliance with the Standards in future years, or (2) requests that funds be held in abeyance by DOJ pending disposition consistent with the statute." Bureau of Justice Assistance, U.S. Dep't of Just., Prison Rape Elimination Act (PREA), https://bja.ojp.gov/program/prea/overview#governor [https://perma.cc/3FNE-MXRB].

documents/401301-sexual-abuse-and-harassment-prevention-and-intervention-program.pdf [https://perma.cc/4VHF-WSCF].

In the context of carceral sexual abuse, therefore, PREA and its implementing standards are the "clearest and most reliable objective evidence of contemporary values." *See Atkins*, 536 U.S. at 312 (internal quotation marks and citation omitted). Indeed, "[t]hese laws and policies reflect the deep moral indignation that has replaced what had been society's passive acceptance of the problem of sexual abuse in prison." *Crawford v. Cuomo*, 796 F.3d 252, 260 (2d Cir. 2015). They demonstrate that "the sexual abuse of prisoners, once overlooked as a distasteful blight on the prison system, offends our most basic principles of just punishment." *Id.*

Other circuits have recognized as much—expressly relying on PREA to inform their application of the Eighth Amendment's evolving standards to allegations of staff sexual abuse. In *Crawford v. Cuomo*, the Second Circuit held that the passage of PREA and related state laws "show that standards of decency with regard to sexual abuse in prisons have evolved[.]" *Id.* at 259. The court determined that "[i]n light of this evolution . . . conduct that might not have been seen to rise to the

severity of an Eighth Amendment violation 18 years ago may now violate community standards of decency[.]" *Id.* at 260.

Similarly, in *Bearchild v. Cobban*, the Ninth Circuit confirmed that "sexual assault has no place in prison" and relied on PREA and the PREA Standards as the "clearest and most reliable objective evidence of contemporary values." 947 F.3d 1130, 1144 (9th Cir. 2020) (quoting *Atkins*, 536 U.S. at 312). The Ninth Circuit concluded that circuit law "reflect[ed] our recognition of these societal standards." *Id.*; *see also DeJesus v. Lewis*, 14 F.4th 1182, 1197, 1197 n.14 (11th Cir. 2021) (recognizing that a "broad[] range of conduct certainly qualifies as sexual assault" in violation of the Eighth Amendment, and citing to the PREA Standards); *Ricks v. Shover*, 891 F.3d 468, 477–78 (3d Cir. 2018) (invoking PREA when "considering contemporary standards of decency").[10]

[10] In *J.K.J. v. Polk Cnty.*, this Court noted that "PREA is not a constitutional standard[.]" 960 F.3d at 384. Indeed, PREA is neither the constitutional ceiling nor the floor. "The standards are not intended to define the contours of constitutionally required conditions of confinement. Accordingly, compliance with the standards does not establish a safe harbor with regard to otherwise constitutionally deficient conditions involving inmate sexual abuse." National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37107 (June 20, 2012). Congress did, however, enact PREA specifically

B. PREA and State Practice Demonstrate that Consent Is Irrelevant to Civil Claims of Custodial Sexual Abuse Under the Eighth Amendment.

Applied here, PREA, the PREA Standards, and state practice demonstrate that evidence of purported consent is irrelevant to civil claims of custodial sexual abuse under the Eighth Amendment.

PREA set forth a "zero-tolerance standard" for sexual abuse in carceral settings—with no consent exceptions. *See* 34 U.S.C. § 30302(1). And the PREA Standards expressly define sexual abuse of an incarcerated person by a staff member as a range of sexual acts, "*with or without consent* of the inmate, detainee, or resident[.]" 28 C.F.R. § 115.6 (emphasis added). This definition, developed following the Prison Rape Elimination Commission's comprehensive research and input from experts in the field, deserves particular consideration. *See Hall*, 572 U.S. at 710–11 (holding it was "proper" to consider the definitions used by experts in the field when determining contemporary standards and relying on those expert definitions to define intellectual disability).

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to "protect the Eighth Amendment rights of Federal, State, and local prisoners." 34 U.S.C. § 30302(7). *Amici* urge this Court not to adopt PREA as the "constitutional standard," but rather to rely on PREA to inform its application of the Eighth Amendment's evolving standards of decency.

Nationwide, state adoptions of the PREA Standards also reject the relevance of "consent" in the custodial sexual abuse context. Most pertinent here, Illinois Department of Corrections regulations define sexual abuse of an incarcerated person by a staff member to include a range of sexual acts "with or without consent" of the incarcerated person. *See* Ill. Dep't of Corrs., Sexual Abuse and Harassment Prevention and Intervention Program, 04.01.301, at 2 (2021), https://idoc.illinois.gov/content/dam/soi/en/web/idoc/programs/documents/401301-sexual-abuse-and-harassment-prevention-and-intervention-program.pdf [https://perma.cc/4VHF-WSCF]. The other states in this Circuit are in accord. *See* Wisc. Dep't of Corrs., Executive Directive #72: Sexual Abuse and Sexual Harassment in Confinement 3 (2008), https://doc.wi.gov/Documents/AboutDOC/PREA/ED%2072%20Final%209.22.2022.pdf [https://perma.cc/4GVZ-NZ4J] (defining sexual abuse of an incarcerated person as a delineated list of acts, "with or without consent" of the incarcerated person); Ind. Dep't of Corr., Sexual Abuse Prevention 5 (2020), https://www.in.gov/idoc/files/policy-and-procedure/policies/02-01-115-Sexual-Abuse-Prevention-4-1-2020.pdf [https://perma.cc/W5GS-SEZP] (same).

These "objective indicia of society's standards, as expressed in legislative enactments and state practice[,]" *Roper*, 543 U.S. at 563, demonstrate the consensus that consent is irrelevant to civil liability under the Eighth Amendment for custodial sexual abuse.

II. Courts and Experts Have Long Recognized the Inherent Power Inequities in Carceral Settings that Render Evidence of Consent Irrelevant to Eighth Amendment Custodial Sexual Abuse Claims.

Applying the Court's own judgment, there is no "reason to disagree with the judgment reached by the citizenry and its legislators." *Atkins*, 536 U.S. at 313. Prisons are inherently coercive environments, as courts and experts have repeatedly acknowledged. This, too, supports the conclusion that evidence of purported consent is irrelevant to civil claims of custodial sexual abuse under the Eighth Amendment.

Courts across the country have recognized the power inequities and inherent coercion found in the custodial environment. Indeed, this Court stated in *J.K.J. v. Polk County* that the "confinement setting is a tinderbox for sexual abuse" because the "authority and control" of officers confers "power and, in turn, access and opportunity to abuse it." 960 F.3d at 381–82. The Court noted that incarcerated people depend on facility staff for "nearly everything in their lives—their safety as well

as their access to food, medical care, recreation, and even contact with family members." *Id.* at 381. It is, therefore, "difficult to conceive of any setting where the power dynamic could be more imbalanced." *Id.* at 382. *See also, e.g., Wood v. Beauclair*, 692 F.3d 1041, 1047 (9th Cir. 2012) ("The power dynamics between prisoners and guards make it difficult to discern consent from coercion. . . . [I]t is difficult to characterize sexual relationships in prison as truly the product of free choice." (citation omitted)); *Brown v. Flowers*, 974 F.3d 1178, 1185 (10th Cir. 2020) (discussing the "power dynamic" between officers and incarcerated people in denying qualified immunity to a jail officer for sexual abuse); *Carrigan v. Davis*, 70 F. Supp. 2d 448, 460–61 (D. Del. 1999) (noting "the totality of the Plaintiff's circumstances as a prisoner, the control the institution necessarily maintained over her, and the lack of control which she maintained over her own life" and concluding that staff sexual abuse of an incarcerated person may violate the Constitution regardless of consent).

Research and investigations confirm that the inherent power inequities in carceral settings render irrelevant any evidence of purported consent by incarcerated people to sexual contact with staff.

Indeed, experts have catalogued multiple ways in which correctional staff exploit these power inequities to sexually abuse people in custody.

Facility staff may coerce an incarcerated person into sexual contact through "overt or veiled threats."[11] For example, staff may assert or imply that they will use their authority to prolong or interfere with an incarcerated person's sentence to coerce sexual activity.[12] Or staff may threaten "to write disciplinary tickets, take away their privileges, and have them transferred" to far-flung facilities.[13] In this

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[11] Michelle VanNatta, *Conceptualizing and Stopping State Sexual Violence Against Incarcerated Women*, 37 Soc. Just. 27, 31 (2010).

[12] *See, e.g.*, U.S. Dep't of Just., Civil Rights Div., *Investigation of the Lowell Correctional Institution – Florida Department of Corrections (Ocala, Florida)*, at 9 (Dec. 22, 2020), https://www.justice.gov/opa/press-release/file/1347811/dl [https://perma.cc/93QG-EDUL] (describing testimony that incarcerated women engaged in sexual contact with officer who threatened to take away their "gain time" towards early release); Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. Sex Research 217, 222 (Aug. 2002) (describing an officer's threat to "trump up charges" so an incarcerated woman would "never get out").

[13] Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, Part VIII (text accompanying note 828) (1996), https://www.hrw.org/legacy/reports/1996/Us1.htm [https://perma.cc/B3VW-9LF5].

case, for example, the counselor who sexually abused Doe controlled her access to phone calls with her daughter. SA 24.

Likewise, as the Sixth Circuit recognized, facility staff may promise to assist incarcerated people with their criminal cases or other matters, which holds out "a double edged-sword" because "[b]y proposing to help . . . [the officer] also implied he could harm her case." *Hale v. Boyle Cnty.*, 18 F.4th 845, 854–55 (6th Cir. 2021). The court found that the promise of help was, "[n]o doubt . . . the most egregious example of coercion here." *Id.* at 855; *see also Cal. Coal. for Women Prisoners v. United States*, 723 F. Supp. 3d 712, 722 (N.D. Cal. 2024) (noting that prison warden used both the granting of compassionate release motions and the placement of women in the segregated housing unit to coerce incarcerated women into sexual contact).

Staff may also assert or imply that they will deprive the incarcerated person of basic necessities such as food, water, or hygiene products[14]—a legitimate and potent threat given their total control over every aspect of an incarcerated person's life. *See, e.g.*, *J.K.J.*, 960 F.3d

[14] *See* VanNatta, *supra*, at 32; *Investigation of the Lowell Correctional Institution*, *supra*, at 9.

at 381. And these threats may go even further—staff may also threaten harm to an incarcerated person's loved ones.[15]

Staff members may also use "inducements such as privileges or access to resources in exchange for sexual contact."[16] In an environment where resources are scarce, staff may hold out increased freedom within the facility; extra food; phone calls; money in prison accounts; access to items such as candy, ice, makeup, shampoo, or stamps; or access to contraband such as cell phones, cigarettes, and alcohol.[17] "Each of these gifts, favors, and privileges is indicative of coercion." *Hale*, 18 F.4th at 855. Indeed, in a recent investigation into federal prisons, the U.S. Department of Justice Inspector General found that prison staff used

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[15] *See, e.g.*, Human Rights Watch, *supra*, at Part VI (text accompanying note 546) (sexual advances were "accompanied by threats of retaliation against the woman, her family and children" including references to a child's place of residence).

[16] VanNatta, *supra*, at 31.

[17] *See, e.g.*, Human Rights Watch, *supra*, at Parts III, V–VIII (text accompanying notes 193–95, 391–400, 409, 552–54, 704, 845–52); *see also Investigation of the Lowell Correctional Institution*, *supra*, at 1–2 ("It is common for officers to . . . bribe prisoners with contraband including drugs, cigarettes, food, and makeup in exchange for sex.").

"contraband, including cell phones, cigarettes, and drugs to groom and develop relationships with inmates and subsequently assault them."[18]

In addition, prison staff may create "unequal or exploitative 'romances'" with incarcerated people by taking advantage of their unmet "human needs for touch, sexuality, and intimacy."[19] Staff in positions of trust in particular—such as pastoral, educational, counseling, and treatment staff—can exploit their relationships with incarcerated people in order to sexually abuse them.[20] Incarcerated people who attempt to end the interactions often then face the staff member's persistent sexual advances or retaliation and harassment

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[18] *Sexual Abuse of Female Prisoners in the Custody of the Federal Bureau of Prisons: Hearing Before the Permanent Subcommittee on Investigations of the S. Comm. on Homeland Sec. and Gov't Affairs*, 117th Cong. 4–5 (2022) (statement of Michael E. Horowitz, Office of Inspector Gen., U.S. Dep't of Just.), https://oig.justice.gov/sites/default/files/2022-12/12-13-2022.pdf [https://perma.cc/PXL7-7HCX].

[19] VanNatta, *supra*, at 31, 33.

[20] *See, e.g.*, *Statement of Michael E. Horowitz, supra*, at 4 (describing situation where a chaplain used "Biblical parables and his victim's religious beliefs to manipulate her and coerce her into submitting to him").

from the staff member and/or their colleagues if they report the sexual abuse.[21]

Indeed, incarcerated people who report sexual abuse frequently are placed in solitary confinement pending investigation, and staff commonly threaten incarcerated people who report abuse with retaliation, including placement in solitary confinement.[22] *See Cal. Coal. for Women Prisoners*, 732 F.Supp.3d at 743 (noting that multiple correctional staff at FCI Dublin including the prior warden "silenced their victims by threatening them with, or actually sending them to, the [segregated housing unit]."). In this case, for example, the plaintiff was told by her abuser that if she informed anyone of the sexual contact between them she would be given a year of segregated housing and restricted privileges. Doe Br. at 6 (citing R.270 35:8-36:14).

The risk of coercive sexual abuse by facility staff is compounded by the fact that many incarcerated people have histories of sexual abuse

[21] *See, e.g.*, Human Rights Watch, *supra*, at Parts III, VI, VIII (text accompanying notes 201, 554, 628–33, 757, 853–55).

[22] *Investigation of the Lowell Correctional Institution*, *supra*, at 9.

and other trauma[23]—factors that make them particularly vulnerable to sexual abuse while incarcerated. In Illinois, for example, 75% of interviewees in women's prisons reported a history of sexual abuse.[24] And research suggests that individuals with a history of sexual abuse are at increased risk for future sexual abuse.[25]

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[23] *See, e.g.*, Shannon M. Lynch et al., Bureau of Justice Assistance, U.S. Dep't of Just., *Women's pathways to jail: The roles & intersections of serious mental illness & trauma*, at tbl.12 (Sept. 2012), https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/Women_Pathways_to_Jail.pdf [https://perma.cc/5YDM-WX2J] (86% of female interview subjects in jails reported experiences of prior sexual violence); Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep't of Just., *Prior Abuse Reported by Inmates and Probationers*, at 2 tbl.1 (Apr. 1999), https://bjs.ojp.gov/content/pub/pdf/parip.pdf [https://perma.cc/99Z5-ADG8] (39-57% of incarcerated women and 7-16% of incarcerated men experienced physical or sexual abuse before admission).

[24] Jessica Reichert et al., Ill. Crim. Just. Info. Auth., *Victimization and help-seeking behaviors among female prisoners in Illinois*, at 21 (Apr. 2010), https://archive.icjia-api.cloud/files/icjia/pdf/ResearchReports/Victimization%20and%20help%20seeking%20behaviors%20among%20female%20prisoners%20in%20Illinois.pdf [https://perma.cc/Y7TT-PZNR].

[25] Catherine C. Classen et al., *Sexual Revictimization: A Review of the Empirical Literature*, 6 Trauma, Violence & Abuse 103, 112 (Apr. 2005); *see also* Anne E. Jafe et al., *Risk for Revictimization Following Interpersonal and Noninterpersonal Trauma: Clarifying the Role of Posttraumautic Stress Symptoms and Trauma-Related Cognitions*, 32 J. of Traumatic Stress 42, 49 (Feb. 2019) (the experience of any form of

The prevalence—and effectiveness—of such coercive tactics is confirmed by data. For example, in a Bureau of Justice Statistics survey of former state prisoners, 62.4% of respondents who reported staff sexual misconduct described coercion other than force or threat of force.[26] This included 49.6% of respondents who reported being offered favors or special privileges, 27.2% who reported being given bribes or blackmailed, 18.6% who reported being given drugs or alcohol, and 13.3% who reported being offered or given protection from another correctional officer.[27] Critically, 61.6% of respondents reported coercive tactics even when they said that they were "willing" to have sexual

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past interpersonal trauma—i.e. physical or sexual abuse—increases the risk of subsequent experiences of interpersonal trauma).

[26] Allen J. Beck & Candace Johnson, Bureau of Justice Statistics, U.S. Dep't of Just., *Sexual Victimization Reported by Reported by Former State Prisoners, 2008*, at 12 tbl.4 (May 2012), https://bjs.ojp.gov/content/pub/pdf/svrfsp08.pdf [https://perma.cc/Z5BY-5ZA7]; *see also* Office of the Inspector General, U.S. Dep't of Just., *The Department of Justice's Efforts to Prevent Staff Sexual Abuse of Federal Inmates*, at 1 (Sept. 2009), https://oig.justice.gov/reports/plus/e0904.pdf ("[I]n most cases prison employees obtain sex from prisoners without resorting to the use of overt threats or force.").

[27] Beck & Johnson, *supra*, at 12 tbl. 4.

contact with staff,[28] confirming that coercion and power inequities are omnipresent in custodial settings. Consent thus plays no role in determining civil liability under the Eighth Amendment for sexual contact between incarcerated people and those who incarcerate them.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's denial of Appellants' motions for judgment as a matter of law and for a new trial.

Dated: January 29, 2025

Respectfully submitted,

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[28] *Id.*

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 5,646 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface with 14-point Century Schoolbook font.

Dated: January 29, 2025

/s/ Jennifer A. Wedekind
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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2025, I electronically filed this brief with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit, causing notice of such filing to be served upon all parties registered on the CM/ECF system.

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