No. 21-6878

In The
Supreme Court of the United States

RONALD COX,

Petitioner,

v.

DEPUTY WARDEN BENJIE NOBLES, OFFICER CRUMP, WARDEN PERRY, SERGEANT DAVIS, WARDEN TED PHILBIN, UNIT MANAGER HARRIS,

Respondents.

On Petition for Writ of *Certiorari* to the U. S. Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* LGBT BAR ASSOCIATION OF NEW YORK IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

WILLIAM J. ROLD, ESQ.
(COUNSEL OF RECORD)
98 BERGEN STREET
BROOKLYN, NY 11201
(718) 624-2890
williamjroldesq@verizon.net

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

PROFESSOR EMERITUS ARTHUR S. LEONARD
NEW YORK LAW SCHOOL
185 WEST BROADWAY
NEW YORK, NY 10013

ERIC LESH, EXECUTIVE DIRECTOR
BRETT M. FIGLEWSKI, LEGAL DIRECTOR
LGBT LAW ASSOCIATION OF GREATER NEW YORK
(LEGAL)
601 W. 26TH STREET, SUITE 325-20
NEW YORK, NY 10014

QUESTION PRESENTED

Amicus would reframe the question for review as follows:

Is evidence of prison officials' notice and actions taken under the Prison Rape Elimination Act relevant to their subjective state of mind for deliberate indifference under *Farmer v. Brennan* when they invoke the affirmative defense of qualified immunity?

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INTEREST OF *AMICUS CURIAE*

LGBT BAR ASSOCIATION OF NEW YORK (LeGaL)[1, 2]

The LGBT Bar Association of New York (LeGaL) is one of the nation's oldest lesbian, gay, bisexual, and transgender ["LBGT"] bar associations and remains one of the largest and most active legal organizations of its kind in the country. LeGaL is dedicated to improving the administration of the law, ensuring full equality for LGBT people, and promoting the expertise and advancement of LGBT professionals.

LeGaL is keenly interested in underserved members of the LGBT community. We conduct *pro bono* walk-in clinics in New York City and Long Island, work with other bar associations, provide CLE, and (through our Foundation) publish a monthly newsletter, *LGBT Law Notes,* which highlights legal developments affecting LGBT people, with a dedicated section on prisoners.

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[1] Statement per Supreme Court Rule 37.6: No counsel for a party authored this brief, in whole or in part; and no party or its counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] Per Supreme Court Rule 37.1, notice was given of intention to file this *amicus* brief on or before February 7, 2022; and counsel for both Petitioner and Respondent have given written permission.

Counsel of Record, William J. Rold, is a member of LeGaL and of the bar of this Court. He has litigated about the civil rights of prisoners for over four decades. He is the associate editor of *Law Notes* for prisoner issues. He represented the American Public Health Association as *amicus curiae* before this Court in *West v. Atkins,* 487 U.S. 42 (1988), which established liability theory under 42 U.S.C. § 1983 for private medical contractors who work in state prisons. He represented the American Bar Association on the board of directors of the National Commission on Correctional Health Care, which sets standards for accreditation of health systems in prisons and jails.

Co-counsel, Arthur S. Leonard, also a member of the bar of this Court, is the Robert F. Wagner Professor of Law and Employment Law Emeritis at New York Law School and a founder of LeGaL. He is the editor-in-chief of *Law Notes*.

Co-counsel, Eric Lesh and Brett M. Figlewski, are the Executive Director and Legal Director, respectively, of LeGaL. They coordinate LeGaL's *pro bono* litigation.

CONSTITUTION AND REGULATIONS

Amicus would add the following to the citations on pages 2-5 of the Petition:

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted.

28 C.F.R. § 115.41: Screening for risk of victimization and abusiveness.

> (a) All inmates shall be assessed during an intake screening and upon transfer to another facility for their risk of being sexually abused by other inmates or sexually abusive toward other inmates….
>
> (c) Such assessments shall be conducted using an objective screening instrument.
>
> (d) The intake screening shall consider, at a minimum, the following criteria to assess inmates for risk of sexual victimization:
>
> (1) Whether the inmate has a mental, physical, or developmental disability;
>
> (2) The age of the inmate;

(3) The physical build of the inmate;…

(7) Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;

(8) Whether the inmate has previously experienced sexual victimization;

(9) The inmate's own perception of vulnerability;…

(f) Within… 30 days from the inmate's arrival,… the facility will reassess the inmate's risk of victimization or abusiveness based upon any additional, relevant information received by the facility since the intake screening.

(g) An inmate's risk level shall be re-assessed when warranted due to a referral, request, incident of sexual abuse, or receipt of additional information that bears on the inmate's risk of sexual victimization.

FACTS RELEVANT TO *AMICUS* BRIEF

Ronald Cox is a transgender woman. Upon arrival at Georgia Department of Corrections [Ga.DOC]'s Autrey men's prison, she was receiving hormones and presented as a female, with breasts and feminine appearance.

Without screening under Prison Rape Elimination Act ["PREA"], she was housed in the men's prison with another inmate, who threatened her with a weapon and sexually assaulted her, for which she was hospitalized. Ms. Cox grieved the failure to separate her.

Ms. Cox again sought and was denied PREA protection when she was moved to Ga.DOC's Central State Prison for men. Inmates assaulted her and kicked and punched her on the ground. Ms. Cox also grieved these events.

Four months later, at Ga.DOC's Augusta men's prison, Ms Cox again sought PREA protection. It was denied, and she was assaulted twice, once with a shank. Officials moved her to a different cell in the same dorm. She was attacked again by the same inmate, who remained in the dorm.

The last attack (a stabbing) caused critical injuries and a six-day hospitalization. After release, Ga.DOC housed Ms. Cox in a PREA dorm at Augusta.

APPLICATION OF PREA SCREENING REGULATIONS TO FACTS

28 C.F.R. § 115.41 requires that prisoners be assessed for vulnerability for sexual victimization using an "objective screening instrument," as follows: (1) on arrival; (2) on transfer; (3) within thirty days after arrival; (4) after an incident of sexual abuse; and (5) upon request.

Here, there were three arrivals, two transfers, two 30+ days lapses of time, three sexual abuse incidents, and one hospitalization prior to the last one – each of which required, but did not produce, a PREA assessment of risks to this transgender inmate. Ms. Cox also filed grievances and made her own requests.

These eleven events should have self-triggered Ga.DOC to assess this inmate under 28 C.F.R. § 115.41. PREA regulations require written documentation of assessments.

THE RELEVANCE OF THE DISCOVERY STAY

Although the Eleventh Circuit fails to mention it, the District Court stayed discovery after defendants moved for dismissal on qualified immunity under F.R.C.P. 12(b)(6).[3]

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[3] *Cox v. Nobles,* 19-cv-0031 (S.D. Ga., Sept. 8, 2019), Docket No. 24.

Ms. Cox had already answered the motion to dismiss, relying on reasonable inferences from the facts and PREA, specifically invoking 28 C.F.R. § 115.41.[4]

By requiring Ms. Cox to plead specific details about Ga.DOC's PREA responses – information asymmetrically in Ga.DOC's control -- the Court of Appeals imposed an improper heightened pleading requirement in this qualified immunity case.

SUMMARY OF ARGUMENT

The Court has never addressed the role of PREA in the Eighth Amendment claims of prisoners who are the victims of rape. Despite PREA's passage, this plague on the criminal justice system remains.

The lower federal courts are either divided or silent as to how to apply PREA to prisoner claims. Yet Congress plainly intended to provide resources and set standards for prevention and investigation of sexual assault in prisons and jails.

The Court should include consideration of PREA among the evolving standards of decency that inform Eighth Amendment analysis. It can begin by acknowledging what *amicus* submits is the key PREA provision whose violation leads to

[4] *Id.* (Aug. 29, 2019), Docket No. 22.

most of the constitutional violations that follow: failing to screen potential aggressors and victims and keeping them apart.

The ruling below conflicts with rulings of Courts of Appeals. It imposes a "heightened pleading" requirement when defendants raise qualified immunity, contrary to this Court's precedents for lower-level defendants in civil rights cases

ARGUMENT

"Prison rape may be the single largest shame of the American criminal justice system, and that's saying a lot."[5]

One of the first historical accounts of prison rape in America, Katz' groundbreaking treatise, GAY AMERICAN HISTORY,[6] recounts an 1826 interview with an inmate victim of the "Sin of Sodom" during a minister's trek through prisons from Massachusetts to Georgia:

> Was the crime committed on you? Yes, Sir! By whom? Pat, an Irishman. Why did you submit? He choked me. He was stronger than I! Why did you not

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[5] Martin, "The Prison Rape Elimination Act: Sword or Shield?" 56 TULSA L. REV. 283, 283 n.1 (2021), *quoting* Jenness & Smyth, "The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects," 22 STAN. L. & POL'Y REV. 489, 500 (2011).

[6] (Cromwell 1976) 27-8.

> complain? I did in the room! But they said if I told of it they would punish me! Who said so? They all said I must not tell anything out of the room! Did Pat effect his object? Yes, Sir?

Sadly, nearly two hundred years later, this could be written today.

In the experience of *amicus,* corrections officials' failure to comply with the law -- by screening potential prison victims and aggressors and separating them – is at the core of most sexual abuse in prison – and it was the main fault here. That is why we focus on the persistent failure to implement 28 C.F.R. § 115.41 and what weight it should have in Eighth Amendment adjudication.

POINT I: ASSESSMENT OF NEW INMATES UNDER PREA FOR RISK OF SEXUAL ASSAULT IS GERMANE TO THE SUBJECTIVE COMPONENT OF DELIBERATE INDIFFERENCE TO THEIR SAFETY UNDER THE EIGHTH AMENDMENT.

A. The Horrible History of Prison Rape.

Commentators have been denouncing indifference toward prison rape for nearly a century.[7] But this Court did not apply the

[7] Martin, *supra* n.5, 287.

Eighth Amendment broadly to the states until 1962.[8] Over the next decades, stereotypes about sexual assault in prison flourished. The *Boston Globe* found in 1994 that fifty percent of those surveyed believed that "society accepts prison rape as part of the price criminals pay for their wrongdoing."[9] Sexual assault became viewed as "common and inevitable"[10] and "part of prison life."[11] It was (and continues to be) exploited in movies and television.[12]

A myth developed that only gay men are perpetrators or victims of prison rapes of other men.[13] This fostered a widespread view among

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[8] *Robinson v. California,* 370 U.S. 660, 664 (1962).

[9] Turchik, "Myths about Male Rape" A Literature Review" 13 PSYCHOLOGY OF MEN & MASCULINITY 211 (2012), *citing Boston Globe,* "Poll Finds Wide Concern About Prison Rape…" (May 17, 1994) at 22.

[10] Turchik,*id.* at 216-17.

[11] Martin, *supra* n.5, 284.

[12]*Midnight Express* (1978); *Shawshank Redemption* (1994); *Oz* (1997-2003); and *Orange Is the New Black* (2013-2019).

[13] Turchik, *supra* n.9, 212. *See Lucas v. Chalk,* 2019 U.S. App. LEXIS 24561 (6th Cir., Aug. 19, 2019) (remanding dismissal of claim against bisexual prison rape victim's psychologist, who denied treatment because prisoner probably "liked" being raped).

corrections officers that "prisoners who had consensual sex with men deserve to be raped."[14]

The nation's prisons and jails have disproportionate numbers of incarcerated LGBT people – nearly three times the number of those self-identified in the population at large.[15] Their rate of sexual assault is more than eight times the victimization of heterosexual prisoners.[16] Transgender inmates are thirteen times more likely to be victims than cisgender inmates.[17]

B. This Court's Adoption of a Cause of Action in *Farmer v. Brennan.*

Against this landscape the Court held in *Farmer v. Brennan*, 825 U.S. 511 (1994), that

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[14] "No Escape: Male Rape in U.S. Prisons," HUMAN RIGHTS WATCH (2001). This combination of sexism and homophobia persists today. In Georgia, despite efforts to legislate gender neutrality, only a woman can be a victim of rape. Ga. Code Ann. § 16-6-1.

[15] Meyer, "Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey," 107 AM. J. PUB. HEALTH 234, 238 (2017).

[16] Beck & Johnson, "Sexual Victimization Reported by Former State Prisoners 2008," BUREAU OF JUSTICE STATISTICS 56 (2012).

[17] Jenness, *et al.,* "Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault," U.C. IRVINE CENTER FOR EVIDENCE-BASED CORRS. (2007); *see also*, "It's War in Here: A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons," SYLVIA RIVERA PROJECT (2007).

the Eighth Amendment protects prisoners against deliberate indifference to their safety from attacks by other inmates. If the risk were serious, if defendants knew of it, and if they failed to take reasonable steps to abate it, liability would attach. Importantly, the Court said that "knowledge" by defendants could be inferred by a jury (as with other reasonable inferences in civil cases), if the risks were "obvious." *Farmer,* 825 U.S. at *passim* ("obvious" mentioned 22 times in decision).

The Court placed the primary responsibility for responding on prison officials, finding it not relevant at the pleading stage that Farmer, herself a transgender prisoner, did not object to her placement in general population at the maximum-security federal penitentiary in Terre Haute. 511 U.S. at 830. It is likewise not dispositive that the victim plaintiff is unable to identify her specific future assailant: a defendant cannot "escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." *Farmer*, 511 U.S. at 843, 848.

Farmer was not enough. Prisoners had a constitutional cause of action, but there was no structure. There was a call for national

standards for prevention and tracking of sexual violence in prisons.[18]

C. The Prison Rape Elimination Act.

In 2003, Congress enacted the Prison Rape Elimination Act, now codified at 34 U.S.C. §§ 30301, *et seq.* ["PREA"']. It was a bipartisan, multi-advocate-supported effort, and it passed unanimously within a few months.[19]

Congress established a Commission to study prison rape and to prepare a report of "findings and recommendations." It required the Attorney General to promulgate national standards to reduce sexual assault, preserve evidence, and treat victims. 34 U.S.C. §§ 30302(3), (6) and (7); 30606(d); 30307(a)(1). Critics applauded.[20]

Congress provided that the standards would apply to the federal government upon promulgation. 34 U.S.C. §30307(b). States and localities were required to "certify" compliance as a condition of certain federal grant-in-aid money. The Attorney General could enforce

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[18] *See* Turchik *supra* n.9, 219 (collecting literature).

[19] Nolan & Telford, "Indifferent No More: People of Faith Mobilize to End Prison Rape," 32 J. LEGIS. 129, 139 (2006) (noting that the coalition to pass PREA was an "unlikely amalgam of groups" and observing that it "recruited legislators from across the political spectrum").

[20] Dumond, "Confronting America's Most Ignored Crime Problem: The Prison Rape Elimination Act of 2003," 31 J. AM. ACAD. PSYCHIATRY & L. 354, 355 (2003).

compliance by withholding up to five percent of such money as a sanction for non-compliance. 34 U.S.C. § 30307(e).[21]

Congress did not create an explicit private cause of action by prisoner victims in PREA. Lower federal courts have declined to imply one, sometimes treating such arguments dismissively – *see* discussion, *infra,* Point II.

Amicus suggests there is another way to look at Congress' silence. This Court had *already* implied a cause of action for inmate protection from harm, directly under the Eighth Amendment. Congress referenced *Farmer* in the preamble to PREA (34 U.S.C. § 30302(13)). Relying on a constitutionally mandated cause of action, Congress had no need to embellish the point. The "flesh" would come with the body of the report and the regulations Congress mandated.

The Commission investigation took longer than expected. In the interregnum, critics

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[21] Cases where funding withdrawal has been at issue seem to follow their own track, without reference to PREA's impact on individual inmates. *New York v. Department of Justice,* 951 F.3d 84 (2d Cir. 2020); *City of Los Angeles v. Barr,* 941 F.3d 931 (9th Cir. 2019); *City of Philadelphia v. Attorney General*, 916 F.3d 276 (3d Cir. 2019).

continued to lament the lack of specificity in PREA.[22]

D. The PREA Commission Report.

In 2009, the PREA Commission issued the "Report" required by 34 U.S.C. § 30306. The Report found that sixty-five percent of inmates did not believe they could safely or effectively report sexual abuse, concluding that only a fraction (2-3%) of sexual abuse was ever reported – and some states boasted that they had no rapes at all in their entire prison system. National Prison Rape Elimination Commission Report (June 2009) (*passim*).

Prison rape continued to be endemic, although PREA was intended "to be a strong vehicle for change."[23] In the reality of prison life, PREA events were discounted or found "unsubstantiated" because of "poor-quality

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[22] *See* Robertson, "A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison," 51 N.C. L. Rev. 433, 433 n.* (2003). The harsh criticism is derived from a District Court decision in *Smith v. Ullman,* 874 F.Supp. 979, 987 (D. Neb. 1994), which had dismissed a prisoner rape victim's claims under *Farmer* and, on reconsideration, under PREA, prior to the not-yet-issued regulations. *See also,* Arkles, "Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm," 17 N.Y.U. J. LEGIS. & PUBL. POL. 801, 805-6 (2014) (discussing delays implementing PREA).

[23] Martin, *supra* n.5, 285.

investigation" or "difficulty gathering sufficient evidence."[24]

E. The PREA Regulations.

After formal rule-making, the Department of Justice published a Final Rule in 2012 to establish standards for investigating and responding to allegations of sexual abuse committed against prisoners. 28 C.F.R., Part 115. The regulations "account in various ways for the particular vulnerabilities of inmates who are LGBT or whose appearance or manner does not conform to traditional gender expectations." 77 Fed. Reg. 37106, 37109 (June 20, 2012).

PREA regulations *require* screening at intake upon an inmate's arrival at any new prison to assess for risk factors for victimization, 28 C.F.R. § 115.41, including prisoners "perceived to be gay, lesbian, bisexual, transgender…." *Id.* at § 115.42(d)(7). These inmates are to be re-assessed after thirty days, upon transfer, on the occurrence of an incident of sexual abuse or harassment, or upon request.

Other regulations address: creating protocols on "zero tolerance,"[25] training and

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[24] "National Prison Rape Elimination Commission Report," U.S. Dept. of Justice, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE 118 (2009).

[25] 28 C.F.R. § 115.21.

supervision of staff,[26] cross-gender strip searches,[27] reporting and investigation of incidents,[28] and prohibiting retaliation.[29] They require data collection[30] and audits.[31]

F. Lack of Judicial Enforcement of PREA Regulations.

With two exceptions, lower federal courts have taken a hands-off approach to attempts directly to enforce the PREA regulations. "As a result of compromises made, PREA imposes minimal consequences on state facilities that violate its standards."[32]

What has evolved from PREA is a self-monitored program overseen by a group of industry-identified "monitors," who report "zero tolerance" everywhere, with no PREA violations (100% compliance repeatedly) -- while not enough has changed.

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[26] *Id.* at §§ 115.13. and 115.31.

[27] *Id.* at §§ 115.15.

[28] *Id.* at §§ 115.22, 115.61, and 115.71.

[29] *Id.* at § 115.67.

[30] *Id.* at § 115.87.

[31] *Id.* at § 115.93.

[32] Martin, *supra* n.5, 285; *see also,* Arkles, *supra* n.22, 805 (same).

> I have never spoken to a warden or commissioner of corrections who does not proclaim a zero tolerance policy in the prison or department; however, when I tour facilities and speak with prisoners, a very different story inevitably emerges.[33]

Supposed "zero tolerance" has evolved into a contrived "safe harbor" used to shelter correctional defendants from claims of constitutional torts.[34]

The two PREA regulations that have been enforced involve the interplay between PREA and the Prison Litigation Reform Act ["PLRA"]. 28 C.F.R. § 115.52(b)(1) states that corrections officials may not impose a time limit on filing grievances alleging sexual abuse under PREA.[35]

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[33] Kupers, "Role of Misogyny and Homophobia in Prison Sexual Abuse," 18 U.C.L.A. WOMEN'S L. J. 107, 108, 128 (2010); *see also,* "'I Don't Believe You, So You Might as Well Get Used to It' – The Myth of Zero Tolerance in Texas Prisons," NATIONAL PREA RESOURCE CENTER (Nov. 20, 2018).

[34] Arkles, *supra* n.22, 821 & n.138.

[35] While the proposed rule extended grievance time deadlines by ninety days, the final rule "places no time limit on grieving sexual abuse." The commentary notes: "[I]nmates may require a significant amount of time in order to feel comfortable filing a grievance and might need to wait until their abuser is no longer able to retaliate." (fn. cont'd)

This was enforced against Michigan by the Sixth Circuit in *Does 8-10 v. Snyder*, 945 F.3d 951, 956 (6th Cir. 2019).

The second regulation, 28 C.F.R. § 115.52(d)(1), provides that a final decision on a PREA grievance must issue within 90 days. A transgender inmate in Delaware who received no reply within ninety days to a grievance under PREA was deemed to have "exhausted" under the PLRA. *Naisha v. Metzer,* 2021 WL 5632063 (3d Cir., Dec. 1, 2021).

Despite other litigation barriers imbedded at the core of the PLRA, litigants have attempted to use PREA as an additional source of relief for sexual abuse in custody. A recent study of dismissals under the PLRA assessing its impact on PREA claim found that that LGBT people in custody raising PREA claims were fifteen percent of the cases dismissed under the PLRA.[36]

The PLRA does not apply to Ms. Cox, as she filed her complaint after being released from prison. Former prisoners are not covered by the PLRA even if their suit concern events that

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77 Fed. Reg. 37106, 37138 (June 20, 2012). The statute of limitations for commencing a lawsuit remains. 77 Fed. Reg. at 37159.

[36] Smith, "Promise Amid Peril: PREA's Efforts to Regulate an End to Prison Rape," 57 AM. CRIM. L. REV. 1599, 1622 (2020).

occurred in custody.[37] The interaction of PLRA and PREA is nevertheless germane here because it has national implications.

A possible "third" exception could be based on 28 C.F.R. § 115.72, which limits correctional officials investigating a sexual assault to a standard of proof no greater than "a preponderance of the evidence." *Amicus* is aware of no appellate decisions applying this provision. It is *amicus'* experience, however, that, when correctional officials refer a PREA perpetrator to prosecutors (who think in terms of "beyond a reasonable doubt"), the officials accede to a decision not to prosecute – and take no further action. Thus, a PREA regulation designed to make it *easier* to prove sexual assault administratively is nullified.

On rare occasions, PREA regulations have been cited in Eighth Amendment cases to evaluate correctional officials' states of mind, their delivery of preventative services, and their response to reported or reportable events. But there is wide disagreement among the circuits, with some perfunctorily closing this door.

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[37] *Talamantes v. Leyva,* 575 F.3d 1021, 1023-5 (9th Cir. 2009); *Jackson v. Johnson,* 475 F.3d 261, 266-7 (5th Cir. 2007); *Norton v. City of Marietta, Okla.,* 432 F.3d 1145, 1150 (10th Cir. 2005); *Nerness v. Johnson,* 401 F.3d 874, 878 (8th Cir. 2005); *Ahmed v. Dragovich,* 29 F.3d 201, 210 n. 10 (3d Cir. 2002). *Amicus* is not aware of any appellate authority to the contrary.

POINT II: THE COURT SHOULD GUIDE THE LOWER COURTS' APPLICATION OF PREA IN EIGHTH AMENDMENT PROTECTION FROM HARM CLAIMS.

A. This Court's Silence.

The only time the Court has mentioned PREA occurred in a dissent *Woodford v. Ngo,* 548 U.S. 81, 117-8 (2006), where three justices expressed concerns about whether the PLRA exhaustion rule announced (complete exhaustion under state rules) would bar litigation "irrespective of whether a claim is meritorious or frivolous." The example given was a prison sexual assault:

> Consider, for example, an inmate who has been raped while in prison….[I]n enacting the Prison Rape Elimination Act…, Congress estimated that some one million people have been sexually assaulted in the Nation's prisons over the last 20 years…. Although not all of these tragic incidents result in constitutional violations, the sovereign does have a constitutional duty to provide humane conditions of confinement," *Farmer* v. *Brennan,* 511 U.S. 825, 832 (1994)…. [T]hose inmates who are sexually assaulted by guards, or whose sexual assaults by other inmates are facilitated by guards, have suffered grave deprivations of their Eighth Amendment rights. Yet, the… PLRA's

> exhaustion requirement risks barring such claims when a prisoner fails… to file her grievance… within strict time requirements that are generally no more than 15 days….

The final PREA rule responded to this issue in 28 C.F.R. § 115.52(b)(1), as stated above, and those few Courts of Appeals that have addressed it have enforced it.

B. The Discordant Courts of Appeals.

Amicus has attempted a national survey. We found no significant decisions, even non-precedential ones, in four circuits (Fourth, Eighth, Tenth, and D.C.).

The First Circuit has not addressed implied cause of action, although it allowed correctional defendants to raise PREA in support of denying hormones to a transgender inmate, arguing that her Massachusetts prison was too dangerous under PREA reports and hormones would make her a target. *Battista v. Clarke,* 645 F.3d 449, 451 (1st Cir. 2011). The defense was rejected

The Second Circuit has found PREA part of the "evolving standards of decency" under Eighth Amendment analysis, and it relied in part on PREA in broadening protection against sexual harassment. *Crawford v. Cuomo,* 796 F.3d 252, 260 (2d Cir. 2015). It said that legislative enactments like PREA are the "clearest and most reliable objective evidence of

contemporary values," *quoting Atkins v. Virginia,* 536 U.S. 304, 315 (2002). It continued:

> It is not only the number of state laws that is significant, but "the consistency of the direction of change" in the law. [*quoting Atkins, id.*]… [S]exual abuse of prisoners, once overlooked as a distasteful blight on the prison system, offends our most basic principles of just punishment.

795 F.3d at 260

Although the Third Circuit ruled that there are no implied remedies under PREA, *Bowens v. Wetzel,* 674 Fed. App'x 133 (3d Cir. 2017), it subsequently reversed an Eighth Amendment dismissal,where the transgender inmate was found "at risk" in a PREA screening. *Shorter v. United States,* 12 F.4th 366, 368, 375 (3d Cir. 2021).

The Fifth Circuit said plainly that there is no implied cause of action under PREA, finding the argument "frivolous." *Krieg v. Steele,* 599 Fed. App'x 231, 232 (5th Cir. 2013), *cert. denied,* 136 S.Ct. 238 (2015).[38] In *Rivera v. Bonner,* 952 F.3d 560, 566, 568 n.2 (5th Cir. 2017), it said that, while PREA may advise "best practices" for vetting new correctional staff, the Texas prison

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[38] *See also, Ard v. Rushing,* 597 Fed. App'x 213, 220 n.6 (5th Cir. 2014) (PREA has no relevance).

officials were not constitutionally bound to follow them.[39]

Despite Fifth Circuit hostility, *Zollicoffer v. Livingston,* 169 F.Supp.3d 687 (S.D. Tex. 2016), is described by one commentator as an "example of how courts could and should reference PREA standards."[40] The plaintiff alleged a "contrast" between Texas' written policies and the "actual policies condoned." 169 F.Supp.3d at 692, pleading that "PREA training is considered a joke for many TDCJ employees, who believe that sexual assault of LGBT people is funny." *Id.* at 693. The District Court deferred ruling on qualified immunity and ordered limited discovery on defendants' subjective state of mind under PREA. *Id.* at 698. The case settled prior to appeal.[41]

The Sixth Circuit has *Does 8-10 v. Snyder,* and *Lucas v. Chalk, supra*. While they discuss

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[39] The Fifth Circuit allowed defendants to introduce evidence of PREA's burdens on their staffing in defending an inability to provide security coverage for congregate religious services. *Brown v. Collier,* 929 F.3d 218, 234 (5th Cir. 2019).

[40] Martin, *supra* n.5, 300.

[41] 14-cv-3037 (S.D. Tex., Febr. 26, 2018), Docket No. 102. In another District Court settlement in the Fifth Circuit, the Court approved a consent decree about conditions in the Orleans Parish jail, citing PREA as a justification for various provisions. *Jones v. Gusman,* 296 F.R.D. 416, 454 n.488 (E.D. La. 2013).

PREA, they do not fix its place in Eighth Amendment analysis.

In *J.K.J v. Polk County,* 960 F.3d 367, 384 (7th Cir. 2020) (*en banc*), the Court wrote that the "risks… in the confinement setting are obvious – indeed PREA owes its very existence to that reality." It then ruled that PREA is not a constitutional standard, and jails are not required to adopt it.[42]

The Ninth Circuit has not applied PREA to an inmate plaintiff's case in a published decision, except for approval of a jury instruction based on the definition of sexual abuse in 28 C.F.R. § 115.6, in *Bearchild v. Cobban,* 947 F.3d 1130, 1137 (9th Cir. 2020). It has accepted defense arguments raising PREA. *See Vazquez v. County of Kern,* 949 F.3d 1153, 1159 (9th Cir. 2020) (defendants use adherence to PREA standards as defense in protection from harm case); *Doe v. Kelly,* 878 F.3d 710, 718 (9th Cir. 2017) (defendants seek reconsideration of preliminary injunction regarding Tucson Border Patrol holding cells, arguing orders are impairing their ability to comply with PREA).

Before turning to the Eleventh Circuit, where this case arose, *amicus* mentions the Federal Circuit decision in *Bannon, Inc. v.*

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[42] *But see Monroe v. Jeffreys,* 2021 U.S. Dist. LEXIS 21224 at **25-26, 2021 WL 391229 (S.D. Ill., Febr. 4, 2021) (court admits expert testimony based on PREA "goals and purposes").

United States, 779 F.3d 1376, 1378-80 (Fed. Cir. 2015). The Court held that it was "beyond dispute" that the federal Bureau of Prisons could require a proposed vendor to certify in its bid that it would comply with PREA.

In this case, the Eleventh Circuit declined to consider PREA: "Although we have no doubt that PREA documents *could* put prison officials on notice of a substantial risk of serious harm to an inmate, in this case Cox failed to allege anything to help us discern what the PREA documents said." (Emphasis by the Court).[43]

Ms. Cox's pleading is legally similar to that of Ms. Shorter, sustained by the Third Circuit in *Shorter v. United States, supra.* Deliberate indifference to Ms. Shorter's safety occurred in one institution, while Ms Cox was transferred three times. The records of Ga.DOC's indifference logically followed her to each institution as she repeatedly requested PREA screening for her safety,[44] but it took a six-day hospitalization before she was finally placed in a

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[43] *Cox v. Nobles,* No. 21-6878, Appendix, Court of Appeals Slip Op'n at 21.

[44]Records would include information about Ms. Cox's history, security, housing, injuries, hospitalizations, grievances, and sexual abuse incidents. Central would know what happened at Autry; Augusta would know what happened at both Autry and Central. Ga.DOC's deliberate indifference increased with each warden's failure to perform a PREA screening upon transfer.

PREA dorm, which existed all along but was not previously used to protect Ms. Cox.

The Eleventh Circuit took the same view of PREA in *Sconiers v. Lockhart*, 946 F.3d 1256, 1271 (11th Cir. 2020), where it reversed summary judgment on a claim of sexual assault by a guard without mentioning PREA. Concurring, Judge Rosenbaum wrote that PREA should have applied, because the guard's willful and malicious inserting of a finger in the plaintiff's anus was sexual assault with an "object" within the meaning of 34 U.S.C. § 30309(9)(A) and the "evolving standards of decency" under the Eighth Amendment. *Id.* at 1270.

The Georgia transgender case of *Diamond v. Owens,* 131 F.Supp.3d 1346, 1376-7 & n.33 (M.D. Ga. 2015), cited PREA regulations several times as "part of" corrections' expected knowledge base and standard of care. Releasd but again incarcerated, Ms. Diamond refiled. The U.S. Department of Justice filed Statements of Interest in both cases, arguing that PREA is relevant to the Eighth Amendment.[45]

The lower courts have varying and inconsistent standards for application of PREA to Eighth Amendment claims. The Court should grant the writ on this basis alone.

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[45] *See Diamond v. Ward,* 20-cv-0453 (M.D. Ga., Apr. 22, 2021), Docket No. 65.

POINT III: CONSIDERATION OF PREA REGULATIONS ACCORDS WITH EVOLVING STANDARDS OF DECENCY UNDER THE EIGHTH AMENDMENT.

The Court has long looked to "evolving standards of decency" as a yardstick to measure the protections of the Eighth Amendment. *See, e.g.* (in reverse chronology), *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (forfeiture of citizenship as punishment); *Estelle v. Gamble,* 429 U.S. 97, 102 (1976) (deliberate indifference to prison medical care); *Hudson v. McMillan,* 503 U.S. 1, 10 (1992) (excessive force injuries need not meet a "significant" threshold); *Farmer v. Brennan,* 825 U.S. at 834 (deliberate indifference to prison safety); *Roper v. Simmons,* 543 U.S. 551, 565 (2005) (banning execution of juveniles); *Graham v. Florida,* 560 U.S. 48, 58 (2009) (prohibiting juvenile sentences of life without parole).

Some Courts of Appeals have specifically related PREA to evolving standards of decency. *See, e.g., Crawford v. Cuomo, supra.* Most, however, have not been persuaded by PREA to "evolve" on "standards of decency."

PREA regulations 28 C.F.R. §§ 115.6(5), 115.6(6), and 115.6(8) are illustrative. They define sexual abuse of a prisoner by staff or guards to include sexual contact "through clothing," "threats" of sexual contact, and "voyeurism" -- "with or without consent."

Yet, the elimination of "consent" as a defense for sex between staff and inmates under 28

C.F.R. 115.6 is only a rebuttable presumption in the Ninth Circuit. *Wood v. Beauclair*, 692 F.3d 1041, 1049 (9th Cir. 2012). The Sixth Circuit followed *Wood. Hale v. Boyle Cty.,* 18 F.4th 845, 854 (6th Cir. 2021).[46] In addition to PREA, a "growing majority" of states now eliminate inmate "consent" to sex with staff, classifying it as statutory rape.[47]

This trend, plus Congress' mandate of "zero tolerance," should invoke contemporary standards of decency. But PREA is "not given much credence by the judiciary…. [which] contradicts the core purpose of PREA and undermines progress in extinguishing prison rape, sexual abuse, and sexual harassment."[48]

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[46] The Tenth Circuit declined a rebuttable presumption as in *Wood,* but it found that any such "presumption" would have been overcome by the inmate victim's writing sexually explicit notes to the officer and attempting to seduce him. *Graham v. Sheriff of Logan Cty.,* 741 F.3d 1118, 1126 (10th Cir. 2013).

[47] Penland, "A Constitutional Paradox: Prisoner Consent to Sexual Abuse in Prison under the Eighth Amendment," 33 MINNESOTA J. OF LAW & INEQUALITY 507, 510 (2015).

[48] Martin, *supra* n.5, 286. PREA is a "highly relevant…. tool that has been severely hindered by many court's seemingly dissonant interpretations." *Id.* at 299, 302.

POINT IV: *FARMER v. BRENNAN* DOES NOT REQUIRE A HEIGHTENED STANDARD OF PLEADING.

The Eleventh Circuit dismissed on the pleadings saying that Ms. Cox did not provide "any context" for her PREA complaints – or the content of the PREA documents in Ga.DOC's possession. As to Ms. Cox' transfer within the dorm at her last prison, with her prior assailant still in the same dorm, the Circuit said her amended complaint provided no basis for an inference that she and her assailant would "encounter each other in an unsupervised setting."[49]

The Eleventh Circuit purported to follow *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007), by looking to whether the allegations are "plausible" when given all reasonable inferences. This is not what the Eleventh Circuit did; instead, it required heightened specificity in Ms. Cox's amended complaint.

The Court has cautioned against "heightened pleading" standards in constitutional cases as contrary to the purposes of civil rights remedies and the "short and plain statement" of pleading rules in F.R.C.P.

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[49] *Cox v. Nobles,* No. 21-6878, Appendix, Court of Appeals Slip Op'n at 18.

8(a)(1).[50] *Iqbal* and *Bell Atlantic* did not change this paradigm for most constitutional defendants.

Iqbal, the later case, arose from the detention after September 11th of Muslim inmates at Brooklyn's Metropolitan Detention Center. Raising multiple constitutional claims, they sued everyone from the warden (and the deputy warden) up to the Attorney General and the Director of the FBI. The latter two were the only petitioners in *Iqbal.*

At the Second Circuit, the Court upheld pleadings against the former warden and deputy warden in *Iqbal v. Hasty,* 490 F.3d 143, 166 (2d Cir. 2007). It found that inferences may fade "at the extremities of the hierarchy," but these lower-level defendants were properly in the case on the pleadings and that they could raise their qualified immunity defenses in a motion for summary judgment after discovery. *Id.* at 166, 178. The wardens were never before this Court.

Iqbal does not help the wardens and lower-level defendants Ms. Cox is suing here. It is the same claim allowed by the Third Circuit in *Shorter, supra,* which also deferred ruling on qualified immunity. Defendants in PREA cases are typically prison staff, who should not be

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[50] *See Swierkiewicz v. Sorema*, 534 U.S. 506, 515 (2002) (Title VII); *Crawford-El v. Britton,* 523 U.S. 574, 580 (1998) (prisoner pleadings); *Leatherman v. Tarrant County,* 507 U.S. 163, 168 (1993) (claims against municipalities).

permitted to raise PREA as a shield while inmate plaintiffs are precluded from pleading it as a sword.[51]

A prisoner victim's claim may fail if defendants acted "reasonably in response to the risk." *Farmer,* 511 U.S. at 844. In prisoner deliberate indifference cases, this is rarely, "a neat abstract issue of law." *Ortiz v. Jordan,* 562 U.S. 180, 190 (2011). Again, the Third Circuit did not reach this issue on the pleadings in *Shorter,* 12 F.4th at 373 n.5, and the Eleventh Circuit should not have reached it here.

It is *amicus'* experience that it is reasonable to infer that inmates housed in the same dorm will encounter one another "in unsupervised settings" many times a day. Ms. Cox's claim is plausible.

CONCLUSION.

For the reasons stated, *amicus* suggests that the Court should grant the Petition for a Writ of *Certiorari.*

Brooklyn, New York
February 16, 2022

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[51] Martin, *supra* n.5, 302.

Respectfully submitted,

LGBT BAR ASSOCIATION OF NEW YORK
(LEGAL)

WILLIAM J. ROLD, ESQ.
(COUNSEL OF RECORD)
98 BERGEN STREET
BROOKLYN, NY 11201
(718) 624-2890

ARTHUR S. LEONARD
PROFESSOR EMERITUS
NEW YORK LAW SCHOOL
185 WEST BROADWAY
NEW YORK, NY 10013

ERIC LESH
EXEC. DIR., LEGAL
BRETT FIGLEWSKI,
LEG.DIR., LEGAL
601 W. 26TH ST.
NEW YORK, NY 10014