

No. 21-1060

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

LUIS “DIVINITY” RIOS,

Plaintiff-Appellant,

v.

FNU REDDING, FNU SIMMS, FNU JONES,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado

United States Magistrate Judge Michael E. Hegarty

Case No. 20-cv-01775-MEH

**BRIEF OF *AMICI CURIAE* FORMER CORRECTIONS OFFICIALS IN
SUPPORT OF PLAINTIFF-APPELLANT LUIS “DIVINITY” RIOS**

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FRAP RULE 29 STATEMENTS

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a)(2), undersigned counsel for amicus curiae states that all parties have consented to the filing of this brief. Pursuant to FRAP 29(a)(4)(E), undersigned counsel for amicus curiae states that no party or party's counsel authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amicus Curiae contributed money to the preparation or submission of this brief.

Dated: June 3, 2021

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INTEREST OF *AMICI CURIAE*

The *Amici Curiae* filing this brief are Eldon Vail, Steve J. Martin, Dan Pacholke, Richard Morgan, Martin F. Horn, and Phil Stanley.

Amici are six high-ranking former corrections officials with over half a century of combined experience in some of the largest correctional systems in the country. Each has worked at various levels of the prison system, from entry level staff to senior positions, inclusive of positions as final responsible authority within their respective state and territorial systems. Their experience spans at least 6 jurisdictions, within each of which they worked at or oversaw numerous facilities that collectively housed thousands of prisoners.

As corrections professionals, *amici* have an interest in making sure that corrections facilities are managed in a manner that is consistent with sound penological principles. *Amici* thus respectfully submit this brief to advise the court of common dynamics in corrections facilities relevant to this case and the basic responsibilities of officers working in these facilities.

Amici are:

Eldon Vail served as Deputy Secretary of the Washington Department of Corrections from 1999 to 2006. He served as the Secretary of the Washington Department of Corrections from 2007 until 2011. As Secretary, he successfully reduced violence in the state prison system and implemented a wide array of

evidence-based programs, including an intensive treatment program for people in prison with a mental illness and a step-down program for people held for long terms in solitary confinement. Since his retirement in 2011 he has served as a correctional consultant and expert witness over sixty times in twenty-two states.

Steve J. Martin is the former General Counsel/Chief of Staff of the Texas prison system and has served in Texas gubernatorial appointments to both a sentencing commission and a council for offenders with mental impairments. He also has served as an expert with the U.S. Department of Justice's Civil Rights Division and has worked on the development of the PREA standards. In addition, he was in the first class of PREA Auditors to be certified and provided the Department of Justice with feedback on the certification process. Mr. Martin coauthored Texas Prison, the Walls Came Tumbling Down, and has written numerous articles on criminal justice issues.

Dan Pacholke is the former Secretary for the Washington State Department of Corrections (WDOC). He started his 33-year career as a Correctional Officer, working his way to the senior most position for the department. As the Director of Prisons he led the system wide effort to implement PREA in prisons, community corrections and work release facilities.

Richard Morgan served as Secretary of the Washington State Department of Corrections in 2016. He also was appointed twice to Washington State's Parole

Board and elected to the Walla Walla City Council, and he has served on the Board for the Washington State Coalition to Abolish the Death Penalty since 2012.

Martin F. Horn served as the Secretary of Corrections of Pennsylvania from 1995 to 2000. He also served as Commissioner of the New York City Department of Correction and Probation for seven years. Mr. Horn has also served as Executive Director of the New York State Sentencing Commission.

Phil Stanley is the former Commissioner of the New Hampshire Department of Corrections, reporting directly to the Governor. He has served as Superintendent of three prisons in Washington State, as Regional Administrator, and probation Officer. He is currently a consultant for jail operations.

SUMMARY OF ARGUMENT

It is widely recognized within the corrections profession that transgender inmates, inmates who have previously been victimized, and inmates who are being threatened face a greater risk of experiencing violence and sexual assault. Training standards, screening procedures, and data collection mandated by the Prison Rape Elimination Act (“PREA”), as well as the positions of professional corrections organizations and the day-to-day experiences of corrections officers, serve to make corrections officers well aware of the commonsense reality that inmates belonging to these vulnerable groups are especially susceptible to attacks from other inmates. Sound correctional practice requires corrections officers to take subjective and

overt threats of violence directed at particularly vulnerable prisoners seriously, to investigate these threats, and to take appropriate measures to proactively protect such prisoners from harm.

ARGUMENT

I. Correctional Staff Are Well Aware That Transgender Prisoners and Prisoners Who Have Previously Been Victimized Are at Substantial Risk of Sexual Abuse

Prisons are generally dangerous environments, but the danger is especially high for transgender prisoners and prisoners who have previously been victimized. Data from the Bureau of Justice Statistics (“BJS”), a data collection agency within DOJ, indicates that transgender prisoners and prisoners who have previously been victimized are about 8 and 3 times respectively more likely to be sexually assaulted than other prisoners.¹ Similarly, a study from the University of California, Irvine’s Center for Evidence-Based Corrections found that 59% of transgender prisoners

¹ See ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12, SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES 2 (2014), https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf (finding that between 33.1% and 39.9% of transgender prisoners across three studies reported being sexually victimized by another inmate within a year or less of being surveyed); ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12 10, 18 (2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (finding that 12.0% of previously victimized prisoners and 4.0-4.5% of the general population reported being sexually victimized by another inmate within a year or less of being surveyed).

sampled reported having experienced sexual assault during their time in prison, which was 13 times the general population sample.²

This danger has been documented by government entities. The National Prison Rape Elimination Commission (“NPREC”), a body created by Congress to study sexual abuse in prison, produced an extensive report in 2009 which found that “most male-to-female transgender individuals who are incarcerated are placed in men’s prisons . . . [which] puts them at extremely high risk for abuse.”³ It also found that those who have experienced victimization are “at increased risk of further exploitation.” *Id.* at 71. Similarly, the National Institute of Corrections, an agency within the Federal Bureau of Prisons responsible for providing assistance to corrections institutions, released a policy report on incarcerated LGBTI individuals which found that transgender women are “highly vulnerable to sexual abuse” compared to the general population.⁴

² VALERIE JENNESS ET AL., UNIVERSITY OF CALIFORNIA, IRVINE CENTER FOR EVIDENCE-BASED CORRECTIONS, VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 42 (2007), https://ucicorrections.seweb.uci.edu/files/2013/06/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf.

³ NAT’L PRISON RAPE ELIMINATION COMM’N REPORT 74 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

⁴ NAT’L INST. OF CORR., POLICY REVIEW AND DEVELOPMENT GUIDE: LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX PERSONS IN CUSTODY 4, 11 (2d ed. 2015), https://info.nicic.gov/sites/info.nicic.gov/lgbti/files/lgbti-policy-review-guide-2_0.pdf.

The heightened risk to these particularly vulnerable groups of prisoners is common knowledge within the corrections profession. The National Institute of Corrections has recognized, “[c]orrections officials are aware of the particular vulnerabilities LGBTI individuals face.” *Id.* at 12.

One of the primary ways the corrections community has been made aware of the elevated risk of sexual assault for transgender prisoners and prisoners who have previously been victimized is through PREA. Since PREA’s passage in 2003, standards have been promulgated pursuant to PREA’s implementation regarding training correction staff and screening inmates for risk of victimization or abuse.

PREA states that “[t]he agency shall train all employees who may have contact with inmates on . . . [t]he dynamics of sexual abuse and sexual harassment in confinement.” PREA National Standards, 28 C.F.R. § 115.31. The trainings developed by the National PREA Resource Center, a cooperative agreement formed in part by the Bureau of Justice Assistance, a component of the Office of Justice Programs within the Department of Justice, are designed to fulfill this requirement.⁵ One of the trainings developed to satisfy § 115.31 explicitly states that transgender prisoners and prisoners who have previously been victimized are

⁵ NAT’L PREA RES. CTR., UNIT 3, PART 1: PREVENTION AND DETECTION OF SEXUAL ABUSE AND SEXUAL HARASSMENT PLAN 1 (2014), https://www.prearesourcecenter.org/sites/default/files/content/unit_3.1_lesson_plan.pdf.

particularly vulnerable. *Id.* at 41. The training materials also include statistics from the BJS regarding the rates of abuse experienced by LGBTI respondents and respondents who have previously been victimized. *Id.*

Similarly, corrections officials are also trained to take threats of physical and sexual violence seriously. The same National PREA Resource Center training on sexual assault prevention states that threats and intimidation are types of sexual harassment and that “sexual harassment may precede sexual abuse.” *Id.* at 47-48. Corrections officials are aware that threats of violence and extortion indicate looming abuse. In cases where previous threats have already led to sexual assault and there are more ongoing threats, the risk of continued victimization is particularly clear.

PREA-mandated screening procedures also inform corrections officers of the vulnerability of transgender prisoners and prisoners who have previously been victimized. PREA standards require officers to determine both “[w]hether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming” and “[w]hether the inmate has previously experienced sexual victimization” when screening for their risk status upon entering a facility. PREA National Standards, 28 C.F.R. § 115.41. Virtually every corrections officer is briefed on these screening procedures, and is therefore aware that both an

inmate's transgender identity and their prior victim status indicate that they are at a greater risk of harm.

The PREA standards also require that housing assignments for transgender prisoners be made on a case-by-case basis and reassessed at least twice a year “to review any threats to safety experienced by the inmate.” 28 C.F.R. § 115.42(c)-(d). PREA also requires transgender prisoners to have an opportunity to shower separately from other prisoners. *Id.* § 115.42(f). Finally, PREA requires facilities to take into consideration whether an incidence of assault was motivated by transgender status in every sexual assault investigation. *Id.* § 115.86(d)(2).

The prevailing understanding of corrections officials that transgender inmates, in particular, face an elevated risk of harm is reflected in the publications of professional corrections organizations. For instance, the American Correctional Association, the oldest and largest trade association and accrediting body for the corrections industry, has published articles and presentations highlighting the vulnerability of transgender prisoners.⁶ Similarly, the National Commission on Correctional Health Care has issued a position statement on transgender and

⁶ See David Radziewicz & Carole A. Mattis, *Providing Support Services to Transgender Inmates*, AM. CORR. ASSOC., CORRECTIONS TODAY, July/Aug. 2018, <https://perma.cc/D4JW-93VW>; AM. CORR. ASSOC., A SPECIAL SESSION WEBINAR, TRANSGENDER CARE IN CORRECTIONS: WHERE WE ARE AND WHERE WE'RE GOING (2018), <https://perma.cc/C8W7-K263>.

gender non-conforming prisoners acknowledging that members of this group are “common targets for violence.”⁷

Corrections officials have also been informed of the substantial risk to transgender prisoners by highly publicized cases. In the years and months leading to Ms. Rios’s assault in the late summer of 2019, the danger to transgender inmates in prisons was being greatly reported and discussed.⁸ One of the many high-profile cases of abuse against transgender prisoners concerned Ashley Diamond, a transgender woman who was imprisoned in 2012. Ms. Diamond was placed in a facility with violent men, who raped her at least seven times.⁹ Ms. Diamond’s case

⁷ NAT’L COMM’N ON CORR. HEALTH CARE, POSITION STATEMENT: TRANSGENDER, TRANSSEXUAL, AND GENDER NONCONFORMING HEALTH CARE IN CORRECTIONAL SETTINGS 2 (Apr. 2015), <https://web.archive.org/web/20200407164105/https://www.ncchc.org/filebin/Positions/Transgender-Transsexual-and-Gender-Nonconforming-Health-Care.pdf>.

⁸ See e.g., Karma Allen, *Family 'Demands Answers' in Wake of Transgender Inmate Layleen Polanco's Death in New York City*, ABC NEWS (June 11, 2019, 5:06 AM), <https://abcnews.go.com/US/family-demands-answers-wake-transgender-inmates-death-rikers/story?id=63621456>; Anna Orso, *After Keeping Her in a Men’s Prison for 17 Months, N.J. Will Move Transgender Inmate to Women’s Facility*, THE PHILA. INQUIRER (Aug. 29, 2019), <https://www.inquirer.com/news/nj-move-transgender-prisoner-to-womens-facility-after-lawsuit-aclu-20190829.html>; *Transgender Woman Says She Was Jailed with Men, Assaulted*, ASSOCIATED PRESS (Nov. 6, 2017), <https://apnews.com/article/72b1f102b653459fa802a74340892b5f>; Kirk Mitchell, *Transgender Inmate Raped, Beaten in Cañon City Prison Hours After Judge Denied Motion to Keep Her in Safer Quarters*, DENVER POST (May 3, 2018, 12:35 PM), <https://www.denverpost.com/2018/05/03/transgender-inmate-raped-beaten-canon-city/>.

⁹ E.g., Deborah Sontag, *Transgender Woman Cites Attacks and Abuse in Men’s Prison*, N.Y. TIMES (Apr. 5, 2015),

received enough attention that the U.S. Department of Justice intervened on her behalf, *id.*, and her case was spotlighted in “Where Justice Ends,” a documentary released in April, 2019.¹⁰ The summer of 2019, Strawberry Hampton’s experience in prison was also publicized nationally.¹¹ During her incarceration, Ms. Hampton was spat on, stomped on, and sexually assaulted on multiple occasions.¹² Hampton expressed that she felt like “a sex slave.” Kozlov, *supra* note 12.

Additionally, corrections officials are informed of the vulnerability of transgender prisoners and prisoners who have previously been victimized through their day-to-day work experiences. Prisons are generally unsafe environments where men demonstrate domination and aggressive behaviors (both random and

<https://www.nytimes.com/2015/04/06/us/ashley-diamond-transgender-inmate-cites-attacks-and-abuse-in-mens-prison.html>.

¹⁰ Alejandra Martinez, *Local Filmmaker Explores The Mistreatment Of Transgender Prison Inmates In New Film*, WJCT NEWS (Apr. 22, 2019), <https://news.wjct.org/post/local-filmmaker-explores-mistreatment-transgender-prison-inmates-new-film>.

¹¹ Rachel Hinton, *Transgender Inmate Free After ‘Tooth and Nail’ Prison Battle — Vows to Fight ‘for Everyone That Was Done Like Me’*, CHI. SUN TIMES (July 10, 2019, 3:52pm),

<https://chicago.suntimes.com/politics/2019/7/10/20689443/transgender-inmate-free-prison-battle-vows-fight-strawberry-hampton>.

¹² *Id.*; Dana Kozlov, *After Years Of ‘Verbal And Physical Abuse’ Trans Woman Strawberry Hampton Is Released From Prison*, CBS Chi. (July 10, 2019, 11:08 PM), <https://chicago.cbslocal.com/2019/07/10/after-years-of-verbal-and-physical-abuse-trans-woman-strawberry-hampton-is-released-from-prison/>; Michael Tarm, *Transgender Inmate Seeks Rare Transfer to Female Prison*, ASSOCIATED PRESS (Jan. 5, 2018), <https://apnews.com/article/8e3e919709db41f1b5b51071a96778b8>.

systemic) in order to control other prisoners.¹³ These behavior patterns frequently are motivated by self-protection. This creates a culture in which transgender prisoners are often referred to using derogatory slurs and subjected to physical and sexual abuse due to their perceived effeminacy.¹⁴ Given these dynamics, it is not credible that a corrections officer with even passing familiarity with their work environment would be unaware that a transgender woman who had been threatened, like Ms. Rios, was at a serious and operationally predictive risk of experiencing another sexual assault. Operationally, the courts have provided prison administrators with a wide range of authority over prisoners, especially when compared to the rights and protections available to individuals in the community. This variance is partially due to the need of prison administrators to have flexibility to ensure the basic and elementary protection of staff, prisoners,

¹³ See, e.g., American Medical Association, *Reports to the Board of Trustees*, 24 (2018), <https://www.ama-assn.org/system/files/2019-12/a18-bot-reports.pdf>; Rebecca Mann, *The Treatment of Transgender Prisoners, Not Just an American Problem – A Comparative Analysis of American, Australian, and Canadian Prison Policies Concerning the Treatment of Transgender Prisoners and a “Universal” Recommendation to Improve Treatment*, 15 TUL. J.L. & SEXUALITY 91, 105 (2006).

¹⁴ See, e.g., Valerie Jenness et al., *Sexual Victimization Against Transgender Women in Prison: Consent and Coercion in Context*, 57 CRIMINOLOGY 603, 617 (2020), <https://onlinelibrary.wiley.com/doi/10.1111/1745-9125.12221> (detailing that transgender prisoners “report[ed] routinely being called a ‘faggot,’ ‘punk,’ and ‘bitch.’”); Sontag, *supra* note 20 (noting that prison officials called Ashley Diamond a “he-she thing”); SYLVIA LAW RIVERA PROJECT, IT’S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS 18, 23 (2007), <https://srlp.org/wp-content/uploads/2012/08/WarinHere042007.pdf>.

and the community. It is counterproductive for prison officials' use of this discretion to result in random and systemic violence and sexual victimization.

II. Corrections Officials Have an Elemental Responsibility and Authority to Protect Particularly Vulnerable Prisoners

Corrections officials have the responsibility and authority to take precautions to protect prisoners who they know or perceive are vulnerable to physical violence and/or sexual abuse. As a corrections officer, protecting particularly vulnerable groups from sexual assault is not a matter of "best practices." Instead, it is a fundamental requirement of the job.

The Bureau of Prisons Transgender Offender Manual states that, pursuant to the PREA National Standards, a transgender prisoner's placement may "not jeopardize the inmate's health and safety," and that "[i]n making housing unit and programming assignments, a transgender or intersex inmate's own views with respect to his/her own safety must be given serious consideration."¹⁵ Accordingly, sound correctional practice requires corrections officers to take threats of violence directed at particularly vulnerable prisoners seriously, to investigate these threats, and to take appropriate measures to protect such prisoners from harm.

¹⁵ FEDERAL BUREAU OF PRISONS, TRANSGENER OFFENDER MANUAL 7 (2018), <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf>; *see also* 28 C.F.R. § 115.42(e).

Protecting particularly vulnerable prisoners from sexual assault also yields broader penological benefits. When corrections officers listen to the concerns of vulnerable groups and take precautions to protect them, such as monitoring their safety, they increase their legitimacy as authority figures. This also abates predator prisoners (individually and as a group) from establishing their command authority over the prison and other prisoners. Additionally, these actions signal to other prisoners that abuse will not be tolerated and increase the safety of the facility for officers and prisoners alike.

Therefore, allowing *Bivens* claims against officials for failing to protect particularly vulnerable prisoners does not interfere with the proper use of their discretion. It will only require officials to conform to their clearly stated job responsibilities, as articulated through PREA regulations, trainings, and Supreme Court precedent. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (holding in a case involving a transgender prisoner that “prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners”) (citation omitted). These *Bivens* claims also reinforce obligations that yield penological benefits for vulnerable prisoners and the broader corrections system.

In this case, Ms. Rios’s transgender status, repeated recent sexual victimization, and the ongoing threats of assault against her should have indicated to corrections officers that her concerns needed to be taken seriously. Appellant

App. 79. Following a severe beating in July 2019, Ms. Rios reported her assault and was examined by nursing staff. *Id.* at 33. She also expressed her concerns for her safety in writing and orally to various corrections officials and requested she be allowed to stay in the special housing unit.¹⁶ Rather than take these concerns seriously, Defendants mocked Ms. Rios and transferred her back to the general population, where she was sexually assaulted. *Id.* at 79. The corrections officials must have known they were exposing Ms. Rios to substantial risk by transferring her back to the general population without taking precautions to ensure that the threats against her would not be carried out. Instead, they should have either kept Ms. Rios in the segregated housing unit as requested or put in place protections to prevent continued sexual or physical assaults against her.

CONCLUSION

As the Supreme Court recognized in *Farmer*, sexual abuse of prisoners “serves no ‘legitimate penological objective.’” 511 U.S. at 833 (citation omitted). Corrections officers are made well aware that transgender prisoners, prisoners who

¹⁶ After being raped and beaten by other prisoners repeatedly, Ms. Rios notified a corrections officer, who directed her to fill out a questionnaire about her experiences. Appellant App. 32-33, 79. She underwent a physical evaluation of her injuries, including a contusion under her eye, and completed additional documentation. Appellant App. 33. Following this, she was transferred to segregated housing for twenty-five days. Appellant App. 79. Defendants then interviewed her, and she again expressed that other prisoners were threatening to assault her if she did not engage in sexual activity. Appellant App. 34, 79.

have previously been victimized, and prisoners being threatened are at a considerably higher risk of sexual assault through PREA-mandated trainings and standards, the positions of professional corrections organizations, and their day-to-day work experiences. Sound correctional practice requires corrections officers to take threats of violence directed at particularly vulnerable prisoners seriously, to prevent and proactively investigate these threats, and to take appropriate objective measures to reasonably protect such prisoners from harm.

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CERTIFICATE OF COMPLIANCE

I, Alexander L. Chen, hereby state that:

1. This document complies with Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 3,185 words.
2. This document 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 it has been prepared in size fourteen Times New Roman font. This is a plain, roman style font in proportionally spaced typeface.

Dated: June 3, 2021

____/s/ Alexander L. Chen_____
Alexander L. Chen

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on July, 3, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that opposing counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

Dated: June 3, 2021

____/s/ *Alexander L. Chen*_____
Alexander L. Chen

Counsel for Amici Curiae