



November 2<sup>nd</sup>, 2023

**Testimony on Senate Bill 438**

*Relating to: definition of “sex” for the purpose of placing prisoners and conducting strip searches*

There is a glaring loophole currently in Wisconsin’s laws and administrative code regarding inmate housing and body content search and seizures. At the moment, those in prisons, jails, and county houses of correction must be housed with those of the same sex, and any strip searches must be conducted by someone of the “same sex”.

When these provisions were originally drafted, it was clear what these terms were referencing – someone’s biological sex. However, as certain groups have moved to redefine what sex and gender mean, these “new” definitions have allowed inappropriate scenarios where biological men are being housed with and strip searching women. These scenarios are incredibly uncomfortable for the women living with and being searched by these men and have little to no avenues of recourse.

As an example, there is a transgender inmate currently living in Taycheedah Correctional Institution who has a history of violent crimes against women. In this case, the inmate raped his own 10-year-old daughter. Astonishingly, there are still another 161 men identifying as women still trying to get into female prisons in our state, and over half of them – 81 to be exact – have similar histories of sexual assault or abuse. This issue has moved far beyond affirming someone’s own self-perception and is now bordering on a crisis for the safety and security of our female prisoners who deserve to be protected while serving out their sentences.

Senate Bill 438 would define “sex” as a person’s sex at birth, being either male or female, according to distinct reproductive roles as manifested by sex and reproductive organ anatomy, chromosomal makeup, and endogenous hormone profiles. This distinction would address this glaring technicality in our corrections system and ensure the privacy of our incarcerated men and women.

Thank you for the opportunity to testify on this bill, and I will happily take any questions.

Respectfully,

Senator Jesse James  
23<sup>rd</sup> Senate District

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STATE REPRESENTATIVE • 59<sup>TH</sup> ASSEMBLY DISTRICT

**Testimony on Senate Bill 438**  
**Senate Committee on Judiciary and Public Safety**  
**Wednesday, November 2, 2023**

Thank you Chairman Waangard and members of the committee on Judiciary and Public Safety for the opportunity to testify in favor of Senate Bill 438, which pertains to the definition of "sex" for the purpose of placing prisoners and conducting strip searches. I would also like to express my gratitude to Senator Jesse James for co-authoring this legislation with me.

This proposal came to my attention through interactions with constituents and Department of Corrections employees. I have engaged in discussions about this legislation with constituents in my district who have serious concerns about individuals conducting strip searches on those of a different biological sex. This legislation offers a clear definition of "sex." According to the legislation, "sex" refers to an individual's sex at birth, specifically as male or female, as determined by distinct reproductive roles as indicated by sex and reproductive organ anatomy, chromosomal makeup, and endogenous hormone profiles. According to this legislation, a person conducting a strip search on someone must be of the same sex, unless exigent circumstances require otherwise.

Current Wisconsin law mandates that inmates be housed with those of the same sex in prison, jail, or a county house of correction. Moreover, the current administrative code stipulates that strip searches or body content seizures must be performed by someone of the "same sex."

As of July 21, 2023, there were 161 transgender women in Wisconsin Department of Corrections prisons. Among these 161 transgender individuals, 81 have been convicted of at least one count of sexual assault or sexual abuse. This information was obtained through a public records request and has been reported in the media.

Despite the clear intent and application of the law, the term "sex" is not technically defined. This loophole has allowed for situations where biological men are housed with biological women, and biologically male officers are strip searching biologically female inmates, all because the men identify as the opposite sex, technically not violating any rules. I empathize with our inmates, particularly female inmates, as this situation has placed many women in uncomfortable scenarios with no recourse. As a former DOC employee who spent time working with inmates, I have come to understand that while they may have made mistakes, they are still deserving of respect and dignity, and I have no issue introducing this legislation on their behalf.

Passing this legislation will represent a positive step toward safeguarding the privacy and dignity of individual inmates.

Once again, thank you for your time and consideration of this legislation.



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## Wisconsin

November 2, 2023

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.<sup>1</sup>

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.<sup>2</sup>

In addition to violating PREA,<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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<sup>1</sup> 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/>.

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

<sup>3</sup> See 34 U.S.C.A § 30308(a).

<sup>4</sup> 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>.

<sup>5</sup> 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.<sup>6</sup> According to a 2015 survey, almost a quarter of incarcerated trans people reported being physically assaulted by other people in custody or staff.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

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.

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<sup>6</sup> *Id.*

<sup>7</sup> 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>.

<sup>8</sup> *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").

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

<sup>10</sup> *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).

**To: Chairman Wanggaard, Committee on Judiciary and Public Safety**

**From: Anna Neal, Legislative Advisor, Wisconsin Department of Corrections**

**Date: November 2, 2023**

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**RE: Information Only**

- Senate Bill 172 Relating to: establishing and operating community reentry centers and making an appropriation.
  - Senate Bill 438 Relating to: definition of "sex" for the purpose of placing prisoners and conducting strip searches.
  - Senate Bill 461 Relating to: creating an immersive work opportunity program for persons incarcerated in the state prisons
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**Senate Bill 172:** The Department of Corrections (DOC) has been a vocal advocate for increasing resources and programs to assist the Persons in our Care with finding and maintaining meaningful employment. The Legislative Council Study Committee on Increasing Offender Employment Opportunities sought out creative solutions to assist the agency in meeting their goals. DOC believes the committee's recognition of the barriers in place for justice involved individuals assisted in drafting a series of thoughtful bills for consideration, including SB 172.

As our agency continues to use evidenced-based decision making to implement programs and practices, we appreciate the committees such as these, who work alongside us to find bipartisan solutions. DOC supports the overall goals within these bills, and is grateful to the study committee for seeking out information from our agency to identify the needs of the population, and learn more about our business process.

**Senate Bill 438:** In 2003, Congress enacted the Prison Rape Elimination Act (PREA), which set a zero-tolerance standard for sexual abuse and sexual harassment of those criminally confined to a federal, state or local facility. National standards took effect in 2012, establishing clear requirements to prevent, detect, and respond to sexual abuse and sexual harassment in confinement. In addition, PREA has national standards regarding the placement and strip searching of transgender individuals in a confined setting. This bill is in conflict with those standards.

Under this bill, DOC would be prohibited from placing, keeping together, or knowingly permit to be kept together persons in our care of different sexes (as defined in the bill) except to participate together in treatment or in educational, vocational, religious or athletic activities or to eat together, under supervision. As written, the bill would require DOC to be in violation of PREA standard 115.42, which created the following language:

*(c) In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates, and in making other housing and programming assignments, the agency shall consider on a*

*case-by-case basis whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems.*

*(d) Placement and programming assignments for each transgender or intersex inmate shall be reassessed at least twice each year to review any threats to safety experienced by the inmate.*

*(e) A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.*

*(f) Transgender and intersex inmates shall be given the opportunity to shower separately from other inmates.*

*(g) The 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.*

Interpretive guidance issued by the United States Department of Justice (USDOJ) on 3/24/2016 further states, "Any written policy or actual practice that assigns transgender or intersex inmates to gender-specific facilities, housing units, or programs based solely on their external genital anatomy violates the standard. A PREA-compliant policy must require an individualized assessment...The policy must allow for housing by gender identity when appropriate."

The PREA standards also govern cross-gender viewing and searches. The federal Department of Justice updated its PREA guidance as of May 2023 to address how transgender staff and non-binary staff be classified for the purposes of complying with cross-gender viewing and search prohibitions established in PREA Standard 115.15. In the guidance, they stated:

*The PREA Standards do not provide specific guidance regarding the classification of transgender and nonbinary staff; however, it is important to note that the PREA Standards do not prohibit facilities from classifying transgender employees consistent with their gender identity with regard to all aspects of their employment, including those related to PREA Standard 115.15. For example, it does not violate the PREA standards for a staff member who is a transgender man to conduct strip searches of male inmates.*

*If for a reason other than the PREA Standards, a facility does not classify a transgender employee consistent with their gender identity, facilities should make an individualized determination based on the gender identity of the staff member and not solely based on the staff member's sex assigned at birth, the gender designation of the facility or housing unit to which the staff member is assigned, the related and required job duties of the specific staff member, the limits to cross-gender viewing and searches in PREA Standard 115.15, and the goal of the PREA Standards to prevent trauma and sexual abuse. This determination should be made at the request of, and in conjunction with, the transgender or non-binary staff member. Agencies should be aware that the determination of assignment in the facility may change at the request of and in conjunction with the employee as part of an ongoing adjustment process or as the staff member gains experience living consistently with their gender identity.*