

Case No. 19-17443

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EDWARD GLADNEY,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
No. 4:17-cv-0427-DCB

**BRIEF OF AMICI CURIAE CIVIL RIGHTS, HEALTH CARE, & NON-
PROFIT ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT
EDWARD GLADNEY AND REVERSAL**

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
CORPORATE DISCLOSURE STATEMENT	vii
FED. R. APP. P. 29(a) STATEMENT.....	viii
FED. R. APP. P. 29(a)(4)(D) STATEMENT OF AMICI CURIAE’S IDENTITY	ix
INTRODUCTION.....	1
ARGUMENT	3
I. Defendant Had Unambiguous Notice That, As a Transgender Person in Custody, Ms. Gladney Required Heightened Protection in Federal Prison.	3
II. Defendant Has A Statutory, Regulatory, and Constitutional Obligation to Protect Individuals in Federal Custody from Sexual Assault.....	6
A. PREA Binds the BOP to Protect Individuals in Federal Custody from Sexual Assault.....	6
B. The PREA Standards Contain Special Safeguards to Address the Vulnerabilities That Incarcerated Transgender People Face.	8
C. Defendant Has an Affirmative Duty under the Constitution to Protect Incarcerated Transgender People Like Ms. Gladney from Sexual Assault.....	9
III. The Federal Tort Claims Act Is a Preferred Remedy for Victims of Sexual Assault in Federal Custody.	10
IV. The Discretionary Function Exception Does Not Apply Because Defendant’s Discretion Was Constrained by Statute, Regulation, and the U.S. Constitution.....	11
A. The PREA Statute and Regulations Created Mandatory Safeguards That Cabined Defendant’s Discretion.	11
B. The Eighth Amendment Mandates Protection for Incarcerated Transgender People Who Are Particularly Vulnerable to Sexual Assault.....	14
V. Affirming the District Court’s Decision Would Deny Victims of Sexual Assault a Vital Legal Remedy.	17

A. The FTCA Must Remain an Available Remedy for Ms. Gladney and Other Victims of Sexual Assault.....17

B. The BOP Has Failed to Provide an Adequate and Effective Alternative Remedy for Survivors Seeking Redress for Sexual Assault.....19

VI. Applying the Discretionary Function Exception Here Would Allow Prisons to Evade Their Obligation to Protect Prisoners from Sexual Assault and Create a Culture of Impunity.22

CONCLUSION25

TABLE OF AUTHORITIES

Cases

<i>Berkovitz v. United States</i> , 486 U.S. 531 (1988)	13
<i>Castro v. Cty. of Los Angeles</i> , 797 F.3d 654 (9th Cir. 2015)	15, 17
<i>Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984)	18
<i>De Veloz v. Miami-Dade Cty.</i> , 756 F. App'x 869 (11th Cir. 2018)	16
<i>Doe v. United States</i> , 510 F. App'x 614 (9th Cir. 2013)	11, 19, 22
<i>Edmo v. Corizon, Inc.</i> , 949 F.3d 489 (9th Cir. 2020)	10, 15
<i>F.D.I.C. v. Meyer</i> , 510 U.S. 471 (1994)	10
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994)	passim
<i>Feres v. United States</i> , 340 U.S. 135 (1950)	2
<i>Galvin v. Hay</i> , 374 F.3d 739 (9th Cir. 2004)	14
<i>GATX/Airlog Co. v. United States</i> , 286 F.3d 1168 (9th Cir. 2002)	13
<i>Gonzalez v. United States</i> , 814 F.3d 1022 (2016)	10, 12, 13
<i>Greene v. Bowles</i> , 361 F.3d 290 (6th Cir. 2004)	9, 16

<i>Kim v. United States</i> , 940 F.3d 484 (9th Cir. 2019)	13
<i>Knappick v. United States</i> , 875 F.2d 318 (9th Cir. 1989)	11, 22
<i>Kosak v. United States</i> , 465 U.S. 848 (1984)	10, 18
<i>Nurse v. United States</i> , 226 F.3d 996 (9th Cir. 2000)	13, 14, 17
<i>Prescott v. United States</i> , 973 F.2d 696 (9th Cir. 1992)	12
<i>Schwenk v. Hartford</i> , 204 F.3d 1187 (9th Cir. 2000)	15
<i>Terbush v. United States</i> , 516 F.3d 1125 (9th Cir. 2008)	12, 18
<i>Tuuamalemalo v. Greene</i> , 946 F.3d 471 (9th Cir. 2019)	15
<i>United States v. Gaubert</i> , 499 U.S. 315 (1991)	10, 12, 19
<i>Whisnant v. United States</i> , 400 F.3d 1177 (9th Cir. 2005)	13
<i>Zollicoffer v. Livingston</i> , 169 F. Supp. 3d 687 (S.D. Tex. 2016)	16

Statutes

28 C.F.R. § 115	passim
28 U.S.C. § 1346	10
28 U.S.C. § 2679	19
28 U.S.C. § 2680	2
34 U.S.C. § 30302	4, 7, 10

34 U.S.C. § 30306.....	4
34 U.S.C. § 30307.....	7, 9, 12, 18

Other Authorities

Allen J. Beck & Timothy A. Hughes, <i>Sexual Violence Reported by Correctional Authorities, 2004</i> , BUREAU OF JUSTICE STATISTICS (July 2005)	21
Allen J. Beck, <i>Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12, Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates</i> , U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (Dec. 2014).....	4, 5, 23
<i>Federal Bureau of Prisons Annual Report, Calendar Year 2016</i> , FED. BUREAU OF PRISONS (June 2017).....	3
<i>Federal Bureau of Prisons Annual Report, Calendar Year 2017</i> , FED. BUREAU OF PRISONS (June 2018).....	3, 6
<i>Federal Bureau of Prisons Annual Report, Calendar Year 2018</i> , FED. BUREAU OF PRISONS (June 2019).....	3, 5
Gregory M. Herek & Kevin T. Berrill, <i>Hate Crimes: Confronting Violence against Lesbians and Gay Men</i> (1992)	5
<i>Investigating Sexual Assaults in Correctional Facilities</i> , NAT’L INST. OF CORRS., U.S. DEP’T OF JUSTICE (2007).....	24
Janine M. Zweig, et al., <i>Addressing Sexual Violence in Prisons: A National Snapshot of Approaches and Highlights of Innovative Strategies</i> , NAT’L CRIMINAL JUSTICE REFERENCE SERV. (2007)	20, 21
Jason Lydon, et al., <i>Coming Out of Concrete Closets: A Report on Black & Pink’s National LGBTQ Survey</i> , BLACK & PINK (Oct. 2015)	5
Mark S. Fleisher & Jessie L. Krienert, <i>The Culture of Prison Sexual Violence</i> , NAT’L CRIMINAL JUSTICE REFERENCE SERV. (2006).....	20
<i>National Prison Rape Elimination Commission Report</i> , NAT’L CRIMINAL JUSTICE REFERENCE SERV. (2009).....	passim

Office for Victims of Crime, <i>Responding to Transgender Victims of Sexual Assault, Office of Justice Programs</i> , U.S. DEP’T OF JUSTICE (last visited Oct. 5, 2020)	4
Review Panel on Prison Rape, <i>Report on Sexual Victimization in Prisons, Jails, and Juvenile Correctional Facilities</i> , U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS (2016)	8
<i>Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12</i> , U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS (Mar. 2013)	4
<i>Sexual Victimization in Prisons and Jails Reported by Inmates, 2012-15</i> , BUREAU OF JUSTICE STATISTICS (July 2018)	20
<i>Transgender Offender Manual</i> , U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS (May 11, 2018)	5, 6
U.S. Dep’t of Justice, <i>National Standards to Prevent, Detect, and Respond to Prison Rape</i> , NAT’L PREA RESOURCE CTR. (May 2012)	8
U.S. Dep’t of Justice, <i>Sexually Abusive Behavior Prevention and Intervention Program</i> , FED. BUREAU OF PRISONS (last visited Oct. 7, 2020)	6, 9
<i>Unjust: How the Broken Criminal Justice System Fails LGBT People of Color</i> , MOVEMENT ADVANCEMENT PROJECT (Aug. 2016)	5

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amici curiae hereby certify that none of the amici curiae have a parent corporation. Amici curiae are civil rights, health care, and non-profit organizations and have no shares or securities that are publicly traded.

FED. R. APP. P. 29(a) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *Amici* have received Appellant and Appellee's written consent to file this amicus brief. Pursuant to Rule 29(a)(4)(E), no party or party's counsel authored the brief or contributed money that was intended to fund preparing or submitting the brief.

**FED. R. APP. P. 29(a)(4)(D) STATEMENT OF AMICI CURIAE'S
IDENTITY**

Amici Curiae the American Civil Liberties Union, the American Civil Liberties Union of Arizona, Black and Pink, Center for Constitutional Rights, Family Equality, Freedom Overground, GLBTQ Legal Advocates and Defenders, Human Rights Campaign, Just Detention International, Lambda Legal Defense and Education Fund, Inc., Modern Military Association of America, National Center for Lesbian Rights, Southern Poverty Law Center, Transgender Law Center, Transgender Legal Defense & Education Fund, and Whitman-Walker Institute respectfully submit this brief in support of Plaintiff-Appellant Ms. Edward Gladney. *Amici* are non-profit civil rights, health care, and public policy organizations that advocate for lesbian, gay, bisexual, and transgender people through litigation and public policy. Statements of interest for the *amici* appear in Appendix A.

INTRODUCTION

As the Supreme Court has recognized, “[b]eing violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citation omitted). “Prison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure.” *Id.* at 853 (Blackmun, J., concurring). Accordingly, “prison officials must fulfill their affirmative duty ... to prevent inmate assault including prison rape, or otherwise face a serious risk of being held liable for damages.” *Id.* at 858 (Blackmun, J., concurring).

While housed at the United States Penitentiary in Tucson, Arizona (“USP-Tucson”), Appellant, Ms. Edward Gladney, a transgender woman,¹ was sexually assaulted by a male in federal custody who, with no interference or intervention by facility staff, gained access to Ms. Gladney’s unit and assaulted her. Defendant negligently failed to take reasonable steps to protect Ms. Gladney, or to provide for supervision or video monitoring, thereby allowing Ms. Gladney’s assault at USP-Tucson to occur. Defendant also ignored the sexual assault prevention standards

¹ The term “transgender” refers to individuals whose gender differs from their sex assigned at birth. The term “cisgender” refers to individuals whose gender and sex assigned at birth are aligned.

promulgated under the Prison Rape Elimination Act (“PREA”), which recognize that transgender individuals like Ms. Gladney are at heightened risk of sexual assault.

In dismissing Ms. Gladney’s Federal Tort Claims Act (“FTCA”) lawsuit pursuant to the discretionary function exception, 28 U.S.C. § 2680(a), the district court made two fundamental errors. *First*, the Court disregarded the fact that Bureau of Prisons (“BOP”) regulations, PREA, and federal PREA standards, 28 C.F.R. § 115 et seq. (“PREA Standards”), obligate Defendant to ensure that vulnerable prisoners are monitored sufficiently to protect them from sexual violence. *Second*, the court overlooked that the Eighth Amendment to the U.S. Constitution separately creates a legal obligation to protect incarcerated transgender people from sexual violence that is neither discretionary nor subject to policy considerations.

Application of the discretionary function exception to this case would not only be legal error, it would threaten the safety of all vulnerable populations in federal custody. Claims under the FTCA by incarcerated people who have been sexually assaulted in federal facilities would be futile—contravening the “primary purpose” of the FTCA, which is “to extend a remedy to those who have been without.” *Feres v. United States*, 340 U.S. 135, 140 (1950). In addition to constituting a grave miscarriage of justice for victims of sexual assault, affirming the district court’s ruling would largely place sexual violence in federal prisons beyond the reach of the courts—weakening the deterrence mechanisms that exist, and allowing sexual abuse

to fester in federal prisons, contrary to the Supreme Court’s ruling that the “Eighth Amendment places restraints” and “imposes duties on [prison] officials.” *Farmer*, 511 U.S. at 832.

ARGUMENT

I. Defendant Had Unambiguous Notice That, As a Transgender Person in Custody, Ms. Gladney Required Heightened Protection in Federal Prison.

As the United States Department of Justice (“DOJ”) and BOP’s own investigations, reports, and official statements make clear, Defendant had unambiguous notice that by placing Ms. Gladney—a transgender woman—in a facility for cisgender males, she was particularly vulnerable to sexual assault. This vulnerability was heightened by Ms. Gladney’s placement in USP-Tucson, which has the notorious status of leading the BOP in alleged sexual assaults each year.²

² See *Federal Bureau of Prisons Annual Report, Calendar Year 2017*, FED. BUREAU OF PRISONS, 3-4 (June 2018), https://www2.fed.bop.gov/inmates/custody_and_care/docs/prea_2017.pdf (“2017 PREA Annual Report”) (reporting that USP Tucson led the nation in alleged sexual assaults, with 25 reported cases); *Federal Bureau of Prisons Annual Report, Calendar Year 2016*, FED. BUREAU OF PRISONS, 3-4 (June 2017), https://www.bop.gov/inmates/custody_and_care/docs/cy16_prea_report.pdf (reporting more allegations of sexual abuse at USP Tucson than any other facility apart from one); *Federal Bureau of Prisons Annual Report, Calendar Year 2018*, FED. BUREAU OF PRISONS, 15 (June 2019), https://www.bop.gov/inmates/custody_and_care/docs/cy18_prea_report.pdf (noting that in over 10% of substantiated sexual assault cases, “the victim’s transgender status may have been a risk factor”) (“2018 PREA Annual Report”).

Incarcerated transgender people experience “shockingly high levels of sexual abuse and assault” according to the DOJ.³ Nearly *forty percent* of incarcerated transgender people have been sexually assaulted⁴—a rate ten times higher than the overall prison population.⁵ PREA created the National Prison Rape Elimination Commission (“Commission”) charged with investigating prison rape and creating binding “national standards for the detection, prevention, reduction, and punishment of rape,” 34 U.S.C. §§ 30306, 30302(3). The Commission explained that “the discrimination, hostility, and violence members of these groups often face in American society are amplified in correctional environments and may be expressed by staff as well as other incarcerated persons.”⁶ The Commission has even noted

³ See Office for Victims of Crime, *Responding to Transgender Victims of Sexual Assault, Office of Justice Programs*, U.S. DEP’T OF JUSTICE, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/forge/sexual_numbers.html (last visited Oct. 5, 2020).

⁴ Allen J. Beck, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12, Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates*, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, at Tbl. 1 (Dec. 2014), https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf (noting an incidence rate of 39.9% for incarcerated transgender people) (hereinafter “DOJ Transgender Sexual Victimization Statistics”).

⁵ *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, 8 (Mar. 2013), <https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (noting an incidence rate of 4% for the prison population generally).

⁶ *National Prison Rape Elimination Commission Report*, NAT’L CRIMINAL JUSTICE REFERENCE SERV., 73 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf>

that being transgender places individuals “at special risk” for sexual abuse in prisons and jails.⁷

Incarcerated transgender people within BOP are particularly susceptible to victimization because, pursuant to BOP policy, they are typically placed in facilities according to the sex they are assigned at birth, rather than their gender identity.⁸

The BOP has, itself, acknowledged that incarcerated transgender people are specifically targeted for abuse, identifying “transgender status” as a “risk factor” and “motivating factor” that increases the likelihood of sexual assault.⁹ The BOP has

(citing Gregory M. Herek & Kevin T. Berrill, *Hate Crimes: Confronting Violence against Lesbians and Gay Men*, 35 (1992)) (“Commission Report”).

⁷ *Id.*

⁸ See DOJ *Transgender Sexual Victimization Statistics*, *supra* note 4, at Tbl. 1 (aggregating sexual assault data for state and federal prisons); *Transgender Offender Manual*, U.S. DEP’T OF JUSTICE, FED. BUREAU OF PRISONS, 3 (May 11, 2018), <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf> (mandating placement in male facilities except “in rare cases”).

For more research concerning the harms associated with placing transgender women in facilities based on their birth-assigned sex, see Ctr. for Am. Progress, et al., *Unjust: How the Broken Criminal Justice System Fails LGBT People of Color*, MOVEMENT ADVANCEMENT PROJECT, 29 (Aug. 2016), <https://www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf> (documenting the practice of housing transgender people by assigned sex); Jason Lydon, et al., *Coming Out of Concrete Closets: A Report on Black & Pink’s National LGBTQ Survey*, BLACK & PINK, 9 (Oct. 2015), <https://www.blackandpink.org/wp-content/uploads/2020/03/Coming-Out-of-Concrete-Closets-incorporated-102115.pdf> (recommending that the practice be discontinued for purposes of promoting safety).

⁹ See, e.g., 2018 PREA Annual Report, *supra* note 2, at 15 (noting that in over 10% of substantiated sexual assault cases, “the victim’s transgender status

issued a manual specifically on the treatment of incarcerated transgender people due to the special vulnerabilities they face.¹⁰ The BOP's standard operating procedures also state that being transgender is an "objective criteria" that places individuals at "risk of victimization" and therefore requires the BOP to engage in proactive mitigation, including by assessing the "placement and programming assignments" for incarcerated transgender people "at least twice each year to review any threats to safety experienced."¹¹

II. Defendant Has A Statutory, Regulatory, and Constitutional Obligation to Protect Individuals in Federal Custody from Sexual Assault.

A. PREA Binds the BOP to Protect Individuals in Federal Custody from Sexual Assault.

Congress enacted PREA in 2003 to "(1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States; (2) make the prevention of prison rape a top priority in each prison system; [and] (3) develop and

may have been a risk factor"); 2017 PREA Annual Report, *supra* note 2, at 13 (describing transgender status as a "motivating factor" for sexual abuse).

¹⁰ For example, the BOP Transgender Offender Manual details BOP policy concerning staff training and responsibilities, initial designations and intake screening, housing and programming assignments, and documentation and sentry assignments, among other things. *See BOP Transgender Offender Manual, supra* note 8.

¹¹ *See* U.S. Dep't of Justice, *Sexually Abusive Behavior Prevention and Intervention Program*, FED. BUREAU OF PRISONS, 31, 33, 53, 62, https://www.bop.gov/policy/progstat/5324_012.pdf (last visited Oct. 7, 2020) (mandating additional screening for transgender prisoners); Prison Rape Elimination Act, 28 C.F.R. §§ 115 et seq. (same).

implement national standards for the detection, prevention, reduction, and punishment of prison rape.” 34 U.S.C. § 30302. The Commission recognized that effective assault prevention “require[s] correctional facilities to provide the supervision necessary to protect incarcerated persons from sexual abuse.”¹²

Accordingly, the federal PREA Standards, promulgated in 2012, require, among other things, that BOP facilities adopt a “policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment.” 28 C.F.R. § 115.11(a); 34 U.S.C. § 30307(b).¹³ The PREA Standards further require facilities to “develop, document, and make its best efforts to comply on a regular basis with a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse,” taking into consideration factors such as “[t]he prevalence of ... incidents of sexual abuse” and the “facility’s physical plant (including ‘blind spots’ or areas where staff or inmates may be isolated).” 28 C.F.R. § 115.13(a), (a)(5), (a)(10).

¹² Commission Report, *supra* note 6, at 25, 60.

¹³ The PREA Standards include numerous other provisions addressing sexual violence in prison. *See, e.g.*, 28 C.F.R. § 115.6(2) (defining as “sexual abuse” a range of sexual acts committed by prison staff against incarcerated individuals); 28 C.F.R. § 115.15 (limiting cross-gender viewing and searches by prison staff); 28 C.F.R. § 115.17 (prohibiting hiring prison staff with history of sexual abuse); 28 C.F.R. §§ 115.51(a), 115.52(c), 115.67 (mandating mechanisms to report sexual abuse by staff and protect against retaliation).

B. The PREA Standards Contain Special Safeguards to Address the Vulnerabilities That Incarcerated Transgender People Face.

The PREA Standards also impose a mandatory obligation on the BOP to protect incarcerated transgender people who are especially vulnerable to sexual assault. They “account in various ways for the particular vulnerabilities of inmates who are LGBTI or whose appearance or manner does not conform to traditional gender expectations.”¹⁴ Specifically, the PREA Standards identify lesbian, gay, bisexual, transgender, and intersex (“LGBTI”) individuals as likely targets of sexual violence in custody.¹⁵ The PREA Standards “require correctional institutions to screen inmates upon intake for heightened risk of sexual abuse [including] whether the inmate is or is perceived to be LGBTI or gender nonconforming.”¹⁶

The PREA Standards also require that BOP employees undergo regular training to ensure they are knowledgeable about the agency’s current sexual abuse

¹⁴ U.S. Dep’t of Justice, *National Standards to Prevent, Detect, and Respond to Prison Rape*, NAT’L PREA RESOURCE CTR., 8 (May 2012), <https://www.prearesourcecenter.org/sites/default/files/library/preaexecutivesummary.pdf>.

¹⁵ See Commission Report, *supra* note 6, at 73 (2009); 28 C.F.R. § 115.42 (identifying LGBTI status as characteristic to screen for vulnerability to abuse).

¹⁶ See 28 C.F.R. § 115.41(d)(7) (“The intake screening shall consider, at a minimum, the following criteria to assess inmates for risk of sexual victimization: ... whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming”); see also Review Panel on Prison Rape, *Report on Sexual Victimization in Prisons, Jails, and Juvenile Correctional Facilities*, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, 51 (2016), https://ojp.gov/reviewpanel/pdfs/panel_report_prea_apr2016.pdf.

and sexual harassment policies and procedures, BOP's zero-tolerance policy for sexual abuse and sexual harassment, and how to interact with incarcerated transgender people in a professional manner. *See* 28 C.F.R. § 115.31 (a)(1)-(9), (c). These standards are binding on the BOP and expressly are incorporated into BOP policies.¹⁷

C. Defendant Has an Affirmative Duty under the Constitution to Protect Incarcerated Transgender People Like Ms. Gladney from Sexual Assault.

Prison officials also have an affirmative duty under the U.S. Constitution to protect prisoners from sexual assault. Pursuant to the Eighth Amendment, prison officials must “take reasonable measures to guarantee the safety of [] inmates,” including incarcerated transgender people who are uniquely susceptible to sexual violence. *Farmer*, 511 U.S. at 844 (prison officials could be held liable for an incarcerated transgender person's sexual assault in federal prison where they failed to protect her from a known risk of assault); *Greene v. Bowles*, 361 F.3d 290, 293-94 (6th Cir. 2004) (prison officials could be held liable where incarcerated transgender person was assaulted after being housed with a high-security individual in custody). Indeed, one of the stated purposes of PREA is to “protect the Eighth

¹⁷ *See* 34 U.S.C. § 30307 (b); *see also Sexually Abusive Behavior Prevention and Intervention Program*, Federal Bureau of Prisons (June 4, 2015), https://www.bop.gov/policy/progstat/5324_012.pdf (incorporating standards).

Amendment rights of Federal, State, and local prisoners.” 34 U.S.C. § 30302(6)-(7).

Prison officials thus violate the Eighth Amendment rights of an incarcerated person when they subjectively know of, and disregard, an excessive risk to the incarcerated person’s health and safety. *Edmo v. Corizon, Inc.*, 949 F.3d 489, 500-01 (9th Cir. 2020). Subjective knowledge is a question of fact “subject to demonstration in the usual ways, including inference from circumstantial evidence,” and may be established by “the very fact that the risk was obvious.” *Farmer*, 511 U.S. at 842.

III. The Federal Tort Claims Act Is a Preferred Remedy for Victims of Sexual Assault in Federal Custody.

The FTCA provides relief for tortious acts committed by federal employees in the course of employment and waives “the sovereign immunity of the United States for torts committed by federal employees.” *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994); 28 U.S.C. § 1346(b)(1) (substituting United States for private employee “under circumstances where the United States, if a private person, would be liable to the claimant”). Through the FTCA, Congress established a “broad waiver of sovereign immunity,” *Kosak v. United States*, 465 U.S. 848, 852 (1984), for “ordinary common-law torts” committed by government employees as part of their professional duties. *Gonzalez v. United States*, 814 F.3d 1022, 1026 (2016) (citing *United States v. Gaubert*, 499 U.S. 315, 318 (1991)).

This Circuit has routinely affirmed that the FTCA is a preferred remedy when an individual in federal custody is sexually assaulted due to the BOP's negligence. *See, e.g., Doe v. United States*, 510 F. App'x 614, 616 (9th Cir. 2013) (reversing district court's ruling that discretionary function exception applied because BOP personnel "*created* the risk to Plaintiff through his own decision—possibly in violation of prison policy—to leave Plaintiff alone in an unsupervised closet" where she was sexually assaulted) (emphasis added); *Knappick v. United States*, 875 F.2d 318 (9th Cir. 1989) (reversing district court decision that FTCA's discretionary function exception applied because prison "did not follow the prescribed course of conduct set forth in federal statute, regulation or policy" and was negligent in the "supervision and hiring of an employee that proximately result[ed]" in rape).

IV. The Discretionary Function Exception Does Not Apply Because Defendant's Discretion Was Constrained by Statute, Regulation, and the U.S. Constitution.

A. The PREA Statute and Regulations Created Mandatory Safeguards That Cabined Defendant's Discretion.

The district court's ruling that the FTCA "discretionary function exception" applied to Defendant's "protocols for monitoring housing units," Op. at 12 (ER118), was in error because, as explained *supra* in Parts I-II, Defendant's obligation to adopt a "zero-tolerance policy" towards sexual abuse in order "to protect inmates against sexual abuse" was legally mandated by PREA and the PREA Standards, rendering

this obligation mandatory and not subject to discretion. 28 C.F.R. § 115.11(a), 34 U.S.C. § 30307(b).

The United States has the burden to prove that an exception to the FTCA applies. *See Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992) (“We thus hold explicitly that the United States bears the burden of proving the applicability of one of the exceptions to the FTCA’s general waiver of immunity.”). Determining whether the discretionary function exception applies requires a two-step inquiry. *First*, the court must “determine whether the challenged actions involve ‘element of judgment or choice.’” *Terbush v. United States*, 516 F.3d 1125, 1129 (9th Cir. 2008) (citing *United States v. Gaubert*, 499 U.S. 315, 322 (1991)). *Second*, “[w]hen a specific course of action is not prescribed,” or the conduct involves an element of judgment, the court must then “consider whether that judgment is of the kind that the discretionary function exception was designed to shield, namely, only governmental actions and actions based on considerations of public policy.” *Id.*

It is incontrovertible that federal employees must follow “federal statute[s], regulation[s], or polic[ies that] specifically prescribe[] a course of action for an employee to follow.” *Gonzalez*, 814 F.3d at 1027 (citations omitted). The PREA statute and accompanying regulations, which direct BOP to adopt a “zero-tolerance policy toward sexual assault,” 28 C.F.R. § 115.11(a); 34 U.S.C. § 30307(b), are thus

a binding mandate—albeit, one that was breached with respect to Ms. Gladney—that is not susceptible to judgment, policy determinations, or cost-benefit analyses.

Where, as here, the challenged action was not “a matter of choice for the acting employee,” the discretionary function exception is not applicable because Defendants had “no rightful option but to adhere to the directive.” *Berkovitz v. United States*, 486 U.S. 531, 536 (1988); accord *Gonzalez*, 814 F.3d at 1027. Stated simply, where official “conduct violates a mandatory directive, it is *not discretionary*.” *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174 (9th Cir. 2002) (emphasis added). *See also Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) (same); *Whisnant v. United States*, 400 F.3d 1177, 1181 (9th Cir. 2005) (decisions governed by a statute, policy, or regulation “cannot be shielded under the discretionary function exemption”).

Defendant also failed to implement a proactive approach in supervising and protecting those in its custody such that they would be in compliance with its own zero-tolerance policy. Here, Defendant had multiple feasible options, such as video and audio monitoring, to comply with its obligation to maintain a facility with zero tolerance for sexual assault. Indeed, USP-Tucson acknowledged the feasibility of video and audio monitoring when it later implemented such equipment. *See Appellant’s Br.* at 54.

Policy implementation is similarly a non-discretionary act, meaning that the mere presence of a policy decision as part of a prescribed course of conduct does not trigger the discretionary function exception. *See Kim v. United States*, 940 F.3d 484, 488-89 (9th Cir. 2019) (policy implementation is not covered by the discretionary function exception). Indeed, as the Ninth Circuit has held, “[w]hile the government has discretion to decide how to carry out its responsibility to maintain safe and healthy premises, *it does not have discretion to abdicate its responsibility in this regard.*” *Whisnant*, 400 F.3d at 1185 (emphasis added).

Because the BOP does not have discretion to disregard PREA’s plainly non-discretionary standards, the District Court erred in finding that the FTCA’s discretionary function exception barred Ms. Gladney’s claims.

B. The Eighth Amendment Mandates Protection for Incarcerated Transgender People Who Are Particularly Vulnerable to Sexual Assault.

Moreover, the discretionary function exception does not apply to this case because federal officials “do not possess discretion to violate constitutional rights.” *Galvin v. Hay*, 374 F.3d 739, 757-58 (9th Cir. 2004) (finding that the FTCA’s discretionary function exception did not apply where challenged conduct violated the First Amendment). Thus, where the Constitution establishes baseline obligations for government officials, it “limit[s] the discretion of federal officials such that the FTCA’s discretionary function exception will not apply.” *Nurse*, 226

F.3d at 1002, n.2; accord *Tuuamalemalu v. Greene*, 946 F.3d 471, 479 (9th Cir. 2019) (conduct that disregards the law is generally not entitled to immunity).

It is well settled that Defendant had an affirmative, non-discretionary duty to act reasonably to protect Ms. Gladney from sexual assault at the hands of other incarcerated people. *Farmer*, 511 U.S. at 844. For example, in *Farmer*, the Supreme Court held that a federal correctional officer acted with deliberate indifference under the Eighth Amendment when he placed a transgender prisoner in general population within BOP, thereby failing to acknowledge a substantial risk of serious harm or adopt reasonable measures to abate it. 511 U.S. at 835; see also *Edmo*, 949 F.3d at 500-01 (“Prison officials violate the Eighth Amendment rights of an inmate when they subjectively know of, and disregard, an excessive risk to the inmate’s health and safety.”). As such, “the Eighth Amendment right of prisoners to be free from sexual abuse [is] unquestionably clearly established.” *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000); accord *Castro v. Cty. of Los Angeles*, 797 F.3d 654, 664 (9th Cir. 2015), *on reh’g en banc*, 833 F.3d 1060 (9th Cir. 2016) (“*Farmer* sets forth the contours of the right to be free from violence at the hands of other inmates with sufficient clarity to guide a reasonable officer.”).

Like PREA, the Eighth Amendment requires that prison officials take into account specific factors relevant to an incarcerated person’s vulnerability when providing supervision and protection from sexual violence. Courts have recognized

that men and women are not housed together in prisons because doing so would subject women to a risk of sexual assault that “is not only self-evident, but serious and real.” *De Veloz v. Miami-Dade Cty.*, 756 F. App’x 869, 877 (11th Cir. 2018). A similar level of risk applies to transgender women housed in male facilities. *Farmer*, 511 U.S. at 848 (remanding for a new trial on the grounds that, *inter alia*, the District Court did not properly consider factors such as the plaintiff’s “feminine characteristics” when analyzing the defendant’s requisite knowledge of risk to the incarcerated person on a motion for summary judgment); *see also Greene*, 361 F.3d at 294 (triable issue of fact exists concerning whether incarcerated transgender person belonged to vulnerable population where her physical appearance was considered relevant).

Even prison officials’ generalized knowledge of the statistical likelihood of sexual assault faced by incarcerated transgender people has been found to put prison officials on notice of incarcerated transgender people’s particular vulnerability to sexual violence. *See Zollicoffer v. Livingston*, 169 F. Supp. 3d 687, 697 (S.D. Tex. 2016) (finding that defendants knew of and disregarded a substantial risk of sexual assault to an incarcerated transgender person based on their knowledge of prison sexual assault statistics, including the particular vulnerability of gay and incarcerated transgender people).

Not only has the duty to protect transgender individuals from sexual assault under the Eighth Amendment been clearly established by law, but so has the recognition that an incarcerated transgender person's very status as transgender may put prison officials on notice that they must take reasonable measure to abate harm to that incarcerated person. *Farmer*, 511 U.S. at 835; *Castro*, 797 F.3d at 664; *Zollicoffer*, 169 F. Supp. 3d at 697. Therefore, the discretionary function exception does not apply to Ms. Gladney's sexual abuse claims because "governmental conduct cannot be discretionary if it violates a legal mandate." *Nurse*, 226 F.3d at 1002.

V. Affirming the District Court's Decision Would Deny Victims of Sexual Assault a Vital Legal Remedy.

A. The FTCA Must Remain an Available Remedy for Ms. Gladney and Other Victims of Sexual Assault.

Applying the discretionary function exception to the instant case has the potential to leave thousands of vulnerable persons, including a disproportionate number of transgender individuals, deprived of a vital legal remedy because: (a) the FTCA is the only statutory remedy available for claims against federal prisons arising from sexual assault and (b) the Government has otherwise failed to provide a reliable or adequate avenue for redress either through internal investigations, discipline, or criminal prosecution of the assailant.

In cases such as this one where Congress, by passing PREA, makes its intent on a precise issue facially clear, "that is the end of the matter; for the court, as well

as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Declining to apply the discretionary function exception to this case would properly satisfy Congressional intent because USP-Tucson failed to comply with the mandates made applicable to BOP by Congressional statute. *See* 34 U.S.C. § 30307(b) (stating that the PREA Standards “shall apply to the Federal Bureau of Prisons immediately upon adoption”). Furthermore, applying the exception to cases alleging sexual assault would frustrate the Commission’s explicit guarantee that “[i]f prisoners are sexually abused because the correctional facility failed to protect them, they have a right to seek justice in court,” including “financial compensation for past abuses that corrections officials could and should have prevented.”¹⁸

The Supreme Court has cautioned courts that “unduly generous interpretations of the exceptions” to the FTCA “run the risk of defeating the central purpose of the statute,” namely, providing plaintiffs injured by federal employees’ negligence an opportunity to recover directly against the government. *See Kosak*, 465 U.S. at 853 n.9. As this Circuit has previously acknowledged, “the FTCA was created by Congress with the intent to compensate individuals harmed by government negligence, and as a remedial statute, it should be construed liberally, and its exceptions should be read narrowly.” *Terbush*, 516 F.3d at 1135 (citations omitted);

¹⁸ Commission Report, *supra* note 6, at 92.

see also Doe, 510 F. App'x at 616 (reversing dismissal of FTCA claim against correctional facility under the discretionary function exception where challenged conduct “may have violated a mandatory policy”).

Unless a remedy is available under the FTCA, victims of sexual assault like Ms. Gladney who are placed under the supervision and care of federal correctional officers would have limited remedies available to redress their injuries. Because federal employees are immunized from personal liability for torts committed in the course of employment, the FTCA is the primary judicial remedy available for tortious conduct committed by federal employees. *See United States v. Smith*, 499 U.S. 160, 165-66 (1991) (noting that the Westfall Act explicitly finds “[t]he remedy’ against the [United States] under the FTCA ‘is exclusive of any other civil action or proceeding for money damages’”) (citing 28 U.S.C. § 2679(b)(1)).

B. The BOP Has Failed to Provide an Adequate and Effective Alternative Remedy for Survivors Seeking Redress for Sexual Assault.

Without the FTCA, incarcerated people who endure sexual assault would lose a critical tool for creating a culture of accountability internally within the BOP. To date, Defendant has wholly failed to provide adequate mechanisms for individuals in federal custody, particularly incarcerated transgender people, to report sexual assault, or for prison facilities to properly investigate these serious, sensitive

allegations.¹⁹ Similarly, there are significant, entrenched barriers in place that make discipline, and especially criminal prosecution, of an individual assailant unlikely.²⁰

The federal government has historically failed to offer adequate or effective means of redress to individuals victimized by sexual violence while incarcerated. Prison rape is rampant and engrained in the culture of prison facilities.²¹ Faced with an epidemic of sexual violence, federal prisons have shown themselves to be completely ill-equipped to control or remedy the stark number of sexual assaults that occur in their facilities. From 2013 to 2015, an estimated 15,875 allegations of inmate-on-inmate sexual harassment were made in various types of corrections facilities—more than 10,000 of which occurred in prisons.²²

¹⁹ Janine M. Zweig, et al., *Addressing Sexual Violence in Prisons: A National Snapshot of Approaches and Highlights of Innovative Strategies*, NAT'L CRIMINAL JUSTICE REFERENCE SERV. 41-42 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/216856.pdf> (reporting that victims to sexual assault in prison often face significant challenges in reporting because of “logistical or administrative issues inherent” in “conducting thorough investigations”).

²⁰ *Id.*

²¹ See Mark S. Fleisher & Jessie L. Krienert, *The Culture of Prison Sexual Violence*, NAT'L CRIMINAL JUSTICE REFERENCE SERV., 212-15 (2006), <https://www.ncjrs.gov/pdffiles1/nij/grants/216515.pdf> (examining decades of prison culture and citing poor prison management as one of the many factors contributing to the increasing amount of prison sexual violence).

²² *Sexual Victimization in Prisons and Jails Reported by Inmates, 2012-15*, BUREAU OF JUSTICE STATISTICS, 11 (July 2018), <https://www.bjs.gov/content/pub/pdf/svraca1215.pdf>.

The potential for discipline or criminal prosecution of the perpetrators of sexual assaults in prison offers an inadequate substitute remedy. According to a special report by the Bureau of Justice Statistics, *twenty-five percent* of substantiated nonconsensual inmate-on-inmate sexual abuse did not result in any internal discipline whatsoever.²³ With respect to criminal prosecution, a report by the Urban Institute Justice Policy Center identified numerous barriers to prosecuting inmate-on-inmate sexual violence including “limited resources make focusing on prison incidents more challenging,” a belief that “inmate-against-inmate incidents are not important or they were probably consensual[,] ... a lack of community will to prosecute such cases, a lack of sympathy for incarcerated victims from community grand juries, a lack of understanding that incarcerated individuals do not deserve to be sexually assaulted in prison, and a lack of support for tax dollars being spent on such cases.”²⁴ Even as survivors of sexual assault, incarcerated victims have no power or control over whether criminal charges will be brought against their assailants. Nor does the criminal process offer sexual assault survivors any compensation for their injuries.

²³ See Allen J. Beck & Timothy A. Hughes, *Sexual Violence Reported by Correctional Authorities, 2004*, BUREAU OF JUSTICE STATISTICS, 9 (July 2005), http://www.ncdsv.org/images/BJS_SV-reported-by-correctional-authorities-2004_7-2005.pdf.

²⁴ *Addressing Sexual Violence in Prisons*, *supra* note 22.

In light of the severely limited judicial options available to incarcerated individuals victimized by sexual violence, viewed alongside the serious deficiencies with other avenues of redress, the FTCA stands out as the most viable remedy for at-risk incarcerated individuals like Ms. Gladney to seek justice. *See Doe*, 510 F. App'x at 615-16 (holding plaintiff's FTCA claim was not barred by discretionary function exception where BOP personnel left plaintiff alone and unsupervised and she was sexually assaulted); *Knappick*, 875 F.2d at 318 (holding discretionary function exception did not apply in FTCA action where plaintiff was raped due to the negligent supervision and hiring of BOP employee). That weighs heavily in favor of reversal in this case. After effectively removing any other alternative care and protection for vulnerable incarcerated individuals such as transgender people, the Government should not now be permitted to escape responsibility when sexual assaults occur because of the negligence of its correctional officers.

VI. Applying the Discretionary Function Exception Here Would Allow Prisons to Evade Their Obligation to Protect Prisoners from Sexual Assault and Create a Culture of Impunity.

A ruling that the discretionary function exception applies in the instant case would permit prisons to disregard their legal obligations mandated by PREA and BOP regulations through the adoption of pretextual policies intended to insulate the BOP from negligence claims. Such a scheme would nullify the FTCA's ability to provide a remedy for victims of torts at the hands of government employees, and

would effectively eliminate the most viable avenue to redress the systemic problem of prison rape that affects thousands of vulnerable individuals in federal custody.

Courts have long acknowledged that prisons are charged with providing a safe space for prisoners in their care. *See supra*, Part II.B. Put simply, prison officials have an affirmative duty to protect those imprisoned because prisons have “stripped [incarcerated individuals] of virtually every means of self-protection and foreclosed their access to outside aid.” *Farmer*, 511 U.S. at 833. For this reason, “the government and its officials are not free to let the state of nature take its course.” *Id.*

A ruling that immunizes prisons from liability for failing to comply with their regulatory mandates would allow prisons to wipe their hands clean of protecting the vulnerable populations in their custody and care. As the Commission found, “[e]very day, the lives and the physical integrity of lesbian, gay, bisexual, and transgender people are at stake within our prison systems.”²⁵ Presently, the BOP has proven itself incapable of protecting this vulnerable population and the improper application of the discretionary function exception to this legal obligation will only further exacerbate this failure as the courts will no longer serve as the intended backstop.

Even though incarcerated transgender people are at especially high risk of sexual abuse, internal investigations conducted by prisons have proven inadequate

²⁵ Commission Report, *supra* note 6, at 73.

and ineffective at combating sexual violence against this vulnerable population.²⁶ According to the Commission, BOP investigative staff often lack the training, sensitivity, and experience in dealing with reports of sexual abuse necessary to effectively investigate such a uniquely difficult issue, making the need for judicial oversight all the more urgent.²⁷

Equally troubling, the Commission reported that “biases and prejudice also may influence the willingness or ability of staff to support a zero-tolerance policy [against sexual abuse].”²⁸ Notably, the Commission reported that “some officers were more willing to protect heterosexual prisoners from abuse than those with other sexual identities,” a finding that highlights the special vulnerability facing transgender or gender non-conforming individuals in custody, and the reason why court supervision is vital.²⁹ Moreover, absent safe, reliable, or effective reporting

²⁶ See generally *DOJ Transgender Sexual Victimization Statistics*, *supra* note 4; *Concrete Closets*, *supra* note 8; *Unjust*, *supra* note 8 (discussing high incidence of sexual abuse of transgender people in prisons and jails).

²⁷ See *Investigating Sexual Assaults in Correctional Facilities*, NAT’L INST. OF CORRS., U.S. DEP’T OF JUSTICE, 10, 15 (2007), <https://s3.amazonaws.com/static.nicic.gov/Library/022444.pdf> (describing focus group participants’ observations of barriers to effective investigations including a “need for more education and training about investigations” and listing “training employees to be more sensitive to sexual assault” as a recommendation to improve internal investigations).

²⁸ Commission Report, *supra* note 6, at 56.

²⁹ *Id.*

and investigatory mechanisms, victims of sexual assault in prisons may unsurprisingly be reluctant to report their abuse.

Affirming the District Court’s decision would have a powerfully negative effect on Ms. Gladney and numerous other uniquely vulnerable individuals in federal custody who routinely fall victim to sexual abuse due to negligent oversight in correctional facilities. Access to the courts is critical to deter negligent oversight that may lead to horrific—and completely avoidable—sexual victimization. As the Commission has acknowledged, “court orders have had an enormous impact on the Nation’s jails and prisons. Beyond the reforms courts usher in, their scrutiny of abuses elicits attention from the public and reaction from lawmakers in a way that almost no other form of oversight can accomplish.”³⁰

CONCLUSION

For all of these reasons, Amici Curiae respectfully request that this Court reverse the District Court’s judgment.

³⁰ *Id.* at 91.

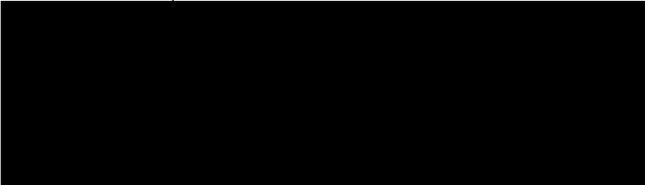
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October 21, 2020

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BRIEF OF AMICI CURIAE CIVIL RIGHTS, HEALTH CARE, & NON-PROFIT ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT EDWARD GLADNEY AND REVERSAL and APPENDIX A

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Appendix A

**STATEMENT OF AMICI CURIAE’S INTEREST PURSUANT TO
FEDERAL RULE APPELLATE PROCEDURE 29(A)(4)(D)**

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with approximately 4 million members and supporters dedicated to defending and preserving the individual rights and liberties guaranteed by law. Over the past 100 years, the ACLU has served as counsel or amicus in many cases concerning the rights of transgender people and incarcerated people, including *Farmer v. Brennan*.

The ACLU of Arizona is a statewide nonpartisan organization with over 20,000 members and the state affiliate of the national ACLU. The ACLU of Arizona serves as counsel or amicus in a wide range of cases addressing the civil rights and liberties of people in Arizona including transgender people and incarcerated people.

Black and Pink is prison abolitionist organization dedicated to abolishing the criminal punishment system and liberating LGBTQIA2S+ people and people living with HIV/AIDS who are affected by that system through advocacy, support, and organizing. We are increasingly concerned with the sexual, physical, and emotional abuse suffered by transgender people while in state custody and the lasting effects it has on them as well as the impact on public safety.

The Center for Constitutional Rights (“CCR”) is a national, not-for-profit legal, educational and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded

in 1966 to represent civil rights activists in the South, CCR has litigated numerous landmark civil and human rights cases on behalf of individuals impacted by arbitrary and discriminatory criminal justice policies, including policies that disproportionately impact LGBTQI communities of color and policies that violate the Eighth Amendment's prohibition against cruel and unusual punishment and cause significant harm to people in prison. CCR successfully mounted a challenge regarding the use of solitary confinement in prisons and jails in its class action *Ashker v. Brown*, No. 4:09-cv-05796-CW (N.D. Cal 2009).

Family Equality (formerly Family Equality Council) is a national organization that advances lived and legal equality for LGBTQ families and those who wish to form them. Since its founding in 1979, Family Equality has worked to change attitudes, laws, and policies through advocacy and public education to ensure that all families, regardless of creation or composition, are respected, loved, and celebrated in all aspects of their lives. Family Equality frequently participates in litigation in support of equal rights and treatment of all LGBTQ people.

Freedom Overground supports the Trans and Gender-nonconforming (TGNC) incarcerated population in the South-East United States. Due to the spread of misinformation and lack of training about this high-risk community, incarcerated TGNC people face the highest rates of harassment, abuse, & neglect in the US prison system.

GLBTQ Legal Advocates and Defenders (“GLAD”) works in New England and nationally, through strategic litigation, public policy advocacy, and education, to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS.

Human Rights Campaign, the largest national lesbian, gay, bisexual, and transgender political organization, envisions an America where lesbian, gay, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community.

Just Detention International (“JDI”) is the only organization in the world dedicated exclusively to ending sexual abuse behind bars. JDI works to: hold government officials accountable for prisoner rape; promote public attitudes that value the dignity and safety of people in detention; and ensure that survivors of this violence get the help they need. JDI trains staff on sexual abuse prevention and response, educates prisoners about their rights, and creates policies that increase safety for LGBT and other especially vulnerable prisoners.

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the oldest and largest national legal organization committed to achieving full recognition

of the civil rights of lesbians, gay men, bisexuals, transgender (LGBT) people, and everyone living with HIV through impact litigation, education, and public policy work.

Lambda Legal seeks to address the particular vulnerability of LGBT people in custody and has appeared as counsel or amicus curiae in numerous federal and state court cases involving the rights of incarcerated LGBT people. *See, e.g., Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015) (per curiam) (reinstating transgender prisoner's complaint alleging that denial of gender-confirming surgery violated 8th Amendment); *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687, 697 (S.D. Tex. 2016) (finding that defendants knew of and disregarded a substantial risk of sexual assault to a transgender inmate based on their knowledge of prison sexual assault statistics, including the particular vulnerability of gay and transgender inmates); and *Edmo v. Corizon, Inc.*, 949 F.3d 489, 500-01 (9th Cir. 2020) (concluding that gender confirmation surgery was medically necessary for incarcerated transgender woman with gender dysphoria). Lambda Legal is counsel for Amici.

The Modern Military Association of America (“MMAA”) is a non-profit, non-partisan legal services, policy, and watchdog organization serving lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) military personnel, veterans, military spouses, family members, and allies, and individuals living with HIV. MMAA has a special interest in assisting is transgender members: MMAA has filed lawsuits and

amicus briefs challenging laws and regulations that target, stigmatize, discriminate against, or negatively affect the communities it serves, including the transgender military ban, and also provides direct legal services, including criminal defense representation to service members.

The National Center for Lesbian Rights is a national legal organization committed to protecting and advancing the rights of lesbian, gay, bisexual, and transgender people, including LGBT individuals in prison, through impact litigation, public policy advocacy, public education, direct legal services, and collaboration with other civil rights organizations.

Southern Poverty Law Center (“SPLC”) is a nonprofit civil rights organization working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. Since its founding in 1971, the SPLC has won numerous landmark legal victories on behalf of society’s most vulnerable members, including the LGBTQ community and transgender incarcerated people. SPLC was counsel in *Diamond v. Owens*, 5:15-cv-50-MTT (M.D. Ga. 2015) (ending the Georgia Department of Corrections’ policy of denying hormone therapy to transgender incarcerated people on a blanket basis) and amicus curiae in *Keohane v. Florida Department of Corrections Secretary*, 18-14096 (11th Cir. 2019) (challenging the Florida

Department of Corrections' denial of constitutionally adequate treatment for gender dysphoria).

Transgender Law Center (“TLC”) is the largest national trans-led organization advocating self-determination for all people. Grounded in legal expertise and committed to racial justice, TLC employs a variety of community-driven strategies to keep transgender and gender nonconforming (“TGNC”) people alive, thriving, and fighting for liberation. TLC believes that TGNC people hold the resilience, brilliance, and power to transform society at its root, and that the people most impacted by the systems TLC fights must lead this work. TLC builds power within TGNC communities, particularly communities of color and those most marginalized, and lays the groundwork for a society in which all people can live safely, freely, and authentically regardless of gender identity or expression. TLC works to achieve this goal through leadership development and by connecting TGNC people to legal resources. It also pursues impact litigation and policy advocacy to defend and advance the rights of TGNC people, transform the legal system, minimize immediate threats and harms, and educate the public about issues impacting our communities.

Transgender Legal Defense & Education Fund (“TLDEF”) is a transgender-led nonprofit organization whose mission is to end discrimination and achieve equality for transgender people throughout the nation, particularly those in

our most vulnerable communities. In service of that mission, TLDEF works to eliminate mistreatment of transgender people from the policies and practices of law enforcement, jails, and prisons, through advocacy, negotiation, and litigation. Along with co-counsel, TLDEF recently reached a settlement with the sheriff of Steuben County, New York, which included the adoption of the nation's most adequate policies for safeguarding the rights of transgender inmates in a county jail. TLDEF believes that if a county jail in Western New York is willing and able to align its policies with the laws and the Constitution, there is no reason the federal government cannot do the same.

Whitman-Walker Institute is a Federally Qualified Health Center operating in Washington, D.C., serving the greater Washington, D.C. metropolitan area, with a special focus on lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals and families, persons living with HIV, and other individuals and families who face barriers to accessing care. In calendar year 2019, Whitman-Walker provided health services to more than 20,700 distinct individuals. Transgender and gender-non-binary individuals comprise a substantial and growing part of Whitman-Walker's patient base: approximately 16% of medical patients and 10% of all those receiving any health services. Whitman-Walker's Legal Services Program provides advice and legal representation to the transgender community on a wide range of issues, including discrimination, access to health care, public benefits navigation,

and immigration relief. The Whitman-Walker Institute conducts research, advocates for just and inclusive public policies, and engages in clinical and community education in order to advance the health and wellness of our community.

Transgender and gender-nonconforming persons are subjected to systemic discrimination and stigma in virtually every aspect of their lives, which undermines their physical and mental health directly and indirectly. Transgender people are particularly at risk of violence, including sexual assault. Transgender individuals who are subject to arrest and incarceration are often among the poorest, most stigmatized and marginalized members of the community, and are particularly vulnerable to abuse. Whitman-Walker has a compelling interest in ensuring that arrested and incarcerated LGBTQ individuals are protected from violence and treated with respect.