UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 18-1688

E.D.,
Plaintiff-Appellee,

v.

SHARKEY, et al.,
Defendants-Appellants.

Appeal from the Order dated March 27, 2018, of the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 5:16-cv-2750

CORRECTED BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE, FUTURES WITHOUT VIOLENCE, JUST DETENTION INTERNATIONAL, NATIONAL ALLIANCE TO END SEXUAL VIOLENCE, TAHIRIH JUSTICE CENTER, AND WOMEN'S LAW PROJECT IN SUPPORT OF APPELLEE AND AFFIRMANCE

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IDENTITY AND INTEREST OF *AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, non-partisan organization dedicated to the principles of liberty and equality enshrined in the U.S. Constitution. Throughout its 98-year history, the ACLU has been deeply involved in protecting the rights of detainees and prisoners, and in 1972 created the National Prison Project to further this work. Through its Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, the ACLU has taken a leading role advocating for the rights of survivors of gender-based violence. The ACLU of Pennsylvania is the state affiliate of the ACLU. This case is of significant concern to both the national ACLU and the ACLU of Pennsylvania because it seeks to vindicate the rights of immigrant victims of sexual violence in detention.

The **Asian Pacific Institute on Gender-Based Violence** (formerly, Asian & Pacific Islander Institute on Domestic Violence) is a national resource center on domestic violence, sexual violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander and in immigrant communities. The Institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander and immigrant and refugee survivors of domestic violence, sexual assault, and human trafficking, and provides analysis and consultation on critical issues facing victims of gender-based violence in the Asian and Pacific Islander and in immigrant and refugee communities, including training

and technical assistance on implementation of the Violence Against Women Act and protections for immigrant and refugee survivors. The Institute leads by promoting culturally relevant intervention and prevention, expert consultation, technical assistance and training; conducting and disseminating critical research; and informing public policy.

Futures Without Violence ("FUTURES") is a national nonprofit organization that has worked for over 35 years to prevent and end violence against women and children around the world. FUTURES mobilizes concerned individuals, social justice groups, and allied professionals to end violence through public education and prevention campaigns, public policy reform, training and technical assistance, and programming designed to support better outcomes for women and children experiencing or exposed to violence. FUTURES joins with the other amici because it has a long-standing commitment to supporting the rights and interests of women and children who are victims of crime regardless of their immigration, citizenship, incarceration, or residency status. FUTURES co-founded and co-chaired the National Network to End Violence Against Immigrant Women, working to help service providers, survivors, law enforcement, and judges understand how best to work collaboratively to bring justice and safety to immigrant victims of violence.

Founded in 1980, **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. JDI also helps make sure that survivors in detention get the crisis services they need and deserve. One of JDI's top priorities is to make sure that prisoner rape survivors can get the help they need to heal. Every day, JDI gets letters from prisoners who have been sexually assaulted. We respond to each survivor who contacts us, letting them know that they are not alone, that the abuse was not their fault, and that healing is possible.

The **National Alliance to End Sexual Violence** ("NAESV") is the voice in Washington D.C. for the 56 state and territorial sexual assault coalitions and 1300 rape crisis centers working to end sexual violence and support survivors. NAESV advocates for the rights of all survivors, including those detained or held in custody for any reason. We also strongly support the use of responsible practices and policies within detention facilities to prevent victimization.

The **Tahirih Justice Center** is the largest multi-city direct services and policy advocacy organization specializing in assisting immigrant women and girls who survive gender-based violence. Since its beginning in 1997, Tahirih has provided

free legal assistance to more than 22,000 individuals, many of whom have experienced the coercion inherent in immigration detention facilities. Through direct legal and social services, policy advocacy, and training and education provided in five cities across the country, Tahirih protects immigrant women and girls and promotes a world where they can live in safety and dignity. Tahirih amicus briefs have been accepted in numerous federal courts across the country.

The **Women's Law Project** ("WLP") is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. The WLP's mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, the WLP engages in high-impact litigation, advocacy, and education. The WLP is committed to ending violence against women, to safeguarding the legal rights of women who experience sexual abuse, and to protecting the rights of incarcerated women. The WLP has provided counseling to victims of violence through its telephone counseling service; engages in public policy advocacy work; participates in *amicus curiae* briefs that seek to improve the legal system's response to victims of sexual assault and violence; and represents women seeking to vindicate their legal rights to health, safety, and equality while incarcerated.

SUMMARY OF ARGUMENT[1]

Appellants are co-workers and a supervisor who stood by and made jokes while Defendant Sharkey, a detention center counselor, used threats and other means of coercion to sexually abuse E.D., one of the women they all were supposed to keep safe. Sharkey's conduct was immoral, illegal, unconstitutional, and damaging to E.D.

In this appeal, Appellants argue that they should have been granted qualified immunity because E.D. was an immigration detainee, not a prisoner; and because she was not physically forced to have sex with her counselor.[2] These arguments ignore both the law that presumes lack of consent when a custodian engages in a sexual relationship with a confined person in any custodial setting, and the reality that undergirds that law. As corrections professionals and law-makers have recognized for decades, the imbalance of power in any custodial setting, including that in the Berks County Residential Center – Immigration Family Center ("BCRC"), is easily abused and vitiates any alleged consent to sexual contact.

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[1] No party to this litigation has authored this *amici curiae* brief in whole or in part; no party nor any party's counsel contributed money that was intended to fund preparing or submitting this *amici curiae* brief; and no person—other than the amici, their members and the counsel listed herein—contributed money that was intended to fund preparing or submitting the brief.

[2] Appellants also contend that they did not know that Sharkey had achieved his aims. As Appellee has ably argued, that disputed question of fact is not a valid basis for an appeal from the denial of qualified immunity.

That reality has also been recognized by the courts, and for almost as long—meaning that it is well established that Appellants had a duty to protect E.D. from sexual misconduct by staff, including from the crime of institutional sexual assault. Amici write to urge this Court to confirm that custodial staff—in any setting—who learn of a risk that a person under their care is at risk of sexual exploitation must take all reasonable steps to prevent that harm and, failing that, they are not entitled to qualified immunity.

ARGUMENT

A. Inherent Power Inequities in Custodial and Institutional Settings Mean that Prisoners, Detainees, and Other Confined Persons Cannot Meaningfully Consent to Sexual Contact with their Custodians.

Researchers, law-makers and courts across the country have recognized that the "pronounced dichotomy of control between prison guards and prisoners" results in "power inequities . . . [that] foster opportunities for sexual abuse" and "make it difficult to discern consent from coercion." *Wood v. Beauclair*, 692 F.3d 1041, 1047 (9th Cir. 2012).[3]

1. Confined persons are at their custodians' mercy, creating an inherent power inequity that negates apparent consent to sexual contact with custodians.

Prison research[4] confirms that, in custodial settings, inherent power inequities alone—without the use of force—breed situations ripe for "psychological coercion," which, as acknowledged by the U.S. Department of Justice, nullifies confined persons' apparent consent to sexual contact with custodians. Bureau of Justice Statistics, U.S. Dep't of Justice, *Rape and Sexual*

[3] *See also, e.g., Graham v. Sheriff of Logan Cty.*, 741 F.3d 1118, 1126 (10th Cir. 2013); *Chao v. Ballista*, 806 F. Supp. 2d 358, 363-64 (D. Mass. 2011); *Commonwealth v. Mayfield*, 832 A.2d 418, 472 (Pa. 2003).

[4] *See, e.g.*, Human Rights Watch, *All Too Familiar: Sexual Abuse of Women in U.S. State Prisons*, Part I (1996), https://www.hrw.org/legacy/reports/1996/Us1.htm#_1_2; Michelle VanNatta, *Conceptualizing and Stopping State Sexual Violence Against Incarcerated Women*, 37 Soc. Just. 27, 31-33 (2010).

Assault, https://www.bjs.gov/index.cfm?ty=tp&tid=317#terms_def (last visited Oct. 8, 2018) (defining both rape and sexual assault as acts that "may or may not involve force"). Researchers have catalogued at least three ways custodians exploit power inequities to commit sexual abuse and sexual assault.

First, custodians may "coerc[e] [the confined person] into sexual contact through overt or veiled threats."[5] For example, custodians may contend that they will use their authority to interfere with or prolong an uncooperative victim's sentence[6]—conduct similar to Sharkey's threats here about E.D.'s potential deportation, *see* J.A. 566, 569, 571. They may likewise threaten "to write disciplinary tickets, take away . . . privileges, and have [confined persons] transferred" to a worse facility.[7] Even easier, they may simply express that they will deprive the confined person of "basic resources," such as "food, water, [or] light"[8]—a "powerful inducement," given that confined persons "are completely

[5] VanNatta, *supra* note 4, at 31.

[6] *See* Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. Sex Research 217, 222 (Aug. 2002) (describing an officer's threat to "trump up charges" so that the incarcerated woman would "never get out").

[7] Human Rights Watch, *supra* note 4, Part VIII (text accompanying note 828).

[8] VanNatta, *supra* note 4, at 32.

dependent on [custodians] for the most basic necessities."[9] And their perceived or threatened power does not stop even at the walls of the facility: custodians may also speak of possible harm to a confined person's loved ones,[10] perhaps using their access to records to intimidate the confined person with their knowledge of a relative's residence.[11]

Second, custodians may "us[e] inducements such as privileges or access to resources in exchange for sexual contact."[12] Custodians may offer confined persons assistance with disciplinary matters or housing issues; increased freedom within the facility; extra food; extra phone calls; extra money in their prison accounts; access to store goods and other items, such as candy bars, gum, ice, nail polish, perfume, shampoo, or stamps; or, to take advantage of the commonplace substance-use dependencies among confined persons, contraband such as cigarettes and alcohol.[13] Here, Sharkey's gifts to E.D. of jewelry, music, cell phone use, and

[9] Human Rights Watch, *supra* note 4, Part I; *accord id.*, Part VII (text accompanying notes 845-46).

[10] VanNatta, *supra* note 4, at 32.

[11] *See, e.g.*, Human Rights Watch, *supra* note 4, Part VI (text accompanying note 546).

[12] VanNatta, *supra* note 4, at 31.

[13] Human Rights Watch, *supra* note 4, Parts III, V-VIII (text accompanying notes 193-95, 201, 391-98, 409, 411, 551-54, 704, 845, 849-52); *see* Jennifer Bronson et al., Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 250546, *Drug Use*,

food fit perfectly into this category of sexually coercive inducements. *See* J.A. 567-68.

Finally, custodians may "creat[e] unequal or exploitative 'romances,'" taking advantage of confined persons' unmet "human needs for touch, sexuality, and intimacy."[14] In these situations, custodians commence sexual relationships with confined persons who are "alone, separated from [their] famil[ies], and seeking care and attention."[15] These persons are often especially emotionally and sexually vulnerable, given the high rates of female prisoners who report prior child sexual abuse.[16] (Similarly, here, E.D. is a survivor of domestic violence. J.A. 565.) Although a confined person's sexual relationship with a custodian in these circumstances may appear consensual at first, its exploitative nature becomes clear when the confined person attempts to leave the relationship and, often, cannot

Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009, at 6-9 & tbls.8-11 (June 2017).

[14] VanNatta, *supra* note 4, at 31-33.

[15] Human Rights Watch, *supra* note 4, Part III, V (text accompanying notes 198-201, 400-01).

[16] *See* Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 172879, *Prior Abuse Reported by Inmates and Probationers*, at 1-2 & tbl.1 (Apr. 1999).

escape the custodian's persistent sexual advances or harassment.[17] Moreover, even if she successfully leaves the relationship, she may face the custodian's retaliation.[18]

The prevalence—and effectiveness—of these tactics is confirmed by the data. In the Bureau of Justice Statistics' 2008 survey of former state prisoners, more than half (62.4%) of the 27,100 respondents who reported staff sexual misconduct described coercion other than force or threat of force.[19] And 27.2% of these victims reported being bribed or blackmailed, 18.6% reported being given drugs or alcohol, 13.3% reported being offered or given protection from another correctional officer, and 49.6% reported being offered favors or special privileges.[20] These statistics confirm earlier studies' similar data.[21] Importantly, in

[17] Human Rights Watch, *supra* note 4, Parts III, V, VII (text accompanying notes 198-201, 400-01, 853-54).

[18] *See, e.g.*, *id.*, Parts VI, VIII (text accompanying notes 554, 628, 855).

[19] Allen J. Beck & Candace Johnson, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 237363, *Sexual Victimization Reported by Former State Prisoners, 2008*, at 12-13 & tbl.4 (May 2012).

[20] *Id.*

[21] *See* Cindy Struckman-Johnson & David Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. Interpersonal Violence 1591, 1601, 1603-04 & tbl.5 (2006); Struckman-Johnson et al., *Sexual Coercion Experiences Reported by Men and Women in Prison*, 33 J.

the 2008 survey results, victims reported coercive tactics regardless whether they said they were "unwilling" or "willing" to have sexual contact with staff[22]—further demonstrating that coercion and power inequities are omnipresent in custodial settings, and that sexual contact between confined people and their custodians cannot be considered free from that coercion.

2. Inherent power inequities between confined persons and their custodians exist not just in prisons, but also across the spectrum of custodial and institutional settings.

Although Appellants attempt to distance this case from those arising in prison settings, *see* Appellants' Br. 23, 30, the patterns of sexual coercion described above arise in all confinement settings where the custodian has significant power over the confined person. Statistics confirm that the incidence of abuse in custodial settings increases along with the power differential of the given situation. For instance, data show higher rates of victimization among vulnerable populations who are in custody: young people[23] and people with mental health

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Sex Research 67, 71-72 & tbl.5 (1996); Struckman-Johnson & Struckman-Johnson, *supra* note 5, at 224 tbl.4.

[22] Beck & Johnson, *supra* note 19, at 12-13 & tbl.4.

[23] Beck & Johnson, *supra* note 19, at 25 & tbl.15.

concerns.[24] In lower-security facilities, custodian sexual misconduct rates decrease, likely due to fewer restraints that custodians may use for coercive purposes.[25] But even in minimum security facilities, such as halfway houses and residential treatment centers, confined persons still report custodian sexual misconduct.[26]

More to the point here, immigration detention facilities report rates of sexual victimization allegations that are comparable to those in traditional correctional facilities.[27] Between 2010 and 2015, rates of sexual victimization allegations in immigration detention facilities actually *exceeded* rates in federal prisons and in local and private jails.[28] What's more, for allegations of sexual victimization that

[24] Allen J. Beck & Marcus Berzofsky, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 241399, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, at 25-26 (May 2013).

[25] *Id.* at 22-23 & tbl.13; *see also* Leanne Fiftal Alarid, *Sexual Assault and Coercion Among Incarcerated Women Prisoners: Excerpts from Prison Letters*, 80 Prison J. 391, 401 (Dec. 2000) (observing that "more inmate rapes" occurred in more restrictive housing).

[26] *See* Beck & Johnson, *supra* note 19, at 10 & tbl.2, 23 tbl.13.

[27] Ramona R. Rantala, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 251146, *Sexual Victimization Reported by Adult Correctional Authorities, 2012-15*, at 6 tbl.2 (July 2018).

[28] *Id.*

were ultimately substantiated, immigration detention facilities' rates in recent years have been the highest of those from non-military facilities.[29]

Other less-restrictive custodial settings show the same patterns of sexual coercion fueled by power inequities. Juvenile facilities' sexual victimization allegation rates, as well as their rates of allegations that were substantiated, are higher than rates in adult facilities.[30] As with custodian sexual coercion in adult facilities, custodian sexual coercion in juvenile facilities often includes instances of sexual contact with "willing" youth in exchange for access to contraband, favors, or the custodian's protection.[31] In other words, it is not the *reason* for the confinement—criminal conviction versus other circumstances—that breeds the risk of sexual abuse, but the power differential that exists, to a greater or lesser extent, in any custodial setting.

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[29] *Id.* at 9 tbl.6.

[30] *Compare* Allen J. Beck & Ramona R. Rantala, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 249145, *Sexual Victimization Reported by Juvenile Correctional Authorities, 2007-12*, at 3 tbl.1, 6 tbl.4 (Jan. 2016), *with* Rantala, *supra* note 27, at 6 tbl.2, 9 tbl.6.

[31] *See State v. Martin*, 561 A.2d 631, 632-33, 636 (N.J. Super. Ct. App. Div. 1989); Allen J. Beck & David Cantor, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 241708, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2012*, at 22 & tbl.13 (June 2013); Beck & Rantala, *supra* note 29, at 13-14 & tbl.11.

3. Legislatures nationwide acknowledge that inherent power inequities in custodial settings preclude meaningful consent on the confined person's part.

Recognizing the inherent power inequities in custodial settings, all fifty states, the District of Columbia, and the federal government impose criminal liability—without requiring proof of force—on correctional facility staff who have sexual contact with persons under their care.[32] Many of the criminal statutes in this

[32] 18 U.S.C. § 2243; Ala. Code § 14-11-31; Alaska Stat. §§ 11.41.410(a)(3)(B); Ariz. Rev. Stat. § 13-1419; Ark. Code Ann. § 5-14-124 to -127; Cal. Penal Code § 289.6; Col. Rev. Stat. § 18-7-701; Conn. Gen. Stat. § 53a-71(a)(5); Del. Code Ann. tit. 11, §§ 780A, 780B; D.C. Code §§ 22-3013, 22-3014; Fla. Stat. § 794.011(2)(a)-(d), (e)(7); Ga. Code Ann. § 16-6-5.1; Haw. Rev. Stat. § 707-732(1)(e); Idaho Code Ann. § 18-6110; 720 Ill. Comp. Stat. 5 / § 11-9-2; Ind. Code § 35-44.1-3-10; Iowa Code § 709.16; Kan. Stat. Ann. § 21-5512; Ky. Rev. Stat. Ann. § 510.060(1)(e); La. Rev. Stat. Ann. § 14:134.1; Me. Rev. Stat. tit. 17, § 253(2)(E); Md. Crim. Law Code § 3-314; Mass. Gen Laws ch. 268, § 21A; Mich. Comp. Laws § 750.520c(i)-(*l*); Minn. Stat. § 609.345, subd. 1(m); Miss. Code Ann. § 97-3-104; Mo. Ann. Stat. §§ 217.010(12), 217.015, 217.405; Mont. Code Ann. § 45-5-501(1)(b)(v); *id.* §§ 45-5-502, -503, -508; Neb. Rev. Stat. § 28-322.01; Nev. Rev. Stat. § 212.188; N.H. Rev. Stat. Ann. § 632-A:2(1)(n); N.J. Stat. Ann. 2C:14-2(c)(2); N.M. Stat. Ann. § 30-9-11(E)(2); N.Y. Penal Law §§ 130.05(3)(e)-(f), 130.20 to .96; N.C. Gen. Stat. § 14-27.31; N.D. Cent. Code § 12.1-20-06; Ohio Rev. Code Ann. § 2907.03(A)(6), (11); Okla. Stat. tit. 21, § 1111(A)(7); Or. Rev. Stat. §§ 163.452, 163.454; 18 Pa. Cons. Stat. § 3124.2; R.I. Gen. Laws § 11-25-24; S.C. Code Ann. § 44-23-1150; S.D. Codified Laws §§ 22-22-7.6, 24-1-26.1; Tenn. Code Ann. §§ 39-16-408, 39-16-601; Tex. Penal Code Ann. §§ 22.011(b)(8), (11), 39.04(a)(2); Utah Code Ann. § 76-5-412; Vt. Stat. Ann. tit. 13, § 3257; Va. Code Ann. § 18.2-67.4(iii), (iv); Wash. Rev. Code §§ 9A.44.160, 9A.44.170; W. Va. Code §§ 61-8B-2(c)(5), 61-8B-10; Wis. Stat. § 940.225(2)(h), (i); Wyo. Stat. Ann. § 6-2-303(a)(vii).

category expressly provide that "[c]onsent . . . is not a defense,"[33] and the rest (all written like statutory rape laws) implicitly exclude consent as a defense.[34] All of these statutes except Nevada's were enacted before April 2014, when the events at issue here began, *see* J.A. 565.[35] And many of these statutes—including

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[33] Del. Code Ann. Tit. 11, §§ 780A(c), 780B(c); *see also* Ark. Code Ann.§§ 5-14-124(b), 5-14-126(b); Cal. Penal Code § 289.6(e); D.C. Code § 22-3017(a); Fla. Stat. § 794.011(2)(a)-(d), (e)(7); Ga. Code Ann. § 16-6-5.1(e); Ind. Code § 35-44.1-3-10(d); Mass. Gen Laws ch. 268, § 21A; Minn. Stat. § 609.345, subd. 1(m); Mont. Code Ann. § 45-5-501(1)(b)(v); Neb. Rev. Stat. § 28-322.01; Nev. Rev. Stat. § 212.188(3)(a)(1), (b)(1); N.H. Rev. Stat. Ann. § 632-A:2(1)(n); N.Y. Penal Law § 130.05(3)(e)-(f); N.C. Gen. Stat. § 14-27.31(c); Or. Rev. Stat. §§ 163.452(2), 163.454(2); Tex. Penal Code Ann. § 22.011(b)(11); Utah Code Ann. § 76-5-412(7)(b); Wash. Rev. Code §§ 9A.44.160(2), 9A.44.170(2); W. Va. Code § 61-8B-2(c)(5).

[34] *See generally, e.g.*, *Commonwealth v. Rhodes*, 510 A.2d 1217, 1229 (Pa. 1986) ("The . . . existence or effectiveness of the victim's consent is immaterial to [a] crime of statutory rape."); *Commonwealth v. A.W.C.*, 951 A.2d 1175, 1177 (Pa. Super. Ct. 2008) ("[T]o convict [for statutory sexual assault], the Commonwealth need not prove the elements of [lack of] consent or force.").

[35] *See* Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, 100 Stat. 3592, 3621-22; 2004 Ala. Legis. Serv. 298 (West); 1978 Alaska Sess. Laws ch. 166, at 12-13; 1996 Ariz. Legis. Serv. ch. 257, § 3 (West); 2001 Ark. Legis. Serv. 1738 (West); 1994 Cal. Legis. Serv., ch. 499 (West); 2000 Colo. Legis. Serv. ch. 216, § 7 (West); 1985 Conn. Acts 496-97 (Reg. Sess.); 2010 Del. Laws ch. 241; 1994 D.C. Laws 10-257; 1999 Fla. Sess. Law Serv. ch. 99-188 (West); 2010 Ga. Laws, Act 389; 2001 Haw. Sess. Laws, Act 1; 1993 Idaho Sess. Laws, ch. 222; 1997 Ill. Legis. Serv., P.A. 90-66 (West); 2012 Ind. Legis. Serv., P.L. 126-2012 (West); 1991 Iowa Legis. Serv., ch. 219; 2010 Kan. Sess. Laws, ch. 136, § 76; 2010 Ky. Laws, ch. 26; 1981 La. Acts 996; 1989 Me. Legis. Serv. 401 (West); 2002 Md. Laws, ch. 26; 1999 Mass. Legis. Serv., ch. 127, § 183 (West); 2000 Mich. Legis. Serv., P.A. 227 (West); 2001 Minn. Sess. Law Serv., ch. 210 (West); 1998 Miss. Laws, ch. 470; 1989 Mo. Legis. Serv., H.B. 408 (West); 2001 Mont. Laws, ch. 562; 1999 Neb. Laws, L.B. 511; 1997 N.H. Laws,

Pennsylvania's—criminalize sexual contact between custodians and confined persons not just in prisons, but also in less restrictive settings, such as in police custody, while released on probation or parole, in juvenile correctional facilities, or in child welfare settings.[36] In view of this legal backdrop, any detention officer or custodian in 2014 would have known this basic principle: regardless of a confined person's apparent consent to sexual contact, engaging in that sexual contact—or failing to stop it—is an immoral abuse of custodial settings' inherent power inequities, and is unlawful.

B. The Inherent Power Inequities in BCRC Give Rise to the Same Potential for Sexual Abuse—and the Same Futility of Any Concept of "Consent" to that Abuse—as in Other Custodial and Institutional Settings.

Appellants argue that they should not be held to the same standard as correctional personnel because BCRC is not a prison, pointing to the fact that the

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ch. 220; 1978 N.J. Laws 549-50; 1995 N.M. Laws, ch. 159; 1996 N.Y. Sess. Laws, ch. 266 (McKinney); N.C. Gen. Stat. § 14-27.7 (2013); 1973 N.D. Laws 303; 2002 Ohio Laws, File 210; 1984 Okla. Sess. Laws 477; 2005 Or. Laws, ch. 488; 1998 Pa. Legis. Serv., Act No. 1998-157 (West); 1995 R.I. Laws, Ch. 95-119; 2001 S.C. Laws, Act 68; 2000 S.D. Laws, ch. 103; 1996 S.D. Laws, ch. 151; 1997 Tenn. Laws, ch. 388; 1997 Tex. Sess. Law Serv., ch. 1406 (West); 2001 Utah Laws, ch. 35; 2006 Vt. Laws, P.A. 177; 1999 Va. Laws, ch. 294; 1999 Wash. Legis. Serv., ch. 45 (West); 2000 W. Va. Laws, ch. 86; 2003 Wis. Legis. Serv., Act 51 (West); 2007 Wyo. Laws, ch. 7.

[36] *See* sources cited *supra* note 32 (Nevada, New Mexico, and Rhode Island's statutes excepted).

detainees are not confined to their rooms and that there is family-oriented programming. But that does not change the custodial nature of the setting or the imbalance of power that exists between those who are confined there and those who confine them, a reality that is acknowledged by federal regulation.

1. The ICE family detention system is a restrictive custodial setting.

Immigration and Customs Enforcement (ICE) detains immigrant families pursuant to its authority under the Immigration and Nationality Act. Although immigration detention serves a civil, not criminal, purpose, its operation and structure are identical to more restrictive settings such as prisons and jails. The current immigration detention system spans over 200 jail- and prison-like facilities across the country, including three "Family Residential Centers" (FRCs) such as BCRC. At the time it opened in March 2001 under the authority of the former Immigration and Naturalization Service ("INS"), the Berks facility was the only detention facility for immigrant families.

Starting in 2006, however, ICE expanded its capacity for family detention with an Intergovernmental Service Agreement with Williamson County, Texas to open the 512-bed T. Don Hutto Family Residential Center ("Hutto").[37] The agency

[37] ICE removed all families from Hutto in 2009 and recommissioned it as an adult only facility.

subsequently further expanded family detention in 2014 with the repurposing of a federal training center in Artesia, New Mexico,[38] converting an all-male detention facility in Texas into the Karnes FRC, and expanding the capacity at both Berks and the South Texas Family Residential Center in Dilley, Texas ("Dilley").[39] All three are secure facilities that do not permit detainees to leave and re-enter.[40]

2. Detained families are especially vulnerable in detention and suffer from harmful impacts.

Immigrants in family detention are particularly vulnerable to abuse. Various investigations have concluded that ICE family detention facilities fail to meet basic constitutional and human rights standards for access to child care, medical and mental health care, and legal assistance, among other issues.[41]

[38] Negative public scrutiny of the 672-bed Artesia facility ultimately led to its closure in December 2014. All of the families detained there were transferred to the Karnes and Dilley facilities.

[39] Dora Schriro, *Weeping in the Playtime of Others: The Obama Administration's Failed Reform of ICE Family Detention Practices*, 5 J. Migration and Human Security 452, 460 (2017).

[40] American Bar Association (ABA) Commission on Immigration, *Family Detention: Why the Past Cannot be Prologue* (July 31, 2015), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf.

[41] *See, e.g.*, Women's Refugee Comm'n (WRC) and Lutheran Immigration and Family Services (LIRS), *Locking Up Family Values*, (Feb. 2007); WRC and LIRS,

The majority of immigrant families detained by ICE are seeking protection in the United States after having suffered from abuse and persecution in their home countries or during their journey to the United States.[42] This trauma is often compounded by the experience of being detained, often for long periods of time while their immigration cases are pending, without access to community and family support or necessary legal or medical resources.

For immigrant parents who are detained with their children, the experience of detention can be especially traumatizing and can lead to major, long-term medical and mental health effects for both parent and child even after they are released from custody.[43] Moreover, the stress on families while they are in detention has been well-documented and includes reports of babies losing weight, young children with suicidal thoughts, and mothers who suffer from serious mental

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Locking up Family Values, Again (Oct. 2014); ABA Commission on Immigration, *supra* note 39, at 10 n. 4.

[42] ABA Commission on Immigration , *supra* note 40, at 26.

[43] Miriam Jordan, *Whistle Blowers Say Detaining Migrant Families 'Poses High Risk of Harm*,' N.Y. Times, July 18, 2018, https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html; Jamie Ducharme, *Separating Kids From Parents Can Cause Psychological Harm. But Experts Say Detaining Them Together Isn't Much Better*, June 21, 2018, http://time.com/5317762/psychological-effects-detaining-immigrant-families/.

health problems.[44] These findings are consistent with documented consequences of family detention internationally.[45] These harmful effects of detention impact immigrant parents' ability to access services they may need for themselves or their children and to navigate the complex immigration legal and detention systems.

3. Sexual abuse is a pervasive and systemic problem in immigration detention, including family detention.

For families in the vast immigration detention system, being detained means not just facing a loss of liberty and potential deportation. It means being vulnerable to abuses within that system, including sexual abuse. Recent data shows that there were 1,448 allegations of sexual abuse filed with ICE between 2012 and March 2018.[46] In 2017 alone, there were 237 allegations of sexual abuse in immigration detention facilities.[47]

For example, in October 2014, the Karnes FRC was at the center of allegations of sexual assault by guards threatening or bribing detained women, with reports that women were being singled out for abuse by facility staff with

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[44] WRC and LIRS, *Locking Up Family Values, Again*, *supra* note 40.

[45] *Id.*

[46] Alice Speri, *Detained, Then Violated*, The Intercept, Apr. 11, 2018, https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/.

[47] *Id.*

promises of assistance with immigration proceedings.[48] Similar reports have been documented in other immigration detention facilities.[49]

Sexual abuse is a problem that is widely underreported in the outside world, so there is little question that these numbers do not represent the full scope of the problem. Without access to counsel for the vast majority of detained immigrants and inadequate oversight of the detention system, these layers of abuse often go unchecked.

4. The federal government recognizes the custodial nature of ICE detention and the risk of sexual abuse in such settings.

In 2007, ICE established the Family Residential Standards (FRS), a set of seven general detention standards modeled after the American Correctional Association (ACA) standards for pre-trial adult defendants to govern the day-to-day operation of family detention facilities, at the time BCRC and Hutto.[50] The

[48] Mexican American Legal Defense and Educational Fund, Letter to DHS Sec. Jeh Johnson (Sept. 30, 2014), http://www.maldef.org/assets/pdf/2014-09-30_Karnes_PREA_Letter_Complaint.pdf.

[49] Human Rights Watch, *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, (Aug. 25, 2018), https://www.hrw.org/report/2010/08/25/detained-and-risk/sexual-abuse-and-harassment-united-states-immigration-detention.

[50] U.S. Immigration and Customs Enforcement , *Family Residential Standards* (2007), https://www.ice.gov/detention-standards/family-residential; *see* Schriro, *supra* note 38, at 456.

stated purpose of the standards is to "set minimum expectations for those facilities' safety and security, staff selection and training, program services, and medical care."[51] While the FRS include a standard entitled "Sexual Abuse and Assault Prevention and Intervention,"[52] it is not clear that this internal agency standard fully complies with the requirements under the Prison Rape Elimination Act (PREA), which apples in ICE detention facilities including FRCs. *See* 34 U.S.C. § 30307(a), (c) (PREA applies to detention facilities operated by the Department of Homeland Security and custodial facilities operated by the Department of Health and Human Services).

Enacted in 2003, PREA establishes a "zero-tolerance standard for rape in prisons in the United States."[53] Under the PREA regulations for ICE facilities, "sexual abuse" of a detainee by a staff member at the facility includes any sexual contact with a detainee, "with or without the consent of the detainee."[54] These regulations apply to BCRC and were effective in 2014 prior to the events giving

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[51] Schriro, *supra* note 39, at n.3.

[52] U.S. Immigration and Customs Enforcement, *§2.7 Sexual Abuse and Assault Prevention and Intervention* (2007), https://www.ice.gov/doclib/dro/family-residential/pdf/rs_sexual_assault_prevention-intervention.pdf.

[53] 34 U.S.C. §§ 30301-30302. *See also* 34 U.S.C. § 30307(c) (amending federal law in 2013 to require issuance of final regulations governing sexual assault of immigrants held in detention).

[54] 6 C.F.R. § 115.6.

rise to this suit. Thus, BCRC staff were governed by both state and federal prohibitions on any sexual contact with detainees, regardless of whether such contact was consensual.

C. It is Clearly Established that Detainees like E.D. Have a Right to be Protected from Sexual Abuse, Including Statutory Sexual Assault.

Appellee's brief ably lays out the long-standing authority that establishes E.D.'s right to be free from sexual abuse by the employees of BCRC. As that analysis makes clear, even under the Eighth Amendment deliberate indifference analysis, Appellants are not entitled to qualified immunity. But the Supreme Court has long recognized that, in non-prison settings, detainees have *more* protection than that afforded by the Eighth Amendment (not less, as Appellants argue). E.D.'s claims—and Appellants' argument for qualified immunity—should turn on whether Appellants' actions were reasonable under the circumstances. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (citing *Bell v. Wolfish*, 441 U.S. 520, 540 (1979)).[55]

[55] In *Kingsley* the Supreme Court applied the reasonableness standard to claims of a defendant in criminal proceedings who was detained pretrial. At least one Circuit has held that persons like E.D., who are held in government custody for purposes of civil proceedings and not for the purpose of criminal prosecution, deserve an even more protective standard. *See Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004).

For decades, the Supreme Court has made clear that persons confined by the government for reasons other than a criminal conviction are protected by the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment. *See Bell*, 441 U.S. at 540.[56] In *Kingsley v. Hendrickson*, the Supreme Court explained the impact of that distinction in the context of a claim of excessive force by a person held pending criminal proceedings: such a person "must show . . . only that the officers' use of that force was *objectively* unreasonable" and not "that the officers were *subjectively* aware that their use of force was unreasonable." 135 S. Ct. at 2470 (emphasis in original). While the Court acknowledged that "the defendant must possess a purposeful, a knowing, or possibly a reckless state of mind" because "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process," it explained that this "subjective" awareness means only that the defendant must subjectively intend the actions complained of (his actions themselves must be deliberate and not accidental or negligent)—liability does not require any other degree of intention, but turns on

[56] Like pretrial detainees and persons confined for mental health treatment, immigration detainees cannot be subjected to punitive incarceration. *Zadvydas v. Davis*, 533 U.S. 678, 690-91(2001) (acknowledging that immigration detention is civil).

whether the defendant's actions were "unreasonable" or "excessive in relation to [a legitimate] purpose." *Id.* at 2472-73.

This Court has held that Fourteenth Amendment claims outside the context of confinement, likewise, require a plaintiff to show only that the defendant's actions were objectively unreasonable, and do not require any proof of subjective disregard for the plaintiff's rights. *See L.R. v. Sch. Dist. of Philadelphia*, 836 F.3d 235 (3d Cir. 2016) (denying qualified immunity to a teacher who released a kindergartener to a stranger who then abused the child). In such non-custodial settings, this Court has held that the application of a purely objective standard of liability was not clearly established before *Kingsley* and *L.R. Kedra v. Schroeter*, 876 F.3d 424, 437-40 (3d Cir. 2017) (holding that firearms instructor who shot trainee was entitled to qualified immunity for actions predating *Kingsley* where there was no allegation of deliberate indifference).

But *Kingsley* did not change the law with respect to the protections afforded people who are confined by the government without a criminal conviction: such persons have, since at least the 1970s, enjoyed greater constitutional protections from harm at the government's hands than people who are confined after a conviction. *See Bell*, 441 U.S. at 540. The Supreme Court sent Kingsley's claims back for retrial, after holding that the jury instructions in his case failed to articulate the appropriate standard of liability. *Kingsley*, 135 S. Ct. at 2471-72. If

the Court had viewed itself as announcing a new rule of liability, the *Kingsley* defendants would have been entitled to immunity from damages. The Supreme Court did not mention qualified immunity, but the Seventh Circuit, on remand, expressly held that it was not available to the defendants, because the conduct of which they were accused—using a Taser on a detainee who was restrained and not resisting—was clearly unconstitutional even before the Supreme Court's decision. *Kingsley v. Hendrickson*, 801 F.3d 828, 832-33 (7th Cir. 2015) (per curiam).

Similarly, the failure of government custodians to take any action to protect a confined person from sexual exploitation—including institutional sexual assault—has long been understood to violate the Constitution. Appellee Br. 33-40, 47-50. This Court should apply the objective standard described in *Kingsley* to E.D.'s claims, and deny Appellants' bid for qualified immunity for the same reason that the defendants in *Kingsley* were denied that protection—because no reasonable official at the BCRC could have thought, in 2014 or today, that it was acceptable to turn the other way when a staff member was sexually exploiting one of the women they were supposed to protect.

CONCLUSION

E.D. was profoundly vulnerable. She was a young mother to a three-year-old child, desperately fleeing abuse in her home country, terrified of being deported and desperate to protect her child's future. Instead of finding safety at the Berks County detention facility, she was set upon by a counselor who first promised to help her and then threatened to have her deported, preying on her vulnerability to coerce her into a sexual relationship with him. Instead of intervening to protect her, the other BCRC staffers made jokes about it. The district court was correct to reject their arguments that they did nothing wrong and were immune from suit.

For the foregoing reasons, the order below should be affirmed.

Respectfully submitted,

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CERTIFICATES

Mary Catherine Roper, one of the attorneys for Amici, hereby certifies that:

1. Pursuant to L.A.R. 28.3(d), I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. This Brief complies with the type/volume limitation in Rules 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because, excluding the parts of the document exempted by Rule 32(f), this document contains 6190 words.

3. This Brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

4. On this date, the foregoing Brief for Amici was filed electronically and served on the other parties via the Court's ECF system and that counsel for Amici has delivered an electronic copy of the same to counsel for all parties and is sending the same by regular mail to:

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5. Pursuant to L.A.R. 31.1(c), I hereby certify that the text of the electronic Brief for Amici has been filed with the Court in electronic form and will be delivered in paper form within five days, and that the text of the electronic brief is identical to the text in the paper copies.

6. The electronic version of this Brief filed with the Court was virus checked and was found to have no viruses.

Dated: January 28, 2019

/s/ Mary Catherine Roper
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 36.1 and 29(a)(4), undersigned counsel for *amici curiae* American Civil Liberties Union, et al., states that *amici* are non-profit, public-interest organizations, none of which has a parent corporation, and none of which issues public stock.

Dated: January 28, 2019

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