

No. 24-1207

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**

**BRIEF OF AMICI CURIAE EXPERT SCHOLARS, PSY-
CHOLOGISTS, PSYCHIATRISTS, AND FORMER COM-
MISSIONERS AND SECRETARIES OF DEPARTMENTS
OF CORRECTIONS IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICI CURIAE*¹

The *amici curiae* are expert scholars, psychologists, psychiatrists, and former department of corrections commissioners, secretaries, and officers who have significant professional experience with the issues presented here. They have devoted their lives to the betterment of incarcerated populations, interviewed thousands of prisoners, and managed some of the largest and most dangerous correctional facilities in the United States. They are experts in the field of consent in the prison setting and in managing, treating, and addressing the problems the issue presented poses to incarcerated populations. They support the petitioner, and urge the court to grant the petition and decide this case in a manner consistent with the reality that there is no such thing as consensual sex between a prisoner and a prison official.

- **Dr. Sharen Barboza** is a clinical and consulting psychologist providing expert opinions on the delivery of mental health services in correctional settings. She has served as a court-appointed mental health expert, a psychologist in a maximum security prison, the chief psychologist at a maximum security psychiatric hospital, and a mental health executive for many correctional systems. Dr. Barboza also serves on numerous committees for the National Commission on Correctional Health Care (NCCHC). She received her B.S. in Psychology and M.S. in

¹ Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention of *amici* to file this brief.

Experimental Psychology from Tufts University and her Ph.D. in Clinical Psychology from Fairleigh Dickinson University.

- **Patricia L. Caruso** is the lead facilitator for the Warden Peer Interaction Training program at Sam Houston State University and the facilitator of the National Institute of Corrections flagship leadership program: “Executive Excellence.” Director Caruso joined the Michigan Department of Corrections in 1988 and served in several capacities including three years as business manager, nine years as warden, two years as regional prison administrator, and ten months as deputy director. She was appointed Director of the Department by Governor Jennifer Granholm in 2003 and served in that position through 2010. She is a Past President of the Association of Women Executives in Corrections, the Correctional Leaders Association, and the American Correctional Association. Director Caruso was awarded the ACA’s ER Cass Award, which recognizes lifetime achievement in the corrections field. She received a B.A. in political science and sociology from Lake Superior State University and a Master of Arts in comprehensive occupational education from the University of Michigan.
- **Dr. Kathleen Dennehy** is the former Commissioner and Chief Executive Officer for the Commonwealth of Massachusetts Department of Correction. Dr. Dennehy has worked in the criminal justice system for 48 years and has been a consultant for justice and correctional systems for over 25 years. She also has taught courses on criminal justice at the

undergraduate and graduate levels. Dr. Dennehy testified before the Prison Rape Elimination Act (PREA) Commission concerning the culture of corrections and the need for reform. She earned a Bachelor of Arts from Wheaton College, a Masters in Public Administration from Suffolk University, and a Masters and a Ph.D. from Brandeis University. Dr. Dennehy recently served for 6 1/2 years as an independent federal court monitor, and she now serves as an expert witness in prison-based sexual abuse cases nationwide.

- **Dr. Craig Haney** is a Distinguished Professor of Psychology at the University of California, Santa Cruz. In work that began as a principal researcher on the Stanford Prison Experiment, he is widely known for his research on the psychology of imprisonment. Dr. Haney has toured and inspected correctional facilities in most of the state and federal jurisdictions in the United States and interviewed several thousand prisoners about the effects of their conditions of confinement and treatment in prison, including issues involving sex and consent. He has served as an expert witness in many landmark cases establishing the constitutional rights of prisoners, and his research and testimony have been cited by many courts, including the U.S. Supreme Court in *Brown v. Plata*, 563 U.S. 493 (2011). Dr. Haney received his M.A., Ph.D., and J.D. from Stanford University and his B.A. from the University of Pennsylvania.
- **Martin Horn** is a distinguished lecturer in corrections at the John Jay College, City University of New York, and serves as Executive

Director of the New York State Sentencing Commission. He was appointed by Mayor Michael Bloomberg to serve as the Commissioner of the New York City Department of Probation and as Commissioner of the New York City Department of Correction. Mr. Horn also has served as Pennsylvania's Secretary of Corrections, Superintendent of Hudson Correctional Facility, CEO for the New York State Division of Parole, co-chair of the American Bar Association Corrections Committee, and head of Rikers Island prison. Mr. Horn received his M.A. from John Jay College and B.A. from Franklin & Marshall College.

- **Dr. Terry Kupers** is a board-certified psychiatrist, Professor Emeritus at the Wright Institute, Distinguished Life Fellow of the American Psychiatric Association, and leading authority on the psychiatric effects of prison conditions and correctional mental health issues. Dr. Kupers has served as a psychiatric expert witness in multiple lawsuits concerning sexual consent in prisons. He has interviewed over one hundred incarcerated individuals around the country about prison and jail conditions, including sexual abuse, misconduct, and retaliation, and has served as a consultant to the U.S. Department of Justice and Human Rights Watch on various prison confinement issues. Dr. Kupers received his B.A. from Stanford University and his M.D. and M.S.P. Social Psychiatry from the University of California, Los Angeles.
- **Dan Pacholke** is an expert in corrections who has served as the Secretary of the Washington

State Department of Corrections, the top position within the Department, and the Superintendent of the Stafford Creek Corrections Center. Mr. Pacholke has worked in the Department of Corrections for over three decades, starting as a correctional staff officer and working his way up to top management roles. As co-author of *Keeping Prisons Safe: Transforming the Corrections Workspace* (2014), Mr. Pacholke has introduced programs to reduce correctional violence, created policies to redesign prison facilities to maximize positive interactions between staff and prisoners, and taught correctional staff response techniques to negative prisoner conduct. Mr. Pacholke holds a bachelor's degree from Evergreen State College.

- **Dr. Ryan Quirk** is the Chief of Forensic Psychology for the Washington State Department of Corrections (WADOC). Dr. Quirk began his mental health career in corrections as a psychologist with WADOC. While there, his work focused on providing mental health care to incarcerated individuals living in restrictive housing settings and classified as “maximum custody.” He has served as the Psychiatric & Social Services Manager for King County Public Health-Jail Health services in Seattle, Washington. While in that position, he participated in the annual PREA Compliance audits, as well as the monthly administrative reviews of PREA-related incidents. Dr. Quirk has reviewed and written correctional mental health policies and procedures, including those related to compliance with the PREA. He has assessed hundreds of patients in response to PREA-related incidents. He also has published and

presented on topics pertaining to correctional mental health care. He has served as a consultant on the subject of correctional mental health, both to facilitate training and to provide technical assistance, and he has been retained as a psychological expert in civil litigation. Dr. Quirk received his B.S. from Fordham University and his Ph.D. in School and Clinical Psychology from Hofstra University.

- **Eldon Vail** is the former Secretary of the Washington State Department of Corrections. He has more than 40 years of experience in the field of corrections and has served as an expert witness in many prison-related cases across the country.
- **Roger Werholtz** is the former Director of Corrections in Kansas and Colorado and the former Deputy Secretary of Corrections in Kansas. Mr. Werholtz supervised all three divisions of the Kansas Department of Corrections—Community and Field Services, Programs and Staff Development, and Facilities Management. He also has served as a graduate level instructor at the University of Kansas School of Social Welfare, and he has experience in community mental health and child protective services as well as substance abuse treatment and prevention.

INTRODUCTION

The petition asks the Court to decide a fundamentally important issue affecting countless people, now and in the future: whether individuals who are incarcerated, with little or no power over their physical persons, actions, or movement, have the capacity to consent to sex with, and sexual advances by, corrections staff who control nearly every aspect of their lives. The answer is no.

Amici are experts in the corrections field and on the issue of consent that the petition presents. They also spent their professional lives interacting with the very people that the question presented affects. *Amici* therefore serve not only as experts, but as channels for the firsthand experiences of the incarcerated.

They submit this brief to underscore the importance of the question presented, to urge the Court to grant the petition and, ultimately, to render a decision recognizing that sexual consent between prisoners and prison staff does not and cannot exist.

The petition raises important issues regarding the nature of the relationship between prison staff and incarcerated individuals. The country has an extremely large prison population that is affected by this relationship as a matter of daily life. The question of whether it is possible for an incarcerated individual to consent to sexual relations with prison staff arises repeatedly, as illustrated by the Circuit split addressing whether a prison official may raise consent as a defense to an Eighth Amendment claim alleging sexual abuse.

Based on their substantial experience and expertise, *amici* conclude that the power dynamics of the prison setting foreclose the possibility that an

incarcerated individual can consent to sex with prison staff. Staff have the power to offer inducements, such as privileges that others do not receive, to incarcerated individuals who engage in a sexual relationship with them. Staff also have the power to withhold basic rights—such as going to the commissary, receiving visitors, or making phone calls—from prisoners who refuse sexual advances. Because staff exercise plenary control over nearly all aspects of an incarcerated individual’s life, the idea that an incarcerated person can consent to a sexual relationship with prison staff is a fiction.

Further, as experts in prison administration, *amici* have learned that anything less than a strong constitutional deterrent to sexual relations between prison staff and the incarcerated population destabilizes prison operations by fomenting violence between individuals who are receiving special privileges for sex and those who are not, and by eroding the integrity of staff’s authority to enforce prison rules.

The Eighth Amendment is the constitutional backstop against mistreatment of the vulnerable incarcerated population, and it must acknowledge and reflect the realities of the power dynamics between prison staff and incarcerated individuals. This case presents the ideal vehicle for this Court to enshrine that principle.

ARGUMENT

This Case Offers The Opportunity To Recognize That An Incarcerated Individual Cannot Consent To Sex With Prison Officials, And To Construe The Eighth Amendment To Provide Meaningful Protection Against Destructive Behavior.

Nearly two million Americans are currently incarcerated, and nearly one out of every twenty Americans will spend time in prison during their lifetime.² A ruling from this Court that consent cannot exist when prison officials seek sex from prisoners will protect the Eighth Amendment rights of this nation's vast incarcerated population.

A. There is no such thing as sexual consent between a prisoner and prison staff.³ The overwhelming

² See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2025*, PRISON POLICY INITIATIVE 1 (Mar. 11, 2025), <https://perma.cc/GG4N-W8RG> (“[T]he U.S. doesn’t have one criminal legal system; instead, we have thousands of federal, state, local, and tribal systems. Together, these systems hold nearly 2 million people in 1,566 state prisons, 98 federal prisons, 3,116 local jails, 1,277 juvenile correctional facilities, 133 immigration detention facilities, and 80 Indian country jails, as well as in military prisons, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories—at a system-wide cost of at least \$182 billion each year”); see Thomas P. Bonczar & Allen J. Beck, *Lifetime Likelihood of Going to State or Federal Prison* 1, U.S. Dep’t of Justice, Off. of Justice Programs (Mar. 1997), <https://perma.cc/ZP3U-FNSM> (“[A]n estimated 1 of every 20 persons (5.1%) will serve time in a prison during their lifetime.”).

³ Brenda Smith, *Rethinking Prison Sex: Self-Expression And Safety*, 15 Colum. J. Gender & L. 185, 194 (2006) (“Most advocates and correctional authorities agree in principle that sex between staff and inmates can never, from a legal standpoint, be consensual.”); see U.S. Dep’t of Justice, Off. of the Inspector

presence of coercion in the relationship makes consent impossible.⁴ Prison staff control every aspect of prisoners' lives, from the moment they wake up, to the moment they go to bed.⁵ From strip searches to cell inspections, incarcerated individuals lack freedom over their bodies and their daily choices. They cannot meaningfully resist unwanted advances from prison officials.⁶

General, *Deterring Staff Sexual Abuse of Federal Inmates* 1 (Apr. 2005), <https://perma.cc/8Y7L-6ADZ> (explaining three factors creating authority structure between prisoners and guards with such an imbalance of power that consent can never be a defense); Nat'l Prison Rape Elimination Comm'n, *Report* 13 (2009) ("The power imbalance between staff and prisoners vitiates the possibility of meaningful consent.") (*Deterring Staff*).

⁴ *Wood v. Beauclair*, 692 F.3d 1041, 1047 (9th Cir. 2012) ("The power dynamics between prisoners and guards make it difficult to discern consent from coercion.").

⁵ Anthea Dinos, *Custodial Sexual Abuse: Enforcing Long Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. Sch. L. Rev. 281, 283 (2000) ("This imbalance of power between guards and inmates allows guards to take advantage of a prisoner's dependency on them for basic necessities by giving guards the opportunity to withhold privileges.") (*Custodial Sexual Abuse*); Margaret Penland, *A Constitutional Paradox: Prisoner Consent to Sexual Abuse in Prison under the Eighth Amendment*, 33 Minn. J.L. & Inequality 507, 519 (2015) ("Inmates in correctional facilities are in an inherent position of inferiority and subordination to the authority and power of prison guards and other employees. Prison employees are able to explicitly exert this authority over inmates to obtain sex or sexual favors. When prison employees utilize this authority, their conduct can encompass a broad range of action from aggressive physical force to quid pro quo exchanges.").

⁶ Expert Report of Terry A. Kupers 9-12, Attachment B, Comments of Iowa Federal Criminal Defense Clinic (July 11, 2024), in U.S. Sentencing Comm'n, *2024-2025 Amendment Cycle, Public*

When faced with sexual advances from prison officials, prisoners face a dilemma: accept an unwelcome advance and endure unwanted sexual contact leading to an increased risk of harm, retribution, and loss of freedom during and after the relationship, or reject the advance and almost certainly face immediate harm, retribution, and loss of freedom.⁷

Thousands of interviews conducted by *amici* confirm that prisoners have no true choice because of this overwhelmingly coercive dilemma produced by the environment in which they live.⁸ When rejecting an advance means less food, fewer privileges, or less time on the phone with loved ones, that “request” becomes an order.⁹

B. Prisoners have no meaningful way to voice their concerns and defend themselves. Prisoners do not lodge most complaints against prison officials for fear of retribution.¹⁰ And when they do, most complaints fail—in some prisons close to 100% are

Comment on Proposed Priorities, 89 FR 48029 (June 4, 2024), <https://perma.cc/H475-DVLX> (*Kupers Report*).

⁷ U.S. Dep’t of Justice, Civil Rights Div., *Investigation Of The Lowell Correctional Institution – Florida Department Of Corrections (Ocala, Florida)* 9 (Dec. 22, 2020), <https://perma.cc/5M7G-4HJF> (“Prisoners who report sexual abuse often are placed in confinement pending investigation, and it is common for staff to threaten prisoners who report abuse with retaliation, including placement in confinement.”) (*Investigation of Lowell*).

⁸ *Kupers Report* at 9-12; *Wood*, 692 F.3d at 1047; *Custodial Sexual Abuse* at 283.

⁹ *Kupers Report* at 12.

¹⁰ See, e.g., *Investigation of Lowell* at 9.

dismissed.¹¹ Permitting a consent defense will exacerbate that problem, forcing prisoners to endure more hardship by those who dictate their every move.

C. Relationships between prisoners and prison officials also imperil prison operations. As noted, prison officials often coerce prisoners into sex through “privileges” (as well as punishment).¹² Prison officials weaponize privileges—contraband like food, toilet paper, or time on the phone with children—to force prisoners into sex.¹³

Prisons cannot operate effectively when this happens.¹⁴ When one prisoner starts to receive special

¹¹ Eliza Fawcett & Chris Gelardi, ‘A Waste of Time’: *Inside New York’s Broken Jail Accountability System*, NEW YORK FOCUS (Dec. 4, 2023), <https://perma.cc/Y855-YM9R> (“Between 2019 and 2021, the council fielded nearly 12,500 grievances about county jails—and rejected more than 98 percent.”).

¹² Brenda Smith, *Analyzing Prison Sex: Reconciling Self-Expression with Safety*, 13 HUMAN RIGHTS BRIEF 17, 18 (2006), <https://perma.cc/49F6-4Z7T> (“Prisoners engage in sexual practices in exchange for common items like cigarettes, candy, chips, or a phone call.”); see also Katherine A. Heil, *The Fuzz(y) Lines of Consent: Police Misconduct with Detainees*, 70 S.C. L. Rev. 941, 949 (2019) (“[I]nmates may try to use sexual acts in exchange for prohibited items or privileges—which is dangerous to the safety and security of the prison.”).

¹³ Staff can also subject prisoners to solitary confinement and revoke good-conduct credits, lengthening incarceration. *Investigation of Lowell 2*.

¹⁴ Allowing an influx of contraband is widely recognized to increase violence and death in prison. It increases the risk of weapons and drugs being smuggled into the prison; it also increases the risk of fights over items of high value or the opportunity to make weapons. See, e.g., Katharine Jackson, *US Federal Prison Failures Led to Inmate Deaths, Justice Dept Review Finds*, REUTERS (Feb. 15, 2024), <https://perma.cc/K8X7-PBLL> (“Safety

treatment, contraband, or extra attention, order and governance over the entire prison body breaks down.¹⁵ It undermines prison officials’ authority, credibility, and responsibility. Orders are disobeyed, fights break out, and people are injured or killed.

At the same time, one of the leading causes of prison escapes is prison officials becoming sexually involved with a prisoner and deciding to help them escape.¹⁶ And there are always some bad actors who will push the limits of how far a “consent” defense can take them. Any ruling other than a categorical rejection of this behavior risks increasing rape in prison, including organized “rape clubs.”¹⁷

failures by the U.S. Bureau of Prisons (BOP), including the widespread use of single cells and failure to keep out drugs and weapons, led to preventable inmate deaths, the Justice Department watchdog said on Thursday.”); Carla J. Simmons, *Food Insecurity in Prison Makes People Like Me Vulnerable to Labor Exploitation*, TRUTHOUT (Jan. 17, 2024), <https://perma.cc/DD6T-K7SL> (“The inadequacy of prison food exposes [prisoners] to forced labor and sexual abuse in [their] desperation for adequate nutrition.”).

¹⁵ *Detering Staff* § II.A (“[I]nmates may not report sexual abuse because they receive unauthorized privileges or contraband in exchange for the sexual acts.”).

¹⁶ See, e.g., Kate Sullivan, *Why Female Prison Workers Are Targeted by Inmates Looking to Escape*, A&E CRIME CENTRAL (Feb. 7, 2024), <https://perma.cc/H645-NCWR> (“In the last 25 years, prison breaks have been facilitated by a prison tailor, a dog trainer and a psychologist, among others. They have a common denominator: An alleged ‘romantic’ relationship between a female worker and a male inmate (or inmates).”).

¹⁷ Press Release, U.S. Atty’s Office, N. Dist. Cal., *Two More Dublin Federal Correctional Officers To Plead Guilty To Sexually Abusing Multiple Female Inmates* (July 14, 2023), <https://perma.cc/Q3MA-Z52J> (“The two officers were each

* * *

At its core, the question presented addresses whether there is any circumstance in which prisoners should be subjected to sex by those who control virtually every aspect of their life. Because the answer to that question is no, this Court should grant the petition and set a clear standard foreclosing consent as a defense to Eighth Amendment sexual abuse claims.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted.

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charged * * * with multiple counts of sexually abusing female inmates and then lying about the abuse to federal investigators.”); *Judge will appoint special master to oversee California federal women’s prison after rampant abuse*, AP NEWS (Mar. 15, 2024), <https://perma.cc/S7GM-XUQC> (“Since 2021, at least eight FCI Dublin employees have been charged with sexually abusing inmates. Five have pleaded guilty. Two were convicted at trial. Another case is pending. Roughly 50 civil rights lawsuits against FCI Dublin employees are also ongoing.”).