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Opponent Testimony for SB 228

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American Civil Liberties Union of Kansas

House Committee on Corrections and Juvenile Justice

Wednesday, March 8, 2023 – 546-S

Committee Chair and Members of the Committee,

I appreciate the opportunity to provide this testimony on behalf of the American Civil Liberties Union of Kansas. I'm D.C. Hiegert, a lawyer, and the LGBTQ+ legal fellow with the ACLU of Kansas. We are a nonpartisan, non-profit organization that works to preserve and strengthen the civil rights and liberties of every person in our state.

The ACLU of Kansas stands strongly opposed to SB 228 as amended by the Senate Committee on the Judiciary.¹ While we remain neutral regarding the general contents of SB 228, we take issue with the Senate Committee on the Judiciary's amendments related to the definition of sex, under which sheriffs would be required to categorize individuals held in Kansas jails. These amendments would result in significant harm to transgender, non-binary, and intersex Kansans who are housed in our county jails, by forcing them to be placed in jails 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.²

Specifically, we oppose the language amended and added to lines 40-41 on page 2 and lines 1-3 on page 3 of SB 228 as amended by the Senate Committee of the Whole.³ Of note, we are not opposing the ability of the State to create separate facilities for the sexes—what we take issue with is the fact that the language in SB 228 requires sheriffs to determine which facility an individual should be housed in based on an inaccurate and underinclusive definition of “sex.” More specifically, the amended language violates federal law. The language creates a general bright line rule for determining appropriate housing classifications for individuals in the jail, instead of allowing for a case-by-case determination as required by the Prison Rape Elimination Act (PREA) Standards for placement of residents in prisons and jails.⁴

¹ See http://kslegislature.org/li/b2023_24/measures/documents/cr_2023_sb228_s_1318

² See, e.g., <https://transequality.org/issues/police-jails-prisons>;
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7144448/>

³ See http://kslegislature.org/li/b2023_24/measures/documents/sb228_02_0000.pdf

⁴ See, <https://www.prearesourcecenter.org/standard/115-42>

This should be concerning for the State: if Kansas' jails are not in compliance with National PREA Standards, the State's prisons and jails will lose federal grant funding.⁵ And that is not the only fiscal consequence of the amended language. Additionally, SB 228 would open the State up to costly litigation by people inappropriately held in the wrong gendered facility. For example, a trans woman held in a men's jail in New York sued the county she was jailed in and was awarded \$60,000 in a settlement that required the county to change its jail policies and presumptively house people consistent with their gender.⁶

Aside from the clear financial costs, this bill would also cause direct harm to trans Kansans held in county jails. 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.⁷ In fact, the Bureau of Justice Statistics at the Department of Justice found that 40% of incarcerated trans people have been sexually assaulted—more than 10 times the general incarcerated population rate.⁸ Kansas jails have the obligation under the Eighth Amendment to keep individuals in their custody safe from abuse. This bill would force local sheriffs to set aside that obligation and, in many circumstances, affirmatively place individuals in harms way. Such a bill runs contrary to the principles enshrined in both our bill of rights, and unduly infringes upon the authority of sheriffs to make important decisions regarding the safety and security of people entrusted to their care.

If the State wants to properly address issues of physical and sexual abuse in its county jails—as it is required by law to do—we urge you to remove the language amended and added by the Senate Committee on the Judiciary and instead add language to SB 228 that would comply with PREA Standards § 115.42(c) and (e), which provide that:

“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. ...

“A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.”⁹

For the above reasons, the ACLU of Kansas urges you to oppose SB 228 as amended by the Senate Committee on the Judiciary.

Thank you.

⁵ See 34 U.S.C.A § 30308(a).

⁶ See, *Faith v. Steuben County Settlement Agreement*, https://www.nyclu.org/sites/default/files/field_documents/2020-07-22_faith_final_settlement_agreement_redacted.pdf.

⁷ See, <https://www.vera.org/news/gender-and-justice-in-america/transgender-people-at-higher-risk-for-justice-system-involvement>; https://www.lambdalegal.org/blog/20201125_transgender-people-prisons-jails; <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁸ See, https://www.lambdalegal.org/blog/20201125_transgender-people-prisons-jails.

⁹ See, <https://www.prearesourcecenter.org/standard/115-42>.