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Taking the Prison Rape Elimination Act Seriously: Setting Clear Standards for Identifying and Protecting Vulnerable Prisoners from Sexual Violence in Confinement

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ARTICLE

TAKING THE PRISON RAPE ELIMINATION ACT SERIOUSLY: SETTING CLEAR STANDARDS FOR IDENTIFYING AND PROTECTING VULNERABLE PRISONERS FROM SEXUAL VIOLENCE IN CONFINEMENT

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INTRODUCTION

The Supreme Court has recognized that, "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"[1] Yet, prison rape has become so rampant in the U.S. prison system that it has garnered the attention of nearly every human rights organization and even the Department of Justice ("DOJ"). Prior to

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1. Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

2003, prison rape was poorly understood and rarely studied. Sexual assaults against prisoners were—and continue to be—shamefully and intolerably common in the United States. Annually, approximately four percent of adult inmates held in American prisons are victims of sexual assault.[2] Vulnerable populations, including gay, lesbian, bisexual, transgender, and intersex inmates, are particularly at risk.[3] For example, transgender inmates experience rates of sexual assault while in confinement that are thirteen times greater than that of the general prison population.[4]

For so long, little—if anything—was done to address these "day-to-day horrors" experienced by prisoners as it related to sexual assault in prisons.[5] However, in 2003, Congress unanimously adopted the Prison Rape Elimination Act ("PREA"), a statute designed to detect, prevent, reduce, and punish prison rape within the United States.[6] The PREA tasked the DOJ with, *inter alia*, collecting and analyzing sexual assault statistics from local, state, and federal prisons.[7] The PREA further directed the Attorney General to adopt a "zero tolerance policy" for prison rape and to adopt final standards for its elimination.[8] While this was a seemingly major step for human rights in our society, the PREA has failed to address the humanitarian crisis that is still ravaging the U.S. prison system. Given that the PREA itself does not provide any individual cause of action for injured prisoners, nor does it proscribe any specific course of conduct that every prison facility necessarily must follow, the statute on its own is insufficient to solve the problems it seeks to address.[9]

Accordingly, in 2012, the DOJ finally promulgated much-needed regulations that proscribed specific policies and procedures that prisons should follow in order to prevent, reduce, and respond to prison rape.[10] Unfortunately, these regulations paint with such a broad brush that they miss the canvas entirely. The regulations are broad to a fault and provide nearly unlimited discretion to the prison officials that are bound by them, rendering them meaningless. Where prison officials are afforded unlimited discretion

2. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 254764 PREA DATA-COLLECTION ACTIVITIES, 2020, at 1 (2020).

3. *See* NAT'L PRISON RAPE ELIMINATION COMM'N, NCJ 226680 NAT'L PRISON RAPE ELIMINATION COMM'N REP. 73 (2009).

4. VALERIE JENNESS, CHERYL L. MAXSON, KRISTY N. MATSUDA & JENNIFER MACY SUMNER, VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 31 (2007).

5. *See* 34 U.S.C. § 30301(12).

6. *See The Prison Rape Elimination Act*, JUST. DET. INT'L, https://justdetention.org/what-we-do/federal-policy/the-prison-rape-elimination-act/ (last visited Oct. 3, 2021); *see also* 34 U.S.C. § 30301 Executive Documents: Implementing the Prison Rape Elimination Act.

7. 34 U.S.C. § 30303.

8. *See id.* § 30307.

9. *See, e.g.*, Fisher v. Fed. Bureau of Prisons, 484 F. Supp. 3d 521, 537 (N.D. Ohio 2020) (illustrating that the Prison Rape Elimination Act provides no individual cause of action, and inmates cannot recover individually under the statute alone).

10. *See The Prison Rape Elimination Act*, *supra* note 6; *see also* 28 C.F.R. § 115 (2021).

in how and when to abide by these regulations, prisoners harmed by sexual violence while in confinement have virtually no way to hold prisons or prison officials accountable for their failures to properly protect and monitor prisoners. Vulnerable prisoners have no way to demand that the PREA does what it promises and keep them safe from sexual violence while in confinement.

In the nearly two decades since the PREA was adopted, not much has changed. Prisoners, especially vulnerable prisoners such as transgender inmates, remain at a high risk of sexual victimization within local, state, and federal prisons.[11] The authors of this Article know this well; during our time at the University of St. Thomas School of Law, we had the opportunity to represent Ms. Gladney, a transgender woman and a survivor of prison rape, in her appeal before the Ninth Circuit seeking to hold prison officials accountable for their failure to adequately monitor and protect her while in their custody.[12] While incarcerated at United States Penitentiary-Tucson, the most notorious federal facility for sexual assault,[13] Ms. Gladney was brutally sexually assaulted because the government failed to provide an adequate level of staffing and monitoring necessary to prevent her assault from taking place. She filed a lawsuit under the Federal Tort Claims Act ("FTCA") *pro se* in the United States District Court for the District of Arizona.[14] Her lawsuit was ultimately dismissed.[15]

She appealed the dismissal to the Court of Appeals for the Ninth Circuit. As a part of the Ninth Circuit's Pro Bono Program, we had the opportunity to represent Ms. Gladney. Ultimately, with the support of more than a dozen Amicus organizations, we argued that the National Standards promulgated under the PREA[16] were mandatory (hereinafter, the "National Standards" or "Standards"), and the government's failure to comply with

11. *See, e.g.*, SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET, MA'AYAN ANAFI, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 191–95 (2016) (illustrating recent statistics and figures regarding the percentage of transgender inmates who are sexually assaulted while in confinement).

12. As part of the University of St. Thomas School of Law's Appellate Clinic, the authors were permitted as certified student attorneys to practice before the United States Court of Appeals for the Ninth Circuit.

13. *See* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., FEDERAL BUREAU OF PRISONS ANNUAL PREA REPORT CALENDAR YEAR 2013, at 3 (2014); FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., FEDERAL BUREAU OF PRISONS ANNUAL PREA REPORT CALENDAR YEAR 2014, at 4 (2015); FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., FEDERAL BUREAU OF PRISONS ANNUAL PREA REPORT CALENDAR YEAR 2015, at 4 (2016).

14. Gladney v. Shartle, No. 17-CV-00427, 2020 U.S. Dist. LEXIS 199332 (D. Ariz. Oct. 18, 2019).

15. *Id.* at *19.

16. Specifically, we argued that the National Standards for lockups required "continuous sight and sound supervision" of vulnerable inmates. *See* 28 C.F.R. § 115.113(d). As the National Standards for lockups are a "generally accepted detention and correctional practice," we argued that they are incorporated into the supervision requirements for adult prisons and jails in 28 C.F.R. § 115.13(a)(1).

mandatory regulations should not be protected by the discretionary function exception to the FTCA.[17] The Ninth Circuit rejected this argument and held that "[n]either the Prison Rape Elimination Act [ ] nor any implementing regulation imposes a mandatory duty on the Federal Bureau of Prisons [ ]" and that "[t]he district court properly held that it lacks jurisdiction under the discretionary function doctrine."[18]

While this was a disappointing outcome for Ms. Gladney, it was an absolutely devastating outcome for the PREA and all survivors of prison rape. This decision served as another nail in the coffin for the idea that the PREA delivered what Congress promised—the ability to provide any judicial redress for sexual assault while in prison. While we are not alone in failing to convince the judiciary that the PREA imposed a mandatory duty on the government,[19] this decision served as yet another reminder that the PREA has utterly failed its purpose and that the United States has a long way to go if it ever hopes to regain its status as a protector of human rights.

It is time that the PREA be taken seriously. In an effort to do so, this Article will: (1) describe the historical background of the PREA, exploring its underlying purpose; (2) describe the legal background of the PREA, explaining how and why the statute and its implementing regulations came to be; (3) explore the failure of the PREA as a judicial remedy in the status quo; and (4) address proposed solutions that Congress and the executive branch should implement immediately if the United States ever hopes to address the human rights abuses enduring in its prison system.

I. Historical Background on the PREA

The PREA was drafted and enacted out of necessity. Prison rape was—and undoubtedly continues to be—a serious problem in prisons nationwide.[20] Approximately 70,000 inmates—or one in twenty—are sexually abused while in confinement each year.[21] Many instances of sexual

17. The discretionary function exception to the FTCA shields the government from liability for an act or omission that fails to comply with a discretionary function of the government. In simple terms, failure to comply with a mandatory statute or regulation is not protected by sovereign immunity.

18. *See* Gladney v. United States, 858 F. App'x 221, 223 (9th Cir. 2021).

19. *See, e.g.*, Doe v. United States, No. 12-cv-00640, 2014 U.S. Dist. LEXIS 174413 (D. Haw. Dec. 17, 2014); L.C. v. United States, No. 21-CV-00124, 2022 U.S. Dist. LEXIS 72348 (E.D. Ky. Apr. 19, 2022); Tilga v. United States, No. 14-cv-00256, 2014 U.S. Dist. LEXIS 200785 (D.N.M. Dec. 5, 2014); Dudley v. United States, No. 19-CV-00317, 2020 U.S. Dist. LEXIS 16856 (N.D. Tex. Feb. 3, 2020).

20. *See US: Federal Statistics Show Widespread Prison Rape*, Hum. Rts. Watch (Dec. 15, 2007, 7:00 PM), https://www.hrw.org/news/2007/12/15/us-federal-statistics-show-widespread-prison-rape#. Please note, while many of the statistics in this Article are recent—as opposed to pre-dating the PREA—there is no evidence that the PREA in its current form has decreased the rates of sexual violence among inmates at all. *See* Lena Palacios, *The Prison Rape Elimination Act and the Limits of Liberal Reform*, Univ. Minn.: Gender Pol'y Rep. (Feb. 17, 2017), https://genderpolicyreport.umn.edu/the-prison-rape-elimination-act-and-the-limits-of-liberal-reform/.

21. *US: Federal Statistics Show Widespread Prison Rape*, *supra* note 20.

violence in prisons are instances of inmate-on-inmate violence, but an even higher number of inmates report staff sexual misconduct rather than inmate-on-inmate abuse.[22] Both instances are clear examples of failures on the part of prison staff: either monitoring and supervision of inmates is insufficient, or, even more horrifyingly, prison staff are abusing their positions of power to exert sexual influence and abuse on vulnerable inmates. And, despite the fact that the majority of sexual assault is perpetrated by prison officials,[23] both the federal government and its officials remain entirely untouchable and unaccountable.[24] The PREA was drafted to try to address the prevalence of all sexual assault while in confinement.

Some groups of individuals are at a heightened risk of experiencing sexual violence while in confinement. Specifically, LGBTQIA+[25] prisoners tend to be at a heightened risk for sexual victimization.[26] LGBTQIA+ individuals experience sexual abuse while in confinement at a rate three times greater than the general prison population.[27] While the rates of sexual assault for inmates with disabilities or mental illnesses are not well studied, it appears as though rates for those inmates are high too; for example, inmates suffering from severe psychological distress ("SPD") report rates of sexual victimization nine times that of the general prison population.[28] Young inmates are also at a heightened risk for sexual violence.[29]

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22. *US: Federal Statistics Show Widespread Prison Rape*, *supra* note 20.

23. *See US: Federal Statistics Show Widespread Prison Rape*, *supra* note 20.

24. See Gregory C. Sisk, *Holding the Federal Government Accountable for Sexual Assault*, 104 IOWA L. REV. 731, 740–61 (2019), for an explanation of how the doctrine of sovereign immunity shields the government from liability for the intentional torts—including sexual assault—committed by its officials and agents. Professor Sisk goes on to explain that federal law, specifically the Westfall Act, also shields the government official from official accountability for the very same intentional conduct. *Id.* at 761–77. Professor Sisk is a well-renowned scholar in the area of litigation involving the federal government, and he served as the supervising attorney when the authors participated in the University of St. Thomas School of Law's Appellate Clinic. For more information on the egregious outcomes related to the doctrine of sovereign immunity and the Westfall Act, see *id.*

25. LGBTQIA+—standing for lesbian, gay, bisexual, transgender, queer, intersex, and asexual—is the preferred acronym by the authors, as it is presently the most inclusive, community-utilized acronym to represent the Queer Community. This acronym is by no means all-inclusive. For more information related to this acronym, see Michael Gold, *The ABCs of L.G.B.T.Q.I.A.+*, N.Y. TIMES, https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html (Jun. 7, 2019). "LGBTQIA+" may not be the only acronym utilized in this Article when referring to the same community of individuals, as other quoted sources may utilize different terms.

26. *See* JENNESS ET AL., *supra* note 4.

27. *See* NAT'L CTR. FOR TRANSGENDER EQUAL., LGBTQ PEOPLE BEHIND BARS: A GUIDE TO UNDERSTANDING THE ISSUES FACING TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS 6 (2018).

28. SANDRA HARRELL, ALLISON HASTINGS & MARGARET DIZEREGA, NAT'L PREA RES. CTR., MAKING PREA AND VICTIM SERVICES ACCESSIBLE FOR INCARCERATED PEOPLE WITH DISABILITIES: AN IMPLEMENTATION GUIDE FOR PRACTITIONERS ON THE ADULT AND JUVENILE STANDARDS 5 (2015).

29. *See* PETER L. NACCI & THOMAS R. KANE, FED. BUREAU OF PRISONS, SEX AND SEXUAL AGGRESSION IN FEDERAL PRISONS 5, 14 (1982).

Transgender inmates are arguably the most at-risk population for experiencing sexual violence.[30] Nearly forty percent of incarcerated transgender people have been sexually assaulted while in confinement.[31] The DOJ has recognized this, noting that incarcerated transgender people experience "shockingly high levels of sexual abuse and assault."[32] Incarcerated transgender individuals are often at such a high risk because they are placed in correctional facilities for the sex they were assigned at birth, rather than what aligns with their gender identity.[33] The Federal Bureau of Prisons ("BOP") has, itself, repeatedly acknowledged that incarcerated transgender people are specifically targeted for abuse, identifying "transgender status" as a "risk factor" that increases the likelihood of sexual assault.[34] And, by repeated official statements, the United States has declared that "individuals whose sex at birth and current gender identity do not correspond (transgender or intersex)" are disproportionately vulnerable to "sexual abuse in correctional facilities."[35]

Another key issue in the realm of sexual violence while in confinement is that of staff-on-inmate sexual violence. An alarming sixty percent of sexual violence against inmates is perpetuated by jail or prison staff,[36] often leaving inmates with no redress and no safe place to turn to for assistance. This exploitation of power is particularly concerning and leaves an obvious need for additional protections and safeguards to be put in place for prisoners.

In light of these statistics, Congress unanimously passed the PREA in 2003. The PREA attempted to solve these problems not only through its provisions, but it also created new bodies to investigate and address prison rape.[37] The PREA created the National Prison Rape Elimination Commis-

30. This Article will emphasize the experiences of transgender inmates as they are historically at the greatest risk of sexual violence and their experiences are devastatingly commonplace. Moreover, the authors of this Article have direct experience representing a transgender inmate, who survived prison rape, in a PREA case before the Ninth Circuit.

31. *See* ALLEN J. BECK, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES Table 1 (2014) NCJ 241399 (hereinafter "DOJ Transgender Sexual Victimization Statistics").

32. *Responding to Transgender Victims of Sexual Assault: The Numbers*, OFF. FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST. (June 2014), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/forge/sexual_numbers.html.

33. *See* Fed. Bureau of Prisons, U.S. Dep't of Just., Transgender Offender Manual (May 11, 2018), https://www.documentcloud.org/documents/4459297-BOP-Change-Order-Transgender-Offender-Manual-5.html (mandating placement in male facilities except "in rare cases").

34. *See* FED. BUREAU OF PRISONS, FEDERAL BUREAU OF PRISONS ANNUAL PREA REPORT CALENDAR YEAR 2018, at 15 (2014) (noting that in about ten percent of substantiated sexual assault cases, "the victim's transgender status may have been a risk factor").

35. *See, e.g.,* NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 3.

36. *Victims of Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/victims-sexual-violence (last visited Dec. 4, 2022).

37. *See* 34 U.S.C. § 30306.

sion (the "Commission") for this purpose.[38] The Commission, too, found that LGBTQIA+ incarcerated individuals were particularly at risk for sexual violence, finding specifically that being transgender places one at "special risk" for sexual abuse in prisons and jails.[39] The PREA was born out of sheer necessity due to the continued national failings to address prison sexual assault.

II. Legal Background on the PREA

In response to this "day-to-day horror experienced by victimized inmates," Congress unanimously enacted the PREA in 2003.[40] The PREA was the first federal law of its kind to address sexual abuse behind prison walls,[41] and its stated purpose was to "establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States" and to "make the prevention of prison rape a top priority in each prison system."[42] In order to establish such a standard, Congress clearly stated its intention to "develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape," "increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape," and to "protect the Eighth Amendment rights of . . . prisoners."[43] In an attempt to accomplish these crucial objectives, Congress and the DOJ committed to adopting national standards to detect, prevent, and respond to prison rape and to providing judicial redress to inmates if they are subjected to sexual violence.[44]

A. The National Standards

In order to develop and implement national standards, Congress directed the Attorney General to publish a final rule adopting uniform standards for the detection and prevention of prison rape across the federal and state prison systems.[45] Congress also directed that these National Standards

38. *See id.* §§ 30306, 30302(3).

39. *See* Nat'l Prison Rape Elimination Comm'n, *supra* note 3; Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men 35 (Gregory M. Herek & Kevin T. Berrill eds., 1992) ("[t]he discrimination, hostility, and violence members of these groups often face in American society are amplified in correctional environments and may be expressed by staff as well as other incarcerated persons").

40. *See* 34 U.S.C. § 30301.

41. *See The Prison Rape Elimination Act, supra* note 6.

42. 34 U.S.C. §§ 30302(1), (2).

43. *Id.* §§ 30302(3), (6), (7).

44. *See Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape*, Off. Pub. Aff., U.S. Dep't of Just. (last updated Sep. 15, 2014), https://www.justice.gov/opa/pr/justice-department-releases-final-rule-prevent-detect-and-respond-prison-rape.

45. *See* 34 U.S.C. § 30307(a)(1) (stating that "the Attorney General shall publish a final rule adopting National Standards for the detection, prevention, reduction, and punishment of prison rape"). While Congress invoked its interstate commerce powers to adopt the National Standards

would become binding on the BOP "immediately upon adoption."[46] Despite the immediacy of the rape crisis occurring within prison walls, these standards were not adopted nationwide until May 17, 2012.[47]

The adoption of these National Standards required prisons to, *inter alia*, collect data and statistics on sexual abuse inside of prisons,[48] commit to heightened protections of "vulnerable" inmates,[49] and consider an inmate's risk of sexual victimization in informing prison officials' decisions regarding housing, work assignments, and prison placement.[50] These Standards were implemented across four subsects of the federal prison system—adult prisons, lockups, community confinement facilities, and juvenile facilities.[51]

Importantly, the DOJ made the commitment within the National Standards to provide inmates with a "full and fair opportunity to file grievances regarding sexual abuse so as to preserve their ability to seek judicial redress after exhausting administrative remedies."[52] But, these National Standards have utterly failed their purpose and the judiciary has refused to honor Congress' and the DOJ's commitment to judicial redress for sexual violence.

B. The Eighth Amendment

In addition to the adoption of the National Standards, Congress and the executive branch clearly stated that the PREA was enacted to "protect the Eighth Amendment rights of . . . prisoners."[53] In its findings pursuant to the PREA, Congress expressly stated that "[t]he high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution."[54] While some prisoner litigants have had limited success in arguing that failure to detect, prevent, or respond to sexual assault

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across the federal prison system, it relied on its spending powers under art. I, § 8, cl. 1 of the U.S. Constitution to condition state prison funding on the adoption of the same standards across the state's prison systems. *See id.* at § 30307(b), § 30307(e)(2)(A).

46. *Id.* § 30307(b).

47. The National Standards were codified in the Code of Federal Regulations at 28 C.F.R. §§ 115.11–115.501.

48. 34 U.S.C. § 30303(a).

49. *See* 28 C.F.R. § 115.113(d) (2021); *see also id.* § 115.41(d). As will be discussed later, BOP's commitment to "heightened protections" of vulnerable inmates requires prisons to maintain adequate staffing levels and, where applicable, video monitoring.

50. *See id.* § 115.42.

51. A "prison" is defined as "an institution under Federal or State jurisdiction whose primary use is for the confinement of individuals convicted of a serious crime, usually in excess of one year in length, or a felony"; a "lockup" is defined as "a facility that . . . [is] (1) [u]nder the control of a law enforcement, court, or custodial officer; and (2) [p]rimarily used for the temporary confinement of individuals who have recently been arrested [or] detained . . . ." *Id.* § 115.5. This Article does not discuss "community confinement facilities" or "juvenile facilities" so the definitions are omitted.

52. *See Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape, supra* note 44.

53. 34 U.S.C. § 30302(7).

54. *Id.* § 30301(13).

inside prison walls amounts to "deliberate indifference" in violation of the Eighth Amendment,[55] far more litigants have had the doors to the judiciary slammed in their faces in response to such complaints.[56]

C. *The Lack of an Independent Cause of Action*

Moreover, even though Congress—through the PREA—clearly established a "zero-tolerance policy" for prison rape and expressly stated that sexual assault inside prison walls is a violation of the Eighth Amendment, what is glaringly absent from the PREA is an independent cause of action. So, what appears to be a commitment from the federal government to a "zero-tolerance policy" for prison rape is, in reality, a pipe dream. And, while advocates across the nation have had limited success in achieving justice for the victims of prison rape, the PREA is grossly inadequate and does not accomplish what it promises. The judiciary has consistently refused to hold the federal government to the standards it adopted or provide judicial redress as promised by the Attorney General and the DOJ.

III. Failure of Judicial Remedies in Effectuating the PREA

Prison condition reform advocates and survivors of prison rape lauded the passage of the PREA. However, as soon as the PREA and the corollary National Standards were adopted, it became increasingly clear that it was a blank letter. Prisoners and advocates across the nation sought the judicial redress promised by Congress through the PREA in federal and state courts. However, these efforts proved difficult because the PREA did not include an independent cause of action. Even after resorting to creative measures to seek redress under the PREA, such as invoking the seemingly mandatory National Standards, nearly every court has held that the PREA's National Standards speak in "discretionary" language and, as such, cannot be binding on prison officials.[57] With each door slammed in their faces, advocates and survivors resorted to a last-ditch attempt to hold the government accounta-

55. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 832–33, 851 (1994) (vacating the finding that there had been no deliberate indifference to petitioner's safety and remanding the case to the District Court for further proceedings); Tafoya v. Salazar, 516 F.3d 912, 915 (10th Cir. 2008) (finding that a law enforcement official "was aware of prison conditions that were substantially likely to result in the sexual assault of a female inmate" and "that a jury might infer that the assaults on Ms. Tafoya were caused by these dangerous conditions").

56. Fisher v. Goord, 981 F. Supp. 140, 174 (W.D.N.Y. 1997) (finding that even if the inmate's testimony had been found credible, the inmate "failed to establish an Eighth Amendment violation" in regard to three prison officials); Richardson v. District of Columbia, 322 F. Supp. 3d 175, 179 (D.D.C. 2018) (finding the inmate "offered no evidence that a District policy or practice of ignoring inmates' concerns about the risk of assault caused the purported Eighth Amendment violation"); Perez v. Ponte, 236 F. Supp. 3d 590 (E.D.N.Y. 2017) (finding that the detainee's constitutional claims against two prison officials failed as the claims failed to properly allege personal involvement by the prison officials).

57. *See generally*, 28 C.F.R. § 115 (2021) (regularly using discretionary language to direct action instead of mandatory language).

ble for allowing their brutal assaults—pleading deliberate indifference in violation of the Eighth Amendment to the United States Constitution.[58] While litigants have had some success in proving deliberate indifference, this sole and unreliable remedy has allowed prison rape to continue running rampant in the U.S. prison system without consequence.

The authors of this Article, as prior advocates for a transgender victim of sexual violence while in confinement, have seen these failures first-hand; we write this Article in an attempt to use our experience—and the stories of survivors of prison rape—to encourage advocates and other legal professionals to push for the much-needed reform that Congress promised, but did not deliver, in the PREA.

A. No Independent Cause of Action

Based upon the federal government's promise to provide a "full and fair opportunity to file grievances regarding sexual abuse so as to preserve their ability to seek judicial redress,"[59] prison litigants and advocates sought to establish that the PREA mandated prison officials to take actions to detect and prevent prison rape. However, the judiciary made clear that the PREA had no enforcement mechanism, as it did not authorize an independent cause of action. In district court after district court, and circuit after circuit, litigants and advocates sought to convince the judiciary that the PREA meant what it said; but, to no avail.[60] As each attempt failed, it became more difficult to advance any argument that the PREA provided accountability for prison officials.

Illustratively, since the PREA was enacted, every single federal circuit court to consider the issue has rejected any attempt to invoke the PREA or National Standards to plead a direct cause of action.[61] Clearly, without a direct amendment to the PREA itself, any attempt to establish that a violation of the PREA is independently unlawful will continue to fail.

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58. *See* discussion *infra* Section III.C.

59. *See Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape, supra* note 44.

60. *See, e.g.*, Bowens v. Wetzel, 674 F. App'x 133, 137 (3d Cir. 2017) (stating that a litigant "may not attempt to enforce statutes or policies that do not themselves create a private right of action by bootstrapping such standards into a constitutional deliberate indifference claim"); Williams v. Wetzel, 827 F. App'x 158, 161 (3d Cir. 2020) (stating that "to the extent that [plaintiff] sought to bring standalone civil claims under the PREA . . . the District Court did not err in rejecting those claims on the basis that [plaintiff] failed to identify a private right of action"); Krieg v. Steele, 599 F. App'x 231, 232–33 (5th Cir. 2015) (explaining that "other courts addressing this issue have found that the PREA does not establish a private cause of action" and "any claim raised under the PREA is properly dismissed as frivolous"); Cissel v. Myers, 2020 U.S. App. LEXIS 18156, at *3 (6th Cir. 2020) ("[T]he district court held that the statute did not create a private right of action" and, as such, the appeal seemed to "lack an arguable basis in the law"); Johnson v. Garrison, 859 F. App'x 863, 863–64 (10th Cir. 2021) (holding that "the district court correctly concluded [plaintiff] has failed to show that the PREA provides an inmate with a private right of action.")

61. *See* cases cited *supra* note 60.

B. The National Standards

Many prisoners and advocates have also sought to invoke creative arguments to attain the judicial redress promised by the PREA, including invocation of the National Standards that implement the PREA. Survivors of prison rape have argued that the FTCA[62] and the National Standards adopted under the PREA provide recourse for the government's failure to protect them from abuse while in custody.[63] However, this too has failed to provide the judicial redress promised by Congress through the PREA.

The National Standards are divided into four major subsections: adult prisons and jails, lockups, community confinement facilities, and juvenile facilities.[64] The PREA's National Standards provide uniform regulations regarding reducing and responding to prison rape, including: prevention planning, responsive planning, training and education, screening for risk of sexual victimization, reporting, and responding to inmate complaints.[65] While some of these standards are cloaked in discretionary language, some standards use mandatory language, indicating that they are required of all prisons and prison officials. For example, upon incarceration, "[a]ll inmates *shall* be assessed during an intake screening . . . for their risk of being sexually abused by other inmates . . . ."[66] In making these determinations prison officials are required, at a minimum, to consider certain factors.[67]

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62. The FTCA is a waiver of sovereign immunity and states that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . . " 28 U.S.C. § 2674. However, the statute contains several exceptions to that waiver of sovereign immunity, including the "discretionary function" exception which bars a cause of action against the government for a tortious act or omission that occurred while the government or government official was engaged in a "discretionary" role or function. *See id.* § 2680(a).

63. *See, e.g.*, L.C. v. United States, No. 21-CV-00124, 2022 U.S. Dist. LEXIS 72348 (E.D. Ky. Apr. 19, 2022); Endre v. United States, No. 17-CV-04446, 2020 WL 1508542 (S.D. Ind. Mar. 30, 2020); Doe v. United States, No. 12-cv-00640, 2014 U.S. Dist. LEXIS 174413 (D. Haw. Dec. 17, 2014); Tilga v. United States, No. 14-cv-00256, 2014 U.S. Dist. LEXIS 200785 (D.N.M. Dec. 5, 2014).

64. *See* subparts A–D of 28 C.F.R. § 115 (2021) where subparts A, B, C, and D provide the National Standards for adult prisons and jails, lockups, community confinement facilities, and juvenile facilities, respectively. For purposes of this Article, the National Standards for adult prisons and jails are most relevant.

65. *See* 28 C.F.R. §§ 115.11–115.93 (2021).

66. *Id.* § 115.41(a) (emphasis added).

67. The National Standards require prisons to consider the following factors when screening inmates upon intake: "(1) [w]hether the inmate has a mental, physical, or developmental disability; (2) [t]he age of the inmate; (3) [t]he physical build of the inmate; (4) [w]hether the inmate has previously been incarcerated; (5) [w]hether the inmate's criminal history is exclusively nonviolent; (6) [w]hether the inmate has prior convictions for sex offenses; (7) [w]hether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming; (8) [w]hether the inmate has previously experienced sexual victimization; (9) [t]he inmate's own perception of their vulnerability; and (10) [w]hether the inmate is detained solely for civil immigration purposes." *Id.* § 115.41(d). *See also* Gregory Sisk, *Recovering the Tort Remedy for Federal Official Wrongdoing*, 96 NOTRE DAME L. REV. 1789 (2021) (discussing generally the constitutional exclusion of the discretionary function exception).

One of the most important National Standards with regard to protecting vulnerable inmates from sexual assault is the requirement that the BOP ensure that each prison facility, "make its best efforts to comply on a regular basis with a staffing plan that provides for adequate levels of staffing, and, where applicable, video monitoring, to protect inmates from sexual abuse."[68] However, what constitutes an "adequate staffing plan" is not left to the discretion of the BOP. The National Standards mandate that the BOP must consider all "[g]enerally accepted detention and correctional practices," among other factors, in determining its staffing plan.[69] Despite the use of mandatory language, the federal judiciary has consistently rejected any attempt to invoke the National Standards to hold the government accountable for its failures.

C. The Eighth Amendment

Having failed at each and every turn, prisoners and their advocates have attempted to establish liability under the PREA by asserting the claim as an Eighth Amendment violation. To clarify, this is not a discussion of prisoners bringing independent claims under the Eighth Amendment. Rather, claims of Eighth Amendment violations can be—and have been—used in FTCA cases as a response to the government's claim that the discretionary function exception shields them from liability for a prisoner's injury. The argument relies on the notion that, "federal officials do not possess discretion to violate constitutional rights."[70] In essence, prisoners argue that the government's deliberate indifference to their vulnerable positions violates the Eighth Amendment, and that government officials have no discretion to allow them to suffer harm accordingly. While this argument has been sporadically successful across the country, it has not been uniformly accepted by all circuits such as to be a reliable method for prisoners to seek relief through the PREA.

Courts generally agree that government officials have no discretion to disobey the Constitution, and where they do, the discretionary function exception is unavailable.[71] This means that—in theory—if prison officials know that a prisoner is especially vulnerable to sexual assault, and those officials are deliberately indifferent to such a fact and take no action to protect the prisoner, their failure to prevent assault cannot be seen as a pro-

68. 28 C.F.R. § 115.13(a) (2021).

69. *Id.* §§ 115.13(a)(1)–(11).

70. Galvin v. Hay, 374 F.3d 739, 758 (9th Cir. 2004) (quoting U.S. Fid. & Guar. Co. v. United States, 837 F.2d 116, 120 (3d Cir. 1988)).

71. *See, e.g.*, *id.* at 758–59. Most other circuits have held the same. *See* Loumiet v. United States, 828 F.3d 935, 943 (D.C. Cir. 2016) ("At least seven circuits, including the First, Second, Third, Fourth, Fifth, Eighth, and Ninth, have either held or stated in dictum that the discretionary-function exception does not shield government officials from FTCA liability when they exceed the scope of their constitutional authority.").

tected discretionary action. Several courts, including the Supreme Court,[72] the Sixth Circuit,[73] and the D.C. Circuit,[74] have recognized that failure to protect a knowingly vulnerable prisoner from sexual violence may constitute deliberate indifference by the prison in violation of the Eighth Amendment.

And yet, many other courts have not bought into such an argument. Some courts have concluded that the Eighth Amendment does not define a course of action "specific enough to render the discretionary function exception inapplicable."[75] In fact, the Seventh Circuit expressly stated that the discretionary conduct alleged to be unconstitutional nevertheless may fall within the discretionary function exception.[76]

On behalf of Ms. Gladney, the authors also raised an argument regarding deliberate indifference under the Eighth Amendment to the government's assertion of the discretionary function exception, unfortunately, without success. The fact that the Ninth Circuit would not accept this argument in Ms. Gladney's case—one which, on paper, feels exceptionally clear—should make one nervous about relying on this as a method to recover for harms suffered as a result of sexual assault in prison. Ms. Gladney was clearly a vulnerable inmate: she was a transgender woman, she was housed in the nation's most dangerous federal facility for sexual violence, and she resided in a unit with many blind spots that the prison did not monitor. Each and every one of these factors should have imparted prison officials with knowledge of Ms. Gladney's extremely elevated risk for sexual assault while in confinement.[77] The vulnerability of transgender inmates—specifically those housed in especially dangerous facilities—is no secret.

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72. In *Farmer v. Brennan,* 511 U.S. 825, 848–49 (1994), the Supreme Court recognized that a transgender inmate may be "particularly vulnerable" to attack.

73. In *Taylor v. Michigan Department of Corrections*, 69 F.3d 76, 84 (6th Cir. 1995), the Sixth Circuit found a "[t]riable issue[] of fact" as to whether a prison knew that a small, mentally disabled prisoner was vulnerable before he was raped when placed in the general population.

74. In *Doe v. District of Columbia*, 215 F. Supp. 3d 62, 73–80 (D.D.C. 2016), the court ruled that a reasonable jury could find that jail guards acted with deliberate indifference and disregarded a known and heightened risk in violation of the Eighth Amendment when they placed a transgender woman into a cell with a male inmate who raped her.

75. Garza v. United States, 161 F. App'x 341, 343 (5th Cir. 2005).

76. Linder v. United States, 937 F.3d 1087, 1091 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 159 (2020).

77. The United States has indeed plainly admitted that it is aware of these risks. Through multiple official statements, the United States has admitted that transgender prisoners experience "shockingly high levels of sexual abuse and assault." *See, e.g.*, *Responding to Transgender Victims of Sexual Assault: The Numbers*, *supra* note 32; *see also* NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 3 (discussing high risks of sexual abuse to gender nonconforming prisoners); *Transgender and Gender Diverse Health Care in Correctional Settings*, *Position Statement*, NAT'L COMM'N ON CORR. HEALTH CARE (reaffirmed with revision Nov. 1, 2020), https://www.ncchc.org/transgender-and-gender-diverse-health-care-in-correctional-settings-2020/ (confirming that prison staff should be aware that transgender people are common targets for violence).

While Ms. Gladney did not prevail on her Eighth Amendment argument, the Ninth Circuit ruled narrowly and certainly left the door open for successful assertion of this argument in the future. Specifically, the Ninth Circuit held that the district court erred when it failed to properly address Ms. Gladney's Eighth Amendment argument.[78] However, the Ninth Circuit also found that this error was harmless because, "the record lack[ed] evidence of any individualized risk to Plaintiff of which guards were aware."[79] Of course, this was not the case. The guards at USP-Tucson knew that Ms. Gladney was transgender—putting her at an extremely elevated risk for violence—and knew that the prison was dangerous and ill-equipped to monitor for sexual violence.[80] Despite this undisputed reality, the Ninth Circuit found that there was no "individualized risk" to Ms. Gladney for which the guards were deliberately indifferent.[81]

D. Allowing the Government to Use the PREA as Both a "Sword" and a "Shield"

In addition to these above-referenced failures, the judiciary has further bolstered its anti-PREA viewpoint by granting the government free rein to use the PREA's provisions as a shield against liability.[82] What we mean by this is that nearly every federal court has refused to consider an incarcerated person's arguments that the PREA or its implementing regulations provide them the judicial redress Congress promised, while at the exact same time allowing the government to argue compliance with the PREA to avoid any liability or accountability. For example, in *Crane v. Allen*, the U.S. District Court for the District of Oregon noted a county's compliance with the PREA as a rationale for its decision that the county did not act with deliberate indifference to the rights or safety of an incarcerated individual.[83] Yet, despite its willingness to permit the government to offer compliance with the PREA as a defense to its actions, court after court continues to dispose

78. Gladney v. United States, 858 F. App'x 221, 223 (9th Cir. 2021).

79. *Id.*

80. Prison staff at USP-Tucson undoubtedly knew that Ms. Gladney identified as transgender and that she was at an unparalleled risk of sexual harm. For example, they knew that she was "ladylike in appearance" and "small in stature," and they routinely referred to her as "Ma'am, Miss, and Ms." *See* Excerpts of Record at 7, 22–23, 28–29, *Gladney*, 858 F. App'x 221 (No. 19-17443), ECF No. 26. These individualized characteristics are clearly sufficient to put the BOP on notice of Ms. Gladney's vulnerability to sexual violence. Further, prison staff were (or at least should have been) aware that the prison was ill-equipped to monitor the general population to prevent violence within its walls. Not only was the prison woefully understaffed, but its monitoring system was punctured by "blind spots." *See id.* at 14, 19, 38.

81. *Gladney*, 858 F. App'x at 224.

82. *See generally* Sage Martin, *The Prison Rape Elimination Act: Sword or Shield?*, 56 TULSA L. REV. 283 (2021).

83. *See* Crane v. Allen, No. 09-CV-1303, 2012 U.S. Dist. LEXIS 22967, at *23 (D. Or. Feb. 22, 2012) (holding that the county did not act with deliberate indifference because the record demonstrated, *inter alia*, that the county's policies and procedures complied with the PREA).

of an incarcerated person's PREA arguments without so much as a paragraph explanation in its opinion.[84]

And, just when you think things could not get worse for the PREA, the judiciary takes their contempt a step further and permits the government to violate the religious and medical rights of incarcerated individuals through the guise of compliance with the PREA. For instance, courts have permitted the BOP to withhold religiously required prayer oils from inmates by arguing that they could conceivably be used as "personal lubricants for illicit sexual activity" in violation of the PREA.[85] And, in *Battista v. Clarke*, prison officials went so far as arguing that the PREA justified its refusal to offer medically-necessary hormone treatments to transgender individuals because it increased the risk of sexual assault.[86] While the First Circuit did not expressly accept this justification, it indicated its willingness to permit the government to withhold medically-necessary treatment by arguing that the PREA demands such a result.[87]

All of these failures beg the question—how do we ensure that those prisoners who are truly vulnerable can be recognized as such in the eyes of the law so that they can seek the promised, genuine, legal redress for their grievances? This is precisely the question we seek to answer in Section IV below.

IV. Proposed Solution to Effectuate the PREA

A. Adding an Independent Cause of Action to the PREA

As discussed, the PREA does not provide an independent cause of action, and every court that has been asked to interpret the PREA as providing one has declined.[88] Simply, the most effective solution to providing inmates redress for sexual violence that they experience while in confinement would be to amend the PREA to provide an independent cause of action under which prisoners can bring their claims.

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84. *See e.g.*, Beverly v. Cnty. of Orange, No. 22-55080, 2022 U.S. App. LEXIS 29549, at *1–2 (9th Cir. 2022); Johnson v. Garrison, 859 F. App'x 863, 863–64 (10th Cir. 2021); Bowens v. Wetzel, 674 F. App'x 133, 137 (3d Cir. 2017); Krieg v. Steele, 599 F. App'x 231, 232–33 (5th Cir. 2015).

85. Hammons v. Jones, No. 00-CV-143, 2007 U.S. Dist. LEXIS 55170, at *10 (N.D. Okla. July 27, 2007).

86. *See* 645 F.3d 449, 451 (1st Cir. 2011).

87. *See id.* at 454 ("[T]he question remains whether the withholding of hormone therapy was 'wanton' or outside the bounds of 'reasonable professional judgement.' Medical 'need' in real life is an elastic term: security considerations also matter at prisons or civil counterparts, and administrators have to balance conflicting demands. The known risk of harm is not conclusive: so long as the balancing judgments are within the realm of reason and made in good faith, the officials' actions are not 'deliberate indifference,' or beyond 'reasonable professional' limits." (citations omitted)).

88. *See supra* note 62–63 and accompanying text.

Of course, there would be various logistical difficulties that would need to be addressed before such an independent cause of action could become a reality. It does not seem likely that Congress would ever put into practice a law that held government officials indisputably liable any time that an inmate was sexually assaulted in prison, even if there were seemingly no wrongdoings on the part of the government officials. Instead, this cause of action would need to be clear and specifically tailored to address when a prison official has behaved in such a manner that they could be held liable for a prisoner's injuries. There are at least two bases on which an inmate should be able to invoke an individual cause of action, and we propose two here.

First, prisoners who experience sexual violence where there is inadequate supervision and monitoring ought to be able to bring an independent cause of action under the PREA. Of course, what constitutes adequate supervision and monitoring is another question that remains to be answered. This could be addressed by: (a) looking to the National Standards already in place; and/or (b) writing new language into the statute to clearly define what levels of supervision, monitoring, and staffing are necessary to adequately protect inmates from sexual violence while in confinement. The latter of these two options would likely be more effective since—as discussed before—the National Standards have been interpreted by the courts to be rather discretionary.

Second, prisoners should be able to access an independent cause of action for prison conditions that put them at an excessive risk for sexual violence, even if no violence per se has occurred. The PREA, as written, provides minimal guidance as to reporting and statistic-keeping for prisons as they relate to sexual violence within the facility. However, this reporting and knowledge of statistics alone is not enough to keep prisoners safe. Prisons should be mandated to comply with the National Standards, and where they do not and the culture at the prison is dangerous in terms of sexual violence, those inmates should be able to take action against the prison/prison officials before violence occurs. While this concept may sound radical in theory, similar causes of action already exist in the status quo. Take for instance hostile work environment claims in employment law; this cause of action allows employees who are in dangerous, hostile, and/or uncomfortable working conditions to bring a cause of action against their employer even if they have not suffered a concrete, physical injury.[89] Inmates in dangerous prison conditions should be afforded this same right. If inmates are constantly in fear of and at risk for sexual violence due to inadequate prison conditions—be it inattentive guards, insufficient staffing, deficient monitoring, etc.—they should be afforded a cause of action against the prison. This should, at a minimum, include (a) the right to re-

89. *See* Title VII, 42 U.S.C. §§ 2000e–2000e17.

cover for any harm suffered for enduring these conditions and (b) the right to take action and hold the prison accountable *before* prisoners experience actual, devastating violence.

Allowing a cause of action for both *ex post facto* and *ante facto* instances of sexual violence while in confinement allows inmates the best chances of being able to prevent sexual violence in a facility and/or to recover for it in the event that it has already happened. Simply amending the PREA to be clear on this matter would provide ample rights of recovery to prisoners which they are currently denied.

B. Issuing Stronger Guidance on the PREA's Implementing Regulations

As every avid follower of politics knows too well, amending a federal law—particularly a federal law which grants additional protections to vulnerable and incarcerated populations—is a daunting task. Thankfully, Congress is not our last hope. The executive branch of the federal government holds powerful tools which can positively impact the PREA's effect. For instance, the U.S. Attorney General has the power and authority to issue interpretations of federal regulations known as "guidance" documents. These documents have the effect of influencing how the executive branch, and even the judiciary, enforce federal regulations and federal law.

For decades, the federal government has utilized this tool to enforce federal laws in the ways it deemed most desirable. However, after assuming office, the Trump Administration severely restricted the government's ability to interpret federal regulations using these so-called guidance documents.[90] These actions directly, and fatally, affected enforcement of the PREA through the means of civil litigation.[91]

While many legal advocates felt that this was the death knell of the PREA's implementing regulations, they were able to collectively sigh in

90. During his presidency, former President Trump issued Executive Order 13,891, "Promoting the Rule of Law Through Improved Agency Guidance Documents," and the DOJ subsequently promulgated "Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department." *See* Prohibition on the Issuance of Improper Guidance Documents Within the Justice Department, 85 Fed. Reg. 50,951, 50,952 (Aug. 19, 2020) (codified at 28 C.F.R. § 50.26(a)(4) (2021)). This regulation "emphasized that guidance documents generally may not be used [to] 'create rights or obligations binding on persons or entities outside the Executive Branch [including state, local, and tribal government].'" Processes and Procedures for Issuance and Use of Guidance Documents, 86 Fed. Reg. 37,674, 37,675 (July 16, 2021) (citing 28 C.F.R. § 50.26(a)(4) (2021)). The same regulation went on to state that "[l]ikewise, except where expressly authorized by law or as expressly incorporated into a contract, Department components may not issue guidance documents that create binding standards by which the Department will determine compliance with existing regulatory or statutory requirements." 28 C.F.R. § 50.26(a)(4) (2021).

91. On January 25, 2018, former Associate Attorney General Brand issued a memorandum which provided that "the Department could not 'convert' guidance documents into binding rules through litigation, and that failure to comply with a guidance document should not be used as presumptive or conclusive evidence that a party violated a related statute or regulation." Processes and Procedures for Issuance and Use of Guidance Documents, 86 Fed. Reg. 37,674, 37,675 (July 16, 2021)).

relief when President Biden issued Executive Order 13,992. Through this Executive Order, entitled "Revocation of Certain Executive Orders Concerning Federal Regulation," President Biden expressly revoked Executive Order 13,891, stating that "[agencies] must be equipped with the flexibility to use robust regulatory action to address national priorities."[92]

President Biden's statement on Executive Order 13,992 promoted the appearance that he was willing to issue guidance directing the DOJ and BOP to use its regulatory authority to address the "national priority" of eliminating prison rape. Yet, despite this grandiose language, the Biden Administration has not used its newly reinstated authority to issue guidance mandating that the PREA's implementing guidelines are indeed binding on the BOP.[93]

While the Biden Administration has not gone far enough to address the prison rape crisis, it has made strides. For instance, on April 22, 2021, the Civil Rights Division of the DOJ issued a Statement of Interest in the case of *Diamond v. Ward* in the Middle District of Alabama.[94] As one article points out, the DOJ "reminds the court that the Prison Rape Elimination Act, passed by Congress to address the epidemic of sexual assault in prisons, requires prison officials to protect inmates against sexual assault."[95] Among other things, it suggested that the PREA requires the BOP to conduct individualized assessments for risks of harm to incoming inmates, and that it must consider an inmate's subjective perception of risk and the history of violence at any given facility.[96]

While these steps represent a stark contrast to the previous administration's contempt towards incarcerated populations—primarily transgender people and transgender people of color—there is much work left to be done. Based on our experience litigating prisoner rights under the PREA, we strongly urge that concerned citizens push for the Executive Branch to issue guidance documents interpreting the National Standards as binding on the BOP. While this would demonstrate a commitment to furthering basic

92. Exec. Order No. 13,992, 86 Fed. Reg. 7,049 (Jan. 25, 2021); *see also* Processes and Procedures for Issuance and Use of Guidance Documents, 86 Fed. Reg. 37,674 (July 16, 2021) (implementing Executive Order 13,992 to revoke, for example, 28 C.F.R. § 50.26).

93. Exec. Order No. 13,992, 86 Fed. Reg. 7,049 (Jan. 25, 2021).

94. *See* Arthur S. Leonard, *Biden Administration Reminds Federal Court of Obligation to Protect Trans Inmates*, GAY CITY NEWS (Apr. 27, 2021), https://gaycitynews.com/37329-2/; Statement of Interest of the United States, Diamond v. Ward, No. 20-cv-00453 (M.D. Ga. Nov. 23, 2020). In *Diamond*, a transgender female who was raped more than a dozen times since she was incarcerated, sued the Bureau of Prisons alleging that it was deliberately indifferent to her safety and medical needs.

95. Leonard, *supra* note 94 (stating that "the Statement of Interest reminds the court that the Prison Rape Elimination Act, passed by Congress to address the epidemic of sexual assault in prisons, requires prison officials to protect inmates against sexual assault"). *See also* Statement of Interest of the United States, *supra* note 94, at 1, 6.

96. *See* Leonard, *supra* note 94; Statement of Interest of the United States, *supra* note 94, at 2, 7.

human rights, any steps by the executive branch are unlikely to last. Just as the Biden Administration issued an Executive Order rescinding former President Trump's Executive Order limiting the DOJ's authority, the next administration could certainly employ the same strategy. With this possibility in mind, we suggest one final solution which could be implemented immediately to take one giant leap towards addressing Congress' self-proclaimed "zero-tolerance policy" for prison rape.

C. Amending and Extending the Implementing Regulations

Finally, while issuing stronger guidance as to the current implementing regulations is likely the most feasible type of reform, more large-scale reform must also be demanded and discussed in the form of amending and extending the implementing regulations as a whole. The regulations in their current form plainly do not do enough to protect vulnerable prisoners or to allow prisoners to hold prison officials accountable for sexual violence that does take place.

As described, a key failing of the PREA and its implementing regulations is that neither adequately protect the inmates who are most vulnerable for sexual assault. These inmates often include LGBTQIA+ inmates, disabled inmates, and young inmates.[97] To adequately protect vulnerable inmates, at least two key steps must be in place: (1) there must be a useful and mandatory mechanism for identifying which inmates are vulnerable to sexual assault, and (2) there must be heightened protections put in place to protect these vulnerable inmates.

In terms of an identification mechanism, the PREA's implementing regulations indeed provide some adequate guidance. The required screening procedure for vulnerability of inmates states that the BOP must consider—at a minimum—five factors.[98] These factors are: (1) physical, mental, or developmental disability, (2) age, (3) physical build, (4) criminal history, and (5) any previous incarceration.[99] The language also adds the additional factor of "[w]hether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender non-conforming."[100] Moreover, those prison regulations state that "[a] transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration" in the determination of the inmate's vulnerability status.[101] These factors establish a minimum floor, and the BOP should not have discretion in whether to consider them. If prisons adequately screened inmates for vul-

97. *See, e.g.*, Nancy Wolff, Cynthia L. Blitz, Jing Shi, Ronet Bachman, & Jane A. Siegel, *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. URBAN HEALTH 835, 836 (2006) (documenting that "younger inmates are at greater risk of sexual victimization").

98. 28 C.F.R. § 115.41(d).

99. *Id.* § 115.41(d)(1)–(5).

100. *Id.* § 115.41(d)(7).

101. *Id.* § 115.42(e).

nerability, especially taking into consideration each inmate's own perception of their vulnerability, the facilities would have adequate information to determine who needs heightened protections.

In terms of what to do with this screening information, the "adult prison and jail" regulations currently do not provide sufficient direction as to how the BOP must protect inmates identified as vulnerable. However, unlike these clearly insufficient regulations, the lockup regulations provide appropriately mandatory guidance for how vulnerable inmates ought to be protected. The pertinent BOP regulation states:

> If vulnerable detainees are identified pursuant to the screening required by § 115.141, security staff shall provide such detainees with heightened protection, to include continuous direct sight and sound supervision, single-cell housing, or placement in a cell actively monitored on video by a staff member sufficiently proximate to intervene, unless no such option is determined to be feasible.[102]

The language in this regulation is quite strong and—if appropriately followed—has the ability to provide great protections to vulnerable inmates.[103] First, the regulation specifies that security staff *shall* provide heightened protections, indicating that the regulation is mandatory,[104] not discretionary.[105] This should be sufficient to take any failure to follow this course of action out of purview of the discretionary function exception.[106] Second, it specifies "heightened protections," meaning a facility cannot rely on its general security measures as adequate for inmates who have been specifically identified as vulnerable. Third, it describes different modes of heightened protections which have been proven to decrease sexual assault while in confinement, like continuous direct sight and sound monitoring.[107] Finally, the regulations exception for "feasibility" is not broad, and it does not encapsulate situations in which the BOP claims that heightened security is too expensive or difficult. Rather, the plain meaning of the word "feasi-

102. *Id.* § 115.113(d).

103. It is particularly concerning that these types of heightened protections are presently only afforded to detainees in lockup facilities, which tend to be small, short-term holding centers where oversight is more available. To remove these heightened protections once an inmate moves to their long-term and often geographically larger facility with more sporadic oversight is puzzling and concerning.

104. *See* Berkovitz v. United States, 486 U.S. 531, 536 (1988) (indicating that the most conventional way to prescribe a mandatory course of action is to use non-discretionary language, such as "shall").

105. *Id.* (holding for purposes of the FTCA that no discretion remains if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow").

106. *See id.*

107. Of course, we recognize that there are privacy interests of inmates that would need to be weighed with any mandatory continuous direct sight and sound monitoring. This is precisely why offering other heightened protections in addition to or instead of continuous monitoring is key, such as single-cell placements, key card monitoring systems, and increased staffing.

ble" is "capable of being done,"[108] and it does not grant the BOP leave to "wave the flag" of policy to avoid accountability for its failure to uphold its mandatory duties.[109] In fact, the United States Supreme Court has gone so far as holding that the word "feasibility" admits "little of administrative discretion," and that it does not open the door to a "wide-ranging endeavor" involving weighing factors such as cost and safety.[110]

Were these regulations—that currently apply only to lockups—to apply to adult prison facilities, the BOP would have much greater guidance and accountability in protecting vulnerable inmates from sexual violence. In order to accomplish this directive, the adult prison and jail regulations must be amended to provide sufficient direction to facilities about what to do once an inmate is identified as vulnerable. While adding parallel language to what exists in the lockup regulations would be a great start, the PREA and its regulations have a long way to go before they will ever truly address the crisis of sexual assault while in confinement.

Conclusion

Being sexually assaulted while in confinement "is simply not 'part of the penalty that criminal offenders [are to] pay for their offenses.'"[111] And yet, despite the fact that Congress passed this legislation and the DOJ enacted regulations targeted to prevent these occurrences decades ago, little has changed. The PREA and its enacting regulations—while undoubtedly well-intentioned—are so vague in content and cloaked in discretion such that they are nothing more than blank letters. It is time that the PREA be taken seriously; it must do as it says. The suggestions contained in this Article are a start, but it will take continued efforts on legal, political, and societal levels to enact and see the change that is so desperately needed. Nevertheless, we must commit ourselves to take any feasible measures possible to oppose the unyielding and ongoing human rights and public health crisis that is prison rape.

108. *Feasible*, Merriam-Webster (11th ed. 2003).

109. *See* Young v. United States, 769 F.3d 1047, 1057 (9th Cir. 2014). Further, the judiciary has made clear that "feasible" is not a weasel word, and it should not be interpreted to nullify a specific prescription of action. For example, in *Fernandez v. United States*, the Ninth Circuit interpreted a federal regulation which required the Forest Service to "dispose of" dangerous trees as "promptly as possible" as "unconditional and clearly mandatory" and that, while superficially appearing discretionary, the language "as promptly as possible" "must have some meaning or it would be rendered superfluous." *See* 496 F. App'x 704, 705–06 (9th Cir. 2012).

110. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 411 (1971).

111. Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).