

No. 22-2846

In the
United States Court of Appeals
for the Third Circuit

TONY FISHER, AKA KELLIE REHANNA,
Plaintiff-Appellant,

v.

JORDAN HOLLINGSWORTH, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the
District of New Jersey, No. 1:18-cv-16793
The Honorable Karen M. Williams, United States District Judge

**BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, BLACK AND PINK NATIONAL, CENTER FOR
CONSTITUTIONAL RIGHTS, AND JUST DETENTION
INTERNATIONAL
IN SUPPORT OF PLAINTIFF-APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, for *Amici* certify that *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., Black and Pink National, Center for Constitutional Rights, and Just Detention International certify they have no parent corporations, are not publicly held corporations, and no person or entity owns 10% or more of their stock.

IDENTITY AND INTERESTS OF AMICI CURIAE¹

Amici Curiae Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), Black and Pink National, Center for Constitutional Rights, and Just Detention International submit this brief in support of Plaintiff-Appellant. *Amici* are non-profit organizations that advocate for incarcerated people including lesbian, gay, bisexual, transgender, and questioning/queer (“LGBTQ+”) people through litigation and public policy. *Amici* have an interest in ensuring that the Constitution’s guarantees to be free from cruel and unusual punishment apply to all people and that incarcerated LGBTQ+ people have access to the courts.

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 LGBTQ+ people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal seeks to address the particular vulnerability of detained LGBTQ+ people and has appeared as counsel or *amicus curiae* in numerous cases involving their rights. *See, e.g., Lucas v. Chalk*, 785 F. App’x 288 (6th Cir. 2019) (*amicus* brief that successfully argued that an incarcerated bisexual man should have been granted

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

leave to amend complaint to allege equal protection violation and deliberate indifference to his health and safety by refusing to treat him based on his sexual orientation); *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687 (S.D. Tex. 2016) (represented transgender woman who validly alleged that defendants knew of and disregarded a substantial risk of sexual assault based on their knowledge of prison sexual assault statistics, including the particular vulnerability of gay and transgender people); *Edmo v. Corizon, Inc.*, 949 F.3d 489 (9th Cir. 2020) (amicus brief that successfully argued that gender confirmation surgery was medically necessary for incarcerated transgender woman with gender dysphoria). Lambda Legal is counsel for *Amici*.

Black and 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 and Pink National is a 501(c)(3) organization based in Omaha, NE. Black and Pink also has local chapters across the nation.

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 U.S. Constitution and international law.

Founded in 1966 to represent civil rights activists in the South, CCR has litigated numerous landmark civil and human rights cases. CCR advocates for individuals impacted by arbitrary and discriminatory criminal justice policies, including policies that disproportionately impact LGBTQI+ communities of color. CCR also challenges policies that violate the Eighth Amendment’s prohibition against cruel and unusual punishment and cause significant harm to people in prison.

CCR served as co-counsel in *Diamond v. Ward*, 5:20-cv-0453-MTT, 2022 WL 3221224 (M.D. Ga. Aug. 9, 2022), a lawsuit that challenged the Georgia Department of Corrections’ failure to protect transgender people in custody or provide them medically necessary care, and prompted the U.S. Department of Justice to launch a statewide investigation into sexual and gender based violence in Georgia prisons. CCR also mounted a successful challenge to the use of solitary confinement in prisons and jails in its class action *Ashker v. Brown*, No. C 09–5796 CW, 2013 WL 1701702 (N.D. Cal Apr. 18, 2013).

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.

Amici curiae file this brief pursuant to Fed. R. App. P. 29(a)(2). All parties consent to its filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

“Being violently assaulted in prison 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) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The U.S. Supreme Court has long recognized that “having stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.” *Farmer*, 511 U.S. at 833. Prison officials have a duty under the Eighth Amendment of the U.S. Constitution to protect incarcerated people from sexual violence by assessing the particular risks each person faces and taking reasonable steps to keep them safe. *Id.* at 843-45. But despite this constitutional mandate, the reality is that “[e]very day, the lives and the physical integrity of lesbian, gay, bisexual, and transgender people are at stake within our prison systems.” Nat’l Prison Rape Elimination Comm’n, *Report 73* (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf> [hereinafter “2009 NPREC Report”].

Plaintiff-Appellant Kellie Rehanna’s² claims reflect this reality, underscoring the critical importance of ensuring that those who suffer sexual

² Ms. Rehanna is a transgender woman who uses the first name Kellie, the last name Rehanna, and she/her pronouns. AA026 (Compl. ¶ 7). At the time of the underlying incidents, Ms. Rehanna presented as an effeminate gay man. AA034 (Compl. at 10 ¶ 47). This brief uses Ms. Rehanna’s preferred name and her pronouns.

violence while incarcerated may seek redress for the violation of their constitutional and statutory rights. Such claims fall squarely within *Farmer's* holding that incarcerated people may pursue a *Bivens*³ action for violations of their Eighth Amendment rights resulting from prison officials' deliberate indifference to their risk of experiencing sexual violence. Should the Court conclude that Ms. Rehanna's claims may proceed as timely, the Court should also reject any argument that she has failed to state a claim based on qualified immunity or the impropriety of her *Bivens* claim, as Appellees argued below. The law is well settled, including in this Circuit, and there is no basis for prison officials to claim ignorance of their obligations or evade liability for their deliberate indifference.

As the U.S. Supreme Court held over twenty-five years ago, “gratuitously allowing the beating or rape of one prisoner by another serves no ‘legitimate penological objective,’ any more than it squares with ‘evolving standards of decency.’” *Farmer*, 511 U.S. at 833 (cleaned up). Since it was decided, *Farmer* has been relied on in thousands of cases for its rule that the Eighth Amendment imposes upon prison officials a duty to provide incarcerated people with “reasonable safety” from a substantial risk of serious harm, including violence at the hands of other incarcerated people. *Shorter v. United States*, 12 F.4th 366, 373

³ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

(3d Cir. 2021) (holding that *Farmer* remains good law); *Bistrrian v. Levi* (*Bistrrian II*), 912 F.3d 79 (3d Cir. 2018) (concluding that the Supreme Court has, pursuant to *Bivens*, recognized a failure-to-protect claim under the Eighth Amendment). The availability of a *Bivens* claim in these circumstances ensures that other LGBTQ+ victims of sexual violence in federal custody are not deprived of a clearly established right to hold prison officials accountable for Eighth Amendment violations.

The passage of the Prison Rape Elimination Act (“PREA”) reflected Congress's recognition and implementation of prison officials' obligations to protect incarcerated people from the risk of sexual violence. The PREA Standards even explicitly acknowledge the heightened risk of sexual violence against LGBTQ+ people. Thus, PREA augments rather than undermines *Farmer* and supports the availability of *Bivens* actions to vindicate the rights of incarcerated people who were sexually assaulted or abused.

Ms. Rehanna reported a number of factors in addition to her sexual orientation that Appellees were required to consider in keeping her safe. She was previously a victim of sexual assault, she had prior placement in protective custody and had a fear of placement in the general population, she was a first-time offender, and had a sex offense conviction. AA054 (Compl. Ex. A(2)). Appellees knew of the risk of sexual violence that Ms. Rehanna faced and failed to protect

her. This is precisely the type of *Bivens* action approved and delineated in *Farmer*, and thus her claims should be permitted to proceed.

ARGUMENT

I. INCARCERATED LGBTQ+ PEOPLE EXPERIENCE HIGH RATES OF SEXUAL VIOLENCE AND ABUSE IN PRISON.

It is well-established that incarcerated LGBTQ+ people face a heightened risk of sexual abuse committed by other incarcerated people and staff. For people who do not follow rigid gender norms, a prison sentence is all too often a sentence to a term of ongoing assault, abuse, and isolation. Because incarcerated people are expected to conform to certain standards of masculinity or femininity, LGBTQ+ people—who are often perceived as inherently diverging from those norms—face a particularly serious risk of harm. This disproportionality is supported by research and recognized by courts across the country.

A. Research Shows That Incarcerated LGBTQ+ People Face Disproportionate Risk of Experiencing Sexual Assault.

Incarcerated LGBTQ+ people are sexually assaulted by other incarcerated people at a disproportionate rate. “[R]esearch on sexual abuse in correctional facilities [has] consistently documented that men and women with non-heterosexual orientations, transgender individuals, and people with intersex

conditions were highly vulnerable to sexual abuse.”⁴ While 4% of heterosexual men have reported being sexually victimized by another incarcerated person, 34% of bisexual men and 39% of gay men reported being victimized by another incarcerated person.⁵

Although bias on the basis of gender identity or expression is different from bias on the basis of sexual orientation, the experiences of transgender people can be instructive for understanding the experiences of LGB people because both groups are often targeted for failing to conform to gender stereotypes. It is also possible that someone has multiple identities, *e.g.* a transgender person whose sexual orientation is gay, lesbian, or bisexual. Regarding incarcerated transgender people, a 2009 survey of California prisons found that they experience sexual victimization at a rate 13 times higher than those who are cisgender.⁶ Similarly, the

⁴ Brenda V. Smith & Jaime M. Yarussi, Nat’l Inst. Of Corrs., *Policy Review and Development Guide: Lesbian, Gay, Bisexual, Transgender, and Intersex Persons in Custodial Settings* (2d ed.

2015), https://info.nicic.gov/sites/info.nicic.gov/lgbti/files/lgbti-policy-review-guide-2_0.pdf; *see also* 2009 NPREC Report, *supra* 1.

⁵ Allen J. Beck & Candace Johnson, Bureau of Justice Statistics, *Sexual Victimization Reported By Former State Prisoners, 2008 5* (2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/svrfsp08.pdf>.

⁶ Valerie Jenness et al., UC Irvine Ctr. For Evidence-Based Corrs., *Violence in California Correctional Facilities: An empirical Examination of Sexual Assault* (2007), <https://www.prearesourcecenter.org/sites/default/files/library/55-preapresentationpreareportucijennessetal.pdf>; *see also* Sylvia Rivera Law Project, *“It’s War in Here:” A Report on the Treatment of Transgender & Intersex People in New York State Men’s Prisons* (2007), <https://srlp.org/files/warinhere.pdf>.

Bureau of Justice Statistics (“BJS”) estimated that incarcerated transgender people are almost ten times more likely to have been sexually abused than others in the general prison population. *Compare* Allen J. Beck & Marcus Berzofsky, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12* 9 (2014), <https://bjs.ojp.gov/content/pub/pdf/svpjri1112.pdf> (noting nearly 7% of general prison and jail population reported experiencing sexual victimization), *with* Allen J. Beck, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12: Supplemental Tables* (2014), http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf (noting nearly 70% of incarcerated transgender people in prisons and jails reported experiencing sexual victimization).

Furthermore, research shows that the LGBTQ+ population is also disproportionately targeted by staff themselves. BJS has found that of men formerly incarcerated in state facilities, 18% of bisexual men and 12% of gay men reported experiencing sexual victimization by staff, compared to 5% of straight men.⁷ A 2012 survey found that, of the LGBTQ+ respondents who were incarcerated in the five years prior to the survey, 7% reported sexual assault by

⁷ Beck & Johnson, *Sexual Victimization Reported By Former State Prisoners 2008* 16 (2012) .

prison or jail staff.⁸ Of formerly incarcerated transgender respondents, 11% reported being sexually assaulted by facility staff during the prior year.⁹ Of the survey respondents who were assaulted by staff, nearly half (49%) reported that it happened once, 9% reported that it happened twice, 19% said it happened between three and seven times, and nearly a quarter (23%) said that it happened eight or more times.¹⁰

B. Courts Have Recognized That Incarcerated Gay Men Are Uniquely Vulnerable to Sexual Victimization.

For Ms. Rehanna, being gay (in addition to other vulnerability factors that are not the focus of this brief) exposed her to a heightened risk of sexual victimization. Courts throughout the country have found the same. *See, e.g., Howard v. Waide*, 534 F.3d 1227, 1238 (10th Cir. 2008) (“[A] jury could conclude that [corrections officials] knew [a gay prisoner] was particularly vulnerable to assault.”); *Johnson v. Johnson*, 385 F.3d 503, 530-31 (5th Cir. 2004) (allowing claim by gay prisoner alleging that he was sexually assaulted because other prisoners believed him to be more vulnerable to move forward); *Jenkins v.*

⁸ Lambda Legal, *Protected and Served?: Executive Summary* (2012), https://legacy.lambdalegal.org/sites/default/files/publications/downloads/ps_executive-summary.pdf.

⁹ Sandy E. James et al., Nat’l Ctr. For Transgender Equal., *Report of the 2015 U.S. Transgender Survey* 191-92 (2016),

<https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

¹⁰ *Id.* at 192.

Freeman, No. 09-CV-323-WMC, 2010 WL 2812959, at *2 (W.D. Wis. July 15, 2010) (“Being labeled ‘a fag’ is likely to heighten a prisoner's risk for physical or sexual assault.”). Courts have also weighed a defendant’s characteristics including sexual orientation in the context of downward sentencing departures. *See, e.g., United States v. Lara*, 905 F.2d 599, 605 (2d Cir. 1990) (affirming a downward departure based on sexual orientation and “fragility” and noting that such factors made the defendant “particularly vulnerable to in-prison victimization.”); *United States v. Ruff*, 998 F. Supp. 1351, 1359 (M.D. Ala. 1998) (“Ruff is of small build, of feminine appearance, identifies as a gay man, and has been sexually assaulted in prison in the past,” making assault likely and supporting a downward departure).

II. THIS COURT HAS REAFFIRMED THE VIABILITY OF A BIVENS FAILURE-TO-PROTECT CLAIM UNDER THE EIGHTH AMENDMENT.

Both the U.S. Supreme Court in *Farmer* and this Court have stated that a failure-to-protect claim is available under the Eighth Amendment. *Farmer*, 511 U.S. at 833; *Shorter*, 12 F.4th at 372-73; *Bistrrian*, 912 F.3d at 90-92. In fact, this Court has recognized an incarcerated person’s right to be free from violence by a fellow prisoner for decades. *Bistrrian*, 912 F.3d at 90 (citing *Curtis v. Everette*, 489 F.2d 516, 518-19 (3d Cir. 1973)). In *Bistrrian II*, which involved an incarcerated person who was physically assaulted by other incarcerated people after they found out he was working with prison officials, this Court concluded that “*Farmer*

practically dictates our ruling” because this failure-to-protect claim was not “different in a meaningful way” from the one at issue in *Farmer* and therefore did not present a new *Bivens* context. *Id.* at 91 (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 139 (2017)). Building upon the foundations of *Farmer* and *Bistrain II*, this Court held in *Shorter* that prison officials’ deliberate indifference to the safety of an incarcerated LGBTQ+ person in their custody that resulted in that person being sexually assaulted was not a new *Bivens* context either. *Shorter*, 12 F.4th at 372-73. This Court clarified that in order to determine that a case does not present a new *Bivens* context, the facts of that case do not have to be virtually identical to those of previous cases in which the Supreme Court recognized a *Bivens* remedy. *Id.* at 373 n.7. Thus, within this Circuit, a *Bivens* remedy exists when prison officials fail to protect an incarcerated person in their custody from physical or sexual violence. *Id.* at 372-73 (pointing out common thread of prison officials’ failure to protect in this case, *Bistrain II*, and *Farmer*). *Cf. Castro v. City of Los Angeles*, 797 F.3d 654, 664 (9th Cir. 2015), *on reh’g en banc*, 833 F.3d 1060 (9th Cir. 2016) (“*Farmer* sets forth the contours of the right to be free from violence at the hands of other inmates with sufficient clarity to guide a reasonable officer.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) (“[T]he Eighth Amendment right of prisoners to be free from sexual abuse [is] unquestionably clearly established.”) *Lewis v. Siwicki*, 944 F.3d 427, 430-31 (2d Cir. 2019)

(acknowledging that *Farmer* established the availability of a failure-to-protect claim); *Luna v. Davis*, 59 F.4th 713, 715 (5th Cir. 2023) (per curiam) (same).

The federal judiciary occupies a critical role in addressing and remedying severe abuses of basic human rights by prison systems. *See Brown v. Plata*, 563 U.S. 493, 1928-29 (2011). The National Prison Rape Elimination Commission has emphasized that “if prisoners are sexually abused because the correctional facility failed to protect them, they have a right to seek justice in court.”¹¹ Access to the courts is essential to uphold the rights of incarcerated LGBTQ+ people to be free from sexual violence in prisons and to spur the systemic change necessary to reform a culture in which rape has been too long accepted as an ordinary part of a criminal sentence. In the words of the National Prison Rape Elimination Commission, “court orders have had an enormous impact on the Nation’s jails and prisons. Beyond the reforms courts usher in, their scrutiny of abuses elicits attention from the public and reaction from lawmakers in a way that almost no other form of oversight can accomplish.”¹²

Ms. Rehanna’s claim does not present a new *Bivens* context. For her and others who are sexually victimized due to prison official or officials’ failure-to-protect, this claim should remain available.

¹¹ 2009 NPREC Report, *supra* 1, at 92.

¹² *Id.* at 91.

III. THE PRISON RAPE ELIMINATION ACT UNDERSCORES RATHER THAN UNDERMINES BOP OFFICIALS' OBLIGATION TO PROTECT LGBTQ+ PEOPLE IN FEDERAL CUSTODY FROM SEXUAL VIOLENCE.

Incarcerated LGBTQ+ people are particularly vulnerable to suffering sexual assault. But prison rape devastates the human spirit and serves no penological purpose. *See Farmer*, 511 U.S. at 853 (Blackmun, J., concurring) (“Prison rape . . . is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure.”). Recognizing that sexual assault and rape should never be part of any incarcerated person’s sentence in light of *Farmer*, Congress 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).

In passing PREA, Congress recognized the Supreme Court’s holding in *Farmer* that prison officials can be liable for failing to protect an LGBTQ+ person from a known risk of sexual assault.

The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution. In *Farmer v. Brennan*, the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment.

34 U.S.C. § 30301(13) (citation omitted).

PREA did not purport to limit the remedies of or undermine constitutional rights for vulnerable prisoners subjected to sexual assault. The legislative history of PREA indicates Congress intended for the statute to advance the rights of federal prisoners under the Eighth Amendment, not limit them.¹³

As required by PREA, the Attorney General published the PREA Standards in 2012. The PREA Standards are binding on the Federal Bureau of Prisons (“BOP”) and require that BOP facilities adopt a “policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment . . .” 28 C.F.R. § 115.11(a); 34 U.S.C. § 30307(b).¹⁴ In order to ensure the reasonable safety of all incarcerated people, the PREA Standards require prison officials to screen

¹³ “Today’s systematic indifference to prison rape not only represents grievous and unacceptable penal and social policy; Congressional action is further in order because the Supreme Court’s *Farmer v. Brennan* decision makes deliberate indifference to prison rape a direct violation of the Eighth Amendment of the Constitution.” *Prison Rape Reduction Act of 2003: Hearing on H.R. 1707 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 108th Cong. 1 (2003) (statement of Michael J. Horowitz).

¹⁴ See U.S. Dep’t of Justice Fed. Bureau of Prisons, *Sexually Abusive Behavior Prevention and Intervention Program* (June 4, 2015), https://www.bop.gov/policy/progstat/5324_012.pdf (incorporating standards).

everyone to assess their risk of being sexually abused by, or sexually abusive toward, other prisoners upon their initial intake screening and any transfer to another facility. 28 C.F.R. § 115.41(a). Among the criteria prison officials must use to assess an incarcerated person’s risk of sexual victimization are: “[w]hether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming; [w]hether the inmate has previously experienced sexual victimization . . . ; [and] [t]he inmate’s own perception of vulnerability” 28 C.F.R. § 115.41(d).

In light of the high rates of sexual abuse in prisons and jails, and because the consequences of sexual abuse are far-reaching and “have the potential to harm a person in every dimension of life: psychological, physical, spiritual, and social,”¹⁵ the PREA Standards include requirements to provide victims of sexual abuse with access to medical and mental health care. *See Id.* § 115.81-83. “Sexual abuse and emotional and psychological responses may also lead to serious medical conditions. For both men and women, responses like chronic anxiety, hyper-arousal, sleep disturbances, and eating disorders are strongly associated with development of long-term health problems, including cardiovascular disease, ulcers, and a weakened immune system.”¹⁶ The PREA Standards require that

¹⁵ 2009 NPREC Report, *supra* 1, at 126 (quotation marks omitted).

¹⁶ *Id.* At 128.

facilities provide incarcerated people with access to emergency medical and mental health services (*Id.* § 115.82) related to any report of sexual abuse, a “medical and mental health evaluation, and as appropriate, treatment to all inmates who have been victimized by sexual abuse in prison, jail, lockup, or juvenile facility.” *Id.* § 115.83(a).

Additionally, the Department of Justice funds the PREA Resource Center, created in 2010, to “[serve] the corrections field by assisting state, local, and tribal agencies in implementing the PREA Standards.”¹⁷ The PREA Standards mandate staff training on the “zero-tolerance policy for sexual abuse and sexual harassment.” 28 C.F.R. § 115.31(a). In fact, the BOP included BJS-documented trends of “who may be vulnerable in confinement settings” into trainings. The BJS findings explain that people “who may be viewed as vulnerable or physically small or weak, gay, transgender or effeminate may be more vulnerable” to rape and sexual assault.¹⁸

Further, the Department of Justice recognized: “The [PREA] standards are not intended to define the contours of constitutionally required conditions of

¹⁷ National PREA Resource Center, *About*, <https://www.prearesourcecenter.org/about/prea-resource-center> (last visited Apr. 20, 2023).

¹⁸ National PREA Resource Center, *PREA Employee Training Unit 3, Part 1: Prevention and Detection of Sexual Abuse and Sexual Harassment* 43 (2014), https://www.prearesourcecenter.org/sites/default/files/content/unit_3.1_lesson_plan.pdf.

confinement. Accordingly, compliance with the standards does not establish a safe harbor with regard to otherwise constitutionally deficient conditions involving inmate sexual abuse.”¹⁹ But knowledge of, and failure to comply with, the PREA Standards can serve as further evidence of subjective recklessness to prisoner safety. *Ricks v. Shover*, 891 F.3d 468, 477 (3d Cir. 2018) (noting that when considering contemporary standards of decency, this Court begins by reviewing ““objective indicia of consensus,”” such as legislative enactments, including PREA (quoting *Ropers v. Simmons*, 543 U.S. 551, 564 (2005)); accord *Sconiers v. Lockhart*, 946 F.3d 1256, 1270-72 (11th Cir. 2020) (Rosenbaum, J., concurring) (finding PREA and other state legislative enactments to be reliable evidence of contemporary standards of decency) (citing *Crawford v. Cuomo*, 796 F.3d 252, 260 (2d Cir. 2015)). Thus, while compliance with PREA Standards does not insulate prison officials from responsibility for constitutional violations, failure to comply with PREA can evidence deliberate indifference. Accordingly, prison officials can *and should* be held liable for injuries resulting from their deliberate indifference in failing to protect an incarcerated LGBTQ+ person from sexual assault.

¹⁹ See National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,107 (June 20, 2012).

CONCLUSION

“The Constitution ‘does not mandate comfortable prisons’, but neither does it permit inhumane ones.” *Farmer*, 511 U.S. at 832 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)) (cleaned up). *Farmer* made clear that prison officials have a constitutional duty to protect incarcerated people entrusted to be in their custody from obvious and substantial risks of harm. Moreover, this Court has reaffirmed that a failure-to-protect claim under the Eighth Amendment is not a new *Bivens* context and is therefore available to provide redress for survivors and to hold prison officials accountable for their deliberate indifference to the serious, known risks of sexual violence against incarcerated LGBTQ+ people.

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that all counsel for *Amicus Curiae* are members of the bar of the United States Court of Appeals for the Third Circuit.

Dated: April 24, 2023

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because this brief contains 4231 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.
3. Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies.
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amicus Curiae* Brief of Lambda Legal Defense and Education Fund, Inc., Black and Pink National, Center for Constitutional Rights, and Just Detention International in Support of Appellant with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on April 24, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 24, 2023

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