

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA,

-against-

DARNELL WASHINGTON,

Defendant.

Case No. 13-CR-0173 (JBW)

**BRIEF OF AMICI CURIAE LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC., THE NATIONAL CENTER FOR LESBIAN  
RIGHTS, THE NATIONAL CENTER FOR TRANSGENDER EQUALITY,  
AND THE SYLVIA RIVERA LAW PROJECT,  
IN SUPPORT OF DEFENDANT**

Hayley Gorenberg  
Lambda Legal Defense and Education  
Fund, Inc.  
120 Wall Street, 19th Floor  
New York, New York 10005-3919  
Tel: (212) 809-8585  
Fax: (212) 809-0055  
hgorenberg@lambdalegal.org

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENTS OF INTEREST .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	6
<b>I.    LGBT PRISONERS LIKE MR. WASHINGTON FACE           OVERWHELMINGLY HIGH RATES OF           ABUSE IN PRISON .....</b>	<b>6</b>
<b>II.   ABUSE OF VULNERABLE PRISONERS HAS PERSISTED           DESPITE THE PASSAGE OF PREA AND INITIAL           IMPLEMENTATION OF THE           FINAL PREA REGULATIONS .....</b>	<b>16</b>
<b>III.  COURTS HAVE JUDGED CONDITIONS UNDER WHICH           VULNERABLE PRISONERS LIKE MR. WASHINGTON           WOULD BE HELD TO VIOLATE THE CONSTITUTION.....</b>	<b>18</b>
CONCLUSION .....	22

## TABLE OF AUTHORITIES

### CASES

<i>Diamond v. Owens</i> , No. 5:15-CV-50 (MTT), 2015 WL 5341015 (M.D. Ga. Sept. 14, 2015).....	17
<i>Doe et al. v. Mich. Dep't of Corrs.</i> , No. 13-14356 (E.D. Mich. Mar. 20, 2014).....	18
<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994).....	<i>passim</i>
<i>Hardy v. District of Columbia</i> , 601 F. Supp.2d 182 (D.D.C. 2009).....	19, 20
<i>Hatch v. District of Columbia</i> , 184 F.3d 846 (D.C. Cir. 1999).....	22
<i>Hope v. Pelzer</i> , 536 U.S. 730 (2002).....	18, 19
<i>Howard v. Waide</i> , 534 F.3d 1227 (10th Cir. 2008) .....	20
<i>In re Medley</i> , 134 U.S. 160 (1889).....	14
<i>Jenkins v. Freeman</i> , No. 09-CV-323-WMC, 2010 WL 2812959 (W.D. Wis. July 15, 2010).....	20, 21
<i>Johnson v. Johnson</i> , 385 F.3d 503 (5th Cir. 2004) .....	20
<i>Rhodes v. Chapman</i> , 452 U.S. 337 (1981).....	4, 19
<i>Shoats v. Horn</i> , 213 F.3d 140 (3d Cir. 2000) .....	22
<i>United States v. Lara</i> , 905 F.2d 599 (2d Cir. 1990) .....	21, 22
<i>United States v. Ruff</i> , 998 F. Supp. 1351 (M.D. Ala. 1998).....	21
<i>Williams v. Lane</i> , 646 F. Supp. 1379 (N.D. Ill. 1986).....	15

### STATUTES

42 U.S.C. §§ 15601 <i>et seq.</i> .....	6, 7
42 U.S.C.A. § 15601 (13) .....	19

42 U.S.C.A. §§ 15602 (1), (2), (7) .....	17
--	----

## REGULATIONS

28 C.F.R. § 115.42 .....	7
77 Fed. Reg. 37106 .....	7, 18
77 Fed. Reg. 37107 .....	18
77 Fed. Reg. 37107 (a)(2) .....	18

## OTHER AUTHORITIES

Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, <i>Sexual Victimization Reported by Former State Prisoners</i> , 2008 (May 2012), <a href="http://www.bjs.gov/content/pub/pdf/svrfsp08.pdf">http://www.bjs.gov/content/pub/pdf/svrfsp08.pdf</a> .....	8, 9
Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, <i>Sexual Victimization in Prisons and Jails Reported by Inmates</i> , 2011-12 (2013), <a href="http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf">http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf</a> .....	9, 10, 11
Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, <i>Sexual Victimization in Prisons and Jails Reported by Inmates</i> , 2011-12, <i>Supplemental Tables, Prevalence of Sexual Victimization Among Transgender Adult Inmates</i> (Dec. 2014), <a href="http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf">http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf</a> .....	10, 11
Allen J. Beck, Bureau of Justice Statistics, <i>Special Report: Use of Restrictive Housing in U.S. Prisons and Jails</i> , 2011-12 (2015), <a href="http://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf">http://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf</a> .....	13
Allen J. Beck & Paige M. Harrison, Bureau of Justice Statistics, U.S. Dep't of Justice, <i>Sexual Victimization in Prisons and Jails Reported by Inmates</i> , 2008-09 (2010), <a href="http://www.bjs.gov/content/pub/pdf/svpjri0809.pdf">http://www.bjs.gov/content/pub/pdf/svpjri0809.pdf</a> .....	9
Allen J. Beck & Ramona R. Rantala, Bureau of Justice Statistics, U.S. Dep't of Justice, <i>Sexual Victimization Reported to Correctional Authorities</i> , 2009-2011 (Jan. 2014), <a href="http://www.bjs.gov/content/pub/pdf/svraca0911.pdf">http://www.bjs.gov/content/pub/pdf/svraca0911.pdf</a> .....	12, 13
Corr. Ass'n of N.Y., <i>Lockdown New York: Disciplinary Confinement in New York State Prisons</i> 30 (Oct. 2003), <a href="http://www.correctionalassociation.org/resource/lockdown-new-york-disciplinary-confinement-in-new-york-state-prisons">http://www.correctionalassociation.org/resource/lockdown-new-york-disciplinary-confinement-in-new-york-state-prisons</a> .....	14, 15
Ctr. for Am. Progress & Movement Advancement Project, <i>Unjust: How the Broken Criminal Justice System Fails LGBT People</i> (2016), <a href="http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf">http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf</a> .....	13, 14
Gregory M. Herek & Kevin T. Berrill, <i>Hate Crimes: Confronting Violence Against Lesbians and Gay Men</i> 35 (1992) .....	7
Jason Lydon et al., <i>Coming Out of Concrete Closets: A Report on Black &amp; Pink's Nat'l LGBTQ Prisoner Survey</i> , ver. 2 (Oct. 21, 2015),	

<a href="http://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015.pdf">http://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015.pdf</a> .....	<i>passim</i>
Kim Shayo Buchanan, “Our Prisons, Ourselves: Race, Gender and the Rule of Law”	
29 Yale L. & Pol’y Rev. 1 (2010).....	22
Lambda Legal, <i>Protected and Served?</i> (2012),	
<a href="http://www.lambdalegal.org/protected-and-served/jails-and-prisons">http://www.lambdalegal.org/protected-and-served/jails-and-prisons</a> .....	11, 12
Nat’l Prison Rape Elimination Comm’n Report (2009),	
<a href="https://www.ncjrs.gov/pdffiles1/226680.pdf">https://www.ncjrs.gov/pdffiles1/226680.pdf</a> .....	4, 7, 8
Nat’l Prison Rape Elimination Comm’n Pub. Hearing,	
(Aug. 19, 2005) (statement of S. Long).....	7
Peter Scharff Smith, “The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature,”	
34 Crime & Just. 441 (2006).....	14
Rudy Estrada & Jody Marksamer, “The Legal Rights of LGBT Youth in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know” (Child Welfare League of Am. 2006), <a href="http://www.nclrights.org/wp-content/uploads/2013/07/LegalRights_LGBT_State_Custody.pdf">http://www.nclrights.org/wp-content/uploads/2013/07/LegalRights_LGBT_State_Custody.pdf</a> .....	13, 14
Sylvia Rivera Law Project, “‘It’s War in Here’: A Report on the Treatment of Transgender & Intersex People in New York State Men’s Prisons” (2007), <a href="http://srlp.org/files/warinhere.pdf">http://srlp.org/files/warinhere.pdf</a> .....	8, 15
U.S. Dep’t of Justice, <i>Nat’l Standards to Prevent, Detect, and Respond to Prison Rape</i> (2012), <a href="http://ojp.gov/programs/pdfs/prea_executive_summary.pdf">http://ojp.gov/programs/pdfs/prea_executive_summary.pdf</a> .....	17
Valerie Jenness et al., <i>Violence in California correctional facilities: An empirical examination of sexual assault</i> (Ctr. for Evidence-Based Corrs. 2009) .....	8, 10
W.S. Wooden & J. Parker,	
<i>Men behind bars: Sexual exploitation in prison</i> (Plenum Press 1982) .....	8

## STATEMENTS OF INTEREST

*Amici* are civil and human rights groups committed to ending discrimination and violence against lesbian, gay, bisexual, and transgender (LGBT) people, including vulnerable populations in prison, jails, and lock-ups. *Amici* have worked extensively with gay men, transgender women, and other vulnerable populations inside our nation's prisons and jails and have an interest in ensuring that the Constitution's guarantees of due process and freedom from cruel and unusual punishment apply to all persons regardless of sexual orientation and gender identity. *Amici* file this brief in support of the defendant, Mr. Washington, to address the particular vulnerability of gay men generally, and Mr. Washington in particular, to sexual abuse while in government custody.

Lambda Legal Defense and Education Fund, Inc. (Lambda Legal) is a national organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender people and those living with HIV through impact litigation, education, and public policy work. Lambda Legal has worked to address the particular vulnerability of LGBT people in custody through comments to the Prison Rape Elimination Act (PREA) Commission, the Department of Justice, the Department of Homeland Security, and testimony to the U.S. Senate and has appeared as counsel or *amicus curiae* in numerous cases in federal and state court involving the rights of LGBT prisoners. From 2013 through 2015,

Lambda Legal's national Legal Help Desk received more than 320 intakes from LGBT or HIV-affected people in custody reporting harassment and/or discrimination based on sexual orientation or gender identity.

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

The National Center for Transgender Equality (NCTE) is a national social justice organization devoted to advancing justice, opportunity and well-being for transgender people through education and advocacy on national issues. Since 2003, NCTE has been engaged in educating legislators, policymakers and the public, and advocating for laws and policies that promote the health, safety and equality of transgender people. NCTE provides informational referrals and other resources to thousands of transgender people every year, including many individuals in prisons, jails and civil detention settings, and has been extensively involved in efforts to implement the Prison Rape Elimination Act (PREA) and other efforts to address the vulnerability of transgender people in confinement settings.

The Sylvia Rivera Law Project (SRLP) provides free legal services to transgender, gender-nonconforming, and intersex people who are indigent, with a

focus on people of color and people with no income. SRLP provides legal services in three main areas, one of which is the rights of people in New York State prisons and jails. For incarcerated clients SRLP provides direct legal services around issues of health care, identity documents, solitary confinement and isolation, gender-based discrimination and sexual violence. SRLP regularly hears from people incarcerated across the United States. In 2015 SRLP sent out over 500 informational referrals, know-your-rights materials, and general information to lesbian, gay, bisexual, transgender, intersex and questioning people in prisons and jails across the United States, the majority of whom had survived sexual violence.



## INTRODUCTION AND SUMMARY OF ARGUMENT

“Being violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The Supreme Court has long recognized that “having stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.” *Farmer*, 511 U.S. at 833. But despite this constitutional mandate, the reality is that “[e]very day, the lives and the physical integrity of lesbian, gay, bisexual, and transgender people are at stake within our prison systems.” Nat’l Prison Rape Elimination Comm’n Report 73 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf>. (NPREC Report). As a result, people such as the defendant in this case are sent to prison to face shockingly high rates of sexual harassment and assault, including in so-called “protective custody.”

Due to Darnell Washington’s sexual orientation (which is the focus of this brief), as well as other characteristics, such as previously having been targeted for and having experienced sexual assault, age, slight stature, and documented, serious mental health needs, sending him to prison for a term of fifteen years is tantamount to sentencing him to a decade and a half of abuse and isolation. As witness Nelson Aponte, a retired Federal Bureau of Prisons agent, former Deputy Warden, Special

Investigative Supervisor, Special Investigative Agent, and Correctional Officer, explained of Mr. Washington, “the fact that he’s...an admitted homosexual...[o]nce he goes into a regular prison, okay, he’s going to be targeted.” Aponte Direct at 135. “[I]n prison,” Aponte went on, “nobody likes an admitted gay.” *Id.* at 139.

Administrative challenges to keeping Mr. Washington and others who share his profile safe do not excuse violence in government custody. “The fact that our prisons are badly overcrowded and understaffed may well explain many of the shortcomings of our penal systems. But...it is no answer to the complaints of the brutalized inmate that the resources are unavailable to protect him from what, in reality, is nothing less than torture.” *Farmer*, 511 U.S. at 853-54 (Blackmun, J., concurring). Insulating sentences from judicial review thus communicates an acceptance of sexual abuse as an additional punishment for certain classes of prisoners—a framework that, *amici* contend, creates the potential for violating the Constitution.

*Amici* therefore submit this brief to highlight the implications of mechanistically sentencing a vulnerable prisoner to extended imprisonment where such imprisonment entails a high risk of sexual and other assaults and long-term isolation. Data establish that LGBT prisoners who do not conform to expectations of norms of masculinity and femininity – are subjected to ongoing abuse and

isolation when in custody. This exceedingly high risk of abuse should inform the Court's determination of a constitutionally permissible sentence.

## **ARGUMENT**

### **I. LGBT PRISONERS LIKE MR. WASHINGTON FACE OVERWHELMINGLY HIGH RATES OF ABUSE IN PRISON.**

For those who do not adhere to rigid gender norms in the prison environment, a prison sentence is all too often a sentence to a term of ongoing assault, abuse, and isolation. Because prisoners are expected to conform to standards of masculinity and femininity in the correctional environment, LGBT prisoners – who are perceived as inherently diverging from those norms – face a particularly serious risk of harm.<sup>1</sup> The evidence presented to the Court and a wealth of data regarding sexual abuse in prison make clear that LGBT prisoners like Mr. Washington will face a devastatingly high risk of being seriously and routinely abused in custody.

Responding to legion incidents of rape and other sexual abuse in government custody, Congress in 2003 passed and President George W. Bush signed the Prison Rape Elimination Act, calling for an end to sexual abuse, including sexual harassment, in government custody and convening the National Prison Rape Elimination Commission (NPREC) to study the problem. 42 U.S.C. §§ 15601 *et*

---

<sup>1</sup> While this brief specifically addresses vulnerabilities linked to LGBT identity, *amici* note that in addition to Mr. Washington's sexual orientation, other factors such as his youth, slight stature and mental health background likely intersect to amplify grounds for the Court's potential departure from mandatory minimum sentencing in order to avert unconstitutional treatment.

*seq.* In 2009, the NPREC released a 250-page report detailing the epidemic of sexual violence in custody. NPREC Report. Informed by the NPREC report and nine years of study and commentary by experts, in 2012 the Department of Justice (DOJ) released the final PREA regulations, which include comprehensive requirements for local, state, and federal prisons, jails, and lock-up facilities. 77 Fed. Reg. 37106 (June 20, 2012). The NPREC report and the final PREA regulations identified LGBT individuals as likely targets of sexual violence in custody. NPREC Report, at 73; 28 C.F.R. § 115.42 (identifying LGBT status among characteristics to screen for vulnerability to abuse). Scott Long, Director of the Lesbian, Gay, Bisexual, and Transgender Rights Program at Human Rights Watch, told the Commission, “[E]very day, the lives and the physical integrity of lesbian, gay, bisexual, and transgender people are at stake within our prison systems.” NPREC Report, at 73 (citing Nat’l Prison Rape Elimination Comm’n Pub. Hearing (Aug. 19, 2005) (statement of S. Long)).

Further, “the discrimination, hostility, and violence members of these groups often face in American society are amplified in correctional environments and may be expressed by staff as well as other incarcerated persons.” NPREC Report, at 73 (citing Gregory M. Herek & Kevin T. Berrill, *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 35 (1992)).

In the years preceding and during the PREA implementation process, research demonstrated that LGBT prisoners and prisoners with intersex conditions suffered significantly higher rates of abuse than the general population. *See, e.g.*, NPREC Report, at 73 (citing W.S. Wooden & J. Parker, *Men behind bars: Sexual exploitation in prison*. (Plenum Press 1982)); Valerie Jenness et al., *Violence in California correctional facilities: An empirical examination of sexual assault* (Ctr. for Evidence-Based Corrs. 2009); *see also* Sylvia Rivera Law Project, “‘It’s War in Here’: A Report on the Treatment of Transgender & Intersex People in New York State Men’s Prisons” (2007), <http://srlp.org/files/warinhere.pdf> (documenting unrelenting harassment and abuse of transgender women incarcerated in New York State men’s prisons).

The federal government has further documented the high rates of abuse against people in men’s corrections facilities who are or are perceived to be LGBT. The Department of Justice’s Bureau of Justice Statistics (BJS), charged with collecting, analyzing, and publishing data related to crime in the United States, produced the National Former Prisoner Survey, showing that 38.6% of gay male former prisoners and 33.7% of bisexual male former prisoners reported sexual victimization by another prisoner during incarceration as compared with only 3.5% of heterosexual former male prisoners. Allen J. Beck, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Sexual Victimization Reported by Former State Prisoners*,

2008, 16 (May 2012), <http://www.bjs.gov/content/pub/pdf/svrfsp08.pdf>. In addition to reports of abuse by other prisoners, gay and bisexual prisoners reported significantly higher rates of abuse by staff than did their heterosexual counterparts, with rates of staff abuse of 5.2% against heterosexual men, as contrasted with 17.5% and 11.8% of bisexual and gay men, respectively. *Id.* Similarly disproportional rates were revealed when federal facilities were incorporated for analysis:

Among heterosexual state and federal prisoners, an estimated 1.3% reported being sexually victimized by another inmate, and 2.5% reported being victimized by staff. In contrast, among prison inmates with a sexual orientation other than heterosexual (including bisexual, homosexual, gay or lesbian, or other), 11.2% reported being sexually victimized by another inmate, and 6.6% reported being sexually victimized by staff.

Allen J. Beck & Paige M. Harrison, Bureau of Justice Statistics, U.S. Dep't of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09*, 14 (2010), <http://www.bjs.gov/content/pub/pdf/svpjri0809.pdf>.

The federal government has elsewhere confirmed the high rates of abuse against non-heterosexual prisoners in custody. The National Inmate Survey (NIS) conducted in 2011 and 2012 revealed reports of inmate-on-inmate sexual victimization ten times higher for imprisoned "non-heterosexual" people as compared to the rate of violence against imprisoned heterosexual people, with 12.2% of non-heterosexuals reporting sexual victimization by another inmate, as contrasted with only 1.2% of heterosexuals. Allen J. Beck, Bureau of Justice

Statistics, U.S. Dep't of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-2012*, 18 (2013),

<http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> (Beck Report May 2013).

Staff sexual misconduct against non-heterosexual prison inmates was reported well over twice as frequently as such misconduct against heterosexual prisoners, with 5.4% of non-heterosexuals reporting such abuse, as contrasted with 2.1% of heterosexuals. *Id.*

Data about the vulnerability of transgender women in men's prisons is also instructive in understanding abuse against prisoners who are known to be gay, as both groups are targeted for failure to conform to masculinity norms in men's prisons. A 2009 survey of California prisons found that transgender prisoners experience sexual victimization at a rate 13 times higher than prisoners who are cisgender (that is, whose gender identity matches their sex assigned at birth, and thus are not transgender). Jenness et al, at 3. More recently, the Bureau of Justice Statistics estimated that transgender prisoners held in United States prisons are about ten times more likely to have been sexually assaulted, as compared to people in the general prison population (at least 39% of transgender prisoners, as compared to 4% of the general prison population). Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12 – Supplemental Tables* (Dec. 2014),

[http://www.bjs.gov/content/pub/pdf/svpjri1112\\_st.pdf](http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf); see also Beck Report May 2013, at 10.

A recent non-governmental survey of lesbian, gay, bisexual, and transgender people in prison and jail confirms the extent of the abuse this vulnerable population is forced to endure during periods of incarceration. In *Coming Out of Concrete Closets*, Black and Pink, an LGBT prisoner advocacy and support organization, analyzed survey responses from 1,118 LGBT-identified prisoners across the United States on a range of issues impacting the population. Jason Lydon et al., *Coming Out of Concrete Closets: A Report on Black & Pink's Nat'l LGBTQ Prisoner Survey*, ver. 2 (Oct. 21, 2015), <http://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015..pdf>. (Black and Pink Report). The report documented extremely high rates of sexual abuse against LGBT prisoners by both other prisoners and staff, and found that of those prisoners reporting assault by another prisoner, 76% reported that prison staff intentionally placed them in situations where they would be at high risk of sexual assault by another prisoner. Black and Pink Report, at 5. Over one-third of respondents reported that they had experienced physical assault by staff, and more than one-third had experienced unwanted touching by staff. Black and Pink Report, at 39. A smaller recent community survey of LGBT people and individuals living with HIV, conducted by Lambda Legal in 2012, found that of survey



respondents who had spent time in jail or prison in the five years prior to the survey, 7% reported sexual assault while incarcerated, 12% reported physical assault (“beat up, hit, attacked with a weapon”), 27% reported sexual harassment, and 57% reported verbal assault or harassment (“shouted at, taunted, called names”) by facility staff. Lambda Legal, *Protected and Served?* (2012), <http://www.lambdalegal.org/protected-and-served/jails-and-prisons>. Fewer than one-third (30%) of survey respondents who experienced harassment or assault by staff while in custody reported that they informed other staff or a monitoring board or agency about their negative experiences, and of those, only 2% of the respondents who reported misconduct felt that the staff or monitoring board fully addressed their complaint. *Id.* These results suggest that available numbers likely represent significant underreporting by prisoners who have experienced physical and sexual violence.

Prison systems, including the Federal Bureau of Prisons, when confronted with prisoners like Mr. Washington who are obvious targets for abuse, often respond by placing such prisoners in isolation, where they are, in effect, punished for their vulnerability. According to the Department of Justice’s own research, “[t]he most common response in substantiated incidents of sexual victimization among inmates was to place the victim in administrative segregation or protective custody.” Allen J. Beck & Ramona R. Rantala, Bureau of Justice Statistics, U.S.

Dep't of Justice, *Sexual Victimization Reported to Correctional Authorities, 2009-2011*, 11 (Jan. 2014), <http://www.bjs.gov/content/pub/pdf/svraca0911.pdf>. Indeed, the Department of Justice recorded that over one-quarter (27.8%) of lesbian, gay, or bisexual prison inmates reported placements in restrictive housing, as compared to just 17.5% of heterosexual prison inmates. Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, *Special Report: Use of Restrictive Housing in U.S. Prisons and Jails, 2011-12*, 4 (2015), <http://www.bjs.gov/content/pub/pdf/urhuspj1112.pdf>.

Contrary to the espoused intent of ensuring safety, protective custody often exposes vulnerable inmates to new kinds or increased risk of harmful outcomes. In segregating LGBT people, it “also further stigmatizes [them] – highlighting their status as LGBT and increasing hostility toward them.” Ctr. for Am. Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People*, 92 (2016), <http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf>. (Ctr. for Am. Progress Report) (citing Rudy Estrada & Jody Marksamer, “The Legal Rights of LGBT Youth in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know” (Child Welfare League of Am. 2006), [http://www.nclrights.org/wp-content/uploads/2013/07/LegalRights\\_LGBT\\_State\\_Custody.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/LegalRights_LGBT_State_Custody.pdf)). “Additionally, when individuals are placed in protective custody or isolated, they are at increased

risk of harassment and abuse by correctional officers because of reduced visibility and oversight.” *Id.*

Discriminatory assessments of the actions of LGBT people also contribute to their disproportional punishment:

Touching by or between LGBT people is often perceived by staff to be sexual and triggers a harsher response, when the same action by a non-LGBT person is not seen in the same way or is punished less harshly. As part of punishment for these behaviors, LGBT people are placed in isolation or solitary confinement or have food or medical care withheld. Research suggests that people of color, including LGBT people, are particularly at risk for punishment by correctional staff. For example, incarcerated people of color are confined in long-term isolation at higher rates than their white counterparts.

Ctr. for Am. Progress Report, at 97. The Black and Pink report similarly documents routine use of solitary confinement for LGBT prisoners, with 85% of survey respondents reporting having spent time in solitary, and almost 50% reporting having spent more than two years in isolation. Black and Pink Report, at 5. Collectively, the 1,112 survey respondents reported spending a combined 5,110 years in solitary confinement. *Id.* This prolonged isolation on its own raises the question of the constitutionality of Mr. Washington’s proposed sentence.<sup>2</sup>

---

<sup>2</sup> See generally Br. of Amicus Curiae Wash. Lawyer’s Comm.; see also *In re Medley*, 134 U.S. 160, 168 (1889) (“A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide....”); Peter Scharff Smith, “The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature,” 34 Crime & Just. 441, 462 (2006) (“[A]t least a third of the inmates reacted to isolation with adverse health effects, and at least a third of these . . . might be characterized as suffering from major psychological and psychiatric problems including hallucinations, paranoia, and different kinds of personal degeneration.”); Corr. Ass’n of N.Y., *Lockdown New York: Disciplinary Confinement in New York State Prisons* 30 (Oct. 2003),

The use of solitary confinement as the sole, grossly inadequate means to protect vulnerable prisoners has been similarly documented in the context of transgender prisoners. One transgender woman incarcerated in New York State men's prisons, explained of her assault and subsequent isolation:

I'm not ashamed—it's war in here. The administration is against us. Something has to be done, and all they say is 'Act like a man!'...The correctional officers are the ones who are the most violent. They're the ones to be scared of....I'm raped on a daily basis, I've made complaint after complaint, but no response. No success. I'm scared to push forward with my complaints against officers for beating me up and raping me.....When you get beat up real bad and they don't want to take you out to get checked out, they put you in the snake pit. They threw me in the snake pit for 6 months after beating me up. Six months!

*It's War in Here*, at 19-20. Where the primary mechanism used to protect the most vulnerable prisoners is itself a form of abuse, the question of constitutionality is called. *See Williams v. Lane*, 646 F. Supp. 1379 (N.D. Ill. 1986) (class action holding that living conditions and institutional programming in protective custody violated inmates' constitutional rights).

Despite the goals of PREA and the standards implementing the law, rape is an additional punishment, beyond the term of incarceration itself, for overwhelming numbers of LGBT prisoners. As one respondent in the Black and Pink report explained, "an inmate raped me and when I reported the rape, I was

---

<http://www.correctionalassociation.org/resource/lockdown-new-york-disciplinary-confinement-in-new-york-state-prisons> (noting that between 1998 and 2001, more than half of the suicides in New York State prisons occurred in disciplinary confinement, although fewer than 7% of prisoners were housed in these units).

ignored by [correctional officers] saying ‘Faggots can’t get raped.’” Black and Pink Report, at 43. Another wrote, “I was beaten and raped by five men. I tried to hang myself to deal with it. I have medical records proving this assault happened – statements from [disciplinary reports], but they still won’t put me in safekeeping.” *Id.*

Given the consistent and well-documented abuses of incarcerated gay men and transgender women men’s facilities and the fact that BOP’s measure intended to reduce such abuse – isolation – is itself constitutionally suspect, *see* Br. of Amicus Curiae Wash. L., the mechanistic application of a 15-year sentence to Mr. Washington cannot be squared with constitutional principles. Despite recited norms against cruel and unusual punishment and aspirations to contemporary standards of decency, for a vulnerable gay man like Mr. Washington, a sentence of 15 years is a sentence to a decade and a half of torture and abuse.

## **II. ABUSE OF VULNERABLE PRISONERS HAS PERSISTED DESPITE THE PASSAGE OF PREA AND INITIAL IMPLEMENTATION OF THE FINAL PREA REGULATIONS.**

Despite efforts to reduce sexual violence in correctional settings, including through PREA and its regulations, the reality is that the catastrophic problem of sexual assault against vulnerable prisoners in facilities across the country remains. As one respondent in a national survey of LGBT prisoners reported recently, “I have been raped at nearly every level camp in [Missouri]. PREA is a joke.” Black

and Pink Report, at 43. Even in a post-PREA environment, rates of sexual abuse against vulnerable prisoners are exceedingly high. Moreover, as even the Department of Justice has recognized, a prison system in compliance with PREA may still subject prisoners to an unconstitutional risk of harm. U. S. Dep't of Justice, *Nat'l Standards to Prevent, Detect, and Respond to Prison Rape*, 2 (2012), [http://ojp.gov/programs/pdfs/prea\\_executive\\_summary.pdf](http://ojp.gov/programs/pdfs/prea_executive_summary.pdf) (“[C]ompliance with the standards does not establish a safe harbor with regard to otherwise constitutionally deficient conditions involving inmate sexual abuse.”).

Though the purpose of PREA was, among other things, to “establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States[,] make the prevention of prison rape a top priority in each prison system [, and] protect the Eighth Amendment rights of Federal, State, and local prisoners,” 42 U.S.C.A. §§ 15602 (1), (2), (7), those goals are significantly unfulfilled, and abuse of vulnerable prisoners persists. *See, e.g., Diamond v. Owens*, No. 5:15-CV-50 (MTT), 2015 WL 5341015, at \*21 (M.D. Ga. Sept. 14, 2015) (denying defendants’ motion to dismiss in case alleging continuing violent sexual assaults against transgender prisoner after the final PREA issued).

Even if compliance with the PREA standards is achieved, such compliance does not ensure that LGBT prisoners like Mr. Washington are safe from sexual

abuse. As the Department of Justice – the agency that promulgated the PREA regulations – has made clear,

Compliance with ... any or all PREA requirements ... does not render moot constitutional claims for failure to reasonably protect prisoners from sexual assault and other serious harm. [T]he PREA regulations do not constitute the constitutional floor, and compliance with the standards does not absolve jurisdictions of liability for any claim of unconstitutional conditions. Rather, the regulations are aimed at 1) preventing, detecting, and responding to incidents of sexual abuse in confinement facilities, and 2) fostering a cultural change within such facilities, by promoting policies and procedures that focus on combating sexual abuse. 77 Fed. Reg. at 37106-37107. Accordingly, [jurisdictions] have dual obligations of providing constitutional conditions of confinement and of complying with PREA standards[.]

Statement of Interest of the United States, *Doe et al. v. Mich. Dep't of Corrs.*, No. 13-14356 (E.D. Mich. Mar. 20, 2014); *see also* 77 Fed. Reg. 37107(a)(2) (June 20, 2012) (“[C]ompliance with the standards does not establish a safe harbor with regard to otherwise constitutionally deficient conditions involving inmate sexual abuse.”). A prison system can thus be compliant with PREA while also allowing conditions of confinement that place LGBT people like Mr. Washington at an extreme risk of harm.

**III. COURTS HAVE JUDGED CONDITIONS UNDER WHICH VULNERABLE PRISONERS LIKE MR. WASHINGTON WOULD BE HELD TO VIOLATE THE CONSTITUTION.**

The Constitution does not tolerate the unnecessary infliction of pain. *Hope v. Pelzer*, 536 U.S. 730, 737 (2002) (“The unnecessary and wanton infliction of pain...constitutes cruel and unusual punishment forbidden by the Eighth

Amendment.”) (citations omitted); *Rhodes*, 452 U.S. at 346, (“Among ‘unnecessary and wanton’ inflictions of pain are those that are ‘totally without penological justification.’”). As the Supreme Court made clear in *Farmer*, “gratuitously allowing the beating or rape of one prisoner by another serves no ‘legitimate penological objectiv[e],” *Farmer*, 511 U.S. at 833. The significance of this holding was reinforced by Congress in its Prison Rape Elimination Act findings: “The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution.” 42 U.S.C.A. § 15601 (13). The inability to keep a prisoner safe from sexual violence therefore runs afoul of both federal statutory and constitutional law.

A prison official can be found liable under the Eighth Amendment if the official “knows of and disregards an excessive risk to inmate health or safety...” *Farmer*, 511 U.S. at 837. Such knowledge may be inferred where the risk of harm is obvious. *Id.* at 842 (“Whether a prison official had the requisite knowledge of a substantial risk is a question of fact...and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.”); *Hope*, 536 U.S. at 738 (“We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious.”); *Hardy v. District of Columbia*, 601 F. Supp.2d 182, 189-190 (D.D.C. 2009) (“In appropriate situations,



subjective knowledge can be inferred from the obviousness of the risk.”) (internal citation omitted).

It is thus incumbent on this Court to determine whether sentencing Mr. Washington to fifteen years in the Federal Bureau of Prisons will subject him to an unreasonable risk of harm. *See* Sections I & II, *supra*; *Farmer*, 511 U.S. at 843-44 (“If...prison officials were aware that inmate ‘rape was so common and uncontrolled that some potential victims dared not sleep [but] instead ... would leave their beds and spend the night clinging to the bars nearest the guards’ station,’ ... it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom.” (internal citation omitted)). Relief can be prospective: one who has yet to begin a sentenced term of imprisonment need not “await a tragic event [such as an] actual assault before obtaining relief.” *Farmer*, 511 U.S. at 845 (alterations in original).

For Mr. Washington, being gay (in addition to other vulnerability factors that are not the focus of this brief) makes the cruelty inherent in his future incarceration plain. *See, e.g., Howard v. Waide*, 534 F.3d 1227, 1238 (10th Cir. 2008) (“[A] jury could conclude that [a gay prisoner] was particularly vulnerable to assault.”); *Johnson v. Johnson*, 385 F.3d 503, 530-31 (5th Cir. 2004) (allowing claim by gay prisoner alleging that he was sexually assaulted because other prisoners believed him to be more vulnerable to move forward); *Jenkins v.*