

Case No. 21-15849

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRENCE JESSE MOORE,

Plaintiff-Appellant,

v.

S. CALDERON,

Defendant-Appellee

On Appeal from Order of the United States District Court
For the Eastern District of California
(No. 1:20-cv-00397)

**BRIEF OF AMICI CURIAE
FORMER STATE PRISON OFFICIALS
IN SUPPORT OF PLAINTIFF-APPELLANT**

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INTEREST OF *AMICI CURIAE*¹

Amici are former leaders of some of the nation's largest state prison systems. With over a century of combined experience, each has worked at various levels of prison systems, from entry level positions including correctional officers, to the Chief Executive Officer position within their respective state organizations. They have worked at and overseen dozens of prison and jail facilities, housing thousands of prisoners. *Amici* are:

- **Kathleen Dennehy, Ph.D.:** the former Commissioner and Chief Executive Officer for the Commonwealth of Massachusetts Department of Correction. Dr. Dennehy has worked in the criminal justice system for over 30 years and has been a consultant for justice and prison systems for over 25 years. She has taught courses on criminal justice and has served as an expert witness in many prison-related cases across the country. Dr. Dennehy is currently serving as an independent federal court monitor.
- **Brian Fischer:** has 44 years in corrections, serving as Commissioner of the New York State Department of Corrections and Community Supervision from 2007–13. Mr. Fischer consolidated the Division of State Parole and the Department of Correction into the Department of Corrections and Community Supervision, downsizing the agency by closing prison farms, annexes, camps, and several medium-security prisons. Prior to serving as Commissioner, Mr. Fischer was the Superintendent of Sing Sing Correctional Institution, a maximum-security facility operated by the New York State Department of Corrections.

¹ No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties that have entered an appearance in this matter have consented to *amici*'s submission of this brief.

- **Martin Horn:** the former Commissioner of the New York City Department of Corrections, and former Secretary of Corrections for the Commonwealth of Pennsylvania. He has worked in the criminal justice system for over 45 years, and is the Distinguished Lecturer in Corrections and Professor Emeritus at the City University of New York.
- **Dan Pacholke:** the former Secretary of the Washington State Department of Corrections, the top position within the Department. He served in the Department for 33 years. He is a co-author of *Keeping Prisons Safe: Transforming the Corrections Workspace* (2014).
- **Eldon Vail:** the former Secretary of the Washington State Department of Corrections. He has more than 40 years of experience in the field of corrections and has served as an expert witness in numerous prison-related cases across the country.

As leading experts in the management of prisons and jails, *amici* have an interest in ensuring that issues affecting carceral systems are decided in a manner that is consistent with sound penological principles. *Amici* thus respectfully submit this brief to advise the Court of certain principles and practices relevant to the issues presented in this case.

INTRODUCTION

This case allows the Court to clarify when verbal sexual harassment² violates the Eighth Amendment. Appellant Jesse Moore (“Moore”) is a transgender woman

² *Amici* use the terms “sexual harassment” and “sexual abuse” as defined by the National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (“PREA Standards”), which apply to all prisons and jails. *See* 28 C.F.R. § 115.6. Sexual harassment includes “[r]epeated verbal comments or gestures of a sexual nature to a [prisoner] by a staff member, contractor, or volunteer,

incarcerated in a men's prison.³ Moore's suit alleges that S. Calderon ("Calderon"), a correctional officer at the Kern Valley State Prison in Delano, California, violated her Eighth Amendment right to freedom from cruel and unusual punishment by sexually harassing her and then retaliating against her for reporting the harassment he perpetrated. ER-21–22. Calderon's sexual harassment and retaliation were so severe that Moore twice attempted suicide. ER-22. But the lower court dismissed

including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures." *Id.* Sexual abuse by a staff member includes

(1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight; (2) Contact between the mouth and the penis, vulva, or anus; (3) Contact between the mouth and any body part where the staff member . . . has the intent to abuse, arouse, or gratify sexual desire; (4) Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member . . . has the intent to abuse, arouse, or gratify sexual desire; (5) Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member . . . has the intent to abuse, arouse, or gratify sexual desire; (6) Any attempt, threat, or request by a staff member . . . to engage in [sexual abuse]; (7) Any display by a staff member . . . of his or her uncovered genitalia, buttocks, or breast in the presence of [a prisoner], and (8) Voyeurism[.]

Id.

³ California's Code of Regulations, which governs the operation of California state prisons, recognizes that the term "transgender" refers to "a person whose gender identity is different from the person's assigned sex at birth." CAL. CODE REGS. tit. 15, § 3000. The code also defines "gender identity" to mean "a person's sense of identification as male, female, neither, or both." *Id.*

Moore's complaint on screening based on a pervasive misinterpretation of this Court's Eighth Amendment standards for verbal harassment. ER-8.

The lower court correctly cited *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996), amended by 135 F.3d 1318 (9th Cir. 1998), as the guiding standard for determining when verbal harassment can violate the Eighth Amendment. Under *Keenan*, verbal harassment violates the Eighth Amendment where (1) "comments were unusually gross even for a prison setting," and (2) "were calculated to and did cause [the prisoner] psychological damage." *See id.* at 1092. But the court followed several district court decisions that effectively nullified *Keenan*'s standard because of a lack of guidance regarding what type of harassment is "unusually gross even for a prison setting" or "calculated to" cause psychological damage. Recognizing this problematic line of district court authority, the lower court noted that the Ninth Circuit's standard needs clarification. Citing examples of federal courts failing to hold corrections officers accountable for "highly inappropriate comments of a sexual nature," the court suggested "perhaps it is time for the Ninth Circuit to reevaluate and address the contours of those circumstances in which the comments are sufficiently 'gross for a prison setting' and [would] lead to an inference of being calculated to cause psychological damage, so as to state a cognizable Eighth Amendment claim." ER-8.

Like the lower court, *amici* believe this case presents an overdue opportunity to address the issue of sexual harassment in prisons so that the Eighth Amendment may better protect vulnerable populations and individuals in the carceral system. As former corrections officials, *amici* have expertise in conduct typical of a prison setting and in effective prison administration practices. *Amici* are also leaders in nationwide efforts to curtail sexual harassment and sexual abuse of prisoners. *Amici* have witnessed first-hand the widespread problems of sexual harassment and sexual abuse and the resultant harm suffered by both prisoners and prison staff.

Sexual harassment causes profound psychological distress and often leads to other abuse, including physical abuse, sexual abuse, and rape. Sexual harassment and sexual abuse lead to significant mental health and physical health problems that endanger individuals and increase the financial and societal cost of confinement. *Amici* thus submit that verbal sexual harassment can constitute an Eighth Amendment violation under modern societal standards.

In this brief, *amici* share with the Court their expertise on two main concepts: (1) Calderon's harassment was "unusually gross even for a prison setting" under the *Keenan* standard, and (2) sexually harassing conduct like Calderon's serves no valid penological purpose and undermines institutional safety and security by increasing physical and psychological risks to both prison staff and incarcerated populations. *Amici* thus urge this Court to overturn the lower court's order dismissing Moore's

complaint and clarify the *Keenan* standard to protect incarcerated people from verbal sexual harassment.⁴

FACTUAL SUMMARY

The complaint details a highly inappropriate and abusive encounter: When Moore went to the prison shower facility, Calderon tried to force her to show him her breasts. ER-21–22. When Moore refused to show her breasts, he told her, “I know you’re transgender! I don’t think you get it, I’ll screw you over if you don’t do what I say and you won’t be getting out of prison anytime soon.” ER-21. When Moore still did not show her breasts, Calderon escalated his sexual harassment, saying, “Now show me your tits since you think you’re a woman.” ER-21. At the time of the incident, the prison was on lockdown so only one cell could move about the prison, and Moore was in the shower facility with no other staff or prisoners. As such, she posed no threat or danger. ER-21–22.

After Moore filed a grievance related to the incident, Calderon threatened to, and did, retaliate against her: Calderon warned Moore he would “make [her] life

⁴ This brief focuses on factors within *amici*’s expertise: what conduct is “unusually gross” for a prison setting and institutional safety and security. This brief does not address the *Keenan* factor concerning whether the harm was calculated to and did cause psychological damage. *See* 83 F.3d at 1092. Still, *amici* believe Moore has met this element as well: Moore pleaded that Calderon stated his goal was to make Moore “wish [she was] dead,” showing that the comments were calculated to cause psychological damage. ER-22. Moore also alleged that the conduct caused Moore to make two attempts on her own life, showing actual psychological damage. ER-22–23.

hell” for going through with the complaint. ER-22. Calderon also allegedly said he “bet” that Moore would not file a complaint, and that:

You fa***ts think you have so many rights. Since you’re writ[ing] a grievance on me you’ll regret it because now I’m writing a 115 [Rules Violation Report] on you Two can play that game. I’m about to make your time in Kern Valley hell now. You’re going to wish you were dead!

Id. Calderon followed through on his threat, and submitted a false rule violation report against Moore in retaliation. *Id.* Moore pleaded that Calderon’s false report against her, coupled with her fear of Calderon, caused her to twice attempt suicide. ER-22–23.

ARGUMENT

I. The Harassment Here Is Unusually Gross “Even For A Prison Setting.”

Verbal harassment can violate the Eighth Amendment. *See Keenan*, 83 F.3d at 1092. This Court has explained that such a violation occurs if the verbal harassment was “unusually gross even for a prison setting and [was] calculated to and did cause [the prisoner] psychological damage.” *Id.* Based on decades of experience in prison settings, *amici* assert that Calderon’s behavior was unusually gross for a prison setting. A male corrections officer sought to force an incarcerated transgender woman to remove her top to show him her breasts, while using sexualized, transphobic, homophobic, and abusive language. Calderon used crude language, demanding that Moore show him her “tits,” questioned her identity as a

woman (“since you think you’re a woman”), called her a homophobic slur (“[y]ou fa***ts think you have so many rights”), and made aggressive retaliatory threats (“I’ll make your time [here] hell,” “[y]ou’re going to wish you were dead”). ER-21–22. Calderon’s retaliation only compounded the gross nature and impropriety of the abuse. *See id.*

In *amici*’s expert opinion, Calderon’s abusive language and behavior was egregious and extreme. Indeed, Calderon’s abuse has no place in a prison setting or anywhere else. It violates professional standards, it violates the Prison Rape Elimination Act (“PREA”) and state law, and it violates contemporary standards of decency.⁵

A. Calderon’s Sexual Harassment Violates Professional Expectations And National Standards For Prisons.

The sexual harassment perpetrated by Calderon in this case has no place in a prison setting under any circumstances. The *Keenan* standard, as interpreted and applied by lower courts here and elsewhere, appears to measure behavior on a prison-specific scale—“unusually gross *even for a prison setting*.” *See Keenan*, 83 F.3d at 1092 (emphasis added). This interpretation appears to be predicated on the assumption that a prison facility is a “rough” environment where one can and should expect “rough” behavior. As former heads of major state prison systems, we assert

⁵ *See, e.g.*, 28 C.F.R. § 115.11(a) (setting a zero-tolerance standard for sexual harassment in prisons).

unequivocally: This is a false assumption. We and our peers set high professional standards for ourselves and our staff and expect those standards to be met at all times. We similarly expect the same from the people incarcerated in these institutions.

Indeed, the standards promulgated by the nation's leading correctional organization, the American Correctional Association, address the professional expectations set for correctional staff. The ACA Standards require facilities to implement written policy, procedure, and practice that prohibit sexual harassment.⁶ The ACA Standards advise that policy must “clearly indicate[] that sexual harassment, either explicit or implicit, is strictly prohibited. Employees and agents of the facility . . . must be advised that they are subject to disciplinary action . . . if found guilty of sexual harassment charges brought by employees or inmates.”⁷

Similarly, and more significantly, the federal PREA Standards prohibit sexual harassment by staff. All prisons must comply with the PREA Standards or risk losing federal funding. The PREA Standards set a “zero tolerance” policy “toward all forms of sexual abuse and sexual harassment.”⁸ “Sexual harassment” under the PREA Standards includes “[r]epeated verbal comments or gestures of a sexual nature to an

⁶ Am. Correctional Ass’n, PERFORMANCE-BASED EXPECTED PRACTICES FOR ADULT CORRECTIONAL INSTITUTIONS § 5-1C-4056 (5th ed. 2018) [hereinafter “*ACA Standards*”].

⁷ *Id.*

⁸ 28 C.F.R. § 115.11.

inmate, detainee, or resident by a staff member, . . . including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures.”⁹ The PREA Standards also prohibit “[v]oyeurism by a staff member,” which includes “an invasion of privacy of an inmate, detainee, or resident by staff for reasons unrelated to official duties, such as . . . requiring an inmate to expose his or her buttocks, genitals, or breasts.”¹⁰ Calderon violated both of these standards. Indeed, Calderon’s conduct is the very type of behavior that these national standards sought to eliminate.

There is no place for sexual harassment in prison settings and no separate prison-specific scale by which to measure the severity of harassment should it occur. There are, however, professional standards, laws, and regulations unique to the prison setting that set standards of conduct. This Court should therefore clarify that the *Keenan* standard must be informed not by archaic and harmful assumptions about prisons but by professional standards as well as the current legislative landscape and the evolving standards of decency that underpin the Eighth Amendment, as discussed below.

⁹ *Id.* § 115.6.

¹⁰ *Id.*

B. Legislative Prohibitions Against Sexual Harassment Guide What Conduct Is “Unusually Gross” Under the Eighth Amendment’s Evolving Standards of Decency.

The Eighth Amendment prohibits cruel and unusual punishment in prisons.¹¹

The Supreme Court has recognized that the Eighth Amendment’s “cruel and unusual punishment” standard “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (alteration in original) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). This changing standard for “extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.” *Id.* (internal quotation marks omitted).

To determine the current state of this evolving standard, courts are guided by “objective indicia of society’s standards, as expressed in legislative enactments and state practice.” *Id.* at 421 (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)). This Court must therefore look to relevant legislative enactments and state practice, such as the federal PREA and California state law, to inform its application of Eighth Amendment standards. Here, these objective indicia of society’s standards show that Calderon’s behavior violated modern concepts of what constitutes cruel and unusual punishment.

¹¹ U.S. CONST. amend. VIII.

1. Calderon's behavior is unusually gross based on federal legislative enactments.

Historically, no federal laws have guided prison operations beyond the Eighth Amendment itself. But because of the devastating consequences of all-too-frequent sexual abuse in America's prisons, Congress unanimously passed the landmark PREA in 2003.¹² PREA directed the Attorney General to "publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape."¹³ Those standards were promulgated in 2012.¹⁴ The significance of PREA and the PREA Standards cannot be overstated. Congress had never before passed national standards for prisons and jails. And to this day, the PREA Standards remain the *only* national legal standards regulating prisons and jails in this country.

PREA and its implementing regulations recognize the severity of prison sexual abuse and sexual harassment, acknowledging that prison sexual abuse and sexual harassment increase violence directed at both prisoners and staff, prison administrative costs, healthcare expenditures, incidence of HIV and other sexually transmitted infections, mental healthcare expenditures, suicides, and recidivism.¹⁵

¹² U.S. DEP'T OF JUST., *Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape* (May 17, 2012), <https://www.justice.gov/opa/pr/justice-department-releases-final-rule-prevent-detect-and-respond-prison-rape>.

¹³ 34 U.S.C. § 30307(a)(1).

¹⁴ See PREA Standards, 28 C.F.R. § 115 *et seq.*

¹⁵ 34 U.S.C. § 30301; 28 C.F.R. §§ 115.6, 115.11.

PREA’s purpose is to make “prevention of prison rape a top priority in each prison system”¹⁶ and requires prisons to adopt a zero-tolerance standard for sexual abuse and sexual harassment.¹⁷

PREA must guide evolving Eighth Amendment considerations, as its very text notes that its purpose is to “protect the Eighth Amendment rights of Federal, State, and local prisoners.”¹⁸ Indeed, this Court has called PREA and the PREA Standards an example of “the ‘clearest and most reliable objective evidence of contemporary values’” in the Eighth Amendment context. *Bearchild v. Cobban*, 947 F.3d 1130, 1144 (9th Cir. 2020) (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002)) (relying on PREA to hold that “sexual assault violates the Eighth Amendment regardless of the amount of force”); *see also Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015) (holding PREA is evidence of contemporary standards of decency).

PREA and the PREA Standards directly address and prohibit Calderon’s harassment and attempted voyeurism.¹⁹ His behavior thus violates the federal legislative standards that must guide the Eighth Amendment’s evolving standards of decency.

¹⁶ 34 U.S.C. § 30302(1)–(2).

¹⁷ *Id.* § 30302(1); 28 C.F.R. § 115.11.

¹⁸ 34 U.S.C. § 30302(7).

¹⁹ *See* 34 U.S.C. § 30302; 28 C.F.R. §§ 115.11, 115.6.

2. Calderon's behavior is cruel and unusual based on state legislative enactments.

State legislatures have overwhelmingly denounced sexual abuse and harassment. All 50 states, the District of Columbia, and the federal government impose criminal liability on staff who have sexual contact with persons under their care.²⁰ In addition, many states have passed legislation that would prohibit the conduct at issue in this case.²¹

State law prohibiting verbal sexual harassment, including of transgender prisoners, is particularly strong in California, where Moore is incarcerated. California's 2005 Sexual Abuse in Detention Elimination Act requires the California Department of Corrections and Rehabilitation to "ensure that staff members intervene when an inmate or ward appears to be the target of sexual harassment or

²⁰ See NAT'L INST. OF CORRECTIONS/AM. UNIV., WASH. COLL. OF LAW PROJECT ON ADDRESSING PRISON RAPE, *Fifty State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody* (2013) <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1000&context=prisonrape-surveys>; NAT'L INST. OF CORRECTIONS/AM. UNIV., WASH. COLL. OF LAW PROJECT ON ADDRESSING PRISON RAPE, *State criminal Laws Prohibiting Sexual Abuse of Individuals in Custody* (Aug. 2009), <https://www.prearesourcecenter.org/sites/default/files/library/penaltiesmap-2009update.pdf>.

²¹ See, e.g., ALA. CODE § 14-3-13; ARK. CODE § 12-29-101; CAL. CODE REGS. tit. 15, § 3401.6; FLA. ADMIN. CODE r. 33-208.002; KAN. STAT. § 75-5210; 501 KY. ADMIN. REGS. 6:020 (incorporating by reference Kentucky Department of Corrections Policy 3.22, which prohibits staff sexual harassment); ME. REV. STAT. tit. 34-A, § 3031(10); MD. CODE REGS. 12.14.04.05(A)(2); MISS. CODE. § 47-5-41; NEV. REV. STAT. § 212.188(3)(A)(1)(VI); N.J. ADMIN. CODE § 10A:31-14.3.

intimidation.”²² And state regulations prohibiting “staff sexual misconduct” in prisons encompass “disrespectful, unduly familiar, or sexually threatening comments directed to, or within the hearing of, an inmate/parolee.”²³ California regulations also prohibit “[t]hreatening an inmate/s parolee’s safety, custody, housing, privileges, work detail, parole conditions or programming because the inmate/parolee has refused to engage in sexual behavior.”²⁴ Further, the regulations contemplate “disciplinary action and/or criminal prosecution” as a penalty for “staff sexual harassment,” which includes “repeated verbal comments or gestures of a sexual nature to an offender by a staff member, . . . including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures.”²⁵

And in 2020, the California Legislature enacted the Transgender Respect, Agency, and Dignity Act (“SB 132”).²⁶ SB 132 recognizes that during confinement, a prisoner may only legally be deprived of rights that are “reasonably related to legitimate penological interests.”²⁷ SB 132 acknowledges that transgender prisoners

²² See Sexual Abuse in Detention Elimination Act, Cal. Assemb. Bill 550, 2005 Reg. Sess., Ch. 303 Cal. Legis. Serv. (enacted), codified at CAL. PENAL CODE § 2636.

²³ CAL. CODE REGS. tit. 15, § 3401.5(a)(3)(F).

²⁴ *Id.* § 3401.5(a)(2).

²⁵ *Id.* § 3401.6.

²⁶ Transgender Respect, Agency, and Dignity Act, Cal. Sen. Bill 132, 2020 Reg. Sess., ch. 182, 2020 Cal. Stat. (enacted).

²⁷ *Id.*

are “particularly vulnerable to sexual abuse and sexual harassment and that disregarding the known risks to a transgender woman constitutes deliberate indifference in violation of the federal constitution.”²⁸ SB 132 also recognizes the high incidence of prison sexual harassment and abuse of transgender prisoners, noting that a prison survey showed thirty-eight percent of transgender women reported being harassed by correctional officers or other staff.²⁹ SB 132 requires that all transgender prisoners must “[b]e addressed in a manner consistent with the incarcerated individual’s gender identity,” and that incarcerated people must be housed “at a correctional facility designated for men or women based on the individual’s preference.”³⁰ Prisoners are also to be searched in a manner consistent with their gender identity, if they choose, which allows transgender women to avoid invasive searches by male officers barring documented exigent circumstances.³¹

SB 132, California’s Penal Code, and California’s Code of Regulations all show that the State of California seeks to prevent exactly the type of cruel and unusual punishment that Moore endured. These legislative enactments, and those

²⁸ *Id.* § 2(b).

²⁹ *Id.* § 2(c)–(d) (explaining that “the rate of sexual assault for transgender women in [California] prisons was 13 times higher than for men in the same prisons” and noting high rates of violence toward transgender men in California prisons).

³⁰ *Id.* § 4 (codified at CAL. PENAL CODE § 2606).

³¹ *See id.*

from other states, should thus guide evolving standards under the Eighth Amendment to prevent the cruel and unusual punishment of staff sexual harassment.

C. Targeting Transgender Prisoners Exploits The Severe Power Imbalance Between Corrections Officers And Incarcerated People.

It is particularly repugnant when a corrections officer, who controls nearly every aspect of a prisoner's life, engages in sexual harassment of a prisoner. Because of the extreme "dichotomy of control between prison guards and prisoners," corrections officers must be held to a high standard when it comes to sexual harassment of prisoners. *See Wood v. Beauclair*, 692 F.3d 1041, 1047 (9th Cir. 2012). Prisoners "cannot choose what or when to eat, whether to turn the lights on or off, where to go, and what to do. They depend on prison employees for basic necessities, contact with their children, health care, and protection from other inmates." *Id.* Officer abuse of transgender prisoners, and retaliation after reporting harassment, are unfortunately not new problems. A 1996 study showed certain categories of prisoners are often "singled out for sexual misconduct by officers."³² These include both transgender prisoners and those who "refus[ed] to submit to

³² Hum. Rts. Watch Women's Rts. Project, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons* (1996), <https://www.hrw.org/reports/1996/Us1.htm> (addressing the severe problem of sexual abuse of prisoners and noting that "[i]n prison, correctional employees have nearly absolute power over the well-being of prisoners").

demands for sexual relations.”³³ Despite this being a known, pervasive problem, power imbalances between prisoners and corrections officers often make it difficult to hold staff accountable. This is because people who are incarcerated often lack effective access to courts, leaving prison officials to serve as police, prosecution, jury, and court of appeals.³⁴ Further, the legal standards applied by some district courts, including the court below, appear to allow staff sexual harassment of prisoners, including transgender prisoners like Moore, to go unchecked and unfettered.

Prisoners deserve basic human dignity.³⁵ *Amici* urge the Court to clarify the *Keenan* standard so as to give lower courts greater ability to enforce Eighth Amendment protections against corrections officers who sexually harass prisoners.

II. Sexual Harassment Serves No Valid Penological Purpose And Undermines Institutional Safety and Security.

The lower court already found that Calderon’s statements to Moore were “highly inappropriate, deeply offensive and disrespectful, and would serve no legitimate penological objective.” ER-6–7. *Amici* agree. Sexual harassment never

³³ *Id.*

³⁴ Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender, and the Rule of Law*, 29 YALE L. & POL’Y REV. 1, 24 (2010) (“Since prisoners lack effective access to the courts, prison officials serve as police, prosecutor, judge, jury, and court of appeals.”).

³⁵ See Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 55 (2009).

serves a valid penological purpose. In fact, sexual harassment undermines important penological goals, endangers institutional safety and security, and leads to further harm. In decades of experience in prison settings, *amici* did not and would not accept sexual harassment by their staff, and they believe such abuse should be actionable under the Eighth Amendment.

A. Sexual Harassment Never Serves A Valid Penological Purpose.

Sexual harassment is never part of any person’s sentence. This Court has held in the sexual abuse context that “[s]exual harassment or abuse of an inmate by a corrections officer is a violation of the Eighth Amendment.” *Wood*, 692 F.3d at 1046. “In the simplest and most absolute of terms . . . prisoners [have a clearly established Eighth Amendment right] to be free from sexual abuse” *Id.* (alteration in original) (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000)). Sexual abuse perpetrated “on an inmate by a guard—regardless of the gender of the guard or of the [inmate]—is deeply offensive to human dignity.” *Schwenk*, 204 F.3d at 1197. Sexual abuse is “simply not part of the penalty that criminal offenders pay for their offenses against society.” *See Wood*, 692 F.3d at 1046 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). Modern society recognizes that verbal sexual harassment can be as harmful as physical abuse to survivors’ mental and physical wellbeing. These same principles should thus apply to verbal sexual harassment.

Consistent with this principle, federal PREA regulations require prisons to “establish a policy to protect all inmates and staff who report sexual abuse or sexual harassment,” including “removal of alleged staff . . . abusers from contact with victims.”³⁶ Such regulation is a federal acknowledgment that harassment serves no valid penological purpose.

Calderon had no valid penological purpose to tell Moore to “show me your tits since you think you’re a woman” or to threaten to “screw her over” if she refused to show him her breasts. *See* ER-21. Calderon’s retaliation against Moore for reporting his sexual harassment compounds this problem.³⁷ Sexual harassment like Calderon’s undermines the creation of a safe environment for rehabilitation, and undermines institutional security and safety.

B. Sexual Harassment Undermines Institutional Safety and Security.

Corrections officers are government agents tasked with protecting the health and safety of the people in their custody.³⁸ Corrections officers have a corresponding

³⁶ 28 C.F.R. § 115.67(a)–(b).

³⁷ Retaliation “may invoke the First and Eighth Amendments” because prisoners have the right to file prison grievances, and “purely retaliatory actions taken against a prisoner for having exercised [that right] violate the constitution quite apart from any underlying misconduct they are designed to shield.” *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005).

³⁸ Megan Coker, Note, *Common Sense About Common Decency: Promoting a New Standard for Guard-on-Inmate Sexual Abuse Under the Eighth Amendment*, 100 VA. L. REV. 437, 438 (2014).

duty to protect and create safe living environments for incarcerated people so that they can engage in educational and rehabilitative programming. *See Farmer*, 511 U.S. at 844.³⁹ When this duty is not carried out, harsh prison conditions increase recidivism.⁴⁰

Sexual harassment also damages corrections officers' ability to keep order. By design, a limited number of staff members are tasked with supervising large numbers of incarcerated people.⁴¹ In *amici*'s experience, developing a rapport with the incarcerated population is a critical technique to maintain safety and security under these circumstances. Good rapport is necessary to facilitate communication with people who are incarcerated and encourage them to report problems and

³⁹ *See also* United Nations Off. On Drugs & Crime, HANDBOOK FOR PRISON LEADERS 34 (United Nations 2010), https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Handbook_for_Prison_Leaders.pdf (“The objective of imprisonment is to respectfully perform the sentence passed by the Court, and facilitate the rehabilitation of prisoners so as to prepare them for their return to society.”); Rusty Ringler, *How Good Security Helps Inmate Re-Entry Into Society*, CORRECTIONS1 (Nov. 3, 2015), <https://www.corrections1.com/re-entry-and-recidivism/articles/how-good-security-helps-inmate-re-entry-into-society-Ih9RRfJaLJTzw0M5/> (“As corrections professionals, we cannot forget that our first and primary function within corrections is keeping the public, staff and offenders safe by confining convicted persons in a secure, safe and humane way. If corrections departments fail to do this, any other strategies for treatment and programming will be ineffective and are destined for failure.”).

⁴⁰ M. Keith Chen, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. LAW & ECO. REV. 1, 24 (2007).

⁴¹ *See* FED. BUREAU OF PRISONS, *Program Fact Sheet* (May 31, 2019), https://www.bop.gov/about/statistics/docs/program_fact_sheet_201907.pdf (noting inmate-to-correctional-officer ratio of 9.3 to 1 in federal prisons).

concerns to the officers. Officers can develop that rapport with incarcerated people only by fairly and consistently applying the same rules and treatment to all groups. *Amici* have seen firsthand that harsh treatment of certain prisoners or groups injects uncertainty into the equation, reducing the likelihood that prisoners will report concerns about safety, staff or prisoner misconduct, or other problems to the correctional officer. It is thus *amici*'s expert opinion that sexually harassing behavior directed at a member of a discrete group, such as Calderon's treatment of a transgender prisoner like Moore, establishes an expectation of unequal treatment not just of transgender prisoners, but also uncertainty about treatment of other groups. In turn, such behavior actively thwarts the sound management of an institution by reducing trust in staff and discouraging prisoners from reporting violence or other problems.

Further, the threatening, sexist, and bullying manner in which Calderon acted created such a hostile environment that it casts doubt on how female and/or transgender staff may be treated by cisgender male staff at this facility. A prison is a workplace, not only with a diverse prison population, but also with diverse staff, including women and transgender employees. Behavior like Calderon's undermines the ability of prison administrators to lead an effective, safe workplace for prison employees.

Finally, officers have a duty to model the behavior and respect we expect from people who are incarcerated. When officers abuse or harass prisoners, the officers fail to fulfill this duty, and indeed set an example for other prisoners to engage in similarly abusive behavior.⁴² By acting in an extreme and abusive manner, Calderon failed to fulfill these important duties to the prisoners under his charge.

C. Sexual Harassment Leads To Physical Harm, Further Undermining Institutional Safety And Security.

Sexual harassment leads to physical harm. Indeed, in *amici*'s experience, unchecked sexual harassment by staff members fosters an environment of impunity, in which staff behavior frequently escalates to physical or sexual abuse. Staff sexual harassment also provides tacit approval for similarly abusive behavior by others. Corrections officers who make "verbal sexual comments directed toward" transgender prisoners can "inspire[] or encourage[]" others to similarly target transgender prisoners. *See Beal v. Foster*, 803 F.3d 356, 358 (7th Cir. 2015) (considering prison staff abuse of gay prisoner). When corrections officers publicly sexually harass transgender or gay prisoners, it serves to make the prisoner "a pariah to his fellow inmates," which "increas[es] the likelihood of sexual assaults on" the prisoner. *Id.* at 358–59; *see also Powell v. Schriver*, 175 F.3d 107, 113 (2d. Cir.

⁴² United Nations, *supra* note 39 at 34 ("The prison system must show by example how people should be treated; by treating prisoners fairly and humanely and demonstrating respect for their rights . . .").

1999) (“[I]n the sexually charged atmosphere of most prison settings . . . disclosure [of an individual’s transgender status] might lead to inmate-on-inmate violence.”). In *amici*’s experience, staff sexual harassment not only encourages more sexual harassment and sexual abuse by others, it also discourages the reporting of sexual harassment or sexual abuse when it occurs, increasing the overall risk of harm to incarcerated people. This harassment may also spill over to transgender staff, female staff, or the community after a prisoner rejoins society.

CONCLUSION

In *amici*’s expert opinion, Moore’s complaint alleges abusive, sexually harassing behavior that is unusually gross for a prison setting and undermines the safety and security of the institution. The Court should therefore reverse the lower court’s dismissal of Moore’s complaint, and allow her to pursue her Eighth Amendment claim.

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