UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUNDAY HINTON, on behalf of herself and others similarly situated, Plaintiff, v. DISTRICT OF COLUMBIA, Defendant.	Civil Action No. _____

MEMORANDUM IN SUPPORT OF PLAINTIFF'S APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

The policy of the Defendant District of Columbia Department of Corrections (DOC) regarding housing of transgender individuals in its custody contains a presumption that they will be housed according to their anatomy—that is, a person who has "male genitals" is housed in a men's unit and a person who has "female genitals" is housed in a women's unit. The presumption may be overcome if a different housing assignment is recommended by the Transgender Housing Committee (THC), which is tasked with evaluating the vulnerability and safety needs of each transgender individual. That committee is supposed to recommend an assignment while a newly detained transgender individual is housed in the intake unit, where they are supposed to be housed for no more than 72 hours (though that period excludes "weekends, holidays, and emergencies"). But the THC has not met for more than 15 months. As a result, transgender individuals detained at DOC facilities are being housed according to the default presumption alone—strictly based on their anatomy. One such person is Plaintiff Sunday Hinton, a transgender woman, who has spent two weeks in a men's unit in DOC custody. DOC's reliance on anatomy rather than individuals' gender identities subjects Ms. Hinton and other transgender individuals in DOC custody to

discrimination in violation of the equal protection guarantee of the Fifth Amendment and the D.C. Human Rights Act, and it places them in serious danger of harm, in violation of their constitutional rights regarding conditions of confinement.

Ms. Hinton seeks emergency relief to prevent DOC from continuing to house her in a men's unit because that decision impermissibly relied solely on anatomy and exposes her to heightened danger, including sexual violence, as a transgender woman in the men's unit. On behalf of a class of all transgender individuals who currently reside in a DOC housing unit that does not accord with their gender identity, or who will be detained in a DOC facility in the future, Ms. Hinton also seeks a preliminary injunction to prohibit Defendant from using anatomy as the default or sole criterion in assigning housing to transgender individuals.

STATEMENT OF FACTS

A. DOC's Policy on Housing Transgender Individuals

DOC Policy 4020.3F, titled "Gender Classification and Housing," establishes procedures for initial intake and assignment of housing for transgender individuals in DOC's custody. Decl. of Rachel Cicurel, Ex. C (DOC Housing Policy), *available at* https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/PP%204020.3F%20Gender%20Classification%20and%20Housing%2001-18-2018.pdf. The policy contains a presumption that transgender individuals will be housed according to their anatomy: "DOC shall classify an inmate who has male genitals as a male and one who has female genitals as a female, unless otherwise recommended by the Transgender Housing Committee and approved in accordance with this policy." *Id.* § 2(a). Under the policy, upon initial intake, staff shall make a "determination of gender" (1) via "inmate verification" (reviewing commitment documents for gender assignment or any notification that identifies someone as transgender or "vulnerable") or (2) by determining

their "genital status" through a medical interview, by reviewing medical records, or, if necessary, a medical exam conducted by a medical practitioner. *Id.* § 9(a)-(d). Any transgender individual who refuses to undergo a "complete physical examination" is placed in protective custody. *Id.* § 9(c). After the "determination of gender," the Inmate Reception Center is required to identify a detained individual as transgender or intersex and record their gender identity and "apparent biological gender." *Id.* § 9(e). The detained individual is then housed in a single cell in the intake housing unit "consistent with the gender identified at intake" for no more than 72 hours ("excluding weekends, holidays, and emergencies"), until classification and housing needs can be assessed by the THC, *id.* § 10(b), although the policy does not make clear whether the THC is required to meet and make a recommendation on housing within that timeframe. Because of the presumption in Section 2(a), every transgender individual in DOC custody is housed—in an intake unit or otherwise—according to their anatomy, at least until the THC meets.

The THC is comprised of a DOC social worker (the chair); a medical practitioner; a mental health clinician; a correctional supervisor; the Chief Case Manager or designee; and a DOC-approved volunteer who is trans and experienced and knowledgeable about trans issues or an acknowledged expert in trans affairs. *Id.* § 7(g). The THC must hold a hearing to assess a detained transgender individual's vulnerability and determine the appropriate housing assignment, unless the individual waives their right to a hearing and requests to be housed according to their sex assigned at birth. *Id.* § 11(d). Apparently in accordance with the Prison Rape Elimination Act (PREA), whose implementing regulations establish procedures for determining housing for transgender individuals, 28 C.F.R. § 115.42, the policy provides that transgender and intersex individuals in custody "will be classified and assigned housing based on their safety/security needs, housing availability, gender identity and sex at birth," and the THC is required to take into

consideration the resident's own opinion of their vulnerability in the general jail population of the men's or women's units. *Id.* §§ 10(c), 11(b). The THC recommends a housing assignment after review of all records and assessments, including an interview with the detained individual. *Id.* § 11(a). The warden may disagree with the THC's recommendation, in which case the director makes the final determination on housing. *Id.* § 11(e). According to Traci Outlaw, a member of the THC, two factors the THC considers when it meets to determine housing are (1) whether the individual has had "full [gender] reassignment surgery"; and (2) whether the individual has ever been in a "heterosexual relationship," Cicurel Decl. ¶ 8—even though neither criterion is in the policy. Furthermore, THC recommendations do not override the DOC's practice of housing transgender individuals in facilities inconsistent with their gender identity, Decl. of Tara Chen ¶ 8; *see also* Decl. of Deborah Golden ¶ 2 (describing her experience of having "never had a [transgender] client in the DOC housed based on anything other than their sex assigned at birth").

Despite DOC's own written policy requiring the THC to hold hearings to consider housing requests, the committee has not met—in person or even virtually—since January 2020. Cicurel Decl. ¶ 8. DOC currently determines housing assignments for transgender individuals based *solely* on their anatomy. Thus, if a transgender woman is deemed "anatomically male," for example, she will be housed in a men's unit regardless of her gender identity. *See* Cicurel Decl. ¶ 5 & Ex. B.

B. Ms. Hinton's Housing at the D.C. Jail

Plaintiff Sunday Hinton is a transgender woman who has been housed at the Central Detention Facility (CDF), a men's facility, based solely on her anatomy. Ms. Hinton has been detained by DOC in a men's housing unit since April 26, 2021, on allegations of unarmed burglary with the intent to steal twenty dollars. Cicurel Decl. ¶ 3; Decl. of Sunday Hinton ¶ 2. When Ms. Hinton's attorney tried to have her moved to a women's housing unit, Michelle Wilson, an attorney

from the DOC's Office of the General Counsel, responded that Plaintiff would be assigned to the men's unit if "she is still anatomically a male," Cicurel Decl. ¶ 4, and suggested that she would not be "housed in the female unit at the DOC" if she is not "anatomically" female, *see id.* ¶ 5. According to Ms. Wilson, Ms. Hinton's only options were to be housed in the general population men's unit or in a protective custody men's unit. Cicurel Decl. ¶¶ 4-5. Traci Outlaw, a member of the THC, confirmed to Ms. Hinton's attorney that anatomy is a central factor in deciding where to house transgender residents; specifically, the THC considers whether someone has had "full [gender] reassignment surgery," and gave examples of a how a transgender man with "functioning vagina," specifically, or transgender women with "working penis[es]," generally, could not be housed in accordance with their gender identities. *Id.* ¶¶ 8-10.

On May 7, 2021, Ms. Hinton filed an emergency grievance with DOC, requesting to be transferred to a women's unit. Hinton Decl. ¶ 7 & Ex. A. DOC policy requires a response to emergency grievances within 72 hours. Cicurel Decl. ¶ 13, Ex. E. As of the time of filing this lawsuit, well over 72 hours later, Ms. Hinton has not received a response. A prison's "failure to timely respond" to a "properly filed grievance renders its remedies 'unavailable'" under the Prison Litigation Reform Act (PLRA), *Robinson v. Superintendent*, 831 F.3d 148, 153 (3d Cir. 2016), and thus exhaustion is not required, *Ross v. Blake*, 136. S. Ct. 1850, 1859 (2016). Thus, Ms. Hinton has met the requirements for exhaustion of administrative remedies under the PLRA, 42 U.S.C. § 1997e(a).

ARGUMENT

To obtain a temporary restraining order or a preliminary injunction, Ms. Hinton must establish that: (1) she is likely to succeed on the merits; (2) she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in her favor; and (4) an

injunction is in the public interest. *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011) (citing *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). Standards for issuing a temporary restraining order and a preliminary injunction are the same and can therefore be analyzed together. *Singh v. Carter*, 168 F. Supp. 3d 216, 223 (D.D.C. 2016). Here, all four factors weigh strongly in Ms. Hinton's favor.

A. Ms. Hinton and Proposed Class Members Are Likely to Succeed on the Merits of Their Claims.

1. DOC's Transgender Housing Policy Violates Equal Protection.

The constitutional guarantee of equal protection of the laws is applicable to the District of Columbia via the Fifth Amendment. *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996). "To prevail on an equal protection claim, the plaintiff must show that the government has treated [her] differently from a similarly situated party and that the government's explanation for the differing treatment 'does not satisfy the relevant level of scrutiny.'" *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 215 (D.C. Cir. 2013) (quoting *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1102 (D.C. Cir. 2005)).

DOC Policy 4020.3F provides that, as a default, "DOC shall classify an inmate who has male genitals as a male and one who has female genitals as a female," Cicurel Decl., Ex. C, § 2(a), and currently, with the THC not meeting, DOC officials have stated that, under its policy, DOC is housing all transgender individuals according to their anatomy, with no opportunity for an individualized assessment. Cicurel Decl. ¶¶ 4-5, 8. DOC Policy 4020.3F treats transgender DOC residents differently from similarly situated cisgender residents because cisgender residents are housed in accordance with their gender identity, while transgender residents are housed—presumptively under the policy, and always under current practice—at odds with their gender identity. *See Doe v. Mass. Dep't of Corr.*, 2018 WL 2994403, at *10 (D. Mass. June 14, 2018)

("[Plaintiff's] assignment to [a men's prison] resulted from her biological sex assignment at birth and an ensuing categorical determination that she was ineligible to be assigned to a women's prison. In this sense, compulsory assignment to a men's prison caused [plaintiff] to be treated differently from other female prisoners in the Massachusetts penal system.").

DOC's genitalia-focused approach to housing detained transgender individuals also constitutes sex discrimination because an incarcerated person who now identifies as a woman but was assigned male at birth is treated differently from a woman who was assigned female at birth. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741-42 (2020). DOC's policy therefore must survive heightened scrutiny both because it "rests on sex-based classifications *and* because transgender people constitute at least a quasi-suspect class." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020), *as amended* (Aug. 28, 2020) (emphasis in original); *see also Tay v. Dennison*, 457 F. Supp. 3d 657, 680-81 (S.D. Ill. 2020) (applying intermediate scrutiny to prison policy housing detained individuals based on their sex assigned at birth); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 208 (D.D.C. 2017) (applying intermediate scrutiny to transgender military ban), *vacated on other grounds sub nom. Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019). While jail authorities are afforded deference regarding some actions that would be constitutional violations outside of the carceral setting, regulations or practices making suspect or quasi-suspect classifications are not exempt from heightened scrutiny simply because they are imposed by a penal institution. *See Johnson v. California*, 543 U.S. 499, 509, 511-12 (2005); *Pitts v. Thornburgh*, 866 F.2d 1450, 1453-55 (D.C. Cir. 1989).

To defend its policy under intermediate scrutiny, the government bears the "demanding" burden to show (1) an "exceedingly persuasive" justification that is "genuine, not hypothesized or invented post hoc in response to litigation" and does "not rely on overbroad generalizations," and

(2) that "the discriminatory means employed are substantially related to the achievement of [the government's] objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)) (internal quotation marks omitted).

DOC's policy for housing transgender individuals in its custody fails this standard. While the policy states that DOC houses men and women in separate units "[f]or the safety, security and order of the facility," Cicurel Decl., Ex. C, § 2(a), the District cannot show that the policy's discrimination against transgender individuals is substantially related to that objective. "[G]eneralized concerns for prison security are insufficient to meet the 'demanding' burden placed on the [District] to justify sex-based classifications." *Doe*, 2018 WL 2994403, at *10 (citing *Virginia*, 518 U.S. at 531); *see also Hampton v. Baldwin*, 2018 WL 5830730, at *11 (S.D. Ill. Nov. 7, 2018). Indeed, despite the policy's stated safety objective, the policy does not actually take into account the safety and security of trans DOC residents. The policy cites the PREA, Cicurel Decl., Ex. C, § 5(f), which establishes procedures for housing transgender individuals to protect them from sexual abuse and requires an individualized determination about how to ensure the safety of each detained individual, 28 C.F.R. § 115.42, but DOC's default rule of housing transgender individuals according to their anatomy contravenes the PREA regulations, *Tay*, 457 F. Supp. 3d at 681 ("PREA's operative regulations . . . provide that housing decisions should not be made solely on the basis of genitals.").

The violation is exacerbated by the current suspension of the THC, which means that, in practice, DOC has completely abandoned any individualized consideration of transgender individuals' gender identity and actual needs and therefore impermissibly houses detained individuals "according to their biological sex without regard to . . . particularized considerations." *Doe*, 2018 WL 2994403, at *10—not just for the initial intake period, but indefinitely. Indeed, Ms.

Hinton has already been confined to a men's housing unit for two weeks. Cicurel Decl. ¶ 3; Hinton Decl. ¶ 2. And DOC's Office of the General Counsel has confirmed that this decision is based solely on anatomy and is not open to reconsideration for any other reason. *Id.* ¶¶ 4-5.

In sum, because DOC's policy regarding housing for trans residents discriminates based on gender identity and sex and is not substantially related to jail safety, Ms. Hinton and proposed class members are likely to succeed on the merits of their equal protection claim.

2. DOC's Transgender Housing Policy Violates the D.C. Human Rights Act's Prohibition on Discrimination on the Basis of Gender Identity.

The D.C. Human Rights Act (DCHRA) makes it an "unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility . . . to any individual on the basis of an individual's actual or perceived . . . gender identity or expression." D.C. Code § 2-1402.73. DOC agrees that it is subject to this prohibition. *See* Cicurel Decl., Ex. C, §§ 3(a), 5(e) (invoking the DCHRA as a source of authority). DOC's policy violates District law by limiting or refusing to provide *transgender* individuals like Ms. Hinton housing facilities consistent with their gender identities, while *cisgender* individuals are always housed in facilities consistent with their gender identities.

Regulations implementing the DCHRA clarify that the District cannot "deny[] access to . . . gender specific facilities that are consistent with a person's gender identity or expression." 4 D.C.M.R. § 801.1(e); *see also* 4 D.C.M.R. § 802.1 (requiring all entities to "allow individuals the right to use . . . gender-specific facilities . . . that are consistent with their gender identity or expression"). DOC's current policy denies this access by assigning transgender individuals to housing units based on "genitals" by default, Cicurel Decl., Ex. C, § 2(a)—a problem worsened, of course, by suspending the operation of the THC, which can recommend housing in accordance with gender identity, *see* Cicurel Decl. ¶ 8; Hinton Decl. ¶ 4. Even when that committee is

operational, DOC Policy 4020.3F creates a default presumption in favor of housing based on anatomy, Cicurel Decl., Ex. C § 2(a), and the committee's recommendations are overridden. *See* Chen Decl. ¶ 8. This default presumption contravenes the purpose of the DCHRA's gender identity protections, which are to "ensure that transgender people are treated in a manner that is consistent with their identity or expression, rather than according to their presumed or assigned sex or gender." 4 D.C.M.R. 800.1(d). DOC policy forces transgender individuals to spend at least a 72-hour intake period in housing units that may be inconsistent with their gender identity. Then, as written, the policy allows transgender individuals to be moved only if they request review by the THC and the THC recommends as much (without being overruled by the director). Moreover, as applied during the pandemic, the policy offers no way at all for transgender residents to avoid being housed in a facility inconsistent with their gender identity.

The experience of cisgender residents is vastly different: they are assigned to a government facility that corresponds with their gender identity from day one and throughout the entirety of their incarceration. Thus, whereas the policy never questions whether cis people can reside in the government housing facility corresponding with the gender identity they claim, trans residents must press officials to have an opportunity of appropriate housing; even then, the odds of accessing proper government facilities remain low. *See* Chen Decl. ¶¶ 4-8.

D.C. Code § 2-1402.73 "signals a focus on the selective denial of benefits to certain persons . . . while those benefits remain available to other persons." *Boykin v. Gray*, 895 F. Supp. 2d 199, 218 (D.D.C. 2012). Because DOC's policy limits or denies access to facilities for transgender individuals but does not do so for cisgender individuals, it discriminates on the basis of gender identity and is prohibited by the DCHRA. Thus, Ms. Hinton and proposed class members are likely to succeed on this claim.

3. DOC's Transgender Housing Policy Violates Ms. Hinton's Due Process Rights Regarding Conditions of Confinement.

DOC's policy of relying (by default or exclusively) on anatomy to make housing decisions for transgender individuals in their custody results in housing assignments in disregard of an excessive risk to those individuals' health and safety, in violation of the Fifth Amendment's Due Process Clause. To prevail on a Fifth Amendment claim regarding conditions of confinement, a plaintiff must show (1) "an excessive risk to health or safety"; (2) that "the defendant-official knew, or should have known" of the risk; and (3) "that the defendant-official acted intentionally . . . or recklessly failed to act with reasonable care to mitigate the risk" posed. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *see also Banks v. Booth*, 468 F. Supp. 3d 101, 111 (D.D.C. 2020) (adopting a similar standard). Because individuals detained pretrial are presumed innocent, they are "entitled to more considerate treatment and conditions of confinement" than those convicted, *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982), and "may not be subjected to punishment of any description." *Hardy v. District of Columbia*, 601 F. Supp. 2d 182, 188 (D.D.C. 2009) (cleaned up). Individuals detained pretrial are entitled to protections "at least as great as the Eighth Amendment protections" available to a convicted individual, *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983), so conditions that would violate convicted individuals' Eighth Amendment rights necessarily violate the Fifth Amendment rights of pretrial individuals, as well. *Hardy*, 601 F. Supp. 2d at 189. Ms. Hinton is likely to succeed on all three prongs.

First, transgender individuals' risk of facing violence, including sexual abuse and rape, while incarcerated constitutes an excessive risk to health and safety. Courts have long recognized that these harms are so serious that officials must protect against them. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994); *Howard v. Waide*, 534 F. 3d 1227, 1237 (10th Cir. 2008) ("Of course the harm of sexual assault is 'serious' enough to have Eighth Amendment

implications."); *Doe v. District of Columbia*, 215 F. Supp. 3d 62, 74 (D.D.C. 2016) ("[R]ape is without question a deprivation of rights 'sufficiently serious' to violate the Eighth Amendment."). Transgender individuals in custody are particularly vulnerable to such risk of violence. *See Doe v. District of Columbia*, 215 F. Supp. 3d at 75 (denying summary judgment on Eighth Amendment claim because, in part, plaintiff "was unusually vulnerable to rape because she was a transgender woman" and noting extensive evidence of transgender women's risk of prison rape); *see also* Golden Decl. ¶ 6 ("[T]rans women housed with cis men while in DOC custody are at a grave risk of physical and psychological harm."); Decl. of Dr. Terry Kupers ¶ 3 ("Trans women are often assigned to [men's] correctional facilities and there they are at extremely high risk of sexual assault.").

Second, Defendant knows or should know that DOC's current implementation of its transgender housing policy fails to provide any means to consider transgender individuals' gender identities in housing—with the result that many individuals, including Ms. Hinton, are housed inconsistently with their gender identities and therefore put at risk of harm. Indeed, DOC's own policy *creates a procedure* for considering a transgender individual's gender identity in housing *because* DOC knows of the risk of violence that detained transgender individuals face. Cicurel Decl., Ex. C, § 11(b), (e) (requiring THC to address whether an individual will be housed in a unit "consistent with their gender identity" and to take into account an individual's opinion of their "vulnerability in the general jail population" in determining housing). Yet despite this recognition, DOC's policy inexplicably creates an anatomy-based presumption for housing an individual prior to meeting with the THC—in other words, DOC itself fails to apply the same factors that it recognizes are necessary for the THC to apply to protect transgender residents. And, of course, with the THC now suspended, transgender individuals in custody, like Ms. Hinton, *never* have

their gender identity considered in their DOC housing assignment. Moreover, Defendant cannot possibly be unaware of the risks of assault transgender individuals face in District facilities specifically, given past litigation over the safety of transgender individuals in DOC custody, *see Doe v. District of Columbia*, 215 F. Supp. 3d at 64 (suit against various officials, as well as the District); *Richardson v. District of Columbia*, 322 F. Supp. 3d 175, 184-86 (D.D.C. 2018) (finding no clearly established law on whether a supervisor needed to prevent detained transgender women from being housed with men but not addressing whether doing so violated the Eighth Amendment), and past reports, *see* Office of the District of Columbia Auditor, *Lessons from the Life and Death of Alice Carter* (2020), http://zd4l62ki6k620lqb52h9ldm1.wpengine.netdna-cdn.com/wp-content/uploads/2020/08/Alice.Carter.Case_.Study_.8.25.20.pdf. Here, Defendant knew of Ms. Hinton's status as a transgender woman, Hinton Decl. ¶ 12, the significant risk of violence she faces as a result, and the fact that refusing to consider her gender identity in assigning her to housing would heighten that risk.

Furthermore, in the Eighth Amendment context, a court may conclude that "a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842. Indeed, this court recognized in *Doe* that a reasonable jury could conclude that a prison official knew of a detained individual's significant risk of assault in part because "the risk of assault can be inferred from knowledge of [the detained individual]'s own characteristics—such as being a transgender woman." *Doe v. District of Columbia*, 215 F. Supp. 3d at 76; *see also Cameron v. Menard*, 2019 WL 4675500, at *7 (D. Vt. Aug. 13, 2019) (holding that the transgender plaintiff had plausibly alleged prison officials' awareness of heightened risk of assault because, in part, "of its obviousness"); *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687, 691 (S.D. Tex. 2016) ("The vulnerability of transgender prisoners to sexual abuse is no secret."). Additionally, PREA

standards instruct officials to assess detained transgender individuals' health and safety on a case-by-case basis in making housing assignments, 28 C.F.R. § 115.42(c), out of recognition of their "particular vulnerabilities." National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37109 (June 20, 2012). DOC agrees that these standards apply. Cicurel Decl., Ex. C, § 5. Here, Ms. Hinton need not meet the higher bar set by the Eighth Amendment's subjective "deliberate indifference" standard, *see Banks*, 468 F. Supp. 3d at 110-11 (discussing consensus of Second, Seventh, and Ninth Circuits), but doing so necessarily means that she has met the Fifth Amendment's objective standard.

Finally, Defendant acted intentionally or recklessly failed to act to mitigate the risk. DOC automatically assigned Ms. Hinton to a men's housing unit without any consideration of her gender identity. Even after various officials were made aware of her status as a transgender woman and her requests to be transferred to the women's unit, they never granted her a transfer. Hinton Decl. ¶ 12. Additionally, Defendant's housing assignment was made without the benefit of its own THC, and Defendant has refused to consider placing transgender individuals in housing corresponding to their gender identities. Cicurel Decl. ¶¶ 4-5, 8; Hinton Decl. ¶ 4; *Cameron*, 2019 WL 4675500, at *7 (finding plaintiff plausibly alleged disregard of risk by refusing her request to be detained in a women's facility and failing to enforce prison's own policy). More generally, the use of anatomy as a default method of assigning transgender residents to housing at the outset of their incarceration contravenes the PREA standards and DOC's own recognition—in creating the THC process—that it must consider transgender individuals' gender identities to ensure their safety.

Because DOC's current housing policy disregards an excessive risk to Ms. Hinton's safety of which DOC knew or should have known, Ms. Hinton is likely to succeed on her Fifth Amendment Due Process Clause claim.

4. The District Bears Responsibility for the Constitutional Violations Caused by Its Policy.

The District is liable under § 1983 when its policy is "the moving force behind the constitutional violation." *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) (cleaned up). "[T]his case unquestionably involves official policy as the moving force of the constitutional violation," *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978), as Ms. Hinton is challenging DOC's written housing policy as well as its current implementation of that policy as explained by DOC's Office of the General Counsel and a DOC employee who is a member of the THC. Cicurel Decl. ¶¶ 4-5, 7-10 & Exs. B-C. Because DOC's policy is the moving force behind the violations of Ms. Hinton's and proposed class members' rights under the Constitution and the DCHRA, the municipality is liable.

5. The Requested Relief Is Consistent with the PLRA.

The PLRA applies to suits brought by incarcerated people, 42 U.S.C. § 1997e, and provides that a court may not grant prospective or preliminary injunctive relief with respect to prison conditions unless the court finds that the relief is narrowly drawn, extends no further than necessary to correct the alleged violation of federal rights, and is the least intrusive means necessary to correct the violation. 18 U.S.C. § 3626(a)(1)(A), (2). In applying these requirements, a court must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system" caused by the prospective or preliminary injunctive relief. *Id.*

Ms. Hinton's request for relief in her TRO could not possibly be narrower: she requests only that she herself be transferred to remedy the violation of her own rights and protect against the risks she faces as a transgender women in a men's cellblock. In her motion for a preliminary injunction, Ms. Hinton requests that the Court enjoin DOC's enforcement of its current policy of housing transgender residents according to their anatomy and its use of anatomy as the default

criterion in its written housing policy. This remedy is likewise narrowly drawn, as it targets precisely the aspects of the policy that violate the constitutional and statutory rights of Ms. Hinton and current and future transgender individuals in detention. To end those violations, DOC must only cease using transgender individuals' anatomy as the default criterion—or, currently, the only criterion—for its housing decisions. This remedy extends no further than necessary to correct the violations, as it does no more than ensure that the class members are housed where they should have been if not for the violation of their rights. And this remedy is not at all intrusive, nor can it jeopardize public safety or DOC's operation, as DOC's own written policy already establishes a procedure for making individualized assessments of transgender individuals' safety. DOC just needs to do what its policy requires—and either do it earlier or change the default presumption from housing trans individuals based on anatomy to housing them based on gender identity. *Benjamin v. Fraser*, 156 F. Supp. 2d 333, 344 (S.D.N.Y. 2001), *aff'd in part and vacated in part on other grounds*, 343 F.3d 35 (2d Cir. 2003) ("[R]ather than evidencing that a court-imposed requirement is not compliant with the PLRA, the fact of an applicable Department [of Corrections] policy attests to narrowness and unobtrusiveness of that requirement."). The only additional prophylactic measure sought is a requirement that DOC actually implement the recommendation of its THC—which is necessary in light of the record evidence that it has ignored routinely in the past. *See* Chen Decl. ¶ 8; Golden Decl. ¶ 2. Thus, the requested preliminary injunctive relief stays well within the limits imposed by the PLRA.

B. Ms. Hinton and Proposed Class Members Will Suffer Irreparable Harm Without Emergency Relief.

1. Ms. Hinton Faces Irreparable Harm Without a TRO.

Named Plaintiff Sunday Hinton requests that the Court grant emergency relief in the form of a Temporary Restraining Order transferring her to a general population women's unit. Without

emergency relief, Ms. Hinton will suffer irreparable harm because her health—both physical and mental—and safety are in danger. "[C]ourts often find a showing of irreparable harm where the movant's health is in imminent danger." *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 20 (D.D.C. 2005) (finding irreparable harm where "the threat of . . . serious physical deterioration [was] real and imminent"). As a transgender woman in a men's unit, she faces significant risk of sexual violence. Golden Decl. ¶ 5; Hinton Decl. ¶ 9; Chen Decl. ¶ 5. Additionally, the men's units in the DOC "have much higher rates of violent disciplinary incidents than women's units." Chen Decl. ¶ 6; Pond Decl. ¶ 4. Given that transgender women are "at extremely high risk of sexual assault" in men's facilities, Kupers Decl. ¶ 3, it may be only a matter of time before Ms. Hinton is seriously physically harmed. The Court should not wait until that occurs; by then, it will be too late to prevent the irreparable harm she faces. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.").

Furthermore, "[i]t has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). As discussed above, Plaintiff's Fifth Amendment rights have been and continue to be violated by DOC policy; these injuries satisfy the irreparable harm standard.

Absent a court-ordered transfer to a women's unit, Ms. Hinton has no adequate remedy available to her. Defendant continues to house her in a men's unit where she is in danger.

Defendant's offer to place Plaintiff in protective custody is no help. Cicurel Decl. ¶ 5. These conditions "are uniformly worse than in general population." Golden Decl. ¶ 6. Protective custody is functionally equivalent to solitary confinement, as individuals are segregated from

others and stripped of access to many services. Chen Decl. ¶ 7; Pond Decl. ¶¶ 2-3; Golden Decl. ¶ 6. In DOC custody, transgender individuals are frequently placed in protective custody, a practice that "can lead to psychological damage, increased risk of abuse by correctional officers, and lack of access to . . . services and support." Wash. Lawyers' Comm. for Civil Rights and Urban Affairs, *D.C. Women in Prison: Continuing Problems and Recommendations for Change*, at 78 (2016), https://www.washlaw.org/wp-content/uploads/2018/12/dc_women_in_prison_report.pdf. Individuals in solitary confinement almost universally report symptoms including "intense anxiety or panic attacks, disordered thinking . . ., severe problems sleeping, problems with concentration and memory, [and] despair." Kupers Decl. ¶ 6. For transgender individuals in solitary confinement, suicide is a "huge problem," and placing a transgender woman "in solitary confinement, even for the purpose of protection, puts her at grave risk of suicide." *Id.* ¶ 7. For that reason, "housing utilized to effect safety" for transgender women "must not constitute solitary confinement." *Id.* ¶ 8. Ms. Hinton "absolutely do[es] not want to be housed in protective custody because it is extremely isolating." Hinton Decl. ¶ 10. Her mental health would be impacted, *id.*, particularly as she would be there for an extensive period. Cicurel Decl. ¶ 14 (noting that trials for detained individuals are "currently being set at least one year out and some in 2023").

An option that subjects Ms. Hinton, who is detained pretrial and cannot constitutionally be punished, to conditions equivalent to the punitive practice of solitary confinement, is no remedy at all. *See also United States v. D.W.*, 198 F. Supp. 3d 18, 142 (E.D.N.Y. 2016) (describing a "growing national and international consensus" that "extreme isolation and the pain it causes may be in violation of constitutional and international standards").

2. Ms. Hinton and Proposed Class Members Face Irreparable Harm Without a Preliminary Injunction.

Plaintiff and proposed class members additionally seek preliminary injunctive relief in the form of an order (1) prohibiting Defendant from using an individual's anatomy as the default or sole criterion in making housing assignments for transgender individuals in DOC custody; (2) requiring Defendant to house transgender individuals, upon initial intake, in an intake housing unit corresponding to their gender identity; (3) requiring Defendant to provide transgender individuals with a Transgender Housing Committee hearing, which may be virtual or telephonic, within 72 hours of intake or within 72 hours of any other time at which the individual's transgender status becomes known to any DOC staff member; (4) requiring Defendant to ensure that every transgender individual in DOC custody is housed in accordance with their gender identity and is provided a THC hearing; and (5) requiring Defendant to implement any THC recommendation regarding individuals' housing assignments. Such relief is required to prevent irreparable harm to proposed class members, who are currently being subjected to discrimination—and, like Ms. Hinton, undoubtedly are facing or will face heightened safety risks of violence—under DOC's policy. *See* Golden Decl. ¶ 5; Chen Decl. ¶ 5. Furthermore, as is the case for Ms. Hinton, the continuing violation or threatened violation of class members' constitutional rights is itself irreparable harm.

C. The Balance of Equities Strongly Favors Plaintiff and Proposed Class Members.

As discussed above, Ms. Hinton and others similarly situated will suffer irreparable harm in the absence of relief from this Court. By contrast, DOC will suffer no harm from the requested temporary restraining order and preliminary injunction. DOC has no legal right and no cognizable interest in housing Ms. Hinton in the men's unit without an individualized assessment and despite her gender identity and the substantial risk of physical harm she faces. Indeed, if anything, the

requested preliminary injunctive relief will *enhance* the safety of DOC facilities by decreasing the risk of harm to Ms. Hinton and other improperly housed transgender individuals who have been assigned based on their genitalia rather than their identity and an individualized assessment of their safety. *See Tay*, 457 F. Supp. 3d at 688 ("The Court will only direct Defendants [to] do their job: protect Plaintiff from abusive staff and prisoners and house her appropriately based on an individualized determination of her needs."); *Hampton*, 2018 WL 5830730, at *17 (granting preliminary injunction and requiring department of corrections' Transgender Care Review Committee to consider all evidence for and against transferring the transgender woman plaintiff to a women's facility). Thus, as compared to the harm that will befall Ms. Hinton and the proposed class members, the burden that would be imposed on DOC is extremely low, and the harm nonexistent, as DOC has already "come up with an individualized housing plan" for transgender individuals in its custody "in accordance with its affirmative duty to protect [them] from a substantial risk of harm," *Tay*, 457 F. Supp. 3d at 688 (citing *Farmer*, 511 U.S. at 833-84), and in accordance with PREA regulations.

Because the entry of an injunction will not harm DOC, the security required by Fed. R. Civ. P. 65(c) should be set at zero. *See, e.g., Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Cir. 2011) ("The district court retains discretion as to the amount of security required, *if any.*" (internal quotation marks omitted)); *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) ("[T]he district court did not abuse its discretion in dispensing with the bond."); *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30, 52 (D.D.C. 2013) ("It is well settled that Rule 65(c) gives the Court wide discretion in the matter of requiring security." (citation omitted)).

D. A TRO/Preliminary Injunction Will Serve the Public Interest.

"It is always in the public interest to prevent the violation of a party's constitutional rights." *Simms v. District of Columbia*, 872 F. Supp. 2d 90, 105 (D.D.C. 2012) (quoting *Abdah v. Bush*, No. 04-cv-1254, 2005 WL 711814, at *6 (D.D.C. Mar. 29, 2005)); *accord Lamprecht v. F.C.C.*, 958 F.2d 382, 390 (D.C. Cir. 1992) (explaining that "a [government] policy that is unconstitutional would inherently conflict with the public interest"). Here, the public interest would be vindicated by respecting transgender individuals' civil rights and ceasing to discriminate against and jeopardize the safety of Ms. Hinton and the proposed class members.

CONCLUSION

The Court should grant the requested temporary restraining order and preliminary injunction. Proposed orders are filed herewith.

May 11, 2021

Respectfully submitted,

/s/ Scott Michelman
Scott Michelman (D.C. Bar No. 1006945)
Megan Yan* (D.C. Bar No. 1735334)
Marietta Catsambas* (D.C. Bar No. 1617526)
Arthur B. Spitzer (D.C. Bar No. 235960)
Michael Perloff (D.C. Bar No. 1601047)
American Civil Liberties Union Foundation
of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005
202-601-4267
smichelman@acludc.org

/s/ Rachel Cicurel
Rachel Cicurel* (D.C. Bar No. 1024378)

* In accordance with D.D.C. Local Civil Rule 83.2(g), the attorneys whose names are marked with an asterisk above certify that: (i) they are members in good standing of the District of Columbia Bar; (ii) they are representing a petitioner who is indigent within the meaning of Local Rule 83.2(g), at no cost to petitioner; (iii) they have never been subject to disciplinary complaint or sanction by any court or other disciplinary authority; and (iv) they possess a copy of the Local Rules of this District and are familiar with the rules generally and as they pertain to this proceeding.

Steven Marcus (D.C. Bar No. 1630882)
Public Defender Service for the District of Columbia
633 Indiana Avenue N.W.
Washington, D.C. 20004
Tel. 202-824-2774
Fax 202-824-2776
rcicurel@pdsdc.org

Counsel for Plaintiff[**]

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