No. 25-131

IN THE

Supreme Court of the United States

DAVID C. L. WALTON,

Petitioner,

v.

ASHLEY NEHLS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Non-consensual sexual conduct between prison officials and incarcerated individuals undoubtedly implicates the Eighth Amendment. The Circuits, however, are divided on how to ascertain whether an incarcerated individual truly consented. The Petition presented a threshold question: Do evolving standards of decency even allow treating incarcerated persons as capable of consenting to sexual conduct with prison officials?

The Petition asked this Court to resolve the Circuit split by answering that question in the negative. Legislative enactments provide the most reliable objective evidence of standards of decency; and, here, all fifty states, the District of Columbia, and Congress have unanimously criminalized sexual conduct between incarcerated persons and prison officials—without allowing consent as a defense. This consensus far exceeds what this Court has found sufficient to mark evolving standards in *Atkins* (18 states), *Roper* (30 states), and *Graham* (26 states). Accordingly, the Petition asked this Court to resolve the Circuit split by adopting a *per se* rule consistent with that consensus.

The BIO's efforts to overcome the Petition's case for this Court's intervention fall short.

First, the BIO argues that review is unwarranted because the Seventh Circuit declined to enter the Circuit split, creating no "square conflict." But refusing to choose sides doesn't eliminate those sides. Indeed, the Seventh Circuit itself acknowledged the Circuit split and that, in time, this Court will likely have to resolve it. Plus, the

BIO overlooks that the Seventh Circuit did enter the fray in a relevant way by explicitly considering and rejecting the *per se* rule. Pet. App. 10a. While the court observed that, "at first glance," such a rule might "comport with both the judgment of our country's legislatures and Eighth Amendment case law recognizing the inherent vulnerability of prisoners," it ultimately declined to adopt it. *Id.* at 9a–10a. This rejection squarely puts at issue the Petition's question presented.

Second, the BIO argues that the Petition's invocation of the legislative consensus is unavailing because that consensus concerns criminal liability and not civil liability (as imposed by a section 1983 claim for cruel and unusual punishment). This argument misses the mark. Legislative enactments—whether civil or criminal—constitute evidence of contemporary standards. If anything, society's willingness to impose a greater penalty on the basis of a standard of decency would seem to only make the probative force of criminal enactments stronger, not weaker.

Third, the BIO spends twelve pages arguing that this Court should deny review because Petitioner loses under any existing framework. But this misses the point. The Petition's thesis is not that this Court should intervene to correct an erroneous application of an existing framework, but that this Court should intervene to correct the existing frameworks themselves.

Fourth, the BIO objects that the *per se* rule of non-consent would enable prisoners to manipulate prison officials and secure windfalls. This inverts reality. It

is the prison officials, not the incarcerated individuals, who control the levers—food, safety, medical care, communications. And, in any case, this concern overlooks that, for purposes of the Eighth Amendment, standards of decency are to be discerned based on objective evidence of legislative enactments, not subjective speculation as to likely policy consequences.

Fifth, the BIO argues waiver, suggesting Petitioner only urged a rebuttable presumption before the Seventh Circuit. This is not the case. While Petitioner argued for the presumption framework as a minimum protection, Petitioner also argued for a *per se* rule before the Seventh Circuit. The Seventh Circuit explicitly considered and rejected the *per se* rule, analyzing it at length—satisfying the "pressed or passed upon" requirement.

In short, the BIO has not escaped the inexorable constitutional logic calling for this Court's intervention here:

- Non-consensual sexual conduct between guards and prisoners implicates the Eighth Amendment.
- Capacity to consent is a normative question determined by evolving standards of decency.
- Legislative enactments provide the most reliable objective evidence of those standards.
- Every legislature has determined that prisoners cannot consent to sexual conduct with prison officials, as evidenced by criminal liability without a consent defense.

- Therefore, this Court should adopt the *per se* rule reflected in the legislative consensus, thereby resolving the Circuit split and bringing Eighth Amendment jurisprudence in line with evolving standards of decency.

Certiorari should be granted.

I. The Circuit Conflict Is Real And Intolerable.

Respondent cannot dispute the divergent approaches across circuits. As the Petition showed, the competing circuit frameworks produce starkly different outcomes. In the Sixth Circuit, a guard providing sodas and cigarettes creates a triable issue of coercion, despite other indicia suggesting consent. *Hale v. Boyle County*, 18 F.4th 845, 853-54 (6th Cir. 2021). Yet in the Eighth Circuit, a guard depositing cash directly into a prisoner's account may be insufficient to raise a factual dispute. *Richardson v. Duncan*, 117 F.4th 1025, 1030 (8th Cir. 2024). This divergence demonstrates that the lower courts fundamentally disagree on how to assess consent in the inherently coercive prison environment.

The BIO's response—that the Seventh Circuit "did not enter the conflict"—misses the point. BIO 10–11. The Seventh Circuit's decision not to choose a side hardly means there are not conflicting sides from which to choose. The Seventh Circuit itself acknowledged that "in time, the Supreme Court is sure to resolve the split." Pet. App. 8a. Its refusal to "choose a side" (Pet. App. 8a) only highlights the intractability of the issues and need for this Court's guidance, not the absence of a conflict.

Moreover, while the Seventh Circuit declined to decide between existing frameworks, it made a definitive legal ruling relevant to the question presented: it explicitly rejected the *per se* rule of nonconsent advocated by Petitioner. Pet. App. 10a. It did so despite acknowledging that such a rule "would comport with both the judgment of our country's legislatures and Eighth Amendment case law." Pet. App. 9a–10a. This rejection squarely presents the question whether the Eighth Amendment permits lower courts to adhere to frameworks that ignore the unanimous legislative consensus on prisoners' incapacity to consent.

II. The Legislative Consensus Is Insurmountable.

Respondent cannot overcome the unanimous legislative judgment.

First, Respondent argues that criminal laws are irrelevant because § 1983 "protects plaintiffs from constitutional violations, not violations of state [or federal] laws." BIO 27. While this may be true, it is not germane here. Petitioner does not argue his § 1983 claim arose because a criminal law was violated, but because the Eighth Amendment was violated. The Eighth Amendment requires consulting "objective indicia" of society's standards. Legislative enactments are "the clearest and most reliable objective evidence" of those standards—irrespective of whether the enactment is criminal or civil. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *Roper v. Simmons*, 543 U.S. 551, 563–64 (2005); *Graham v. Florida*, 560 U.S. 48, 61–62 (2010).

Second, Respondent cites isolated state tort cases considering minors' "consent" in civil battery claims (statutory rape laws notwithstanding). BIO 26-27. These cases, however, involve private actors and common law torts—they do not apply the Eighth Amendment's evolving-standards framework. They are therefore inapposite. They certainly cannot explain why this Court's Eighth Amendment jurisprudence should adopt a standard of decency (recognizing the possibility of consent between an incarcerated individual and a prison official) that that every legislature has rejected.

Indeed, to the extent the BIO invokes the "consent" of minors to sexual conduct to justify the possibility of consent in the context of incarceration, this only underscores how far its position strays from contemporary standards of decency.

Third, Respondent argues that the Eighth Amendment requires a "flexible approach" incompatible with *per se* rules. BIO 25. But this Court has repeatedly adopted categorical rules under the Eighth Amendment when evolving standards of decency demand it, explicitly rejecting case-by-case evaluations for vulnerable populations. *See Roper*, 543 U.S. at 572 (categorically prohibiting death penalty for juveniles); *Atkins*, 536 U.S. at 318 (categorically prohibiting death penalty for intellectually disabled individuals). The legislative consensus demonstrates that prisoners are such a vulnerable population in this context.

In short, the objective evidence here far surpasses the partial showings this Court found sufficient in *Atkins* (18 states), *Roper* (30 states), and *Graham* (26 states). If

those partial showings were sufficient to mark an evolution in standards of decency, today's unanimity cannot be ignored.

III. Policy Concerns Cannot Override Constitutional Commands.

Respondent argues that a *per se* rule would "encourage inmates to manipulate the legal system by seducing officials for possible financial gain." BIO 27. This assumes that the inmate holds the leverage—an inverted understanding of reality in the carceral setting. It is the prison official, not the inmate, who is backed by the coercive authority of the state. The official controls access to food, medical care, communications, and safety. The prisoner holds no such leverage over the official. Thus, the notion that recognizing the categorically coercive context of incarceration would empower prisoners to manipulate their captors is facially implausible.

Moreover, Respondent's parade of horribles ignores the distinction between liability and damages. Under a *per se* rule, the inmate's consent would be categorically precluded from defeating liability. But this would not decide the remedy or quantum of damages, which would remain fact-specific. If a factfinder concludes the petitioner suffered no compensable injury, it may award merely nominal damages to vindicate the right. *See Carey v. Piphus*, 435 U.S. 247, 266-67 (1978).

Finally, Respondent's speculation about policy considerations cannot override clear constitutional mandates. The Eighth Amendment turns on legislative

enactments—not *a priori* speculation. *Atkins*, 536 U.S. at 312. Every legislature has judged that incarceration categorically vitiates the capacity to consent—a judgment that necessarily reflects consideration and rejection of the same policy concerns Respondent is raising. A *per se* Eighth Amendment rule reflects the legislative consensus and makes clear to prison officials that sexual conduct with inmates serves no legitimate penological purpose, and that prison officials must avoid ***all*** sexual conduct with inmates—not ***just*** unwelcome conduct — as the inherently coercive environment makes parsing welcomeness contrary to our standards of decency. Whatever consequences Respondent imagines follow from this policy, this is the moral judgment society has rendered.

IV. This Case Presents The Question Cleanly.

As previously noted, Respondent devotes twelve pages to arguing that Petitioner loses under both existing frameworks—the rule that places the burden on prisoners and the rule that presumes nonconsent unless rebutted. BIO 12-24. This extensive analysis misses the point. The Petition does not challenge application of the existing frameworks, but the existing frameworks themselves. So, this argumentation is simply irrelevant to the question presented. If anything, Respondent's catalog of lower court decisions only underscores the fractured landscape that demands resolution.

This case presents an ideal vehicle for providing that resolution. It presents the capacity-to-consent question cleanly without the need to decide factual

complexities. The lower courts granted and affirmed summary judgment based on Petitioner's testimony that he welcomed the sexual conduct at the time. Thus, if, as a matter of law, Petitioner lacked the capacity to consent, that testimony is legally irrelevant, and summary judgment was improper. Unlike cases with disputed facts about coercion, resistance, or the degree of welcomeness, this case isolates the pure legal question: Do our standards of decency allow treating an incarcerated individual as capable of consenting to sexual conduct with those who incarcerate them?

Thus, by presenting this question, the Petition does not ask this Court to choose between burden-shifting presumptions but rather to recognize what every legislature already has: incarcerated individuals categorically lack capacity to consent to sexual conduct with those who incarcerate them.

V. The Issue of A *Per Se* Rule Was Preserved.

Respondent argues waiver by implying that Petitioner urged the Seventh Circuit only to adopt a rebuttable presumption framework. BIO 2, 7. This misstates the record. Before the Seventh Circuit, Petitioner also argued for a *per se* rule—indeed, the presumption framework was presented as an alternative minimum protection. Arguing positions in the alternative does not forfeit the primary claim. *See Yee v. City of Escondido*, 503 U.S. 519, 534–35 (1992) (no waiver where petitioner refined takings theory on appeal). This is all the more true here, where the Seventh Circuit explicitly considered and rejected the *per se* rule, analyzing it

at length. Pet. App. 9a–11a. That alone is sufficient to satisfy the "pressed or passed upon" requirement. See *United States v. Williams*, 504 U.S. 36, 41 (1992). The issue is therefore properly before this Court.

VI. The Inadvertent Appendix Errors Are Immaterial And Moot.

Respondent's accusation about the errors in the Petition's retyped appendix is a distraction. While certainly regrettable, the inadvertent appendix errors were the result of mistakenly accepting automated software edits and have been acknowledged through a Notice of Errata. Petitioner stipulates to Respondent's Supplemental Appendix D.

CONCLUSION

The question presented transcends procedural disputes about burden-shifting or evidentiary presumptions. This Court must determine whether the Eighth Amendment's prohibition of cruel and unusual punishment permits sexual conduct that every state legislature, the District of Columbia, and Congress have determined does not contain meaningful consent. The unanimous legislative judgment that prisoners lack the capacity to consent to sexual relationships with prison officials constitutes compelling objective evidence of contemporary standards of decency. This unprecedented consensus warrants this Court's review to resolve the acknowledged Circuit split and establish a uniform constitutional standard.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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