



207 East Buffalo Street, Ste 325
Milwaukee, WI 53202
(414) 272-4032
aclu-wi.org

Wisconsin

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Chair Wanggaard, Vice-Chair Jacque, and Honorable Members of the Senate Committee on Judiciary and Public Safety:

The American Civil Liberties Union of Wisconsin appreciates the opportunity to provide testimony in opposition to Senate Bill 438.

This bill would result in significant harm to transgender, non-binary, and intersex Wisconsinites who are incarcerated in prison, jail, or a county house of correction by forcing them to be placed in facilities that do not match their gender and opening them up to an increased likelihood of experiencing sexual or physical abuse and worse mental health outcomes.¹

The definition of “sex” contained in SB-438 creates a bright line rule for determining appropriate housing classifications for incarcerated individuals, instead of allowing for a case-by-case determination required by the Prison Rape Elimination Act (PREA) Standards for placement of residents in prisons and jails.²

In addition to violating PREA,³ the bill would also cause direct harm to trans Wisconsinites incarcerated in DOC and county facilities. Not only are transgender people statistically more likely to be involved with the justice system and to be held in jail or prison, but they are also more likely to face physical or sexual abuse while incarcerated.⁴ In fact, the Bureau of Justice Statistics at the U.S. Department of Justice found that transgender people are nearly ten times more likely to be sexually assaulted than the general prison population, with an estimated 40% of transgender people in state and federal prisons reporting a sexual assault in the previous year.⁵

¹ See Ledesma, E. & Ford, C., “Health Implications of Housing Assignments for Incarcerated Transgender Women,” *American Journal of Public Health* (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7144448/>.

² See <https://www.prearesourcecenter.org/standard/115-42>.

³ See 34 U.S.C.A § 30308(a).

⁴ See James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M., “The Report of the 2015 U.S. Transgender Survey,” National Center for Transgender Equality (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>; <https://www.vera.org/news/gender-and-justice-in-america/transgender-people-at-higher-risk-for-justice-system-involvement>.

⁵ NATIONAL CENTER FOR TRANSGENDER EQUALITY, *LGBTQ PEOPLE BEHIND BARS: A GUIDE TO UNDERSTANDING THE ISSUES FACING TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS* 13 (2018), available at <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf>.

Transgender women who are housed in male facilities are at particularly high risk. For example, a California study found that transgender women who were presumptively housed with men were thirteen times more likely to be sexually assaulted than cisgender men incarcerated in the same facilities.⁶ According to a 2015 survey, almost a quarter of incarcerated trans people reported being physically assaulted by other people in custody or staff.⁷

Wisconsin prisons and jails have the obligation to protect people who are incarcerated from sexual violence, whether that violence is perpetrated by corrections staff or by other incarcerated people. If they fail to do so, they risk running afoul of the Eighth Amendment to the U.S. Constitution, which prohibits cruel and unusual punishment.⁸ This bill would force corrections staff to set aside that obligation and, in many circumstances, affirmatively place individuals in harm's way. The U.S. Department of Justice has interpreted the Eighth Amendment to require that transgender, gender nonconforming, nonbinary, and intersex people who are incarcerated be housed in facilities that align with their gender identities where necessary to provide reasonable safety.⁹ Further, the Equal Protection Clause in the Fourteenth Amendment prohibits treating transgender people differently than cisgender people without a compelling state justification, and courts have applied this rule in the context of housing in prisons and jails.¹⁰

All trans Wisconsinites, including those incarcerated in our prisons and jails, deserve the right to exist, to be treated with dignity and respect, and to be protected from violence. The ACLU of Wisconsin strongly urges you to oppose SB-438.

⁶ *Id.*

⁷ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M., "The Report of the 2015 U.S. Transgender Survey," National Center for Transgender Equality (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁸ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (Prison officials may be liable for sexual assault by another incarcerated person where "the official knows of and disregards an excessive risk to inmate health or safety").

⁹ *Diamond v. Ward*, 20-cv-00453, at *9 (M.D. Ga. Apr. 22, 2021) (Doc. No. 65).

¹⁰ *Hampton v. Baldwin*, 2018 WL 5830730, at *11 (S.D. Ill. Nov. 7, 2018) (applying heightened scrutiny where the majority of transgender people are housed based on genitalia or sex assigned at birth); *Monroe v. Jeffries*, 19-cv-1060, at 18-19 (C.D. Ill. Apr. 9, 2020) (Doc. No. 41); *see also Doe v. Mass. Dep't of Corr.*, 2018 WL 2994403, at *9 (D. Mass. June 14, 2018) (applying heightened scrutiny to classifications based on transgender status); *Tay v. Dennison*, 2020 WL 2100761, at *2 (S.D. Ill. May 1, 2020) (finding transgender incarcerated women are similarly situated with incarcerated cisgender women).