UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 14-969-cv

Caption [use short title]

Motion for: Leave to file amicus brief

James Crawford and Thaddeaus Corley, Plaintiffs-Appellants,

v.

Andrew Cuomo, et al., Defendants-Appellees.

Set forth below precise, complete statement of relief sought:

Leave to file a brief of amici curiae in support of Plaintiffs-Appellants.

MOVING PARTY: New York Civil Liberties Union, et al.
☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent ☑ Amicus Curiae

OPPOSING PARTY: Andrew Cuomo, et al.

MOVING ATTORNEY: Erin Beth Harrist

OPPOSING ATTORNEY: Frank Brady

[name of attorney, with firm, address, phone number and e-mail]

New York Civil Liberties Union
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Court-Judge/Agency appealed from:

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain): by phone on 07-16-14

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: [signature] **Date:** 07/21/2014 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES CRAWFORD & THADDEUS CORLEY, *Plaintiffs-Appellants*, v. ANDREW CUOMO, as Governor of the State of New York, in his official capacity; BRIAN FISCHER, Commissioner of Department of Corrections and Community Supervision, in his official capacity; Superintendent WILLIAM P. BROWN, in his personal and official capacities; Superintendent WILLIAM LARKIN, in his official capacity; Corrections Officer SIMON PRINDLE; and JOHN DOE CORRECTIONS OFFICERS 1-8, *Defendants-Appellees*.	:	14-969-cv

AFFIRMATION OF ERIN BETH HARRIST IN SUPPORT OF MOTION BY THE NEW YORK CIVIL LIBERTIES UNION, THE LEGAL AID SOCIETY OF NEW YORK, HUMAN RIGHTS DEFENSE CENTER, PRISONERS' LEGAL SERVICES OF NEW YORK, AND THE UPTOWN PEOPLE'S LAW CENTER FOR LEAVE TO SUBMIT *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS JAMES CRAWFORD AND THADDEUS CORLEY

Erin Beth Harrist declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am a staff attorney at the New York Civil Liberties Union Foundation ("NYCLU") and a member of the bar of this Court. The NYCLU is a nonprofit,

nonpartisan organization with approximately 50,000 members, founded in 1951 to protect and advance civil rights and civil liberties in New York State. I submit this affirmation in support of the motion of the NYCLU, the Legal Aid Society of New York, Human Rights Defense Center, Prisoners' Legal Services of New York, and the Uptown People's Law Center to appear as *amici curiae* in support of Plaintiffs-Appellants. The proposed brief of *amici curiae* is attached as Exhibit A. This motion and accompanying proposed brief, filed within 7 days of Plaintiffs-Appellants' brief, complies with the time for filing pursuant to Fed. R. App. P. 29(e). Plaintiffs-Appellants consent to the filing of this brief. Defendants-Appellees have been notified of intent to file this brief and have not, to date, taken a position on whether or not they consent.

2. In this case, Plaintiffs-Appellants alleged that a corrections officer had repeatedly squeezed and fondled their penises while issuing threats and sexual comments, resulting in emotional and psychiatric distress. The District Court held that the Plaintiffs did not state a cause of action under the Eighth Amendment because each Plaintiff only experienced the alleged abuse during one incident and there were no allegations of physical injury, penetration, or pain.

3. The *amici curiae* brief addresses two points not briefed by Plaintiffs-Appellants, which *amici curiae* submit are relevant to the Court's ruling on the appeal. First, the District Court's ruling that penetration or physical injury is

required to state a claim under the Eighth Amendment is a common misinterpretation of this Court's ruling in *Boddie v. Schnieder*, 105 F.3d 857 (2d Cir. 1997) that has sown confusion in both district courts within this Court's jurisdiction and in appellate courts across the country. This case presents an opportunity for the Court to correct this misunderstanding of the *Boddie* ruling and clarify that sexual abuse in the prison context does not need to include penetration or physical injury, consistent with controlling constitutional principles regarding what constitutes cruel and unusual punishment.

4. Second, drawing from federal and state laws reflecting current standards of decency, *amici curiae* propose a bright-line rule that cruel and unusual punishment includes any intentional contact by a corrections officer with a detainee's genitalia or other intimate areas that is either unrelated to official duties or where the officer has the intent to abuse, arouse, or gratify sexual desire. This rule is consistent with the federal regulations promulgated under the Prison Rape Elimination Act, the New York Penal Law, and forty-six other states and will bring a much needed consistency and humanity to Eighth Amendment law.

5. The proposed *amici curiae* are well-positioned to address these issues. The NYCLU frequently litigates and advocates on behalf of the constitutional rights of incarcerated New Yorkers, including their Eighth Amendment rights. *See, e.g.*, *Butler v. Suffolk County*, 11-cv-02602 (E.D.N.Y.) (suit against Suffolk County

alleging that the conditions of its correctional facilities violate the Eighth and Fourteenth Amendments to the United States Constitution). The Legal Aid Society of New York, through its Prisoners' Rights Project, seeks to ensure the protection of prisoners' constitutional rights, including on behalf of prisoners who have experienced sexual abuse. *See, e.g.*, *Amador v. Andrews*, 03 Civ. 0650 (S.D.N.Y.) (putative class action brought by women prisoners challenging the policies of State prison officials that enable staff sexual abuse to persist). The Human Rights Defense Center (HRDC) publishes *Prison Legal News* and other reference materials for prisoners and reports extensively on the sexual abuse of prisoners by jail and prison staff. Both the Legal Aid Society and HRDC were involved in the development of the standards promulgated pursuant to the Prison Rape Elimination Act. Prisoners' Legal Services of New York provides civil legal services to indigent inmates in New York State correctional facilities, including claims of sexual abuse and cruel and inhuman treatment. The Uptown People's Law Center advocates for the civil rights of prisoners and litigates class actions and individual cases on behalf of prisoners.

6. On behalf of the NYCLU and the other *amici curiae*, I respectfully request leave to file the attached proposed *amici curiae* brief in support of Plaintiffs-Appellants.

Dated: July 21, 2014
New York, New York

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Exhibit A

14-969-cv

United States Court of Appeals
For the Second Circuit

JAMES CRAWFORD and THADDEUS CORLEY,

Plaintiffs-Appellants,

v.

ANDREW CUOMO, as Governor of the State of New York, in his official capacity; BRIAN FISCHER, Commissioner of Department of Corrections and Community Supervision, in his official capacity; Superintendent WILLIAM P. BROWN, in his personal and official capacities; Superintendent WILLIAM LARKIN, in his official capacity; Corrections Officer SIMON PRINDLE; and JOHN DOE CORRECTIONS OFFICERS 1-8,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* THE NEW YORK CIVIL LIBERTIES UNION, THE LEGAL AID SOCIETY OF NEW YORK, HUMAN RIGHTS DEFENSE CENTER, PRISONERS' LEGAL SERVICES OF NEW YORK, AND THE UPTOWN PEOPLE'S LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS JAMES CRAWFORD and THADDEUS CORLEY

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici curiae* hereby disclose that the New York Civil Liberties Union Foundation, Human Rights Defense Center, Prisoners' Legal Services of New York, Legal Aid Society's Prisoners' Right Project, and Uptown People's Law Center are nonprofit corporations. They have no parent corporations and no corporation directly or indirectly holds 10% or more of the ownership interest in any of the *amici*.

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INTRODUCTION[1]

This case presents an ideal opportunity for the Court to correct an indefensibly narrow interpretation of unconstitutional sexual abuse in prisons and jails under the Eighth Amendment arising from a seventeen year-old decision of this Court. The District Court below misread *Boddie v. Schnieder*, 105 F.3d 857 (2d Cir. 1997), to create a rule that a detainee victimized by a corrections officer must allege penetration of a body cavity or a physical injury in order to state a claim for sexual abuse under the Eighth Amendment. Because the Plaintiffs' allegations in this case involved forcible, threatening, and inappropriate groping of the plaintiffs' genitals, but not penetration or physical injury, the District Court dismissed their complaint.

This Court should expressly reject this misreading of *Boddie* and hold that cruel and unusual punishment includes any intentional contact by a corrections officer with a detainee's genitalia or other intimate areas that is either unrelated to official duties or where the officer has the intent to abuse, arouse, or gratify sexual desire. This rule derives directly from federal and state laws enacted for the purpose of defining and prohibiting sexual abuse in prisons and jails. Such legislative enactments are precisely the objective source material identified by this

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1, *Amici* state that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *Amici*, its members, or its counsel —contributed money that was intended to fund preparing or submitting the brief.

Court and the Supreme Court as defining contemporary standards of decency and informing the scope of the Eighth Amendment's protections. The Supreme Court and this Court's foundational case law defining "cruel and unusual punishment" also supports this rule because that case law focuses on the objective characteristics of the punishment and the subjective intent of the perpetrator. The District Court's rule, by contrast, is inconsistent with contemporary standards of decency and finds no support in the Supreme Court or this Court's case law, including *Boddie* itself, which makes no mention of a requirement to plead penetration or physical injury.

The bright-line rule proposed by *Amici* would bring humanity, rationality and coherence to an area of law that for decades has lacked all three. *Boddie* held that sexual abuse violates the Eighth Amendment but did not define "sexual abuse" other than to suggest that isolated instances of sexual harassment did not suffice to state a claim. Since *Boddie* was decided nearly two decades ago, the question of how to distinguish single instances of unconstitutional sexual abuse from non-actionable sexual harassment has bedeviled courts across the country. Many courts in this Circuit and beyond have, like the District Court here, wrongly interpreted *Boddie* to dismiss claims for a wide range of serious sexual assault and abuse perpetrated by corrections officers on persons in their custody, including forcible groping or fondling of genitals or breasts and forced kissing. This incorrect

interpretation leaves an enormous gap in the Eighth Amendment's protection from grossly inappropriate, offensive, and damaging instances of sexual abuse by corrections officers. Other courts, finding such a gap indefensible, have rejected the notion that penetration or physical injury is necessary to state a claim, resulting in a lack of consistency both within this Circuit and across the country. This Court's articulation of the rule proposed by *Amici* would restore much-needed clarity to this area of law and ensure that inhumane sexual abuse in prisons and jails is not tolerated.

INTEREST OF *AMICI CURIAE*

The **New York Civil Liberties Union (NYCLU)** is a nonprofit, nonpartisan organization with approximately 50,000 members founded in 1951 to protect and advance civil rights in New York. The NYCLU advocates for the constitutional rights of all New Yorkers, including those who are incarcerated, and seeks to ensure individuals can obtain redress in the courts for constitutional violations.

The Legal Aid Society of New York is a private, nonprofit organization that has provided free legal assistance to indigent persons in New York City for over 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure the protection of prisoners' constitutional and statutory rights. For more than a decade the Prisoners' Rights Project has been a vigorous advocate on behalf of prisoners who have experienced sexual abuse, through litigation in the federal and

State courts and through legislative advocacy. Examples include our work in *Amador v. Andrews*, No. 1:03-cv-00650 (KTD) (S.D.N.Y. filed Jan. 28, 2003), a case on behalf of a putative class of women prisoners who challenge the policies of State prison officials that enable staff sexual abuse to persist; participation as a member of the National Prison Rape Elimination Commission's Standards Development Expert Committee; and testimony before a sub-committee of the U.S. House Judiciary Committee relating to the Commission's recommended Standards.

The **Human Rights Defense Center (HRDC)** is a nonprofit charitable corporation headquartered in Florida that advocates on behalf of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities and military prisons. HRDC's advocacy efforts include publishing *Prison Legal News* (PLN), a monthly publication that covers criminal justice-related news and litigation nationwide, publishing and distributing self-help reference books for prisoners, and engaging in litigation in state and federal courts on issues concerning detainees. PLN has reported extensively on the sexual abuse of prisoners by jail and prison staff. In addition, HRDC submitted comments to the U.S. Department of Justice (DOJ) regarding the proposed Prison Rape Elimination Act (PREA) standards in 2010 and 2011 to support the greatest possible

protections for prisoners against being sexually assaulted and raped while in custody.

Prisoners' Legal Services of New York (PLS) is a nonprofit organization that has provided civil legal services to indigent inmates in New York State correctional facilities for over 38 years. PLS receives over 8,000 requests for assistance annually and serves as legal counsel to inmates on a variety of claims in the state and federal courts regarding conditions of confinement, including claims of excessive force, sexual abuse, cruel and inhuman treatment, deliberate indifference and violations of due process. PLS has a significant interest in insuring that incarcerated individuals are treated fairly and humanely and are free from sexual abuse. As such, PLS was one of the amici in *Amador v. Andrews*, No. 1:03-cv-00650, a case brought by The Legal Aid Society of New York challenging state policies that allow sexual abuse of prisoners to continue.

The **Uptown People's Law Center (UPLC)** was founded in 1975 by former coal miners and their widows in an effort to secure black lung benefits for disabled coal miners. UPLC has been a leading voice for prisoner civil rights for over thirty years. It actively represents prisoners in both class action matters as well as individual cases, including denial of adequate medical care, excessive force matters, denial of religious rights, discrimination, access to the courts, due process and cruel and unusual punishment. UPLC also engages in regular outreach to

young people in the community in an attempt to prevent them from becoming involved in the criminal justice system.

ARGUMENT

In this case, the District Court held, pursuant to a misinterpretation of this Court's decision in *Boddie v. Schnieder*, that a corrections officer who on two separate occasions "squeeze[d] and fondle[d]" the two plaintiffs' penises, while issuing threats and sexual comments and, in one case, "grabb[ing plaintiff] tightly around his neck," did not commit sexual abuse in violation of the Eighth Amendment because each was "only a single incident" and the plaintiffs did "not allege physical injury, penetration, or pain." *Crawford v. Cuomo*, No. 9:13-cv-406, 2014 WL 897046, at *4-5 (N.D.N.Y. Mar. 6, 2014).

The Court should take this opportunity to disavow the District Court's cramped understanding of cruel and unusual punishment and adopt the clear, prevailing standard of what constitutes unacceptable sexual abuse in a prison or jail reflected in contemporary federal and state law. *Boddie* does not support the District Court's ruling and, even if it did, the Court would be compelled to abandon *Boddie* by the evolution of the standard of decency that has taken place in the seventeen years since that decision. By clarifying that any intentional contact by a corrections officer with a detainee's genitalia or other intimate areas, such as the groin, anus, breast, inner thigh or buttocks, that is unrelated to official duties or

undertaken with the intent to abuse, arouse, or gratify sexual desire constitutes cruel and unusual punishment, the Court would create an enforceable and coherent bright-line rule defining the Eighth Amendment's prohibitions. The Court should reverse the District Court's dismissal of the complaint in this action, which clearly states a claim under the appropriate constitutional standard.

I. Intentional Contact With a Detainee's Genitalia Unrelated to a Corrections Officer's Official Duties or Undertaken With Intent to Abuse, Arouse, or Gratify Sexual Desire Is Cruel and Unusual Punishment.

Binding precedent and contemporary legislative enactments make clear that the definition of unconstitutional sexual abuse in a prison or jail turns not on penetration or physical injury but on whether the sexual contact is incidental to legitimate duties—such as a pat-frisk or strip search—or, by contrast, whether it is undertaken with subjective intent to abuse the detainee or gratify the sexual desire of the corrections officer. *Boddie* did not hold otherwise. If it had, it would have to be abandoned in light of contemporary standards of decency.

A. Binding Precedent From the Supreme Court and This Court Defining "Cruel and Unusual Punishment" Requires Adoption of the Rule Proposed by *Amici* and Rejection of the District Court's Rule.

Relying on *Boddie v. Schnieder*, the District Court found that the sexual abuse alleged in this case did not state an Eighth Amendment claim because the forcible groping of the plaintiffs' genitals, which allegedly went beyond what was necessary to execute a legitimate pat-frisk search and was undertaken for the

purpose of abusing the plaintiffs, involved no penetration of any body cavity and did not result in physical injury.

As an initial matter, the District Court misread *Boddie*. *Boddie* did not establish a rule that physical injury or penetration is required to state an Eighth Amendment claim. No such holding—nor any words of that nature—appear in the Court's decision. To the contrary, the Court in *Boddie* rightly acknowledged sexual abuse is constitutionally cognizable not only when it leaves physical scars or bruises but also because of its psychological impact on the victim. *Boddie*, 105 F.3d at 861 ("Sexual abuse may violate contemporary standards of decency and can cause severe physical *and psychological* harm.") (emphasis added). *Boddie* established that a line exists between actionable "sexual abuse" and non-actionable "isolated sexual harassment," and classified the particular facts of that case as falling into the latter category, but it did not create the categorical rule requiring allegations of penetration or physical injury that the District Court applied to the facts of this case.[2]

Beyond *Boddie*, case law from the Supreme Court and this Court both before

[2] *Boddie* also established that "severe or repetitive" sexual harassment by a corrections officer can be "objectively sufficiently serious enough to constitute an Eighth Amendment violation." *Boddie*, 105 F.3d at 861. This case does not call upon the Court to further define when a series of acts of harassment, none of which standing alone would violate the Constitution, is sufficiently "severe and repetitive" to amount to an Eighth Amendment issue. Instead, this case asks the Court to hold that any single incident that in itself constitutes criminal sexual abuse and a violation of federal law is sufficiently serious, standing alone, to constitute an Eighth Amendment violation.

and since *Boddie* underscores the error in the District Court's decision below and makes it clear that the rule proposed by *Amici*, not the District Court's rule, is correct. Whether behavior constitutes "cruel and unusual punishment" depends on whether it was "objectively, sufficiently serious" and whether the defendant subjectively had a "sufficiently culpable state of mind." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *see also Boddie*, 105 F.3d at 861. Evaluating whether intentional contact by a corrections officer with a detainee's genitalia or other intimate areas was either unrelated to official duties or had the intent to abuse, arouse, or gratify sexual desire properly turns on the objective circumstances of the incident (i.e., did the corrections officer touch particular areas of the body) and the subjective purpose or intent of the officer (i.e., was the touching legitimately related to official duties or, by contrast, undertaken with intent to abuse, arouse, or gratify sexual desire).

The exemption for touching related to official duties also aligns with the long-standing principle that the Eighth Amendment prohibits unnecessary and wanton acts—punishment that is "so totally without penological justification that it results in the gratuitous infliction of suffering." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). And the inclusion of any touching that has the subjective intent to abuse the victim or arouse or gratify the perpetrator's sexual desire comports with the Supreme Court's clear holding that "[w]hen prison officials maliciously and

sadistically use force to cause harm, contemporary standards of decency always are violated." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). Indeed, after *Boddie*, in a case pertaining to sexual abuse in prisons, this Court recognized that these factors—and not the question of injury caused by the punishment—are the proper relevant factors in defining whether conduct is cruel and unusual. In *United States v. Walsh*, this Court noted that whether the behavior alleged was "purely unwarranted and served no penological purpose weighed in favor of the cause of action, not against it" because "it is the sadistic and unwarranted nature of the behavior, beyond what society expects its criminals to endure as punishment for their misdeeds, that renders the punishment 'cruel and unusual.'" 194 F.3d 37, 49 & n.8 (2d Cir. 1999).

A rule requiring plaintiffs to allege physical injury to state a claim for sexual abuse would be directly contrary to the Supreme Court's decision in *Hudson*, which held that when "prison officials maliciously and sadistically use force to cause harm," the Eighth Amendment is violated "whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury." 503 U.S. at 9; *see also Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (calculated harassment unrelated to prison needs may constitute cruel and unusual punishment). As held by the Supreme Court, the linchpin of the inquiry is

the subjective motive and whether the acts are penologically justified, as *Amici* argue here.

Thus, the District Court's reading of a requirement to establish penetration or physical injury into this Court's decision in *Boddie* was contrary to *Boddie* and other controlling caselaw. The Court should explicitly reject such a rule and adopt, instead, the clear and legally compelled rule articulated by *Amici*.

B. "Contemporary Standards of Decency" Require the Court to Adopt the Rule Proposed by *Amici* and Reject the District Court's Rule.

Even if *Boddie* had announced a rule that penetration or physical injury is required to state a claim of unconstitutional sexual abuse, this Court must still determine whether societal expectations and standards regarding sexual abuse in prisons and jails have changed in the seventeen years since *Boddie* was decided. They have.

Federal and state laws are consistent in their prohibition of *any* intentional contact by a corrections officer with an inmate's genitalia or other intimate areas either (a) that is unrelated to official duties or (b) where the officer has the intent to abuse, arouse, or gratify sexual desire. Given this nationally uniform societal standard and the consistent state-level trend that preceded its codification in federal law, there can no longer be any doubt that the conduct at issue in this case violates contemporary standards of decency.

"To determine whether a punishment is cruel and unusual, courts must look

beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham v. Florida*, 560 U.S. 48, 58 (2010) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). "This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Id.* (internal quotation and citation omitted). Cruel and unusual punishments consist of behavior that is "inconsistent with contemporary standards of decency and repugnant to the conscience of mankind." *Whitley v. Albers*, 475 U.S. 312, 327 (1986) (quoting *Estelle*, 429 U.S. at 103).

In defining "contemporary standards of decency," the Court must look to "objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question . . . for essential instruction." *Roper v. Simmons*, 543 U.S. 551, 564 (2005); *see also Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) ("[T]he clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."). Both a high number of legislative enactments prohibiting certain conduct and a consistent trend toward prohibition strongly indicate that contemporary standards of decency have evolved to classify that conduct as "cruel and unusual." *Roper*, 543 U.S. at 565-67 (holding that the rejection of the juvenile death penalty "in the

majority of states" as well as the "consistency of the direction of change" toward abolition established that the practice violated the Eighth Amendment).

Federal regulations promulgated pursuant to the Prison Rape Elimination Act ("PREA") in 2012 mandate that all correctional facilities in the United States adopt and enforce a "zero tolerance" policy "toward all forms of sexual abuse." 28 C.F.R. § 115.11(a). PREA's regulations have several definitions of what constitutes sexual abuse and include "[a]ny . . . intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member . . . has the intent to abuse, arouse, or gratify sexual desire." 28 C.F.R. § 115.6.[3] "Termination shall be the presumptive disciplinary sanction for staff who have

[3] The rule proposed by *Amici* is not intended to exhaust the subject of prison sexual abuse. PREA reflects the contemporary standards of decency relating to sexual abuse in prisons and conduct that violates PREA should be actionable under the Eighth Amendment. For instance, PREA's regulations also define sexual abuse to include "[c]ontact between the mouth and any body part where the staff member . . . has the intent to abuse, arouse, or gratify sexual desire" and "[a]ny display by a staff member . . . of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, detainee, or resident." 28 C.F.R. § 115.6. Although these behaviors are not at issue in the instant case, they should also constitute conduct actionable under the Eighth Amendment. *Cf. Amador v. Smith*, No. 10-cv-06702 (W.D.N.Y. May 9, 2013) (order denying motion for summary judgment where female prisoner alleged a series of "escalating sexually offensive behavior" by a male officer that included sexual comments, kisses, exposure of his genitalia, and touching of her breasts and buttocks). By contrast, other courts, relying upon *Boddie* in the same erroneous manner that the district court did here, have rejected similar acts as the basis for an Eighth Amendment claim. *See, e.g., Joseph v. U.S. Fed. Bureau of Prisons*, 232 F.3d 901, 902 (10th Cir. 2000) (unpublished decision) (citing *Boddie* for the proposition that a corrections officer who "touched [plaintiff] several times in a suggestive manner and exposed her breasts" to an inmate did not state an Eighth Amendment claim because of the lack of physical injury). The fact that the gap is so large between what prevailing law defines as unacceptable and what district courts have found to be constitutionally unacceptable provides additional reason for this Court to correct the record on *Boddie*.

engaged in sexual abuse" and all such terminations "shall be reported to law enforcement agencies, unless the activity was clearly not criminal." 28 C.F.R. § 115.76(b), (d). The federal government also makes any non-consensual "sexual contact" in a federal prison a felony punishable by up to two years in prison, where "sexual contact" is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. §§ 2244(b), 2246(3).

The New York Penal Law—in provisions enacted three years after *Boddie*—mirrors the language of PREA. The Penal Law classifies as Class A misdemeanors both "Forcible Touching" and "Sexual Abuse in the Second Degree." "Forcible Touching" occurs when a "person, intentionally and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person; or for the purpose of gratifying the actor's sexual desire." N.Y. Penal Law § 130.52. "Sexual Abuse in the Second Degree" is when a person "subjects another person to sexual contact . . . when such other person is incapable of consent by reason of some factor other than being less than seventeen years old," and further provides that any incarcerated person is inherently "incapable of consent." *Id.* §§ 130.60, 130.05(3)(e), (f).

New York is no outlier in this regard. Forty-six states and the District of

Columbia criminalize the intentional or forcible touching of intimate body parts, often in criminal statutes specifically targeting the prison or jail context.[4] (The only exceptions are Mississippi, Oklahoma, Florida and Vermont.)

The District Court's limited definition of unconstitutional sexual abuse is inconsistent with contemporary standards of decency as defined by PREA and state criminal laws. For that reason, the Court should reverse the District Court's dismissal of the Plaintiffs' Eighth Amendment claims and hold, as a rule, that *any* intentional contact by a corrections officer with an inmate's genitalia or other intimate areas that is either unrelated to official duties or involves the intent to abuse, arouse, or gratify sexual desire meets the standard for unconstitutional sexual abuse.

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[4] *See* Ala. Code § 14-11-31; Alaska Stat. § 11.41.427; Ariz. Rev. Stat. Ann. § 13-1419; Ark. Code Ann. § 5-14-127(a)(2); Cal. Penal Code § 289.6; Colo. Rev. Stat. §§ 18-7-701, 18-3-404; Conn. Gen. Stat. §§ 53a-73a; Del. Code. Ann. tit. 11, § 769; D.C. Code § 22-3014; Ga. Code Ann. § 16-6-5.1; Haw. Rev. Stat. §707-732(e); Idaho Code Ann. § 18-6110; 720 Ill. Comp. Stat. Ann. 5/11-9.2; Ind. Code Ann. § 35-44.1-3-10; Iowa Code 709.16; Kan. Stat. Ann. § 21-5512; Ky. Rev. Stat. Ann. §§ 510.120, 510.020; La. Rev. Stat. Ann. § 14:134.1; Me. Rev. Stat. Ann. Tit. 17-A, § 255-A; Md. Code Ann. Crim. Law § 3-314; Mass. Gen. Laws ch. 268, § 21A; Mich. Comp. Laws § 750.520b; Minn. Stat. Ann. § 609.345(1)(m); Mo. Rev. Stat. §§ 566.101, 566.145; Mont. Code Ann. § 45-5-502; Neb. Rev. Stat. Ann. § 28-322; Nev. Rev. Stat. Ann. § 212.187; N.H. Rev. Stat. Ann. §§ 632-A:2(I)(n)(1), 632-A:4; N.J. Stat. Ann. §§ 2C:14-2, 2C:14-3; N.M. Stat. Ann. § 30-9-12; N.C. Gen. Stat. § 14-27.5A; N.D. Cent. Code § 12.1-20-07; Ohio Rev. Code. Ann. §§ 2907.03, 2907.06; Or. Rev. Stat. Ann. § 163.454; 18 Pa. Cons. Stat. § 3124.2; R. I. Gen. Laws § 11-37-4; S.C. Code Ann. § 44-23-1150(c)(2); S. D. Codified Laws § 22-22-7.4; Tenn. Code Ann. §39-16-408; Tex. Penal Code Ann. § 39.04; Utah Code Ann. § 76-5-412(4), (5); Va Code. Ann. §§ 18.2-67.4, 18.2-67.10; W. Va. Code Ann. §§ 61-8B-2, 61-8B-7; Wash. Rev. Code Ann. § 9A.44.170; Wis. Stat. Ann. § 940.225(2); Wyo. Stat. Ann. § 6-2-303.

II. The Standard Proposed by *Amici* Is Necessary to Bring Humanity, Coherence and Consistency to Eighth Amendment Law Governing Sexual Abuse in Prisons and Jails.

The rule proposed by *Amici*—that unconstitutional sexual abuse should be defined as any intentional contact by a corrections officer with a detainee's genitalia or other intimate areas that is either unrelated to official duties or where the officer has the intent to abuse, arouse, or gratify sexual desire—is not only compelled by the Supreme Court, this Court's precedent defining cruel and unusual punishment, and contemporary standards of decency. It is also compelled by the need to make the law defining unconstitutional sexual abuse consistent, rational, and predictable both by lower court judges called upon to interpret it and corrections officers called upon to comply with it. The persistence of the flawed notion that sexual abuse is defined by whether the plaintiff can show penetration or physical injury has resulted in incoherent rulings among New York's federal district courts and among the federal circuits and in the improper dismissal of cases alleging egregious instances of sexual abuse in prisons and jails.

The District Court in this case is not alone in misinterpreting *Boddie* to categorically exclude from the Eighth Amendment's reach instances of sexual abuse that do not involve penetration of a body cavity or physical injury. Several district courts in this Circuit have made the same mistake, often in cases where the sexual abuse alleged is shocking to the conscience and utterly inconsistent with the

punishment we expect the incarcerated to endure. *See, e.g.*, *Jones v. Rock*, No. 9:12-CV-0447, 2013 WL 4804500, at *3-4, 18-20 (N.D.N.Y. Sept. 6, 2013) (citing *Boddie* and finding that allegations that a corrections officer "shoved his fingers between Plaintiff's buttocks with such force that one of his fingers, along with Plaintiff's pants and underwear, invaded Plaintiff's anus," "groped Plaintiff's genitals and squeezed them until Plaintiff cried out in pain" while threatening plaintiff and taunting him for being a virgin, failed to state a claim because "Plaintiff has not alleged that he sustained any physical injury as a result"); *Samuels v. Strange*, No. 3:08-CV-1872, 2012 WL 4754683, at *2-4 (D. Conn. Oct. 4, 2012) (finding that allegations that a corrections officer pulled down plaintiff's pants and fondled his genitals for an extended period of time failed to state a claim because, citing *Boddie*, "not all sexual assaults of a prisoner by a guard or corrections officer violate the Eighth Amendment"); *Castro-Sanchez v. N.Y.S. Dep't of Corr. Servs.*, No. 10 Civ. 8314, 2012 WL 4474154, at *1-3 (S.D.N.Y. Sept. 28, 2012) (citing *Boddie* and finding that allegations that a corrections officer "pulled down plaintiff's pants and groped his buttocks" while laughing and using the term "Puerto Rican motherfucker" did not state a claim); *McEachin v. Bek*, No. 06-CV-6453, 2012 WL 1113584, at *6 (W.D.N.Y. Apr. 2, 2012) (relying on *Boddie* to conclude that allegations that a corrections officer "tried to stick his fingers in [plaintiff's] rectum" while punching him in the head while he was

handcuffed did not state a claim because it was an "isolated incident, which did not involve actual penetration"); *Sanders v. Gifford*, Civ. No. 9:11-cv-0326, 2011 WL 1792589, at *1-2 (N.D.N.Y. Apr. 5, 2011) (finding that allegations that a corrections officer "grabbed [plaintiff's] scrotum and squeezed hard" and "took his ID card and swiped it in between Plaintiff's buttocks" failed to state a claim relying on *Boddie*); *Irvis v. Seally*, No. 9:09-CV-543, 2010 WL 5759149, at *1, 4 (N.D.N.Y. Sept. 2, 2010) (relying on *Boddie* to find that allegations that a corrections officer, on one occasion, forced plaintiff to "bend at the waist," and "spread [his] butt cheeks" while the officer was "rubbing his crotch," and on another occasion "grabbed plaintiff's naked butt cheek while stroking [the officer's] exposed penis with his other hand" did not state a claim); *Holton v. Moore*, No. CIV.A.96CV0077, 1997 WL 642530, at *1-2 (N.D.N.Y. Oct. 15, 1997) (citing *Boddie* and finding that allegations that a corrections officer "put his hands down [plaintiff's] pants trying to part his cheeks coming in touch with his anal" and "unzipped [plaintiff's] pants and touched his penis" did not state a claim). Other federal circuits—specifically, the Fifth, Sixth and Eleventh Circuits—have also relied on *Boddie* to limit the scope of the Eighth Amendment and dismiss claims alleging similar unconscionable facts.[5]

[5] *See Solomon v. Mich. Dep't of Corr.*, 478 F. App'x 318, 320-21 (6th Cir. 2012) (unpublished decision) (citing *Boddie* for the proposition that a corrections officer who "pressed his erect penis into [plaintiff's] buttocks during a search and made sexually suggestive remarks about

These courts' decisions not only extend *Boddie* far beyond its actual holding but also are, for the reasons stated above, inconsistent with this Court's and the Supreme Court's interpretation of the Eighth Amendment. The fact that these misapplications of *Boddie* have had such widespread influence reinforces the need for this Court to clarify its ruling and bring this Circuit's Eighth Amendment jurisprudence back in line with contemporary constitutional norms.

These courts' interpretations of *Boddie* are not only wrong, they have created a split both within this Circuit and among the federal appellate courts on the definition of unconstitutional sexual abuse in prisons and jails. Several other New York district courts—as well as the Seventh, Eighth, and Ninth Circuits—have defined unconstitutional sexual abuse consistently with PREA and the definition of criminal sexual abuse and rejected a rule that turns on the question of penetration or physical injury, resulting in a body of case law that is irreconcilable

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[plaintiff's] buttocks" did not violate the constitution); *Boxer X v. Harris*, 437 F.3d 1107, 1111 (11th Cir. 2006) (citing *Boddie* for the proposition that a corrections officer's solicitation of an inmate's "manual masturbation . . . under the threat of reprisal" did not state a claim); *Washington v. Harris*, 186 F. App'x 865, 865-56 (11th Cir. 2006) (unpublished decision) (holding that a corrections officer who "crept up behind" an inmate, grabbed his genitals, kissed him and threatened to perform oral sex on him did not state a claim); *Jackson v. Madery*, 158 F. App'x 656, at 661 (6th Cir. 2005) (unpublished decision) (citing *Boddie* for the proposition that allegations of a corrections officer "rubbing and grabbing [plaintiff's] buttocks in a degrading and humiliating manner . . . does not rise to the level of cruel and unusual punishment under the Eighth Amendment"); *Copeland v. Nunan*, 250 F.3d 743 (5th Cir. 2001) (unpublished decision) (citing *Boddie* for the proposition that a prison employee who fondled plaintiff's penis and anus on three occasions did not state a claim because it was not a "violent sexual assault" and plaintiff had not alleged "lasting physical injury").

with the cases previously cited.[6] This Court should follow the compelling reasoning of these courts and define unconstitutional sexual abuse in a prison or jail in a manner consistent with contemporary standards of decency, bringing clarity to the law within the Second Circuit and contributing to the resolution of the split among the federal appellate courts.

A rule that any intentional contact by a corrections officer with a detainee's genitalia or other intimate areas that is either unrelated to official duties or done with the intent to abuse, arouse, or gratify sexual desire violates the Eighth Amendment creates a bright line already familiar to correctional institutions, which are under an existing legal obligation to comply with PREA. Individual corrections

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[6] *See, e.g.*, *Amador v. Smith*, No. 10-CV-06702 (W.D.N.Y. May 9, 2013) (holding that allegations that a corrections officer fondled plaintiff's breasts and forcibly kissed her, while making sexual comments, stated a claim); *Lewis v. Fischer*, No. 08-CV-3027, 2009 WL 689803, at *1-2, 4-6 (E.D.N.Y. Mar. 12, 2009) (holding that allegations that a corrections officer in the course of a pat-frisk "put[] his hand into [plaintiff's] pants and fondl[ed] his penis and squeeze[ed] his testicles" stated a claim); *Doe v. Barrett*, No. 3:01-CV-519, 2006 WL 3741825, at *1, 10 (D. Conn. Dec. 19, 2006) (holding that allegations that a prison doctor "forc[ed plaintiff] into a chair, pulling down his pants and touching his genitals" stated a claim); *Rodriguez v. McClenning*, 399 F. Supp. 2d 228, 232, 237-38 (S.D.N.Y. 2005) (holding that allegations that a corrections officer "conducted the pat-frisk in an inappropriate manner that included caressing [plaintiff's] chest and repeatedly groping his genitals and buttocks" stated a claim); *Calhoun v. DeTella*, 319 F.3d 936, 938-40 (7th Cir. 2003) (holding that allegations that a corrections officers forced plaintiff to perform "provocative acts" while they made "sexual ribald comments" during a strip search stated a claim notwithstanding the lack of penetration or physical injury); *Williams v. Prudden*, 67 F. App'x 976, 977 (8th Cir. 2003) (unpublished opinion) (holding that allegations that a corrections officer "ground his pelvis against [plaintiff], grabbed her breast" and verbally harassed plaintiff stated a claim notwithstanding lack of alleged penetration or physical injury); *Schwenk v. Hartford*, 204 F.3d 1187, 1196-98 (9th Cir. 2000) (noting the Ninth Circuit's longstanding rule that "no lasting physical injury is necessary to state a cause of action" and upholding a claim based on allegations that a corrections officer requested oral sex, groped plaintiff's buttocks and pressed his penis into plaintiff's clothed buttocks without penetration).

officers are trained on PREA's provisions[7] and are on notice that the same behavior that would expose them to constitutional liability under the proposed rule already exposes them to criminal liability in New York and the vast majority of other jurisdictions.

The proposed rule is also consistent with corrections officers' responsibility to perform pat-down and strip searches for legitimate penological purposes. The rule does not make every touching of an inmate's genitals or other sensitive body parts unconstitutional. It requires a plaintiff to prove that such touching was either unrelated to the corrections officer's official duties or undertaken with intent to abuse, arouse, or gratify sexual desire. *Cf.* 28 C.F.R. § 115.6 (requiring these elements under PREA); N.Y. Penal Law § 130.52 (requiring proof that the forcible touching was conducted for no legitimate purpose and for the purpose of degrading or abusing the victim). Requiring plaintiffs to meet this burden ensures that incidental or legitimate touching in the course of a penologically justified search could not subject a corrections officer or institution to liability, just as such conduct does not violate PREA or state criminal laws.[8] Indeed, given the

[7] PREA requires that correctional institutions train officers and staff on the law's provisions and the institution's policies to prevent instances of sexual assault and abuse. *See* 28 C.F.R. §§ 115.31-35.

[8] For example, a number of courts have dismissed Eighth Amendment claims predicated solely on allegations of touching plaintiffs' genitals in the context of a pat-frisk or strip search, where the plaintiff had not alleged facts that would support a conclusion that the touching was unrelated to the search. *See, e.g.*, *Williams v. Fitch*, 550 F. Supp. 2d 413 (W.D.N.Y. 2008) (granting

incoherent state of this Circuit's district court jurisprudence, clarification of the definition of unconstitutional sexual abuse and adoption of the clear rule advocated by *Amici* would be likely to discourage the filing of claims against corrections officers who are merely executing lawful searches by making clearer what facts must be pled to state a claim under the Eighth Amendment.

CONCLUSION

For the foregoing reasons, the Court should reverse the District Court's dismissal of Plaintiffs' complaint and adopt a rule that any intentional contact by a corrections officer with a detainee's genitalia or other intimate areas that is either unrelated to official duties or done with the intent to abuse, arouse, or gratify sexual desire constitutes cruel and unusual punishment.

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summary judgment where corrections officer "handl[ed] the tip of [plaintiff's] penis" in the course of a body cavity search, where X-rays showed the presence of a metal object secreted in the plaintiff's foreskin); *Harry v. Suarez*, No. 10 Civ. 6756, 2012 WL 2053533 (S.D.N.Y. June 4, 2012) (dismissing complaint where plaintiff alleged solely that corrections officer "placed one of his hands" on plaintiff's genitals "for five to six seconds" in the course of a pat-frisk search); *Johnson v. Enu*, No. 08-CV-158, 2011 WL 3439179, at *13-15 (N.D.N.Y. July 13, 2011) (dismissing a complaint stating that a corrections officer's "hands had come into contact with [plaintiff's] groin area while securing [plaintiff] for transport"); *Montero v. Crusie*, 153 F. Supp. 2d 368, 373, 375 (S.D.N.Y. 2001) (dismissing complaint alleging solely that on several occasions a corrections officer touched plaintiff's genitalia in course of pat-frisk searches); *Hughes v. Smith*, 237 F. App'x 756, 759 (3d Cir. 2007) (dismissing a claim predicated solely on allegations of "a single pat-down frisk in which the correctional officer allegedly touched [plaintiff's] testicles through his clothing"). Such results would be entirely consistent with the rule advocated by *Amici* in this case.

Dated: July 21, 2014
New York, N.Y.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, according to the word-processing program with which it was prepared, complies with Rule 32(a)(7) of the Federal Rules of Appellate Procedure in that it contains a total of 6,108 words.

/s/ Erin Beth Harrist
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