No. 24-___

IN THE

Supreme Court of the United States

ANGELA SCHUNCEY RICHARDSON,

Petitioner,

v.

KRYSTLE REED DUNCAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

GEOFFREY D. KEARNEY
THE LAW OFFICE OF GEOFFREY D. KEARNEY, PLLC
P.O. Box 8276
Pine Bluff, AR 71611
gdk@gdkpllc.com

JACKSON B. SKEEN
HOGAN LOVELLS US LLP
125 High Street,
Suite 2010
Boston, MA 02110

JO-ANN TAMILA SAGAR
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
jo-ann.sagar@hoganlovells.com

JOHANNAH CASSEL-WALKER
HOGAN LOVELLS US LLP
4 Embarcadero Center,
Suite 3500
San Francisco, CA 94111

Counsel for Petitioner

QUESTION PRESENTED

Angela Richardson, an Arkansas prisoner, engaged in sexual contact with a prison guard after the guard romantically pursued Richardson, exploited her fear of other corrections officers, and provided her with privileges and protection. When Richardson challenged the guard's conduct under the Eighth Amendment, the District Court dismissed her claim, stating that she failed to allege that the sexual contact was nonconsensual. The Eighth Circuit affirmed for the same reason.

"Other circuits have faced similar factual allegations in Eighth Amendment cases, but they have not reached a uniform conclusion." *Walton* v. *Nehls*, 135 F.4th 1070, 1074 (7th Cir. 2025). Indeed, "there is no consensus in the federal courts on whether, or to what extent, consent is a defense to an Eighth Amendment claim based on sexual contact with a prisoner." *Graham* v. *Sheriff of Logan Cnty.*, 741 F.3d 1118, 1125 (10th Cir. 2013).

The question presented is:

Whether a prisoner challenging a prison official's sexual misconduct must plead that the prisoner's participation was coerced in order to state a claim under the Eighth Amendment (as the Eighth and Tenth Circuits have held) or whether a court may instead apply a rebuttable presumption that the prisoner's participation was coerced (as the Sixth and Ninth Circuits have held), or whether consent is not a defense to a prisoner's Eighth Amendment claim of sexual misconduct by a prison official (as district courts in the Second and Third Circuits have held).

PARTIES TO THE PROCEEDING

Petitioner in this Court is Angela Schuncey Richardson, who was the plaintiff-appellant in the proceedings below.

Respondent is Krystle Reed Duncan, who was the defendant-appellee in the proceedings below.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Eighth Circuit:

Richardson v. *Duncan*, No. 23-1414 (8th Cir. Sept. 20, 2024) (reported at 117 F.4th 1025)

U.S. District Court for the Eastern District of Arkansas:

Richardson v. *Duncan*, No. 4:21-cv-134 (E.D. Ark. Jan. 3, 2023) (unreported, available at 2023 WL 22612)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 24-___

ANGELA SCHUNCEY RICHARDSON,
Petitioner,

v.

KRYSTLE REED DUNCAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Angela Schuncey Richardson respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit in this case.

INTRODUCTION

"[T]here is no consensus in the federal courts on whether, or to what extent, consent is a defense to an Eighth Amendment claim based on sexual contact with a prisoner." *Graham* v. *Sheriff of Logan Cnty.*, 741 F.3d 1118, 1125 (10th Cir. 2013).

The Sixth and Ninth Circuits presume that prisoner-staff sexual contact is nonconsensual, but allow a defendant to rebut that presumption with evidence that the interaction "involved no coercive factors," such as "explicit assertions or manifestations

of non-consent" or "favors, privileges, or any type of exchange for sex." *Hale* v. *Boyle County*, 18 F.4th 845, 854 (6th Cir. 2021) (per curiam) (internal quotation marks omitted); *see also Wood* v. *Beauclair*, 692 F.3d 1041, 1049 (9th Cir. 2012). The Eighth and Tenth Circuits, by contrast, put the burden on the prisoner's shoulders, requiring "the plaintiff—not the defendant—to establish that sexual conduct is nonconsensual" when pleading a claim under the Eighth Amendment. *Works* v. *Byers*, 128 F.4th 1156, 1162 (10th Cir. 2025); *see also Freitas* v. *Ault*, 109 F.3d 1335 (8th Cir. 1997). And some federal district courts have held that consent is not a defense at all, such that a plaintiff need not plead it and a defendant would gain nothing by proving it. *See, e.g.*, *Riascos-Hurtado* v. *Raines*, 422 F. Supp. 3d 595, 599 n.2 (E.D.N.Y. 2019).

In the decision below, the Eighth Circuit affirmed the dismissal of Angela Richardson's complaint even though the complaint included allegations that would have stated a claim in the Sixth and Ninth Circuits. Richardson alleged that while incarcerated, she suffered from "[h]ate, discrimination, malice, retaliation, sexual assaults, [and] sexual harassment" at the hands of corrections officers. Pet. App. 42a. She confided in Corporal Krystle Reed Duncan, but Duncan exploited Richardson's vulnerabilities in pursuit of a romantic, and then sexual, relationship. *Ibid.* Duncan sent messages to Richardson; put money in Richardson's prison account; and allowed Richardson to stay in the medical unit, away from the general population, during Duncan's shifts. *Ibid.* Eventually, Richardson "gave in." Pet. App. 46a.

The Eighth Circuit is wrong to require that plaintiffs establish nonconsent. That rule defies common sense, a national consensus on the impropriety of *all* prisoner-staff sexual contact, and a raft of scholarship explaining that prisoners are uniquely vulnerable to coercion. The Eighth Amendment's prohibition of "cruel and unusual punishment" draws meaning from evolving standards of decency, *Hudson* v. *McMillian*, 503 U.S. 1, 10-11 (1992), with "the clearest and most reliable objective evidence of contemporary values" being "legislation," *Atkins* v. *Virginia*, 536 U.S. 304, 312 (2002) (citation omitted). Fifty states, the District of Columbia, and federal law agree: Sexual contact between prisoners and staff is unlawful, *regardless of* consent. The rebuttable presumption applied by the Sixth and Ninth Circuits better reflects this consensus.

This Court should intervene to correct the Eighth Circuit and resolve the split. The question presented is extremely important. Underenforcement of laws regulating prison officials' conduct combine with immense power disparity to make prisons "a tinderbox for sexual abuse." *J.K.J.* v. *Polk County*, 960 F.3d 367, 381-382 (7th Cir. 2020) (en banc). The Eighth Circuit's rule creates additional obstacles to holding prison officials responsible—a result that harms prisoners, prisons, and the public at large. And this case allows this Court to consider the issue on a clean record, unencumbered by the procedural hurdles that often plague Eighth Amendment litigation such as qualified immunity defenses or underdeveloped pro se claims. The federal courts have asked for "guidance from the Supreme Court." *Graham*, 741 F.3d at 1126. The Court should provide it.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 117 F.4th 1025. Pet. App. 1a-13a. The District Court's opinion is not reported but is available at 2023 WL 22612. Pet. App. 14a-15a.

JURISDICTION

The Eighth Circuit entered judgment on September 20, 2024. Pet. App. 1a. The Eighth Circuit denied a timely petition for panel rehearing or rehearing en banc on December 23, 2024. Pet. App. 38a. On March 18, 2025, this Court extended Petitioner's deadline to petition for a writ of certiorari to May 22, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment, U.S. Const. amend. VIII, provides:

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

STATEMENT

Angela Richardson, an Arkansas prisoner, filed the instant suit against Corporal Krystle Reed Duncan, a former prison security officer, alleging that Duncan violated Richardson's Eighth Amendment rights by sexually harassing and assaulting her. Pet. App. 41a-42a. Richardson's pro se complaint explained that the relationship included coercive factors, such as Duncan's offers of money and protection to Richardson. Duncan defaulted. However, the District Court refused to award Richardson relief, concluding that Richardson's complaint failed to state a claim because Richardson did not allege that her sexual

encounters with Duncan were nonconsensual. The Eighth Circuit affirmed for the same reason.

1. In February 2021, Angela Richardson, a prisoner being held by the Arkansas Department of Corrections, filed a lawsuit under 42 U.S.C. § 1983 against Krystle Reed Duncan, a former prison security officer at the Arkansas Department of Corrections.

Richardson's complaint alleged that while incarcerated in the Arkansas Department of Corrections, Richardson felt "targeted" by many of the prison's corrections officers. Pet. App. 42a. She eventually "confi[d]ed * * * in" Corporal Duncan, reporting that she had suffered from "sexual assaults[] [and] sexual harassment" at the hands of other corrections officers. *Ibid.* Corporal Duncan responded by pursuing a romantic and sexual relationship with Richardson. Pet. App. 42a, 46a. Duncan sent messages to Richardson; put money in Richardson's prison account; and allowed Richardson to stay in the medical facilities where Duncan was stationed, away from the general population, during Duncan's nearly nine-hour shifts. Pet. App. 42a. Duncan's pursuit continued for months. *Ibid.* Richardson ultimately "gave in." Pet. App. 46a. Richardson and Duncan kissed and Richardson "penetrat[ed] [Duncan's] vagina." Pet. App. 42a.

Based on these facts, Richardson's complaint alleged that Duncan had violated Richardson's Eighth Amendment rights. Richardson also alleged that she suffered emotional distress as a result of Duncan's actions. Richardson's hair began to fall out. Pet. App. 42a, 79a, 86a. The anxiety and depression that she

developed during the abuse continue to this day. Pet. App. 42a, 79a.

2. Duncan declined to answer the complaint or otherwise participate in the litigation. Pet. App. 3a. On Richardson's motion, the clerk of court entered a default. *Ibid.*

The District Court, acting through a magistrate judge, then scheduled an evidentiary hearing for Richardson to "clarify" her factual allegations and "to present evidence in support of her request for money damages." Pet. App. 18a.

At the hearing, Richardson testified in greater detail about the allegations in her complaint. Richardson explained that Duncan pursued Richardson for months, under the guise of providing her with protection. Pet. App. 59a, 62a-63a, 65a-66a. Duncan placed money in Richardson's account, kissed Richardson, and engaged Richardson in sexual acts that she "didn't want to go along with." Pet. App. 42a, 60a.

Richardson also testified that Duncan preyed on Richardson's fears that other corrections officers were targeting her. Duncan knew that Richardson had reported other officers for sexual misconduct and suffered retaliation in response. Pet. App. 46a, 59a-60a, 63a, 65a. Duncan used that knowledge to her advantage, telling Richardson in emails and letters that other prison officials were "after [her]" but that Duncan would keep her safe. Pet. App. 66a-67a.

Although Duncan did not physically force Richardson to engage in sexual activity, Richardson felt "trapped," and did not believe she was able to say no. Pet. App. 60a, 66a-68a. Richardson testified that Duncan "initiate[d] [the sexual activity] every time,"

even though Richardson "did not want to do [it]." Pet. App. 68a, 84a. "[N]ot one time did [Richardson] ever come on to [Duncan] or make any sexual advances," Pet. App. 90a; instead, Duncan "had her eyes on [Richardson] * * * the whole time," Pet. App. 63a-64a.

3. The magistrate judge recommended dismissal of Richardson's claim.

In articulating the applicable legal standards, the magistrate judge acknowledged that the Eighth Circuit approach to sexual contact claims differs from that of other courts. The magistrate judge noted that some courts hold "that consent is not a valid defense to a prisoner's sexual assault claim," and that others "employ a burden-shifting framework, where sexual conduct is presumed nonconsensual, but the defendant may rebut the presumption by showing that the conduct involved 'no coercive factors.' " Pet. App. 31a-32a n.13. But "the Eighth Circuit has neither adopted a per se rule that an inmate can never consent to sexual contact with a prison employee, nor sanctioned a burden-shifting framework that presumes non-consent." *Ibid*. "Instead, the law of [the Eighth] Circuit holds that * * * unsubstantiated assertions that the plaintiff succumbed to the defendant's sexual advances for fear of 'possible' negative consequences will not suffice" to state an Eighth Amendment claim. *Ibid*.

Applying that legal standard, the magistrate judge concluded that Richardson failed to state a claim because she "does not allege that [Duncan] used her position to threaten, intimidate, or pressure" Richardson into a sexual relationship. Pet. App. 32a.

The District Court adopted the magistrate judge's report and recommendation. Pet. App. 14a-15a.

4. Richardson appealed. The Court of Appeals invited the Arkansas Attorney General to file a brief as amicus curiae.

The Eighth Circuit affirmed in a divided opinion. *See generally* Pet. App. 1a-13a. Adopting the position that the Arkansas Attorney General had advanced in his amicus brief, the panel first concluded that *Freitas* v. *Ault*, 109 F.3d 1335 (8th Cir. 1997)—which held that "welcome and voluntary sexual interactions, no matter how inappropriate, cannot as matter of law constitute 'pain' as contemplated by the Eighth Amendment," *id.* at 1339—had not been overruled or otherwise abrogated by this Court's decision in *Wilkins* v. *Gaddy*, 559 U.S. 34 (2010) (per curiam). In *Wilkins*, this Court held that a claim of excessive force does not fail simply because a prisoner suffers only de minimis injury. 559 U.S. at 38-39. But, reasoning that sexual abuse claims should not be analyzed under the excessive-force framework, the Eighth Circuit concluded that *Wilkins* was inapposite. Pet. App. 6a-7a.

Applying *Freitas*, the panel majority then concluded that "Richardson failed to state a claim in her complaint because she did not allege that her sexual contact with Duncan was not consensual." Pet. App. 7a The panel majority accepted that "any relationship between a corrections officer and an inmate is fraught with potential for coercion due to the imbalance of power," but explained that "*Freitas* accepted that sexual interactions nonetheless could be 'welcome and voluntary,' and thus rejected a *per se* rule that prisoners are incapable of voluntary consent." Pet. App. 8a (quoting *Freitas*, 103 F.3d at 1339). "To state a plausible constitutional claim, therefore, a prisoner who recounts sexual contact that is outwardly consensual

must allege at least some manifestation of resistance by the prisoner or some act of coercion by the corrections official." *Ibid*. The panel majority concluded that "Richardson's complaint makes no such allegation"; Richardson's allegations regarding monetary gifts, safety, and fears of retaliation did not meet that standard. *Ibid*.

Judge Melloy dissented, explaining that the majority's test failed to account for whether Richardson's consent was "truly voluntary" or the product of coercion. Pet. App. 11a. Judge Melloy believed that several allegations "mitigate against finding a truly voluntary sexual relationship," including allegations that (1) "the defendant put money into [Richardson's] prison account," (2) Richardson was "reluctan[t] to report the relationship," and (3) "the defendant made [Richardson] feel safe." Pet. App. 11a-12a. Judge Melloy stated that he would have "remand[ed] for either the reinstatement of the default judgment or the opportunity for the plaintiff to have a counseled hearing to address the issue of whether she truly entered into a consensual sexual relationship with the defendant." Pet. App. 10a.

5. Richardson sought panel rehearing or rehearing en banc. The Eighth Circuit denied that request. Pet. App. 37a-38a. Judges Kelly and Erickson noted that they would have granted the petition for rehearing en banc.[1] *Ibid.*

This petition follows.

---

[1] Judge Melloy, who had dissented from the panel decision, assumed inactive senior status before the rehearing vote and did not participate in the process. Pet. App. 38a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR, ACKNOWLEDGED, AND ENTRENCHED CIRCUIT SPLIT ON THE QUESTION PRESENTED.

"[T]here is no consensus in the federal courts on whether, or to what extent, consent is a defense to an Eighth Amendment claim based on sexual contact with a prisoner." *Graham*, 741 F.3d at 1125. The Sixth and Ninth Circuits apply a rebuttable presumption that sexual contact between prisoners and prison staff is nonconsensual. The Eighth and Tenth Circuits require prisoners to affirmatively plead that the challenged contact was nonconsensual. The other federal courts of appeals have not yet taken a position, though some district courts within those circuits have held that sex between prisoners and prison officials is per se nonconsensual. This Court should grant certiorari to clarify the applicable standard.

A. The Sixth And Ninth Circuits Presume That Prisoner-Staff Sexual Contact Is Nonconsensual.

Two courts of appeals have adopted a presumption of nonconsent for Eighth Amendment claims of sexual contact between prisoners and prison staff. Defendants may rebut that presumption by showing the absence of coercive factors.[2]

1. In the Ninth Circuit, "when a prisoner alleges sexual abuse by a prison guard, * * * the prisoner is

[2] Although the Seventh Circuit has not decided the issue, it recently noted that "the Sixth and Ninth Circuit's approach" to Eighth Amendment claims of sexual misconduct "very well could be the best answer." *Walton* v. *Nehls*, 135 F.4th 1070, 1072 (7th Cir. 2025).

entitled to a presumption that the conduct was not consensual," which "[t]he state then may rebut * * * by showing that the conduct involved no coercive factors." *Wood* v. *Beauclair*, 692 F.3d 1041, 1049 (9th Cir. 2012). Although the Ninth Circuit has "not attempt[ed] to exhaustively describe every factor which could be fairly characterized as coercive," the court has suggested that "explicit assertions or manifestations of non-consent indicate coercion," as well as less explicit factors such as "favors, privileges, or any type of exchange for sex." *Ibid.* And "[u]nless the state carries its burden, the prisoner is deemed to have established the fact of non-consent." *Ibid.*

Thus, for example, in *Wood* v. *Beauclair*, the Ninth Circuit held that a prisoner was entitled to go to trial on an Eighth Amendment claim that a guard sexually abused him. *Wood* involved a female prison guard who pursued a male prisoner until "a romantic relationship developed." *Id.* at 1044. The two "would hug, kiss, and touch each other on the arms and legs." *Ibid.* The prisoner ended the relationship upon learning that the guard was married, but the guard still pursued him—twice entering into the prisoner's cell to "cup[] his groin" and "stroke[] his penis," then subjecting him to "a series of aggressive, vindictive, and sexual pat searches." *Id.* at 1044-45. The district court granted summary judgment for the guard—in part, because it concluded that the prisoner's prior relationship with the guard meant that the challenged contact "was not unwelcome per se." *Id.* at 1046 (internal quotation marks omitted). But the Ninth Circuit disagreed, "remand[ing] for a trial" because the guard failed to identify undisputed facts showing "that [her] conduct was not coercive," making summary judgment improper. *Id.* at 1049.

The Ninth Circuit reiterated that rule in *Bearchild* v. *Cobban*, explaining that a plaintiff may establish an Eighth Amendment sexual assault claim by "prov[ing] that a sexual assault occurred." 947 F.3d 1130, 1134-35, 1145 (9th Cir. 2020) (citing *Wood*, 692 F.3d at 1046). There, the prisoner alleged that a prison official violated the Eighth Amendment by stroking and groping the prisoner's genitals during a purportedly routine strip search. *Id.* at 1134-35. Citing *Wood*, the Ninth Circuit held that the jury instructions misstated the law because they injected additional elements into an Eighth Amendment claim, and required the plaintiff to do more than merely prove that the assaulting contact occurred. *Id.* at 1045.

2. The Sixth Circuit has also held that "a rebuttable-presumption framework regarding consent applies in cases involving sexual conduct between prison officials and incarcerated persons." *Hale*, 18 F.4th at 854 (applying framework to pretrial detainee); *see also Rafferty* v. *Trumbull County*, 915 F.3d 1087, 1095-96 (6th Cir. 2019) (applying framework to prisoner). Under this framework, the court presumes that "the [challenged] conduct was not consensual." *Hale*, 18 F.4th at 854 (internal quotation marks omitted). To rebut the presumption, "the defendant must affirmatively show that the incarcerated person consented." *Ibid.* That showing can be made with proof that the challenged conduct "involved no coercive factors," such as "explicit assertions or manifestations of non-consent" or "favors, privileges, or any type of exchange for sex." *Ibid.* (internal quotation marks omitted).

In *Hale* v. *Boyle County*, for example, the Sixth Circuit applied its rebuttable-presumption framework to reverse a grant of summary judgment to a court

security officer where evidence of coercion created a genuine dispute about whether the challenged conduct was consensual. 18 F.4th at 855. That case involved a court security officer who developed a sexual relationship with a pretrial detainee during car rides between the detention center and the detainee's pretrial diversion program. *Id.* at 848-850. The officer "never forced [the detainee] to do anything," and instead showered her with privileges and "comfort[]"—buying her soda, allowing her to sit cuffless in the front seat of his car, and offering to pursue a special plea deal for her with the prosecutor on her case. *Ibid.* The district court concluded that the absence of forced sex made the relationship "voluntar[y]" and granted the security officer summary judgment. *Id.* at 851. But the Sixth Circuit disagreed, holding that there was a genuine dispute about whether the challenged conduct was consensual. *Id.* at 855. As the court explained, the officer "provided [detainee] with sunshine, detours, cigarettes, sodas, and his mobile number"—all of which was "indicative of coercion." *Ibid.* Because "coercion can make a purportedly 'voluntary' act involuntary[,]" summary judgment was improper. *Ibid.* (citation omitted).

Similarly, in *Rafferty* v. *Trumbull County*, the Sixth Circuit held that a prisoner was entitled to go to trial on an Eighth Amendment claim that a corrections officer sexually abused her. 915 F.3d at 1091. The plaintiff alleged that the officer repeatedly demanded that she expose her breasts or masturbate while the officer watched. *Ibid.* The Sixth Circuit affirmed the district court's denial of summary judgment, holding that the officer was not entitled to judgment where he lacked undisputed facts showing that the sexual contact challenged was consensual. *Id.* at 1096.

B. The Eighth And Tenth Circuits Require Plaintiffs To Plead Nonconsent.

Two other courts of appeals "have charted a different course" than the Sixth and Ninth Circuits, "declining to adopt a presumption and leaving prisoners with the burden of establishing nonconsent." *Walton*, 135 F.4th at 1074.

1. The Tenth Circuit has held that "in this circuit, the burden remains on the plaintiff—not the defendant—to establish that sexual conduct is nonconsensual" when pleading a claim under the Eighth Amendment. *Works* v. *Byers*, 128 F.4th 1156, 1162 (10th Cir. 2025). Plaintiffs may, however, establish nonconsent with evidence that they "rejected [prison officials'] advances" or with "evidence of coercion." *Id.* at 1164.

The Tenth Circuit first announced that rule in *Graham* v. *Sheriff of Logan County*, where two prison officials argued they were entitled to summary judgment on a prisoner's Eighth Amendment claim because the challenged sexual contact was consensual. 741 F.3d at 1120, 1124-26. The Tenth Circuit held that plaintiffs alleging sexual abuse under the Eighth Amendment must prove "some form of coercion * * * by the prisoner's custodians." *Id.* at 1126. According to the Tenth Circuit, the plaintiff's failure to make that showing entitled the two prison officials to summary judgment. In doing so, the court discounted undisputed evidence that the plaintiff "did not want to have sex" with one of the officials and that the officials provided the plaintiff with "favors" during the period when the disputed contact occurred. *Id.* at 1123-24. Rather than concluding that this evidence created a dispute of fact regarding the plaintiff's consent, it concluded that the plaintiff's evidence could

"[]not undermine the other overwhelming evidence of consent." *Id.* at 1124.

The Tenth Circuit employed similar reasoning in *Works* v. *Byers*, where it affirmed a district court's denial of a detention officer's assertion of qualified immunity with respect to sexual contact with a prisoner. 128 F.4th at 1160-61. The plaintiff alleged that the defendant sexually penetrated her "four to five times" without her consent. *Id.* at 1161. The Tenth Circuit reviewed the factual record de novo because it concluded the district court "legally erred" by "shift[ing] the burden" of proving consent to the officer. *Id.* at 1162. The court nonetheless determined that the plaintiff "met her burden" by showing that a lack of consent made the prison official's conduct "objectively harmful." *Id.* at 1165. The plaintiff presented evidence that she resisted the guard's sexual advances; expressly told the guard that she did not "want to do this," *id.* at 1161; and that the assault had occurred during "inherently coercive" conditions, *id.* at 1164 (internal quotation marks omitted). For example, the prison guard "ordered [plaintiff] out of her cell to the laundry room," and "physically blocked the door" to make her feel like "she could not leave." *Ibid.*

2. The Eighth Circuit similarly holds that "[t]o state a plausible constitutional claim, * * * a prisoner who recounts sexual contact that is outwardly consensual must allege some manifestation of resistance by the prisoner or some act of coercion by the corrections official." Pet. App. 8a. An official's actions are sufficiently "coercive" when they are expressly done "in exchange for sex." Pet. App. 7a-10a.

In the decision below, for example, the panel majority affirmed the District Court's dismissal of

Richardson's Eighth Amendment claim because it concluded that her interactions with Duncan were outwardly consensual. *Ibid.* The court discounted Richardson's allegations of coercion—including that she "went along with the relationship due to her weakness and feeling safe with Officer [Duncan]" and that "Duncan placed money in [Richardson's] prison account at times"—because Richardson did not allege that Duncan provided gifts or protection "*in exchange* for sex." Pet. App. 7a-8a (emphasis added).

Similarly, in *Freitas* v. *Ault*, the Eighth Circuit held that a plaintiff did not suffer an Eighth Amendment violation because he failed to prove that his sexual contact with a prison official was nonconsensual. 109 F.3d at 1336. The plaintiff presented evidence that the official met him "in secluded areas of [the prison], where they would kiss, hug, and talk." *Ibid.* The court nonetheless affirmed the district court's entry of judgment for the defendant, holding that the plaintiff produced "no evidence, other than [his] unsubstantiated assertions, supporting his claim that he succumbed to [the official's] advances because she was his boss and he feared the possible negative consequences of reporting her actions." *Id.* at 1339.

C. Federal District Courts In The Second And Third Circuits Reject A Consent Defense.

Other courts of appeals have not yet taken a position on the split. However, district courts within the Second and Third Circuits have issued oft-cited decisions holding that consent is *never* a defense to Eighth Amendment claims of sexual contact. *See Riascos-Hurtado* v. *Raines*, 422 F. Supp. 3d 595, 599 n.2 (E.D.N.Y. 2019); *Carrigan* v. *Davis*, 70 F. Supp. 2d

448, 452-453 (D. Del. 1999); *Cash* v. *County of Erie*, No. 4-cv-182-JTC, 2009 WL 3199558, at *2 (W.D.N.Y. Sept. 30, 2009).

1. The district courts who have adopted a per se rule invoke two justifications for doing so. *First*, prisons and their employees owe a special duty of care to those in their custody. *Carrigan*, 70 F. Supp. 2d at 458. By "tak[ing] a person into custody and hold[ing] him or her there against his or her will," the State assumes a "corresponding duty to assume some responsibility for his safety and general well-being." *Ibid.* (quoting *DeShaney* v. *Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 197-200 (1989)). Officials compromise that duty of care when they pursue sexual contact with those in their custody. *See ibid. Second*, the pronounced power imbalance between prisoners and prison officials makes it impossible for sexual contact to be truly voluntary. *Id.* at 458-459. Unlike a prisoner, who has an "utter lack of control * * * over basic aspects of his or her life," a prison and its employees assume "*complete* control * * *over the inmate." *Id.* at 458 (emphasis added); *see also, e.g.*, *Riascos-Hurtado*, 422 F. Supp. 3d at 599 n.2. As a result, prisoners are simply "incapable" of voluntarily consenting to sexual contact with their custodians. *Carrigan*, 70 F. Supp. 2d at 460; *see also Riascos-Hurtado*, 422 F. Supp. at 599 n.2; *Cash*, 2009 WL 3199558, at *2.

For example, in *Carrigan* v. *Davis*, a district court judge in the District of Delaware granted a plaintiff judgment as a matter of law on her Eighth Amendment challenge to a prison official's sexual misconduct, explaining that the parties' dispute over consent was "of no import," because sexual intercourse between a prisoner and a prison guard—"whether

consensual or not"—"is a per se violation of the Eighth Amendment." 70 F. Supp. 2d at 452-453. Similarly, in *Cash* v. *County of Erie*, a district court judge in the Western District of New York issued a default judgment against a corrections officer who assaulted and raped a prisoner in his custody. 2009 WL 3199558, at *1, *4. Invoking *Carrigan*, the court noted that the defendant—had he appeared—would have lacked any consent defense to the plaintiff's Eighth Amendment claim. *Id.* at *2. "Because plaintiff was incarcerated, she lacked the ability to consent to engage in sexual intercourse with [the prison guard] as a matter of law." *Ibid.*

2. Although no court of appeals has yet adopted this position, several have seriously considered it. The Seventh Circuit recently opined on the virtues of a per se test in *Walton* v. *Nehls*. 135 F.4th at 1075. And although the court ultimately declined to adopt one rule over another, it acknowledged that a per se rule "would comport with both the judgment of our country's legislatures and Eighth Amendment case law recognizing the inherent vulnerability of prisoners." *Ibid.* Reiterating the power imbalance identified in *Carrigan* and *Cash*, *Walton* explained that prisoners' dependence on prison officials "for nearly everything in their lives" makes them "inherently vulnerable"—"especially in relation to prison officials." *Ibid.* (citation omitted).

The Ninth Circuit similarly considered a per se rule, going so far as to say that it "agree[d] with the underlying rationale" of cases like *Carrigan* and *Cash*. *Wood*, 692 F.3d at 1047. Because of "[t]he power dynamics between prisoners and guards," and the frequency with which favors are traded for sex, "it is

difficult to characterize sexual relationships in prison as truly the product of free choice." *Ibid.* The court ultimately adopted the rebuttable presumption framework, but "underst[ood] the reasons behind a per se rule that would make prisoners incapable of legally consenting to sexual relationships with prison officials." *Id.* at 1048.

II. THE COURT SHOULD GRANT CERTIORARI NOW.

A. The Question Presented Is Important.

The facts of this case are egregious, but they are not unusual. The pronounced power disparity between prisoners and prison staff is why one court described prisons as "a tinderbox for sexual abuse." *J.K.J.*, 960 F.3d at 381-382. With authority and control comes "power and, in turn, access and opportunity to abuse it." *Ibid.* "The imbalance between guards and prisoners allows guards to coerce sex through material inducements that are strikingly petty"—favorable work assignments, a cigarette, a piece of gum. Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 Harv. C.R.-C.L. L. Rev. 45, 56 (2007). In women's prisons, in particular, sexual abuse by guards "is so notorious and widespread that it has been described as 'an institutionalized component of punishment behind prison walls.' " *Id.* at 45 (quoting Angela Davis, *Public Imprisonment and Private Violence: Reflections on the Hidden Punishment of Women*, 24 New Eng. J. on Crim. & Civ. Confinement 339, 350 (1998)).

The Eighth and Tenth Circuits exacerbate this problem for a significant portion of the country's prison population. The states in these circuits house nearly 140,000 prisoners—14% of all prisoners in

State custody across the country. U.S. Dep't of Just., Bureau of Just. Stats., *Census of State and Federal Adult Correctional Facilities, 2019—Statistical Tables*, at 20-21 (Nov. 2021). Barring prisoners from seeking civil redress for sexual misconduct without affirmatively pleading and proving nonconsent risks deterring serious claims of sexual misconduct and withholding accountability from legitimate wrongdoers. *See* Buchanan, *supra* p. 19, at 66-69, 85-86.

Withholding accountability from wrongdoers is also bad for prisons, the people who work there, and society as a whole. Prisoner-staff relationships often introduce contraband into prisons, which diverts scarce resources to ferreting out dangerous items and substantially undermines the safety of prisoners and prison officials alike. Nat'l Prison Rape Elimination Comm'n, *National Prison Rape Elimination Commission Report* 26 (2009); Beth A. Colgan, *Public Health and Safety Consequences of Denying Access to Justice for Victims of Prison Staff Sexual Misconduct*, 18 UCLA Women's L.J. 195, 226-228 (2012). Moreover, the costs of sexual contact between prisoners and prison staff—including "serious mental health issues, infectious disease, and an increased likelihood of recidivism"—are eventually born by the public, as "[u]pwards of 95 percent of all people in prison are ultimately released." Colgan, *supra*, at 218.

B. This Case Is A Good Vehicle.

This case does not feature any of the barriers to review that often exist in Eighth Amendment cases.

First, the question presented is preserved and was the sole basis for the dismissal of Richardson's Eighth Amendment claim. Because these claims are rarely

counseled, many cases are underdeveloped and are resolved in thinly reasoned decisions. Here, however, the question presented was both pressed and passed upon below. Moreover, the magistrate judge's independent analysis of the issue, adopted by the District Court, and the Arkansas Attorney General's appearance as amicus curiae on appeal ensured that the issue was fully litigated notwithstanding Duncan's default.[3]

Second, the facts are undisputed. Duncan declined to file an answer below and thus admitted that she initiated a romantic relationship with Richardson, engaged in prohibited sexual contact, and provided Richardson with money and gifts throughout. *See* Pet. App. 42a; Fed. R. Civ. P. 8(b)(6). The sole question presented by this case is a legal one: whether these "unchallenged facts constitute a legitimate cause of action." Pet. App. 7a (quoting *Marshall* v. *Baggett*, 616 F.3d 849, 852-853 (8th Cir. 2010)).

Third, this case is uncomplicated by any assertion of a qualified-immunity defense, which often frustrates review of prisoners' constitutional claims. *See, e.g.*, *Naisha* v. *Metzger*, No. 20-3056, 2021 WL 5632063, at *2 (3d Cir. 2021) (per curiam) (affirming in part district court's finding of qualified immunity because

[3] Although Duncan did not participate in the litigation below, this Court can appoint an amicus curiae to defend the Eighth Circuit's judgment. *See, e.g.*, *Parrish* v. *United States*, 145 S. Ct. 1158, 1158 (2025) (appointing counsel to brief and argue a case as amicus curiae where the government declined to defend the court of appeals decision); *Bowe* v. *United States*, 145 S. Ct. 1161, 1161-62 (2025) (same); *New York* v. *Harris*, 492 U.S. 934, 934-935 (1989) (appointing counsel to brief and argue case as amicus curiae where respondent declined to appear); *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 487 U.S. 1231, 1231 (1988) (same).

transgender female prisoner lacked a clearly established right "not to be visually stripsearched by a male officer"); *Shannon* v. *Venettozzi,* 749 F. App'x 10, 12-13 (2d Cir. 2018) (affirming dismissal of prisoner's Eighth Amendment claim because prisoner lacked clearly established right to be free from a "single instance" of unwanted sexual contact); *Copeland* v. *Nunan,* No. 00-20063, 2001 WL 274738, at *3 (5th Cir. 2001) (per curiam) (holding that officer was entitled to qualified immunity because it was not clearly established that "isolated and uninvited sexual touchings with little* * * physical or psychological damage" violated the Eighth Amendment).

C. The Courts Of Appeals Have Repeatedly Asked For This Court's Guidance On The Question Presented.

The Ninth Circuit consciously broke with the Eighth Circuit in 2012, explaining in *Wood* that it rejected the Eighth Circuit's approach because the court "f[ou]nd it problematic that [the Eighth Circuit in] *Freitas* utterly failed to recognize the factors which make it inherently difficult to discern consent from coercion in the prison environment." 692 F.3d at 1048.

Over the decade that the split has persisted, multiple courts of appeals have acknowledged the split and asked for this Court's intervention. Indeed, just one year after *Wood*, the Tenth Circuit observed that "[o]ther courts are divided in their approach to consensual sexual intercourse between guards and inmates," and after an exhaustive survey of its sister circuits' decisions, wished for "guidance from the Supreme Court." *Graham*, 741 F.3d at 1124-26. And earlier this month, the Seventh Circuit acknowledged

the conflict but declined to "choose a side," predicting that "the Supreme Court is sure to resolve the split." *Walton*, 135 F.4th at 1074.

Other courts have joined the chorus of confusion, lamenting the lack of a consensus on the right answer to this important question. *See, e.g.*, *Richardson* v. *Stirling*, No. 9:22-cv-00807-TMC-MHC, 2023 WL 5737650, at *10 (D.S.C. July 17, 2023) (explaining that there is "little controlling authority in this Circuit addressing sexual abuse and harassment claims under the Eighth Amendment"), *report and recommendation adopted in part, rejected in part*, No. 9:22-CV-0807-TMC, 2023 WL 5663164 (D.S.C. Sept. 1, 2023); *Walker* v. *County of Gloucester*, 581 F. Supp. 3d 673, 678 (D.N.J. 2022) (adopting a rebuttable-presumption framework because the court "found no recent circuit court opinions that readily conflict with [*Wood*'s] view"); *Landau* v. *Lamas*, No. 3:15-CV-1327, 2018 WL 8949295, at *7 (M.D. Pa. Oct. 4, 2018) (noting the "complexities and uncertainties" of evaluating prisoner consent to sexual contact by prison officials).

III. THE EIGHTH CIRCUIT RESOLVED THE QUESTION PRESENTED INCORRECTLY.

The Eighth Amendment does not require plaintiffs alleging sexual misconduct to affirmatively plead non-consent. A contrary conclusion flouts standards of decency reflected in state and federal laws—all of which criminalize prisoner-staff sexual relationships, regardless of consent. Curtailing prisoners' ability to allege coercion only makes matters worse, ignoring the immense, unspoken pressure on prisoners to relent to sexual advances by their custodians.

A. The Eighth Amendment Requires A Rebuttable Presumption Of Nonconsent.

1. The Eighth Amendment prohibits prison officials from inflicting "cruel and unusual punishments" on prisoners. U.S. Const. amend. VIII. "Punishments 'incompatible with the evolving standards of decency that mark the progress of a maturing society' or 'involv[ing] the unnecessary and wanton infliction of pain' are 'repugnant to the Eighth Amendment.' " *Hudson* v. *McMillian*, 503 U.S. 1, 10-11 (1992) (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 102-103 (1976)).

Eighth Amendment challenges generally fall into three broad categories. One type of claim arises when prison staff exhibit "deliberate indifference to serious medical needs of prisoners." *Estelle*, 429 U.S. at 104. A closely related type of case involves challenges to prisoners' conditions of confinement. *See Hope* v. *Pelzer*, 536 U.S. 730, 737-738 (2002). A third type of claim asserts that prison staff used excessive force against a prisoner. *See Hudson*, 503 U.S. at 5-6.

Courts generally evaluate claims of prisoner-official sexual contact under the excessive force framework. *Ullery* v. *Bradley*, 949 F.3d 1282, 1290 (10th Cir. 2020) (collecting cases). That framework has two components: (1) an objective inquiry that asks "if the alleged wrongdoing was objectively 'harmful enough' to establish a constitutional violation," and (2) a subjective inquiry which asks whether "the officials act[ed] with a sufficiently culpable state of mind." *Hudson*, 503 U.S. at 8 (quoting *Wilson* v. *Seiter*, 501 U.S. 294, 298, 303 (1991)).

The objective prong "draw[s] its meaning from the evolving standards of decency that mark the progress

of a maturing society." *Rhodes* v. *Chapman*, 452 U.S. 337, 346 (1981) (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality op.)). It does not require a prisoner to show a "significant injury" to pursue an Eighth Amendment claim. *Wilkins*, 559 U.S. at 37. Instead, the inquiry centers on the "nature of the force" used. *Id.* at 39. A minor injury can support an Eighth Amendment claim if the force used is "nontrivial and was applied maliciously and sadistically to cause harm." *Ibid.* (ellipsis and internal quotation marks omitted).

The subjective prong turns on whether the officer acted maliciously and sadistically. Where a prison employee's conduct serves no legitimate penological purpose, the conduct itself is sufficient evidence that force was used "maliciously and sadistically for the very purpose of causing harm." *Whitley* v. *Albers*, 475 U.S. 312, 320-321 (1986) (citation omitted).

2. The Eighth Amendment requires courts to, at minimum, apply a rebuttal presumption of nonconsent to sexual contact claims.

This conclusion flows from the Court's well-settled standard for determining whether conduct is "objectively, 'sufficiently serious' " enough to violate the Eighth Amendment. *Farmer* v. *Brennan*, 511 U.S. 825, 834 (1994) (quoting *Wilson*, 501 U.S. at 298). Conduct is sufficiently serious—or objectively harmful—if it is "incompatible with the evolving standards of decency that mark the progress of a maturing society." *Hudson*, 503 U.S. at 10 (quoting *Estelle*, 428 U.S. at 102-103). The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins* v.

Virginia, 536 U.S. 304, 312 (2002) (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989)).

Here, the moral values of the people could not be clearer: All 50 states and the District of Columbia make it a crime for prison officials to engage in sexual activity with prisoners, *regardless* of consent.[4] Arkansas, where Richardson is incarcerated, is no exception. Ark. Code Ann. § 5-14-127(a)(2) (criminalizing "sexual contact" committed by an employee of "the Division of Correction" where "the victim is in the custody of the Division of Correction"). Federal law is in accord. The Prison Rape Elimination Act of 2003 (PREA) creates "a zero-tolerance standard for the incidence of prison rape in prisons in the United States" and "protect[s] the Eighth Amendment rights of Federal, State, and local prisoners." 34 U.S.C. § 30302(1), (7). And the PREA Prisoners and Jail Standards define sexual abuse of an incarcerated person by a staff member as encompassing a range of sexual acts, "*with or without consent* of the inmate, detainee, or resident." 28 C.F.R. § 115.6 (emphasis added). This alignment of federal and state priorities illustrates that "the sexual abuse of prisoners, once overlooked as a distasteful blight on the prison system, offends our most basic principles of just punishment." *Crawford* v. *Cuomo*, 796 F.3d 252, 260 (2d Cir. 2015).

A rebuttable-presumption framework also helps ensure that the Eighth Amendment's objective and subjective inquiries remain distinct. Under this framework, plaintiffs may satisfy the objective prong by identifying sexual contact with a prison official—a purely objective inquiry. But they must still allege

---

[4] *See Walton*, 135 F.4th at 1079-81 (collecting statutes).

that the defendant acted "with a 'sufficiently culpable state of mind.' " *Rafferty*, 915 F.3d at 1094 (quoting *Farmer*, 511 U.S. at 834); *see also id.* at 1096 (analyzing the objective prong separate from the subjective prong). A plaintiff could satisfy this requirement with allegations that the sexual contact was nonconsensual or with other allegations bearing on the defendant's state of mind, such as the existence of coercive factors. By contrast, courts that require plaintiffs to affirmatively plead nonconsent tend to collapse the objective and subjective inquiries. In *Works*, for example, the Tenth Circuit held that the plaintiff's evidence of nonconsent was sufficient to defeat summary judgment on the objective *and* subjective elements of her Eighth Amendment claim. 128 F.4th at 1163-65. And in *Graham*, the Tenth Circuit rejected a plaintiff's Eighth Amendment claim—not based on whether the plaintiff consented to sexual contact—but whether the defendant *knew* that she did not consent. 741 F.3d at 1123. Keeping the objective prong objective would help avoid this analytical misstep.

B. A Rebuttable Presumption Aligns The Eighth Amendment's Protections With Other Constitutional Guarantees.

1. A rebuttable-presumption framework keeps the Eighth Amendment analysis in sync with other constitutional protections. As the Seventh Circuit recently explained, "the Supreme Court frequently applies such presumptions when fleshing out the scope of constitutional rights." *Walton*, 135 F.4th at 1076.

Rights enshrined in the First, Second, Fourth, and Fourteenth Amendments are regularly subject to burden-shifting presumptions. In *New York State Rifle & Pistol Ass'n* v. *Bruen*, for example, the Court explained

that the Second Amendment "presumptively protects" the individual right to bear arms. 597 U.S. 1, 24 (2022). So, too, in the Fourth Amendment context, where this Court deems warrantless searches to be "presumptively unreasonable." *United States* v. *Karo*, 468 U.S. 705, 717 (1984). Tiers of scrutiny likewise "operate as burden-shifting presumptions." *Walton*, 135 F.4th at 1076 (collecting cases). The framework places a thumb on the scale of the rights protected by the Constitution, while maintaining "the sort of flexible approach that constitutional law requires." *Id.* at *4.

2. A rebuttable-presumption framework is also consistent with the rule that courts should "proceed cautiously in making an Eighth Amendment judgment." *Rhodes*, 452 U.S. at 351.

The standard is a middle-ground approach which forgoes categorical rules while keeping the Eighth Amendment in step with a society that punishes prison staff for pursuing sexual relationships with prisoners and with a robust body of literature recognizing prisoners as particularly susceptible to coercion and abuse. *See Miller* v. *Alabama*, 567 U.S. 460, 471 (2012) (explaining that "science and social science" inform the Court's exercise of its independent judgment"); *see also, e.g.*, Katherine A. Heil, *The Fuzz(y) Lines of Consent: Police Sexual Misconduct with Detainees*, 70 S.C. L. Rev. 941, 948-949 (2019) (describing prisoners' susceptibility to coercion); Buchanan, *supra* p. 19, at 51-57 (similar). Indeed, the framework *presumes* that the prison official bears some responsibility for engaging in sexual contact forbidden by federal and state law but allows officials to show that they did not use coercion to secure a prisoner's consent

to the unlawful encounter. *See Hale*, 18 F.4th at 854; *Wood*, 692 F.3d at 1049. Officials can make this showing with evidence that their conduct involved "no coercive factors." *Hale*, 18 F.4th at 854 (citation omitted); *Wood*, 692 F.3d at 1049.

3. The Eighth Circuit's contrary approach "utterly fail[s] to recognize the factors which make it inherently difficult to discern consent from coercion in the prison environment." *Wood*, 692 F.3d at 1048. In the Eighth Circuit's view, plaintiffs alleging that their "consent" to a prison official's advances was the result of coercion must allege that the defendant "used force, intimidation, or threats of retaliation to procure sexual activity" or that the defendant expressly offered privileges or protection "in exchange for sex." Pet. App. 7a-8a.

Requiring Eighth Amendment plaintiffs to affirmatively allege nonconsent undersells the inherently vulnerable position of prisoners that this Court and others have long recognized. The prison environment strips prisoners "of virtually every means of self-protection and foreclose[s] their access to outside aid." *Farmer*, 511 U.S. at 833; *see also Maryland* v. *Shatzer*, 559 U.S. 98, 127 (2010) (Stevens, J., concurring in the judgment) (explaining that "[p]risoners are uniquely vulnerable to the officials who control every aspect of their lives"). Indeed, prisoners depend on prison officials "for nearly everything"—"their safety as well as their access to food, medical care, recreation, and even contact with family members." *J.K.J.*, 960 F.3d at 381; *see also Wood*, 692 F.3d at 1047 ("[Prisoners] depend on prison employees for basic necessities, contact with their children, health care, and protection from other

inmates.") Given the immense control prison officials wield over prisoners, the absence of an express allegation of nonconsent is a poor metric for determining whether a "sexual relationship[] in prison [i]s truly the product of free choice." *Wood*, 692 F.3d 1047.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GEOFFREY D. KEARNEY
THE LAW OFFICE OF
GEOFFREY D. KEARNEY,
PLLC
P.O. Box 8276
Pine Bluff, AR 71611
gdk@gdkpllc.com

JO-ANN TAMILA SAGAR
Counsel of Record
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
jo-ann.sagar@hoganlovells.com

JACKSON B. SKEEN
HOGAN LOVELLS US LLP
125 High Street,
Suite 2010
Boston, MA 02110

JOHANNAH CASSEL-WALKER
HOGAN LOVELLS US LLP
4 Embarcadero Center,
Suite 3500
San Francisco, CA 94111

Counsel for Petitioner

MAY 22, 2025