

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 the United States District Court for the Eastern District of
California

No. 1:20-cv-00397-DAD-BAM

**BRIEF OF AMICI CURIAE LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC., BLACK & PINK NATIONAL, CENTER FOR
CONSTITUTIONAL RIGHTS, EQUALITY CALIFORNIA, JUST
DETENTION INTERNATIONAL, NATIONAL CENTER FOR LESBIAN
RIGHTS, TRANSGENDER LAW CENTER, AND THE TRANSLATIN@
COALITION IN SUPPORT OF PLAINTIFF-APPELLANT AND
REVERSAL**

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
CORPORATE DISCLOSURE STATEMENT	vi
FED. R. APP. P. 29(A) STATEMENT	vii
STATEMENT OF INTEREST OF AMICI CURIAE.....	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	5
ARGUMENT	8
I. Whether categorized as sexual assault or verbal harassment, allegations of sexual coercion and sexualized threats constitute cognizable claims under the Eighth Amendment.....	8
A. Verbal sexual conduct may constitute sexual assault or abuse for Eighth Amendment purposes.....	8
1. Under <i>Beauchild</i> , the purpose and likely harm of sexual victimization is more significant than the method of its infliction.	9
2. Under the Prison Rape Elimination Act, particularly harmful verbal conduct is a form of sexual abuse.....	11
B. Sexual coercion and threats, even when classified as verbal harassment, are unusually gross and calculated to cause psychological harm, including a threat of escalated violence.	13
II. Enacted legislation establishes that the sexual victimization of incarcerated transgender people offends contemporary standards of decency.	18
A. Transgender women are a vulnerable population at a heightened risk of harm from sexual victimization.	18
B. The Prison Rape Elimination Act and California’s The Transgender Respect, Agency, and Dignity Act were enacted to address sexual violence in prisons.....	21
CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	18
<i>Ashker v. Brown</i> , No. 4:09-cv-05796-CW (N.D. Cal 2009)	2
<i>Beal v. Foster</i> , 803 F.3d 356 (7th Cir. 2015).....	14, 15
<i>Bearchild v. Cobban</i> , 947 F.3d 1130 (9th Cir. 2020).....	passim
<i>Benefield v. McDowall</i> , 241 F.3d 1267 (10th Cir. 2001).....	15
<i>Edmo v. Corizon, Inc.</i> , 949 F.3d 489 (9th Cir. 2020).....	1
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976)	6, 14
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994)	11
<i>Giron v. Corr. Corp. of Am.</i> , 191 F.3d 1281 (10th Cir. 1999).....	5
<i>Hope v. Pelzer</i> , 536 U.S. 730 (2002)	14
<i>Hudson v. McMillian</i> , 503 U.S. 1 (1992)	5, 10, 13, 14
<i>Jackson v. Bishop</i> , 404 F.2d 571 (8th Cir. 1968).....	14
<i>Jordan v. Gardner</i> , 986 F.2d 1521 (9th Cir.1993) (en banc).....	16, 17

<i>Keenan v. Hall</i> , 83 F.3d 1083 (9th Cir. 1996).....	6, 14
<i>Lisle v. Welborn</i> , 933 F.3d 705 (7th Cir. 2019).....	17
<i>Parrish v. Johnson</i> , 800 F.2d 600 (6th Cir. 1986).....	15, 16
<i>Rosati v. Igbinoso</i> , 791 F.3d 1037 (9th Cir. 2015).....	1
<i>Schwenk v. Hartford</i> , 204 F.3d 1187 (9th Cir. 2000).....	11, 17
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958)	6, 7
<i>Valandingham v. Bojorquez</i> , 866 F.2d 1135 (9th Cir. 1989).....	15
<i>Vazquez v. Cty. of Kern</i> , 949 F.3d 1153 (9th Cir. 2020).....	17
<i>Watison v. Carter</i> , 668 F.3d 1108 (9th Cir. 2012).....	10, 16
<i>Wood v. Beauclair</i> , 692 F.3d 1041 (9th Cir. 2012).....	passim
<i>Zollicoffer v. Livingston</i> , 169 F. Supp. 3d 687 (S.D. Tex. 2016)	1

Federal Statutes

34 U.S.C. § 30301-30306	7
34 U.S.C. § 30301(12)	11
34 U.S.C. § 30302(2), (3), (7).....	11
28 U.S.C. § 1915A.....	7
Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972.....	7

The Transgender Respect, Agency, and Dignity Act (“the California Act”), 2020
Cal. Legis. Serv. Ch. 182 (S.B. 132) (West) (codified at Cal. Penal Code §§
2605-06) 23, 24

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Cal. Legis. Serv. Ch. 182 (West) 23, 24

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28 C.F.R. § 115.1523

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28 C.F.R. § 115.4123

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Improving Security in Women’s Facilities* (2008),
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* Lambda Legal Defense and Education Fund, Inc, Black & Pink National, Center for Constitutional Rights, Equality California, Just Detention International, National Center for Lesbian Rights, Transgender Law Center, and the Translatin@ Coalition certify that they are nonprofit organizations, that they have no parent corporation, and that they have no shares or securities that are publicly traded.

FED. R. APP. P. 29(A) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *Amici* have received Appellant's written consent to file this amicus brief. The clerk's office of this Court confirmed to the undersigned counsel on September 2, 2021, that because Appellee has not entered an appearance, Appellant is the only party to this appeal for purposes of Fed. R. App. P. 29(a)(2) consent. Pursuant to Fed. R. App. P. 29(a)(4)(E), no party or party's counsel authored the brief or contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF INTEREST OF AMICI CURIAE

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the oldest and largest national legal organization committed to achieving full recognition of the civil rights of LGBT people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal seeks to address the particular vulnerability of LGBT people in custody and has appeared as counsel or amicus curiae in numerous federal and state court cases involving the rights of incarcerated LGBT people. *See, e.g., Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015) (per curiam) (reinstating transgender prisoner’s complaint alleging that denial of gender-confirming surgery violated 8th Amendment); *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687, 697 (S.D. Tex. 2016) (finding that defendants knew of and disregarded a substantial risk of sexual assault to a transgender inmate based on their knowledge of prison sexual assault statistics, including the particular vulnerability of gay and transgender inmates); and *Edmo v. Corizon, Inc.*, 949 F.3d 489, 500–01 (9th Cir. 2020) (concluding that gender confirmation surgery was medically necessary for incarcerated transgender woman with gender dysphoria). Lambda Legal is counsel for *Amici*.

Amicus **Black & Pink National** is a prison abolitionist organization dedicated to abolishing the criminal punishment system and liberating LGBTQIA2S+ people and people living with HIV/AIDS who are affected by that

system through advocacy, support, and organizing. Founded in 2005, the organization had nearly 150 incarcerated members within a year, and now has over 20,000. Black & Pink National is a 501(c)(3) organization based in Omaha, NE. Black & Pink also has local chapters across the nation, including in the San Francisco Bay Area and in Los Angeles.

The Center for Constitutional Rights (“CCR”) is a national, not-for-profit legal, educational and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has litigated landmark civil and human rights cases challenging on arbitrary and discriminatory state policies, including policies that disproportionately impact incarcerated LGBTQI+ people. CCR is currently counsel for Ashley Diamond, a Black transgender woman challenging conditions of confinement in the Georgia Department of Corrections. CCR also successfully mounted an Eighth Amendment challenge to California’s use of solitary confinement in *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal 2009).

Founded in 1999, **Equality California** (“EQCA”) is the nation’s largest statewide lesbian, gay, bisexual, transgender and queer+ (“LGBTQ+”) civil rights organization. Equality California brings the voices of LGBTQ+ people and allies to institutions of power in California and across the United States, striving to create

a world that is healthy, just, and fully equal for all LGBTQ+ people. The organization advances civil rights and social justice by inspiring, advocating, and mobilizing through an inclusive movement that works tirelessly on behalf of those we serve. Equality California frequently participates in litigation in support of the rights of LGBTQ+ persons.

Just Detention International (“JDI”) is the only organization in the world dedicated exclusively to ending sexual abuse behind bars. JDI was one of the key groups that worked to successfully pass the Prison Rape Elimination Act in 2003. 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.

The **National Center for Lesbian Rights** (“NCLR”) is a national legal organization committed to protecting and advancing the rights of lesbian, gay, bisexual, and transgender people, including LGBT individuals in prison, through impact litigation, public policy advocacy, public education, direct legal services, and collaboration with other civil rights organizations.

Transgender Law Center (“TLC”) is the largest national trans-led organization advocating self-determination for all people. Grounded in legal

expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming (“TGNC”) people alive, thriving, and fighting for liberation. TLC believes that TGNC people hold the resilience, brilliance, and power to transform society at its root, and that the people most impacted by the systems TLC fights must lead this work. TLC builds power within TGNC communities, particularly communities of color and those most marginalized, and lays the groundwork for a society in which all people can live safely, freely, and authentically regardless of gender identity or expression.

The TransLatin@ Coalition is a nationwide nonprofit membership organization that advocates for the interests of transgender and gender nonconforming individuals, particularly Latinx immigrants, and provides direct services to the transgender community, such as leadership development, legal services, educational services, and employment services. The TransLatin@ Coalition’s Legal Services Project serves individuals who are transgender, nonbinary, and gender nonconforming, particularly undocumented immigrants, by, inter alia, representing them in affirmative and defensive asylum cases, referring cases to pro bono attorneys, and helping immigrants obtain green cards and citizenship through naturalization.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When an incarcerated person is sexually coerced and threatened by a prison guard, it is essential that they have access to the courts to enforce their rights. At its core, the Eighth Amendment forbids conduct that is so totally without penological justification that it gratuitously inflicts pain. *Hudson v. McMillian*, 503 U.S. 1, 5 (1992); *Wood v. Beauclair*, 692 F.3d 1041, 1050–51 (9th Cir. 2012). As this Court held nearly ten years ago, coercive sexual acts serve no valid objective and such conduct itself is sufficient evidence that a prison guard has acted “maliciously and sadistically for the very purpose of causing harm.” *Wood*, 692 F.3d at 1050 (quoting *Giron v. Corr. Corp. of Am.*, 191 F.3d 1281, 1290 (10th Cir. 1999)). When courts fail to recognize the unnecessary and wanton pain inflicted by a prison guard’s sexual victimization of an incarcerated transgender woman, they diminish the core of the Eighth Amendment’s protection.

Viewed in context, and against the backdrop of related caselaw and enacted legislation, the harm inflicted by sexual victimization cannot be estimated by reference to rigid categories of verbal harassment and physical assault. *Bearchild v. Cobban*, 947 F.3d 1130, 1140 (9th Cir. 2020) (objective measure of harm under Eighth Amendment is contextual). First, even if a prison guard’s demand that a prisoner physically remove her clothing to expose her breasts could be characterized as merely verbal in nature, some verbal conduct may constitute

sexual assault or abuse. This Court’s definition of sexual assault focuses on the purpose and likely harm of sexual victimization—not the method of infliction. *Bearchild*, 947 F.3d at 1144–45 (sexual conduct by a guard for sexual gratification or to humiliate, degrade, or demean an incarcerated person is sexual assault). Similarly, the National Standards to Prevent, Detect, and Respond to Prison Rape (“PREA Standards”)—recognized by this Court as the clearest evidence of contemporary values on this topic—define certain conduct that does not involve touching as sexual abuse, including the precise type of voyeurism alleged by Ms. Moore in this case. A guard would be presumptively subject to termination for such conduct—contradicting any argument that it is part of the “routine discomfort” of prison.

Second, sexual victimization can state a claim for relief even when categorized as “verbal harassment” because it is unusually gross and calculated to cause psychological damage. *See Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), *opinion amended on denial of reh'g*, 135 F.3d 1318 (9th Cir. 1998). The Eighth Amendment prohibits punishments that are “incompatible with ‘the evolving standards of decency that mark the progress of a maturing society.’” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Sexual coercion and threats offend standards of decency. Along with the significant pain directly inflicted by such conduct, it also poses an ongoing

safety threat. Once targeted for abuse, a woman faces an increased risk of sexual harassment and assault. This is especially true for transgender women, who face a disproportionate risk of sexual violence. When a prison guard is the perpetrator, such victimization also sends a message that the incarcerated person will not be protected from harm by other inmates.

Legislation enacted to eradicate sexual victimization in prisons provides objective evidence that the sexual abuse of incarcerated people is unacceptable under contemporary standards. In 2003, Congress unanimously passed the Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified at 34 U.S.C. § 30301-30306) (“PREA”), which recognized that transgender people are at heightened risk for sexual victimization. PREA and similar state protections reflect society’s determination that incarcerated people do not have to wait for physical abuse to occur before prison staff are held accountable for abusive behavior.

Where, as here, an incarcerated person alleges that a prison guard engaged in sexual conduct that caused her significant harm, the claim should survive screening under 28 U.S.C. § 1915A. Otherwise, women, including transgender women, are left without the Eighth Amendment’s core protection against the gratuitous harm inflicted by sexual victimization. “While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.” *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Our courts must not

leave incarcerated people even more vulnerable to sexual abuse by prison guards with no mechanism to hold them accountable.

ARGUMENT

I. Whether categorized as sexual assault or verbal harassment, allegations of sexual coercion and sexualized threats constitute cognizable claims under the Eighth Amendment.

Sexual coercion by a prison guard does not serve any legitimate role in our system of criminal punishment. The allegations in this case state a claim for relief under two lines of existing law. First, such conduct states a claim for relief under this Court's caselaw regarding sexual assault. Those cases—consistent with corresponding statutory protections—define sexual assault and sexual abuse to include some forms of verbal conduct. Courts should consider whether alleged conduct should be categorized as sexual assault and abuse based on the context of each case, rather than relying on a strict distinction between physical and verbal conduct. Second, and perhaps more importantly, the result should be the same under a verbal harassment analysis because sexually coercive or victimizing conduct is unreasonably gross and objectively calculated to cause harm. Such conduct sends a clear threat of escalated violence, especially when targeted against a transgender woman.

A. Verbal sexual conduct may constitute sexual assault or abuse for Eighth Amendment purposes.

1. Under *Bearchild*, the purpose and likely harm of sexual victimization is more significant than the method of its infliction.

In *Bearchild*, this Court examined the definition of sexual assault, noting that *Wood* and *Schwenk* had not had occasion to do so. *Bearchild*, 947 F.3d at 1144 (citing *Wood*, 692 F.3d 1041, and *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000)). This Court focused on the purpose and likely pain inflicted by the conduct, rather than whether the pain was inflicted by physical means. It defined sexual assault as follows:

We now hold that a prisoner presents a viable Eighth Amendment claim where he or she proves that a prison staff member, acting under color of law and without legitimate penological justification, touched the prisoner in a sexual manner **or otherwise engaged in sexual conduct for the staff member's own sexual gratification, or for the purpose of humiliating, degrading, or demeaning the prisoner.**

Bearchild, 947 F.3d at 1144–45 (emphasis added). The court also found that a jury instruction was likely confusing where it did not explain that “sexual assault does not require violent physical force, or indeed, any force.” *Id.* at 1146.

Here, the district court’s ruling is incompatible with *Bearchild*. The Court failed to consider that the definition of sexual assault, in the context of Eighth Amendment Claims, includes “or otherwise engaged in sexual conduct.” Instead, the court limited sexual assault to “touch[ing] the prisoner in a sexual manner.” ER-15:2-9, 24 (quoting but not applying definition, and finding Moore did not

“allege she was sexually assaulted”); ER-6:12-14 (finding that allegations did not include physical touching, and so did not constitute assault). As this Court has held, any sexual conduct is constitutionally offensive where it is undertaken for one of the objectionable reasons listed in the definition (sexual gratification, or to humiliate, degrade, or demean). *Bearchild*, 947 F.3d at 1144–45; *see also Wood*, 692 F.3d at 1050 (where “coercive sexual actions serve[] no valid objective . . . , the conduct itself constitutes sufficient evidence that force was used maliciously and sadistically for the very purpose of causing harm.”) (internal quotations omitted).

The harm that is intended to result, and does result, from sexual victimization need not be physical to state a constitutional claim. Here, for example, Ms. Moore alleged the guard’s conduct caused her to suffer significant distress and contributed to her attempting to take her life twice. ER-14:7-8. As this Court has recognized, alleged pain under the Eighth Amendment may be physical or psychological. *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012); *see also Hudson*, 503 U.S. at 16 (Blackmun, J., concurring) (“It is not hard to imagine inflictions of psychological harm—without corresponding physical harm—that might prove to be cruel and unusual punishment. . . . [T]he Eighth Amendment prohibits the unnecessary and wanton infliction of “pain,” rather than “injury.”).

Sexual coercion, like other forms of sexual assault, serves no legitimate role

and 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). As this Court has repeatedly observed, including in the specific context of a transgender incarcerated person, sexual assault or abuse of an incarcerated person by a prison guard violates the Eighth Amendment. *See Schwenk v. Hartford*, 204 F.3d at 1197 (“In the simplest and most absolute of terms . . . prisoners [have a clearly established Eighth Amendment right] to be free from sexual abuse . . .”). Sexual assault by a prison guard is “always deeply offensive to human dignity and is completely void of penological justification.” *Wood*, 692 F.3d at 1050–51 (internal quotation omitted). Under the Eighth Amendment, sexual assault is objectively “repugnant to the conscience of mankind” and therefore the pain suffered is not *de minimis*. *Bearchild*, 947 F.3d at 1144.

2. Under the Prison Rape Elimination Act, particularly harmful verbal conduct is a form of sexual abuse.

Bearchild is consistent with federal statutory protections, which reflect that particularly harmful sexual conduct can be physical or non-physical. Congress unanimously passed PREA to further expose and combat the “epidemic character of prison rape and the day-to-day horror experienced by victimized [prisoners].” 34 U.S.C. § 30301(12). PREA’s purpose is to “make the prevention of prison rape a top priority in each prison system[,], develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape[, and] protect

the Eighth Amendment rights of Federal, State, and local prisoners.” 34 U.S.C. § 30302(2), (3), (7). As discussed further below, this Court has also expressly relied upon PREA in its Eighth Amendment analysis.

As required by PREA, the Attorney General published the PREA Standards in 2012.¹ Notably, the PREA Standards include non-physical sexual exploitation in the definition of sexual abuse (as distinguished from sexual harassment). In particular, the definition of sexual abuse includes the precise conduct alleged by Ms. Moore:

Sexual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer includes any of the following acts, with or without consent of the inmate, detainee, or resident:

....

(8) Voyeurism by a staff member, contractor, or volunteer.

....

Voyeurism by a staff member, contractor, or volunteer means an invasion of privacy of an inmate, detainee, or resident by staff for reasons unrelated to official duties, such as peering at an inmate who is using a toilet in his or her cell to perform bodily functions; **requiring an inmate to expose his or her buttocks, genitals, or breasts**; or taking images of all or part of an inmate's naked body or of an inmate performing bodily functions.

28 C.F.R. § 115.6 (emphasis added).

¹ See National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106 (June 20, 2012) (codified at 28 C.F.R. § 115) (explanatory text) (“PREA Standards”).

The presumptive disciplinary sanction for staff that engage in sexual abuse—including non-physical sexual abuse such as voyeurism—is **termination**, 28 C.F.R. § 115.76, rebutting any suggestion that such conduct is part of the “routine discomfort” incarcerated people are expected to endure as part of their penalty. *See Hudson*, 503 U.S. at 9. The inclusion of non-physical sexual abuse was intentional. In the draft standards, the presumption applied only to sexual abuse that included physical touching. But it was changed in the final rule after “[a] large number of commenters across all commenter types requested that the standard be revised to provide that termination shall be the presumptive disciplinary sanction not only for staff who have engaged in sexual touching, but also for staff who have engaged in other types of sexual misconduct such as indecent exposure and voyeurism.” PREA Standards, 77 Fed. Reg. at 37173.

Of course, when a prison guard sexually coerces an incarcerated person for no other reason than sexual gratification or degradation, whether to label the conduct as “assault,” “abuse,” or “harassment” is not the critical inquiry. The definitions of assault and abuse in *Bearchild* and PREA, respectively, reflect that it is the cruelty of the conduct that is significant, rather than its category or label.

B. Sexual coercion and threats, even when classified as verbal harassment, are unusually gross and calculated to cause psychological harm, including a threat of escalated violence.

Sexual assault or abuse, including verbal conduct, is actionable because it is

unusually gross and calculated to cause harm. The Eighth Amendment “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’” *Estelle*, 429 U.S. at 102 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)). The objective measure of harm under the Eighth Amendment “is ‘contextual and responsive to contemporary standards of decency.’” *Bearchild*, 947 F.3d at 1140, *quoting Hudson*, 503 U.S. at 8. Categorical shortcuts—including the distinction between physical sexual abuse and verbal sexual harassment—are only as good as the principles that underlie them. *See Hudson*, 503 U.S. at 8 (the Eighth Amendment’s measure of unconstitutional conduct “admits of few absolute limitations”). Overbroad categories risk departing from the Eighth Amendment’s central goal, which is to protect incarcerated people from the “gratuitous infliction of suffering.” *Wood* 692 F.3d at 1050; *Hope v. Pelzer*, 536 U.S. 730, 737 (2002).

“[V]erbal harassment generally does not violate the Eighth Amendment,” but it can where it is unusually gross for a prison setting and calculated to cause psychological damage. *Keenan*, 83 F.3d at 1092. Focusing primarily on whether sexual misconduct involves physical touching is not an effective proxy for estimating cruelty and likely harm. *See Beal v. Foster*, 803 F.3d 356, 357–58 (7th Cir. 2015), (“To attempt to draw a categorical distinction between verbal and physical harassment is arbitrary.”). Instead, courts must consider the increased risk

of harm implicated by sexual coercion, whether or not it involves physical contact.

This court and others have held that verbal conduct is actionable where it creates significant safety concerns. For example, in *Valandingham v. Bojorquez*, 866 F.2d 1135, 1138–39 (9th Cir. 1989), an incarcerated person stated a cognizable claim for relief where he alleged that prison officials had labeled him a snitch, subjecting him to retaliation by other inmates. *See also Beal*, 803 F.3d at 357–59 (verbal harassment may be simultaneously simple and devastating, as where guard’s alleged comments “could have been understood by the inmates as implying that the plaintiff is homosexual,” thus “increas[ing] the likelihood of sexual assaults on him by other inmates”); *Benefield v. McDowall*, 241 F.3d 1267, 1271 (10th Cir. 2001) (labeling inmate a snitch satisfies the *Farmer* standard and constitutes deliberate indifference to safety).

In *Parrish v. Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986), the Sixth Circuit discussed the power dynamics involved when a prison guard verbally abuses a particularly vulnerable incarcerated person. It held that a guard inflicted unnecessary and wanton pain where he brandished a knife to extort cigarettes from the incarcerated person and shouted obscenities while waving a knife at him. The court highlighted that the guard’s behavior, “specifically, the paraplegic slurs, acted to strip [the incarcerated person] of his dignity and reinforce the fact that [he] was dependent upon [the guard] for his continued well-being.” *Parrish*, 800

F.2d at 605. The court noted that any reasonable person would suffer “significant mental anguish knowing [their] health was in the hands of a person performing the type of deviant acts” performed by the guard. *Id.*

Acknowledging such power dynamics—like here, where Ms. Moore alleged the guard demanded to see her breasts while they were alone, with the promise of retaliation if she refused to comply—allows courts to responsibly distinguish “mere” verbal harassment while protecting against the most dangerous types of abuse. *See Wood*, 692 F.3d at 1044 (acknowledging “enormous power imbalance” between guards and incarcerated people). Cases of sexual abuse or coercion are distinguishable from cases involving mere insults, jokes, or obscenities. In *Watison v. Carter*, for example, this Court contrasted “the exchange of verbal insults between inmates and guards” with conduct that carries a “high probability of severe psychological injury and emotional pain and suffering.” 668 F.3d 1108, 1112-13 (9th Cir. 2012), *citing Jordan v. Gardner*, 986 F.2d 1521, 1525 (9th Cir.1993) (en banc). Acknowledging these distinctions is particularly important where a plaintiff has alleged the conduct caused significant psychological injury, including suicide attempts.

When assessing whether alleged conduct is objectively likely to inflict pain, courts must also consider the particular vulnerabilities of the incarcerated person. *See Jordan*, 986 F.2d at 1525–26 (histories of abuse and evidence of

psychological impact relevant to constitutional standard for finding “pain”).

Where prison staff “exploit[] a known vulnerability” to create harm that does not serve a legitimate penological purpose—such as a vulnerability to sexual attacks or suicidality—such conduct cannot be characterized as “simple verbal harassment.” *Lisle v. Welborn*, 933 F.3d 705, 718 (7th Cir. 2019).

Here, prison staff knew that the sexualized targeting of an incarcerated transgender person would have a particularly grave impact. *See* ER-21 (alleging Calderon stated, “I know you’re transgender!”). PREA and required staff training provide sufficient notice that transgender people are a vulnerable population and that voyeurism is a serious form of sexual abuse. *See Vazquez v. Cty. of Kern*, 949 F.3d 1153, 1165 (9th Cir. 2020) (definition of sexual harassment in PREA is evidence as to whether that guard’s behavior was objectively unconstitutional); *see also Schwenk*, 204 F.3d at 1197 (“[T]he Eighth Amendment right of prisoners to be free from sexual abuse was unquestionably clearly established prior to the time of this alleged assault, and no reasonable prison guard could possibly have believed otherwise.”). Moreover, the facts alleged here were more threatening than if Calderon had committed voyeurism by surreptitiously peering at Ms. Moore. Instead, he demanded that she get undressed for him and threatened to “screw [her] over” if she did not comply. ER-21. The alleged conduct was unusually gross and calculated to cause significant harm.

II. Enacted legislation establishes that the sexual victimization of incarcerated transgender people offends contemporary standards of decency.

To assess whether conduct is unconstitutionally excessive under evolving standards of decency, courts are informed by both objective factors such as enacted legislation on the topic and by their own judgment. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (Eighth Amendment bars execution of persons with diminished mental capacity based on evolving standards of decency). As discussed above, sexual assault and abuse have long been established as repugnant to our human conscience and not *de minimis* under the Eighth Amendment. *Bearchild*, 947 F.3d at 1144. Additionally, state and federal statutory protections against sexual violence reflect a growing commitment to eradicate the sexual abuse of incarcerated people—especially at the hands of those that are charged with their care. Recent caselaw and public opinion also reflect an understanding that transgender people must not be excluded from the protection of our nation’s laws.

A. Transgender women are a vulnerable population at a heightened risk of harm from sexual victimization.

When a prison guard orders a transgender woman to show him her breasts or suffer retaliation, the threat delivers a message that extends far beyond immediate humiliation or degradation. Because of the prevalence of violence against transgender women in prisons, the guard’s demand also creates an

environment that exposes the incarcerated person to ongoing violence and signals that she will not be protected from harm.

Incarcerated transgender people face a disproportionate risk of sexual violence. Sexual assault against LGBTQ+ people in prison is a longstanding problem,² and the rate of sexual assault against this population, especially transgender people, is much higher than the national average for prison assaults.³ This rate is about three times higher for incarcerated LGB people, and about ten times higher for incarcerated transgender people.⁴

Sexual abuse by staff is a particularly serious issue that contributes to and escalates further violence. “[S]exual abuse thrives in prisons and jails in which staff allow, or participate in, the degradation of inmates on the basis of their gender identity.”⁵ Once targeted for abuse, a transgender woman is more likely to suffer repeated assaults.⁶ And those who present “stereotypically feminine

² Nat’l Criminal Justice Reference Serv., *National Prison Rape Elimination Commission Report*, 7 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf> (“*Commission Report*”).

³ See Nat’l Ctr. for Transgender Equal., *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights*, 6 (2018), <https://transequality.org/transpeoplebehindbars>.

⁴ *Id.*

⁵ Just Detention Int’l, *Targets for Abuse: Transgender Inmates and Prison Rape*, 2 (2013), <https://justdetention.org/wp-content/uploads/2015/10/FS-Targets-For-Abuse-Transgender-Inmates-And-Prisoner-Rape.pdf>.

⁶ *Id.* (“Once targeted for abuse, the majority of transgender survivors are subjected to repeated sexual assaults.”)

characteristics are especially vulnerable to sexual abuse.”⁷ The obvious gender nonconformity of assigning a transgender woman to a men’s facility makes transgender women particularly vulnerable targets.⁸ This makes sexualized threats and “grooming” behavior such as sexual pressure or intimidation even more objectively harmful, especially when they target transgender women.⁹

As Ms. Moore alleged here, her attempts at suicide were directly caused by the assault. ER-14:7-8 (“Plaintiff suffered mental distress and attempted to take her life two times from the effect of Defendant Calderon’s actions.”). The victimization of transgender people is linked to higher suicide risk. A 2015 survey of over 27,000 transgender adults found that respondents who were a victim of violence, including coercive control by an intimate partner, were more likely to report suicide thoughts and attempts.¹⁰

⁷ Human Rights Watch, *No Escape: Male Rape in U.S. Prisons* (2001), <https://www.hrw.org/report/2001/04/01/no-escape-male-rape-us-prisons> (internal quotations omitted).

⁸ Kate Sosin, *Trans, imprisoned – and trapped*, NBC News, Feb. 26, 2020, <https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436>.

⁹ See Barbara Owen, et. al, *Gendered Violence and Safety: A Contextual Approach to Improving Security in Women’s Facilities*, 43, 64 (2008), <https://www.ojp.gov/pdffiles1/nij/grants/225338.pdf> (“grooming” behaviors such as sexual pressure or intimidation, left unchallenged, can escalate to more serious forms of sexual coercion).

¹⁰ Jody L. Herman, et. al, UCLA Williams Institute, *Suicide Thoughts and Attempts Among Transgender Adults: Findings from the 2015 U.S. Transgender Survey*, 7, 20 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf>.

B. The Prison Rape Elimination Act and California’s The Transgender Respect, Agency, and Dignity Act were enacted to address sexual violence in prisons.

Congress unanimously passed PREA in 2003, responding to the overwhelming number of incidents of rape and other sexual abuse in government custody. PREA recognized that transgender women, like Ms. Moore, are at heightened risk for sexual assault. PREA also created the National Prison Rape Elimination Commission to study the problem. In 2009, the Commission released a 250-page report (“Commission Report”) detailing the epidemic of sexual violence in custody.¹¹

Informed by the Commission Report, and by nine years of study and commentary by experts, the Department of Justice in 2012 released the final PREA Standards, which include comprehensive requirements for local, state, and federal prisons, jails, and lock-up facilities. PREA Standards, 77 Fed. Reg. at 37106. This Court has recognized that **PREA and the PREA Standards are “the ‘clearest and most reliable objective evidence of contemporary values” on this topic.** *Bearchild*, 947 F.3d at 1144. Recognizing the “unique risks” that transgender and intersex people face in prisons, the PREA Standards “account in various ways for the particular vulnerabilities of inmates who are LGBTI or whose appearance or manner does not conform to traditional gender expectations.”

¹¹ *Commission Report*, supra n. 3.

PREA Standards, 77 Fed. Reg. at 37109.

It is particularly egregious for prison staff to wield their power over prisoners to threaten sexual abuse. As noted in the preamble to the PREA Standards:

[S]taff exert tremendous authority over every aspect of inmates' lives—far more authority than employers exert over employees in a workplace context. An attempt, threat, or request to engage in sexual contact, even if it does not result in actual sexual contact, may lead to grave consequences for an inmate, and deserves to be treated seriously.

PREA Standards, 77 Fed. Reg. at 37116.

The Commission Report recognized the danger of non-physical sexual violence by prison staff. Its section on treating trauma opens with the story of an incarcerated woman who was forced by prison staff to strip and dance in front of other inmates and staff while she was so frightened that her legs trembled.¹² This is a clear illustration of sexual violence in and of itself. Predictably, the voyeuristic sexual abuse escalated to physical attacks by other inmates, encouraged by staff's endorsement of the behavior. After a string of incidents that “escalated over time,” the woman testified that she felt “constant stress, anxiety, and dread of imminent sexual attack.”¹³ Even after her release, she suffered from

¹² *Commission Report*, *supra* n.3, at 125-26.

¹³ PREA Standards, 77 Fed. Reg. 37106

insomnia, struggled with an eating disorder, and “spent months emotionally and psychologically debilitated, withdrawn and depressed.”¹⁴

The PREA Standards reflect a societal determination that incarcerated people do not have to wait for physical abuse to occur before prison staff are held accountable to protect them from harm. Instead, obvious safety risks should be addressed based on the risk of extreme harm. For example, 28 C.F.R. § 115.42 requires that transgender prisoners have access to private showers. Section 115.41 requires prisons and jails to screen prisoners within 72 hours of intake to assess risk for victimization or abuse, including whether the prisoner is or is perceived to be LGBT. And because of the known vulnerability of incarcerated LGBT persons, prisons and jails must also train staff specifically on searching transgender people, §115.15, train them about communication with LGBT people, §115.31, and assess during incident reviews whether a person was targeted based on LGBT status, §115.86.

In 2020, California enacted The Transgender Respect, Agency, and Dignity Act (“the California Act”), 2020 Cal. Legis. Serv. Ch. 182 (S.B. 132) (West) (codified at Cal. Penal Code §§ 2605-06), which reflects evolving contemporary standards for the treatment and protection of incarcerated transgender people. The California legislature found that incarcerated transgender people were particularly

¹⁴ *Id.*

vulnerable to sexual abuse and sexual victimization, noting that sexual assault against transgender women in California prisons was “13 times higher than for men in the same prisons.” S.B. 132 at § 2(c).¹⁵ The legislature found and declared that incarcerated people “deserve respect, agency, and dignity.” *Id.* at §2(j).

Similar to PREA, the California Act acknowledges that the significant safety concerns of transgender people in state prisons must be addressed proactively. It requires that state prisons ask during intake whether an incarcerated person identifies as transgender, nonbinary, or intersex. Cal. Penal Code § 2605(a). It requires prisons to house people at facilities that are consistent with their gender identity, and to give serious consideration to that person’s perception of health and safety when assigning them to housing within those facilities. Cal. Penal Code § 2606(a)(3)-(4). And it requires staff to search incarcerated people “according to the search policy for their gender identity or according to the gender designation of the facility where they are housed, based on the individual's search preference.” Cal. Penal Code § 2606(a)(2).

In determining contemporary standards of decency, courts must consider enacted legislation that forbids the sexual victimization of incarcerated

¹⁵ See Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (2007), <https://cpb-us-e2.wpmucdn.com/sites.uci.edu/dist/0/1149/files/2013/06/Jenness-et-al> (finding that transgender prisoners experience sexual victimization at a rate 13 times higher than non-transgender prisoners).

transgender people and recognizes that such conduct disproportionately harms transgender people.¹⁶ These statutory protections are evidence that society rejects the proposition that sexual victimization—whether or not it includes physical contact—should be an expected part of routine life for incarcerated people.

CONCLUSION

For decades this Court has recognized that sexual assault and abuse are presumptively malicious, sadistic, and repugnant to society's standards of decency. An incarcerated person states a cognizable claim when they allege that a prison guard engages in sexual conduct, including abuse through verbal coercion, that causes them significant harm. If such claims are foreclosed based on categories of physical and non-physical abuse, significant violence goes unchecked, despite the resounding message from contemporary society that sexual victimization offends our basic notions of humanity and decency.

Here, the alleged conduct was objectively calculated to subject Ms. Moore to significant pain and increase the risk that she would suffer escalated abuse by staff and others. By dismissing Ms. Moore's complaint, despite controlling caselaw, the district court effectively closed the courthouse doors to her. PREA's

¹⁶ The same evolution is reflected in public opinion about the rights of transgender people. In a recent national poll, for example, 73% of respondents thought transgender people should be protected from discrimination. Luhur, et al., *Public Opinion of Transgender Rights in the United States* (2019) <https://williamsinstitute.law.ucla.edu/publications/public-opinion-trans-rights-us/>.

goal of eliminating sexual violence in prisons cannot be realized when prison guards who sexually abuse incarcerated people are not held accountable for their unconstitutional conduct. *Amici* urge this Court to reverse the dismissal of Ms. Moore's claims and remand for further proceedings.

Dated: September 17, 2021

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