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Housing Transgender Inmates: A Review of PREA Compliance and Related Legislation & Litigation

Carla Williams-Pauley*

“On one occasion where I was physically assaulted, I was stomped, I was spit on, I was dragged, my clothes were sliced off of me with a knife.”

-Strawberry Hampton¹

INTRODUCTION

The last year has seen an explosive increase in attention and legislation attacking transgender, non-binary, and gender non-conforming individuals.² Seemingly everyone wants to weigh in on the rights of transgender people, from the once beloved children’s author, J.K. Rowling,³ to mega-corporations like Amazon and Nestlé USA.⁴ Several high-profile events regarding the placement and housing of transgender inmates have sparked media attention, frenzied debate, and even a roll-back of more progressive placement policies.⁵ While there has been a recent spark in attention to transgender inmates, federal and state rules regarding the housing and placement of this demographic were already promulgated in response to the Prison Rape Elimination Act of 2003 (hereinafter “PREA”). In 2012, the final PREA standards as adopted by the Department of Justice became effective.⁶ Since 2012, the Federal Bureau of

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¹ A transwoman discussing the abuse she suffered while housed in a male prison facility. Rachel Hinton, *Transgender inmate free after ‘tooth and nail’ prison battle – vows to fight ‘for everyone that was done like me’*, CHICAGO SUN TIMES, (July 10, 2019), <https://chicago.suntimes.com/politics/2019/7/10/20689443/transgender-inmate-free-prison-battle-vows-fight-strawberry-hampton>.

² See *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, ACLU (Oct. 6, 2023), <https://www.aclu.org/legislative-attacks-on-lgbtq-rights>.

³ J.K. Rowling (@jk_rowling), TWITTER (Jan. 30, 2023, 12:13 PM), https://twitter.com/jk_rowling/status/1620107934364745728?lang=en.

⁴ See *Business Statement on Anti-LGBTQ State Legislation*, HUMAN RIGHTS CAMPAIGN, (Oct. 3, 2023), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/2023-National-Biz-Statement-on-Anti-LGBTQ-State-Legislation.pdf>.

⁵ See e.g., Adam Rhodes, *New Jersey Rolls Back Protections For Trans Prisoners*, THE APPEAL (Jan. 17, 2023) <https://theappeal.org/new-jersey-transgender-prisoner-policy-demi-minor/>.

⁶ National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106 (June 20, 2012) (to be codified at 28 C.F.R. Part 115).

Prisons and all states and territories have had guidelines regarding the placement and housing of transgender inmates.

This article seeks to review whether the Federal Bureau of Prisons and state correctional departments are abiding by PREA's mandates. Section I provides an overview of PREA guidelines related to the screening and placement of transgender inmates as well as the Federal Bureau of Prison's implementation of these guidelines. Section II assesses the extent to which states are abiding by PREA's transgender-specific housing guidelines by reviewing multiple measures of compliance. In doing so, progressive state legislation for the placement of trans inmates as enacted by Connecticut and California are discussed. Additionally, the recent legislative movement to preserve single-sex spaces in prison based on sex assigned at birth is analyzed. Section III discusses the efficacy of a recent legal challenge to declare California's progressive statute for trans inmates as unconstitutional. Section IV analyzes the successes and limitations for transwomen inmates who have sought to challenge their housing placement using the Eighth Amendment's cruel and unusual punishment clause. Section V discusses the use of specialized housing units for transgender inmates. Lastly, a conclusion with recommendations to enhance the protection of transgender inmates is offered.

I. OVERVIEW OF TRANSGENDER PRISON HOUSING STATUTES AND REGULATIONS

The starting point for federal and state policies on transgender housing is the PREA of 2003 and its final standards. PREA regulations provide that all inmates must undergo a screening process during prison intake with various factors that must be taken into consideration regarding transgender individuals for the purpose of limiting abuse.⁷ PREA regulations are mandatory only

⁷ 28 C.F.R. §§ 115.41 – 115.42

for the Federal Bureau of Prisons facilities.⁸ However, Congress did impose a minor financial penalty on states that do not comply with PREA regulations.⁹ As a result, almost all states annually either submit to the Department of Justice a certification of full compliance with PREA or an assurance that the state will work toward compliance.¹⁰

A. Prison Rape Elimination Act

The purpose of the PREA was to develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape.¹¹ The legislation established a National Prison Rape Elimination Commission to study prison rape and provide recommendations for national standards.¹² The Commission's 2009 report specifically found that transgender inmates were especially vulnerable to abuse, and provided screening and classification recommendations to address this.¹³ The final resulting regulatory framework provides standards for adult prisons and jails, lockups, community confinement facilities, and juvenile facilities.¹⁴

Under the PREA, all facilities must screen transgender inmates for their risk of victimization and abusiveness, and then make an individualized determination regarding the placement and housing of the inmate.¹⁵ The risk screening required by 28 C.F.R. § 115.41 takes into consideration multiple criteria including, but not limited to, whether the inmate is perceived to be transgender or gender nonconforming and the inmate's own perception of their vulnerability. The goal of the risk screening is to “separate those inmates at high risk of being sexually victimized

⁸ 34 U.S.C. § 30307(b).

⁹ 34 U.S.C. § 30307(e)(2)(A).

¹⁰ BUREAU OF JUSTICE ASSISTANCE, FY 2022 LIST OF CERTIFICATION AND ASSURANCE SUBMISSIONS FOR AUDIT YEAR 2 OF CYCLE 3 AUGUST 20, 2020-AUGUST 19, 2021, (2022), <https://bja.ojp.gov/doc/fy22-prea-certification-assurance-submissions.pdf>.

¹¹ 34 U.S.C. § 30302(3).

¹² 34 U.S.C. § 30306.

¹³ NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT, 73-74 (June 2009), <https://www.ojp.gov/pdffiles1/226680.pdf>.

¹⁴ 28 C.F.R. §§ 115.11 – 115.393

¹⁵ *Id.* at §§ 115.41 – 115.42.

from those at high risk of being sexually abusive” in housing assignments.¹⁶ The risk screening must be used to make “individualized determinations” about the safety in placement of each inmate.¹⁷ Importantly, a transgender inmate’s “own views with respect in respect to his or her own safety shall be given serious consideration.”¹⁸ In recognition of the greater susceptibility of abuse that transgender inmates face, the regulation provides that placement and programming assignments for each transgender inmate must be reassessed at least twice per year to review any threats to safety experienced by the inmate.¹⁹

Transgender inmates, and others at high risk of sexual victimization, may be placed in protective custody pursuant to PREA if “there is no available alternative means of separation from likely abusers.”²⁰ The segregated inmates should be given access to programming and activities “to the extent possible” and any restrictions in their access should be documented.²¹ Additionally, although a few agencies have such units, PREA strongly disfavors the placement of LGBTI²² inmates in facilities that house only LGBTI inmates.²³

B. Federal Bureau of Prisons

PREA regulations are mandatory for the Federal Bureau of Prisons (hereinafter “BOP”), meaning all federal prisons must comply.²⁴ BOP created a *Transgender Offender Manual* to create guidance for staff specifically as it relates to the housing and treatment of transgender inmates.²⁵ The most recent BOP manual issued in 2022 tracks closely to PREA regulations;

¹⁶ *Id.* at § 115.42(a).

¹⁷ *Id.* at § 115.42(c).

¹⁸ *Id.* at § 115.42(e).

¹⁹ *Ibid.*

²⁰ *Id.* at § 115.43(a).

²¹ *Id.* at § 115.43(b).

²² LGBTI stands for lesbian, gay, bisexual, and intersex.

²³ *Id.* at § 115.42(g).

²⁴ *See supra* note 8.

²⁵ *See* U.S. DEP’T OF JUST., FED. BUREAU OF PRISONS, NO. 5200.08, TRANSGENDER OFFENDER MANUAL (2022).

however, this was not necessarily always the case. The Trump Administration in 2018 departed from the Obama-era manual by requiring the initial designation for housing to be based on “biological sex.”²⁶ The 2018 changes to the manual stated that designation to a facility of the inmate’s identified gender would “be appropriate in only in rare cases [...] where there has been significant progress towards transition as demonstrated by medical and mental health history.”²⁷ The Trump Administration’s manual was in complete contradiction to codified PREA rules.²⁸ The Trump Administration’s changes to the manual reflected a traditional and increasingly obsolescent version of gender as primarily based on genitalia and the equivocation of one’s sex and gender. The changes also demonstrated the vulnerability of transgender people whose rights may change at the whim of one administration to the next.

The current 2022 manual is in-line with the PREA. The manual provides that if an inmate is transgender, then the matter is referred to the Transgender Executive Council (hereinafter “TEC”), which is the agency’s official decision-making body on all issues affecting the transgender population.²⁹ In making placement decisions, the TEC considers a variety of factors such as the inmate’s security level, criminal history, medical needs, vulnerability to sexual victimization, likelihood of perpetrating abuse, and also may consider facility-specific factors such as staffing patterns.³⁰ Like PREA, the Federal Bureau of Prison’s manual provides that housing should be based on an individualized assessment of the transgender inmate taking into consideration a variety of factors.

II. THE EXTENT OF TRANSGENDER-SPECIFIC PREA COMPLIANCE BY THE STATES

²⁶ U.S. DEP’T OF JUST., FED BUREAU OF PRISONS, CHANGE NOTICE No 5200.04 CN-1, TRANSGENDER OFFENDER MANUAL, at 6 (2018).

²⁷ *Id.* at 7-8.

²⁸ Compare U.S. DEP’T OF JUST., FED. BUREAU OF PRISONS, *supra* note 25, with 28 C.F.R. § 115.42.

²⁹ See *supra* note 25 at 4.

³⁰ *Id.* at 5-6.

Compliance with PREA’s transgender placement rules is exceedingly difficult to ascertain as data regarding the number of transgender inmates, the placement decisions of those inmates, and, most importantly, the reasoning behind those placement decisions is not readily available. As a result, any analysis of a state’s compliance with PREA will be imperfect for even if a state statute aligns with PREA, the question of how it is being executed remains. A number of secondary sources suggest that many state prison administrations either act conservatively in placement decisions, or in bad faith. Furthermore, while a few state legislatures, like that of California, have sought to codify and expand on PREA, others have moved to reinforce the sanctity of single-sex spaces based on one’s biological sex assigned at birth.

A. PREA Audit Function

Congress created an audit process within PREA to assess compliance with PREA standards. The process requires that at least one third of every facility is audited each year, and the entire facility must be audited at least once every three years.³¹ Prior to an onsite visit by an auditor, the prison must first complete a twenty-six-page pre-audit questionnaire regarding the facility’s procedures.³² The questionnaire inquires into the facility’s screening procedures, and whether the facility makes housing assignments on a case-by-case basis as required by 28 C.F.R. § 115.42(c).³³ During the onsite audit, the auditor has wide-latitude to conduct an investigation and may, among other things, observe all areas of the facility, conduct private interviews with inmates, and review videotapes and documents.³⁴

³¹ 28 C.F.R. § 115.401(a)-(b).

³² NAT’L PREA RES. CTR., PREA AUDIT: PRE-AUDIT QUESTIONNAIRE, PRISONS AND JAILS (2019).

³³ *Id.* at 14.

³⁴ *See* 28 C.F.R. § 115.401(g)-(o).

According to the Department of Justice, for fiscal year 2022, twenty-one states and the District of Columbia were in full compliance with PREA, thirty states and territories submitted an “assurance” that they would use funds to come into compliance, and four states and territories declined to provide a certification of compliance and thus were subjected to a five percent reduction in “certain department grant funding.”³⁵

B. Other Measures of Compliance

Despite PREA compliance and assurance records which indicate very high state compliance with PREA standards, other sources suggest a foggier picture. Written state policies may parrot PREA; however, their application varies. Furthermore, the limited available data on transgender placement decisions as reported by news sources indicate blatant non-compliance.

State policies in recent history reflect a discomfort in adopting PREA’s transgender specific standards. In 2017, Prison Policy Initiative conducted a review of transgender policies and PREA compliance in twenty-one states finding that many state policies fail to provide a “minimum baseline for protection and respect.”³⁶ Of the twenty-one states reviewed, Prison Policy Initiative found that eight of the states in their written policies did not include that transgender housing decisions should be made on a case-by-case basis.³⁷ Similarly, only eleven states provided that prison officials must seriously consider a trans inmate’s views in housing decision.³⁸ Since Prison Policy Initiative conducted this review, some states have changed their written policies. For example, the Oklahoma Department of Corrections in their written policies now provide that the prison must both make housing decisions on a case-by-case basis and consider a transgender

³⁵ See *supra* note 10. The four states and territories subject to a reduction in grant funding in 2022 were Alaska, Commonwealth of the Northern Mariana Islands, U.S. Virgin Islands, and Utah. *Id.*

³⁶ Elliot Oberholtzer, *The Dismal State of Transgender Incarceration Policies*, PRISON POL’Y INITIATIVE (Nov. 8, 2017), <https://www.prisonpolicy.org/blog/2017/11/08/transgender/>.

³⁷ See *id.*

³⁸ See *id.*

inmate's views, directly citing the relevant PREA statutes.³⁹ A more recent analysis performed by NPR found that the majority of states' correctional policies for transgender housing follow PREA's federal guidelines.⁴⁰ The trend toward state policies coming into compliance with PREA standards is a step in the right direction. Nevertheless, the relatively slow adoption of transgender specific PREA standards among some of the states reflects ignorance and resistance towards trans people. Although PREA is a national standard, the reality that a transgender inmate may face depends on where within the country they were incarcerated.

Even when a state's department of corrections issues policies that follow PREA standards, the actual application of these standards may vary from locality to locality. For example, a local news outlet in Virginia reached out to seven sheriffs' offices in the southeastern part of the state regarding their transgender housing policies.⁴¹ These geographically close sheriffs' offices provided differing interpretations of their policies. The Virginia Beach Sheriff's Office stated that they are "legally required to house male and female inmates separately based on their biological sex," yet that they also base housing on a "complete set of facts."⁴² The Newport News Sheriff's Office provided a summary of their policies which closely track that of PREA, and the Chesapeake Sheriff's Office specifically stated that they adhere to the policies from the Virginia Department of Corrections which follow PREA.⁴³ The news article reflects that the localities have a familiarity with PREA standards, although a slight differentiation in interpretation.

³⁹ OKLAHOMA DEPARTMENT OF CORRECTIONS, OP-030601, at 17 (Dec. 21, 2021), <https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-03/op030601.pdf>.

⁴⁰ Jaclyn Diaz, *Minnesota recognizes she's a woman. She's locked in a men's prison anyways*, NPR (Oct. 22, 2022, 6:07 AM), <https://www.npr.org/2022/10/04/1126801351/trans-rights-transgender-inmates>.

⁴¹ Zak Dahlheimer, *How do Virginia jails and prisons handle transgender inmates?*, 3 WTKR (July 31, 2023), <https://www.wtkr.com/investigations/how-do-virginia-jails-and-prisons-handle-transgender-inmates>.

⁴² *Id.*

⁴³ *See id.*

Whether these differences as-applied result in unequal outcomes among trans inmates is unclear without more data.

It appears to be the case that very few transgender inmates are housed according to their gender identity. In 2020, NBC News reported that “out of 4,890 transgender state prisoners tracked in 45 states and Washington D.C., NBC News was able to confirm only 15 cases in which a prisoner was housed according to their lived gender, based on responses to Freedom of Information Act requests.”⁴⁴ Strikingly, NBC reported that in Texas “none of the 980 transgender prisoners live in gender-affirming housing.”⁴⁵ The statistics that NBC reported are so drastic that one must infer that prison administrators are not seriously considering a trans persons own views about their safety and executing case-by-case housing decisions in good faith. Certainly, there are many legitimate reasons to house a trans inmate according to their sex-at-birth. However, the “inexorable zero” indicates that prison administrations across the country have a practice of non-compliance with PREA standards, and perhaps mal intent.⁴⁶

Overall, while state correctional policies have increasingly come into compliance with PREA, the actual application of these policies is varied. The historic resistance to adopting PREA’s transgender housing policies coupled with news reporting statistics on the issue indicates a level of non-compliance greater than that reported by the Department of Justice’s audits.

C. The Legislative Movement to Strengthen Trans Prisoners’ Rights

⁴⁴ Kate Sosin, *Trans, imprisoned – and trapped*, NBC NEWS (Feb. 26, 2020), <https://www.nbcnews.com/feature/nbc-out/transgender-women-are-nearly-always-incarcerated-men-s-putting-many-n1142436>.

⁴⁵ *Id.*

⁴⁶ The “inexorable zero” is a rule of inference in employment discrimination law cases stemming from *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 (1977) (quoting *United States v. T.I.M.E.-D.C., Inc.*, 517 F.2d 299, 315 (5th Cir. 1975)). When a plaintiff demonstrates a complete absence of members of a protected class in a job, such statistic provides some proof of discriminatory motive.

In recognition of the shortcomings of PREA in protecting transgender prisoners' rights, some states, namely Connecticut and California, have enacted legislation to support housing transgender prisoners in line with their gender identity.

In 2018, Connecticut passed S.B. 13 entitled *An Act Concerning Fair Treatment of Incarcerated Women*, which among things, supported a trans inmate's right to be housed in a facility that matches their gender identity.⁴⁷ The law requires that an inmate who has a birth certificate, passport, or driver's license reflecting their gender identity, must "presumptively be placed in a correctional institution with inmates of the gender consistent with the inmate's gender identity."⁴⁸ This presumption can be overcome by the prison administration showing that the placement would "present significant safety, management or security problems."⁴⁹ Connecticut's law presents a barrier for trans inmates that do not already come into the incarceration system with some form of identification that reflects their gender identity. Many states have burdensome or complicated processes for changing a gender marker that make it effectively impossible to get updated identification.⁵⁰ In some rare cases, an inmate may come out as transgender during their tenure in prison, in which case, it is unclear how the state would address the inmate's placement.⁵¹ Regardless of its limitations, Connecticut's passing of S.B. 13 was certainly a step forward in strengthening trans housing protections. At a minimum, it showcased a state legislature's willingness to protect trans inmates at a time when the Federal Bureau of Prisons

⁴⁷ See, e.g. *ACLU of Connecticut Applauds Passage of S.B. 13, Fair Treatment of Incarcerated Women and Transgender People*, AM. C.L. UNION CONN., <https://www.acluct.org/en/press-releases/aclu-connecticut-applauds-passage-sb-13-fair-treatment-incarcerated-women-and> (last visited Nov. 18, 2023).

⁴⁸ CONN. GEN. STAT. § 18-81ii.

⁴⁹ *Id.*

⁵⁰ *Identity Documents & Privacy*, NAT'L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/issues/identity-documents-privacy> (last visited Nov. 18, 2023).

⁵¹ As an example, Chelsea Manning is perhaps the most widely known case of an inmate coming out as transgender after sentencing and placement. *Everything you need to know about Chelsea Manning*, ABC NEWS (May 16, 2017, 1:20 PM), <https://abcnews.go.com/US/chelsea-manning/story?id=44809970>.

was rolling back protections.⁵² Furthermore, Connecticut may have provided some insight for legislatures in other states, like California, to build on.

In 2020, California passed the Transgender Respect, Agency, and Dignity Act which requires the Department of Corrections to house inmates in correctional facilities based on the inmate's preference unless there are security concerns.⁵³ If the Department of Corrections denies an inmate's preferred housing placement, they must "certify in writing a specific and articulable basis why the department is unable to accommodate" the inmate's housing preference.⁵⁴ While not necessarily providing a route for procedural due process, the law does require that after a denial, the inmate is given "meaningful opportunity to verbally raise any objections to that denial, and have those objections documented."⁵⁵ California's legislation is straightforward and clear in providing transgender inmates deference and autonomy in their housing placement. The California legislature intended to protect trans inmates from sexual assault and codify policies that provide even greater protection than PREA requires.⁵⁶

Connecticut's and California's transgender housing laws both provide that an inmate's stated gender identity and preferences in housing provide the basis for an initial housing decision. As opposed to PREA's case-by-case approach, Connecticut's and California's laws make the inmate's gender identity paramount and center while also making exceptions for security. These examples may serve as a model for other states or for Congress to reevaluate PREA and amend its language.

D. The Legislative Movement for Single Bio-Sex-Spaces: Women's Bill of Rights

⁵² See *supra* notes 26-28.

⁵³ 2020 Cal. Legis. Serv. Ch. 182 (West).

⁵⁴ CA PENAL CODE § 2606(b) (West 2021).

⁵⁵ *Id.* at § 2606(d).

⁵⁶ See Terry Thornton, *Governor Newsom signs Senate Bill 132*, CAL. DEP'T OF CORR. & REHAB. (Sept. 29, 2020), <https://www.cdcr.ca.gov/insidecdcr/2020/09/29/governor-newsom-signs-senate-bill-132-to-respect-gender-identity-during-incarceration/>.

There exists a conservative legislative movement in many states to pass what is generally known as the “Women’s Bill of Rights” to codify a binary definition of sex and gender as related solely to one’s genitalia and reproductive organs.⁵⁷ The stated purpose by the model drafters of the Women’s Bill of Rights is to protect women’s rights.⁵⁸ However, these bills in effect attempt to bar transgender and nonbinary people from accessing single-sex spaces including such spaces in prisons. Such bills also cause general confusion and chaos surrounding statutory interpretation.⁵⁹ As a result, a facility may be more cautious in their placement of inmates.

In April 2023, the Kansas legislature successfully passed the Women’s Bill of Rights (hereinafter “S.B. 180”) which, among other things, defines what male and female means, instructs government agencies to only use one’s sex-at-birth in state documentation, and provides that making a distinction between the sexes with respect to prisons is substantially related to the important governmental objectives of protecting the health, safety and privacy of individuals in

⁵⁷ The “Women’s Bill of Rights” is model legislation promoted by non-profit organizations such as the Independent Women’s Forum and Women’s Liberation Front. *See* SUPPORT THE WOMEN’S BILL OF RIGHTS, <https://womensbillofrights.com/> (last visited Nov. 26, 2023); *see also* WOMEN’S LIBERATION FRONT FIGHTS AT THE FRONT LINE OF FEMINISM, <https://womensliberationfront.org/> (last visited Nov. 26, 2023). The Independent Women’s Forum has been funded by conservative donors, including, but not limited to, the Charles G. Koch Charitable Foundation, Castle Rock Foundation, National Christian Charitable Foundation, etc. *Independent Women’s Forum*, CONSERVATIVE TRANSPARENCY, <http://conservativetransparency.org/recipient/independent-womens-forum/>.

⁵⁸ SUPPORT THE WOMEN’S BILL OF RIGHTS, <https://womensbillofrights.com/> (last visited Nov. 26, 2023).

⁵⁹ A slew of news organizations and media outlets reported information regarding S.B. 180 that characterized the bill as more sweeping on its face than it is. For example, multiple outlets reported S.B. 180 to be a “bathroom bill” whereby trans people would no longer be able to use bathrooms or lockers rooms that align with their gender identity. *See, e.g.,* Katie Bernard and Jonathan Shorman, *Trans Kansans to be barred from single-sex spaces, blocked from changing gender on ID*, THE KANSAS CITY STAR (May 5, 2023, 11:55 AM), <https://www.kansascity.com/news/politics-government/article274776876.html>; *see also* Nick Sloan, *Douglas County, Kan. Says she won’t prosecute anyone after “bathroom bill” goes into effect*, KMBC NEWS (Jun. 9, 2023, 5:20 PM), <https://www.kmbc.com/article/douglas-county-kan-says-she-wont-prosecute-anyone-after-bathroom-bill-goes-into-effect/44157099>. S.B. 180 is clearly a threat to the rights of trans people and uses language that defines such persons as illegitimate in their gender identity. As of now, it is unclear exactly how S.B. 180 will be used against trans people in the future. What is clear is that S.B. 180’s vagueness and the reporting surrounding it has caused fear, anxiety, and uncertainty among the LGBTQ+ community in the state. *See* Rachel Mipro, *Large portion of Kansas anti-trans law may not be enforced, but consequences still felt*, KANSAS REFLECTOR (June 23, 2023, 1:30 PM), <https://kansasreflector.com/2023/06/23/large-portion-of-kansas-anti-trans-law-may-not-be-enforced-but-consequences-still-felt/>.

prisons.⁶⁰ While Kansas was the first state to enact a Women’s Bill of Rights into law, other states have been working to do the same. Tennessee passed an almost identical law in May of 2023.⁶¹ Oklahoma’s and Nebraska’s governors both signed executive orders for the Women’s Bill of Rights in August 2023.⁶² The Women’s Bill of Rights is meant to be a step toward making sure trans women cannot access a facility that houses biological women. A state representative in Oklahoma said as much stating that the purpose of the bill is to protect women adding that she does not believe that “a woman should be sharing a cell or a dorm room or a bathroom with a biological male.”⁶³

The big question in Kansas is whether S.B. 180 prohibits women’s corrections facilities from housing any individual who does not meet the statutory definitions for “female” established by S.B. 180, subsection (a)(2) and, relatedly, whether men’s prisons are prohibited from housing a biological female, as defined by S.B. 180, who identifies as male and requests placement in a men’s prison. The Kansas Attorney General answered this exact question in response to a state representative stating that S.B. 180 does not mandate that the Kansas Department of Corrections make distinctions between the sexes as is defined in S.B. 180.⁶⁴ Even though S.B. 180 was unsuccessful in statutorily mandating biological-sex separation in prisons, such strict definitions of sex leave the door wide open for further regulation and attempts to circumnavigate PREA. For example, as of now, no Kansas state statute or Kansas Administrative Regulation requires the

⁶⁰ Senate Bill No. 180 (Kan. 2023).

⁶¹ Senate Bill No. 1440, (Tenn. May 2023).

⁶² Okla. Executive Order No. 2023-20 (Aug. 1, 2023), <https://www.sos.ok.gov/documents/executive/2079.pdf>; Neb. Executive Order No. 23-16 (August 30, 2023), <https://governor.nebraska.gov/sites/governor.nebraska.gov/files/doc/press/EO%20No.%202023-16%20-%20Establishing%20a%20Women%27s%20Bill%20of%20Rights.pdf>.

⁶³ Marcus Trevino, *House passes ‘Women’s Bill of Rights’: Ranson, Democrats argue it ostracizes trans women*, STILLWATER NEWS PRESS (Mar. 24, 2023), https://www.stwnewspress.com/oklahoma/news/house-passes-womens-bill-of-rights-ranson-democrats-argue-it-ostracizes-trans-women/article_3b432e00-ca94-11ed-bd91-9f31026732e8.html.

⁶⁴ Kan. Att’y Gen. Op. No. 2023-2 (June 26, 2023), <https://ksag.washburnlaw.edu/opinions/2023/2023-002.pdf>.

Kansas Department of Corrections to maintain separate prisons for men and women as a general matter. However, if one did, then the regulation would be mandated to use S.B. 180's definition of sex in classifying inmates. Under S.B. 180's definition of sex, no trans person would ever be considered anything other than their sex at birth.

The model legislation for the Women's Bill of Rights, which is largely what is being adopted by the states, mandates that public schools and any federal, state, and local agency that collects vital statistics must use the sex definitions at outlined in the bill.⁶⁵ In a state like Kansas, for example, this means that the state agencies that issue driver's licenses and birth certificates must abide by the sex definition as stated in S.B. 180.⁶⁶ PREA was enacted in large part to study the issue of prison rape. PREA mandated that the Bureau of Justice Statistics carry out annual statistical reviews regarding prison rape at all facility levels.⁶⁷ Since the Women's Bill of Rights requires state agencies to use its definition of sex, it is conceivable that this could cause issues in federal data collection in that the state's data will inaccurately reflect a trans inmate's gender, or that they are even transgender at all. The Bureau of Justice Statistics must rely on reporting from state and local facilities in their data collection activities. If data from an entity like the Kansas Department of Corrections, under S.B. 180, does not accurately identify a trans inmate's gender identity, then the data reflecting that inmate's reported abuse will not show that the inmate, as a trans person, made the report. For example, a trans woman in a men's facility who reports abuse would be considered male, and therefore, the data would only reflect this as an instance of male-on-male violence, essentially eradicating the trans experience. Considering trans inmates report high levels of abuse in prison, it is particularly important that data is collected accurately to

⁶⁵ See *supra* at note 58.

⁶⁶ See *supra* at note 64 and pp. 3-4, 6.

⁶⁷ 34 U.S.C. § 30303.

reflect their experience. In this sense, the Women’s Bill of Rights conflicts with PREA’s data collection purpose. In a state like Kansas, it will be up to the Kansas Department of Corrections to make sure that they collect data in-line with S.B. 180, but also collect data that aligns with the Bureau of Justice Statistic’s sex and gender identity definitions.⁶⁸

Single-sex spaces based solely on one’s biological sex do not align with the mandates of PREA. The Women’s Bill of Rights provides state legislatures the ability to signal to their voter base their values around trans issues, without having to affirmatively buck PREA. While the Women’s Bill of Rights lacks an enforcement mechanism, it still may frustrate PREA by using language around single-sex prison spaces that doesn’t align with PREA, causing confusion in interpretation, and impacting data collection.

III. THE BURGEONING LEGAL CHALLENGE AGAINST PROGRESSIVE STATE STATUTES

While states like California have sought to strengthen the rights of trans inmates by passing progressive housing policies, this has not come without a legal challenge. In 2021, the Women’s Liberation Front⁶⁹ on behalf of four cisgender female inmates from the California Department of Corrections and the organization Woman II Woman⁷⁰ filed a complaint for declaratory and injunctive relief challenging California’s enactment of S.B. 132, known as the Transgender Respect, Agency and Dignity Act.⁷¹ The complaint under case name *Chandler v. California Department of Corrections and Rehabilitation* alleges that S.B. 132 is invalid and seeks a

⁶⁸ The Bureau of Justice Statistics publishes multiple analyses and surveys that take gender identity into consideration. For more information, see BUREAU OF JUSTICE STATISTICS, *Sexual Orientation and Gender Identity in BJS Data Collections*, (Sept. 14, 2022), <https://bjs.ojp.gov/sexual-orientation-and-gender-identity-bjs-data-collections#ugbb3a>.

⁶⁹ See *supra* note 57 and accompanying text.

⁷⁰ Woman II Woman is a nonprofit Christian organization in California whose stated mission is to provide resources, education, and support services for system-impacted women. *About Woman II Woman*, WOMAN II WOMAN, <https://www.womaniiwoman.org/about>.

⁷¹ Complaint, *Chandler v. California Department of Corrections and Rehabilitation*, 1:21-cv-01657 (E.D. Cal. Nov. 17, 2021).

declaration that the law violates the First Amendment, Eighth Amendment, and Fourteenth Amendment of the U.S. Constitution, and multiple provisions of California's constitution.⁷² The complaint also seeks injunctive relief in the form of a permanent injunction enjoining California's Department of Corrections and Rehabilitation from enforcing or implementing S.B. 132 as codified in Cal. Pen. Code §§ 2605, 2606.⁷³ In 2022, multiple trans-affirming organizations such as Lambda Legal, the ACLU of Southern California, and the Transgender Law Center filed motions to intervene to defend S.B. 132.⁷⁴ Litigation regarding this case is ongoing. In its most recent order in August of 2023 in response to a motion to intervene, the federal district court noted that due to the court's busy docket, it still may be many months before the court will rule on the defendant's motion to dismiss the case.⁷⁵ The allegations, reasoning, and language relied on in the complaint evidence the plaintiffs' denial of transness as a legitimate gender identity. The efficacy of the complaint's legal theories are weakened by the complaint's sensationalist claims and lack of factual allegations to support the claims.

Chandler alleges that S.B. 132 imposes cruel and unusual punishment on incarcerated women.⁷⁶ The complaint states that women are disproportionately subject to sexual victimization by men; therefore, the placement of a trans woman or a cisgender man claiming a transfeminine identity will substantially increase the risk of sexual violence against cisgender women.⁷⁷ The complaint does not rely on specific instances of cisgender female inmates being harmed by transgender women or cisgender men who have claimed a trans identity. One of the plaintiffs

⁷² *See id.*

⁷³ *Id.* at 34.

⁷⁴ *Chandler v. California Department of Corrections and Rehabilitation*, LAMBDA LEGAL, <https://lambdalegal.org/case/chandler-v-california-department-of-corrections-and-rehabilitation/>.

⁷⁵ *Chandler v. California Dep't of Corr. & Rehab.*, No. 121CV01657JLTHBK, 2023 WL 5353212, *8 (E.D. Cal. Aug. 21, 2023).

⁷⁶ Complaint, *supra* note 65, at 20.

⁷⁷ *See id.* at 21.

does claim that she was sexually assaulted by a man whom the prison referred to as a transgender woman; however, that does not serve as the basis of the complaint.⁷⁸ Instead, the complaint continually asserts that women are placed at a higher risk of sexual violence when housed with men, regardless of their gender identity, thus framing all trans women as definitively male.⁷⁹ To be successful in an Eighth Amendment cruel and unusual punishment claim, the plaintiff must demonstrate that the defendant was deliberately indifferent to a substantial risk of serious harm.⁸⁰ As discussed in Section IV, the cruel and unusual punishment standard is a very high bar. In a similar case, *Guy v. Espinoza*, in which a female inmate made an Eighth Amendment claim for deliberate indifference due to feeling threatened by the presence of post-operative male-to-female transgender inmates, the district court held that the plaintiff did not state a claim for infliction of pain in violation of the Eighth Amendment.⁸¹ Similarly, the complaint here does not rely on any serious injuries that have occurred. Rather, the complaint uses the fact that women are disproportionately harmed by men, to argue that predatory male inmates will claim a false gender identity under S.B. 132 for the purpose of enacting sexual violence against female inmates. As alleged, the complaint's speculations fail to meet the high burden of the Eighth Amendment.

The plaintiffs also seek a judgment that S.B. 132 violates the plaintiffs' First Amendment right to freedom of speech, freedom of religion, and right to be free from the government establishment of religion.⁸² *Chandler* claims that S.B. 132 requires female inmates to use a trans inmate's preferred pronouns in violation of their freedom of speech.⁸³ Additionally, the complaint

⁷⁸ *Id.* at 17.

⁷⁹ *See, e.g., id.* at 4.

⁸⁰ *See infra* notes 77 and 78.

⁸¹ *Guy v. Espinoza*, No. 119CV00498AWIEPGPC, 2020 WL 309525, at *9 (E.D. Cal. Jan. 21, 2020), *report and recommendation adopted*, No. 119CV00498AWIEPGPC, 2020 WL 949556 (E.D. Cal. Feb. 27, 2020).

⁸² Complaint, *supra* note 65, at 22-24.

⁸³ *Id.* at 22.

alleges that S.B. 132 violates the free exercise of religion because it does not provide any accommodations for women who hold religious beliefs concerning the inability to share intimate spaces with men.⁸⁴ Lastly, the complaint asserts that S.B. 132 violates the Establishment Clause by imposing a “faith-based belief system founded on acceptance of the unproven (and unprovable) assertion that human beings have no objective, immutable sex.”⁸⁵ While relatively recent and rare, female inmates have had limited success in challenging prison administration’s policies regarding transgender inmates on the grounds of religious liberty.⁸⁶ Here, the complaint’s strongest claim is likely regarding the free exercise of one’s religion to practice modesty and avoid sharing certain spaces with men.

Lastly, *Chandler* claims that S.B. 132 deprives women and plaintiffs from equal protection of the law in violation of the Fourteenth Amendment’s Equal Protection Clause.⁸⁷ The complaint argues that the law “converts women’s correctional facilities into mixed-sex facilities with no corresponding conversion of men’s facilities” and imposes on female offenders an increased risk of physical and sexual assault without a corresponding risk imposed on men.⁸⁸ In *Guy v. Espinoza*, the court dismissed with prejudice the plaintiff’s claim that housing transgender women in a women’s prison violates the equal protection rights of cisgender women because the plaintiff did not allege facts to demonstrate intentional discrimination against cisgender women

⁸⁴ *Id.* at 23.

⁸⁵ *Ibid.*

⁸⁶ *See, e.g., Fleming v. Fed. Bureau of Prisons*, No. 4:21-CV-325-MW/MJF, 2022 WL 1005069 (N.D. Fla. Feb. 22, 2022), *report and recommendation adopted in part, rejected in part*, No. 4:21CV325-MW/MJF, 2022 WL 1003184 (N.D. Fla. Apr. 4, 2022) (Dismissing the plaintiff’s First Amendment claims against the Federal Bureau of Prisons, but allowing the Religious Freedom Restoration Act claim to proceed against the Warden for requiring the plaintiff to expose her nudity to transgender female inmates and by requiring her to use feminine pronouns when addressing or referring to transgender female inmates); *see also Pasquarello v. Murphy*, No. CV2118806ZQNQDEA, 2022 WL 1665016 (D.N.J. May 25, 2022) (Dismissing the plaintiff’s Religious Land Use and Institutionalized Person Act claim that the presence of transgender inmates places a substantial burden on their religious exercise).

⁸⁷ Complaint, *supra* note 65, at 24-26.

⁸⁸ *Id.* at 24-25.

nor did they establish differential treatment from similarly situated inmates.⁸⁹ *Chandler* similarly has no showing of intentional discrimination. Furthermore, the plaintiffs do not demonstrate that they are being treated differently from male inmates as S.B. 132 allows female-to-male transgender inmates to be housed in a men’s facility.

Chandler is indicative of the burgeoning legal challenge against state efforts that embrace and expand on PREA’s treatment of transgender inmates. While *Chandler* has little precedential support, litigation in this area is relatively new.

IV. THE ROLE OF THE EIGHTH AMENDMENT IN CHALLENGING PLACEMENT DECISIONS

Transwoman inmates have had growing success in challenging their placement decisions under an Eighth Amendment claim. However, such challenges have generally only been successful for transwomen who have undergone extensive and severe physical and sexual abuse while housed in a men’s facility. The Eighth Amendment imposes on prison officials a duty to “take reasonable measures to guarantee the safety of the inmates.”⁹⁰ This includes a duty to protect prisoners from violence at the hands of other prisoners.⁹¹ In *Farmer v. Brennan*, the Supreme Court held that an Eighth Amendment claim based on deliberate indifference to the health and safety of an inmate must satisfy both an objective and a subjective component test.⁹² The official’s act must have objectively caused a substantial risk of serious harm, and the official must have been subjectively aware of that risk of that harm, yet acted indifferently towards it.⁹³ Using this standard, a growing number of courts have acknowledged that prison officials may

⁸⁹ *Guy v. Espinoza*, 2020 WL 309525, at *12.

⁹⁰ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citing *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).

⁹¹ *Id.* at 833.

⁹² *Id.* at 834.

⁹³ *See id.*

fail to protect transgender women, who are highly vulnerable to sexual assault, when housed in correctional facilities inconsistent with their gender identity.

In the context of challenging a placement decision, the initial hurdle is to adequately plead both prongs of the *Farmer* test. For the objective component, *Farmer* only requires that that official's act or omission caused a "substantial risk of serious harm."⁹⁴ In the context of transgender housing, this means, in theory, that the transgender inmate does not have to suffer physical harm to seek injunctive relief to stop that harm from ripening. However, cases that have been somewhat successful in challenging housing placements generally require allegations of extreme physical and sexual abuse.⁹⁵ Threats, verbal taunts, and a generalized fear of sexual assault in areas like showers and bathroom stalls do not qualify as a substantial risk of serious harm.⁹⁶ *Farmer*'s second component requires that the officer was subjectively aware of the risk of harm and acted deliberately indifferent towards it.⁹⁷ *Farmer* held that circumstantial evidence of the obviousness of the substantial risk of harm, not just explicit notification, may be used to establish subjective awareness.⁹⁸ Regarding transgender housing placements, courts may consider the defendant's knowledge about the vulnerability of transgender inmates, and prison policies and guidelines on transgender inmates may be used to support an inference that the officer held subjective awareness.⁹⁹ However, an officer's awareness that the plaintiff-inmate filed a PREA complaint is likely not enough to show the officer's subjective awareness of the

⁹⁴ *Id.*

⁹⁵ See *infra* notes 71 to 79 for two cases supporting this proposition.

⁹⁶ See, e.g., *Gordon v. Inslee*, 3:21-CV-5802-BJR-DWC, 2023 WL 2874062 (W.D. Wash. Feb. 6, 2023), *report and recommendation adopted*, 21-5802-BJR-DWC, 2023 WL 2864187 (W.D. Wash. Apr. 10, 2023); See also *Williams v. Wood*, 223 F. App'x 670, 1 (9th Cir. 2007) (stating that "speculative and generalized fears of harms as the hands of other prisoners do not rise to a sufficiently substantial risk of serious harm to [the inmate's] future health.").

⁹⁷ See *supra* note 68.

⁹⁸ *Farmer*, 511 U.S. at 842-44.

⁹⁹ See *Greene v. Bowles*, 361 F.3d 290, 294 (6th Cir. 2004); See also *Shaw v. D.C.*, 944 F. Supp. 2d 43, 59-60 (D.D.C. 2013) (finding that reports, regulations, and guidelines regarding transgender inmates may support the inference that the risk to trans inmates was obvious and known).

risk.¹⁰⁰

In 2018, Strawberry Hampton, a transgender woman, filed a preliminary injunction against the Illinois Department of Corrections seeking to be placed in a women’s facility.¹⁰¹ Hampton made numerous disturbing allegations including, but not limited to, that officers forced her to engage in sexual acts with her cellmate for their entertainment, officers raped her, inmates sexually assaulted her, and despite reporting the abuse to the PREA hotline and prison administration, she continued to face such treatment.¹⁰² Among other claims, Hampton argued that prison officials failed to protect her against sexual and physical abuse in violation of the Eighth Amendment.¹⁰³ The court partially granted her preliminary injunction, ordering that the prison administration “consider all evidence for and against transferring Hampton to a women’s facility.”¹⁰⁴ Ultimately, the Illinois Department of Corrections moved Hampton to a women’s prison a few months after this decision, making Hampton the first transgender woman transferred to a women’s prison as a result of litigation.¹⁰⁵ While the court did not explicitly order Hampton to be moved, the court’s order to reconsider Hampton’s placement and the ongoing litigation likely pressured the state into moving her.

Two years later in the same district court, another transgender woman, Tay Tay, alleged graphic physical and sexual abuse by both officers and prisoners while housed in multiple men’s facilities within the Illinois Department of Corrections.¹⁰⁶ On Tay Tay’s failure to protect claim,

¹⁰⁰ See, e.g., *Cox v. Nobles*, CV 119-031, 2020 WL 1541698, at *8 (S.D. Ga. Mar. 31, 2020), *aff’d*, 15 F.4th 1350 (11th Cir. 2021) (finding that the plaintiff failed to allege sufficient facts that the officer was subjectively aware of the underlying facts of the PREA complaint).

¹⁰¹ *Hampton v. Baldwin*, 3:18-CV-550-NJR-RJD, 2018 WL 5830730 (S.D. Ill. Nov. 7, 2018).

¹⁰² *Id.* at *1-3.

¹⁰³ *Id.* at *13.

¹⁰⁴ *Id.* at *17.

¹⁰⁵ *Hampton v. Illinois Department of Corrections*, MACARTHUR JUSTICE CENTER, <https://www.macarthurjustice.org/case/hampton-v-idoc/>.

¹⁰⁶ *Tay v. Dennison*, 457 F. Supp. 3d 657, 666-68 (S.D. Ill. 2020).

the court found that the defendants had knowledge that she faced a substantial risk of serious harm from both prisoners and staff.¹⁰⁷ As in *Hampton*, the court partially granted Tay Tay’s preliminary injunction and ordered the defendants to develop an “individualized case management plan” that would take into consideration the inmate’s need for safety.¹⁰⁸ Perplexingly considering PREA’s stance on transgender-specific units,¹⁰⁹ the court also asked the defendants to report to the court any efforts the state had made to “explore the possibility of creating a voluntary housing unit for transgender prisoners in IDOC.”¹¹⁰ Soon after the ruling on the preliminary injunction, Tay Tay was granted a clemency petition and was released from custody.¹¹¹ While Tay Tay was never moved to a women’s facility due to her release, it is conceivable that she would have been considering the outcome in *Hampton* and the movement of other trans inmates in the state.¹¹² *Hampton* and *Tay* demonstrate both the success and limits of an Eighth Amendment failure to protect claim. Even under extreme allegations of sexual and physical abuse, the most relief that the court will initially provide is a partial preliminary injunction. The partial preliminary injunctions in these cases show the court’s deference to the prison administration’s housing placement determination, but also, the judiciary’s willingness to put some pressure on the administration to reconsider.

Eighth Amendment claims in practice are a high bar for transgender inmates to meet. While *Farmer* only requires a substantial risk of harm, in practice, the most successful cases are ones in which the plaintiff alleges multiple instances of physical abuse, rape, and sexual assault. These

¹⁰⁷ *Id.* at 684.

¹⁰⁸ *Id.* at 690.

¹⁰⁹ See *infra* 113 and accompanying text.

¹¹⁰ *Tay*, 457 F. Supp. 3d at 690.

¹¹¹ *Tay Tay v. Illinois Department of Corrections*, MACARTHUR JUSTICE CENTER, <https://www.macarthurjustice.org/case/tay-tay-v-illinois-department-of-corrections/>.

¹¹² E.g., In 2019, Janiah Monroe, a trans woman, was moved to a women’s prison in Illinois. *Monroe v. Jeffreys*, UPTON PEOPLE’S LAW CENTER, <https://www.uplcchicago.org/what-we-do/prison/monroe.html>.

cases also suggest that the teams making the individualized PREA placement decisions were not following PREA's guidelines to continually reassess placements for transgender inmates. In cases like *Hampton* and *Tay*, either there was no re-consideration of their housing decision which violates PREA or the prison officials knew of the harm and were deliberately indifferent to it in violation of the Eighth Amendment.

V. ARE SPECIALIZED HOUSING UNITS THE ANSWER?

To put it simply, most likely no. Specialized housing units, or dedicated LGBTQ units, are occasionally used as an alternative to placing trans inmates in a facility that does not align with their gender identity. PREA is highly skeptical of such units and provides that an agency shall not place lesbian, gay, bisexual, transgender, or intersex inmates in “dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.”¹¹³ Proponents of these status-specific units argue that vulnerable inmates are more safe and comfortable in them, and are able to retain a sense of community in segregation.¹¹⁴ Others have remarked that specialized units harm those that do not fit within the mainstream LGBTQ culture, stereotypes them as victims, and disrupts relationships with the non-LGBTQ population.¹¹⁵ In part due to PREA's mandate against specialized units, there are very few units in existence. Los Angeles County's “K6G” and the Special Consideration Unit of Riker's Island serve as two examples to study.

¹¹³ 28 C.F.R. § 115.42(g). Initially, the Department of Justice intended to be more lenient in allowing LGBTI specific units. However, in response to public comment taking issue with such units due to concerns about the safety of these units, whether they would be used to punish inmates, the size of the units, programming available for inmates, etc., the Department of Justice limited the creation of these units in their final rule. National Standards To Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106, 37,153 (June 20, 2012) (to be codified at 28 C.F.R. Part 115).

¹¹⁴ See, e.g., Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 Am. Crim. L. Rev. 1, 4 (2011).

¹¹⁵ See, e.g., Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 Cal. L. Rev. 1309, 1309 (2011).

Los Angeles County’s “K6G” unit was created in 1985 as a result of a consent decree after the ACLU brought a lawsuit on behalf of homosexual inmates.¹¹⁶ K6G houses only gay men and transgender women inside L.A. County’s Men’s Central Jail. Although K6G has been operating in some form for decades, there is relatively little research devoted to studying the unit’s effectiveness in housing gay men and trans women in comparison to a general population unit.

Sharon Dolovich, a law professor, wrote an article about K6G after spending seven weeks conducting research in the jail in 2007.¹¹⁷ Professor Dolovich argues that K6G’s strategic segregation model is an effective approach for prison officials to keep sexual minorities safe. Through qualitative interviews, Professor Dolovich found that almost all the inmates sampled reported feeling safer in K6G than in general population, and sometimes even the out-of-prison community.¹¹⁸ Additionally, Professor Dolovich takes the fact that some heterosexual men pretended to be gay to get into the unit to avoid gang violence as corroborating circumstantial evidence of K6G’s relative safety.¹¹⁹ A PBS Documentary about the unit that aired in 2014 largely reiterated the safety benefits of the unit and depicted a culture of support and acceptance within the unit.¹²⁰ However, K6G is not without its critics. Professor Robinson disputes Professor’s Dolovich’s assessment that K6G is safer than general population and argues that the unit casts gay and transgender people as inherit victims, disrupts sexual relationships and denies sexual autonomy, and exposes gay and trans inmates to heightened HIV risk.¹²¹

A second, lesser known, specialized unit exists at Riker’s Island’s women’s facility, the Rose M. Singer Center. Within the facility is the Specialized Consideration Unit (hereinafter “SCU”)

¹¹⁶ See Stipulation and Request for Dismissal Order, *Robertson v. Block*, No. 82 1442 WPG (Px) (C.D. Cal. July 17, 1985).

¹¹⁷ See *supra* note 114.

¹¹⁸ *Id.* at 45.

¹¹⁹ *Id.* at 48.

¹²⁰ *SoCal Connected, Life Behind Bars for GBT Inmates at the K6G*, (KCET television broadcast Dec. 17, 2014).

¹²¹ See *supra* at note 114.

whereby transgender, gender non-binary, or intersex inmates may apply to be housed. The New York City Department of Corrections describes SCU as a “dormitory-style housing area designated for the purpose of housing individuals who are at heightened risk of sexual victimization, including but not limited to those who identify as transgender, intersex, or gender non-binary.”¹²² There is very little information regarding SCU, its operations, and its efficacy in keeping sexual minorities safe. In a New York City Council Committee meeting on criminal justice, the Commissioner of NYC Department of Corrections was questioned regarding the department’s lack of transparency in policies for transgender inmates; however, little seemed to have been resolved.¹²³ Reportedly, there is serious mismanagement regarding SCU and how housing decisions are made for transgender women which caused an entire task force dedicated to making the unit better to quit.¹²⁴

Practically speaking, the creation of voluntary segregated units for trans inmates are not a viable option due to PREA’s limitations. Outside of one law professor’s firsthand observations over a decade ago, there is little to no empirical data to suggest that these units are safer and better environments for transgender inmates. Ideally, correctional facilities should seek to make their general population units secure and safe enough to house anyone of any gender identity. Of course, such a task requires a great amount of political will and resources. The third option of specialized units “other” trans people, and symbolically label them either as a victim of sexual violence, or as a sexual predator dangerous to cis women. While it is worth devoting resources to

¹²² New York City Department of Corrections, Special Consideration Housing Application Report December 2022-May 2023, (2023), https://www.nyc.gov/assets/doc/downloads/pdf/SCU_Housing_Application_Report-December_2022_May_2023.pdf.

¹²³ Ari Ephraim Feldman, *Council presses jail chief on transgender inmate policies*, SPECTRUM NEWS NY 1 (Jan. 25, 2023), <https://ny1.com/nyc/all-boroughs/news/2023/01/25/council-presses-jails-chief-on-transgender-inmate-policies>.

¹²⁴ George Joseph, *Under Eric Adams, a Rikers Island Unit that Protected Trans Women Has Collapsed*, THE CITY (Jan 24, 2023), <https://www.thecity.nyc/2023/01/24/rikers-lgbtq-trans-eric-adams-corrections/>.

research the efficacy of the few existing units in existence, which may be appropriate in niche circumstances, the greater goals of safety and justness cannot be lost.

CONCLUSION

In discussions of law and policy, it can be easy to forget that we are talking about real people living in terror and subject to heinous physical and sexual abuse for what are often nominal crimes against society. As PREA recognizes, the state has a responsibility to protect those that are most vulnerable within penal institutions. PREA provides a simple mandate for correctional institutions to use individualized case-by-case assessments for housing transgender inmates. As discussed, PREA standards and its lackluster audit function fail to adequately protect transgender inmates. Transgender inmates are not uniformly protected by PREA, for one prison administration's interpretation and faithfulness to its requirements may widely vary from another. In recognition of this, some states, namely California, strengthened protections for trans inmates by providing for greater deference to the preference of the inmate. Conversely, other states have sought to weaken PREA, at least symbolically, by reinforcing a gender binary through the Women's Bill of Rights. The same organizations that support the Women's Bill of Rights have also initiated a legal challenge against California's progressive statute. There is great political will both legislatively and in litigation to either support or attack PREA's tenants. Especially in response to the incongruence among the states, Congress should act to strengthen what they initially sought out to do in protecting inmates from sexual violence.

Multiple options are available to Congress to better protect trans inmates from abuse. First, Congress should provide for a limited private cause of action for transgender inmates to be able to enforce PREA's housing and placement related regulations. Providing a cause of action would be consistent with the judiciary's shift in recognizing Eighth Amendment rights for

transgender inmates. Second, Congress should provide explicit protection for an inmate's Eighth Amendment right against cruel and unusual punishment. As it stands now, the judiciary tends to only intervene for the most heinous of cases where the trans inmate has already suffered extreme sexual and physical abuse, and even then such intervention is limited to ordering the department of corrections to reconsider their housing placement or to come up with another safety plan.

Third, Congress should amend PREA to provide for more robust auditing and oversight of prison administrations. While these measures will not completely solve all issues regarding transgender housing, they would aid in accomplishing PREA's goal to eradicate rape and sexual assault in the carceral setting.