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For The Eighth Circuit
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RE: 22-2640 Wilbert Glover v. Richard Rodriquez, et al

Dear Counsel:

The amicus curiae brief of Former State Prison Officials has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

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HAG

Enclosure(s)

cc: Ms. Caitlinrose Hoolihan Fisher
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Ms. Virginia R. McCalmont
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District Court/Agency Case Number(s): 0:19-cv-00304-NEB

Case No. 22-2640

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

WILBERT GLOVER,
Plaintiff-Appellee,

v.

RICHARD RODRIQUEZ, ALBERT ROSS, R. PAUL #705, MATT BOSTROM, JOE PAGET, AND OFFICER HENDRIKT,

Defendants-Appellants

On Appeal from Order of the United States District Court for the District of Minnesota
(No. 19-CV-304)

BRIEF OF AMICI CURIAE FORMER STATE PRISON OFFICIALS IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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INTEREST OF *AMICI CURIAE*[1]

Amici are former leaders of some of the nation's largest state prison systems. With over a century of combined experience, each has worked at various levels of prison systems, from entry level positions including correctional officers, to the Chief Executive Officer position within their respective state organizations. They have worked at and overseen dozens of prison and jail facilities, housing thousands of prisoners. *Amici* are:

- **Kathleen Dennehy, Ph.D.**: 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 over 30 years and has been a consultant for justice and prison systems for over 25 years. She has taught courses on criminal justice and has served as an expert witness in many prison-related cases across the country. Dr. Dennehy is currently serving as an independent federal court monitor.

- **Martin Horn**: the former Commissioner of the New York City Department of Corrections, and former Secretary of Corrections for the Commonwealth of Pennsylvania. He has worked in the criminal justice system for over 45 years, and retired in 2020 as the Distinguished Lecturer in Corrections at the City University of New York.

- **Justin Jones**: the former Director of the Oklahoma Department of Corrections. He spent 36 years with the Oklahoma Department of Corrections. He has also served as the Chair of the Commission on Accreditation for the American Correctional Association.

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties that have entered an appearance in this matter have consented to *amici*'s submission of this brief.

- **Dan Pacholke**: the former Secretary of the Washington State Department of Corrections, where he served the agency for 33 years. After retiring from WDOC, he worked for the New York University Marron Institute of Urban Management, and today he serves as an investigator and expert witness in a wide range of cases.

- **Eldon Vail:** 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 numerous prison-related cases across the country.

As leading experts in the management of prisons and jails, *amici* have an interest in ensuring that issues affecting carceral systems are decided in a manner that is consistent with sound penological principles. *Amici* thus respectfully submit this brief to advise the court of certain principles and practices relevant to the issues presented in this case.

INTRODUCTION

Plaintiff-Appellee Wilbert Glover survived summary judgment on his sexual abuse[2] claim against Defendant-Appellant R. Paul, a corrections officer in Ramsey

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[2] *Amici* use the terms "sexual harassment" and "sexual abuse" as defined by the National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act ("PREA Standards"), which apply to all prisons and jails. *See* 28 C.F.R. § 115.6. Sexual harassment includes "[r]epeated verbal comments or gestures of a sexual nature to a [prisoner] by a staff member, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures." *Id.* Sexual abuse by a staff member includes

> (1) Contact between the penis and the vulva or the penis and the anus, including penetration, however slight; (2) Contact between the mouth and the penis, vulva, or anus; (3) Contact between the mouth and any body part where the staff member … has the intent to abuse,

County Adult Detention Center. Glover alleged that Paul "grasped Glover's penis and squeezed it hard and gestured" during a strip search.[3] R. Doc. 98 at 9. This conduct amounted to sexual abuse, which is a constitutional violation. *See Ullery v. Bradley*, 949 F.3d 1282, 1297 (10th Cir. 2020) ("[E]ven *de minimis* uses of force, particularly in sexual abuse cases, violate the Eighth Amendment when the conduct is 'repugnant to the conscience of mankind.'" (quoting *Washington v. Hively*, 695 F.3d 641, 642 (7th Cir. 2012))).

The district court held that the officer's conduct violated a clearly established constitutional "right to be free from sexual assault—including assault during a pat-down search." R. Doc. 98 at 10. Thus, the district court denied qualified immunity

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> arouse, or gratify sexual desire; (4) Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member … has the intent to abuse, arouse, or gratify sexual desire; (5) Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member … has the intent to abuse, arouse, or gratify sexual desire; (6) Any attempt, threat, or request by a staff member… to engage in [sexual abuse]; (7) Any display by a staff member … of his or her uncovered genitalia, buttocks, or breast in the presence of [a prisoner], and (8) Voyeurism[.]
>
> *Id.*

[3] Viewing the allegation in the complaint in the light most favorable to the plaintiff, the court should infer that the gesture, read in context, was a sexually suggestive one. *See Shannon v. Koehler*, 616 F.3d 855, 861–62 (8th Cir. 2010).

to Paul,[4] R. Doc. 98 at 10, and denied summary judgment on the sexual abuse claim against him, *id.* at 13. *Amici* agree that this right is clearly established in Eighth Circuit case law. *See Freitas v. Ault*, 109 F.3d 1335, 1338 (8th Cir. 1997) ("[T]he sexual harassment or abuse of an inmate by a corrections officer can never serve a legitimate penological purpose….").

Like the district court, *amici* believe Paul's misconduct is an egregious example of custodial sexual abuse that must be addressed so that the Eighth Amendment may better protect vulnerable populations and individuals in the carceral system. As former corrections officials, *amici* have expertise in conduct typical of a prison setting and in effective prison administration practices. *Amici* are also leaders in nationwide efforts to curtail sexual abuse of incarcerated people.

In this case, the district court properly assessed the illegitimacy of Paul's actions. *Amici* submit this brief to share with the court their expertise on three main concepts: (1) corrections officers such as Paul know that it is unlawful to sexually harass or abuse incarcerated people during a strip search; (2) sexual harassment and abuse serve no valid penological purpose and undermine institutional safety and security by increasing physical and psychological risks to both staff and incarcerated

[4] "When a defendant raises the qualified immunity defense, the plaintiff must … establish (1) [that] the defendant violated a federal statutory or constitutional right, and (2) [that] the right was clearly established at the time of the defendant's conduct." *Ullery*, 949 F.3d at 1289.

populations; and (3) incarcerated people have little recourse against sexual harassment or abuse by corrections officers. Because the district court correctly denied Paul qualified immunity, this Court should affirm.

ARGUMENT

I. CORRECTIONS OFFICERS KNOW THAT IT IS UNLAWFUL TO SEXUALLY HARASS OR ABUSE INCARCERATED PEOPLE, ESPECIALLY DURING STRIP SEARCHES

Defendant-Appellant Paul is not entitled to qualified immunity because his actions were objectively unreasonable in light of clearly established law. His conduct—grasping Glover's genitals, squeezing, and gesturing—falls squarely within the relevant definitions of sexual abuse and sexual harassment under national standards for prisons and jails. Any reasonable corrections officer in Paul's position would know the alleged conduct was unlawful.

A. Courts Have Uniformly Held That the Eighth Amendment Prohibits Corrections Officers From Sexually Abusing Incarcerated People, Including During Strip Searches

Precedent across the circuits both before and after the alleged abuse occurred unequivocally establishes that corrections officers are not permitted to intentionally fondle prisoners' genitalia or make lewd gestures.[5] "[S]exual contact between a prisoner and a prison guard serves no legitimate role and 'is simply not part of the

[5] This circuit, like most circuits, considers both binding circuit precedent and decisions from other circuits in determining whether the law is clearly established. *Turner v. Ark. Ins. Dep't,* 297 F.3d 751, 755 (8th Cir. 2002).

penalty that criminal offenders pay for their offenses against society.'" *Wood v. Beauclair*, 692 F.3d 1041, 1050 (9th Cir. 2012) (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted)). As the Ninth Circuit stated fifteen years before this incident occurred: "In the simplest and most absolute of terms, the Eighth Amendment rights of prisoners to be free from sexual abuse was unquestionably clearly established prior to the time of this alleged assault, and no reasonable prison guard could possibly have believed otherwise." *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000). And this court found in 2002 that "no reasonable prison official … could have concluded … that a detainee who was sexually assaulted by a prison guard did not suffer a 'serious harm.'" *Kahle v. Leonard*, 477 F.3d 544, 553 (8th Cir. 2007).

Courts have thus consistently held that the Eighth Amendment protects against sexual abuse by corrections officers, with many of the incidents underlying the cases occurring during pat-down searches or strip searches. *See, e.g.*, *Crawford v. Cuomo*, 796 F.3d 252, 257 (2d Cir. 2015) ("A corrections officer's intentional contact with an inmate's genitalia or other intimate area, which serves no penological purpose and is undertaken with the intent to gratify the officer's sexual desire or humiliate the inmate, violates the Eighth Amendment."); *Ricks v. Shover*, 891 F.3d 468, 471 (3d Cir. 2018) ("Our society requires prisoners to give up their liberty, but that surrender does not encompass the basic right to be free from severe

unwanted sexual contact."); *Washington*, 695 F.3d at 642–44 (holding that "gratuitously fondling" the plaintiff for "five to seven seconds … through the plaintiff's clothing" and for "two or three seconds" while strip searching him violated the Eighth Amendment); *Bearchild v. Cobban*, 947 F.3d 1130, 1146 (9th Cir. 2020) ("We … reaffirm … that sexual assault violates the Eighth Amendment regardless of the amount of force used."); *Hayes v. Dahlke*, 976 F.3d 259, 275 (9th Cir. 2020) ("[T]he routine nature of these pat frisks alone does not shield an officer from liability, and the conduct described by [the plaintiff], if believed, could certainly support an inference that [the defendant] engaged in conduct beyond what was required for a pat search…."). In short, "[w]here guards themselves are responsible for … sexual abuse of inmates, qualified immunity offers no shield" because "the Eighth Amendment right of prisoners to be free from sexual abuse [i]s unquestionably clearly established." *Schwenk*, 204 F.3d at 1197.

The same can be said of sexually explicit gestures. At least one federal court of appeals has established that sexually explicit gestures during a strip search can give rise to an Eighth Amendment sexual abuse claim. In *Calhoun v. DeTella*, 319 F.3d 936 (7th Cir. 2003), the plaintiff alleged that officers made sexually explicit comments and gestures during a strip search and "forced him to perform sexually provocative acts" in front of female officers who were "invited spectators." *Id.* at 940. The Seventh Circuit decided that such behavior from corrections officers during

a search "can only lead to the conclusion that the prison guards conducted the strip search in a manner designed to demean and humiliate" the plaintiff. *Id.* Here, the gesture made by Paul should be viewed in context of Paul's decision to squeeze Glover's penis. Just as the Seventh Circuit took all the evidence into account and found the strip search "reprehensible," permitting the plaintiff to pursue punitive damages, *id.* at 942, this court has strong evidence to conclude that the gesture was sexually harassing behavior contributing to the Paul's intent to "demean and humiliate" Glover. *See Crawford*, 796 F.3d at 258–59 (finding an officer who squeezed a plaintiff's penis violated the plaintiff's rights and finding certain demeaning comments "suggest that [the officer] undertook the search in order to arouse himself, humiliate [the plaintiff], or both").

The district court correctly applied well-established law to Glover's case. Paul's qualified immunity defense fails in light of this precedent.

B. Sexual Abuse During Strip Searches Violates Professional Expectations and National Standards for Prisons and Jails

Sexual abuse of the sort perpetrated by Paul is reprehensible and has no place in a carceral setting under any circumstances. As former heads of major state prison systems, *amici* assert unequivocally that no incarcerated person should experience this type of abuse. We and our peers set high professional standards for ourselves and our staff and expect those standards to be met at all times. As a member of our profession, Paul was unquestionably aware that his conduct was unlawful.

The standards promulgated by the nation's leading correctional organization, the American Correctional Association, address the professional expectations set for correctional staff. The ACA Standards require facilities to implement written policies and procedures that prohibit "sexual conduct between staff and inmates" and subject violators to "administrative and criminal disciplinary sanctions."[6] The ACA Standards similarly require facilities to implement policies and procedures that "clearly indicate[] that sexual harassment, either explicit or implicit, is strictly prohibited."[7]

Congress unanimously passed the Prison Rape Elimination Act ("PREA") in 2003, 34 U.S.C. § 30301 *et seq.*, and the Attorney General promulgated a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape in 2012, 28 C.F.R. § 115.11 *et seq.* The significance of PREA and the PREA Standards cannot be overstated. Congress had never before passed national standards for prisons and jails. And to this day the PREA Standards remain the only national legal standards regulating prisons and jails in this country. PREA's very text notes that its purpose is to "protect the Eighth Amendment rights of Federal, State, and local prisoners." 34 U.S.C. § 30302(7). The Eighth Amendment requires courts to "look beyond historical conceptions to 'the evolving standards of decency

[6] Am. Corr. Ass'n, *Performance-Based Expected Practices for Adult Correctional Institutions* § 5-3D-4281-6 (5th ed. 2018).
[7] *Id.* § 5-1C-4056.

that mark the progress of a maturing society.'" *Graham v. Florida*, 560 U.S. 48, 58 (2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). As a unanimously passed legislative enactment, PREA is the "clearest and most reliable objective evidence of contemporary values." *Crawford*, 796 F.3d at 260 (quoting *Atkins v. Virginia*, 536 U.S. 304, 315 (2002)); *see also Bearchild*, 947 F.3d at 1144.

PREA defines rape to include sexual fondling. 34 U.S.C. § 30309(9). Sexual fondling "means the touching of the private body parts of another person (including the genitalia, anus, groin, breast, inner thigh, or buttocks) for the purpose of sexual gratification." *Id.* § 30309(11). The PREA Standards prohibit sexual abuse by staff. All prisons must comply with the PREA Standards or risk losing federal funding, which all state prison systems receive. *Id.* § 30307(e)(2). The PREA Standards set a "zero tolerance" policy "towards all forms of sexual abuse and sexual harassment." 28 C.F.R. § 115.11. In relevant part, the PREA Standards prohibit "intentional contact, either directly or through the clothing, of or with the genitalia …, that is unrelated to official duties." *Id.* § 115.6. And sexual harassment under the PREA Standards includes "obscene language or gestures." *Id.* Paul's alleged conduct therefore falls squarely within the list of acts that these national standards sought to eliminate.

II. SEXUAL ABUSE SERVES NO VALID PENOLOGICAL PURPOSE AND UNDERMINES INSTITUTIONAL SAFETY AND SECURITY

The district court held that a "jury could find that squeezing a prisoner's penis hard during a strip search is not penologically necessary and could find that it is 'repugnant to the conscience of mankind.'" R. Doc. 98 at 9 (quoting *Hudson v. McMillian*, 503 U.S. 1, 10 (1992)). *Amici* agree. Sexual harassment and abuse *never* serve a valid penological purpose. In fact, sexual harassment and abuse undermine important penological goals, endanger institutional safety and security, and lead to further harm. In decades of experience in prison settings, *amici* did not and would not accept sexual harassment or abuse by their staff, and they believe such abuse should be actionable under the Eighth Amendment.

A. Sexual Abuse Never Serves a Valid Penological Purpose

Sexual abuse is never part of any person's sentence. Sexual abuse perpetrated "on an inmate by a guard … is deeply offensive to human dignity." *Schwenk*, 204 F.3d at 1197. As stated above, sexual abuse is "simply not part of the penalty that criminal offenders pay for their offenses against society." *Wood*, 692 F.3d at 1050 (quoting *Farmer*, 511 U.S. at 834 (internal quotation marks omitted)). In *Berry v. Oswalt*, 143 F.3d 1127 (8th Cir. 1998), this court found that harassing behavior—nonroutine pat-downs, propositions for sex, intrusions while plaintiff was not fully clothed, and sexual comments, *id.* at 1131—"evidenced intent to initiate sexual contact with [the plaintiff], a state of mind … consistent with the 'obduracy and

wantonness … that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.'" *Id.* at 1133 (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). In light of the consistent federal jurisprudence, it is without question that sexual abuse and sexual harassment never serve a valid penological purpose. *See Bearchild*, 947 F.3d at 1143 ("Because there is no 'legitimate penological purpose' served by a sexual assault, the subjective component of 'malicious and sadistic intent' is presumed if an inmate can demonstrate that a sexual assault occurred.").

Consistent with these principles, as stated above, the PREA Standards prohibit sexual abuse and sexual harassment of the type that allegedly occurred here. *See* 28 C.F.R. §§ 115.11, 115.6. These regulations are federal acknowledgments that sexual harassment and abuse serve no valid penological purpose. Thus, Paul had no valid penological purpose to gratuitously squeeze Glover's penis during a strip search or make a sexually harassing gesture.

B. Sexual Abuse Undermines Institutional Safety and Security

Paul's behavior also undermines the creation of a safe environment for rehabilitation and undermines institutional security and safety. Searches are vulnerable moments when prisoners are subject to a corrections officer's intrusive physical touch. Corrections officers are government agents tasked with protecting

the health and safety of the people in their custody.[8] To take advantage of that role by abusing a person forced to succumb to an invasion of their bodily privacy undermines any educational and rehabilitative goals of carceral institutions.[9]

Sexual harassment and abuse also damage corrections' officers' ability to keep order and uphold their "duty under the Eighth Amendment … to ensure 'reasonable safety.'" *Farmer*, 511 U.S. at 844 (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)). By design, a limited number of staff members are tasked with supervising large numbers of incarcerated people.[10] In *amici*'s experience, developing rapport with the incarcerated population is critical to maintaining safety and security under these circumstances. Good rapport is necessary to facilitate communication with incarcerated people and to encourage them to report problems and concerns to the staff. Corrections officers can develop that rapport only by fairly

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[8] Megan Coker, Note, *Common Sense About Decency: Promoting a New Standard for Guard-on-Inmate Sexual Abuse Under the Eighth Amendment*, 100 Va. L. Rev. 437, 438 (2014).

[9] United Nations Off. On Drugs & Crime, *Handbook for Prison Leaders* 34 (United Nations 2010), https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Handbook_for_Prison_Leaders.pdf ("The objective of imprisonment is to respectfully perform the sentence passed by the Court, and facilitate the rehabilitation of prisoners so as to prepare them for their return to society."); *see also* M. Keith Chen, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 Am. L. & Econ. Rev. 1, 24 (2007) (arguing harsher prison conditions increase recidivism).

[10] *See* Fed. Bureau of Prisons, *Program Fact Sheet* (May 31, 2019), https://www.bop.gov/about/statistics/docs/program_fact_sheet_201907.pdf (noting inmate-to-correctional-officer ratio of 9.3 to 1 in federal prisons).

and consistently treating all people in the facility with dignity. Sexual abuse like the behavior alleged here actively thwarts the sound management of the entire institution by reducing trust in staff and discouraging incarcerated people from reporting violence or other problems. Finally, officers have a duty to model the behavior and respect we expect from people who are incarcerated. When officers abuse or harass incarcerated people, the officers fail to fulfill this duty, and instead set a negative example for other prisoners to engage in similarly abusive behavior.[11]

III. PRISONERS HAVE LITTLE RECOURSE AGAINST SEXUAL ABUSE BY CORRECTIONS OFFICERS

Sexual abuse occurs all too frequently in American prisons and jails. The judiciary should take every opportunity to condemn sexual abuse committed by corrections officers. Federal law unequivocally prohibits the type of conduct that Glover endured, and corrections officers who violate it should be held accountable. Denying Paul's appeal would solidify this circuit's position that those officers who choose to harass or abuse incarcerated people cannot claim a qualified immunity defense.

[11] *See* United Nations, *supra* note 9, at 34 ("The prison system must show by example how people should be treated; by treating prisoners fairly and humanely and demonstrating respect for their rights, one can hope that prisoners will learn how to treat others from that example.").

A. Sexual Abuse by Corrections Officers Is All Too Common

Pervasive sexual misconduct in correctional facilities has been described as "America's most open secret."[12] When it enacted PREA in 2003, Congress found that "[t]he total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000." 34 U.S.C. § 30301(2). In 2018, corrections officials nationwide reported 24,661 allegations of sexual abuse in carceral facilities.[13] And in 2011, corrections officers committed approximately half (252 out of 546) of all substantiated allegations of sexual victimization reported by federal and state prison authorities.[14]

It is particularly repugnant when a corrections officer, who controls nearly every aspect of a prisoner's life, engages in the sexual abuse of a prisoner. Because of the extreme "dichotomy of control between prison guards and prisoners," corrections officers should be held to a high standard when it comes to sexual abuse of prisoners. *See Wood*, 692 F.3d at 1047. Prisoners "cannot choose what or when to eat, whether to turn the lights on or off, where to go, and what to do. They depend on prison employees for basic necessities, contact with their children, health care,

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[12] Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 Yale L. & Pol'y Rev. 195, 196 (1999).
[13] Bureau of Justice Statistics, *PREA Data Collection Activities, 2018*, at 1 (June 2018), https://bjs.ojp.gov/content/pub/pdf/pdca18.pdf.
[14] *See* Ramona R. Rantala et al., Bureau of Justice Statistics, *Survey of Sexual Violence in Adult Correctional Facilities, 2009-11 Statistical Tables* 1, 7 (Jan. 2014), https://bjs.ojp.gov/content/pub/pdf/ssvacf0911st.pdf.

and protection from other inmates." *Id.* Such power imbalances between prisoners and corrections officers often make it difficult to hold staff accountable; prisoners often lack effective access to courts, leaving prison officials to serve as police, prosecution, jury, and court of appeals.[15]

Even where corrections officers do not directly perpetrate sexual abuse, they may deliberately ignore it. As Justice Blackmun observed over forty years ago, "[p]rison officials either are disinterested in stopping abuse of prisoners … or are incapable of doing so, given the limited resources society allocates to the prison system." *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting). Robust enforcement by the courts and adequate oversight by prison and jail administrators is critical to ensuring custodial sexual abuse is not accepted as an inevitable reality.[16]

B. Prisoners Who Report Sexual Abuse by Corrections Officers Often Face Retaliation

Actual or threatened retaliation by corrections officers often compounds the harm inflicted by sexual abuse and impedes efforts to hold officers accountable. Abusive corrections officers may retaliate against prisoners who refuse their sexual

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[15] Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender, and the Rule of Law*, 29 Yale L. & Pol'y Rev. 1, 24 (2010) ("Since prisoners lack effective access to the courts, prison officials serve as police, prosecutor, judge, jury, and court of appeals.").

[16] *See* Bell, *supra* note 12, at 196, 215–16.

advances or report their conduct.[17] One survey suggests that "more than half of prisoners who file grievances report experiencing retaliation for making a complaint against staff."[18] In another study, 61% of prisoners reported that concerns about retaliation by corrections officers deterred them from filing grievances.[19] That study found that prisoners "often endure abuse by guards in order not to jeopardize their release date."[20] Another researcher said that "[m]ost prison sexual assault victims do not report the incidents to correctional authorities, because they fear reprisals, fear no one will believe them, or think it will only cause more problems."[21] Further, "sexual assault is likely to be underreported by male inmates because of ... unwillingness to be a 'snitch,' and fear of being labeled a homosexual or weak."[22] Courts have also recognized a pattern of retaliation against prisoners who report staff

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[17] *See* Robert W. Dumond, *Impact of Prisoner Sexual Violence: Challenges of Implementing Public Law 108-79 The Prison Rape Elimination Act of 2003*, 32 J. Legis. 142, 149 (2006) (stating corrections officers may resort to blackmail, pressure tactics, physical force, and/or psychological manipulation if their advances are refused); Jeffrey Ian Ross, *Deconstructing Correctional Officer Deviance: Toward Typologies of Actions and Controls*, 38 Crim. Just. Rev. 110, 114 (2013) (discussing that corrections officers "have a considerable amount of power while on the job and can take a litany of retaliatory acts against them if they choose).

[18] John J. Gibbons & Nicholas de B. Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 Wash. U. J.L. & Pol'y 385, 515 (2006).

[19] Kitty Calavita & Valerie Jenness, *Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic* 68 (2015).

[20] *Id.* at 69.

[21] Dumond, *supra* note 17, at 154.

[22] Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 Prison J. 379, 380 (2000).

sexual abuse. *See, e.g.*, *Watson v. Jones*, 980 F.2d at 1165, 1166 (8th Cir. 1992) (reversing summary judgment for a corrections officer who allegedly "fondled [plaintiffs] during pat-down searches" and who "retaliated" against them "when they refused to be searched by [her]."); *see also Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 741 (6th Cir. 2004); *Keith v. Koerner*, 843 F.3d 833, 852 (10th Cir. 2016); *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 931 (D.C. Cir. 1996). Because of the widespread fear of retaliation, "[p]rison rape often goes unreported." 34 U.S.C. § 30301(6). And when staff sexual abuse goes unreported, officers are not held accountable.

Glover risked such retaliation by raising the allegations in his complaint. Because of his brave decision to report what happened, this court has the opportunity to condemn the sexual abuse by Paul, which is emblematic of the sexual abuse happening in prisons and jails across the nation. Securing a remedy for Glover and denying Paul qualified immunity may deter other corrections officers from committing similar abuses.

CONCLUSION

The district court's denial of summary judgment for the claims against Paul should be affirmed.

Date: November 14, 2022 Respectfully submitted,

/s/ Samuel Weiss

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because it contains 4,490 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Date: November 14, 2022

/s/ Samuel Weiss
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I hereby certify that I electronically filed the foregoing amicus curiae brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system on November 14, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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