No.

IN THE

Supreme Court of the United States

DAVID CHRISTOPHER WALTON,
Petitioner,
v.
ASHLEY NEHLS, REGISTERED NURSE,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

All fifty states, the District of Columbia, and federal law make it a crime for a prison official to engage in sexual conduct with an incarcerated person, deeming consent legally irrelevant. The question presented is:

Whether the Eighth Amendment, which is interpreted according to "evolving standards of decency," permits a contrary rule that treats an incarcerated person as capable of giving legally effective consent to sexual conduct with a prison official.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. Petitioner is David C. Walton. He is an individual who was incarcerated at Waupun Correctional Institution in Wisconsin.

2. Respondent is Ashley Nehls**,** a nurse who was employed at the same institution during the relevant period of time.

3. There are no nongovernmental corporate parties to this proceeding. Accordingly, no corporate disclosure statement is required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

1. U.S. Court of Appeals for the Seventh Circuit—*Walton v. Nehls*, No. 23-1207 (7th Cir. May 2, 2025). The Seventh Circuit affirmed summary judgment against David C. Walton; the opinion is reported at 135 F.4th 1070.

2. U.S. District Court for the Eastern District of Wisconsin—*Walton v. Nehls*, No. 1:22-cv-00007 (E.D. Wis. Jan. 20, 2023). In the district court, Judge William C. Griesbach granted the defendant's motion for summary judgment and dismissed Walton's § 1983 claim. The order is unreported but appears at 2023 WL 346041.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 135 F.4th 1070 (2025) and is reproduced at Pet. App. 1a-19a. The District Court's opinion granting summary judgment is unreported (but available at 2023 WL 346041) and is reproduced at Pet. App. 20a-27a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals entered its judgment on May 2, 2025, and this petition is timely filed within ninety days of that date.

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides:

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

U.S. Const. amend. VIII.

INTRODUCTION

"In time, the Supreme Court is sure to resolve the split," the Seventh Circuit declared in its decision below. Pet. App. 5a. That time has come.

This petition presents a constitutional issue at the heart of the justice system: How can conduct that

society has deemed a crime to which consent is not a defense, at the same time be deemed constitutionally permissible under the Eighth Amendment based on that very "consent"?

Prison officials control every aspect of a prisoner's existence. If they were to use that control to coerce prisoners into nonconsensual sexual conduct, there would be no dispute that the Eighth Amendment would be implicated. But there is a deeper question: Should we even be treating inmates as capable of consenting to sexual conduct with prison officials in the first place?

Few relationships are as asymmetric as that between a prisoner and a prison official; and few contexts are as undermining of free will as incarceration. Recognizing this, Congress has criminalized such conduct without regard to consent. And all fifty states and the District of Columbia have largely done the same. These enactments reflect society's judgment that standards of decency preclude treating inmates as capable of consenting to sexual conduct with officials.

Yet circuit courts persist in case-by-case analyses that assume consent is possible in principle—asking only whether a prisoner "welcomed" or "resisted." Unsurprisingly, this has resulted in confusion and a circuit split, as the Seventh Circuit noted below when it predicted the need for this Court's intervention.

Accordingly, this Petition asks this Court to resolve the confusion by adopting a *per se* rule of nonconsent, aligning the courts with the legislative consensus. This case presents the ideal vehicle for doing so because it isolates the issue of capacity. The lower courts dismissed Mr. Walton's claim based on his testimony that he enjoyed the conduct and found

it consensual. That is not in dispute. But this leaves the pure legal question: Did Mr. Walton have the capacity to consent in the first place? Without that capacity, his expression of approval is legally irrelevant. While the lower courts answered the question of capacity in the affirmative, prevailing standards of decency answer it in the negative. This case therefore provides this Court an ideal vehicle through which to bring the courts in line with prevailing standards of decency.

STATEMENT

This Court has long recognized that incarceration "strip[s]" prisoners "of virtually every means of self-protection." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994). It was in this context that Petitioner David Christopher Walton, an inmate at Waupun Correctional Institution, engaged in a sexual relationship with Respondent Ashley Nehls, a prison nurse. *See*, *e.g.*, Pet. App. 17a.

During his deposition, Mr. Walton described his subjective feelings about the relationship at the time, stating that he "enjoyed" it and considered it "consensual." Pet. App. 14a, 22a-23a. The lower courts treated this testimony as dispositive, granting and affirming summary judgment for Respondent. *See* Pet. App. 2a, 13a-15a (court of appeals); *see also* Pet. App. 21a-24a (trial court).

Mr. Walton's testimony may, at this stage, preclude a fact dispute. But in doing so, it also isolates the deeper legal question: As a matter of Eighth Amendment law, does a person in Mr. Walton's circumstances possess the legal ***capacity*** to consent in the first place? Without this capacity, the expressions of approval (which the lower courts treated as dispositive) would be legally irrelevant.

REASONS FOR GRANTING THE PETITION

I. The circuits are divided.

The circuits have reached irreconcilable conclusions as to the issue presented. This split has matured and deepened, leading the Seventh Circuit below to predict that "[i]n time, the Supreme Court is sure to resolve the split." Pet. App. 5a.

A. The Ninth and Sixth Circuits presume nonconsent.

In *Wood v. Beauclair*, 692 F.3d 1041, 1047 (9th Cir. 2012), the Ninth Circuit held that "prisoners are entitled to a presumption that any relationship with a correctional officer is not consensual." Under this standard, an inmate can consent in principle, but prison officials bear the burden of proving the consent by proving the "absence of coercive factors." *Id*.

The Sixth Circuit adopted a similar approach in *Rafferty v. Trumbull County*, 915 F.3d 1087, 1096 (6th Cir. 2019). As one court applying Rafferty explained, the decision "created a presumption that sexual conduct between prison officials and prisoners was nonconsensual, though one that could be rebutted." *Hale v. Boyle County*, 18 F.4th 845, 850 (6th Cir. 2021).

B. The Eighth and Tenth Circuits do not presume nonconsent.

In contrast, the Eighth Circuit does not presume nonconsent. Rather, it places the burden on inmates to prove either "some manifestation of resistance" or "some act of coercion by the corrections

official." *Richardson v. Duncan*, 117 F.4th 1025, 1030 (8th Cir. 2024).

The Tenth Circuit similarly places the burden on inmates, treating such claims "as a species of excessive-force claim, requiring at least some form of coercion." *Graham v. Sheriff of Logan County*, 741 F.3d 1118, 1124 (10th Cir. 2013).

C. The Seventh Circuit declined to "choose a side."

The decision below adds another layer to the conflict.

The Seventh Circuit acknowledged "a presumption of nonconsent may be the right answer," but found "this case does not compel us to choose a side." Pet. App. 5a. The court found that affirmance would be justified on any framework (other than a *per se* rule). Pet. App. 12a–14a. As a result, the Seventh Circuit's holding was limited to rejecting the *per se* rule—the only issue it needed to decide in order to affirm. Pet. App. 8a.

The Seventh Circuit acknowledged that "a *per se* rule would comport with both the judgment of our country's legislatures and Eighth Amendment case law." Pet. App. 9a-10a. But it ultimately declined to adopt such a rule, citing this Court's instruction that Eighth Amendment jurisprudence be approached cautiously. Pet. App. 10a-11a.

In reaching its conclusion, however, the Court provided a careful and thoughtful analysis of the state of the law, recognizing the conflicting considerations and need for this Court's intervention. Pet. App. 4a-12a.

D. The circuit split has practical consequences.

The circuit split is not merely a matter of academic or technical disagreement. It produces real-world consequences.

In the Sixth Circuit, for instance, a guard giving an inmate sodas and cigarettes would be deemed evidence of coercion sufficient to create a triable issue under the Eighth Amendment. *See Hale*, 18 F.4th at 853–54.

Yet, in the Eighth Circuit, even a guard depositing cash directly into a prisoner's commissary account would not be enough to create a question of fact on consent. *See Richardson v. Duncan*, 117 F.4th 1025, 1027, 1030 (8th Cir. 2024).

This stark divergence highlights the unworkability of current standards. In contrast, a *per se* rule of nonconsent would provide a clear and consistent standard, ensuring that all sexual conduct between officials and inmates is treated as inherently coercive, in line with unanimous legislative judgments criminalizing such acts regardless of purported consent.

II. The *per se* rule resolves the split and aligns with this Court's Eighth Amendment methodology.

Adopting a categorical rule that prisoners cannot consent to sexual conduct with corrections officers would resolve the split and align the circuits with this Court's Eighth Amendment methodology.

A. Capacity determinations under the Eighth Amendment reflect standards of decency.

This Court's jurisprudence recognizes that capacity questions reflect our standards of decency.

In *Roper v. Simmons*, 543 U.S. 551, 572 (2005), for instance, this Court relied on evolving standards of decency to hold that juveniles as a class lack full capacity for moral culpability, explicitly rejecting case-by-case maturity evaluations. Similarly, in *Atkins v. Virginia*, 536 U.S. 304, 318 (2002), the Court found that, as a class, intellectually disabled individuals "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct," establishing a categorical incapacity based on societal moral evolution. *Id.*

These decisions confirm that questions of capacity are grounded in our standards of decency. They also show that this Court's Eighth Amendment jurisprudence is amenable to categorical capacity rules for classes of vulnerable individuals. This same framework should apply no less to prisoners.

B. Legislative enactments are the clearest evidence of contemporary standards.

This Court's Eighth Amendment jurisprudence begins with the foundational principle articulated by Chief Justice Warren in *Trop v. Dulles*: the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101 (1958).

To discern those standards, the Court first examines "objective indicia of society's standards," of which "legislative enactments" provide the "clearest and most reliable objective evidence of contemporary values." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *see also Kennedy v. Louisiana*, 554 U.S. 407, 419-20 (2008).

Here, as discussed below, such objective indicia are overwhelmingly clear.

C. The legislative consensus demonstrates society's moral judgment that prisoners lack the capacity to consent.

The objective evidence here far surpasses the showings that this Court has deemed sufficient in past cases to mark an evolution in standards of decency.

As the Seventh Circuit noted below, "the legislatures in all 50 states (plus the District of Columbia) have made it a crime for prison officials to engage in sexual activity with prisoners—regardless of consent." Pet. App. 9a. Twenty-six states plus the District of Columbia explicitly provide that consent is not a defense. Pet. App. 17a. The remaining states treat such conduct as a strict liability offense. Pet. App. 18a.

What's more, the legislative trend is also unidirectional—no jurisdiction has moved toward allowing consent defenses. *Cf. Roper*, 543 U.S. at 565.

Compare this 51-jurisdiction consensus with the evidence this Court found persuasive in prior cases:

- In *Roper v. Simmons*, the Court found a national consensus against the juvenile death penalty based on the fact that 30 states prohibited it. 543 U.S. 551, 564 (2005)
- In *Atkins v. Virginia*, the Court found a consensus against executing the intellectually disabled based on a trend that began with 18 states enacting prohibitions. 536 U.S. at 314-16.
- In *Graham v. Florida*, the Court found a consensus against life without parole for juvenile non-homicide offenders based on

prohibitions in 26 states and the federal system. 560 U.S. 48, 62 (2010).

As the table below brings into relief, if the partial showings in *Atkins, Roper,* and *Graham* were sufficient, then surely the complete, unidirectional, and unprecedented legislative unanimity in this case all the more sufficient.

Case	**Legislative Evidence**	**Sufficient?**
Atkins v. Virginia	18 states + federal gov't	Yes
Roper v. Simmons	30 states + federal gov't	Yes
Graham v. Florida	26 states + federal gov't	Yes
Walton v. Nehls	50 states + D.C. + federal gov't	Question Presented

III. This Court may adopt the *per se* rule to resolve the circuit split, though no circuit has adopted it.

This Court may resolve circuit splits or entrenched lower-court errors by adopting constitutional rules or frameworks that no circuit had previously embraced.

For instance, in *Miranda v. Arizona*, 384 U.S. 436 (1966), no circuit court had required specific warnings before custodial interrogations. Yet, this Court established the now-iconic safeguards to protect Fifth Amendment rights, overriding disparate lower-court approaches to voluntariness and creating a national standard.

A circuit split may create the need for this Court's intervention, but it does not constrain the manner in which this Court may intervene. Despite no circuit adopting a *per se* rule of prisoner nonconsent, this Court can—and should—resolve the split by adopting such a rule that brings the courts in line with evolving standards of decency.

Just as the Court in *Miranda* established prophylactic warnings to safeguard Fifth Amendment rights in the inherently coercive setting of custodial interrogation, this Court should adopt a prophylactic rule of non-consent to safeguard Eighth Amendment rights in the uniquely coercive environment of a prison. The unworkable, fact-intensive inquiries into "welcomeness" and "coercion" that have fractured the circuits are reminiscent of the voluntariness test that *Miranda* rightly replaced with a clear, bright-line rule.

IV. This case presents an ideal vehicle for the fundamental constitutional question presented.

This Court regularly grants certiorari to resolve important questions of federal law that have divided the lower courts, especially when those questions affect vulnerable populations. This case presents both factors in an ideal procedural posture, free from complicating factual disputes.

Indeed, here, it is precisely what the lower courts found dispositive that makes this case such an ideal vehicle: Mr. Walton's testimony that he found the relationship "consensual." This strips away any need for a fact-intensive inquiry into the nuances of coercion, resistance, or welcomeness that have complicated other cases. Instead, this presents the Court with a simple vehicle through which to reach the deeper, and dispositive, pure question of law: Does a prisoner's expression of "consent" have any legal relevance under the Eighth Amendment, or does the inherent nature of the prison environment render him legally incapable of giving such consent as a matter of law?

This is ***the*** fundamental question. If an individual lacks the capacity to consent, his contemporaneous expressions of approval are legally irrelevant, much like a minor's purported consent in statutory rape contexts. The time has come for this Court to answer that question. It may never be presented with a more procedurally clean case in which to do so.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant the petition for a writ of certiorari.

The current inconsistency among federal courts undermines uniform application of constitutional law and creates an untenable situation where prisoners' rights depend on geography rather than legal principle.

In contrast, state legislatures across the country, together with the U.S. Congress, have provided a clear and consistent answer to the question presented: a *per se* rule. This universal legislative consensus reflects society's standards of decency, which have evolved to hold that inmates, as a class of individuals, cannot consent to sexual contact with those who control every aspect of their existence.

Accordingly, this Court should resolve the circuit split and bring the courts in line with prevailing standards of decency.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NO. 23-1207

DAVID C.L. WALTON, PLAINTIFF-APPELLANT,
v.
ASHLEY NEHLS, DEFENDANT-APPELLEE.

Argued: October 21, 2024
Decided and Filed: May 2, 2025

On Appeal from the United States District Court for the Eastern District of Wisconsin
No. 22-c-7—Hon. William C. Griesbach, District Judge

OPINION

Before: Rovner, Scudder, and Lee, Circuit Judges.

Scudder, Circuit Judge.

This appeal presents an issue of first impression for our court: whether, as a matter of Eighth Amendment law, a prisoner can consent to sexual activity with a prison official. David Walton, a Wisconsin prisoner, invoked 42 U.S.C. § 1983 and sued Ashley Nehls, a prison nurse, alleging that she

violated his Eighth Amendment rights by engaging in a sexual relationship with him. But Walton also testified in his deposition that the relationship was consensual. Relying on that testimony, the district court entered summary judgment for Nehls, reasoning that a consensual sexual relationship cannot constitute a cruel or unusual punishment under the Eighth Amendment.

***1072** On appeal Walton urges us to join the Sixth and Ninth Circuits and adopt a legal presumption that any sexual activity between a prisoner and prison official is nonconsensual and, by extension, violates the Constitution unless the prison official can show an absence of coercion. That position has much to say for itself, given the power and control prison officials have over inmates and considering today's standards of decency, as all 50 states have made a prison official's sexual conduct with a prisoner a crime. But even if we applied the presumption, the evidence in the record establishes that the alleged sexual relationship between Walton and Nehls lacked any coercive factors. We therefore AFFIRM the district court's entry of summary judgment for Nehls, saving for another day the question whether to adopt a presumption of nonconsent.

I.

Walton alleges that he began a romantic and sexual relationship with Nehls in June 2021. He has always described the relationship as "consensual." Within three months, however, other officials at the prison learned of the relationship and immediately transferred Walton to a new institution. Walton, no longer in contact with Nehls, then brought the § 1983 action against her in federal court in Wisconsin.

Walton's lawsuit requires us to determine whether a relationship that he considered consensual

nonetheless deprived him of his Eighth Amendment rights. That is no easy task, for neither Supreme Court precedent nor our own case law squarely answers the question, and the circuits that have weighed in have taken differing approaches. We think the Sixth and Ninth Circuit's approach—presuming nonconsent and shifting the burden of establishing consent onto the defendant—very well could be the best answer. But we ultimately need not decide whether to adopt such an approach to resolve Walton's appeal.

A.

A prison official's conduct does not constitute cruel and unusual punishment in violation of the Eighth Amendment, the Supreme Court has explained, unless "two requirements are met." *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). First, the conduct "must be, objectively, 'sufficiently serious.' " *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991)). 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" or "involve[es] the unnecessary and wanton infliction of pain." *Hudson v. McMillian*, 503 U.S. 1, 10, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102–03, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). Second, the "prison official must have a 'sufficiently culpable state of mind.' " *Farmer*, 511 U.S. at 834, 114 S.Ct. 1970 (quoting *Wilson*, 501 U.S. at 297, 111 S.Ct. 2321). The official must act with " 'deliberate indifference' to a substantial risk of serious harm" of which they are "subjectively aware." *Id.* at 828, 114 S.Ct. 1970.

We first had occasion to apply those principles to allegations of prison sexual abuse in *Washington v. Hively*, 695 F.3d 641 (7th Cir. 2012). James Washington, a Wisconsin pretrial detainee, claimed that a guard had violated his Eighth Amendment rights by "gratuitously fondling" his genitals when conducting a pat down and strip search. *Id.* at 642. We recognize, of course, that today we would analyze Washington's claim under the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment. See ***1073** *Kingsley v. Hendrickson*, 576 U.S. 389, 400, 135 S.Ct. 2466, 192 L.Ed.2d 416 (2015). But the distinction is of no moment for present purposes, since the Fourteenth Amendment similarly protects pretrial detainees from "abusive conditions." *Miranda v. County of Lake*, 900 F.3d 335, 350 (7th Cir. 2018).

In *Hively*, the district court had entered summary judgment against Washington on the ground that he had "presented evidence of only de minimis injury." 695 F.3d at 642. But we reversed, explaining that "[s]exual offenses forcible or not are unlikely to cause so little harm as to be adjudged *de minimis*." *Id.* at 643. Put differently, unwanted sexual contact, regardless of whether it involves force, is objectively harmful under the Eighth Amendment in light of the "significant distress and often lasting psychological harm" that it tends to cause. *Id.*

We also took care in *Hively* to emphasize the importance of the subjective intent inquiry. See *id.*at 643–44. We acknowledged that objectively harmful sexual conduct will not give rise to an Eighth Amendment violation when the defendant lacks the requisite subjective intent. See *id.* If, for instance, the defendant "had no intention of humiliating" the prisoner or "deriving sexual pleasure," but "was

merely overzealous in conducting the pat down and strip search," there would be "no deliberate violation of a constitutional right and so no basis for the suit." *Id.* at 643. Still, we recognized that subjective intent, "unless admitted, has to be inferred rather than observed." *Id.*And we concluded that a reasonable jury could infer the guard's requisite intent based on the prisoner's allegation that "he complained vociferously ... to no avail." *Id.* at 644. After all, such conduct, "if correctly described," could not "be thought a proper incident of a pat down or search." *Id.*

More recently, in *J.K.J. v. Polk County*, we upheld a jury's award of damages against a prison guard who repeatedly sexually assaulted two prisoners. See 960 F.3d 367, 376 (7th Cir. 2020) (en banc). We explained that, based on the evidence at trial, it "was more than reasonable for the jury to conclude" that the guard "acted with deliberate indifference to an excessive risk" to the health and safety of the two prisoners. *Id.* We also rejected the guard's contention that the trial court "erred in not giving a special instruction on his consent defense." *Id.* No such instruction was necessary, we reasoned, because had "the jury bought" the guard's story that the prisoners "were willing participants (and, for that matter, even capable of being willing participants under the circumstances)," it would not have found that the guard "acted with deliberate indifference to their safety and well-being." *Id.*

Hively and *J.K.J.* supply a few takeaways. For one, it is of no legal moment that Walton did not allege that Nehls used force against him. Force or no force, unwanted sexual contact between a prison official and prisoner is objectively harmful under the Eighth Amendment. Nehls's subjective intent, though,

remains relevant. As in any other Eighth Amendment sexual abuse case, Walton (the prisoner) must establish that Nehls (the prison official) acted with deliberate indifference to an excessive risk of harm to his safety or well-being.

Yet we have not encountered the particulars of the scenario before us here. Unlike the inmates in *Hively*and *J.K.J.*, Walton admits that he consented to a sexual relationship with Nehls. But given the inherent coerciveness present in a prison environment, Walton's argument goes, the relationship was nevertheless legally nonconsensual. It is on those allegations that we must decide whether a reasonable jury could conclude that Nehls's conduct was objectively harmful and that she acted ***1074** with deliberate indifference to an excessive risk to Walton's well-being.

B

Other circuits have faced similar factual allegations in Eighth Amendment cases, but they have not reached a uniform conclusion. In *Wood v. Beauclair*, a district court entered summary judgment against a prisoner on the basis that the prisoner's "romantic relationship" with a prison guard "was consensual." 692 F.3d 1041, 1043 (9th Cir. 2012). The Ninth Circuit reversed, emphasizing "[t]he power dynamics between prisoners and guards" and questioning whether "sexual relationships in prison" are "truly the product of free choice." *Id.* at 1047. At the same time, the court expressed "concern[ ] about the implications of removing consent as a defense for Eighth Amendment claims," ultimately deciding that "the better approach" was "a rule that explicitly recognize[d] the coercive nature of sexual relations in the prison environment." *Id.* at 1048–49.

Aligned with that principle, the Ninth Circuit adopted the following framework for Eighth Amendment sexual abuse cases:

> [W]hen a prisoner alleges sexual abuse by a prison guard, we believe the prisoner is entitled to a presumption that the conduct was not consensual. The state then may rebut this presumption by showing that the conduct involved no coercive factors. We need not attempt to exhaustively describe every factor which could be fairly characterized as coercive. Of course, explicit assertions or manifestations of non-consent indicate coercion, but so too may favors, privileges, or any type of exchange for sex. Unless the state carries its burden, the prisoner is deemed to have established the fact of non-consent.

Id. at 1049.

The Sixth Circuit has since followed suit, adopting wholesale the Ninth Circuit's presumption in a sexual abuse case—albeit one concerning the alleged deprivation of a pretrial detainee's Fourteenth (as opposed to Eighth) Amendment rights. See *Hale v. Boyle County*, 18 F.4th 845, 852, 854 (6th Cir. 2021).

The Eighth and Tenth Circuits have charted a different course, though, declining to adopt a presumption and leaving prisoners with the burden of establishing nonconsent. "To state a plausible constitutional claim" in the Eighth Circuit, "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." *Richardson v. Duncan*, 117 F.4th 1025, 1030 (8th Cir. 2024). The Tenth Circuit has echoed the Eighth Circuit, stating that "in this circuit, the burden remains on the plaintiff—not the defendant—to establish that sexual conduct is nonconsensual." *Works v. Byers*, 128 F.4th 1156, 1162 (10th Cir. 2025).

C

In time, the Supreme Court is sure to resolve the split. And, while this case does not compel us to choose a side, we do see many reasons for why a presumption of nonconsent may prove to be the right answer to a difficult question.

Supreme Court precedent is clear that bedrock Eighth Amendment principles require us to assess a prison official's conduct against "the evolving standards of decency that mark the progress of a maturing society." *Hudson*, 503 U.S. at 8, 112 S.Ct. 995 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)). Recall that conduct is objectively harmful (and therefore may give rise to an Eighth Amendment violation) when it is "incompatible" with such ***1075**standards. *Id.* at 10, 112 S.Ct. 995 (quoting *Estelle*, 429 U.S. at 102–03, 97 S.Ct. 285). "[R]eview under those evolving standards," the Supreme Court has explained, "should be informed by 'objective factors to the maximum possible extent.' " *Atkins v. Virginia*, 536 U.S. 304, 312, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). And the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Id.* at 312, 122 S.Ct.

2242 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)).

It is telling, then, that the legislatures in all 50 states (plus the District of Columbia) have made it a crime for prison officials to engage in sexual activity with prisoners—regardless of consent. The Appendix to this opinion lists each state's statute. Federal law similarly makes it a criminal offense for a federal law enforcement officer to "knowingly engag[e] in a sexual act" with a prisoner, regardless of consent. 18 U.S.C. § 2243(b); see also *United States v. Martinez*, 110 F.4th 160, 166 (2d Cir. 2024) (explaining that 18 U.S.C. § 2243(b) "prohibits sexual acts between an inmate and a guard regardless of the inmate's consent to such acts"). So the takeaway is clear: our country's legislatures have determined that sexual activity between prisoners and prison officials is a crime, intolerable conduct in a civilized society.

The aligned judgment of elected officials at the state and national level is consistent with Eighth Amendment jurisprudence recognizing the inherently vulnerable position of prisoners, especially in relation to prison officials. The prison environment, the Supreme Court has underscored, "strip[s]" prisoners "of virtually every means of self-protection and foreclose[s] their access to outside aid." *Farmer*, 511 U.S. at 833, 114 S.Ct. 1970. We recognized that same reality in *J.K.J.*, explaining that prisoners depend on prison officials "for nearly everything in their lives—their safety as well as their access to food, medical care, recreation, and even contact with family members." 960 F.3d at 381.

But these observations invite yet another question: why not conclude that, as a matter of Eighth Amendment law, a prisoner can *never* consent to a sexual relationship with a prison official? After all, at

first glance, such 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.

We are mindful, however, that the Supreme Court has instructed courts to "proceed cautiously in making an Eighth Amendment judgment." *Rhodes*, 452 U.S. at 351, 101 S.Ct. 2392. Any determination that certain conduct constitutes a *per se* violation of the Eighth Amendment "cannot be reversed short of a constitutional amendment." *Gregg v. Georgia*, 428 U.S. 153, 176, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). A *per se* nonconsent rule would run counter to the Supreme Court's instruction by broadly and indeed categorically expanding Eighth Amendment liability in one fell swoop—without regard to the unique factual circumstances that could arise in future cases.

Determining the scope of a constitutional right, moreover, can be an endeavor ill-suited to an overly formalistic or categorical approach. See, *e.g., Florida v. Bostick*, 501 U.S. 429, 439, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (rejecting a "*per se* rule" in a Fourth Amendment case and explaining that "in order to determine whether a particular encounter constitutes a seizure, a court must consider all the ***1076**circumstances"). That observation rings particularly true when it comes to the Eighth Amendment, which "draw[s] its meaning from ... evolving standards of decency" and, as a result, "admits of few absolute limitations." *Hudson*, 503 U.S. at 8, 112 S.Ct. 995(alteration in original) (quoting *Rhodes*, 452 U.S. at 346, 101 S.Ct. 2392). Put differently, because evolving standards of decency define the Eighth Amendment's scope, Eighth Amendment cases require a flexible approach that is

not often compatible with *per se*, broadly applicable rules.

A burden-shifting presumption may well align better with the sort of flexible approach that constitutional law requires. Indeed, the Supreme Court frequently applies such presumptions when fleshing out the scope of constitutional rights. 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, 142 S.Ct. 2111, 213 L.Ed.2d 387 (2022). For that reason, if a government regulation bars or otherwise limits that right, the government bears the burden of "justify[ing] its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.*

And in the Fourth Amendment context, the Supreme Court has long held that "[w]arrantless searches are presumptively unreasonable." *United States v. Karo*, 468 U.S. 705, 717, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984). Under that presumption, the government bears the burden of showing that a warrantless search was nevertheless constitutional. See *Chimel v. California*, 395 U.S. 752, 761, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

Even the tiers of scrutiny, ubiquitous in First and Fourteenth Amendment jurisprudence, operate as burden-shifting presumptions. Under the First Amendment, content-based laws are "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). For any content-based restriction or regulation, then, the government bears the burden of establishing that it is "narrowly tailored to serve compelling state interests." *Id.* Racial classifications are likewise "presumptively invalid" under the Fourteenth

Amendment's Equal Protection Clause. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). It is therefore the government that bears the burden of establishing the legitimacy of any such classifications. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007).

The prevalence of burden-shifting presumptions in these contexts is perhaps unsurprising. It reflects the reality that the Constitution's provision of individual rights can be broad and that giving content to those rights is not always a straightforward exercise. But knowing that the Constitution protects "the right of the people to keep and bear Arms," to be free from "unreasonable searches and seizures," to enjoy "the freedom of speech," or take comfort in "the equal protection of the laws" is one thing. U.S. Const. amends. I, II, IV, XIV. Knowing exactly when official action infringes on any of those individual rights is another. The latter requires evaluating both the official action as well as the nature of the alleged infringement on the individual. Under such an evaluation, the government's justification (or historical basis) for a particular action is of course relevant. But the law will often place a thumb on the scale in favor of the individual—especially when the official action "appears on its face within a specific prohibition of the law." ***1077** *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938); see also *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (citing *Carolene Products* and explaining that something more than rational basis review must "be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the

freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms").

In the Eighth Amendment context, a presumption of nonconsent may fit comfortably within the line of constitutional cases applying burden-shifting frameworks. Our own case law establishes that a prison official who engages in a nonconsensual sexual relationship with a prisoner runs afoul of the Eighth Amendment's prohibition on cruel and unusual punishment. See *J.K.J.*, 960 F.3d at 376. Presuming that any such sexual relationship is nonconsensual, then, would be tantamount to presuming that a prison official has violated the Eighth Amendment—a presumption that aligns with both the judgment of our nation's legislatures and the inherently coercive prison environment.

Yet before we can adopt a presumption of nonconsent, several difficult questions need answering. Start with determining what conduct triggers the presumption. We have observed that sexual conduct need not involve the use of force to be objectively harmful. See *Washington*, 695 F.3d at 643. But how, exactly, should we define sexual conduct? Some conduct is obviously sexual in nature, but what about a kiss or touch of the thigh? Alternatively, what about nonphysical conduct, such as indecent exposure or verbal harassment? Relatedly, should the presumption apply to *all* prison officials? Or should we limit it to only those officials capable of affecting or influencing a prisoner's conditions of confinement? And if we do so limit the presumption, how do we determine whether an official satisfies that standard?

Given the difficulty of those questions (and the no doubt many others that will arise), we are hesitant

to adopt a presumption of nonconsent, especially once we return to the facts before us.

II

Even if we applied a presumption of nonconsent, Nehls would be able to overcome it based on the facts in the record. In the end, then, this case does not present the best vehicle for working out the dimensions of a presumption framework for future Eighth Amendment prison sexual abuse cases.

A

Walton alleges that, over the course of three months or so beginning in June 2021, he and Nehls were in a romantic and sexual relationship. For her part, Nehls denies that she was ever romantically or sexually involved with Walton. But because this appeal comes to us from the district court's entry of summary judgment in Nehls's favor, we recount the facts in the light most favorable to Walton. See *Hackett v. City of South Bend*, 956 F.3d 504, 506 (7th Cir. 2020).

The relationship began in June 2021, when Walton visited the prison's health services unit to receive prescription medication from Nehls. While giving Walton the medication, Nehls touched his arm. In response, Walton joked, "You touch me like that, I might touch you." Nehls replied, "All right," and grabbed Walton's shirt. Walton and Nehls then kissed each other.

Walton continued to visit Nehls at the health services unit, where the two would kiss "almost every single day." Walton ***1078** sometimes initiated the kissing. Walton also says Nehls touched his penis over his clothing at times and "allow[ed]" him to touch her chest and buttocks over her clothing. Walton compared their interactions to "two high school kids making out."

Throughout the course of their relationship, Nehls provided Walton with illegal contraband, including chips, candy, chewing gum, a cell phone, and an unprescribed antidepressant. Nehls never asked Walton for anything in return.

Walton described the relationship as "consensual," and explained that "outside of the prison," he would consider Nehls his "girlfriend." He did not report the relationship because he "enjoyed it," wanted it to continue, and did not want himself or Nehls "to get into trouble."

Despite his wishes, the relationship did not continue. Walton last visited Nehls on August 30, 2021. On that day, Walton and Nehls began kissing in a private room within the health services unit. Nehls then closed the door and touched Walton's penis underneath his clothing with her bare hand—an interaction that Walton described as "consensual." At one point, Walton joked about letting a correctional officer "catch" them. Nehls responded by threatening to sound an alarm that would warn correctional officers of an ongoing assault. Walton then reached out toward Nehls, who stepped back and then fell to the floor. As Walton bent down over Nehls, several correctional officers entered the private room and discovered them.

Prison officials transferred Walton to another institution the next day. Since his transfer, he has had no contact with Nehls. In his complaint, he alleged that his relationship with Nehls triggered post-traumatic stress disorder, anxiety attacks, and self-harm.

B

Against those facts, the district court did not err in entering summary judgment for Nehls. Walton implores us to reverse the district court on the ground

that it should have applied the Ninth Circuit's presumption of nonconsent. But even if the district court had done so, summary judgment would have been proper. Nehls would be able to meet the burden of showing that the relationship was consensual. Walton has never deviated from describing their encounters as "consensual" and even acknowledged initiating some of the sexual conduct. He also stated that he "enjoyed" the relationship and wanted it to continue.

To be sure, Nehls provided Walton with contraband—conduct that under many circumstances can be coercive. See *Wood*, 692 F.3d at 1049 (identifying "favors, privileges, or any type of exchange for sex" as indicators of coercion). But Walton explained that Nehls did not expect anything in return. And nowhere has he suggested that Nehls provided the contraband in exchange for sexual contact.

Having taken a close look at the evidentiary record, we see nothing that would allow a jury to find that Nehls coerced Walton into a sexual relationship. The closest evidence of coercion is a declaration Walton submitted to the district court, stating that, at one point in July 2021, Nehls "got upset" with him and "fals[e]ly" had him "placed on temporary lock[ ] down." Walton also attached an incident report that Nehls filled out, accusing him of making inappropriate comments about "a female staff member." But Walton did not submit any evidence connecting the incident report to a theory of coercion. He did not, for instance, allege that he continued with the relationship out of fear that Nehls would submit another report or otherwise get him in trouble. To the contrary, ***1079** he continued to describe their later interactions as consensual.

Absent evidence of coercion, we are left with Walton's clear, consistent, and unqualified statements that his relationship with Nehls was consensual. Those statements would be sufficient to overcome any presumption that the relationship was nonconsensual. We can therefore save the broad legal question for another day.

* * *

We recognize the fundamental power imbalance between prison officials and prisoners and the inherently vulnerable position of prisoners. But deplorable as Nehls's alleged conduct may be, we cannot on this record say that she knew of and was deliberately indifferent to an excessive risk that her conduct would seriously harm Walton. In the final analysis, then, we cannot say that Nehls's conduct constitutes an Eighth Amendment violation. So with this closing observation we AFFIRM the district court's entry of summary judgment for Nehls.

Appendix

In 26 states plus the District of Columbia, statutes make it a criminal offense for prison officials to engage in sexual activity with prisoners and explicitly state that consent is not an affirmative defense:

State	Relevant Statute
Alabama	Ala. Code § 14-11-31
Arkansas	Ark. Code Ann. § 5-14-126
California	Cal. Penal Code § 289.6
Delaware	Del. Code Ann. tit. 11, § 780A
District of Columbia	D.C. Code Ann. §§ 22-3014, -3017(a)
Florida	Fla. Stat. Ann. § 944.35(3)(b)
Georgia	Ga. Code Ann. § 16-6-5.1
Illinois	720 Ill. Comp. Stat. 5/11-9.2
Indiana	Ind. Code Ann. § 35-44.1-3-10

Kansas	Kan. Stat. Ann. § 21-5512
Kentucky	Ky. Rev. Stat. Ann. §§ 510.020(3)(f), .120(1)(c)
Massachusetts	Mass. Gen. Laws Ann. ch. 268, § 21A
Minnesota	Minn. Stat. Ann. §§ 609.341, subd. 24(2)(viii), 609.345
Mississippi	Miss. Code Ann. § 97-3-104
Missouri	Mo. Ann. Stat. § 566.145
Montana	Mont. Code Ann. § 45-5-502
Nebraska	Neb. Rev. Stat. Ann. § 28- 322.01

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New Hampshire	N.H. Rev. Stat. Ann. §§ 632- A:2, -A:4
New York	N.Y. Penal Law § 130.05(3)(e)–(f)
North Carolina N	N.C. Gen. Stat. Ann. § 14- 27.31
Oregon	Or. Rev. Stat. Ann. §§ 163.452, .454
Pennsylvania	18 Pa. Cons. Stat. Ann. § 3124.2
South Carolina	S.C. Code Ann. § 44-23-1150
Utah	Utah Code Ann. §§ 76-5-412, -412.2
Washington	Wash. Rev. Code Ann. §§ 9A.44.160, .170
West Virginia	W. Va. Code Ann. §§ 61-8B-2, -10
Wisconsin	Wis. Stat. Ann. § 940.225(2)(h), (4)
Wyoming	Wyo. Stat. Ann. §§ 6-2- 303(a)(vii), -307(b)

The remaining 24 states make it essentially a strict liability offense for prison officials to engage in sexual activity with prisoners, omitting consent as an available affirmative defense.

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State	**Relevant Statute**
Alaska	Alaska Stat. §§ 11.41.427(a)(1), .432

Arizona	Ariz. Rev. Stat. Ann. §§ 13- 1407, -1419
Colorado	Colo. Rev. Stat. Ann. § 18-7- 701
Connecticut	Conn. Gen. Stat. Ann. §§ 53a65(3), 54a-73a(a)(1)(E)
Hawaii	Haw. Rev. Stat. Ann. § 707- 732
Idaho	Idaho Code Ann. § 18-6110
Iowa	Iowa Code Ann. § 709.16
Louisiana	La. Stat. Ann. § 14:134.1
Maine	Me. Rev. Stat. Ann. tit. 17-A, § 255-A(1)(I) to -A(1)(J)
Maryland	Md. Code Ann., Crim. Law § 3-314(b)
Michigan	Mich. Comp. Laws Ann. § 750.520c(1)(i)
Nevada	Nev. Rev. Stat. Ann. § 212.187
New Jersey	N.J. Stat. Ann. § 2C:14-2(c)(2)
New Mexico	N.M. Stat. Ann. § 30-9- 11(E)(2)
North Dakota	N.D. Cent. Code Ann. §§ 12.1- 20-06, -07
Ohio	Ohio Rev. Code Ann. § 2907.03(A)(6)
Oklahoma	Okla. Stat. tit. 21, § 1111(A)(7)
Rhode Island	R.I. Gen. Laws § 11-25-24
South Dakota	S.D. Codified Laws §§ 22-22- 7.6, 24-1-26.1
Tennessee	Tenn. Code Ann. § 39-16-408
Texas	Tex. Penal Code Ann. § 39.04
Vermont	Vt. Stat. Ann. tit. 13, § 3257(a)(1)
Virginia	Va. Code Ann. §§ 18.2-64.2, -67.4

APPENDIX B

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WISCONSIN

Case No. 22-C-7

DAVID CHRISTOPHER LEE WALTON, PLAINTIFF,
v.
ASHLEY NEHLS, DEFENDANT.

Signed: January 20, 2023

DECISION AND ORDER

William C. Griesbach, United States District Judge:

Plaintiff David Christopher Lee Walton is a prisoner currently serving a state sentence at Green Bay Correctional Institution (GBCI). Walton filed this 42 U.S.C. § 1983 action pro se seeking damages for violations of his rights under the Eighth Amendment to the United States Constitution, which proscribes cruel and unusual punishment. Walton's claim rests on the assertion that he was subjected to such punishment while an inmate at Waupun Correctional Institution (WCI) when he freely engaged in a consensual sexual relationship with a female WCI staff nurse from June 2021 through August 2021. The Court has jurisdiction under 28 U.S.C. § 1331. The case is before the Court on the defendant nurse's

motion for summary judgment. The Court will grant Defendant's motion and dismiss this case.

BACKGROUND

During the relevant time, Walton was an inmate at Waupun Correctional Institution where Defendant worked as a nurse. Walton, who is serving a sentence of eighteen years for his second armed robbery conviction, is six feet, three inches tall, and weighs 245 pounds. Defendant, according to Walton, is five feet, six inches and weighs about 120 pounds. Walton asserts that, in early June 2021, Defendant touched his arm and kissed him during a medication pass. He states that he did not report the kiss, in part, because he enjoyed the attention and wanted it to happen again. According to Walton, he and Defendant kissed and touched each other in the health services unit several times a week for nearly three months. The touching consisted of Walton touching Defendant's breasts or buttocks, and Defendant touching his chest or stomach. On several occasions, Walton testified that Defendant touched his penis. On all but one occasion it was over his clothing.

Walton describes their relationship as "kind of like two high school kids making out." He acknowledges that he was physically attracted to Defendant and that he "enjoyed it." He states that the two of them had an "emotional connection" and that he would have considered her his girlfriend had they met outside of prison. Walton asserts that Defendant would sometimes give him contraband such as junk food, candy, pain pills, and a cell phone. He states that Defendant never asked for anything in return, and he never gave her anything in return.

Walton explains that their relationship ended on August 30, 2021, after officers discovered him

bending over Defendant in a room with the lights off and the door closed and blocked by a medication cart. Walton was transferred to Dodge Correctional Institution the next day. Walton asserts that, following an investigation, Defendant's employment was terminated. Walton has had no contact with Defendant since his transfer.

LEGAL STANDARD

Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the Court must view the evidence and draw all reasonable inferences in the light most favorable to the non-moving party. In response to a properly supported motion for summary judgment, the party opposing the motion must "submit evidentiary materials that set forth specific facts showing that there is a genuine issue for trial." "The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts." Summary judgment is properly entered against a party "who fails to make a showing to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial."

ANALYSIS

The Eighth Amendment to the United States Constitution proscribes "cruel and unusual punishment." In simple terms, "cruel and unusual punishment" means "the unnecessary and wanton infliction of pain." By his own admission, Walton did not suffer from the unnecessary and wanton infliction of pain. To the contrary, Walton testified that he was attracted to Defendant and enjoyed his encounters

with her. He testified under oath that his relationship with her was consensual. He even said they acted like "two high school kids kind of like making out" and that, if he had not been incarcerated, he would have considered her his girlfriend "because who has that type of an emotional connection or a physical—a physical connection, should I say, without being in some type of relationship." It is unlikely that a reasonable jury could find from this evidence that Defendant violated Walton's Eighth Amendment rights by subjecting him to cruel and unusual punishment. Other courts have held that "welcome and voluntary sexual interactions, no matter how inappropriate, cannot as matter of law constitute 'pain' as contemplated by the Eighth Amendment"; and that absent some form of coercion, such claims do not constitute excessive force.

This is not to suggest that a prison official who sexually abuses an inmate does not violate the Eighth Amendment's prohibition of cruel and unusual punishment. Not only does the prison official who sexually abuses an inmate violate the inmate's Eighth Amendment rights, but so does the governmental entity that employs the official if it exercises deliberate indifference and fails to act in the face of obvious and known risks to the inmate. Courts also recognize the difficulty in discerning consent from coercion in the prison environment. However, those factors are not present where, as in this case, the plaintiff inmate no longer has any contact with the accused prison staff member and freely admits that he consented to the relationship and likens it to a romantic relationship he would have cherished were he not incarcerated. In no sense could Defendant's alleged conduct be considered the infliction of pain or sexual abuse upon Walton.

During his deposition, Walton repeatedly spoke of his attraction to Defendant and the fact that he enjoyed his contact with her and wanted it to continue. He stated, "I'm in prison with an 18-year prison sentence. Any time that a female shows me any type of affection or intimacy, I'm not going to willingly turn the other cheek." He conceded that, apart from a brief disagreement, he never told her to stop and that he looked forward to his encounters with her. He acknowledged that he sometimes initiated the contact and stated that their interactions were "like two high school kids making out." Although Walton testified that Defendant gave him junk food, candy, pills, and even a cell phone, he asserted that these were all gifts and that Defendant never asked him for anything in return and he never gave her anything in return. Without qualification, Walton agreed that, at the time, his relationship with Defendant was consensual and that he was a willing participant.

Walton also testified that he did not report the relationship until after he transferred to Dodge because he did not want to get Defendant or himself in trouble and because he enjoyed his contact with Defendant. In response to Defendant's proposed statements of fact, Walton attempted to qualify his deposition testimony by asserting that he also did not report it because Defendant was a staff member. He further responded that he did not feel like he could tell Defendant to stop because of her position. But Walton's qualifications, which he appears to have made in an attempt to create a triable issue on the question of consent, are not included in his sworn complaint, his declaration, or in the portions of his deposition that he cites, and are therefore not properly supported. Accordingly, based on this record, the Court finds that, as a factual matter, the only

reasonable conclusion a jury could reach is that Walton consented to the sexual contact he had with Defendant.

Nonetheless, despite characterizing himself as a willing participant, Walton insists that Defendant violated the Eighth Amendment when she had sexual contact with him because, as a matter of law, he cannot consent to a sexual relationship with a prison official. The Court concludes, as have other courts in this district, that consensual sexual contact does not give rise to a constitutional violation.

Walton's argument is predicated upon the Prison Rape Elimination Act (PREA), which has as its goal the elimination of prison rape, and the Wisconsin Criminal Code, which defines second degree sexual assault to include "sexual contact or sexual intercourse with an individual who is confined in a correctional institution" by a correctional staff member. Neither the PREA nor Wisconsin law warrant a different conclusion, however.

Defendant's alleged conduct does not constitute a rape within the meaning of the PREA. More importantly, the PREA does not create a private right of action. And while it may constitute a crime for a correctional staff member to have sexual contact or sexual intercourse with a prison inmate, it does not follow that such conduct constitutes cruel and unusual punishment. To the extent Defendant's alleged behavior violated internal policy or even state law, it has long been held that violations of that nature "do not form the basis for imposing § 1983 liability." "But ignoring internal prison procedures does not mean that a constitutional violation has occurred."

In short, "not all misbehavior by public officials, even egregious misbehavior, violates the

Constitution." Walton's rights under the Eighth Amendment were not violated because the record establishes that Walton consented to the sexual contact he had with Defendant. To hold otherwise would encourage inmates to manipulate the legal system by seducing officials for possible financial gain. Defendant is entitled to summary judgment.

CONCLUSION

IT IS THEREFORE ORDERED that Defendant Ashley Nehls' motion for summary judgment is **GRANTED**.

IT IS FURTHER ORDERED that Defendant's motion to compel is **DENIED** as moot.

IT IS FURTHER ORDERED that this case is **DISMISSED**. The Clerk of Court is directed to enter judgment accordingly.

This order and the judgment to follow are final. Plaintiff may appeal this Court's decision to the Court of Appeals for the Seventh Circuit by filing in this Court a notice of appeal within 30 days of the entry of judgment. This Court may extend this deadline if a party timely requests an extension and shows good cause or excusable neglect for not being able to meet the 30-day deadline. If Plaintiff appeals, he will be liable for the $505.00 appellate filing fee regardless of the appeal's outcome. If Plaintiff seeks leave to proceed in forma pauperis on appeal, he must file a motion for leave to proceed in forma pauperis with this Court. Plaintiff may be assessed another "strike" by the Court of Appeals if his appeal is found to be non-meritorious. If Plaintiff accumulates three strikes, he will not be able to file an action in federal court (except as a petition for habeas corpus relief) without prepaying the filing fee unless he

demonstrates that he is in imminent danger of serious physical injury.

Under certain circumstances, a party may ask this Court to alter or amend its judgment under Federal Rule of Civil Procedure 59(e) or ask for relief from judgment under Federal Rule of Civil Procedure 60(b). Any motion under Federal Rule of Civil Procedure 59(e) must be filed within 28 days of the entry of judgment. Any motion under Federal Rule of Civil Procedure 60(b) must be filed within a reasonable time, generally no more than one year after the entry of judgment. The Court cannot extend these deadlines.

A party is expected to closely review all applicable rules and determine what, if any, further action is appropriate in a case.

APPENDIX C

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WISCONSIN

Case No. 22-C-7

DAVID CHRISTOPHER LEE WALTON, PLAINTIFF,
v.
ASHLEY NEHLS, DEFENDANT.

Dated: January 20, 2023

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict

☒ **Decision by Court.** This action came before the Court for consideration.

IT IS HEREBY ORDERED AND ADJUDGED that the plaintiff takes nothing and this case is DISMISSED.

Approved: s/ William C. Griesbach
WILLIAM C. GRIESBACH
United States District Judge

GINA M. COLLETTI
Clerk of Court

s/ Mara A. Corpus
(By) Deputy Clerk