EXECUTIVE ORDER 13988

A FEMINIST ANALYSIS AND CALL TO ACTION

by

Women's Collective on Law and Policy

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INTRODUCTION

This white paper provides an independent feminist legal analysis intended to influence federal policy makers and inform organizations and individuals at a critical time for the future of U.S. federal sex-discrimination laws. The authors support the full and equal protection of all people under the law. We offer an alternative to Focus on the Family-style paternalism[1] that proceeds from sex-stereotyped assumptions about the nature of women and men and seeks to deny equal protection to lesbian, gay, and transgender persons.[2] We further provide an alternative to a mainstream liberal position that gender is an adequate or necessary replacement for sex in civil rights statutes that women have used to challenge sex discrimination for more than half a century.

We recognize that single sex classifications are sometimes reasonably necessary to protect privacy, safety, fairness, equality, and/or bodily autonomy. Women, in particular, have vested legal interests in the continued recognition of sex in settings such as prisons, emergency shelters, locker rooms, and sports. Sex matters. Gender identity as affirmation of self-understanding and expression is widely understood as distinct from sex. Transgender status also should be understood in law as separate from sex, worthy of recognition in its own right but not displacing sex classifications where sex matters.

This woman-centered legal and social analysis can be used to educate both Democratic and Republican officials, at all levels of government, about the continuing reality of sex-based

[1] See A Promise to America's Children, spearheaded by The Heritage Foundation, the Family Policy Alliance, and the Alliance Defending Freedom: https://promisetoamericaschildren.org/about-us/

[2] As the Biden Administration commendably moves forward with extending civil rights protections to LGBT persons, conservative political organizations such as the Heritage Foundation and Family Policy Alliance are spending millions of dollars and resources to appeal to existing anti-LGBT sentiment with the goal of placing and expanding broad religious-belief exceptions into existing civil rights protections. As feminists, we oppose such exceptions to the law on the basis of subjective belief structures. One need only look to the holdings of the Supreme Court which have expanded the ministerial exception to Civil Rights laws *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S Ct. 2049 (2020), and undermined the ACA's birth control coverage, *Little Sisters of the Poor v. Pennsylvania, et al.*, 140 S. Ct. 2367 (2020) to see the danger of an overweening religious rights jurisprudence.

discrimination and the need to strike a legislative balance that protects all civil rights stakeholders. As we move into a new era of civil rights protections, we must not leave behind women and girls whose own rights to equality, safety, privacy, and bodily autonomy have not yet been fully realized.[3]

On January 20, 2021, President Joseph Biden issued Executive Order 13988, directing all Federal agencies to extend the reasoning of the June 2020 Supreme Court opinion in *Bostock v. Clayton County, Georgia* beyond its narrow judicial application to Title VII. Agencies which administer a multitude of internal rules and Federal statutes, including Title IX, the Prison Rape Elimination Act, the Fair Housing Act and other statutes which directly impact women's and girls' lives, have been directed to make proposals for interpretation and enforcement of these statutes consistent with *Bostock*'s reasoning. As these Agency reviews move forward, and as proposals for regulatory amendments are published, it is critical that *Bostock* be understood within, and applied consistently with, the protections against sex discrimination that are the bedrock of its holding. *Bostock* is clear: sex exists and any analysis, and extension, of civil rights protections to LGBT persons must start with sex. Applying a sex-based analysis ensures that protections for all groups can be harmonized.

There is, for example, no inherent contradiction between protecting a woman or a transwoman from being fired. Nor is there an inherent contradiction between protecting males, however they identify, from rape in prison or protecting women, however they identify, from rape in prison. However, contradictions and conflicts overtake good intentions and displace reasonable approaches when sex and gender identity are treated as the same thing. We address our concems to these conflicts and the adverse effects on women and girls when an individual male's internal gender identity (*i.e.* a transwoman or nonbinary individual) is treated as if it were identical to the female sex as a matter of law or fact.

We urge application of *Bostock*'s holding consistent with its recognition that sex matters.[4] *Bostock* provides no support for any interpretation or application of its holding which would disregard or undermine consideration of sex when sex matters. Federal Agencies should recognize the centrality of sex to *Bostock*'s holding by heeding those areas of law which recognize sex distinctions as necessary for equality, privacy, safety, or bodily autonomy. Indeed, Executive Order 13988 ("E.O. 13988") compels such an application when it directs Agencies to extend *Bostock*'s reasoning only "...so long as the laws do not contain sufficient indications to the contrary."

Some early cases applying *Bostock* to Title IX fail to take the measured approach required by E.O. 13988, instead misreading *Bostock* to effectively replace sex as a protected characteristic

[3] *See* Appendix B: "Women's Sexed Status in U.S. History, Custom, Law and Economics".

[4] While we anticipate that some may use a narrow reading of *Bostock* to challenge the advancement of civil rights to LGBT persons or to expand religious exemptions to civil rights statutes, we reject those arguments. We address solely the confusion of gender identity with biological sex and the harms that flow from such confusion.

with gender identity.[5] This overreach, if replicated in Agency responses to E.O. 13988, will work great harm to women's ongoing efforts to end sex discrimination and achieve equal protection under the law.

This white paper offers a feminist analysis of the Executive Order's scope, directives, and potential impacts. To this end, we provide analysis and arguments useful for commenting to most federal agencies. If the legal and factual arguments made here are given serious consideration by Agency officials in the process of implementing E.O. 13988, then existing statutory protections against sex discrimination can not only be maintained but can be strengthened through application of *Bostock* and incorporation of LGBT protections. However, if the misapplication of *Bostock*'s holding continues, women's rights to equality, safety, privacy, and bodily autonomy are at risk of being substantially eroded if not destroyed in many areas.

As one example, we have made a detailed analysis of the potential impact of the Executive Order on women prisoners.[6] This analysis demonstrates the severe conflicts which can be expected if E.O. 13988 is implemented without due consideration for women's rights and the relevant differences between sex and gender identity. It illustrates the complexity and scope of the issues that will be encountered within each administering Agency. It also highlights the opportunity for implementing Agencies to notice and address gaps in protections against sex-based discrimination and violence. Our analysis shows that simply adding the new forms of discrimination to existing regulations is insufficient. Doing so displaces sex-based protections for women and is already having disastrous effects. Agencies can, and should, take this opportunity to extend civil rights protections to LGBT persons while also revising guidance and regulations to strengthen the rights of women and girls.

In order to appreciate the full scope and effect of challenges to women's rights, it is necessary to understand the historic and ongoing sexed subordination of women. Appendix B. "Women's Sexed Status in U.S. History, Custom, Law and Economics", provides a historical overview of women's subordination in the United States that situates current challenges to women's rights within a history of gains followed by backlash.

Individuals and organizations are encouraged to use the information, arguments, and contact information in this resource to develop timely comments for submission to relevant federal agencies and officials.

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[5] *Adams v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020). In contrast, the Sixth Circuit recently stated that "Title VII differs from Title IX in important respects: For example, under Title IX, universities must consider sex in allocating athletic scholarships, 34 C.F.R. § 106.37(c), and may take it into account in 'maintaining separate living facilities for the different sexes.' 20 U.S.C. § 1686. Thus, it does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Meriweather v. Hartop, et al.*, Case No. 20-3289, p. 20 n4 (6th Cir. Mar. 26, 2021). This is an important distinction that should not be overlooked by implementing Agencies.

[6] Appendix A, "Implications for Female Prisoners of Executive Order 13988".

This white paper is organized into the following sections:

- Explanation of Executive Order 13988
- Analysis of *Bostock v. Clayton Co., Georgia*
- Analysis of Agency application of E.O. 13988 consistent with existing law
- Suggestions for influencing application of E.O. 13988
- Contact Information
- Conclusion

Additionally, we provide links to supplemental documents which provide a specific analysis of E.O. 13988's effect on female prisoners, historical and factual analysis to support our position, and a draft letter to adapt for use with relevant Federal agencies.

- Appendix A: "Implications for Female Prisoners of Executive Order 13988"
- Appendix B: "Women's Sexed Status in U.S. History, Custom, Law and Economics"
- Appendix C: Draft Agency Letter

EXECUTIVE ORDER 13988

On January 20, 2021, President Biden issued the "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation" ("E.O. 13988"). Executive Order 13988 consists of four sections:

Section 1. Policy

Section 2. Enforcing Prohibitions on Sex Discrimination on the Basis of Gender Identity or Sexual Orientation

Section 3. Definitions

Section 4. General Provisions

I. Section 1: Policy

A. Declaration of Policy

President Biden declares that it is the policy of his Administration "to prevent and combat discrimination on the basis of gender identity or sexual orientation, to fully enforce Title VII and

other laws that prohibit discrimination on the basis of gender identity or sexual orientation" and to "address overlapping forms of discrimination". E.O. 13988 specifically identifies race and disability as "overlapping" sites of discrimination stating that, for example, "...transgender Black Americans face unconscionably high levels of workplace discrimination, homelessness, and violence, including fatal violence".

President Biden targets education (inclusive of restrooms, locker rooms, and sports), employment, healthcare, and housing as sites for application of the policy. E.O. 13988 concludes that "[a]ll persons should receive equal treatment under the law, no matter their gender identity or sexual orientation".

B. Legal Support for the Policy Declaration

President Biden finds support for his policy declaration in the Constitution's equal protection guarantee and in Federal anti-discrimination statutes. He locates statutory protections for LGBT persons in Title VII, 42 U.S.C. 2000e *et seq.*, which prohibits discrimination on the basis of race, color, religion, sex, or national origin in workplaces, labor organizations, and employment agencies. But because neither transgender status nor sexual orientation is within the text of Title VII, additional authority is required to bring such persons within its scope. This authority is provided by the 2020 U.S. Supreme Court opinion of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), in which, E.O. 13988 states, "the Supreme Court held that Title VII's prohibition on discrimination 'because of . . . sex' covers discrimination on the basis of gender identity and sexual orientation."[7]

E.O. 13988 goes beyond the narrow holding in *Bostock*, and directs extension of *Bostock*'s "reasoning" to other Federal statutes, directing that: "[u]nder Bostock's reasoning, laws that prohibit sex discrimination…prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary." President Biden specifically identifies the following statutes "along with their respective implementing regulations" (*i.e.*, the Code of Federal Regulations applicable to each statute):

- Title IX of the Education Amendments of 1972, as amended (20 U.S.C. § 1681 *et seq.*), which prohibits sex discrimination in educational programs, including sports and facilities, which receive Federal funding;

- The Fair Housing Act, as amended (42 U.S.C. § 3601 *et seq.*), which prohibits housing discrimination on the basis of "race, color, religion, sex, familial status, or national origin"; and

- Section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. § 1522), which provides programs for resettling and assisting refugees and requires that such

[7] This statement of *Bostock*'s holding is not accurate, as *Bostock* extends protection to "transgender status", not "gender identity". *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020) ("An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.").

assistance be provided "without regard to race, religion, nationality, sex, or political opinion".

Although E.O. 13988 does not specifically identify other statutes, its direction for review and revision encompasses the implementing regulations of all statutes addressing sex discrimination. For example, it will undoubtedly be used to affect implementation of the Prison Rape Elimination Act, 34 U.S.C. § 303, which does not address sex discrimination but does direct consideration of transgender status and sexual orientation in deciding where to house prisoners.

II. Section 2. Enforcing Prohibitions On Sex Discrimination On The Basis Of Gender Identity Or Sexual Orientation

To effectuate the policy goals of E.O. 13988, the heads of Federal Agencies are directed to undertake a broad regulatory review followed by a plan of action to rewrite, amend, or rescind existing regulations, etc. that are not consistent with E.O. 13988.

A. Agency Review

The head of each Agency is directed to review, in consultation with the Attorney General, "all existing orders, regulations, guidance documents, policies, programs, or other agency actions" ("agency actions") that are "promulgated or are administered by the agency" under any statute or regulation that prohibits sex discrimination and which "are or may be inconsistent with" E.O. 13988's policy. Once the review is completed, the Agency head is to "consider" whether to "revise, suspend, or rescind such agency actions, or promulgate new agency actions" as "necessary to fully implement statutes that prohibit sex discrimination and the policy set forth" in E.O. 13988. The Agency head is to take such actions "consistent with applicable law, including the Administrative Procedure Act (5 U.S.C. § 551 *et seq*.)".

Each Agency head is further to "consider whether there are additional actions that the agency should take to ensure that it is fully implementing" E.O. 13988. Each Agency head is also directed to account for and take "appropriate steps to combat, overlapping forms of discrimination, such as discrimination on the basis of race or disability".

B. Plan Development

By April 30, 2021, each Agency head, in consultation with the Attorney General, is to develop "a plan to carry out" the revisions, suspensions, rescissions, promulgation of new rules, or other actions identified by the Agency head which are necessary to implement E.O. 13988's anti-discrimination policy.

III. Section 3. Definitions

E.O. 13988 defines Agency pursuant to 44 U.S.C. § 3502(1)[8], excluding independent regulatory agencies, as defined in 44 U.S.C. 3502(5)[9]. The E.O.'s definition of Agency is expansive and covers hundreds of agencies and departments. A list of government agencies and departments can be found here. For our purposes, we can assume Agencies relevant to feminist concerns are taking actions in accordance with this order, including the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, Department of Education, United States Citizenship and Immigration Services, Immigration and Customs Enforcement, the Bureau of Prisons, and the Department of Health and Human Services.

IV. Section 4. General Provisions

E.O. 13988 concludes with general provisions as to the scope of its authority. It does not impair or affect Agency authority granted by law or the functions of the Director of the Office of Management and Budget regarding budgetary, administrative or legislative proposals. It directs that the E.O. shall be implemented "consistent with applicable law and subject to the availability of appropriations" and states that it does not create any legally enforceable right against the United States.

BOSTOCK v. CLAYTON COUNTY, GEORGIA

Because E.O. 13988 relies heavily on the Supreme Court's reasoning in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), for its authority, it is necessary to look closely at *Bostock* itself and the basis for, and the scope of, its holding. *Bostock v. Clayton Co. Ga, et al.*, was a trio of

[8] 44 U.S.C. § 3502(1) defines an agency as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency". It specifically excludes the Government Accountability Office, the Federal Election Commission, "the government of the District of Columbia and of the territories and possessions of the United States", and "Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities."

[9] 44 U.S.C. § 3502(5) defines "independent regulatory agency" as: "the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency, and any other similar agency designated by statute as a Federal independent regulatory agency or commission[.]"

cases that elevated the issues of gay and transgender rights to the Supreme Court. In these cases, plaintiffs alleged that they had been terminated from employment because of gender identity, one case, or sexual orientation, two cases. In a narrowly-written opinion, the Court held that firing an employee because of his or her sexual orientation or transgender status is prohibited sex discrimination within the purview of Title VII.

In reaching this decision, the Court declined to take up the position, advocated for by some, that "sex", as used in Title VII, is synonymous with gender identity.[10] While this position was vigorously debated by litigants and amici, the Court found the debate extraneous to the question before it, stating that "nothing in our approach to these cases turns on the outcome of the parties' debate".[11] The Court "proceed[ed] on the assumption that 'sex'...referr[ed] only to biological distinctions between male and female."[12] The Court further stated its agreement "that homosexuality and transgender status are distinct concepts from sex."[13]

Importantly for purposes of this white paper and correct implementation of E.O. 13988 across Federal statutes, *Bostock* relies explicitly on biological sex for its expansion of Title VII employment protections to LGBT persons. The touchstone for the Court is neither the gender identity nor the sexual orientation of the litigant: rather it is the sex of the litigant. *Bostock* implicitly recognizes that "biological distinctions between male and female" are necessary to the coherent construction and understanding of both sexual orientation and transgender identity. And *Bostock*'s reasoning explicitly holds that legal recognition of sexual orientation and transgender status under Title VII is premised on the biological sex of the litigants. Neither sexual orientation nor transgender status could be brought into coherent legal existence without first acknowledging "biological distinctions between male and female." Federal civil rights protections for LGBT persons were created through recognition of their biological sex.

Having set the terms of the debate, the Court then held that it was impossible to fire someone for being homosexual or transgender and not refer to their sex. According to the Court, "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[14] To discriminate against employees because of their transgender status or sexual orientation "requires an employer to

[10] Title VII states, in relevant part, that **"**It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex". 42 U.S.C. § 2000e-2(a)(1).

[11] 140 S.Ct. at 1739.

[12] *Id*.

[13] *Id*. at 1746-47.

[14] *Id*. at 1737.

intentionally treat individual employees differently because of their sex," which Title VII explicitly prohibits.[15]

In reaching this holding, the Court compared an employer's hypothetical treatment of two employees, one a man and one a woman, who are both attracted to men. If the employer fires the male employee because he is attracted to men, it "discriminates against him for traits or actions it tolerates in his female colleague."[16] The Court similarly posits a situation in which a male employee with a transgender identity is terminated when a female employee is not. "[T]he employer intentionally penalizes a person identified as male at birth [who now identifies as a woman] for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."[17]

In accord with *Bostock*'s reasoning, transgender status and sexual orientation are "sex-plus" characteristics, *i.e.*, when an employer discriminates against an employee because of their sex plus another factor, such as age, or having minor children. *Bostock* explicitly relies upon the sex-plus holding of *Phillips v. Martin Marietta Corp*. 400 U.S. 542 (1971). There, the Court held that an employer's refusal to hire women with preschool-aged children, while hiring men with preschool-aged children, was sex discrimination. This was true even though a majority of applicants hired were women. The Court found that discrimination based on sex "plus" caregiving status was sex discrimination under Title VII. After *Bostock*, so too with transgender status and sexual orientation. The sex of the litigant neither disappears nor loses importance by the addition of caregiving status or transgender status. Rather, sex remains the relevant factor even if transgender status or sexual orientation is the employer's claimed motivation. Just as in *Phillips*, "it has no significance [to *Bostock*] if another factor—such as the sex the plaintiff is attracted to or presents as—might also be at work, or even play a more important role in the employer's decision."[18] Neither transgender status nor sexual orientation replaces Title VII's sex categories, which remain undisturbed. As *Bostock* recognizes, LGBT persons are within Title VII's sex classification and discrimination against them is recognized and redressed as sex discrimination. In other words, sex is not conflated with, changed by, or subsumed into, any person's transgender status or gender identity.

Moreover, transgender status and sexual orientation are both "sex-plus" categories that can only be understood with biological sex held constant. The nouns we use to refer to sex and social gender are, perhaps unfortunately, the same. But *Bostock* should not be interpreted to conflate sex, a biological constant, with gender identity, an individual's evolving expression of personal identity. While *Bostock* uses the term "identify" to describe both sex and gender ("identified at birth" and "identifies as" later in life), this does not mean that the later act of self-identification erases the first act of biological classification as a matter of fact. It should not do so as a matter of law, either. Because sex matters. Sex matters in a number of contexts directly because of physical

[15] *Id*. at 1742.

[16] *Id*. at 1741.

[17] *Id*.

[18] *Id*. at 1744.

differences and also matters to the social, cultural, political and legal work of undoing systemic sex-based discrimination, *i.e.*, the relative status of advantage and disadvantage accorded to male and female persons. For this reason, transgender status as a personal affirmation of self-understanding and expression needs to be understood as separate from sex, worthy of recognition in its own right but not displacing sex classification.

Significantly, the term "gender identity" appears only once in the *Bostock* opinion and only to describe the arguments presented by the plaintiffs.[19] In contrast, the terms "transgender" and "transgender status" are used nearly fifty times. The *Bostock* holding rests entirely on "transgender status". The Court's failure to make liberal use of "gender identity" was plainly intentional. By relying exclusively on "transgender status" *Bostock* signaled a departure from a growing trend and, in doing so, refused to endorse both existing and proposed statutory schemes that allow "gender identity" to either override sex or subsume sex as a subcategory of gender identity.

Just as *Bostock* rejected use of the expansive term "gender identity", it also deliberately confined its holding to the facts as presented to it: allegations that the litigants were terminated from employment because they were transgender or homosexual. The Court identified many socially and legally contentious issues surrounding transgender rights advocacy, but declined to address those issues and further declined to extend *Bostock*'s holding to other statutes or employment situations.

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say, sex segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex."[20]

Many people across the political spectrum are concerned by conflicts between transgender rights advocacy and civil rights protections for women and girls. The Court clearly anticipates that such conflicts will result in further litigation: "[w]hether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these."[21]

The issue at the heart of the conflicts the *Bostock* Court saves for a later day is whether employers, landlords, prisons, refuges, schools, gyms, or other public accommodations can treat

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[19] "The employees counter by submitting that, even in 1964, the term [sex] bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation." *Id*. at 1739.

[20] *Id*.at 1753.

[21] *Id*.

transgender-identified persons in accordance with their biological sex when that sex is contrary to their self-identity. As the Court alludes to, there are times and situations when sex matters. Sex matters when privacy is at issue.[22] It matters in sports.[23] It matters when confining or managing individuals in prisons[24] or sheltering them in emergency or temporary housing. Sex may be a *bona fide* occupational qualification in employment.[25]

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[22] "Inmate privacy encompasses the inmate's 'interest in not being viewed unclothed by members of the opposite sex'—an interest that 'survives incarceration' despite prisoners' diminished privacy expectations. In the same vein, inmates have a privacy interest in having non-emergency strip and pat searches—a pervasive fact of prison life—performed by guards of the same sex." *Teamsters Local Union No. 117 v. Wash. Dep't of Corr.*, 789 F.3d 979, 990 (9th Cir. 2015).

"Without question, permitting educational institutions to provide separate housing to male and female students, and separate educational instruction concerning human sexuality, was to protect students' personal privacy, or discussion of their personal privacy, while in the presence of members of the opposite biological sex." *Texas v. United States*, 201 F. Supp. 3d 810, 833 (N.D. Tex. 2016).

"When, however, a gender classification *is justified* by acknowledged differences, identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender. The point is illustrated by society's undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different." *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993).

"Admitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996).

[23] 34 C.F.R. § 106.41(b) schools "may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."

10 U.S.C. § 4342 provides that academic and other standards for women admitted to the Military, Naval, and Air Force Academies "shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals".

[24] "State prisons have long segregated prisoners by gender for legitimate and obvious security reasons. This segregation is substantially related to an important government objective, that is, the safety of the prisoners." *Fernandez v. California*, No. 2:10-cv-3198 KJN P, 2012 U.S. Dist. LEXIS 52609, at *3 (E.D. Cal. Apr. 11, 2012).

"It is beyond controversy that male and female prisoners may lawfully be segregated into separate institutions within a prison system. Gender-based prisoner segregation and segregation based upon prisoners' security levels are common and necessary practices." *Klinger v. Dep't of Corr.*, 107 F.3d 609, 615 (8th Cir. 1997).

[25] *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977); *Everson v. Mich. Dep't of Corr.*, 391 F.3d 737, 753 (6th Cir. 2004) ("Viewed in proper perspective, the exclusion of males from these

There is nothing in *Bostock* to suggest that extension of civil rights protections to LGBT persons has changed the body of sex equality law, on which *Bostock* depends, by replacing sex with gender identity. Rather, *Bostock*'s reliance on sex as the protected characteristic strongly suggests that where sex matters for purpose of sex equality law, it will still matter, transgender identity notwithstanding. Precedents which allow single-sex housing, bathrooms, changing rooms, sports, and job classifications are not implicated or affected by *Bostock*'s holding or its reasoning. As the Court stated, call it what you will, discrimination on the basis of transgender status is sex-based discrimination. And where the law allows distinctions to be drawn on the basis of sex, it is sex, not identity, that is, and should remain, the relevant determinant.[26] *Bostock* does not replace sex with gender identity. Nor should E.O. 13988.

The narrowness of *Bostock*'s holding, its explicit grounding in biological sex, and its refusal to consider expansion of its holding to other statutes argues for a measured approach to enforcement of E.O. 13988. In expanding the reach of *Bostock*, the Agencies acting at its behest are obligated to recognize that sex, and sex discrimination, are at the center of *Bostock*'s reasoning. They should not replace sex with gender identity, and protections for transgender persons should not be permitted to destroy or impinge upon sex-based protections for women and girls. *Bostock* neither replaces sex with gender identity, nor does it mandate sex-blind policies--fidelity to *Bostock*'s reasoning should not do so either.

AGENCY APPLICATION OF THE EXECUTIVE ORDER MUST COMPLY WITH EXISTING LAW

I. E.O. 13988 Contains Self-Limiting Language

The Executive Order explicitly recognizes that extension of *Bostock*'s proscription on discrimination against LGBT persons must comply with existing law. E.O. 13988 includes self-limiting language: "Under Bostock's reasoning, laws that prohibit sex discrimination…prohibit discrimination on the basis of gender identity or sexual orientation, *so long as the laws do not contain sufficient indications to the contrary*." (emphasis added) Additionally, Section 4(b) of E.O. 13988 states that it "*shall be implemented consistent with applicable law*". (emphasis added) Far

positions is 'reasonably necessary' to 'the normal operation' of the MDOC's female facilities. The MDOC reasonably concluded that a BFOQ would materially advance a constellation of interests related to the 'essence' of the MDOC's business--the security of the prison, the safety of inmates, and the protection of the privacy rights of inmates--and reasonable alternatives to the plan have not been identified.").

[26] Ontologically and experientially, transgender identity itself requires sex to be understood as a constant against which a person's self-identification can be understood as transgender. As such, gender identity is already distinct from sex and should legally be understood as such. Sex should not be legally or functionally replaced with gender identity in the body of sex discrimination law.

from being mere boilerplate, this language militates against any interpretation that Agencies can or should go beyond existing law to effectuate the policy of E.O. 13988.

Our reading of *Bostock* suggests that where statutory or regulatory schemes recognize and enforce sex-based classifications as important for effectuating privacy, sex equality, and/or safety interests, those statutes contain "sufficient indications" that differentiating on the basis of sex irrespective of gender identity is allowed. That is, single-sex accommodations or distinctions currently allowed by law remain "applicable law" limiting the scope and application of E.O. 13988. For example, Title VII's *bona fide* occupational qualification allows employers to hire or employ people on the basis of their sex if "sex...is a *bona fide* occupational qualification for employment."[27] Accordingly, prisons have been permitted to employ female guards in contact positions within female prisons in order to protect female inmates from sexual misconduct by male deputies, maintain jail security, and protect inmate privacy. These considerations are all reasonably necessary to the essence of prison administration.[28] Single-sex prisons are constitutionally allowed for security reasons,[29] which include the safety of women prisoners.[30] These allowances are based on the understanding and reality that sometimes sex matters. They are meant to ensure substantive equality for women and girls who face discrimination and violence because of their sex. E.O. 13988 disallows substituting either gender identity or transgender status in place of sex in such allowances because doing so would be inconsistent with statutory language, intent, and other applicable law.

This self-limiting language provides further support for continuing to give full effect to existing statutory provisions and long-standing regulatory schemes that provide affirmative measures to uphold the substantive equality of women and girls. Nowhere is it stated or implied in E.O. 13988 or in *Bostock* that the intent or necessary effect of extending civil rights protections to LGBT persons is to reduce existing sex discrimination protections for women. Application of E.O. 13988 should be mindful of both its language and the body of sex equality law that provides single-sex spaces and allowances.

II. An Overly Broad Interpretation of E.O. 13988 Risks Overreach and Legal Challenge

A broad interpretation of E.O. 13988 at odds with *Bostock* and existing sex equality law risks overreach and legal challenge. An Executive Order interprets but does not make law. An Executive Order which exceeds authorizing law, *i.e.*, an Act of Congress or the Constitution, is considered to have been issued outside the scope of executive authority and is termed "ultra vires" ("outside the powers").[31] Agencies should use care not to extend the reach of E.O. 13988 beyond

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[27] 42 USC § 2000e-3(b).

[28] *Teamsters Local Union No. 117 v. Wash. Dep't of Corr.*, 789 F.3d 979, 990 (9th Cir. 2015).

[29] *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994) ("prisons have special security concerns that other educational institutions do not, and that the genders are segregated for security reasons").

[30] *Richards v. Snyder*, No. 1:14-cv-84, 2015 U.S. Dist. LEXIS 76061, at *29 (W.D. Mich. June 12, 2015) ("Obviously, the decision to house women at different facilities than men is rationally related to the government's interest in protecting the safety of its female prisoners").

[31] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863 (1952).

the bounds of existing law. As discussed above, the *Bostock* holding prohibits discrimination on the basis of transgender status, not gender identity. Yet E.O. 13988 erroneously instructs Agencies to revise rules and regulations to prohibit discrimination on the basis of "gender identity". While the E.O. does not define "gender identity", its use of this term signals a concerning overreach given how the term is defined elsewhere to override sex.

The *Bostock* Court significantly chose the term "transgender status" rather than "gender identity" to describe the protection *Bostock* requires. Though neither phrase is well-defined, "gender identity" is the term most commonly incorporated into state anti-discrimination statutes to protect transgender people. More than twenty states currently provide some form of anti-discrimination protection on the basis of "gender identity".[32] These are important civil rights protections, but most states' statutory schemes suffer a pernicious flaw: "gender identity" is positioned as a direct legal replacement for sex and must be recognized *regardless* of sex.[33] The hierarchy of dominance created by "gender identity" statutes is replicated in the proposed Federal Equality Act in which "gender identity" has been inserted as a required proxy for sex even when single sex classifications are legally permissible—including in Title IX's allowance for single-sex sports, housing, and changing facilities.[34] In short, single-sex spaces and accommodations cease to exist. In line with these problematic constructions of "gender identity", E.O. 13988 strongly and erroneously suggests that access to single-*sex* spaces should be governed not by sex, but by the undefined term "gender identity." These instructions represent both a misreading and misapplication of the *Bostock* holding.

We support application of E.O. 13988 consistent with *Bostock*'s actual reasoning. For the first time in U.S. history, lesbians, gay men, bisexual persons, and transgender persons will receive federal antidiscrimination protection. As a result, the rights of people with same-sex sexual orientations and transgender status are protected in such important areas of life as education, housing, and health. Feminists celebrate this advancement of human rights in the U.S. However, we do not support an interpretation of E.O. 13988 that would, effectively, replace sex with gender identity by conflating the two. There is a significant risk that Agencies, in their zeal to address transgender discrimination, will err by conflating gender identity (or transgender status) and sex. There is no authority in E.O. 13988, nor in existing law, which requires or allows such conflation. As the Supreme Court stated in *Bostock*, "two causal factors may be in play -- both the individual's sex and something else (the sex to which the individual is attracted or with which the individual

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[32] Movement Advancement Project https://www.lgbtmap.org/equality-maps/non_discrimination_laws

[33] As an example, see Iowa Code § 216.2(10), which defines "gender identity" as "a gender related identity, appearance, expression, or behavior of a person, regardless of the person's assigned sex at birth."

[34] The proposed Equality Act would amend Title VII's BFOQ by equating sex and gender identity and requiring that when "sex is a *bona fide* occupational qualification, individuals are recognized as qualified in accordance with their gender identity." H.R. 5 § 7(c)(2) - Employment (117th Cong. 2021). It would also amend multiple statutes, including Title VII and Title IX, which currently allow for single-sex accommodations, by replacing sex with gender identity: "an individual shall not be denied access to a shared facility, including a restroom, a locker room, and a dressing room, that is in accordance with the individual's gender identity." H.R. 5 § 9(2) (117th Cong. 2021).

identifies). But Title VII doesn't care."[35] Sex remains the necessary causal factor for anti-discrimination law. Failure to recognize this fundamental precept, and acting outside the scope of sex discrimination laws, puts civil rights protections for women and protections for transgender persons in conflict.

For example, a prison administration might seek to maintain its policy of assigning female guards to contact positions in women's prisons, and male guards in men's prisons, as a sex-based BFOQ under Title VII.[36] The law currently allows such sex-based BFOQs for multiple reasons, including the privacy and safety of inmates, the safety of guards, and maintenance of prison security. These are sex-based considerations that do not change with an assertion of gender identity. From a feminist perspective, conflation of the guards' sex with their gender identity fails to protect the privacy and safety interests of the female inmates. Recognition of the guards as male appropriately balances the Title VII interests of the guards under the BFOQ standard and the constitutional privacy interests of the female inmates (a balancing that has been repeatedly done and supported in case law). To accept the claim that a person's self-stated identification requires, or even allows, redefinition of that person's sex is to deny women—the class of female persons historically and presently oppressed because of their sex—any opportunity for adjudication of their legitimate rights and interests in bodily privacy and safety from persons whose sex is male regardless of their gender identity.

Conflation of sex with gender identity also renders sex-related data unreliable and misleading. Data collection on transgender persons as a class and women as a class that does not distinguish between the two forms of discrimination prevents distinct collection of data on women with respect to both their experience of sex-based disadvantage compared with men and their experiences and needs in contexts where their sex is directly of concern. This can be harmful in a medical context for individual transgender persons as well as for women, and result in an inability to study women's medical problems with any degree of accuracy. It also renders unreliable statistics on matters of great concern to women, such as rape and domestic violence and the pay gap between men and women with compounding impact on women who are multiply impacted by discrimination based on race and/or disability as well as sex.

Potential conflicts arising between diverse forms of discrimination that have been brought under the umbrella of sex-based discrimination should be accounted for in all agency reviews of current law, and care must be taken to resolve them fairly in compliance with existing law. *If* Agencies show awareness of this likelihood and review any proposed changes with a view toward minimizing these conflicts, they can also minimize the chance of a successful legal challenge based on impingement of women's existing rights from the outset.

III. Agencies Must Address Sex as an "Overlapping" Form of Discrimination

Other provisions of E.O. 13988 also limit its application. The E.O. states that "[i]t is also the policy of [the Biden] Administration to address overlapping forms of discrimination." The two

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[35] *Bostock,* 140 S.Ct. at 1742.

[36] *Dothard v. Rawlinson*, 433 U.S. 321, 335-36 (1977); *Teamsters Local Union No. 117 v. Wash. Dep't of Corr.*, 789 F.3d 979, 990 (9th Cir. 2015).

grounds explicitly mentioned are race and disability. Sex is not explicitly recognized as a grounds of potentially overlapping discrimination or oppression. But it should be. Sex is historically and currently a major axis of oppression for over half of the world's population.[37] While E.O. 13998 directs Agencies to incorporate LGBT protections into sex discrimination laws, it is imperative that sex not be displaced by, or subsumed into, the new categories. Agencies must be cognizant of the intersectionality of sex when making recommendations—or not making recommendations—for policy change. Consideration of overlapping classes requires considering all the constituent overlaps: race, disability, ethnicity, sexual orientation, gender identity—and sex. These categories intersect one another without displacing any of them.

Lesbian existence, for example, is itself a site of overlapping oppressions which must be understood and navigated to realize the full promise of E.O. 13988. "It is important in particular that lesbians not be used as a wedge and that our own intersectional identity as lesbians, along with other intersectional identities we may have, remains intact. We do not need or want 'protection' from religious fundamentalists, we do not want to be used against transgender persons, and we do not want our identity as lesbians or our hard-won spaces where we can come together as lesbians expropriated by male persons whether they sincerely claim to identify as women and lesbians or whether they are simply taking advantage of transgender advocacy to bully and sexually harass us."[38] Agencies must take full account of these potential conflicts within their plans.

HOW TO INFLUENCE IMPLEMENTATION OF E.O. 13988

I. Contact Agency Heads

E.O. 13988 does not itself rescind any law or rule. But its broad mandate to review and develop enforcement plans for existing programs and policies will result in updated guidance, enforcement priorities, and rules implementing laws prohibiting sex discrimination. Internal rules, hiring policies, and personnel policies can (and likely will) be changed without notice or hearing. For example, the EEOC or the Department of Education (if they have not done so) may update their non-discrimination policies to reflect non-discrimination in hiring on the basis of gender identity and sexual orientation. And they will likely start collecting and investigating complaints of discrimination on the basis of sexual orientation or gender identity.

Activists can, and should, try to influence this review process by contacting the White House, the Attorney General, the Agency heads, and representatives in Congress. It is imperative that Federal officials be educated on, and cautioned against, conflating sex and gender identity to the detriment of women's sex-based rights.

[37] *See* Appendix B: "Women's Sexed Status in U.S. History, Custom, Law and Economics".

[38] Tina Minkowitz, Submission to the UN Expert on Sexual Orientation and Gender Identity.

Comments or Petitions submitted to agency heads preparing Plans should be submitted as soon as possible so that they may be considered before April 30, 2021, when the Plans must be submitted after consultation with the Attorney General.

II. Participate in Comment Periods

After the Attorney General-approved Plans have been developed, E.O. 13988 explicitly invokes the formal rule-making process of the Administrative Procedure Act ("APA"), directing Agencies to take actions "consistent with applicable law, including the Administrative Procedure Act (5 U.S.C. § 551 *et seq*.)". The federal rule-making process mandated by the APA does not apply to internal policies. However, any changes to the Code of Federal Regulations (the "CFR") must go through the APA process, which will likely take several months after the April 30th deadline in E.O. 13988. The CFR are the implementing and enforcement regulations for Federal statutes. Written by the administering Agencies, they provide direction, guidance, and instruction for enforcement of Federal statutes, including statutes which prohibit sex discrimination such as Title VII (29 C.F.R. § 1600 *et seq*.) and Title IX (34 C.F.R. § 100 *et seq*). These CFRs are the "implementing regulations" referred to in E.O. 13988. Accordingly, President Biden is instructing his Agency heads to consider and propose changes to the CFRs regarding sex discrimination.

Before such changes are made, the APA requires that notices of proposed and final rulemaking be published in the Federal Register and that the public be given the opportunity to comment on notices of proposed rulemaking. 5 U.S.C. § 553(b). Comments may be formal or informal and should be submitted as soon as possible after notice of the comment period is made public. This could occur as early as May 2021. Engaging this comment process is imperative because the CFRs control how sex-discrimination statutes are going to be enforced going forward.

For example, 29 C.F.R. § 1606.2 states that "Title VII...protects individuals against employment discrimination on the basis of race, color, religion, sex or national origin." This language will likely be updated to reflect the addition of sexual orientation and gender identity. How such protections will be added and interpreted is the key. That is, will these new categories be added as separate bases of discrimination, as subsets of sex discrimination, or in some way displace sex as a protected characteristic? Will these new categories be defined? Will "gender identity" be distinguished from "transgender status"? These are all questions the implementing agencies, guided by consultation with the Attorney General, should be considering.

For another example, the Title IX CFRs currently permit single-sex sports teams, change rooms, housing and other accommodations. 34 C.F.R. § 106.32; 34 C.F.R. § 106.41. During President Obama's presidency, the Office of Civil Rights issued what was known as a "Dear Colleague" letter stating that, for purposes of Title IX enforcement, sex and gender identity were to be treated as the same thing. Accordingly, schools across the country began allowing boys to play on girls' sports teams and access girls' locker rooms—over the objections of girls on the teams and in the locker rooms. The Obama letter was rescinded by the Trump Administration. But the terms of E.O. 13988 make clear that the Biden Administration is seeking to codify the "Dear Colleague" letter in the Title IX CFRs. While the "Dear Colleague" letter was merely advisory, a revised CFR would have the enforcement authority of the Federal Government behind it.

III. Framing comments

When submitting comments to Agencies and officials, it is helpful to show how a comment is supported by the language of either *Bostock* or E.O. 13988. It is important because any Agency changes must conform to the reasoning of the *Bostock* case, as it is the primary authority relied upon in E.O. 13988. Comments may fall generally into the following categories of arguments that can be used to support or oppose a proposed rule or other application of E.O. 13988:

1. The reasoning and holding of the *Bostock* decision does not allow gender identity or transgender status to override sex.

2. Single-sex classifications, where legally permitted by statute or regulation, are already narrowly drawn. They are well supported by women's long established interests in privacy, safety, equality, and bodily autonomy.

3. Per E.O. 13988, the existing law or regulation contains "sufficient indications to the contrary" of changes the Agency is recommending and therefore such changes are not authorized. The proposed agency implementation is overbroad and must be more narrowly drawn to minimize inconsistencies with existing law.

   For example, Title IX contains legally permissible single-sex classifications that may represent "sufficient indications to the contrary" against conflating sex with gender identity. It permits schools to maintain single-sex admissions policies, 20 U.S.C. § 1681(a)(1), single sex housing, 34 C.F.R. § 106.32(b), athletic scholarships, 34 C.F.R. § 106.37(c), gym and health classes, 34 C.F.R. § 106.34(b), sports teams, 34 C.F.R. § 106.41(b), and locker rooms and bathrooms, 34 C.F.R. § 106.33. Title IX also allows schools to take account of sex when hiring employees to work in locker rooms or toilet facilities. 34 C.F.R. § 106.61.

   Title VII also contains "sufficient indications to the contrary" against conflating sex with gender identity where sex is a bona fide occupational qualification for employment purposes, 42 USC § 2000e-3(b).

4. Per E.O. 13988, Agency heads must take overlapping forms of discrimination into account when proposing regulatory changes to include LGBT protections. Crucially, sex is an overlapping discrimination which must be recognized and accounted for.

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CONCLUSION

Sex matters. It has mattered in countless ways throughout the history of this country, and sex inequality continues to afflict the lives of women. This white paper is necessary to clarify and correct the now-prevalent confusion of sex and gender identity. This confusion, replicated in statutes and proposed legislation, undermines the rights of women and girls. It reinforces the deep-seated cultural bias to disregard the rights of women and the wrongs done to women because of sex. Sex is the foundational form of discrimination recognized and addressed by the *Bostock* decision. A misreading of *Bostock* or a misapplication of Executive Order 13988 conflating sex and gender identity would effectively displace sex as a category of civil rights protection. Sex matters in reality and in law. That should not be changed by Agency action.

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.[1] 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.[2] 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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[1] "[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.

[2] *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,[3] 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.[4]

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

[3] *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."

[4] 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.[5] 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.[6] 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."[7]

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.[8] "[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."[9] 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."[10] And in April 2020, the Department of Justice released a report about sexual violence against female inmates in New

[5] *Harris v. Miller*, 818 F.3d 49, 57 (2nd Cir. 2016) ("we reiterate today that inmates retain a limited right to bodily privacy under the Fourth Amendment").

[6] 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)).

[7] Human Rights Watch, "All Too Familiar Sexual Abuse of Women in U.S. State Prisons".

[8] *Castillo v. Day*, 790 F.3d 1013, 1020 (10th Cir. 2015).

[9] *Hovater v. Robinson*, 1 F.3d 1063, 1068 (10th Cir. 1993).

[10] *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.[11]

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."[12] 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.[13] Accordingly, the Commission Report and

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[11] 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.

[12] *The Prison Rape Elimination Act: Implications for Women and Girls*.

[13] 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.[14]

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)."[15] 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.[16] 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."[17] 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.

[14] Human Rights Watch, "All Too Familiar Sexual Abuse of Women in U.S. State Prisons".

[15] "National Prison Rape Elimination Commission Report"at p. 73.

[16] *Id*. p. 17.

[17] *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 trangender 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."[18] 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."[19] "Even though women account for less than 10 percent of inmates, their reports account for three

[18] Human Rights Watch, "All Too Familiar Sexual Abuse of Women in U.S. State Prisons".

[19] Pecora, Christina, "Female Inmates and Sexual Assault".

quarters of assaults, and almost three-quarters of staff are men."[20] 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.[21] 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.[22] 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."[23] 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

[20] Bozelko, Chandra, "Sexual Violence in Women's Prisons Reaches "Constitutional Proportions." Will Lawmakers Step In?", Ms. Magazine, April 23, 2020.

[21] Prison Rape Commission Report at p. 36.

[22] *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.

[23] *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.[24] 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

[24] *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.

APPENDIX B

Women's Sexed Status in U.S. History, Custom, Law, and Economics

Any attempt to reform the law around sex and gender must address historic injustices against women, the structural subordination of female status, and the pervasiveness of male violence against women, most of which is committed with impunity. These problems predate the formation of the United States and they persist today. In the colonial period, English law and common law encoded colonial women's status as chattel, denying or limiting their rights to property, child custody, work, control their earnings, or choose their domicile. It even foreclosed women's rights over their own bodies. Simultaneously, chattel slavery denied basic human rights to African-Americans while wars of conquest violated the rights of First Nations people. In both instances, rape functioned as a weapon of ethnic as well as sexual subordination.

After 1779, most of these sexed laws were at the state level and overwhelmingly denied women's rights to property, employment, public office, voting, and jury duty. Married women remained subject to the old status of coverture (in the old Norman phrase "woman covered by a man"), losing their names and authority to husbands. Justice Abe Fortas defined coverture in *United States v. Yazell*, as the old common-law fiction that the husband and wife are one, [and] the one is the husband." Under this system, wives were denied standing to act in law or business without the husband's approval (a sexed subordination often referred to as the "legal minority" or even the "legal incapacity of women").[1] In the 20th century, women had to fight, state by state, to retain their birth name after marriage. Until 1937, the government refused to issue passports to a married woman in her own right (she could only be an add-on to her husband's papers: "Mr. John Doe and wife").

Women did not exist in the Constitution, which assumed a masculine default (concurrent with its dehumanization of First Nations and enslaved people). The first mention of sex came with the 14th amendment—which formally debarred women from the vote by declaring that all male citizens over twenty-one years old could vote. (The intended enfranchisement of black men was soon abrogated by Jim Crow laws after Emancipation). Only white men had rights, along with countless privileges they inherited from European common law, social custom, economic practices, and religious doctrine. These men barred women from holding office, attending universities, colleges, and many schools (including public schools[2]). Women were blocked from entire categories of jobs and were held to subordinate positions in the rest. They were paid less than half of men of their class (sometimes much less). These systemic disadvantages were enforced

[1] William Harland Cord, *A Treatise on the Legal and Equitable Rights of Married Women As Well in Respect to Their Property and Persons as to Their Children*. Volume 1, 1885 p. 358; *North Carolina Reports: Cases Argued and Determined in the Supreme Court of North Carolina*. Vol 111, 1892, p. 610.

[2] Boston Latin School was the oldest existing school in the United States. It was established in 1635 as the Latin Grammar School, open to boys of all social classes, and tax-supported. Another prestigious public school, Bronx Science (established in 1938) did not admit girls until 1946.

on the basis of sex, as simultaneously racialized caste operated to subordinate people of color, and women of color faced discrimination along multiple axes.

Women were spatially confined in a multitude of ways (and in many instances, still are). The streets and public places were *de facto* male space, which women entered at risk of harassment. Taverns commonly excluded women. There were no public bathrooms for women. Women were barred from posh restaurants and bars, with signs like "No Unescorted Ladies Will Be Served", and some restaurants had sex-segregated areas from which non-compliant women were ejected. City councils, business associations, and police departments criminalized women who went around unchaperoned. Countless establishments, including rooming houses, threw out women suspected of being "loose" or of selling sex. Women were banned from smoking or wearing pants, and sometimes arrested for doing so.[3] Not until Title IX passed in 1972 was schools' enforcement of skirt-wearing against girls overturned (although states continued to ignore this legal change). These exclusions and coercions were committed on the basis of sex.

In the first half of the 20th century, "morals" police targeted women, especially working class and women of color, under the American Plan", which allowed them to arrest "suspicious" women, which could mean anything from walking down the street to sitting in a restaurant alone, or for no reason at all. They hauled women off the street and took them in for involuntary genital examinations.

> From the 1910s through the 1950s, and in some places into the 1960s and 1970s, tens of thousands—perhaps hundreds of thousands—of American women were detained and forcibly examined for STIs [sexually transmitted infections]. If the women tested positive, U.S. officials locked them away in penal institutions with no due process. While many records of the program have since been lost or destroyed, women's forced internment could range from a few days to many months. Inside these institutions, records show, the women were often injected with mercury and forced to ingest arsenic-based drugs, the most common treatments for syphilis in the early part of the century. If they misbehaved, or if they failed to show "proper" ladylike deference, these women could be beaten, doused with cold water, thrown into solitary confinement—or even sterilized.[4]

This persecution of women began as a campaign to protect soldiers in WWI, but expanded over the decades, supported even by the ACLU and "progressives." In the 60s, forced vaginal exams were still being used against political activists—from 18-year-old anti-war protester Andrea Dworkin in the Women's House of Detention in New York to civil rights activists in Birmingham, Alabama to Black Panther women in Sacramento, "as part of a police harassment campaign."[5]

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[3] In 1960, a New York judge threw Lois Rabinowitz out of traffic court for wearing pants, ordering her to come back in a skirt.

[4] Scott W. Stern, "America's Forgotten Mass Imprisonment of Women Believed to Be Sexually Immoral" July 21, 2019.

[5] Kim Kelly, "A Forgotten War on Women." May 22, 2018, https://newrepublic.com/article/148493/forgotten-war-women

Women were excluded from powerful associations such as the National Press Club (founded 1908, women admitted only in 1971). Harvard's undergraduate Lamont library barred female students until 1967. Universities imposed curfews ("parietal hours") on female students into the 1970s; it was common practice to lock them out of their dorms, thus forcing some to seek refuge in a boyfriend's bedroom. Factory workhouses often did the same and also kicked out women rumored to be sexually active (who thus at a single stroke lost their livelihood and housing). The prestigious Rhodes Scholarship was limited to males until 1977. Columbia University was the last Ivy League school to admit women (in 1983). African American feminist and civil rights activist Pauli Murray referred to this constellation of systemic discrimination against women as "Jane Crow." Still today, women continue to be excluded from powerful all-male academic clubs, professional clubs, golf clubs, and religious organizations.

A woman had little or no recourse if a husband drank or gambled away his earnings, beat her, cheated on her, or deserted her (and their children). Marital rape was legal in all states until the late 20th century. Nebraska was the first state to outlaw it (1975), while Oregon was the first to prosecute a husband for raping his wife (*Oregon v. Rideout*, 1978). It was not until 1993 that marital rape was treated as a crime nationally, and even after criminalization some states continue to treat it as a less serious crime than stranger rape. Divorce was equally fraught for women. Each state had its own rules about how many times a man could physically abuse his spouse before she was allowed to divorce him. Courts favored husbands and blamed wives. Even today, when men contest custody in divorces, courts statistically favor them over mothers, even though women remain the primary caregivers.

Husbands had the right of chastisement, and wives the obligation of obedience. While on the surface this language came to be repudiated in the late 19th century, in practice courts continued to allow wife-battering by asserting a new rationale for it: that the state should not intervene but must protect marital "privacy" and (ignoring the brutalization) promote domestic harmony. In 1868, the North Carolina Supreme Court ruled in *State v. Rhodes* that husbands should not be liable for assault and battery on women, "because the evil of publicity would be greater than the evil involved in the trifles complained of, and because they ought to be left to family government."[6]

Further, courts turned down women who sued husbands for battery and false imprisonment. In 1863, the New York Supreme Court ruled against a woman who won damages from a lower court for spousal assault and battery, claiming that the judgement would "sow the seeds of perpetual domestic discord … [and] offer a bounty or temptation to the wife to seek encroachment upon her husband's property."[7] In 1877, the Supreme Court of Maine ruled against a woman who ''sued her ex-husband in tort, alleging that he violently assaulted her, and for malicious reasons had her forcibly abducted, put in irons, and incarcerated in a mental institution, where she was 'imprisoned as an insane person for a long time against her will and to the great injury of her health and comfort.'" The court ruled that the husband was immune from such suits, again arguing that they could be used against husband's property rights and using the rationale of marital "privacy":

[6] R.B. Siegel, "Wife Beating as Prerogative and Privacy," p. 2154, https://digitalcommons.law.yale.edu/fss_papers/1092/.
[7] *Longendyke v. Longendyke*, 44 Barb. 366, 366-67 (N.Y.Sup. Ct. 1863), in Siegel, 2164.

"it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive."[8]

This denial of legal remedy to abused women extended also to police policies not to arrest or intervene in beatings which, into the 1970s and beyond, they did not view as crimes, but rather as "family problems."[9] Even after legal challenges began to change this picture, male violence remained unchecked. In the early 1990s, "battering of women by husbands, ex-husbands or lovers '[is] the single largest cause of injury to women in the United States." The U.S. Surgeon General stated that "[t]hirty-one percent of all women murdered in America are killed by their husbands, ex-husbands, or lovers."[10]

Justice for women subjected to violence (rape, battery, and femicide) is massively outweighed by the *de facto* impunity of these crimes. Women who defend themselves against batterers, even after enduring decades of abuse, continue to receive much higher sentences than their attackers. The legal bias of "reasonable man" standards works against them as do definitions of "premeditation" that overlook sexed disparities in physical strength and the terror of PTSD survivors who snap after years of abuse. So, the batterer is convicted of manslaughter, while his victim gets slapped with first degree murder; and judges have shown themselves especially punitive toward battered women who finally kill.

Jobs were sex-segregated, with lower pay and status for women (which persists, to a lesser degree, though women of color and mothers continue to face discrimination to a disproportionate degree). Only in 1968 did the Equal Employment Opportunity Commission opine that classifying job ads as "male" and "female" violated Title VII of the Civil Rights Act. Many forms of sex-discrimination were enforced in practice, without any legal basis, by employers and public institutions such as schools, fire departments, and libraries. Female teachers, nurses, and flight attendants were often fired for marrying, for being sexually active, or for pregnancy (until 1978). They were forced to comply with dress codes, age and weight limitations, and other discriminatory rules that punished behavior seen as unremarkable in males. The first equal economic opportunity case under Title VII was a 1971 suit against a company that refused to hire women with children under school age.[11]

Single mothers, especially African-Americans and other women of color, faced coercion from another direction: government agencies. They were denied benefits as part of attempts to control their personal lives and sexual activities and were subjected to intrusive questioning by social workers and forced searches of their homes, looking for "the man under the bed," in efforts to terminate their monthly welfare checks. The state also seized poor women's children, using charges of "neglect" to penalize women working at poverty wages for not being able to afford childcare or sufficient food.[12] Many children were funneled into a foster care system which itself

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[8] *State v. Oliver*, 70 N.C. 60, 61-62 (1874), in Siegel, 2165.
[9] Siegel, 2171.
[10] Siegel, pp. 2118-19.
[11] *Phillips v. Martin Marietta Corp*. 400 U.S. 542 (1971).
[12] This is extensively documented by Louise Armstrong in *Of 'Sluts' And 'Bastards': A Feminist Decodes The Child Welfare Debate*, 1995.

is rife with neglect and sexual abuse (and which has also swept up children of mothers who were imprisoned for crimes of survival).

Marital status and male permission continued to function as controls on women's self-determination and employment. The birth control pill went on the market in 1960 but was denied to unmarried women until 1972, when the Supreme Court struck down a Massachusetts law that penalized giving birth control to single women. Laws against contraception, abortion, and even against sex education limited women's life choices by forcing them to bear and take care of children, greatly curtailing their earning power. Since *Roe v. Wade*, the restoration of women's right to reproductive self-determination has been subjected to death by a thousand cuts, primarily in the states, but also by the Hyde Amendment and other regulations. Religious conservatives have launched numerous challenge cases into the pipeline and the Supreme Court is poised to overturn *Roe* in the not-distant future.

The law of coverture persisted in custom even after its legal basis had eroded. Until 1974, banks did not allow women to open bank accounts, apply for loans, or get credit cards under their own name (even when they owned or earned more than their husbands). A male co-signer was required and the same applied to buying a car or house (for which women, as also people of color in general, are statistically overcharged).

Women had long been prohibited from serving on juries (and so never got a jury of their peers as the Constitution promised). The dates when this ban was overturned vary by state; Utah, 1879, was the first, but only in 1975 did all states allow women to be jurors (and women of color still faced multiple barriers). Women were not formally admitted to the U.S. military until the Women's Army Corps was established in 1948. The first woman did not enter West Point until 1976 and it took another 20 years for The Citadel, a military academy in Virginia which was the last all-male public university, to admit women. It was forced to do so by a Supreme Court ruling; Rehnquist dissented, arguing for "separate but equal."

Legal, educational, and economic barriers are some of the structural exclusions and deprivations women have faced, based on their sexed status, in the United States. But the greatest single factor limiting women's life, liberty, and pursuit of happiness (earning a living, keeping a job, getting an education, surviving) has been male violence. Men kill women (wives, girlfriends, and exes) at a rate of 4 per day in the United States.[13] Male violence (battering and rape) is the most common reason for a woman ending up in an emergency room. A third of women suffer violence inflicted by an intimate partner, and those who leave are at highest risk of murder.

Misogynist aggression is a major factor in mass shootings, in which killers often specifically target women or girls, or their families, not excluding their own children. (Media reports stubbornly ignore the sexed nature of this targeting.) Refusal of sexual access is a salient factor in femicides, either by "incel" males or by men that women are attempting to leave. Violent attacks are often the outcome of men following women or stalking them over a period of time. Stalking itself disrupts the targeted women's ability to hold a job, especially when the harassment

[13] Russell, Diana E.H. and Harmes, Roberta A, (Eds.), *Femicide in Global Perspective*, 2001, p. 13-14.

extends into the workplace, with perpetrators making threatening phone calls or even showing up at the job site.[14]

The constant threat of violence forces women into a calculus of where they go, when they go, how and whether they will go: if they are alone, if it is night or a deserted area; if they'd better pay for a cab they can't afford rather than risk assault. Not all men are rapists, but women have no way of telling which ones are, as they hear rapid footsteps approaching them from behind, or are alone in a parking garage or elevator. This unknowability works against women, who are now being excoriated for fearing the presence of males in places of undress, even though male predators do target women in bathrooms and changing rooms.

After rapist attacks, women face presumptions that it was their fault, interrogations about their own dress or behavior, whether they were drinking, or their sexual histories. Women of color, especially Native women, suffer much higher rates of rape and sexual violence. But the great majority of those crimes go unprosecuted and unpunished, as law enforcement commonly refuses even to investigate, and the court system to convict, the perpetrators. White men constitute the majority of rapists of Native women but enjoy near-immunity for these crimes, since the federal government refuses to prosecute them but also denies standing to tribal governments to try white men. Disabled women are a much-overlooked group that is subjected to extremely high rates of sexual assault, at a rate of 83% in a lifetime.

Women continue to be denied equal protection under the law from systemic male violence, in the home, on the job, in public spaces and institutions. It took decades of activism to get police to arrest batterers instead of treating battery and terrorizing as non-crimes. In real terms, impunity for rapists remains the rule rather than the exception. Not until 1993 was it illegal for husbands to rape their wives in all 50 states, and legal loopholes still exist in some states, such as North Carolina. Women who defend themselves against batterers, even after decades of abuse, are sentenced to much harsher terms than men who kill the women they are abusing. Women in the military suffer high rates of rape from within the ranks and then face retaliation from the military for reporting the violence.

The courts have shown a high degree of prejudice against girls who report sexual abuse by fathers, brothers, and other relatives, and against mothers who try to take action to protect their children from incest-rape. Fathers have marshalled lawyers and psychologists touting "parental alienation syndrome" to blame mothers for children's fear of sexually abusive fathers. It is common for judges deny custody to reporting mothers and give custody to abusers. This is an international phenomenon, and shows a high degree of complicity with ancient codes of paternal authority (*patria potestas*) in the court system.

Sex trafficking is another major driver of women's inequality. Because huge amounts of money are made from selling sex, primarily by male pimps, traffickers and brothel owners, coercion is rife, with young women (especially those with prior histories of sexual abuse) as the primary targets. Strategies of entrapment, including threats against the woman's family, ensure compliance and the flow of money into the hands of the traffickers. Those whose bodies are sold are subject to rape, beatings, choking, and murder, by johns, and by pimps who use violence to

[14] Logan et al. 2007; Swanberg and Logan 2005.

enforce quotas of how much money the girl or woman has to bring them. The rate of PTSD for women in the sex industry is comparable to that suffered by combat veterans, battered women seeking shelter, rape survivors, and victims of state-sponsored torture. The dangers of the sex trade is one area where the experience of transwomen overlaps with that of females, although the former are, overall, more likely to advocate for that industry than to articulate its risks.

Equal protection under the law has never existed for women in the United States, especially for Native, Black, Latina or Asian women. Sex constitutes a subjugated socio-political and economic status—one that is usually disregarded and passed over in law. It does not stand alone, since race, class, and citizenship status are potent intersectional factors, but it needs to be taken into account as its own nexus of inequality. It took a concerted effort to achieve women's suffrage (which was on paper but not in practice for many African-American women). Decades later, Congress still did not take women's rights seriously. Women's rights only got added to the Civil Rights Act of 1964 when a congressman who opposed the Act added "sex" as an amendment in Title VII in an attempt to prevent its passage.

Women's rights have long been subsumed into rubrics such as "privacy rights" that fail to address the sexed subordination and the massive levels of violence and discrimination women endure. Violence against women is still not recognized in legal designations of "hate crimes". Femicide is still mostly relegated to the back pages of newspapers. The prevalent near-impunity of male aggression is grounded in a history of treating women as legally, socially, and politically inconsequential. We have climbed out from what the Victorians called "women's legal incapacity" but remain without remedy against state laws that discriminate against or even target us, including the growing number of strict anti-abortion laws.

In the 1970s, women attempted to pass the Equal Rights Amendment so that our rights would not be conditional on the complex patchwork of sex-discriminatory laws in the states and would finally be guaranteed on the federal level. We nearly got there, but came just short of ratification within an artificially-imposed deadline. The effort foundered and was in abeyance for nearly 40 years. So, we have been left with Title VII and Title IX as the only Federal redress against the historic disadvantages imposed on women. However, these provisions don't address the colossal levels of violence that women are subject to in the United States. Neither does the ERA, and neither do proposed reforms which conflate sex and gender identity.

Historically, women have been denied legal standing to determine the conditions of their lives, property (if they had any), children, and even of our own bodies. There is not space here to detail all the ways this happens: through psychiatric imprisonment (which, in addition to terrorizing women who are labeled with mental illness, has been leveraged by abusive husbands and by parents who disapproved of lesbian or gay offspring); through grooming and entrapment into the sex trade; through structural economic precarity and the many ways that it exposes women to homelessness and male violence; and even through child marriage or denial of the right to divorce, as happens in some religious sects.

Women's rights to self-determination are currently being contested from several directions, with an intensity greater than we have seen for a century. Some states are passing or considering laws that restrict and effectively outlaw abortion rights, and even access to certain kinds of birth

control. These rights have only been guaranteed nationally since the Supreme Court ruled on *Roe v. Wade* in 1973.

In the last two decades, women's rights have been increasingly contested from another direction, by transactivists and queer theorists. These disputations take the form of denying the multitude of disadvantages and aggressions that women are subjected to on the basis of sex by, among other tactics, conflating sex with gender identity. Women's speech which analyzes sexed oppression and the gender system which has constrained us in so many ways is now being contested. We face aggressive opposition to our right to advocate for women's self-determination, or even to say that sex and gender are not the same thing. Gains we have fought for, including organizations centered on the needs of girls and women, or ascent to professorial or other professional positions, are being assailed and, in many cases, taken away.

Trans people have the right to earn a living, obtain housing, and be safeguarded against violence or abusive treatment. These rights do not necessarily conflict with women's rights. However, where women's self-determination, equality or security is contested or threatened, there exists a conflict of interests that cannot and should not be swept under the rug. Women's rights are increasingly being violated, as if prevention of sexual violence, intrusion, or other harms is no longer an issue for women. It is.

APPENDIX C

DRAFT AGENCY LETTER

This letter is a simple form that can be used to provide general comments consistent with this white paper, or more detailed arguments may be inserted as needed, depending on the agency and legal context.

<Date>

Dear <name/official title>

RE: Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

I am writing to express my support for the extension of non-discrimination protections across the board in all civil rights law to lesbians, gay men, bisexual women and men, and transgender persons.

As <your agency> considers its responsibility to implement President Biden's "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation" ("E.O. 13988"), **I urge you to ensure that existing legal provisions for single sex classification are not trampled in a rush to implement new policy**.

Single sex classifications are sometimes reasonably necessary to protect privacy, safety, equality, and/or dignity. Women, in particular, have vested interests in the continued legal recognition of single sex classifications in settings such as prisons, emergency shelters, locker rooms, and sports. **Sex matters.**

The Supreme Court's reasoning in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), the primary legal authority for E.O. 13988, demonstrates how transgender people can be protected from discrimination without disturbing existing single sex classifications whose application and enforcement do *not* constitute discriminatory actions under existing law (e.g., employee use of bathrooms, locker rooms, bona fide occupational qualifications, etc.). *Bostock* is a narrowly drawn decision that relies explicitly on biological sex for its expansion of protection to LGBT persons.

Significantly, *Bostock* does not conflate sexual orientation or transgender status with sex, stating: "We agree that homosexuality and transgender status are distinct concepts from sex." *Bostock* does not provide support for any interpretation or application of its holding which would disregard or undermine consideration of sex when sex matters.

Implementation of E.O. 13988 must therefore extend *Bostock's* holding consistent with its recognition that sex matters. ***Bostock's* guarantee of protection to gay, lesbian, and transgender Americans includes responsibly balancing the interests of all impacted parties and honoring existing single sex classifications. This can be done by prohibiting discrimination on the basis of transgender status while confirming the legitimacy of single sex classifications where sex matters**.

Sincerely,

<your name>