

## APPENDIX A

# IMPLICATIONS FOR FEMALE PRISONERS OF EXECUTIVE ORDER 13988

## I. ISSUES

There are currently over 150,000 Federal inmates housed in Federal prisons, private prisons, and other facilities throughout the United States. There are more than 2,000,000 inmates in state and local facilities across the United States. As of 2019, approximately 231,000 women and girls were incarcerated in all facilities across the United States, including Federal prisons and jails, State and local prisons and jails, and immigration detention. A great number, if not the majority, of women and girls have experienced domestic violence, sexual assault or abuse of some kind prior to incarceration. Female inmates face staggeringly high and disproportionate rates of sexual abuse while incarcerated.<sup>1</sup> Since the passage of the Prison Rape Elimination Act (PREA), male prisoners with transgender identities have increasingly been placed in women's prisons. And, in March 2021, California enacted legislation mandating that transgender prisoners "shall...[b]e housed at a correctional facility designated for men or women based on the individual's preference". Connecticut, Massachusetts, and New York City also house prisoners according to gender identity to varying degrees. As gender identity increasingly begins to displace sex in prison housing decisions, with apparently little regard for the rights and safety of women prisoners, this area is ripe for analysis and advocacy on behalf of female inmates.

Housing male prisoners with female prisoners has already resulted in harm to women inmates in the United States and abroad. In England, a judicial review of the Minister of Justice's policy of housing male inmates in the women's estate based on transgender identity is under way. Impetus for the review is the repeated sexual assaults of female inmates by male prisoners with transgender identities. Freedom of Information requests have revealed that up to half of male prisoners with transgender identities are convicted sex offenders. In Ireland, a male with a history of sexual assault of women has been transferred to a woman's prison. In Canada, a male prisoner has been charged with sexual assault of a female prisoner. In the United States, female prisoners have sued correctional facilities alleging sexual assaults and sexual harassment by male inmates with transgender identities who were transferred to women's prisons.<sup>2</sup> In 2008, a female inmate's daughter started a Change.org petition to remove convicted rapist Richard Masbruch from the women's prison where her mother was housed because of reports Masbruch was raping women

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<sup>1</sup>"[A]lthough women comprise only 7 percent of the state prison population, they comprise 46 percent of sexual abuse victims." Pecora, Christina, "Female Inmates and Sexual Assault".

"Even though women account for less than 10 percent of inmates, their reports account for three quarters of assaults, and almost three-quarters of staff are men." Bozelko, Chandra, "Sexual Violence in Women's Prisons Reaches 'Constitutional Proportions.' Will Lawmakers Step In?", Ms. Magazine, April 23, 2020.

<sup>2</sup> *Driever v. United States*, Civil Action No. 19-1807 (TJK), 2020 U.S. Dist. LEXIS 192695 (D.D.C. Oct. 19, 2020).

with objects. In 2021, males with convictions for predation on women and girls (including murder and rape) are being transferred into women’s prisons.

In a feminist analysis, placing male prisoners in women’s prisons violates the rights of women prisoners, is contrary to the protections which are supposed to be afforded by existing law, makes women prisoners less safe, and strips them of what little privacy they have left given their conditions of incarceration. We strongly agree with the purpose and intent of the PREA —to make *all* prisoners safe from sexual assault in prison and we recognize the specific danger of rape to transgender inmates. However, it is not necessary to house males, even males with transgender identities, in women’s prison facilities to protect them from sexual assault. Reform of male prisons to provide the necessary protections for gender-non-conforming males serves the purposes of the PREA to prevent and remediate sexual assault and protects the rights of female inmates to safety and privacy. The rights of female prisoners are of equal importance to the rights of transgender-identified prisoners. There are ways of protecting both at-risk populations without diminishing the rights or protections of either. Given the inherent difficulties of recognizing and preventing prisoner-on-prisoner sexual assaults,<sup>3</sup> given that sex is demonstrably a risk factor for being a victim of sexual assault both prior to and during incarceration, given that female inmates are already at increased risk of sexual assault from male guards and staff, and given existing Constitutional protections for female inmates, female inmates should be afforded sex-specific prisons as a means of protection from sexual assault and preservation of the small amount of privacy they struggle to retain while incarcerated.

## **II. EXISTING LAW**

Prisoners’ rights are protected by the United States Constitution and include a limited Fourth Amendment right to bodily privacy and the Eighth Amendment right to be free of cruel and unusual punishment. Additionally, the Prison Rape Elimination Act and its implementing regulations seek to end sexual assault of incarcerated persons through, among other methods, prisoner risk assessments and housing assignments based on such assessments. The Federal Bureau of Prisons has implemented the “Transgender Offender Manual”, providing standards for treatment of transgender inmates, and “The Female Offender Manual”, to address the specific sex-based needs of incarcerated females. Finally, Federal Regulations provide that the Federal Bureau of Prisons “shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs.” 28 CFR § 551.90.<sup>4</sup>

Because the PREA’s implementing regulations address treatment of transgender inmates, and because of changes to the Transgender Offender Manual made during the Trump

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<sup>3</sup> See “Sexual Violence in Women’s Prisons and Jails: Results From Focus Group Interviews”, staff interviews revealed that staff in women’s prisons “had difficulty in distinguishing between coerced relationships and those that appear to be consensual and in determining the relational context of institutional life among women inmates.”

<sup>4</sup> A comprehensive review of all statutes, rules, regulations, and case law applicable to the treatment of prisoners is beyond the scope of this paper. We have highlighted those provisions which seem to come most directly within the purview of E.O. 13988.

Administration, it is likely that the PREA and its regulations will be part of E.O. 13988’s broad mandate for review and revision. **E.O. 13988 must not be applied in such a way as to further the victimization of incarcerated women and girls.** Housing prisoners by gender identity creates a disproportionate risk of sexual victimization and abuse of female prisoners. The PREA has done nothing to protect female prisoners from widespread sexual abuse at the hands of male guards and staff—the problem should not be made worse through misguided and legally incorrect application of E.O. 13988. Sex matters—it is a demonstrable risk factor for sexual assault and victimization. The PREA and its regulations currently willfully disregard that reality. E.O. 13988 presents the opportunity to change that. The PREA, the Transgender Offender Manual, and the Female Offender Manual must be revised to explicitly recognize the sex-based rights and vulnerabilities of female prisoners.

#### A. Constitutional Protections

Prisoners retain a limited right to bodily privacy protected by the Fourth Amendment.<sup>5</sup> Case law interpreting and applying these protections have recognized the right of female prisoners to be free of non-physical intrusions by male guards and staff. The Fourth Amendment right to bodily privacy encompasses proscriptions against cross-sex strip searches absent exigent circumstances as such searches both intrude upon inmates’ privacy and foster abuse between prison guards and prisoners.<sup>6</sup> And “the regular viewing of prisoners of the opposite sex who are engaged in personal activities, such as undressing, using the toilet facilities or showering, when not reasonably necessary, has been found to constitute a violation of the prisoners’ right to bodily privacy.”<sup>7</sup>

Prisoners also have Eighth Amendment protections against cruel and unusual punishment which encompasses the failure to protect inmates from assaults by guards and fellow inmates.<sup>8</sup> “[A]n inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards. [A] prison official’s failure to protect an inmate from a known harm may constitute a constitutional violation.”<sup>9</sup> Female prisoners have been protected by the Eighth Amendment against male guards who failed to announce their presence in their living areas and “routine invasions of bodily privacy, such as men peering into women’s cells.”<sup>10</sup> And in April 2020, the Department of Justice released a report about sexual violence against female inmates in New

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<sup>5</sup> *Harris v. Miller*, 818 F.3d 49, 57 (2<sup>nd</sup> Cir. 2016) (“we reiterate today that inmates retain a limited right to bodily privacy under the Fourth Amendment”).

<sup>6</sup> Nicholas D. Kristof, Op-Ed., *Kids in Crisis (Behind Bars)*, N.Y. TIMES, Jan. 28, 2010, at A33 (discussing a “stunning new Justice Department special report” finding that cross-gender assignments in prisons foster abuse of inmates by male and female officers); Connie Rice and Pat Nolan, Op-Ed., *Policing Prisons*, L.A. Times, Apr. 5, 2010, at A13 (citing to the June, 2009, National Prison Rape Elimination Commission Report (Commission Report)).”

<sup>7</sup> Human Rights Watch, “All Too Familiar Sexual Abuse of Women in U.S. State Prisons“.

<sup>8</sup> *Castillo v. Day*, 790 F.3d 1013, 1020 (10<sup>th</sup> Cir. 2015).

<sup>9</sup> *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10<sup>th</sup> Cir. 1993).

<sup>10</sup> *Women Prisoners v. District of Columbia*, 877 F.Supp. 634 (D.D.C. 1994).

Jersey's women's prison the Edna Mahan Correctional Facility. The DOJ Report concluded that the risk of harm to female inmates was so high that it violated women's Eighth Amendment rights. The Report identified "systemic failures" at the prison that impede reporting, investigating, preventing, and remediating sexual abuse of female inmates and "provide opportunities for further sexual abuse" of female inmates. The Report concluded that there was "reasonable cause to conclude that Edna Mahan (1) fails to protect women prisoners from sexual abuse by staff in violation of the Eighth Amendment; and (2) exposes women prisoners to substantial risk of serious harm from sexual abuse in violation of the Eighth Amendment." And in 2014, the DOJ reached the same conclusion with regards to sexual abuse of female inmates in the Julia Tutwiler Prison for Women in Alabama. In addition, multiple lawsuits have been filed by female inmates against multiple correctional facilities alleging widespread sexual abuse of female inmates.<sup>11</sup>

Case law applying constitutional protections to inmates recognizes that biological sex matters when it comes to protecting prisoner rights. The sex-based realities recognized in these cases do not disappear when gender identity enters the picture. E.O. 13988 should be interpreted and applied consistent with this body of law specifically applicable to female prisoners.

#### B. The Prison Rape Elimination Act and implementing regulations

State and Federal inmate housing placements are subject to the requirements of the Prison Rape Elimination Act, 34 U.S.C. § 30301 (the "PREA") and its implementing regulations at 28 C.F.R. § 115. The Department of Justice is responsible for promulgating the PREA's implementing regulations.

The PREA was passed in 2003 with the broad purpose of establishing a "zero tolerance" standard for prison rape, 34 U.S.C. § 30302(1), and addressing and remediating prison rape through, *inter alia*, establishment of "national standards for the detection, prevention, reduction, and punishment of prison rape[.]" 34 U.S.C. § 30302(3). To develop these standards the PREA established the nine-member Prison Rape Elimination Commission; its brief was to produce a report regarding prison rape and its prevention. 34 U.S.C. § 30306.

The PREA does not mention sex or sex equality anywhere in it. It has been criticized as being too-narrowly targeted at violent male-on-male prison rape. "The predominant concern of the supporters of the law [PREA] was a focus on violent male-on-male inmate rape, primarily in the adult prison and jail settings."<sup>12</sup> Though both the Commission Report and the PREA regulations are to be commended for addressing LGBT as an at-risk population for sexual assault, they missed the mark by failing to consider or understand women *as* women to be an at-risk population for sexual assault both prior to and during incarceration.<sup>13</sup> Accordingly, the Commission Report and

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<sup>11</sup> Bozelko, Chandra, "Sexual Violence in Women's Prisons Reaches 'Constitutional Proportions.'" Will Lawmakers Step In?", Ms. Magazine, April 23, 2020.

*See also* "Bureau of Prisons and Executive Order 13988: Legal Implications for Women Prisoners and Correctional Staff March 11, 2021" for a further discussion of Eighth Amendment concerns.

<sup>12</sup> *The Prison Rape Elimination Act: Implications for Women and Girls.*

<sup>13</sup> The Commission Report also addressed other at-risk populations which include females: juveniles, persons in community corrections, and immigrants. Yet the Commission Report simply

the PREA’s implementing regulations both give short shrift to sex-based violence against women and fail to recognize sex itself as a specific risk factor for sexual victimization. Nor did the PREA consider race as a factor in sexual assault even though, in 1996, African American women were 14.5 percent of the general U.S. population but 52.2 percent of the female prison population.<sup>14</sup>

The Prison Rape Elimination Commission issued its report, “National Prison Rape Elimination Commission Report” (the “Commission Report”) in June 2009. The Commission Report appropriately recognizes the specific “vulnerability of men and women with nonheterosexual orientations (gay, lesbian, or bisexual) as well as individuals whose sex at birth and current gender identity do not correspond (transgender or intersex).”<sup>15</sup> It does not, however, address biological sex itself as a risk factor for rape and sexual assault. Nor does it consider race as risk factor for rape and sexual assault. Nor does it consider the intersection of sex and race with vulnerability to sexual assault. Although the Report recognizes that “[s]imply being female is a risk factor” for rape, it does so in the context of juvenile incarceration.<sup>16</sup> The Report notes that “[g]irls are disproportionately represented among sexual abuse victims [in confinement]. According to data collected by BJS in 2005–2006, 36 percent of all victims in substantiated incidents of sexual violence were female, even though girls represented only 15 percent of confined youth in 2006.”<sup>17</sup> Yet, no similar statistics for adult female inmates are referenced or discussed, much less are any statistics about inmates of color provided to evaluate these intersecting axes of oppression and discrimination.

The PREA implementing regulations are contained in the Code of Federal Regulations at 28 C.F.R. § 115.5, et seq. Like the PREA itself, the implementing regulations do not mention sex or sex equality. And like the Commission Report, the implementing regulations appropriately recognize LGBT as an at-risk population (thus including lesbians and bisexual women in relation to their sexual orientation) but ignore women *qua* women as an at-risk group and their specific sex-based vulnerability to rape and sexual assault. Consistent with its erasure of sex, the C.F.R. does not define sex, but does provide the following definitions:

- *Gender nonconforming* means a person whose appearance or manner does not conform to traditional societal gender expectations. 28. C.F.R. § 115.5.
- *Transgender* means a person whose gender identity (*i.e.*, internal sense of feeling male or female) is different from the person’s assigned sex at birth. 28. C.F.R. § 115.5.

The C.F.R. establishes mandatory screening of every adult and juvenile prisoner for risk of sexual victimization and abusiveness. For adults, it provides ten screening criteria for assessing

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does not consider or address women or women of color as at-risk populations irrespective of their membership in these mixed-sex groups.

<sup>14</sup> Human Rights Watch, “All Too Familiar Sexual Abuse of Women in U.S. State Prisons“.

<sup>15</sup> “National Prison Rape Elimination Commission Report” at p. 73.

<sup>16</sup> *Id.* p. 17.

<sup>17</sup> *Id.*

inmates for risks of sexual victimization. 28 C.F.R. § 115.41(d). For juveniles, it provides eleven screening criteria. 28 C.F.R. § 115.341(c). For both populations, one of the factors is, appropriately, “[w]hether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming”. 28 C.F.R. § 115.41(d)(7); 28 CFR § 115.341(c)(2). It also provides factors to consider when screening inmates for risk of being sexually abusive: “prior acts of sexual abuse, prior convictions for violent offenses, and history of prior institutional violence or sexual abuse,” for adults and “prior sexual abusiveness”, and “offense history”. 28 C.F.R. § 115.41(e); 28 C.F.R. § 115.341(c).

This screening information is used “to inform housing, bed, work, education, and program assignments with the goal of keeping those inmates at high risk of being sexually victimized from those at high risk of being sexually abusive.” 28 C.F.R. § 115.42. The C.F.R. has five provisions addressing appropriate housing for LGBT prisoners. *Id.* The C.F.R. provides discretion to place transgender identified inmates in either female or male facilities, directing officials to “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.” 28 C.F.R. § 115.42(c). And further directs that “[a] transgender or intersex inmate’s own views with respect to his or her own safety shall be given serious consideration.” 28 C.F.R. § 115.42(e).

**Neither the PREA Commission Report nor the implementing regulations of the PREA recognize sex itself as a risk factor for rape or sexual assault.** Women as women and as persons with intersecting identities based on sex, race, disability, national origin, immigrant status, sexual orientation, or transgender status simply go unrecognized, unremarked, and unprotected. Because of this failure, the PREA cannot meet its stated goal of protecting women inmates from rape and sexual assault. But even worse, the PREA’s elevation of gender identity over sex in determining prison housing assignments puts women at *more* risk of sexual assault than they were prior to passage of the PREA. This must change. E.O. 13988 provides the opportunity for change.

### C. The Transgender Offender Manual

Risk assessments and housing decisions for Federal inmates with transgender identities are made by a body called the Transgender Executive Council (“TEC”) applying standards contained in the Bureau of Prisons “Transgender Offender Manual”. The Manual was reviewed and revised in 2018. Prior to the 2018 revision, the Manual stated only that the Transgender Executive Council “will recommend housing by gender identity when appropriate” but gave no guidance as to when, why, or under what conditions or restraints, it may be “appropriate” to house an inmate in a facility incongruent with his or her sex. The 2018 revisions did not remove the possibility of transgender inmates being assigned to a prison based on his or her gender identity. But they made clear that inmate housing assignments shall “use biological sex as the initial determination for designation”. A facility Warden may recommend to the TEC that an inmate be transferred to a different facility “based on an inmate’s identified gender,” *i.e.*, to a facility incongruent with his or her sex. The TEC then is tasked with considering a number of factors in determining whether or not to follow such a recommendation. Those factors include the health and safety of the transgender inmate, other options for mitigating risk to the transgender inmate, the history of the transgender inmate, and whether the proposed transfer “pose[s] a risk to other inmates in the institution (e.g., considering inmates with histories of trauma, privacy concerns, etc.)”. Finally, the Manual concludes that deviation from initial sex-based assignments “would be appropriate only in rare

cases after consideration of all of the above factors and where there has been significant progress towards transition as demonstrated by medical and mental health history.” *Id.*

#### D. The Female Offender Manual

The Female Offender Manual is meant “[t]o ensure the Bureau [of Prisons] provides programs, services, and policies that are gender-responsive, trauma-informed, culturally sensitive, and address the unique needs of incarcerated females at facilities that house female offenders.” **Yet, the Female Offender Manual does not address, or even consider, women’s specific, sex-based risk of sexual assault both prior to and during incarceration.** Nor does the Manual address the safety and privacy concerns which make sex-segregated prison housing the norm across the United States.

### III. REVIEW AND REVISION UNDER E.O. 13988

Given the mandate of E.O. 13988, and the tightening of criteria in the 2018 revisions, it is highly likely that the Transgender Offender Manual will be reviewed and revised per Executive Order 13988. Such a review is appropriate and should be conducted consistent with *Bostock’s* reasoning. That is, care should be taken to prevent displacing sex-based protections with gender identity-based concerns.

In the main, the 2018 revisions of the Transgender Offender Manual attempt to strike a balance between sex-based housing assignments, which protect the privacy and Eighth Amendment rights of female inmates, and the individual needs of gender non-conforming male prisoners. Yet, unexamined in the 2018 revisions is the assertion that the safety of male prisoners can be best served by housing them with female prisoners. Certainly, this removes pressure for prison systems to reform. So long as males designated as at special risk of sexual assault can be made “safe” by removal from male prisons, there is little incentive to change the conditions that make male prisons unsafe for all males. And neither the risk nor the reality of sexual assault is remedied for the males who remain in male prisons. Nor is the risk of sexual assault removed for female inmates. Rather, failure to consider the specific sex-based risk of sexual assault will merely displace the risk of sexual assault for some males onto female inmates —as is beginning to come clear through reports of sexual assault and harassment of female prisoners by male prisoners housed with them.

Additionally, the Manual makes no attempt to consider overlapping areas of discrimination, such as race, national origin, or disability. Any revisions to the Manual should consider not only these specific areas of concern, but should also address their intersection with sex as a risk factor for sexual assault.

Additionally, we believe that the Female Offender Manual and the PREA’s implementing regulations should also be subject to review and revision. The Female Offender Manual does not recognize single-sex prison accommodations as a fundamental right of female prisoners. And under the C.F.R., biological sex is not one of the screening factors for either risk of being sexually victimized or being sexually abusive. And neither race nor national origin is a screening factor for an inmate’s risk of being sexually victimized. Nor does the C.F.R. contain any direction or guidance as to appropriate housing for female prisoners so as to protect them from sexual abuse.

The C.F.R. simply does not address sex, race, or national origin, either alone or in combination, as risk factors for sexual victimization. Nor does it direct that sex should be used as a screening criteria for housing or other placements, likely because prisons are already sex-segregated and there are no plans to change that. Yet, the C.F.R. explicitly allows gender identity to override sex in prisoner housing placements with no recognition, much less discussion, of sex-based impacts on prisoner safety and privacy.

As such, the C.F.R. is inconsistent with *Bostock*'s reasoning, cannot address much less remedy sex-based abuse of female prisoners, runs afoul of E.O. 13988's directive to consider overlapping forms of discrimination, and exacerbates rather than ameliorates rampant Eighth Amendment violations against female prisoners. The C.F.R. should be amended and it should be amended consistent with *Bostock*. It should, at the least, recognize sex, race, and national origin, alone and in combination, as risk factors for being sexually victimized, recognize sex as a risk factor for being sexually abusive, and should affirm female prisoners' rights to sex-segregated housing to protect their rights to privacy and freedom from cruel and unusual punishment.

To this end, we believe the following revisions (at least) to the PREA's implementing regulations, the Transgender Offender Manual, and the Female Offenders Manual are necessary:

- Recognition of the sex-based risk of sexual assault to female inmates;
- Recognition that single-sex prisons are a fundamental right of female inmates;
- Recognition that sex-segregated prisons are both necessary and appropriate to protect the rights and interests of female inmates;
- Use of biological sex as a screening factor for risk of being sexually victimized;
- Use of biological sex as a screening factor for risk of being sexually abusive;
- Use of race as a screening factor for risk of being sexually victimized, both alone and in combination with sex and gender non-conforming status;
- Use of national origin as a screening factor for risk of being sexually victimized, both alone and in combination with sex and gender non-conforming status;
- Recognition that gender non-conforming male prisoners have the right to be safe in male prisons and that failure to protect them from abuse by other males is sex discrimination, as recognized in *Bostock*;
- A requirement that all prison housing assignments be made according to biological sex, without deviation;
- Absent such a requirement, a presumption that all prison housing assignments be made according to biological sex with rare deviations;
- Absent such a requirement, a ban on gender-identity based housing assignments where the inmate in question has any history of domestic violence, sexual assault,



or violent crime;

- Absent such a requirement, retention of the 2018 Transgender Offender Manual revisions and incorporation of them into the PREA’s implementing regulations; and
- Absent such a requirement, female prisoners should have the unrestricted right to opt out of mixed-sex facilities, including cells, cell blocks, units, shower facilities, and prisons.

No prisoner should be sexually assaulted as a term or condition of imprisonment. Prison facilities have an obligation to provide safe, rape-free prisons for all inmates. The Commission Report, the PREA and its implementing regulations, and the Transgender Offender Manual correctly identify LGBT persons as an at-risk population for sexual assault. Yet no report, rule, or regulation recognizes that women, as women, are an at-risk population for sexual assault by virtue of their sex. And this sex-based risk is increased by overlapping oppressions of race, national origin, and disability. Nor do the PREA and its implementing regulations adequately address the risk of prison rape to males who must remain in male facilities.

*Bostock* recognizes that sex matters. Case law applying Fourth and Eighth Amendment protections to prisoners recognizes that sex matters. Implementation of E.O. 13988 should similarly recognize that sex matters and that it grounds sex discrimination and oppression. Sex-based protections and gender-identity based protections can co-exist and be mutually supporting. To be sure, recognizing and remediating risks of rape to women, to LGBT individuals, and to men who are at risk because they are imprisoned, puts additional pressures and requirements on prisons and their administrators. But a regulatory scheme that allows prisons to avoid these burdens by displacing the risk and effects of male violence from one at-risk population onto another at-risk population does nothing to achieve the aims of the PREA or protect the constitutional rights of prisoners. Displacing sex with gender identity does not achieve the goals of the PREA and is contrary to *Bostock*’s reasoning and the requirements of E.O. 13988. The Biden Administration, the Bureau of Prisons, and the Attorney General should take this opportunity to recognize that sex matters and to ensure that the PREA, at long last, at least recognizes the sex-based harms of rape and sexual assault to female prisoners.

#### **IV. Suggested Arguments**

- Women inmates are specifically vulnerable to rape and sexual assault as females.

A 1996 report by Human Rights Watch reported studies “that between 40 percent and 88 percent of incarcerated women have been the victims of domestic violence and sexual or physical abuse prior to incarceration.”<sup>18</sup> Additionally, studies have documented the vast overrepresentation of women and girls as victims of sexual abuse while incarcerated. “[A]lthough women comprise only 7 percent of the state prison population, they comprise 46 percent of sexual abuse victims.”<sup>19</sup> “Even though women account for less than 10 percent of inmates, their reports account for three

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<sup>18</sup> Human Rights Watch, “All Too Familiar Sexual Abuse of Women in U.S. State Prisons”.

<sup>19</sup> Pecora, Christina, “Female Inmates and Sexual Assault”.

quarters of assaults, and almost three-quarters of staff are men.”<sup>20</sup> Women, as women, are specifically vulnerable to sexual assault. Women, as women, enter prison with significant histories of sexual assault and abuse. Sex is a risk factor for sexual victimization.

- Women inmates are already vulnerable to sexual abuse from prison guards.

The Prison Rape Commission Report recognizes that “[i]ncarcerated women have always been vulnerable to sexual coercion and abuse” from corrections officers.<sup>21</sup> Sexual assault of female inmates by male guards and staff is endemic and is a violation of inmates’ constitutional rights. Two Federal prisons have been the subject of Attorney General investigations into the prevalence of sexual assault of female inmates by male staff and guards. In both cases, the Department of Justice concluded that sexual assault of female prisoners by male staff and guards, and the risk of sexual assault, deprived female prisoners of their Eighth Amendment protections against cruel and unusual punishment. In addition, multiple lawsuits have been filed by female inmates against multiple correctional facilities alleging widespread sexual abuse of female inmates.<sup>22</sup> This risk of sexual assault to female prisoners is only increased when male prisoners are placed into women’s prisons. There is no evidence that a male prisoner’s assertion of an internal gender identity acts as a preventative to sexual assault of women. Indeed, there is clear evidence to the contrary.

- Women inmates have been sexually abused and harassed by male inmates.

The Supreme Court has found that sex can be a bona fide occupational qualification for prison guards because, among other reasons, if female guards were assigned to “a male, maximum-security, unclassified penitentiary” there was a significant risk that sexual offenders would assault the female guards. “There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison.”<sup>23</sup> The risk of sexual assault is obviously increased for female inmates confined with males and further increased if those males already have a history of sexual assault.

Female prisoners are being sexually assaulted and raped by males who are being placed in women’s prisons because of their asserted gender identity. Housing male prisoners with female prisoners has already resulted in harm to women inmates in the United States and abroad. In England, there has been a surge of male prisoners self-identifying as transgender. And there have been multiple reports of sexual assaults of female inmates by male prisoners with transgender identities. Freedom of Information requests have revealed that up to half of male prisoners with transgender identities are convicted sex offenders. Additionally, there are reports that female

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<sup>20</sup> Bozelko, Chandra, “Sexual Violence in Women’s Prisons Reaches “Constitutional Proportions.” Will Lawmakers Step In?”, Ms. Magazine, April 23, 2020.

<sup>21</sup> Prison Rape Commission Report at p. 36.

<sup>22</sup> *Id.* See also “Bureau of Prisons and Executive Order 13988: Legal Implications for Women Prisoners and Correctional Staff March 11, 2021” for a further discussion of Eighth Amendment concerns.

<sup>23</sup> *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977).

officers have been sexually assaulted by male prisoners housed in female prisons. In Canada, male prisoners housed in women's prisons have sexually assaulted female prisoners. In the United States, female prisoners have sued correctional facilities alleging sexual assaults and sexual harassment by male inmates with transgender identities who were transferred to women's prisons.<sup>24</sup> And there are additional reports of sexual assaults by male prisoners against female prisoners they are housed with. Through it all, female prisoners are not being asked their opinions about males being housed with them and it is apparent that no thought is being given to the risks posed to women.

The vast majority of sexual assaults are carried out by males. The sex-based reality of sexual assault does not disappear with the assertion of gender identity. Allowing males to choose incarceration in a female prison based on the assertion of a transgender identity places female inmates at greater risk of sexual assault. One need not that believe that all males with claimed transgender identities will commit sexual assaults against females. It is sufficient that some have done so to demonstrate the risk of housing males with females. Just as a female inmate cannot avoid the male guard who sexually violates her, so too she cannot escape a male prisoner incarcerated in her cell or cell block with her.

- Sex should be explicitly recognized in the C.F.R. as a risk factor for sexual abuse.

That sex is a risk factor, indeed a dispositive and sufficient risk factor, for sexual abuse may seem so obvious as to not require mention. It is common knowledge that the vast majority of sexual abuse involves men as perpetrators and women as victims. Male genitals are themselves weaponized as the paradigmatic instrument of sexual assault and can be used against other males as well as against females. The disparity of vulnerability underlies the policy of maintaining same-sex prisons, and this policy is understood to protect women against assault by male inmates, though it does not prevent assault by guards or other staff.

When gender identity is allowed as a basis for transferring male inmates to women's prisons, we have even greater reason to make sure that sex is explicitly recognized as a risk factor for sexual abuse. The relationship of sex to rape should be fully taken into account in all policymaking and measures related to prevention of sexual abuse in custodial settings. For example, female prisoners should have the unrestricted right to opt out of being housed in mixed-sex facilities. Female inmates should be allowed to transfer to a single-sex cell, prison block, unit, or prison at their own request. And female inmates should, at all times, be provided with single-sex shower and medical facilities.

- Female inmates have a right to bodily privacy on the basis of sex.

The PREA implementing regulations recognize the right to bodily privacy from the opposite sex for both male and female prisoners, including those with transgender identities. 28 C.F.R. § 115.15. The C.F.R. prohibits “cross-gender” strip searches of any inmate and “cross-gender” pat downs of female prisoners, absent exigent circumstances. In addition, the C.F.R. requires facilities to “implement policies and procedures that enable inmates to shower, perform

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<sup>24</sup> *Driever v. United States*, Civil Action No. 19-1807 (TJK), 2020 U.S. Dist. LEXIS 192695 (D.D.C. Oct. 19, 2020).

bodily functions, and change clothing without nonmedical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks.” It further requires “staff of the opposite gender to announce their presence when entering an inmate housing unit.” Accordingly, it makes little sense that female prisoners would then be required to expose their bodies as a daily condition of incarceration to male inmates who profess a certain gender identity. *Bostock* is clear, sex remains sex regardless of the addition of gender identity or sexual orientation. Denying female inmates bodily privacy by requiring them to perform all intimate bodily functions in the presence of male inmates housed with them is a violation of their Eighth and Fourth Amendment rights, just as requiring them to do so in the presence of a male guard would be.

- Prison housing determinations should be made on the basis of sex.

Prison housing decisions should be made on the basis of sex, with no deviation. Introducing any male person into housing for female prisoners places a heavy burden on the safety of every female prisoner exposed to that individual in their shared facilities. This can also be expected to have a detrimental effect on the mental health of female prisoners, a substantial number of whom are survivors of sexual assault and other violence, abuse, and exploitation by male persons. Housing prisoners strictly according to sex serves not only important policy considerations but obligations under the Constitution, the PREA and international law to protect the safety and bodily privacy of female inmates, who are vulnerable both as a matter of their sex and because they have been placed in the vulnerable position of being held in state custody.

Accommodation of the gender identity of male individuals who wish to be treated as women should be accomplished in other ways that do not put women at risk, as is the preference expressed in the Transgender Offender Manual. These include alternative cell or unit assignments and transfers to other facilities. Moreover, it must be recognized that failure to provide safe prison housing for gender-non-conforming males is a failure attributable to sex discrimination, per *Bostock*. Removing some specific males from male prisons does nothing to make those prisons safer for the remaining men. Male violence continues, even though some males may escape their specific situation. Further, this male violence is displaced onto female prisoners through requiring them to accept, at best, the loss of what little privacy they have (a not insignificant loss) and, potentially, their own sexual victimization. The sex discrimination is thus doubled, rather than ameliorated. The path to reducing sexual assault in prison is to reduce sexual assault in all prisons, of all prisoners, where they are housed.

- If sex is to be disregarded, no male with any history of assault, sexual assault, or domestic violence should be housed with female inmates.

Should assignment of male prisoners with transgender identities to women’s prisons continue, there should be a clear mandate that no male with a history of domestic violence, sexual abuse, sexual assault, stalking, or any sexual or violent crime against a woman or girl should be permitted to transfer to a women’s prison. When transfer of a male prisoner with a transgender identity to a women’s prison is contemplated, as much attention should be paid to the safety of the female inmates as to the safety of the transgender inmate. Due care should be paid to the reality

that female inmates will have no ability to avoid or protect themselves against any sexually abusive or violent male inmates housed with them. Transferring any male inmate with a history of violence against a woman to a women's prison creates an unreasonable and readily foreseeable risk of harm to female inmates, regardless of the gender identity of the male prisoner.

And if male prisoners are housed in women's prisons, female prisoners should be allowed to opt out of mixed-sex facilities, including cells, cell blocks, units, shower facilities, and prisons, without restriction or need for justification. Sex segregated facilities should remain available to female prisoners who should be allowed to opt-out of mixed-sex facilities without limitation.

- The failure to prevent sexual assault of gender non-conforming prisoners is sex discrimination.

Transferring certain male prisoners to female facilities both recognizes and disregards male violence. It recognizes that gender non-conforming males are raped by other males and that male prisons may not be safe for them. But transfer of these males does not address the reality of male sexual violence against other males. Rather, some portion of males who are designated as at high risk of sexual assault are allowed to escape those conditions of male violence. But what of other males who are also at high risk of sexual assault? What of smaller males, males new to the penal system, younger males, males who have been previously raped? The Commission Report recognized that these males are also at greater risk of sexual assault while incarcerated. Transferring some male prisoners to women's prisons does nothing to meet the PREA's stated goal of ending prison rape for the vast majority of males who are at risk of rape and sexual assault. It is nothing more than a panacea that increases women's risk of sexual assault.

## V. CONCLUSION

There is a real danger that the Biden Administration's mandate to extend *Bostock's* reasoning will result in the collapsing of sex into gender identity. That is, that women's sex-based oppression will, as a policy matter, be disregarded in any case where claims of gender identity compete with sex. The enforcement of PREA guidelines, which remarkably do not consider sex at all when putatively seeking to end sexual assaults in prison, provides an illustration of the harms to women from such an approach. Female inmates have been required to surrender both their bodily privacy and physical safety to accommodate males with transgender identities. While we recognize, as both a societal and legal matter, that single-sex prisons are both appropriate and necessary to protect women prisoners, that recognition is set aside in the case of males with transgender identities. Yet, putting women at greater risk, and depriving them of their rights to bodily privacy and integrity, does nothing to make male prisons safer or protect the vast majority of male prisoners from rape. If we are to achieve the stated objective of the PREA, the effects of male violence cannot be displaced onto female prisoners. Male violence must be addressed in all places it occurs, including men's prisons. Displacing male violence into women's prisons makes women less safe and violates their rights to equal protection, bodily privacy, and protection from sexual assault.