No. 21-15849

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRENCE JESSE MOORE,
Plaintiff-Appellant,

v.

S. CALDERON, Correctional Officer at Kern Valley State Prison,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California
No. 1:20-cv-00397
Hon. Dale A. Drozd, *District Judge*

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Jesse Moore,[1] a transgender woman housed in a men's prison, had just stepped out of her cell to shower when she was approached by a male prison guard. The two were completely alone. The guard, defendant Calderon,[2] demanded that Ms. Moore expose her breasts to him. Because he had no legitimate penological reason for doing so and because Ms. Moore is transgender, she refused. Her refusal incensed Calderon; in response, he threatened to "screw you over if you don't do what I say." He then repeated his demand for Ms. Moore to expose herself, this time in far more vulgar terms: "show me your tits since you think you're a woman." When Ms. Moore again refused and said that she planned to file a grievance against him for sexual harassment, Calderon escalated things even further. He called Ms. Moore a derogatory epithet, saying "you faggots think you have so many rights." He also threatened to write a false disciplinary report on her in retaliation—a threat he later made

[1] Ms. Moore uses she/her pronouns, *see* ER-23, and the first name Jesse, although her full legal name—as reflected in the case caption—is Terrence Jesse Moore.

[2] Because Ms. Moore's case was dismissed at the pre-service screening stage under 28 U.S.C. § 1915A(a), Calderon's full name is currently unknown.

good on. And he told Ms. Moore that he would "make [her] time in Kern Valley hell now," so much so that she would "wish [she] were dead."

Ms. Moore suffered greatly from Calderon's misconduct. She was so distressed that she became suicidal and twice attempted to take her own life in the weeks that followed. The false disciplinary report Calderon filed against her led to her release date getting moved back and in the loss of her prison job, among other adverse consequences. And Calderon temporarily succeeded in intimidating her out of filing a grievance against him, though once she was on the suicide ward—and thus safely out of Calderon's control—a nurse helped her work up the confidence to come forward.

Contending that Calderon violated her Eighth and First Amendment rights by sexually harassing and retaliating against her, Ms. Moore filed suit *pro se*. Following a magistrate judge's recommendation, the district court dismissed her claims at screening.

The district court's Eighth Amendment analysis was equal parts notable and wrong. Notable, because it called on this Court to reevaluate or clarify when verbal harassment may violate the Eighth Amendment, given the recurrence of claims involving abhorrent verbal conduct by

prison staff. Wrong, because the sexual harassment Ms. Moore endured states an Eighth Amendment claim when judged under either of two standards. First, it falls within this Court's definition of sexual abuse—a per se Eighth Amendment violation—because it is "sexual conduct" done "for the purpose of humiliating, degrading, or demeaning the prisoner." *Bearchild v. Cobban*, 947 F.3d 1130, 1144 (9th Cir. 2020). This comports with societal standards of decency on these issues, which have evolved dramatically in recent years. Second, while most verbal harassment in prisons does not offend the Eighth Amendment, the harassment here does because it satisfies the test this Court established in *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996): it was both "unusually gross" and "calculated to and did cause [] psychological damage." Allowing Ms. Moore's Eighth Amendment claim to proceed also aligns with the trend in other circuits, which increasingly recognize that while words are usually just words, sometimes words rise to the level of unnecessary and wanton infliction of pain in violation of the Eighth Amendment.

Ms. Moore's First Amendment claim also should have cleared the screening hurdle. It's hard to imagine a more straightforward retaliation

claim: Ms. Moore engaged in protected conduct when she told Calderon of her intent to file a sexual harassment grievance against him. Calderon, in turn, explicitly threatened to retaliate against her by filing a false disciplinary report—a threat he later fulfilled—and his own words linked that false report to her protected conduct. Under this Court's precedent, that false disciplinary report kills three retaliation elements with one stone: it was an adverse action that also necessarily lacked legitimate penological purpose and sufficiently chilled protected activity.

This Court should reverse on both grounds and allow Ms. Moore's claims to proceed past the screening stage. This case also warrants consideration by a merits panel, with full briefing and argument. As the district court identified, this case involves a frequently recurring and important constitutional issue, and one where district courts lack adequate guidance. "[I]t is time for the Ninth Circuit to reevaluate and address" this issue, ER-8, and this case provides an ideal vehicle for doing so. Unlike most such cases, Ms. Moore is represented by counsel, and the issues are fully preserved.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Ms. Moore's claims under 28 U.S.C. § 1331, because Ms. Moore brought claims under the Eighth and First Amendments of the U.S. Constitution. After screening Ms. Moore's complaint under 28 U.S.C. § 1915A(a), the district court dismissed the case and entered final judgment against Ms. Moore on April 20, 2021. ER-3-4. Ms. Moore timely filed a notice of appeal on May 11, 2021. ER-24. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether verbal sexual harassment of a transgender woman by a male prison guard plausibly states an Eighth Amendment claim under the *Bearchild* definition of sexual abuse, when that harassment involved unjustified and repeated orders for Ms. Moore to expose her breasts (including a demand to "show me your tits"), a homophobic slur ("faggot"), mockery of Ms. Moore's gender identity, and multiple threats.

2. Whether verbal harassment of a transgender woman by a male prison guard—harassment so distressing it caused the prisoner to repeatedly attempt suicide—plausibly states an Eighth Amendment claim under the *Keenan* test, because the harassment was both

"unusually gross even for a prison setting" and "calculated to and did cause psychological damage."

3. Whether a prison guard filing a false disciplinary report in response to a prisoner's stated intent to pursue a grievance against the guard states a First Amendment retaliation claim, when the guard's own words explicitly connected the filing of the false report to the prisoner's planned grievance.

STATEMENT OF THE CASE[3]

I. Factual Background

While incarcerated at Kern Valley State Prison in the summer of 2019, Jesse Moore, a transgender woman, had just come out of her cell to shower when she was approached by a male prison guard, defendant S. Calderon. ER-21-22. Ms. Moore and Calderon were completely alone; no other staff or prisoners were around. ER-22. For no legitimate penological reason, Calderon demanded that Ms. Moore remove her top and show him her breasts. ER-21. Ms. Moore refused, explaining that

[3] As an appeal from a section 1915A dismissal, all allegations of material fact in Ms. Moore's complaint are taken as true and are construed liberally and in the light most favorable to Ms. Moore. *Byrd v. Maricopa Cty. Bd. of Supervisors*, 845 F.3d 919, 922 (9th Cir. 2017).

as a transgender woman, she was under no obligation to reveal her breasts. ER-21. This refusal upset Calderon. He became threatening, telling Ms. Moore "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. Calderon escalated from there, ordering Ms. Moore to "show me your tits since you think you're a woman." ER-21.

As Ms. Moore's complaint explains, there was no legitimate penological purpose behind Calderon's order to "show me your tits." ER-21-22. Ms. Moore was "completely alone" at the time, so she could not have posed a security threat to other prisoners or staff. ER-22. Nor was Calderon "attempting to maintain any form of security, enforce any rule, or do anything that had to [do] with his job." ER-22. Instead, as Ms. Moore's complaint alleges, Calderon was harassing Ms. Moore simply to cause her "severe psychological harm." ER-21.

Calderon's misconduct did not end with ordering Ms. Moore to show him her "tits." Horrified and deeply upset by Calderon's verbal attacks, Ms. Moore informed Calderon that she would be filing a grievance against him for sexual harassment. ER-22. Calderon did not take kindly

to this. He not only continued harassing Ms. Moore—including by using a disparaging and profoundly offensive epithet—but also explicitly threatened her, saying, "I'll bet you won't. You faggots 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 [a disciplinary report] on you." ER-22. Ms. Moore asked Calderon why he intended to write her up—since she had broken no rules—but Calderon simply responded, "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!" ER-22. And these were no mere empty threats: true to his word, Calderon filed a false disciplinary report against Ms. Moore shortly thereafter. ER-22.

Ms. Moore suffered greatly from Calderon's misconduct. In fact, it caused her such severe psychological distress that she twice attempted suicide in the following weeks. ER-22-23. Calderon's false disciplinary report also had serious consequences for Ms. Moore: loss of time on her release date, loss of her prison job, and loss of her property, among others. ER-23. And Calderon's retaliatory report had the desired effect: Ms. Moore initially backed out of filing her sexual harassment grievance against Calderon, for fear of further retaliation. ER-22. It was only once

she was on a suicide ward—and therefore away from Calderon's control—several weeks later that Ms. Moore confided in a nurse about what Calderon did to her and managed to work up the courage to actually file the grievance against him. ER-22-23.

II. Proceedings Below

Ms. Moore filed suit *pro se*, alleging, among other claims, that Calderon violated the Eighth Amendment by sexually harassing her and the First Amendment by retaliating against her for her protected conduct. D. Ct. Dkt. 1. A magistrate judge screened Ms. Moore's complaint under 28 U.S.C. § 1915A, dismissing the complaint but granting leave to amend on her Eighth and First Amendment claims. D. Ct. Dkt. 11. Ms. Moore timely filed a first amended complaint, again alleging that Calderon had violated the Eighth Amendment by sexually harassing her and the First Amendment by retaliating against her. ER-21-22.

The magistrate judge recommended that Ms. Moore's first amended complaint be dismissed with prejudice. ER-14-18. As to her Eighth Amendment claim, the magistrate judge first correctly observed that this Court has left open the possibility of Eighth Amendment claims based on

verbal harassment, provided the harassment was (1) "unusually gross even for a prison setting," and (2) "calculated to and [does] cause [plaintiff] psychological damage." *See* ER-15 (citing *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996)). But, according to the magistrate judge, Ms. Moore's allegations were conclusory and did not satisfy the *Keenan* test. ER-15-16. Somewhat perplexingly, the magistrate judge then made a far more sweeping statement: that "sexual harassment claim [sic] based on verbal harassment insufficient [sic] to state a claim under § 1983." ER-16 (citing *Osborn v. Wishchuen*, No. CV-20-01155, 2020 WL 4697990, at *2 (D. Ariz. Aug. 13, 2020)).

The magistrate judge's First Amendment analysis was both difficult to parse and wrong. Despite Ms. Moore's allegations that Calderon filed a false disciplinary report in express retaliation for Ms. Moore saying she planned to file a sexual harassment grievance against him, *see* ER-22-23, the magistrate judge concluded that "Plaintiff alleges no facts demonstrating that Defendant Calderon took an adverse action against Plaintiff based on Plaintiff's protected conduct. Rather, Plaintiff sets forth one verbal interaction with Calderon, none of which identifies Calderon's involvement in any alleged false rules violation report." ER-

17. As to the fifth element of a retaliation claim—that the adverse action did not advance any legitimate correctional goals—the magistrate judge held only that "Plaintiff alleges conclusory allegations that alleged the action did not reasonably advance a legitimate correctional goal in light of whether there was a penological interest involved." ER-17.

Ms. Moore timely objected to the magistrate judge's recommendation on her Eighth Amendment claim. *See* ER-10-11.

The district court adopted the magistrate judge's recommendation and dismissed Ms. Moore's claims with prejudice. *See* ER-9. As to her Eighth Amendment claim, the district court found that Calderon's conduct was "clearly [] highly inappropriate," "deeply offensive," and "served[] no legitimate penological objective." ER-6-7. Like the magistrate judge, the district court seemingly alternated between holding that verbal harassment claims might be actionable in some cases and that verbal harassment claims can *never* violate the Eighth Amendment. *See* ER-6-8. The district court acknowledged *Keenan*, but relied on a series of district court cases holding that similar comments were inadequate to satisfy the *Keenan* standard. ER-7. And it concluded its analysis by stating that "the law is clear: verbal harassment, even if

sexual in nature, does not without more violate the Constitution." ER-8 (quoting *Reed v. Racklin*, No. 17-cv-0799-WBS-AC, 2019 WL 4745266, at *4-5 (E.D. Cal. Sept. 30, 2019)).

In an unusual move, however, the district court called on this Court to "reevaluate and address the contours of those circumstances" in which verbal harassment can give rise to Eighth Amendment claims, given the "number of cases" raising the issue. ER-8. It also reiterated the "obviously highly offensive" and "completely and totally inappropriate" nature of Calderon's harassment. ER-8.

As to Ms. Moore's First Amendment retaliation claim, the district court adopted the magistrate judge's recommendation to dismiss with prejudice. ER-8.

The district court entered judgment, ER-3, and Ms. Moore timely appealed, ER-24.

SUMMARY OF THE ARGUMENT

I. Ms. Moore plausibly alleged that the harassment she endured violated the Eighth Amendment's flexible and ever-evolving protections against the unnecessary and wanton infliction of pain, whether physical or psychological.

A. As this Court has long held, "sexual harassment or abuse of an inmate by a corrections officer is a violation of the Eighth Amendment." *Wood v. Beauclair*, 692 F.3d 1041, 1046 (9th Cir. 2012). More recently, this Court defined "sexual assault" for Eighth Amendment purposes to include "sexual conduct . . . [done] for the purpose of humiliating, degrading, or demeaning the prisoner." *Bearchild v. Cobban*, 947 F.3d 1130, 1144 (9th Cir. 2020). The verbal sexual harassment here falls within the *Bearchild* definition. No serious argument can be made that it wasn't sexual or done with the requisite purpose, certainly not at this preliminary stage of the proceedings. And "conduct" encompasses verbal acts as well as physical ones, consistent with how Black's and other dictionaries define the term. Moreover, to describe Calderon's conduct as "mere verbal harassment" is to ignore that he repeatedly ordered Ms. Moore to reveal her breasts; had she complied rather than refused (a refusal that led to dire consequences for her), there would be no doubt that the harassment would rise to the level of an Eighth Amendment violation. And societal standards of decency—the Eighth Amendment's cornerstone—support Ms. Moore's Eighth Amendment claim, because social norms have evolved dramatically in recent years when it comes to

prison sexual abuse, sexual harassment, and the treatment of transgender individuals.

B. Ms. Moore also stated an Eighth Amendment claim under the standard this Court established for verbal harassment claims—of any type, not merely sexual—in *Keenan v. Hall,* 83 F.3d 1083, 1092 (9th Cir. 1996). The harassment here meets the first part of the *Keenan* test—that it was "unusually gross even for a prison setting"—because it involved a male prison guard's repeated demands that a transgender woman expose her breasts (including an order to "show me your tits"); the use of a homophobic epithet ("faggot"); mockery of Ms. Moore's gender identity; and multiple threats (including a fulfilled threat to file a false disciplinary report against Ms. Moore, and threats to make Ms. Moore's time in prison "hell" and to "screw [her] over" if she didn't "do what I say"). It also meets the second part of the *Keenan* test, because the harassment was "calculated to and did cause [her] psychological damage." Ms. Moore alleged that Calderon harassed her for no other reason than to cause her severe psychological harm, an assertion backed up by Calderon's hateful, vulgar words and the lack of plausible penological purpose. And he unfortunately succeeded: the harassment

caused Ms. Moore such severe psychological distress that she twice attempted suicide. Allowing Ms. Moore's claim to proceed also aligns with the trend in this Court's sister circuits; the Seventh Circuit, for example, has in recent years established that the Eighth Amendment "protects psychologically vulnerable inmates against psychological pain deliberately inflicted by correctional officers," even if words are the only tool used to inflict that pain. *Lisle v. Welborn*, 933 F.3d 705, 718 (7th Cir. 2019). Here, Calderon intentionally inflicted psychological pain against a psychologically vulnerable transgender woman housed in a men's prison.

II. Ms. Moore alleged a straightforward First Amendment retaliation claim, meeting all five elements. This Court has long held that filing a false disciplinary report constitutes an adverse action, thus satisfying the first element of her retaliation claim. *Watison v. Carter*, 668 F.3d 1108, 1115 (9th Cir. 2012). The second element—that the adverse action was "because of" Ms. Moore's protected conduct, *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2005)—is also met: by his own words, Calderon filed the false report "because" and "since" Ms. Moore said she planned to file a sexual harassment grievance against him. Her

verbal intent to file a grievance constitutes "protected conduct," taking care of the third element. *Entler v. Gregoire*, 872 F.3d 1031, 1042 (9th Cir. 2017). As to the fourth element—whether the adverse action would chill a person of ordinary firmness from exercising their First Amendment rights—under this Court's existing precedent, the filing of a false disciplinary report is sufficiently chilling. *See Watison*, 668 F.3d at 1115. The fifth and final element—that the adverse action did not "reasonably advance a legitimate correctional goal," *Rhodes*, 408 F.3d at 568—is likewise met. On this issue, the lower court accused Ms. Moore of conclusorily alleging that no legitimate correctional purpose was advanced by Calderon's false disciplinary report. But as this Court has held, false disciplinary reports *necessarily* satisfy this element because they never advance legitimate correctional goals, *Watison*, 668 F.3d at 1114-15, so Ms. Moore pled all that she needed to.

STANDARD OF REVIEW

This Court reviews de novo a district court's section 1915A dismissal for failure to state a claim, "construing the pro se complaint liberally and taking all the allegations of material fact as true and in the light most favorable to [the plaintiff]." *Byrd v. Maricopa Cty. Bd. of*

Supervisors, 845 F.3d 919, 922 (9th Cir. 2017). Although Ms. Moore did not specifically object to the magistrate judge's recommendation on her First Amendment claim, this Court still reviews the lower court's legal conclusions as to that claim de novo. *Wilkerson v. Wheeler*, 772 F.3d 834, 839-840 (9th Cir. 2014).

ARGUMENT

I. The Sexual Harassment Ms. Moore Endured States an Eighth Amendment Claim.

The Eighth Amendment's prohibition on "cruel and unusual punishments" protects against more than just "physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). The Amendment's protections run far more broadly; after all, its "basic concept" is "nothing less than the dignity of man." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). Put differently, the Eighth Amendment is a recognition that "[p]risoners retain the essence of human dignity inherent in all persons." *Brown v. Plata*, 563 U.S. 493, 510 (2011). It thus "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency." *Estelle*, 429 U.S. at 102 (cleaned up). Under the Eighth Amendment, the "unnecessary and wanton infliction of pain" violates the Constitution. *Hudson v. McMillian*, 503 U.S. 1, 5

(1992). The Amendment protects against all such pain, whether it "be physical or psychological." *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012).

A. The harassment Ms. Moore suffered is sexual abuse of a prisoner as defined by this Court.

"Sexual harassment or abuse of an inmate by a corrections officer is a violation of the Eighth Amendment." *Wood v. Beauclair*, 692 F.3d 1041, 1046 (9th Cir. 2012); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) ("In the simplest and most absolute of terms, the Eighth Amendment right of prisoners to be free from sexual abuse [is] unquestionably clearly established."). Such claims easily satisfy both the objective and subjective components of an Eighth Amendment claim. *See Bearchild v. Cobban*, 947 F.3d 1130, 1145 (9th Cir. 2020); *Wood*, 692 F.3d at 1049-51. As to the subjective component, this Court has made plain that sexual abuse of prisoners serves "no legitimate penological purpose." *Wood*, 692 F.3d at 1050-51. This lack of valid purpose thus allows the requisite "malicious and sadistic intent" to be presumed. *Id.* at 1049-50; *Bearchild*, 947 F.3d at 1143-44. It also satisfies the objective component, because it is "offensive to human dignity." *Wood*, 692 F.3d at 1051.

Although this Court's prior sexual abuse cases have largely dealt with physical abuse or physical abuse in concert with verbal abuse, the verbal sexual harassment here—including repeated unjustified orders for Ms. Moore to strip and reveal her breasts—fits within this Court's definition of "sexual assault" for Eighth Amendment purposes:

> [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 (emphasis added).

Each relevant element of that definition is met here. No one could fairly contest the first two elements, that Calderon was a prison staff member and acted under color of law. And the district court agreed with Ms. Moore's allegation that Calderon's harassment "serve[d] no legitimate penological objective." *See* ER-6-7; *see also* ER-21-22. That leaves two remaining elements: that Calderon "engaged in sexual conduct," and that he did so "for the purpose of humiliating, degrading, or demeaning [Ms. Moore]." Calderon's harassment satisfies both, and thus gives rise to a plausible Eighth Amendment claim.

1. The verbal sexual harassment Ms. Moore was subjected to is "sexual conduct."

The verbal sexual harassment Ms. Moore endured constitutes "sexual conduct." First, it was "sexual." To say that "show me your tits" is sexual is to state the obvious. *See, e.g.*, *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 318 (3d Cir. 2013) ("[T]he word 'tits' . . . is a patently offensive reference to sexual organs." (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978)); *DeJesus v. K-Mart Corp.*, 9 F. App'x 629, 630 (9th Cir. 2001) (evidence of sufficiently severe sexual harassment included coworker flashing sign reading "show me your tits"); *Wright v. Rolette County*, 417 F.3d 879, 883 (8th Cir. 2005) (coworker's comments about "tits" were among "unwelcome comments of a sexual nature that would be offensive to any reasonable person"). The harassment was also expressly based on Ms. Moore's gender identity as a transgender woman ("Now show me your tits since you think you're a woman."); sexual harassment is by definition motivated by gender, and harassment motivated by gender is by definition sexual harassment. *See, e.g.*, *Sampson v. Cty. of Los Angeles*, 974 F.3d 1012, 1023 (9th Cir. 2020); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1743-44 (2020).

Second, "conduct" is not limited to physical acts; it also includes verbal harassment. Indeed, Black's Law Dictionary explicitly includes verbal behavior in its definition of "conduct": "personal behavior, whether by action or inaction, *verbal* or nonverbal; the manner in which a person behaves; collectively, a person's deeds." Black's Law Dictionary (11th ed. 2019) (emphasis added). Non-legal dictionaries define the word similarly. *See, e.g.*, Random House College Dictionary (2010) ("personal behavior; way of acting; deportment"); Webster's New World College Dictionary (4th ed. 2010) ("the way that one acts; behavior; deportment"). Nothing in those dictionary definitions can be read to limit "conduct" to acts of physical touching or assault; to the contrary, all support the contention that "conduct" includes verbal acts. This Court seemed to accept as much even before *Bearchild*, reversing summary judgment where a prisoner alleged that a prison doctor made "sexual comments" during otherwise-legitimate rectal examinations, because whether the comments "were [] sufficiently offensive to human dignity to constitute sexual harassment" or "served [any] penological justification" were questions for the jury. *Yarborough v. Norwood*, 722 F. App'x 678, 679-80 (9th Cir. 2018).

At any rate, to describe Calderon's harassment as "merely" verbal is to tell an incomplete story. The harassment included repeated and unjustified orders for Ms. Moore to strip and reveal her breasts, accompanied by an explicit threat if she did not comply. Had she not refused,[4] Calderon's actions would be a clear Eighth Amendment violation; courts have long held that unjustified strip searches or cross-gender viewings of a prisoner's nude body are unnecessary and wanton inflictions of pain.

In *Rafferty v. Trumbull County*, for example, the Sixth Circuit held that a prisoner's clearly established Eighth Amendment rights were violated by a guard ordering her to reveal her breasts and masturbate, despite absence of any physical touching by the guard, the lack of any explicit threat, and the prisoner's purported "consent." 915 F.3d 1087, 1091, 1096-97 (6th Cir. 2019). Similarly, the Fourth Circuit concluded 40 years ago that forcing a female prisoner to remove her bra and underwear in the presence of male guards when not reasonably necessary violates the Eighth Amendment, because it is "demeaning and

[4] Recall, too, that Ms. Moore's justifiable refusal to comply led to dire consequences for her, including more time behind bars, loss of her prison job, and loss of privileges. *See supra* at 8; *infra* at 46.

humiliating." *Lee v. Downs*, 641 F.2d 1117, 1119-20 (4th Cir. 1981). Other circuits have held similarly. *See, e.g.*, *Calhoun v. DeTella*, 319 F.3d 936, 939-940 (7th Cir. 2003) (strip search conducted "in a manner designed to demean and humiliate" male prisoner in front of female guards violates the Eighth Amendment); *Kent v. Johnson*, 821 F.2d 1220, 1227-28 (6th Cir. 1987) (allowing female guards to watch a male prisoner shower at close range and without restriction states an Eighth Amendment claim); *Daskalea v. District of Columbia*, 227 F.3d 433, 439-41 (D.C. Cir. 2000) (forcing a prisoner to perform a striptease violates the Eighth Amendment). This Court should not close the courthouse doors on Ms. Moore simply because she bravely refused—at great consequence to herself—to comply with Calderon's unjustified and harassing demands to bare her breasts.

2. Calderon harassed Ms. Moore for the purpose of humiliating, degrading, and demeaning her.

The harassment Ms. Moore experienced also falls squarely within the second part of the *Bearchild* test: that the sexual conduct was "for the purpose of humiliating, degrading, or demeaning the prisoner." *Bearchild*, 947 F.3d at 1144. Ms. Moore alleged in her complaint that Calderon said what he said to "cause [her] severe psychological harm."

ER-21. At this stage, of course, Ms. Moore's allegations must be taken as true. *Byrd v. Maricopa Cty. Bd. of Supervisors*, 845 F.3d 919, 922 (9th Cir. 2017). And this allegation of intent fits with the words Calderon used—words that mocked Ms. Moore's transgender identity in the most vulgar possible manner ("Now show me your tits since you think you're a woman."), and then used a homophobic slur to refer to her ("You faggots think you have so many rights."). It also dovetails with the utter lack of legitimate penological purpose for Calderon's actions. *See Wood*, 692 F.3d at 1050 ("Where there is no legitimate penological purpose for a prison official's conduct, courts have presumed malicious and sadistic intent.") (cleaned up). At least at this preliminary stage of the proceedings, Ms. Moore has satisfied the intent element of the *Bearchild* test.

3. Evolving standards of decency demonstrate why the sexual harassment Ms. Moore was endured states an Eighth Amendment claim.

As this Court and other circuits have recognized, "societal standards of decency regarding sexual abuse and its harmful consequences have evolved." *Bearchild*, 947 F.3d at 1144 (quoting *Crawford v. Cuomo*, 796 F.3d 252, 256 (2d Cir. 2015)). For example, the

last several decades have seen substantial legislative activity—among "the clearest and most reliable objective evidence of contemporary values"—in the area of prison sexual abuse. *Id.* (quoting *Atkins*, 536 U.S. at 312). These enactments include Congress's unanimous passage of the Prison Rape Elimination Act (PREA) in 2003, and the Attorney General's promulgation of PREA's implementing regulations in 2012. *See id.* Those regulations specifically recognize sexual harassment as harmful and intolerable. They require, for instance, that correctional agencies "have a written policy mandating zero tolerance toward all forms of sexual abuse *and sexual harassment*." 28 C.F.R. § 115.11(a) (emphasis added). They also require investigation—whether administrative or criminal—for *all* allegations of sexual harassment. 28 C.F.R. § 115.22. Similarly, all prison employees must be trained on prisoners' "right to be free from sexual abuse *and sexual harassment*," as well as "the dynamics of sexual abuse and *sexual harassment* in confinement." 28 C.F.R. § 115.31 (emphasis added). And the United States Department of Justice (DOJ) specifically explained that verbal sexual harassment by prison staff—as opposed to by other prisoners—*is* "sexual abuse." National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg.

37106, 37116 (June 20, 2012). As DOJ put it: "This distinction recognizes that staff exert tremendous authority over every aspect of inmates' lives—far more authority than employers exert over employees in a workplace context." *Id.*

California, where Ms. Moore is incarcerated, has also enacted strict regulations around sexual harassment by prison staff, including verbal harassment. These regulations were promulgated to comply with California's obligations under PREA and the California Sexual Abuse in Detention Elimination Act, passed in 2005. *See* Cal. Penal Code §§ 2635-2644. For example, state regulations explicitly define "sexual misconduct" to include "disrespectful, unduly familiar, or sexually threatening *comments* directed to, or within the hearing of, an inmate/parolee." Cal. Code Regs. tit. 15, § 3401.5(a)(3)(F) (emphasis added). The definition also includes "threatening an inmate/parolee's safety . . . housing, privileges, [or] work detail . . . because the inmate/parolee has refused to engage in sexual behavior." *Id.* at § 3401.5(a)(2). And the statutorily-mandated California Department of Corrections and Rehabilitation Prison Rape Elimination Policy establishes a "zero tolerance" policy for sexual harassment in its

institutions. Cal. Dep't of Corrections & Rehabilitation, *Operations Manual*, ch. 5, art. 44, § 54040.1 (Jan. 1, 2021), https://www.cdcr.ca.gov/regulations/wp-content/uploads/sites/171/2021/05/DOM_2021_ADA.pdf.

Courts, too, have increasingly recognized that "sexual abuse of prisoners, once passively accepted by society, deeply offends today's standards of decency." *Crawford*, 796 F.3d at 254. *Crawford* well illustrates the point. There, two prisoners alleged that a guard had groped their genitalia while making inappropriate comments on one occasion each. *Id.* at 255. In 1997, the Second Circuit held that a similar, but arguably more severe, course of sexual misconduct did not state an Eighth Amendment claim. *See Boddie v. Schneider*, 105 F.3d 857, 859-61 (2d Cir. 1997) (over a several-week period, female prison guard made pass at male prisoner, touched his penis, called him a "sexy black devil," and repeatedly pinned her body against him, including holding her breasts against him and making clothed contact between his penis and her pelvic area). But because "the basic mores of society" had changed in the intervening 18 years, the court in *Crawford* held not only that the plaintiffs in the case before it stated an Eighth Amendment claim, but

also that the "officer's conduct in *Boddie* would flunk its own test today." *Crawford*, 796 F.3d at 259-60.

And like DOJ, courts have come to emphasize the power disparities between prisoners and guards in assessing sexual abuse claims. As the en banc Seventh Circuit put it: "It is difficult to conceive of any setting where the power dynamic could be more imbalanced than that between a male guard and a female inmate." *J.K.J. v. Polk County*, 960 F.3d 367, 382 (7th Cir. 2020) (en banc), *cert denied*, 141 S. Ct. 1125 (2021). This is because prisoners are "confined in circumstances where they depend[] on male guards for nearly everything in their lives—their safety as well as their access to food, medical care, recreation, and even contact with family members." *Id.* at 381. *J.K.J.* called this "common sense," "as obvious as obvious could be." *Id.* at 382. This is why a growing number of courts—including this Court—hold that prisoners cannot consent to sexual activity with guards, or that any sexual activity is presumptively nonconsensual. *See, e.g.*, *Rafferty*, 915 F.3d at 1096; *Wood*, 692 F.3d at 1046-47; *Cash v. Cty. of Erie*, 654 F.3d 324, 337 (2d Cir. 2011). This power disparity should likewise be considered in assessing the seriousness of

verbal sexual harassment perpetrated by a male prison guard against a female (whether transgender or cisgender) prisoner, as in this case.

And this is all to say nothing of the broader societal evolution around sexual harassment over the last several decades—an evolution that has rapidly accelerated since the popularization of the #MeToo movement in 2017.[5] This seismic societal shift around sexual misconduct both inside and out of prison is why "conduct that might not have been seen to rise to the severity of an Eighth Amendment violation [some] years ago may now violate community standards of decency." *Crawford*, 796 F.3d at 260.

And just as societal standards of decency have evolved around sexual misconduct, so too have they evolved when it comes to the treatment of the transgender community, including those who are

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[5] *See generally, e.g.*, Ellen McCarthy, *#MeToo Raised Awareness About Sexual Misconduct. Has It Curbed Bad Behavior?*, WASH. POST, Aug. 14, 2021, https://www.washingtonpost.com/lifestyle/style/andrew-cuomo-me-too/2021/08/13/1ae95048-fbed-11eb-8a67-f14cd1d28e47_story.html; Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws*, PEW CHARITABLE TRUSTS: STATELINE (July 31, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws; Ann Nenoff, *#MeToo: A Look at the Influence and Limits of "Hashtag Activism" to Effectuate Legal Change*, 2020 U. ILL. L. REV. 1327 (2020).

incarcerated. For instance, PREA's implementing regulations recognize "the particular vulnerabilities of inmates who are LGBTI or whose appearance or manner does not conform to traditional gender expectations." 77 Fed. Reg. at 37109-10. The regulations contain landmark protections for transgender prisoners, including in placement, searches, supervision, safety assessments, and protective custody. *See, e.g.*, 28 C.F.R. §§ 115.42, 115.15, 115.43. And California, where Ms. Moore is incarcerated, requires prisons to house transgender prisoners according to their gender identity if requested, to search transgender prisoners according to the search policy for their gender identity, and to use appropriate pronouns and honorifics. *See* Cal. Penal Code §§ 2605-06.

Beyond the prison context, the last several decades have seen a sea change in societal attitudes toward transgender individuals. For example, as of 20 years ago, just two states banned discrimination against transgender individuals.[6] Today, the majority of states have

[6] *See* Carey Goldberg, *Rhode Island: Transgender Discrimination Banned*, N. Y. TIMES, July 19, 2001, https://www.nytimes.com/2001/07/19/us/national-briefing-new-england-rhode-island-transgender-discrimination-banned.html.

enacted some form of legal protections for transgender people (and, of course, harassment and discrimination against transgender employees is now illegal nationwide following the Supreme Court's decision in *Bostock*).[7] Public support and acceptance of transgender people has also soared in recent years. For instance, one recent poll showed that more than two-thirds of Americans oppose various iterations of proposed anti-transgender laws and support laws protecting transgender individuals from discrimination.[8] Another poll similarly found that more than 70% of Americans support protecting transgender people from discrimination and believe that trans people should have access to gender-affirming surgery.[9] So while there may have been a time when openly sexually harassing and attacking the gender identity of a transgender person might not have been seen as especially abhorrent, our "maturing society"

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[7] *See, e.g.*, Movement Advancement Project, *Snapshot: Gender Identity Equality By State* (Sept. 2, 2021), https://www.lgbtmap.org/equality-maps.

[8] Matt Loffman, *New Poll Shows Americans Overwhelmingly Oppose Anti-Transgender Laws*, PBS News Hour (Apr. 16, 2021), https://www.pbs.org/newshour/politics/new-poll-shows-americans-overwhelmingly-oppose-anti-transgender-laws.

[9] Winston Luhur, et al., *Public Opinion of Transgender Rights in the United States,* UCLA School of Law Williams Institute (Aug. 2019), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-Trans-US-Aug-2019.pdf.

has moved far beyond that era—a reality the Eighth Amendment analysis must account for. *See Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

As this Court explained in *Bearchild*, "what constitutes a sufficiently serious deprivation may evolve as 'the basic mores of society change.'" 947 F.3d at 1141 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008)). This is because the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Rhodes*, 452 U.S. at 346. The Eighth Amendment thus "admits of few absolute limitations," *Hudson*, 503 U.S. at 8, and is not amenable to any "static 'test,'" *Rhodes*, 452 U.S. at 346. Categorical exclusion of verbal sexual harassment from the Eighth Amendment's protections cannot be squared with these demands.

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Calderon's harassment gives rise to a plausible Eighth Amendment claim because it falls within this Court's definition of "sexual assault"—that is, it was "sexual conduct" done "for the purpose of humiliating, degrading, [and] demeaning" Ms. Moore. It was also not "mere" verbal harassment: it involved repeated demands for Ms. Moore to expose her

breasts; had she complied, it would unquestionably state an Eighth Amendment claim. Evolving standards of decency on these issues demonstrate why Calderon's misconduct violates the Eighth Amendment's protections.

B. Calderon's harassment also violates the Eighth Amendment because it satisfies the *Keenan v. Hall* standard for verbal harassment claims.

Ms. Moore also plausibly alleged an Eighth Amendment claim under the standard this Court established for verbal harassment claims—of any type, whether sexual or not—in *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996). *Keenan* held that while verbal harassment "generally" does not violate the Eighth Amendment, it may if two conditions are met: (1) the comments were "unusually gross even for a prison setting," and (2) the comments were "calculated to and did cause [the prisoner] psychological damage." *Id.* Both parts of the *Keenan* test are satisfied here.

1. The harassment was unusually gross even for a prison setting.

To be sure, prisons are not exactly bastions of civility, and "most verbal harassment by jail or prison guards does not rise to the level of

cruel and unusual punishment." *Beal v. Foster*, 803 F.3d 356, 358 (7th Cir. 2015). But, as the Seventh Circuit explained, "some does." *Id.*

To recap, the harassment here began with Calderon ordering Ms. Moore to expose her breasts without legitimate penological justification. ER-21-22. When Ms. Moore justifiably refused, Calderon became angry and threatening, telling Ms. Moore that he would "screw you over if you don't do what I say," and then to "show me your tits since you think you're a woman." ER-21. After Ms. Moore again refused to expose her breasts and informed Calderon that she would be filing a grievance against him for sexual harassment, Calderon escalated further. ER-22. He called Ms. Moore a derogatory epithet—"faggot"—and threatened that she would regret reporting him, because he was going to falsely write her up and "make [her] time in Kern Valley hell," to the point where she would "wish [she] were dead!" ER-22. And all of this happened while Ms. Moore was "completely alone" with Calderon, and thus lacked the security of having potential witnesses or possibly intervening prison staff around. ER-22.

Compounding the harassment's severity, Calderon was a guard who directly supervised—and thus exerted an enormous amount of control over—Ms. Moore. *See J.K.J.*, 960 F.3d at 382 ("It is difficult to

conceive of any setting where the power dynamic could be more imbalanced than that between a male guard and a female inmate."); 77 Fed. Reg. at 37116 (explaining that verbal sexual harassment by prison staff is "sexual abuse" because of the "tremendous authority" staff exert over "every aspect of inmates' lives"); *cf. Covington v. Paris*, No. 19-cv-384-JD, 2021 WL 1430715, at *2 (D.N.H. April 15, 2021) (no Eighth Amendment violation where plaintiff did not allege that sexual relationship between prison nurse and plaintiff was coerced and there was "no evidence that [prison nurse] had any authority over [plaintiff]" and plaintiff "was not her patient").

While most verbal harassment will not violate the Eighth Amendment, the harassment here does (at least plausibly, at this earliest possible stage of the proceedings). It was both explicitly sexual and explicitly threatening. It involved unjustified and repeated orders to expose Ms. Moore's breasts. It entailed a male guard cornering a transgender woman while completely alone. It used a highly vulgar term to refer to Ms. Moore's breasts ("tits"), followed by a harmful homophobic

epithet ("faggot").[10] It mocked Ms. Moore's identity as a transgender woman. It included a (later fulfilled) promise to retaliate by filing a false disciplinary report, along with a threat to make Ms. Moore's life so miserable that she would "wish [she] were dead." ER-22.

The combined effect of all these factors makes this verbal harassment case look very different than those this Court has previously rejected—especially when judged, as they must be, by 2021's standards of decency. *See supra* at 24-32. Take *Keenan*: there, the plaintiff alleged only vaguely that the comments were "disrespectful and assaultive." 83 F.3d at 1092. Without more detail, it can hardly be said that "disrespectful and assaultive" comments are "unusually gross." Likewise, in the case *Keenan* cited as authority on this issue, the plaintiff alleged only that a programs supervisor had used "vulgar language." *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987).

Neither of the two cases the magistrate judge relied on, *see* ER-15, are to the contrary. In *Somers v. Thurman*, a male prisoner alleged that female guards pointed and made jokes among themselves when he

[10] *See* Linton Weeks, *The Fa-Word: An Insulting Slur in the Spotlight*, NPR (May 28, 2011), https://www.npr.org/2011/05/28/136722113/the-fa-word-an-insulting-slur-in-the-spotlight.

showered or was strip searched—but, crucially, he did not allege that any comments were directed at him, or intended to humiliate him, or even that he heard what was said at all, nor was he particularly psychologically vulnerable. 109 F.3d 614, 616, 623-24 (9th Cir. 1997). In *Austin v. Terhune*, a male guard briefly exposed his penis to a male prisoner while making vulgar comments, but was in an elevated, enclosed control booth and thus physically separate from the plaintiff at the time. 367 F.3d 1167, 1171-72 (9th Cir. 2004). Even *if* the conduct in those cases were of equal severity to the conduct here (and it was not), and even *if* they were correctly decided at the time (and they were not), Ms. Moore would still state an Eighth Amendment claim. Courts "recognize that particular conduct that might not have risen to the level of an Eighth Amendment violation 18 years ago may no longer accord with community standards, and for that reason may state a claim today." *Crawford*, 796 F.3d at 259. *Somers* and *Austin* were decided more than 24 and 17 years ago, respectively. As has been recounted, *see supra* at 24-32, societal standards of decency—the Eighth Amendment's cornerstone—on these issues have evolved dramatically since. So whether or not Ms. Moore might've stated a claim two decades ago, she states one today.

2. The harassment was both calculated to and did cause Ms. Moore psychological damage, leading Ms. Moore to attempt suicide multiple times.

The second part of the *Keenan* test—that the harassment was both "calculated to and did cause [her] psychological damage"—is easily satisfied here. As explained earlier, Ms. Moore plausibly alleged the intent piece, an allegation supported by the vulgarity and bigotry of Calderon's words and that he specifically mocked her identity as a transgender woman. *See supra* at 23-24. It is also supported by the lack of legitimate penological purpose for Calderon's harassment, which allows an inference of malicious and sadistic intent. *See Wood*, 692 F.3d at 1050. The harm aspect is even more clear: as Ms. Moore's complaint explains, Calderon's actions caused her to suffer severe mental stress, become suicidal, and attempt suicide twice in the several weeks afterward. *See* ER-22-23. This sets her claim apart from *Keenan*, where the plaintiff alleged merely that the comments had "denied him peace of mind"—a far cry from triggering a mental health crisis, complete with multiple suicide attempts. *See Keenan,* 83 F.3d at 1092.

This focus on psychological harm is echoed by a trend in this Court's sister circuits, which have increasingly recognized verbal harassment as

actionable under the Eighth Amendment. The Seventh Circuit, for example, has steadily pulled away from its earlier views on verbal harassment in a series of cases over the last six years. In 2000, it held that "standing alone, simple verbal harassment does not constitute cruel and unusual punishment." *DeWalt v. Carter*, 224 F.3d 607, 612 (7th Cir. 2000). But the Seventh Circuit has more recently held that "[t]he proposition that verbal harassment cannot amount to cruel and unusual punishment is incorrect." *Lisle v. Welborn*, 933 F.3d 705, 717-18 (7th Cir. 2019) (examining line of cases).

The Seventh Circuit now acknowledges that verbal harassment may violate the Eighth Amendment where prison staff "exploit[] a known vulnerability to create a danger or harm that cannot have any legitimate penological purpose." *Id.* at 718. That is, the Eighth Amendment "protects psychologically vulnerable inmates against psychological pain deliberately inflicted by correctional officers." *Id.* In *Lisle*, that looked like a prison nurse encouraging a prisoner known to be suicidal to take his own life. *Id.* In another case, that entailed staff calling a prisoner at a facility for those with mental disorders "ignorant," "stupid," and a "moron," and discouraging him from filing grievances in a potentially

threatening manner. *Hughes v. Scott*, 816 F.3d 955, 956-57 (7th Cir. 2016); *see also McIntosh v. United States*, 845 F. App'x 88, 91 (3d Cir. 2021) (per curiam) (calling prisoner names implying that he was a sex offender states an Eighth Amendment claim, because such verbal harassment might lead to "increased assaults against him, or other significant harm" (citing *Beal v. Foster*, 803 F.3d 356, 358 (7th Cir. 2015)).

The Seventh Circuit's emphasis on the role that known vulnerabilities play in the Eighth Amendment analysis is both consistent with this Court's precedent and supportive of Ms. Moore's claim. Indeed, *Lisle* cited this Court's en banc decision in *Jordan v. Gardner*, which affirmed a permanent injunction against cross-gender clothed body searches of female prisoners on Eighth Amendment grounds. 986 F.2d 1521, 1525-28 (9th Cir. 1993) (en banc). *Jordan* explained that the clothed cross-gender body searches satisfied the objective test of the Eighth Amendment—that is, the searches would be "an infliction of pain"—for two reasons. *Id.* at 1525-26. First, many of the women incarcerated at that facility had histories of physical or sexual abuse by men, increasing the risk that the searches would exacerbate pre-existing

trauma. *Id.* Second, women in general "experience unwanted intimate touching by men differently" than men. *Id.*

Like the incarcerated women in *Jordan*, the suicidal prisoner in *Lisle*, and the mentally ill prisoner in *Hughes*, as a transgender woman housed in a men's prison, Ms. Moore was particularly psychologically vulnerable to Calderon's harassment. Incarcerated transgender individuals, especially those housed in a facility that does not match their gender identity, are particularly vulnerable. *See, e.g.*, Leah Drakeford, *Correctional Policy and Attempted Suicide Among Transgender Individuals*, 24 J. CORR. HEALTH CARE 171 (2018) (assigning transgender prisoners to facilities inconsistent with their gender identity associated with a higher risk of suicide, likely due to higher rate of sexual abuse in such facilities); Erin McCauley, et al., *Exploring Healthcare Experiences for Incarcerated Individuals Who Identify as Transgender in a Southern Jail*, 3 J. TRANSGENDER HEALTH 34 (2018) (incarceration often triggers or worsens mental illness in transgender people, especially if they are harassed behind bars). And in general, transgender individuals suffer from far higher rates of mental illness than cisgender individuals. One study found, for example, that 58% of transgender patients were

clinically diagnosed with a mental illness, as opposed to 13.6% of cisgender patients.[11] Another study similarly found that 40% of transgender individuals studied had attempted suicide at least once, compared to 4.6% for the general U.S. population, with similarly disparate rates for "serious psychological distress."[12]

Harassment that mocks or attacks a transgender individual's gender identity—such as Calderon ordering Ms. Moore to "show me your tits since you think you're a woman"—adds fuel to the fire. Such gender-related abuse, intended to undermine and reject a transgender person's gender identity, is correlated with higher rates of depression and suicide. *See, e.g.*, Stephanie L. Brennan, et al., *Relationship Among Gender-Related Stress, Resilience Factors, and Mental Health in a Midwestern U.S. Transgender and Gender-Nonconforming Population*, 18 INT'L J. OF TRANSGENDERISM 433 (2018); Larry Nuttbrock, et al., *Psychiatric Impact*

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[11] Jonathon W. Wanta, et al., *Mental Health Diagnoses Among Transgender Patients in the Clinical Setting*, 4.1 TRANSGENDER HEALTH 313, 314 (2019), https://www.liebertpub.com/doi/pdf/10.1089/trgh.2019.0029.

[12] S.E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Center for Transgender Equality, 105-07, 112-115 (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

of Gender-Related Abuse Across the Life Course of Male-to-Female Transgender Persons, 47 J. SEX RESEARCH 12 (2010); Kristen Clements-Nolle, et al., *Attempted Suicide Among Transgender Persons: The Influence of Gender-Based Discrimination and Victimization*, 51 J. HOMOSEXUALITY 53 (2006); Sarah E. Valentine and Jillian C. Shipherd, *A Systematic Review of Social Stress and Mental Health Among Transgender and Gender Non-Conforming People in the United States*, 66 CLINICAL PSYCHOL. REV. 24 (2018).

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Calderon's harassment plausibly violates the Eighth Amendment under the *Keenan* test. It was unusually gross even for a prison setting: a male prison guard cornered a transgender woman alone, ordered her to expose herself without justification, repeated his order in more vulgar terms ("show me your tits") when she refused, mocked her gender identity, called her a "faggot," and explicitly threatened her. It was also both calculated to and did cause Ms. Moore psychological harm, resulting in her becoming suicidal and repeatedly attempting to take her life. Allowing Ms. Moore to proceed with her Eighth Amendment claim would

also align with the trend in other circuits, because the harassment here was psychological pain deliberately inflicted on a vulnerable prisoner.

II. Because Calderon Filed a False Disciplinary Report in Response to Ms. Moore's Stated Intent to File a Grievance Against Him, Ms. Moore Stated a Cognizable Retaliation Claim.

Prisoners have the First Amendment right to file prison grievances and be free from retaliation for doing so. *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). To state a viable First Amendment retaliation claim, a plaintiff must allege: (1) a state actor took some adverse action against her (2) because of (3) her protected conduct, and that such action (4) chilled her exercise of her First Amendment rights, and (5) did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

The district court incorrectly dismissed Ms. Moore's retaliation claim. The magistrate judge's analysis (agreed with and adopted by the district court, ER-8) was not exactly a paragon of clarity. In conclusory fashion, it held that Ms. Moore alleged "no facts demonstrating that Defendant Calderon took an adverse action against Plaintiff based on Plaintiff's protected conduct. Rather, Plaintiff sets forth one verbal interaction with Calderon, none of which identifies Calderon's

involvement in any alleged false rules violation report." ER-17. It's hard to know from this precisely which element(s) the court found lacking: did the court not believe that verbal intent to file a grievance was protected conduct, or did it not think a false disciplinary report constituted an adverse action, or did it not view the causal element as having been met? It does seem clear, at least, that the court held that the fifth element was not met. It faulted Ms. Moore for alleging only that Calderon's adverse action—filing a false disciplinary report—did not reasonably advance a legitimate correctional goal, without adding more detail. ER-17. But as explained further below, this conclusion rested on a legal error: under this Court's controlling caselaw, a false disciplinary report *necessarily* satisfies the fifth element, because a false disciplinary report by definition cannot advance any legitimate correctional goals. *Watison v. Carter*, 668 F.3d 1108, 1114-15 (9th Cir. 2012). Ms. Moore pled all that was required of her for this element, as well as for all four others.

A. Calderon took an adverse action against Ms. Moore when he filed a false disciplinary report.

To the extent the lower court found the first element—adverse action—lacking, *see* ER-17, that was error. The filing of a false disciplinary report against a prisoner is considered an adverse action

under this Court's precedent. *See, e.g.*, *Watison*, 668 F.3d at 1115; *Hines v. Gomez,* 108 F.3d 265, 267-68 (9th Cir. 1997). Indeed, this is such an unobjectionable proposition that in both *Watison* and *Hines*, this Court seemed to take it as a given. *See Watison*, 668 F.3d at 1115 (simply stating, without discussion, that the plaintiff adequately alleged the adverse action element because staff "filed a false disciplinary charge against him"); *Hines*, 108 F.3d at 267-68 (apparently uncontested that false disciplinary charge was adverse action).

Here, Ms. Moore sufficiently alleged that Calderon took an adverse action because he filed a false disciplinary report against her. As the complaint alleged, after Ms. Moore told Calderon she planned to file a grievance against him for his misconduct, Calderon responded, "I'll bet you won't. You faggots think you have so many rights. Since you're write [sic] a grievance on me you'll regret it because now I'm writing a 115 [a disciplinary report] on you." ER-22. Calderon followed through with this threat, falsely writing Ms. Moore up—an adverse action that carried significant consequences for Ms. Moore, including pushing back her release date and the loss of her prison job. ER-22.

B. Calderon's own words reveal that the adverse action was "because of" Ms. Moore's protected conduct.

Although unclear, it appears that the lower court may have found the second element of Ms. Moore's claim lacking, *see* ER-17; if so, that was wrong. The second element of a First Amendment retaliation claim asks whether the adverse action was "because of" the plaintiff's protected conduct. *Rhodes*, 408 F.3d at 567. This element requires the plaintiff to show that her protected conduct was the "substantial" or "motivating" factor underlying the defendant's adverse action. *Soranno's Gasco, Inc. v. Morgan,* 874 F.2d 1310, 1314 (9th Cir. 1989); *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003).

Alleging verbal statements of clear retaliatory intent satisfies the "because of" element.[13] In *Bruce,* for example, a prisoner asserted that prison officials violated his right to file prison grievances when they validated him as a gang member in retaliation for filing several grievances. 351 F.3d at 1288. He was told by a prison official that "[t]he

[13] Of course, retaliatory intent does not have to be clear and direct to prove the "because of" element. *See Watison*, 668 F.3d at 1116 (inferring "because of" element despite lack of explicit connection in conversation with prison official). But this is the rare case where a prison official explicitly connects the two by his own admission.

higher-ups want you validated to make an example out of you to discourage similar complaints and protests," and that was enough to defeat summary judgment on the issue of retaliatory motive. *Id*. at 1289.

If the statements in *Bruce* were adequate to defeat summary judgment, Calderon's statements are certainly sufficient to make it past screening here. According to Ms. Moore, after she informed Calderon of her intent to file a grievance against him, Calderon replied, "I'll bet you won't. You faggots think you have so many rights. *Since* you're write [sic] a grievance on me you'll regret it *because now* I'm writing a [report] on you." ER-22 (emphasis added). When Ms. Moore asked why she was being written up, Calderon replied, "*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!" ER-22 (emphasis added). True to his word, Calderon then filed the false disciplinary report. ER-22.

As alleged in Ms. Moore's complaint, Calderon used several causal words connecting her oral pursuit of a grievance to his false report—"since" and "because." ER-22. Calderon's own words thus show that Ms. Moore's intent to file a grievance was the "substantial" or "motivating"

factor behind Calderon's false disciplinary report, satisfying the "because of" element of her retaliation claim.

C. Ms. Moore engaged in protected conduct when she orally expressed her intent to file a grievance.

Though its analysis was again murky, the lower court may have incorrectly concluded that the third element of Ms. Moore's claim—protected conduct—was lacking. *See* ER-17. If so, it erred. The "protected conduct" requirement, *Rhodes*, 408 F.3d at 567, was satisfied by Ms. Moore's allegation that Calderon filed a false disciplinary report in response to her expressed intent to file a grievance against him.

Prisoners have a First Amendment right to orally express their *intent* to file a grievance; protected conduct is not limited to the actual filing of a grievance. *Gifford v. Atchison, Topeka & Santa Fe Ry. Co.*, 685 F.2d 1149, 1156 n.3 (9th Cir. 1982). In the context of an employee discrimination claim involving First Amendment activity, *Gifford* concluded: "We see no legal distinction to be made between the filing of a charge which is clearly protected, and threatening to file a charge." *Id.* (citation omitted).

This Court later confirmed that *Gifford*'s reasoning applies in the prison context, because there is "no material distinction between

retaliation in the Title VII context and prisoner retaliation." *Entler v. Gregoire*, 872 F.3d 1031, 1042 (9th Cir. 2017). A prisoner's "right to redress of grievances does not hinge on the label the prison places on a particular complaint"—an intent to file a grievance is protected conduct, period. *Id*. at 1039 (citing *Brodheim*, 584 F.3d at 1271 n.4). This Court's sister circuits have similarly concluded that a prisoner orally expressing an intent to file a grievance is protected by the First Amendment. *See, e.g.*, *Watson v. Rozum*, 834 F.3d 417, 421-23 (3d Cir. 2016) (expressing plans to file a grievance constitutes protected conduct; there is no "substantive distinction between retaliation for informing prison officials of an intent to file a grievance . . . and actually filing such a grievance"); *Maben v. Thelen*, 887 F.3d 252, 264-65 (6th Cir. 2018) (oral complaints are protected conduct); *Pearson v. Welborn*, 471 F.3d 732, 740-41 (7th Cir. 2006) (legitimate complaints do not "lose their protected status simply because they are spoken").

Gifford, *Entler*, and cases from the Third, Sixth, and Seventh Circuits confirm that Ms. Moore's stated intent to file a grievance against Calderon for sexually harassing her was protected conduct under the

First Amendment. The First Amendment protects that oral assertion just as much as it protects a formally filed written grievance.

D. Ms. Moore adequately alleged that Calderon chilled her right to file a grievance.

Though the district court did not appear to address the fourth element, Ms. Moore adequately alleged it. The fourth element of a retaliation claim looks at the chilling effect of any adverse actions, and asks whether they "would chill or silence a person of ordinary firmness from future First Amendment activities." *Rhodes*, 408 F.3d at 568-69 (internal quotation marks and emphasis omitted). Plaintiffs are not required to "demonstrate a *total* chilling of [their] First Amendment rights to file grievances and to pursue civil rights litigation in order to perfect a retaliation claim." *Id.* at 568. Alleging that First Amendment rights have been chilled to some degree is enough—a plaintiff need not show that "his speech was 'actually inhibited or suppressed.'" *Id.* at 569. This element may also be met by alleging "some other harm," so long as that harm is "more than minimal." *Watison*, 668 F.3d at 1114.

As *Watison* held, a false disciplinary report can chill or silence a person of ordinary firmness from future First Amendment conduct. *Id.* at 1115. False reports also satisfy this element because they constitute

"more than minimal" harm. *Id.* Other examples of more than minimal harm include deprivation of points toward prison program incentives, placement in administrative segregation, and interference with parole hearings. *See id.*; *Jones v. Williams*, 791 F.3d 1023, 1036 (9th Cir. 2015). Ms. Moore satisfied this element both because of the inherently chilling nature of false disciplinary reports and because she suffered "more than minimal" harm.[14] As noted, false disciplinary reports are adequate to meet the "person of ordinary firmness" test. *See Watison*, 668 F.3d at 1115. And the false report was not the only harm that Ms. Moore suffered: she also attempted suicide twice, lost her job, lost time on her release date, and lost property. ER-22-23. This alleged harm is certainly "more than minimal," and at least as significant—if not more—than the harms described in *Jones*. Calderon thus chilled Ms. Moore's right to file a grievance.

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[14] And while this Court does not require a plaintiff to allege that she has *subjectively* been chilled—it is enough to allege that a person of ordinary firmness would have been chilled—this element is bolstered by Ms. Moore having been in fact chilled. As she alleged, once she was informed of Calderon's false disciplinary report, she "backed out of filing [her] complaint for fear of further retaliation." ER-22-23. It was only once she was on the suicide unit (and thus away from Calderon's control) and was able to confide in a nurse several weeks later that she worked up the courage to actually file the grievance. ER-22-23.

E. Ms. Moore sufficiently pled that Calderon's false disciplinary report did not reasonably advance a legitimate correctional goal.

As noted above, the clearest aspect of the lower court's retaliation analysis was its incorrect conclusion that the fifth element was unmet. This element requires a plaintiff to allege that the adverse action "did not reasonably advance a legitimate correctional goal" or "was not tailored narrowly enough to achieve such goals." *Rhodes*, 408 F.3d at 568; *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985). It is satisfied if, in addition to a retaliatory motive, the plaintiff alleges "that the defendant's actions were arbitrary and capricious," or that they were "unnecessary to the maintenance of order." *Watison*, 668 F.3d at 1114-15. In *Watison*, this Court held that the prisoner sufficiently satisfied the fifth element when he alleged that the officer "filed a *false* disciplinary complaint against him." *Id.* at 1115 (emphasis in original). By pleading that it was a *false* disciplinary complaint, *Watison* explained, the prisoner had necessarily "pleaded arbitrary, capricious, and retaliatory conduct" that did not advance legitimate correctional goals. *Id.*

Watison's fifth element analysis controls here, making plain the lower court's legal error. When Ms. Moore alleged that Calderon filed a

false disciplinary report, Ms. Moore *necessarily* pleaded that Calderon's conduct was "arbitrary, capricious, and retaliatory" and did not advance legitimate correctional goals. *Watison*, 668 F.3d at 1115. The court, however, failed to appreciate this controlling legal principle. It described Ms. Moore's fifth element allegations as "conclusory," faulting her for not explaining why the adverse action "did not reasonably advance a legitimate correctional goal." ER-17. But because this Court has held that false disciplinary reports per se do not advance legitimate correctional goals, Ms. Moore wasn't required to plead anything more than she already did. *See Watison*, 668 F.3d at 1114-15.

Ms. Moore's other allegations only confirm that Calderon had no legitimate correctional goal in mind. As the complaint alleges, Calderon demanded that Ms. Moore expose her breasts to him, without legitimate penological reason for doing so. When she refused, he reiterated his demand, this time in more vulgar terms: "show me your tits since you think you're a woman," adding that if she didn't do what he said, he would "screw [her] over." ER-21. When Ms. Moore responded to Calderon's extreme statements by voicing her intent to file a grievance, he retaliated with a false disciplinary report. But because the underlying basis for his

false disciplinary report—the failure to comply with his unjustified and harassing demands to bare her breasts—had no legitimate correctional purpose, the report itself cannot have had one, either.

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Ms. Moore alleged a straightforward First Amendment retaliation claim. She engaged in protected conduct when she informed Calderon that she planned to file a sexual harassment grievance against him. Calderon's own statement in response demonstrated causality: he told her that "since" she was "writ[ing] a grievance on him," he would file a false disciplinary report against her. Calderon followed through on his threat to file a false disciplinary report, and under this Court's precedents, that false disciplinary report *necessarily* satisfies the remaining three elements: adverse action, chilling effect, and lack of legitimate correctional purpose. Ms. Moore's retaliation claim should not have been dismissed.

CONCLUSION

For these reasons, this Court should reverse the district court's order dismissing Ms. Moore's Eighth and First Amendment claims and remand for further proceedings.

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Respectfully Submitted,

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STATEMENT OF RELATED CASES

I am unaware of any related cases currently pending before this Court.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,867 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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