Case No.: 19-17443

IN THE

United States Court of Appeals for the Ninth Circuit

EDWARD GLADNEY,
Plaintiff-Appellant,

v.

UNITED STATES
Defendant-Appellee.

On Appeal from the United States District Court for the District of Arizona
No. 4:17-cv-0427-DCB

OPENING BRIEF OF PLAINTIFF-APPELLANT

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Introduction

On May 19, 2016, Ms. Edward Gladney, a transgender woman housed in a federal men's prison, was sexually assaulted and became another example of what Congress called "the day-to-day horror experienced by victimized inmates." 34 U.S.C. § 30301(12). Nearly two decades after Congress unanimously enacted the Prison Rape Elimination Act (PREA) and declared "the prevention of prison rape a top priority in each prison system," *id.* § 30302(2), the Federal Bureau of Prisons (BOP) continues to evade responsibility for its failure to protect vulnerable populations, such as transgender prisoners, from sexual assault by other inmates.

Despite the prison's default in upholding "a zero-tolerance standard for the incidence of prison rape in prisons in the United States," *see id.* § 30302(1) the Defendant United States claims it is shielded from liability under the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a). The BOP insists that it has unreviewable policy discretion on how—and even whether—to implement essential protections of vulnerable populations against sexual violence.

But quite to the contrary, Congress directed that all remedial standards adopted by the National Prison Rape Elimination Commission are "immediately" binding on the BOP. 34 U.S.C. § 30307(b). The codified BOP standards mandate "***continuous*** direct sight and sound supervision" of vulnerable prisoners. 28 C.F.R. § 115.113(d) (emphasis added). And the Government here failed in this mandatory

duty, admitting that it did not continuously monitor entry points and blind-spots to either prevent the trespass or detect the brutal assault that followed. While the BOP may have had discretion in choosing the ***means*** by which to monitor prisoners (video and audio monitoring, key-card scanning at entry points, etc.), the BOP had no discretion about the ***ends*** of "continuous sight and sound supervision." *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (holding that no discretion remains if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow").

Nor, under the "Negligent Guard Theory," can the Government supply a policy justification for a correctional officer's simple inattention to the risks faced by a vulnerable inmate. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 476 (2d Cir. 2006); *Coulthurst v. United States*, 214 F.3d 106, 109–10 (2d Cir. 2000).

If the Prison Rape Elimination Act is to mean anything, a prison cannot "wave the flag of policy" to excuse a derelict prison culture that fails to put necessary and feasible protections in place. *See Young v. United States*, 769 F.3d 1047, 1057 (9th Cir. 2014) (citation omitted). As the statutorily-established National Prison Rape Elimination Commission stated, "[i]f prisoners are sexually abused because the correctional facility failed to protect them, they have a right to seek justice in court." Nat'l Prison Rape Elimination Comm'n, 108th Cong., Report at 92 (2009). Ms. Gladney invokes her "right to seek justice" from this Court.

Jurisdictional Statement

District Court Subject Matter Jurisdiction: Plaintiff Edward Gladney invoked, ER75, 84, federal subject matter jurisdiction under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1), which confers exclusive jurisdiction on the District Court for tort claims against the United States.

In its dispositive ruling, the District Court held that the discretionary function exception of the FTCA applied, and, therefore, the court did not have subject matter jurisdiction. ER119. The District Court quoted, ER117, this Court's ruling in *Green v. United States*, 630 F.3d 1245, 1249–50 (9th Cir. 2010), that satisfaction of the discretionary function exception means that the federal government "is immune from suit—and federal courts lack subject matter jurisdiction—even if the court thinks the government abused its discretion or made the wrong choice."

Although it may make no practical difference in appellate review in this particular case—because the standard of review remains *de novo* in either event—and acknowledging this Court's contrary statements, it is mistaken to characterize the FTCA's discretionary function exception as a jurisdictional matter. Given the ethical responsibility of counsel to address jurisdictional matters, we digress briefly to explain why the exceptions to the FTCA stated in 28 U.S.C. § 2680 are properly appreciated as substantive limitations on the government's liability and ***not*** as non-waivable jurisdictional preconditions. *See generally* Gregory C. Sisk, *Litigation*

With the Federal Government § 3.6(a), at 150–53 (West Academic Press 2016) (Hornbook); Thomas E. Bosworth, Comment, *Putting the Discretionary Function Exception in Its Proper Place: A Mature Approach to "Jurisdictionality" and the Federal Tort Claims Act*, 88 Temple L. Rev. 91 (2015).

In *Federal Deposit Insurance Corporation v. Meyer*, 510 U.S. 471 (1994), the Supreme Court outlined the genuinely jurisdictional elements of the FTCA. Examining 28 U.S.C. § 1346(b), which speaks in the language of jurisdiction, the Court defined the jurisdictional parameters of the FTCA as that "category" of claims which "allege the six elements" outlined in Section 1346(b), namely a claim (1) against the United States, (2) for money damages, (3) for personal injury, death, property harm, or property loss, (4) caused by the negligent or wrongful act or omission of any employee of the United States, (5) while acting within the scope of his office or employment, (6) under circumstances where a private person would be liable under the law of the place where the act or omission occurred. *Id.* at 477. Notably, these jurisdictional elements do not include the exceptions to the FTCA stated separately and non-jurisdictionally in 28 U.S.C. § 2680.

More recently, in *Dolan v. United States Postal Service*, 546 U.S. 481 (2006), the Supreme Court explained that the waiver of sovereign immunity for the FTCA is found, first, in the section of the statute that expressly "confers federal-court jurisdiction in a defined category of cases involving negligence committed by

federal employees in the course of their employment," and, second, in the section making the United States liable in the same manner as a private person under like circumstances. *Id.* at 484–85 (citing 28 U.S.C. §§ 1346(b)(1), 2674). The *Dolan* Court rejected the government's plea for strict construction of the FTCA exceptions as jurisdictional conditions on the waiver of sovereign immunity, instead emphasizing that " 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language.' " *Id.* at 491–92 (citations omitted).

In sum, the FTCA exceptions "limit the breadth of the Government's waiver of sovereign immunity, but they do not accomplish this task by withdrawing subject-matter jurisdiction from the federal courts." *Parrott v. United States*, 536 F.3d 629, 634 (7th Cir. 2008).

Court of Appeals Jurisdiction: On October 19, 2019, the District Court granted the motion of Defendant United States to dismiss, ER120, and on October 23, 2019, entered final judgment, ER5. Plaintiff's motion for reconsideration was denied on November 19, 2019. ER3.

Plaintiff's notice of appeal was submitted by prison mail on November 25, 2019 and filed with the court on December 2, 2019. ER1. Whether measured from

the date of the final judgment or from the date of the order denying reconsideration, Plaintiff's notice of appeal was timely filed within the 60 days for cases in which the United States is a party. *See* Fed. R. App. P. 4(a)(1)(B).

This Court has jurisdiction under 28 U.S.C. §1291.

Issues Presented for Review

Left unmonitored and neglected by the correctional officer on duty, Plaintiff Ms. Edward Gladney, a transgender woman housed in a men's federal prison with violent sex offenders, was sexually assaulted by an out-of-bounds inmate. The Prison Rape Elimination Act (PREA) declared prevention of rape to be a top priority for prisons. Federal Bureau of Prisons (BOP) implementing regulations require heightened protection for vulnerable prisoners, including continuous sight and sound supervision. The Government asserts that the prison's failure to monitor and the correctional officer's inattention are shielded from judicial review as "discretionary" policy, immunizing Defendant United States from liability under the Federal Tort Claims Act (FTCA).

The issues presented on this appeal are:

1. Whether the discretionary function exception to the FTCA may be invoked by the United States as an affirmative defense when a federal prison failed to follow the course specifically prescribed by the PREA

and BOP regulations that mandate continuous direct sight and sound supervision of vulnerable prisoners, such as a transgender woman housed in a men's prison with violent sex offenders.

2. Whether the Government can meet its burden to prove the affirmative defense of the FTCA's discretionary function exception in response to allegations under the "Negligent Guard Theory," which are based on a prison guard's inattentiveness and carelessness in monitoring inmates and thus are not grounded in social, economic, or political policy.

3. Whether the Government is precluded from asserting policy discretion for purposes of the FTCA's discretionary function exception when its failure to properly monitor a vulnerable prisoner at substantial risk of sexual assault demonstrated deliberate indifference in violation of the Eighth Amendment.

Constitutional Provisions, Statutes, Regulations, and Policies

Pursuant to Circuit Rule 28-2.7, pertinent constitutional provisions, statutes, regulations, and policies are included in the Addendum to this brief.

Statement of the Case

On May 19, 2016, Plaintiff Edward Gladney was sexually assaulted by an out-of-bounds inmate at the United States Penitentiary, Tucson (USP-Tucson). Because the United States has the burden of proving the application of the discretionary function exception, and because this case was decided without trial or a fact-finding hearing, the Court views all facts and draws all reasonable inferences in favor of the non-moving party under the summary judgment standard. *See Young v. United States*, 769 F.3d 1047, 1052 (9th Cir. 2014). Accordingly, the recitation of the facts below is based on Ms. Gladney's sworn first-hand account, witness statements, exhibits, discovery admissions, and the statutory and regulatory background, viewed in the light most favorable to Ms. Gladney.

A. Statutory and Regulatory Background

1. The Prison Rape Elimination Act establishes a zero-tolerance standard to protect vulnerable inmates from rape

Sexual assaults against prisoners are shamefully and intolerably common in the United States. Four to five percent of inmates held in American prisons were victims of sexual assault in the most recent report. Bureau of Justice Statistics, U.S. Dep't of Justice, PREA Data-Collection Activities: 2020 at 1 (2020).

Vulnerable populations, including gay, lesbian, bisexual, transgender, or intersex inmates, are particularly at risk. According to the statutorily-created National Prison Rape Elimination Commission, "[r]esearch on sexual abuse in correctional facilities consistently documents the vulnerability of men and women with non-heterosexual orientations (gay, lesbian, or bisexual), as well as individuals whose sex at birth and current gender identity do not correspond (transgender or intersex)." Nat'l Prison Rape Elimination Comm'n, 108th Cong., Report at 73 (2009), at https://www.ncjrs.gov/pdffiles1/226680.pdf. Fifty-nine percent of transgender women in California men's prisons have experienced sexual violence. Valerie Jenness, et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* at 27 (2007), at https://ucicorrections.seweb.uci.edu/files/2013/06/Jenness-et-al. PREA-Report.pdf Transgender prisoners are thirteen times more likely to suffer sexual assault in prison than other inmates. *Id.* at 3.

To address the "horror" of sexual abuse of prisoners, 34 U.S.C. § 30301(12), in 2003, Congress unanimously passed and President George W. Bush signed the Prison Rape Elimination Act (PREA). *Id.* §§ 30301 to 30309. Through the PREA, Congress "establish[ed] a zero-tolerance standard for the incidence of prison rape in prisons in the United States" and declared "the prevention of prison rape a top priority in each prison system." *Id.* § 30302(1) to (2).

2. Federal Bureau of Prisons regulations mandate continuous direct sight and sound monitoring of vulnerable prisoners

The PREA established the National Prison Rape Elimination Commission to recommend remedial standards, 34 U.S.C. § 30306, that is, "national standards for the detection, prevention, reduction, and punishment of prison rape," *id.* § 30302(3). Congress directed that those standards would be "immediately" binding on the Federal Bureau of Prisons (BOP). *Id.* § 30307(b).

For the BOP, those standards are codified at 28 C.F.R. § 115. Saying that, "[f]or too long, incidents of sexual abuse against incarcerated persons have not been taken as seriously as sexual abuse outside prison walls," the BOP in 2012 officially committed to "heightened protections" for "vulnerable detainees." 77 Fed. Reg. 37106, 37118 (June 20, 2012).

Among the most essential of these "heightened protections," a federal correctional facility must ensure "***continuous*** direct sight and sound supervision" of vulnerable persons unless "no such option is determined to be feasible." 28 C.F.R. § 115.113(d) (emphasis added); *see also id.* § 115.13(a)(1) (adopting "generally accepted practices" of supervision and monitoring for adult prisons). When an inmate is identified as "vulnerable," *id.* § 115.141(d), these heightened protections become mandatory, that is, "security staff ***shall*** provide such detainees with heightened protection," *id.* § 115.113(d) (emphasis added).

3. USP-Tucson neglected to maintain continuous monitoring and attention to a vulnerable inmate

USP-Tucson operates as a sex offender management program prison, housing vulnerable populations. ER23, 108. As noted above, the BOP regulation establishes a general standard of "continuous direct sight and sound supervision" of vulnerable persons. 28 C.F.R. § 115.113(d). In this case, the Government admitted that its video monitoring at USP-Tucson failed to cover the entry points into a housing unit or activity inside a cell, ER34–35, that its video footage failed to show how an out-of-bounds inmate entered Plaintiff's housing unit, ER50, and that its surveillance does not capture all activity in the unit, ER19.

In addition, as submitted by the United States, ER42, BOP standards state that "[e]mployees are required to remain fully ***alert*** and ***attentive*** during duty hours." U.S. Dep't of Justice, Federal Bureau of Prisons Program Statement 3420.11(6) (Dec. 6, 2013), at https://www.bop.gov/policy/progstat/3420_011.pdf (emphasis added). At all relevant times, USP-Tucson required residents to carry an identification card on their persons at all times; refused to permit residents out of their cells unless all security measures were adequate; and consistently maintained at least two guards on duty per unit. ER22, 24; see also ER50.

On May 19, 2016, as the prison admitted, Correctional Officer Westling was the sole correctional officer on duty in the B-2 Unit. ER25, 40, 109. Officer

Westling failed to identify an out-of-bounds assailant who improperly entered the unit. ER25. He failed to monitor the assailant or the victim. ER25. And he failed to take any step to verify that the assailant belonged in the B-2 unit. ER25.

B. Factual Background

1. On May 19, 2016, Ms. Gladney, a transgender woman, was sexually assaulted by another inmate who had improperly entered her housing unit

Ms. Gladney falls within the most vulnerable population of inmates likely to be sexually assaulted, as anticipated in the PREA and BOP regulations. She is a transgender woman who outwardly identifies and presents as a female. ER28. Prison staff at USP-Tucson were well-aware of her transgender status and referred to Ms. Gladney by such pronouns as "miss," ma[']am" and "Ms." ER22, 28. Indeed, the prison's psychology report, prepared immediately following the sexual assault, states that "Ms. GLADNEY is a transgender inmate who identifies herself as female." ER7. Ms. Gladney has been naïve and passive since she was a child, ER29, and was described by a witness as "lady like," ER22.

The prison staff at USP-Tucson recognized her vulnerable position from their observations of and interactions with Ms. Gladney, as well as from accessing her BOP psychological records. ER28–29.

On May 19, 2016, Ms. Gladney was assigned to the B-2 housing unit. ER24. She was working on a library computer located in that unit. ER6. Between 9:01 and 10:05 a.m., Ms. Gladney was approached by T.P., another inmate. ER72. T.P., who was assigned to the D-1 housing unit, ER6, had gone "out of bounds" without authority when he approached Ms. Gladney. ER6, 110. Ms. Gladney saw T.P. enter the B-2 unit through the sally port entrance. ER6.

T.P. asked Ms. Gladney to help him clean his shoes, a task at which Ms. Gladney excelled. ER6. Ms. Gladney followed T.P. into a nearby cell. ER6. After examining the shoes, Ms. Gladney went to her own cell to retrieve a bar of soap. ER6. Upon her return to the cell where T.P. waited, T.P. told Ms. Gladney that her bar of soap would "discolor" his shoes. ER6. After a debate about the best soap for the job, Ms. Gladney turned to leave the cell and return to her computer work. ER6.

Before Ms. Gladney could reach the cell door, T.P. grabbed her by her waist, brandished a make-shift knife, and pressed the weapon into her back. ER6. T.P. told Ms. Gladney to "shut the f*** up and don't say sh**." ER26.

While continuing to push the knife against Ms. Gladney's back with one hand, the assailant yanked her pants down, forcefully penetrated her anus with his finger, and masturbated. ER6, 26, 109. *See* 34 U.S.C. § 30309(9) to (10) (defining "rape" to include "sexual assault with an object," such as "the use of any . . . finger

. . . to penetrate, however slightly, the . . . anal opening of the body of another person").

Stricken with fear, ER26, and scared for her life, Ms. Gladney pleaded with T.P. not to "kill [her]" and to "just let [her] go." ER6, 26. T.P. ignored her pleas. ER26–27. He continued the brutal assault for at least three minutes. ER6.

As he completed his attack, T.P. told Ms. Gladney that if she told anybody about or reported the assault, "[he] and the homies would f*** her up." ER27. He also told Ms. Gladney that "[n]ext time I come over here, you better be ready," which instilled deep fear in her that she would be assaulted again in the future. ER27. As soon as she had the opportunity, Ms. Gladney quickly pulled her pants back up and hurried from the cell. ER6.

2. Ms. Gladney has experienced extensive physical and emotional suffering as a direct result of the battery and sexual penetration

As a direct result of the sexual battery, Ms. Gladney has suffered severe physical and psychological trauma. ER27–28. Since the assault, Ms. Gladney has experienced post-traumatic stress disorder, anxiety, nightmares, night sweats, shortness of breath, heart palpitations, rapid heartbeats, and flashbacks. ER27–28. Shortly after the attack, Ms. Gladney was also diagnosed with hypertension and sleep apnea. ER28, 43. She has suffered many sleepless nights reliving this traumatic event. ER28.

Based on notes taken by prison staff and isolated excerpts from Ms. Gladney's later deposition, the Government has portrayed the attack on Ms. Gladney as other than a physical or sexual battery. ER12, 15–16. Ms. Gladney has consistently described the attack as both physical and sexual. She explicitly described the brutal nature of the attack, including anal penetration, to her counselor and the correctional lieutenants who interviewed her shortly afterward, to Government counsel in sworn testimony during her deposition, and to the court in her sworn declaration. ER6, 27. The District Court accepted this direct witness evidence for purposes of its ruling. ER109.

Ms. Gladney has continuously attended psychological appointments with BOP staff at USP-Tucson, USP-Beaumont, and USP-Coleman II. ER28, 53, 62. However, the treatment provided by the prisons has been wholly inadequate and ineffective in addressing these severe post-traumatic effects. ER28, 54–62. The assault has left Ms. Gladney emotionally scarred with overwhelming feelings of being violated, vulnerable, and helpless. ER30. She continues to have flashbacks to the assault and is forced to relive the event frequently. ER30.

3. Ms. Gladney reported the sexual assault and followed the prison grievance and FTCA administrative exhaustion process

Ms. Gladney was initially hesitant to report this brutal assault out of fear for her personal safety. ER27. Nonetheless, the next morning, on May 20, 2016 and

despite her safety concerns, Ms. Gladney reported the assault to her counselor. ER27. She handwrote a formal complaint and cautiously placed it under the door of her counselor's office. ER27. Later that day, Ms. Gladney was called into a correctional lieutenant's office. ER27. Lieutenant Reed, Lieutenant Van Devender, and a BOP psychologist were present during the meeting. ER27. Ms. Gladney described the attack to them in detail. ER27.

Still fearing for her life due to her assailant's attack and threats, Ms. Gladney filed a "Central Inmate Monitoring," which invoked a separation order against the assailant. ER30. After Ms. Gladney's claim was investigated, T.P. was transferred to another institution. ER30, 46. The Government admitted that T.P. was out-of-bounds and was disciplined, ER48, 49, and the Government appears to acknowledge that T.P. was transferred because of that misconduct. ER51, 64–65, 110.

On September 15, 2016, Ms. Gladney completed an administrative claim form as required by the FTCA. ER20. Her administrative claim was received by the BOP on October 24, 2016, ER20, well within the FTCA's two-year statute of limitations. *See* 28 U.S.C. § 2401(b). In the administrative claim, Ms. Gladney alleged, *inter alia*, that the United States and the BOP were negligent in their duties to monitor inmates. ER20.

In denying Ms. Gladney's administrative claim on March 10, 2017, the BOP asserted that an investigation "fail[ed] to disclose any evidence of negligence or other conduct for which the United States is liable." ER21.

C. Court Proceedings

On August 28, 2017, Ms. Gladney filed this lawsuit in the United States District Court for the District of Arizona alleging that prison staff "negligently failed to monitor the Unit and Inmate not housed there."[1] ER81, 84. With the FTCA administrative claim denied on March 10, 2017, the lawsuit was filed within six months as required by the FTCA. *See* 28 U.S.C. § 2401(b). The case is now proceeding under an amended complaint. ER75.

On October 19, 2019, the District Court granted the motion of Defendant United States to dismiss. ER120. The court *sua sponte* placed the entire dispositive ruling under seal. ER107.

The court agreed that Ms. Gladney had administratively exhausted her claim "that she was sexually assaulted as [a] result of the on-duty officer failing to

[1] Ms. Gladney's original complaint named as defendants both the federal government (through the Bureau of Prisons) and individual federal officers. ER82–83. She asserted a claim of negligence and cited to both *Bivens* and the FTCA. ER83–84, 87. She attached to the complaint her administrative claim under the FTCA. ER93–94. Subsequently, Ms. Gladney filed an amended complaint asserting a claim solely under the FTCA, ER75, which the District Court accepted as adequately stating a claim under the FTCA, ER72.

monitor the prisoners" and for "Defendant's failure to provide adequate monitoring of her housing unit." ER115–16.

The court held, however, that statutory and regulatory rules "giv[e] officials broad discretion" on housing and caring for prisoners, including "adequately staffing BOP facilities and for determining the need for video monitoring." ER117–18. In sum, the District Court held that "the protocols for monitoring housing units are left to the discretion of the facility." ER118. Based on its reasoning that monitoring was "a discretionary governmental function" that presumptively was grounded in policy, ER118, the District Court concluded that "the discretionary function exception to the FTCA protects Defendant from suit," ER119.

On October 23, 2019, the District Court entered final judgment, ER5. A timely notice of appeal to this Court was filed on December 2, 2019. ER1.

Summary of the Argument

For too long, the federal prison system has evaded accountability for dereliction of duty in the most basic responsibility of protecting prisoners from rape and sexual assault. A sentence of incarceration does not include the cruel abuse of vulnerable inmates by sexual violence.

And yet the Government here insists that its decision on whether to have effective security measures is shielded from review under the Federal Tort Claims

Act (FTCA) as an exercise of policymaking discretion. *See* 28 U.S.C. § 2680(a). This claim of absolute immunity from liability was endorsed by the District Court, which deferred to the prison's decision not merely on "where to place video cameras," but whether "they are to be used at all." ER118. *But see Whisnant v. United States*, 400 F.3d 1177, 1185 (9th Cir. 2005) ("While the [United States] has discretion to decide how to carry out its responsibility to maintain safe and healthy premises, it does not have discretion to abdicate its responsibility in this regard.").

I

Congress has refused to accept prison apathy and instead has adopted "a zero-tolerance standard for the incidence of prison rape in prisons in the United States." Prison Rape Elimination Act (PREA), 34 U.S.C. § 30302(1). Pursuant to the PREA, the Federal Bureau of Prisons (BOP) established mandatory standards to provide "heightened protection" from sexual violence for vulnerable inmates. 28 C.F.R. § 115.113(d). The question that remains on this appeal is whether those statutory and regulatory mandates are meaningful, as we contend, or instead empty rhetoric, as the Government's invocation of unlimited license effectively suggests.

Prison officials at USP-Tucson failed to uphold a non-discretionary duty to continuously monitor vulnerable inmates to protect against sexual assault, as mandated by the PREA and BOP regulations. Under the implementing BOP regulation, vulnerable prisoners must be given "heightened protection" which includes

"***continuous*** direct sight and sound supervision" of vulnerable prisoners unless "no such option is determined to be feasible." 28 C.F.R. § 115.113(d) (emphasis added). By the Government's own admission, continuous monitoring did not occur here. ER37–38, 64–65, 110.

Multiple "feasible" options for continuous supervision were readily available to the prison, including video and audio monitoring and key-card scanning. The plain meaning of the term "feasible" is that which is "capable of being done, executed, or effected." *American Textile Mfrs. Institute v. Donovan*, 452 U.S. 490, 508–09 (1981). Under the strict and non-discretionary standard of "feasible," and given the "paramount importance" in the PREA of preventing prison rape, the door was not open to a "wide-ranging endeavor" of other costs and benefits. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411–13 (1971).

Because prison officials did not continuously monitor Ms. Gladney as a vulnerable inmate, they violated a non-discretionary duty and are not shielded by the discretionary function exception to the FTCA. *See Berkovitz v. United States*, 486 U.S. 531, 536 (1988) (holding for purposes of the FTCA that no discretion remains if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow").

II

Even aside from the failure to comply with the regulatory mandate for continuous monitoring, the correctional officer on duty at USP-Tucson negligently failed to be alert and attentive to the substantial risk of harm to a particularly vulnerable inmate. Under the "Negligent Guard Theory," when a prison guard is careless in monitoring of inmates, such dereliction in performance cannot shield the government from liability under the discretionary function exception to the FTCA. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 476 (2d Cir. 2006); *Coulthurst v. United States*, 214 F.3d 106, 109–10 (2d Cir. 2000).

With the discretionary function exception, Congress intended to protect only those actions by government officers that were "grounded in social, economic, and political policy." *United States v. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). If a challenged action (or inaction) by a government officer does not implicate one of these policy considerations, the purpose behind the discretionary function exception falls away.

When a prison guard was allegedly inattentive or lazy in performing the duty to supervise inmates, no policy judgment has been made or executed. Acts of simple negligence involve no element of judgment or choice and are not subject to policy analysis. Ms. Gladney fell into the most vulnerable category of prisoners, as

a transgender woman housed with male violent sexual offenders. Yet the prison staff carelessly failed to adequately protect her from a violent sexual assault.

By the Government's logic, a prison may hold up the shield of discretion for any default in security that leaves a vulnerable prisoner to fend for herself against a substantial risk of sexual assault, even to the point of deliberate indifference that violates the Eighth Amendment. *But see Farmer v. Brennan*, 511 U.S. 825, 830–31, 848–49 (1994) (reversing dismissal of a claim by a transgender prisoner that prison officials violated the Eighth Amendment by releasing her into the general prison population despite knowledge that she would be "particularly vulnerable" to sexual attack). But this Court has held that "the Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception will not apply." *Nurse v. United States*, 226 F.3d 996, 1002 n.2 (9th Cir. 2000).

Standard of Appellate Review

"This court reviews de novo a district court's determination that it lacks subject matter jurisdiction under the FTCA and a district court's application of the FTCA's discretionary function exception." *Green v. United States*, 630 F.3d 1245, 1248 (9th Cir. 2011).

Assuming the discretionary function exception raises a jurisdictional question, *but see* Jurisdictional Statement, *supra*, when the matter " 'involv[es] factual

issues which also go to the merits,' " a court should employ the standard applicable to a motion for summary judgment because " 'resolution of [those] jurisdictional facts is akin to a decision on the merits.' " *Young v. United States*, 769 F.3d 1047, 1052–53 (9th Cir. 2014) (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983)). Judgment is appropriate only if, "viewing the evidence in the light most favorable to the nonmoving party," the material jurisdictional facts are not in dispute and the moving party is entitled to judgment as a matter of law. *Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005) (internal quotation omitted).

When a factual dispute remains as to whether the discretionary function exception applies—including whether policies are mandatory—dismissal is premature and the case should be remanded for further fact-finding. *Doe v. United States*, 510 F. App'x 614, 616 (9th Cir. 2013).

This Circuit shifts the burden to the United States to prove the applicability of the discretionary function exception, regarding it as "analogous to an affirmative defense." *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992); s*ee also Young*, 769 F.3d at 1052 ("It is the government's burden to establish that the discretionary function exception applies."). To give effect to Congress's intent "to compensate individuals harmed by government negligence," this Court liberally construes the FTCA and narrowly construes its exceptions. *Terbush v. United States*, 516 F.3d 1125, 1135 (9th Cir. 2008) (quotation omitted).

Argument

The Federal Tort Claims Act (FTCA) was enacted in 1946 to waive the sovereign immunity of the United States for state tort claims. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 842. The FTCA does not create any new causes of action nor does it formulate federal rules of substantive tort law. Instead, as the Supreme Court stated in *Richards v. United States*, 369 U.S. 1, 7 (1962), Congress determined "to build upon the legal relationships formulated and characterized by the States" with respect to principles of tort law.

The FTCA provides that the "United States shall be liable [for] tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *see also* 28 U.S.C. § 1346(b)(1) (holding the United States liable "if a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred"). In other words, the federal government is liable under the FTCA on the same basis and to the same extent as for a tort committed under analogous circumstances by a private person in that particular state. *Olson v. United States*, 546 U.S. 43, 44 (2005). "Although the federal government 'could never be exactly like a private actor, a court's job in applying the standard is to find the most reasonable analogy.' " *Dugard v. United States*, 835 F.3d 915, 919 (9th Cir. 2016) (citations omitted).

The "most reasonable analogy" here is found in the tort liability imposed by Arizona law upon nursing home employees who fail to protect vulnerable patients from a violent assault by another. Arizona law states that "[a] person who has been employed to provide care . . . to a vulnerable adult and who causes or permits the life of the adult to be endangered . . . by neglect" is subject to civil liability. Ariz. Rev. Stat. §§ 46-455(A), (K). As the District of Arizona recently held in another FTCA case involving failure to protect a prisoner from assault:

> Like a nursing facility employee, a BOP employee is tasked with the care of persons who are dependent upon them to make daily housing and safety determinations. And, like nursing care employees, BOP has a duty to ensure the safety of the persons who reside at the facility. *See* 28 U.S.C. § 4042(2).

Estate of Smith v. Shartle, No. CV-18-00323-TUC-RCC, 2020 WL 1158552, at *2 (D. Ariz. Mar. 10, 2020); *see also Panion v. United States*, 385 F. Supp. 2d 1071, 1089 (D. Haw. 2005) (citing *Restatement (Second) of Torts* § 314A (1965) to hold that a party who has custody of another, including the government's relationship with a prisoner, thereby assumes a duty to protect).

Although not applicable here, the FTCA includes an exception for "[a]ny claim arising out of assault [or] battery." 28 U.S.C. § 2680(h). In *Sheridan v. United States*, 487 U.S. 392 (1988), the Supreme Court held this FTCA exception does not apply to a claim for independent negligence when based on a duty to safeguard another from an assault or battery. *Id*. at 398–403. The *Sheridan* Court

ruled that "the negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for government liability." *Id.* at 401.

With that background, the issue on this appeal is whether the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a), bars Ms. Gladney's claim that the prison failed to maintain continuous monitoring of a vulnerable inmate by an alert correctional officer, as required by BOP regulations and policies as well as the Eighth Amendment. That failure in supervision allowed an out-of-bounds inmate to enter Ms. Gladney's unit and, without detection or intervention by prison staff, to commit a brutal sexual battery.

On this appeal, Ms. Gladney does not pursue a separate claim that USP-Tucson was required to maintain a set level of staffing, a claim that the District Court ruled had not been administratively exhausted. ER115–16. Instead, the focus is on that FTCA claim that the District Court agreed had been properly exhausted, "that [Ms. Gladney] was sexually assaulted due to Defendant's failure to provide adequate monitoring of her housing unit." ER115–16.

The ***possibility*** of additional staffing is properly before this Court as but one "feasible" means of maintaining the "continuous direct sight and sound supervision" of vulnerable prisoners that is required by BOP regulations. *See* 28 C.F.R. § 115.113(d). Other "feasible" means also included video and microphone

monitoring equipment, key-card access limits to control passage of inmates into unauthorized areas, and the housing unit roster, together with the BOP policy "that [e]mployees are required to remain fully alert and attentive during duty hours." Federal Bureau of Prisons Program Statement 3420.11(6) (Dec. 6, 2013).

In sum, while it had discretion in determining the ***means***, USP-Tucson was specifically obliged to achieve the mandated ***end*** of continuous monitoring.

I. The prison's failure to continuously monitor Ms. Gladney as a vulnerable transgender prisoner violated a non-discretionary mandate under the Prison Rape Elimination Act and Federal Bureau of Prisons regulations

The discretionary function exception to the FTCA precludes liability based on a government employee's exercise or failure to exercise a "discretionary function or duty . . . whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The exception is grounded in separation of powers concerns, preventing "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *United States v. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). The exception does not apply, however, when (1) the government actor had no discretion to exercise because a statute, regulation, or policy directed the course of action, ***or*** (2) the government's misfeasance simply reflected poor judgment or carelessness rather than policy judgment.

Confirming this understanding, the Supreme Court in *Berkovitz v. United States*, 486 U.S. 531 (1988), set out two steps for the discretionary function exception analysis:

First, the exception is not implicated unless there is actually room for discretion by the governmental actor. By contrast, if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," then no discretion remains and "the employee has no rightful option but to adhere to the directive." *Id.* at 536.

Second, even if there is room for discretion, not every choice falls within the exception, but only those of the type that Congress intended to protect by the exception, that is, social, economic, or political policymaking. *Id.* at 536–37.

A. The PREA and BOP regulations mandate continuous monitoring of vulnerable inmates, removing discretion and thus excluding application of the FTCA's discretionary function exception

Nearly two decades ago, Congress enacted the Prison Rape Elimination Act to prevent the "day-to-day horror" of sexual assault, as was suffered by Ms. Gladney. *See* 34 U.S.C. § 30301(12). No longer willing to defer to prison discretion which has failed to arrest this scourge, Congress directed that prevention of prison rape would henceforth be a "top priority" in all federal prisons. *See id.* at § 30302(2). The statute directed the Attorney General to adopt "national standards for the detection, prevention, reduction, and punishment of prison rape." *Id.*

§ 30307(a)(1) to (2). Those standards are "immediately binding on the Federal Bureau of Prisons." Nat'l Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106, 37107 (June 20, 2012).

At least one in ten—or about 200,000—inmates are victims of prison rape each year. 149 Cong. Rec. H7764 (daily ed. July 25, 2003) (statement of Rep. Sensenbrenner). "Transgender inmates in particular face a shockingly high rate of sexual abuse in prison." *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687, 691 (S.D. Tex. 2016). Transgender inmates experience a sexual victimization rate that is more than thirteen times greater than that of the general prison population. Karri Lyama, *We Have Tolled the Bell for Him: An Analysis of the Prison Rape Elimination Act and California's Compliance as it Applies to Transgender Inmates*, 21 Tul. J. L. & Sexuality 23, 31 (2012). The National Commission on Correctional Health confirms that prison staff should be aware that transgender people are common targets for violence. Nat'l Comm'n on Corr. Health, Transgender, Transsexual, and Gender Nonconforming Health Care in Correctional Settings (2009), at https://www.ncchc.org/transgender-transsexual-and-gender-nonconforming-health-care.

For these reasons, the PREA's implementing regulations expressly provide for heightened protection of vulnerable groups, including transgender inmates, and

specifically require continuous monitoring of vulnerable populations. The pertinent BOP regulation states:

> If vulnerable detainees are identified pursuant to the screening required by § 115.141, security staff shall provide such detainees with heightened protection, to include continuous direct sight and sound supervision, single-cell housing, or placement in a cell actively monitored on video by a staff member sufficiently proximate to intervene, unless no such option is determined to be feasible.

28 C.F.R. § 115.113(d). Because this episode was not about cell assignment or risk from a cell-mate, the provisions for placement in a single or monitored cell are not implicated here. The issue here is the neglect in implementing "continuous direct sight and sound supervision." *See id.*

The prison's failure to protect Ms. Gladney, a vulnerable transgender woman, with continuous monitoring made the brutal assault possible and prevented prison officers from intervening while the attack was underway. The Government concedes that it does not know how the out-of-bounds assailant entered into Ms. Gladney's housing unit, ER34–35, 65, 110, thus confirming the absence of continuous sight and sound supervision. Indeed, the Government admits that it had video footage from the day and time in question, but that its video coverage fails to show how the assailant bypassed the duty officer and entered into an unauthorized housing unit. ER37–38, 48.

Further confirming its failure to comply with the BOP continuous supervision mandate to protect vulnerable prisoners, the Government admitted that

video surveillance at USP-Tucson failed to cover entrances to units, ER38, and was incapable of capturing misconduct inside a cell, ER14, 19. Yet, as the National Prison Rape Elimination Commission observed in preparing the governing standards, "[s]exual abuse can occur almost anywhere in a facility, but it is the hiding places or blind spots . . . where most of the mischief or illegal activity takes place." Nat'l Prison Rape Elimination Comm'n, 108th Cong., Report at 60 (2009) (internal quotation omitted); *see also Tafoya v. Salazar*, 516 F.3d 912, 918–19 (10th Cir. 2008) (finding an issue of fact whether a sheriff was deliberately indifferent to prisoner safety when cameras in the jail left areas "unmonitored" and thus failed to eliminate "blind spots" where assaults could take place).

The Government may object that this explicitly mandatory supervision language appears in Part B of the BOP regulations for detainees in Lockup, rather than in Part A on Adult Prisons. But nothing about the emphatic language suggests limited application; the textual context confirms a broader application to those incarcerated in BOP facilities; and the animating principles of equal treatment and heightened protection for vulnerable populations compel a general application.

Whether a prisoner held by the BOP is in custody as a detainee in a "lockup" or as an inmate in an "adult prison," the right of vulnerable populations, such as sexual minorities, to heightened protection from the greater risk of sexual violence

is equally imperative. The need for direct sight and sound supervision of a vulnerable inmate to protect against sexual violence and the problem of "blind spots" identified by the National Rape Elimination Commission are just as plain in a prison as in a lockup facility. To grant that essential protection to one set of vulnerable prisoners in lockup, but then deny it to vulnerable prisoners in an even more dangerous setting, based merely on the happenstance of custodial location, would offend constitutional expectations of equal protection.

Nor does the actual language support the offensive conclusion that the BOP arbitrarily extends protection to sexual minorities against violence in some places but not in others. Subsection (d) of section 115.113 speaks to the question of vulnerable persons held in custody and the need for continuous direct sight and sound protection without suggesting that problem is unique to a particular facility or location. Moreover, the provision on supervision and monitoring for adult prisons incorporates "[g]enerally accepted detention and correctional practices." 28 C.F.R. § 115.13(a)(1). By the BOP's official declaration in § 115.113(d), the generally accepted standard directs that (1) vulnerable populations need "heightened protection," and (2) "heightened protection" means "continuous direct sight and sound supervision." In addition, the adult prison regulation warns about the same "blind-spots" that the failure of continuous monitoring makes so incredibly risky for sexual assault. *Id.* § 115.13(a)(5).

In sum, the BOP's directive of continuous direct sight and sound supervision for those identified as vulnerable inmates articulates a general standard of what is simply and unavoidably crucial to ensure protection of at-risk inmates, such as a transgender woman held in a men's correctional facility with violent sex offenders. By laying out that expectation, the BOP cannot then depart from it in one setting versus another. Indeed, the alternative is unthinkable: that, after speaking directly to the special vulnerabilities of certain groups and the need for the heightened protection of continuous monitoring, the BOP then abdicates that self-described duty for a major segment of such persons.

At the very least, this formal statement of BOP policy creates a question of material fact as to the mandatory expectations for BOP facilities in upholding the duty to protect vulnerable populations from the horror of sexual violence. And this Court places the burden of proof squarely on the Government to prove that the discretionary function exception applies. *Young*, 769 F.3d at 1052. A question of material fact as to whether this policy is mandatory for the BOP would warrant a remand for further fact-finding. *Doe*, 510 F. App'x at 616.

B. Because the PREA and BOP regulations specifically prescribe a course of conduct, namely continuous monitoring of vulnerable inmates, the FTCA's discretionary function exception does not apply

The failure by USP-Tucson to continuously monitor Ms. Gladney—by maintaining sight and sound supervision at all times—was a violation of a non-discretionary duty specified by BOP regulation. By instead deferring to boundless discretion by prison officials on "the number of officers to employ to supervise a given area, where to place video cameras if they are to be used at all, and tactical choices made surrounding the movement of prisoners within an institution," ER118, the District Court erroneously applied the discretionary function exception.

When a federal statute, regulation, or policy "specifically prescribes" a course of conduct, the discretionary function exception cannot apply because no permissible discretion remains. *Berkovitz*, 486 U.S. at 536. The classic way to "specifically prescribe" a course of conduct is to use mandatory language, such as "shall." *See id.* at 542–43.

In *Berkovitz*, the plaintiff alleged that the federal agency did not comply with mandatory safety rules before licensing a polio vaccine, which led to a child contracting the disease. *Id*. at 542. The regulations directed that the "product license shall be issued only upon examination of the product and . . . a determination that the product complies with the standards prescribed in the regulations." *Id*. Further, the rules also stated that "an application for a license shall not be considered . . .

until the [agency] receives the information and data regarding the product that the manufacturer is required to submit." *Id*. The Supreme Court held that protection of the discretionary function exception was not warranted because the government failed to comply with a specifically prescribed course of conduct. *Id.* at 547–48.

To be sure, as this Court has noted, "the presence of a few, isolated provisions cast in mandatory language does not transform . . . [a] set of guidelines into . . . binding regulations." *Sabow v. United States*, 93 F.3d 1445, 1453 (9th Cir. 1996).

But 28 C.F.R. § 115.113(d) does not use a "few, isolated provisions." It uses consistently mandatory language. This crucial provision of the national standards explicitly states that "if vulnerable detainees are identified pursuant to the screening ***required*** by § 114.141 . . . security staff ***shall*** provide . . . heightened protection, ***to*** include continuous direct sight and sound supervision . . . unless no such option is determined to be feasible." 28 C.F.R. § 115.113(d) (emphasis added).

Like the vaccine licensing rules at issue in *Berkovitz*, the relevant subsection of the BOP regulation on monitoring of vulnerable inmates employs pervasive and consistent language that sounds in mandate. By using language such as "shall," "to," and "required," the BOP is left without discretion as to whether they must provide continuous monitoring to Ms. Gladney. If an inmate is vulnerable, which the prison is required to ascertain, the BOP must provide continuous supervision.

While there might be discretion in the means by which they monitor, there is no discretion as to whether they monitor or as to how extensive and uninterrupted the monitoring must be.

Here, the BOP admitted that it failed to continuously monitor vulnerable inmates such as Ms. Gladney. ER19, 37–38, 46, 65. As a result, Ms. Gladney was brutally and sexually assaulted inside her own housing unit under the negligent supervision of the security staff at USP-Tucson. That is enough to remove this case from the discretionary function exception of the FTCA.

C. The mandatory heightened protection of continuous monitoring must be applied to all vulnerable prisoners, including Ms. Gladney

The PREA-implementation regulations explicitly mandate the BOP to provide heightened protections to vulnerable prisoners. 28 C.F.R. § 115.113(d). "[I]f vulnerable detainees are identified pursuant to the screening required by § 115.141," security staff "shall" provide continuous monitoring. *Id.* To comply with this mandate, the BOP must screen each inmate to identify vulnerability. *Id.*

The required screening procedure for detainees states that the BOP must consider—at a minimum—five factors. 28 C.F.R. § 115.141. These factors are: (1) physical, mental, or developmental disability, (2) age, (3) physical build, (4) criminal history, and (5) any previous incarceration. *Id.* The parallel language for screening for risk of victimization for adult prisons adds the additional factor of

"[w]hether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender non-conforming." 28 C.F.R. § 115.41(d)(7). Moreover, those prison regulations state that "[a] transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration" in the determination of the inmate's vulnerability status. 28 C.F.R. § 115.42. These factors establish a minimum floor, and the BOP does not have discretion in whether to consider them—and consider them seriously.

By any and every measure, Ms. Gladney classifies as a vulnerable inmate. Under the first factor of "physical, mental, or developmental disability," Ms. Gladney has an admitted history of mental health issues and gender dysphoria, which heightens her risk for assault. ER28, 43. The second factor is age. Ms. Gladney has been naïve and passive since she was a child and remains easily controlled by others. ER29. This also increases her risk for assault. The third factor to consider is physical build. Ms. Gladney was described by a witness as "lady like" in appearance. ER22. The next two factors examine an inmate's criminal history and any previous incarceration. Ms. Gladney is a convicted sex offender being held in a facility with other violent sex offenders, which makes her extremely vulnerable to sexual assault. ER23.

The regulation for adult prisons places additional weight on an inmate's transgender or gender non-conforming identity. In addition to satisfying all of the

mandatory factors, Ms. Gladney also voiced her own perception of being transgender, highly vulnerable, and afraid for her safety. ER27–30. By regulation, prison officials were required to consider her concerns in determining vulnerability.

In the end, Ms. Gladney's vulnerability and proper classification as such is not in dispute. She was recognized as a transgender woman by prison officials. ER22, 28. The prison's psychology report, prepared immediately following the sexual assault, states that "Ms. GLADNEY is a transgender inmate who identifies herself as female." ER7.

Ms. Gladney is plainly in the most vulnerable category of prisoners and should have been subject to continuous monitoring to ensure her safety. Default by USP-Tucson in complying with this mandatory directive precludes the Government's invocation of the discretionary function exception.

D. Because continuous monitoring is mandatory unless it is not "feasible," the prison violated its non-discretionary duty

The only scenario under which the BOP could be excused from providing heightened supervision protection to a vulnerable inmate is if "no such option is determined to be feasible." 28 C.F.R. § 115.113(d). However, this narrow exception does not grant the BOP leave to "wave the flag" of policy to avoid accountability for failing to uphold these mandatory duties. *Young v. United States*,

769 F.3d 1047, 1057 (9th Cir. 2014) (internal quotation omitted). Given the many feasible alternative measures to obtain continuous direct sight and sound supervision of a vulnerable inmate, the prison's failure here cannot be excused.

1. "Feasible" means possible or capable of being done, thus requiring continuous supervision of vulnerable prisoners if physically and technically possible

The term "feasible" is not a weasel word that the prison may invoke to either avoid its responsibility or suggest that the regulation's mandate for continuous direct sight and sound monitoring is discretionary. As this Court has said, inclusion of such an apparent qualification should not be interpreted to nullify a specific prescription of action. In *Fernandez v. United States*, 496 Fed. App'x 704, 705–06 (9th Cir. 2012), a broken tree in a national forest area fell onto a semi-truck and injured the driver. The applicable regulation stated that the Forest Service "will dispose" of dangerous trees "as promptly as possible." *Id*. at 705. In the subsequent FTCA lawsuit, this Court held that "will dispose" is "unconditional and clearly mandatory" and thus precludes the discretionary function exception. *Id*. at 705–06. While superficially appearing discretionary, the language "as promptly as possible" must have "some meaning or it would be rendered superfluous." *Id*. at 706.

The term "feasible" is even less susceptible to a discretionary reading. In the classic Administrative Procedure Act case of *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411 (1971), the Supreme Court considered a statute

that said the Department of Transportation "shall not approve" a highway project through a public park unless "there is no feasible and prudent alternative." The Court recognized "[t]his language is a plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted." *Id.* Nor did the exception for when "there is no feasible and prudent alternative" open the door to a "wide-ranging endeavor" that involved weighing multiple factors, like cost and safety. *Id.* at 411–12. As to the meaning of "feasible," the Court agreed that this phrase "admits of little administrative discretion" and spoke only to "sound engineering." *Id.* at 411. Moreover, the statute as a whole made plain that protection of public parks "was to be given paramount importance." *Id.* at 412–13.

Likewise, the BOP regulation at issue here is a "plain and explicit" directive that a vulnerable inmate is entitled to heightened protection by continuous supervision. The exception for when "no such option is determined to be feasible," 28 C.F.R. § 115.113(d), does not invite a "wide-ranging endeavor" by which the prison may shield its failure through excuses of cost or convenience. Unlike the statute at issue in *Overton Park*, no arguably broader word such as "prudent" is included in the mix. Rather, the ***only*** question is feasibility.

As in *Overton*, "feasible" in the BOP regulation means whether it is technically possible to provide for continuous monitoring. And, as Congress stated

in the PREA and the BOP stated by regulation, "heightened protection" for vulnerable inmates is, in the language of *Overton Park*, of "paramount importance."

Similarly, in *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1981), the Supreme Court construed a workplace safety measure requiring the government to adopt standards for toxic materials that "most adequately assures, to the extent feasible" that an employee will not be harmed. *Id.* at 508. The Court adopted "[t]he plain meaning of the word 'feasible' from the dictionary as meaning 'capable of being done, executed, or effected.' " *Id.* at 508–09. The Court held this "feasible" language did not permit balancing of costs and benefits because Congress in the statute had already placed the benefit of worker safety "above all other considerations." *Id.* at 509.

As in *American Textile*, "feasible" in the BOP regulation means whether "continuous direct sight and sound supervision" is "capable of being done." And a cost-benefit or other balancing approach is not permitted to the prison, because the BOP regulation has already placed heightened protection of vulnerable inmates from rape "above all other considerations." *See American Textile*, 452 U.S. at 509.

In sum, the only question here is whether it was actually possible to attain direct sight and sound supervision of vulnerable prisoners, like Ms. Gladney. The

argument that budgetary constraints made continuous monitoring difficult, even if true (and there is no specific evidence of cost), is not available to the prison here.

Even in cases where the government is not mandated to take a particular course of action, this Court has been rightly skeptical that the budgetary constraints that underlie nearly all governmental activity would constitute the type of economic policy that could trigger the discretionary function exception to the FTCA. As this Court has said, "[w]ere we to view inadequate funding alone as sufficient to garner the protection of the discretionary function exception, we would read the rule too narrowly and the exception too broadly." *O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002).

Nor should the Court listen to any other post hoc argument by the Government that continuous monitoring was too expensive, unfavorable, or created other problems, such as privacy concerns or other prison priorities. Again, Congress and the BOP have already made those determinations and taken those excuses off the table. Congress through the PREA has elevated "the prevention of prison rape [to be] a top priority in each prison system." 34 U.S.C. § 30302(2). Through the regulations implementing the national standards, the BOP has declared that the prison "shall" provide for continuous supervision. No wiggle room remains.

In *Friends of the Boundary Waters v. Robertson*, 978 F.2d 1484 (8th Cir. 1992), the Eighth Circuit rejected the government's assertion that, in a statute

barring motorized portaging of boats in a wilderness area unless no other means to transport boats was "feasible," the statute left the agency room to consider what was "reasonable" or "practicable." *Id.* at 1486. Rather, the court held, "feasible" means "capable of being done" or "physically possible." *Id.* at 1488.

Here, that tight definition of "feasible" means that the prison must establish and maintain direct sight and sound monitoring of a vulnerable inmate, on a continuous basis, regardless of convenience, expense, or preference, so long as it is physically and technically possible.

2. Multiple "feasible" options were available to comply with the mandate of continuous supervision of vulnerable prisoners

If we can identify even one feasible approach to comply with the continuous monitoring mandate, the Government cannot prevail on prong one of the *Berkovitz* analysis for the discretionary function exception. If there is a feasible option, and the prison failed to implement it, the Government stands in a clear violation of the mandatory provisions of 28 C.F.R. § 115.113(d).

At least four options were readily available, two of which the prison itself acknowledged were feasible by subsequently adopting them:

Video and audio monitoring: The most obvious, cost-effective, efficient, and comprehensive approach would be to place video and audio devices at all locations, which then could be monitored at a central location by limited staff. As

described earlier, the prison admitted that its video surveillance left open blind spots, by not covering entrances to housing units or capturing misconduct inside a cell. ER14, 19, 38. Nor could this default in video monitoring now be justified as supporting privacy interests, because again the BOP already conducted a balancing analysis and decided to mandate continuous direct sight and sound supervision. In any event, even discrete and simple audio monitoring would have allowed prison officers to hear Ms. Gladney's pleas for help, ER6, 26, thereby bringing prompt intervention.

Scanners/key-cards: The sexual battery on Ms. Gladney would have been prevented if the prison had scanners at the entry points to each housing unit, requiring a prisoner to use an electronic key-card or lanyard to gain entry. That this was "feasible" is proven by the prison's own actions. At the time of the assault, the prison already required all prisoners to keep I.D. cards in their possession, ER40, which the Government admits was to "help staff determine whether or not an inmate is in an unauthorized area of the institution," ER50. As the prison admitted in discovery, just eighteen months after the assault, "new procedures were put in place at U.S.P. Tucson requiring inmates to have their I.D. cards scanned by the metal detector's built-in scanner." ER8. There is, of course, no suggestion that this longstanding key-card technology used routinely by business and government operations across the country for decades was newly invented or discovered.

Additional staffing: Beginning on June 15, 2016, less than a month after the assault on Ms. Gladney, USP-Tucson set out new staffing rules that included an additional correctional officer on each shift. ER18, 112. While the choice of staffing numbers may have been discretionary at a general level, an increase certainly was one possible option for attaining the mandated continuous monitoring. And the increase that followed shortly thereafter proves its feasibility. The prison may have had choices in ***how*** to achieve continuous monitoring, but it had no discretion on ***whether*** to do so.

Housing unit roster check: After she was assaulted, Ms. Gladney was asked by a correctional officer whether the correctional officer on duty had checked the inmate roster before allowing the assailant access to the unit. ER10; see also ER24. Thus, a factual issue remains as to whether yet another means of, or policy for, detecting an out-of-bounds prisoner—checking a name on a roster—was already in place but had been neglected.

In sum, the list of potential—and feasible—alternatives is long. But, while the choice among these options may be left to the prison, ultimately choosing an approach that accomplishes the mandate of continuous direct sight and sound monitoring was not optional. *See Whisnant v. United States*, 400 F.3d 1177, 1185 (9th Cir. 2005) ("While the [United States] has discretion to decide how to carry

out its responsibility to maintain safe and healthy premises, it does not have discretion to abdicate its responsibility in this regard.")

3. The prison failed to "determine" there was no feasible option

Finally, by the terms of the regulation, the BOP must actually "determine" that there is no feasible option for continuous supervision. 28 C.F.R. § 115.113(d). Merely asserting that continuous monitoring was difficult or disfavored—after the fact—is insufficient.

By classic tenets of statutory interpretation, "unless otherwise defined, words will be interpreted as taking their ordinary . . . meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). To determine this ordinary meaning courts should "consult dictionary definitions." *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1088 (9th Cir. 2007).

According to Merriam-Webster, the word "determined" is defined as "to fix conclusively or authoritatively" or "to . . . come to a decision by investigation, reasoning, or calculation." *Merriam-Webster Dictionary* (11th ed. 2020), at https://www.merriam-webster.com/dictionary/determined.

The Government has offered no evidence that, in fact, the BOP considered options for continuous monitoring and concluded that none were "feasible."

Simply stating post hoc during litigation that compliance with mandatory procedures is too burdensome, after negligently failing to prevent the assault, is just not good enough.

II. The correctional officer's failure to attentively monitor a vulnerable transgender prisoner receives no protection under the discretionary function exception because it is not an exercise of policy judgment and because it offends the Eighth Amendment

A. Under the "Negligent Guard Theory," a correctional officer's laziness or lack of attention is not grounded in policy

Failure to adhere to a specifically-prescribed course of conduct in a codified regulation is not the only path by which the United States may lose protection of the discretionary function exception. The exception also withdraws the shield of immunity to tort liability from those governmental actions (or inactions) that are not grounded in "social, economic, or political policy considerations." *Berkovitz*, 486 U.S. at 536–37.

Laziness or lack of attention by a prison guard, for example, is not grounded in any of these three policy categories and finds no shelter under the discretionary function exception. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 476 (2d Cir. 2006); *Coulthurst v. United States*, 214 F.3d 106, 109–10 (2d Cir. 2000). In sum, by definition, inattentiveness or laziness cannot be said to reflect any kind of policy judgment.

USP-Tucson explicitly required all correctional officers to remain "fully alert and attentive during duty hours." U.S. Dep't of Justice, Federal Bureau of Prisons Program Statement 3420.11(6) (Dec. 6, 2013), at https://www.bop.gov/policy/progstat/3420_011.pdf; ER42. Officer Westling was neither. He negligently failed to monitor a vulnerable prisoner and thereby allowed an out-of-bounds inmate to enter another housing unit and brutally assault a transgender woman in an unsupervised environment. ER6. This same prison policy warns that "[i]nattention to duty in a correctional environment can result in escapes, assaults, and other incidents." ER42. Indeed, as discussed further below, this is not the only time that USP-Tucson's inattentiveness has set the stage for a brutal assault. *See Estate of Smith v. Shartle*, No. CV-18-00323-TUC-RCC, 2020 WL 1158552 (D. Ariz. Mar. 10, 2020).

Emphasizing again that the burden lies on the Government to prove the application of the discretionary function exception as an affirmative defense, the prison admitted in discovery that it remains at a loss as to how T.P. was able to walk—without question or restriction—into Ms. Gladney's housing unit. ER34–35. Review of the video footage failed to reveal T.P.'s entry. ER50. When asked to acknowledge that Officer Westling failed to identify this inmate, or any inmate, by I.D. prior to permitting access to Ms. Gladney's housing unit, the Government pleaded that it could neither admit nor deny. ER45.

The "Negligent Guard Theory" of tort liability takes an FTCA case outside of the discretionary function exception because "[s]uch negligent acts neither involve an element of judgment or choice within the meaning of [*United States v.] Gaubert*, 499 U.S. 315 (1991)] nor are grounded in considerations of governmental policy." *Coulthurst*, 214 F.3d at 109; *see also Triestman*, 470 F.3d at 476; *Doe v. United States*, No. CV1701991PHXGMSJZB, 2018 WL 2431774, at *3–4 (D. Ariz. May 30, 2018); *Padilla v. United States*, No. LACV 09-05651, 2012 WL 12882367, at *6 (C.D. Cal. Oct. 9, 2012).

In *Triestman*, which bears striking parallels to Ms. Gladney's case, a federal prison policy directed that inmates were not to be left alone without continuous supervision unless they had access to an emergency signaling device. *Triestman*, 470 F.3d at 472. An inmate sexually assaulted the plaintiff prisoner in his cell, without observation or intervention by the guard on duty. *Id.* The inmates were not actively monitored by prison staff nor did the plaintiff have access to any emergency signaling device. *Id.* Only one guard was on duty at the time, who performed but two rounds of cell checks, thereby satisfying only the bare minimum in BOP guidelines. *Id.* at 472–73. When the guard was not conducting a check, he was out of earshot of the inmates and could not see them. *Id.*

The Second Circuit held that these facts were sufficient to raise a genuine dispute as to whether the guard was "lazy and inattentive." *Id.* at 476–77. The

Second Circuit directed that, were the district court to find at trial that the guard was inattentive, those actions would not be shielded by the discretionary function exception because simple negligent monitoring does not involve any aspect of policy consideration. *Id.*

Earlier this year, a district court in this Circuit applied the Negligent Guard Theory to an incident arising in USP-Tucson, the same prison where Ms. Gladney was assaulted. In *Estate of Smith*, the decedent's survivors alleged a guard negligently allowed one inmate to murder another by failing to uphold proper supervision. *Estate of Smith*, 2020 WL 1158552, at *6. The decedent had notified prison officials that he was uncomfortable being housed with the other inmate who had previously threatened to kill him. *Id.* at *1. The court ruled that the prison's failure to adequately monitor the inmates and refusal to listen to the plaintiff's complaints properly set the stage for application of the Negligent Guard Theory. *Id.* at *6. Rather than implicating policy considerations protected by the discretionary function exception to the FTCA, the prison officials allegedly had performed their duties in a lazy, careless, and inattentive manner. *Id.*

Ms. Gladney suffered a brutal sexual assault as a result of the same type of negligence by USP-Tucson correctional officers as was alleged in *Estate of Smith*. Both cases involved the same prison, the same binding regulations, and the same post orders. In *Estate of Smith*, the prison had knowledge that the plaintiff was at

risk for assault. Here too, the prison had knowledge of all the necessary facts regarding a vulnerable transgender inmate being left at high risk of sexual assault when placed into a violent population. As discussed above in Part I.C and again below in Part II.B, these well-known facts included her status as a transgender woman, her feminine appearance, her mental health, her voiced concerns, and the dangerous population. Nonetheless, USP-Tucson failed to properly monitor Ms. Gladney and, as a result of this negligence, she was subjected to a brutal sexual battery.

The discretionary function exception could not shield USP-Tucson in *Estate of Smith*, and it cannot shield the Government here. At the very least, there is an undecided question of material fact as to whether USP-Tucson was simply negligent, which requires a remand for fact-finding at trial.

B. By failing to protect a vulnerable transgender inmate, the Government violated the Eighth Amendment and thereby forfeited policy immunity under the FTCA's discretionary function exception

In *Taylor v. Michigan Department of Corrections*, 69 F.3d 76 (6th Cir. 1995), the Sixth Circuit held that when correctional staff have knowledge of a "substantial risk of serious harm to particular classes of persons," the prison must afford heightened protection to such inmates under the Eighth Amendment. *Id*. at 81. In *Taylor*, an inmate committed to a Michigan prison was small in stature (only

five-feet tall), small in size (weighing 120 pounds), and was mentally disabled (with an IQ of 66). *Id*. at 78. Despite these obvious vulnerabilities, this prisoner was housed with the general prison population and, soon after, was raped by another inmate. The Sixth Circuit held that the plaintiff prisoner's appearance and mental capacity were sufficient to raise a "triable issue of fact" as to whether prison officials "had knowledge" of vulnerability under the deliberate indifference standard for application of the Eighth Amendment. *Id.* at 84.

To state an Eighth Amendment claim requires a higher showing of deliberate indifference by prison officers, not merely negligence in performance. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). The FTCA, however, does not. If a prisoner's appearance as "young and vulnerable" raises a triable issue of fact under the higher deliberate indifference standard of the Eighth Amendment, *see Taylor*, 69 F.3d at 84, then Ms. Gladney's long list of manifest vulnerabilities is more than sufficient to raise a triable issue about inattentive monitoring under the negligence standard of the FTCA.

Moreover, discretionary function exception immunity is withdrawn when federal government officials transgress constitutional lines. As this Court has held, "the Constitution can limit the discretion of federal officials such that the FTCA's discretionary function exception will not apply." *Nurse v. United States*, 226 F.3d 996, 1002 n.2 (9th Cir. 2000). As discussed earlier and reiterated below, Ms.

Gladney's vulnerabilities are not in dispute and no reasonable correctional officer could have failed to appreciate the grave dangers of sexual assault to a transgender woman housed, not only in a men's prison, but with violent sex offenders.

While these circumstances would have supported a direct claim by Ms. Gladney under the Eighth Amendment, the deliberate indifference shown here certainly forfeits the Government's affirmative defense of the discretionary function exception. "As federal officials do not possess discretion to violate constitutional rights, the discretionary function exception does not apply here." *Galvin v. Hay*, 374 F.3d 739, 758 (9th Cir. 2004) (cleaned up).

Ms. Gladney has "been outwardly transgender" since 2013 and manifested "feminine mannerisms." ER28. In her sworn affidavit, Ms. Gladney reports that the BOP had described her as having "naïve and passive tendencies" and a likelihood of being "controlled by others." ER29. She was described by a witness as "lady like" in appearance. ER22. Each of these known and obvious vulnerabilities of Ms. Gladney are explicitly listed in the BOP regulations for adult prisons as pointing to greater likelihood of victimization. 28 C.F.R. § 115.41(d) (listing "physical build," "transgender," and "[t]he inmate's own perception of vulnerability"). Yet, she still was placed in one of the most dangerous areas of one of the most dangerous prison facilities.

Based on her vulnerabilities, appearance, and gender identity, USP-Tucson knew that Ms. Gladney was at a substantial risk of serious harm: she belongs to the most vulnerable group of inmates, she was housed at a maximum-security facility, and was confined with violent sex offenders. *See* 28 C.F.R. § 115.13(a)(6) (directing consideration of "[t]he composition of the inmate population" in screening for vulnerability for sexual victimization).

Nonetheless, USP-Tucson left her subject to an inattentive guard who failed to monitor her situation. The outrage that followed was a predictable result of this lack of due care for a plainly vulnerable inmate in an exceptionally dangerous environment. Ms. Gladney was sexually assaulted, not because of a legitimate policy decision, but by simple neglect of prison custodians to protect a vulnerable ward from foreseeable harm.

Conclusion

For the foregoing reasons, Plaintiff-Appellant Ms. Gladney asks this Court to reverse the District Court's judgment and remand the case for trial on the merits.

Date: October 14, 2020 Respectfully submitted,

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Statement of Related Cases

Counsel for Plaintiff-Appellant Edward Gladney are not aware of any related cases.

Certificate of Compliance With Rule 32 Type-Volume, Typeface and Type Style requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,155 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using a proportionally spaced typeface in 14 point Times New Roman.

Date: October 14, 2020

s/
Gregory C. Sisk

Proof of Service

I, Gregory C. Sisk, hereby declare: I am employed in Minneapolis, State of Minnesota. I am over the age of 18 years, and not a party to the within action. My business address is University of St. Thomas School of Law, 1000 LaSalle Ave., MSL 400, Minneapolis, MN 55403-2015.

I hereby certify that on October 14, 2020, I electronically filed the following with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF System:

OPENING BRIEF OF PLAINTIFF-APPELLANT

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on October 14, 2020 at Minneapolis, Minnesota.

/s/ Gregory C. Sisk

Addendum

Addendum Table of Contents

UNITED STATES CONSTITUTION

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATUTES

Federal Tort Claims Act

28 U.S.C. § 1346(b)(1) (United States as defendant)

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674 (Liability of the United States)

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C. § 2680(a) (Exceptions)

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

Prison Rape Elimination Act

34 U.S.C. § 30301. Findings

Congress makes the following findings:

(1) 2,100,146 persons were incarcerated in the United States at the end of 2001: 1,324,465 in Federal and State prisons and 631,240 in county and local jails. In 1999, there were more than 10,000,000 separate admissions to and discharges from prisons and jails.

(2) Insufficient research has been conducted and insufficient data reported on the extent of prison rape. However, experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.

(3) Inmates with mental illness are at increased risk of sexual victimization. America's jails and prisons house more mentally ill individuals than all of the Nation's psychiatric hospitals combined. As many as 16 percent of inmates in State prisons and jails, and 7 percent of Federal inmates, suffer from mental illness.

(4) Young first-time offenders are at increased risk of sexual victimization. Juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities--often within the first 48 hours of incarceration.

* * *

(12) Members of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates.

(13) The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution. In Farmer v. Brennan, 511 U.S. 825 (1994), the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and

Unusual Punishments Clause of the Eighth Amendment. The Eighth Amendment rights of State and local prisoners are protected through the Due Process Clause of the Fourteenth Amendment. Pursuant to the power of Congress under Section Five of the Fourteenth Amendment, Congress may take action to enforce those rights in States where officials have demonstrated such indifference. States that do not take basic steps to abate prison rape by adopting standards that do not generate significant additional expenditures demonstrate such indifference. Therefore, such States are not entitled to the same level of Federal benefits as other States.

* * *

34 U.S.C. § 30302. Purposes

The purposes of this chapter are to--

(1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States;

(2) make the prevention of prison rape a top priority in each prison system;

(3) develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape;

(4) increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities;

(5) standardize the definitions used for collecting data on the incidence of prison rape;

(6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;

(7) protect the Eighth Amendment rights of Federal, State, and local prisoners;

(8) increase the efficiency and effectiveness of Federal expenditures through grant programs such as those dealing with health care; mental health care; disease

prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment; and homelessness; and

(9) reduce the costs that prison rape imposes on interstate commerce.

34 U.S.C. § 30306. National Prison Rape Elimination Commission

(a) Establishment

There is established a commission to be known as the National Prison Rape Elimination Commission (in this section referred to as the "Commission").

* * *

(d) Comprehensive study of the impacts of prison rape

(1) In general

The Commission shall carry out a comprehensive legal and factual study of the penalogical, physical, mental, medical, social, and economic impacts of prison rape in the United States on--

(A) Federal, State, and local governments; and

(B) communities and social institutions generally, including individuals, families, and businesses within such communities and social institutions.

(2) Matters included

The study under paragraph (1) shall include--

(A) a review of existing Federal, State, and local government policies and practices with respect to the prevention, detection, and punishment of prison rape;

(B) an assessment of the relationship between prison rape and prison conditions, and of existing monitoring, regulatory, and enforcement practices that are intended to address any such relationship;

(C) an assessment of pathological or social causes of prison rape;

(D) an assessment of the extent to which the incidence of prison rape contributes to the spread of sexually transmitted diseases and to the transmission of HIV;

(E) an assessment of the characteristics of inmates most likely to commit prison rape and the effectiveness of various types of treatment or programs to reduce such likelihood;

(F) an assessment of the characteristics of inmates most likely to be victims of prison rape and the effectiveness of various types of treatment or programs to reduce such likelihood;

(G) an assessment of the impacts of prison rape on individuals, families, social institutions and the economy generally, including an assessment of the extent to which the incidence of prison rape contributes to recidivism and to increased incidence of sexual assault;

(H) an examination of the feasibility and cost of conducting surveillance, undercover activities, or both, to reduce the incidence of prison rape;

(I) an assessment of the safety and security of prison facilities and the relationship of prison facility construction and design to the incidence of prison rape;

(J) an assessment of the feasibility and cost of any particular proposals for prison reform;

(K) an identification of the need for additional scientific and social science research on the prevalence of prison rape in Federal, State, and local prisons;

(L) an assessment of the general relationship between prison rape and prison violence;

(M) an assessment of the relationship between prison rape and levels of training, supervision, and discipline of prison staff; and

(N) an assessment of existing Federal and State systems for reporting incidents of prison rape, including an assessment of whether existing systems provide an adequate assurance of confidentiality, impartiality and the absence of reprisal.

(3) Report

(A) Distribution

Not later than 5 years after the date of the initial meeting of the Commission, the Commission shall submit a report on the study carried out under this subsection to--

(i) the President;

(ii) the Congress;

(iii) the Attorney General;

(iv) the Secretary of Health and Human Services;

(v) the Director of the Federal Bureau of Prisons;

(vi) the chief executive of each State; and

(vii) the head of the department of corrections of each State.

(B) Contents

The report under subparagraph (A) shall include--

(i) the findings and conclusions of the Commission;

(ii) recommended national standards for reducing prison rape;

(iii) recommended protocols for preserving evidence and treating victims of prison rape; and

(iv) a summary of the materials relied on by the Commission in the preparation of the report.

(e) Recommendations

(1) In general

In conjunction with the report submitted under subsection (d)(3), the Commission shall provide the Attorney General and the Secretary of Health and Human Services with recommended national standards for enhancing the detection, prevention, reduction, and punishment of prison rape.

(2) Matters included

The information provided under paragraph (1) shall include recommended national standards relating to--

(A) the classification and assignment of prisoners, using proven standardized instruments and protocols, in a manner that limits the occurrence of prison rape;

(B) the investigation and resolution of rape complaints by responsible prison authorities, local and State police, and Federal and State prosecution authorities;

* * *

(H) the training of correctional staff sufficient to ensure that they understand and appreciate the significance of prison rape and the necessity of its eradication;

* * *

(K) creating a system for reporting incidents of prison rape that will ensure the confidentiality of prison rape complaints, protect inmates who make prison rape complaints from retaliation, and assure the impartial resolution of prison rape complaints;

* * *

(M) such other matters as may reasonably be related to the detection, prevention, reduction, and punishment of prison rape.

(3) Limitation

The Commission shall not propose a recommended standard that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities.

* * *

34 U.S.C. § 30307. Adoption and effect of national standards

(a) Publication of proposed standards

(1) Final rule

Not later than 1 year after receiving the report specified in section 30306(d)(3) of this title, the Attorney General shall publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape.

(2) Independent judgment

The standards referred to in paragraph (1) shall be based upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by the Commission under section 30306(e) of this title, and being informed by such data, opinions, and proposals that the Attorney General determines to be appropriate to consider.

(3) Limitation

The Attorney General shall not establish a national standard under this section that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities. The Attorney General may, however, provide a list of improvements for consideration by correctional facilities.

(4) Transmission to States

Within 90 days of publishing the final rule under paragraph (1), the Attorney General shall transmit the national standards adopted under such paragraph to the chief executive of each State, the head of the department of corrections of each State, and to the appropriate authorities in those units of local government who oversee operations in one or more prisons.

(b) Applicability to Federal Bureau of Prisons

The national standards referred to in subsection (a) shall apply to the Federal Bureau of Prisons immediately upon adoption of the final rule under subsection (a)(4).

* * *

34 U.S.C. § 30309. Definitions

In this chapter, the following definitions shall apply:

* * *

(8) Prison rape

The term "prison rape" includes the rape of an inmate in the actual or constructive control of prison officials.

(9) Rape

The term "rape" means--

(A) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person's will;

(B) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person's will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or

(C) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury.

(10) Sexual assault with an object

The term "sexual assault with an object" means the use of any hand, finger, object, or other instrument to penetrate, however slightly, the genital or anal opening of the body of another person.

(11) Sexual fondling

The term "sexual fondling" means the touching of the private body parts of another person (including the genitalia, anus, groin, breast, inner thigh, or buttocks) for the purpose of sexual gratification.

* * *

FEDERAL BUREAU OF PRISONS REGULATIONS

Subpart A—Standards for Adult Prisons and Jails

* * *

28 C.F.R. § 115.13 Supervision and monitoring.

(a) The agency shall ensure that each facility it operates shall develop, document, and make its best efforts to comply on a regular basis with a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, facilities shall take into consideration:

(1) Generally accepted detention and correctional practices;

(2) Any judicial findings of inadequacy;

(3) Any findings of inadequacy from Federal investigative agencies;

(4) Any findings of inadequacy from internal or external oversight bodies;

(5) All components of the facility's physical plant (including ''blind-spots'' or areas where staff or inmates may be isolated);

(6) The composition of the inmate population;

(7) The number and placement of supervisory staff;

(8) Institution programs occurring on a particular shift;

(9) Any applicable State or local laws, regulations, or standards;

(10) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and

(11) Any other relevant factors.

* * *

28 C.F.R. § 115.41 Screening for risk of victimization and abusiveness.

(a) All inmates shall be assessed during an intake screening and upon transfer to another facility for their risk of being sexually abused by other inmates or sexually abusive toward other inmates.

(b) Intake screening shall ordinarily take place within 72 hours of arrival at the facility.

(c) Such assessments shall be conducted using an objective screening instrument.

(d) The intake screening shall consider, at a minimum, the following criteria to assess inmates for risk of sexual victimization:

(1) Whether the inmate has a mental, physical, or developmental disability;

(2) The age of the inmate;

(3) The physical build of the inmate;

(4) Whether the inmate has previously been incarcerated;

(5) Whether the inmate's criminal history is exclusively nonviolent;

(6) Whether the inmate has prior convictions for sex offenses against an adult or child;

(7) Whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming;

(8) Whether the inmate has previously experienced sexual victimization;

(9) The inmate's own perception of vulnerability; and

(10) Whether the inmate is detained solely for civil immigration purposes.

* * *

28 C.F.R. § 115.42 Use of screening information.

(a) The agency shall use information from the risk screening required by § 115.41 to inform housing, bed, work, education, and program assignments with the goal of keeping separate those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive.

(b) The agency shall make individualized determinations about how to ensure the safety of each inmate.

(c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a case-by-case basis whether a

placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.

(d) Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.

(e) A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.

(f) Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.

(g) The agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.

Subpart B—Standards for Lockups

28 C.F.R. § 115.113 Supervision and monitoring.

(a) For each lockup, the agency shall develop and document a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect detainees against sexual abuse. In calculating adequate staffing levels and determining the need for video monitoring, agencies shall take into consideration;

(1) The physical layout of each lockup;

(2) The composition of the detainee population;

(3) The prevalence of substantiated and unsubstantiated incidents of sexual abuse; and

(4) Any other relevant factors.

* * *

(d) If vulnerable detainees are identified pursuant to the screening required by § 115.141, security staff shall provide such detainees with heightened protection, to include continuous direct sight and sound supervision, single-cell housing, or placement in a cell actively monitored on video by a staff member sufficiently proximate to intervene, unless no such option is determined to be feasible.

28 C.F.R. § 115.141 Screening for risk of victimization and abusiveness.

(a) In lockups that are not utilized to house detainees overnight, before placing any detainees together in a holding cell, staff shall consider whether, based on the information before them, a detainee may be at a high risk of being sexually abused and, when appropriate, shall take necessary steps to mitigate any such danger to the detainee.

(b) In lockups that are utilized to house detainees overnight, all detainees shall be screened to assess their risk of being sexually abused by other detainees or sexually abusive toward other detainees.

(c) In lockups described in paragraph (b) of this section, staff shall ask the detainee about his or her own perception of vulnerability.

(d) The screening process in the lockups described in paragraph (b) of this section shall also consider, to the extent that the information is available, the following criteria to screen detainees for risk of sexual victimization:

(1) Whether the detainee has a mental, physical, or developmental disability;

(2) The age of the detainee;

(3) The physical build and appearance of the detainee;

(4) Whether the detainee has previously been incarcerated; and

(5) The nature of the detainee's alleged offense and criminal history.

FEDERAL BUREAU OF PRISONS POLICIES

U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 3420.11(6) (Dec. 6, 2013), at https://www.bop.gov/policy/progstat/3420_011.pdf.

6. **RESPONSIVENESS**

Inattention to duty in a correctional environment can result in escapes, assaults, and other incidents. Employees are required to remain fully alert and attentive during duty hours.

Because failure to respond to an emergency may jeopardize the security of the institution, as well as the lives of staff or inmates, it is mandatory that employees respond immediately, effectively, and appropriately during all emergency situations.

Employees are to obey the orders of their superiors at all times. In an emergency situation, carrying out the orders of those in command is imperative to ensure the security of the institution.