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**SONIA DOE, a pseudonym,**  
  
**Plaintiff,**

**v.**

**NEW JERSEY DEPARTMENT OF  
CORRECTIONS, MARCUS HICKS, in  
his official capacity as Acting  
Commissioner of the New Jersey  
Department of Corrections, PATRICK  
NOGAN, in his official capacity as  
Administrator of Northern State Prison;  
LESLIE RUSSELL, in her official  
capacity as Disciplinary Hearing Officer  
at the New Jersey Department of  
Corrections; LT. N.R., in her official  
capacity as Lieutenant at Northern State  
Prison, OFC. S.R., in his official capacity  
as Corrections Officer at Northern State  
Prison, and OFC. J.L., in his official  
capacity as Corrections Officer at  
Northern State Prison.**

**Defendants.**

) SUPERIOR COURT OF NEW JERSEY  
) MERCER COUNTY  
) LAW DIVISION  
)  
) Docket No.  
)  
) CIVIL ACTION  
)  
) **BRIEF IN SUPPORT OF**  
) **ORDER TO SHOW CAUSE WITH**  
) **TEMPORARY RESTRAINTS**

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## **PRELIMINARY STATEMENT**

Plaintiff Sonia Doe is a woman and, prior to her incarceration, had publicly lived as a woman in all aspects of her life for more than fifteen years. From her medical records and her self-reporting, Defendants knew or should have known Ms. Doe is a woman from the moment of her entry into the custody of the New Jersey Department of Corrections (NJDOC). Yet Defendants treat Ms. Doe differently from all women in NJDOC custody because she is transgender, including, but not limited to, by confining her exclusively in men's prisons, where she has been subject to sexual harassment, verbal abuse, physical assault, and extreme mental and emotional distress. Ms. Doe has requested a transfer to Edna Mahan Correctional Facility for Women (EMCFW) pursuant to NJDOC policy, yet has been refused this transfer based in whole or in part on the fact that she was assigned the sex of male at birth and has not undergone genital surgery.<sup>1</sup>

Defendants' insistence on confining Ms. Doe in men's prisons amounts to unlawful discrimination on the basis of her gender identity or expression and her sex under the New Jersey Law Against Discrimination and the New Jersey Constitution's guarantee of equal protection of the law. Unless this Court enjoins Defendants from continuing to discriminate against her by confining her in men's prisons, Ms. Doe will continue to suffer irreparable harm. A transfer to EMCFW will serve the public interest and will not alter the status quo of Ms. Doe's incarceration in NJDOC custody. Accordingly, Ms. Doe seeks an injunction from this Court requiring her immediate transfer to EMCFW, in line with her identity as a woman.

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<sup>1</sup> Genital surgery for transgender women includes "surgery to remove [the] testicles (orchiectomy), create a vagina using penile or colon tissue (vaginoplasty), create a vulva (vulvoplasty), create a clitoris (clitoroplasty), and create labia (labiaplasty)." Mayo Clinic, *Feminizing Surgery* (Sept. 26, 2017), <https://www.mayoclinic.org/tests-procedures/feminizing-surgery/about/pac-20385102>.

## STATEMENT OF FACTS

Plaintiff relies on the facts as set forth in the Verified Complaint and Certification accompanying the Order to Show Cause and recounts the following for clarity:

Plaintiff Sonia Doe is a woman. She was assigned the sex of male at birth but has identified as a woman since she was a child. Doe Cert. ¶¶ 1, 2. Since 2003, she has used her current, typically feminine name and has publicly lived as a woman in all aspects of her life. *Id.* ¶¶ 3, 6. In 2006, she legally changed her name in Pennsylvania. Her Pennsylvania drivers license reflects her typically feminine legal name. Her New Jersey drivers license reflects her legal name and female gender. Doe Cert. *Id.* ¶¶ 6, 7.

Ms. Doe's medical files include a diagnosis of gender dysphoria or gender identity disorder<sup>2</sup> and, until her incarceration, she has consistently received treatment for these diagnoses since approximately 2005, including hormone therapy prescribed by a medical provider. Hormone therapy changed her body and appearance: she developed typically feminine breasts, the shape of her body became more feminine, and her skin softened. *Id.* ¶¶ 4, 5.

When Ms. Doe entered New Jersey Department of Corrections (NJDOC) custody in March 2018, her records indicated that she was transgender and/or had a gender dysphoria diagnosis. *Id.* ¶¶ 8, 10, 12. Nevertheless, she was processed for intake at Central Reception and Assignment Facility (CRAF), an NJDOC facility exclusively for men. By contrast, prisoners who the NJDOC classifies as women are processed for intake at Edna Mahan Correctional Facility for Women (EMCFW). *Id.* ¶ 11. Since her entry into NJDOC custody, Ms. Doe has been confined exclusively

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<sup>2</sup> Gender identity disorder, subsequently updated in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) to gender dysphoria, is the medical diagnosis given to individuals whose gender identity – a person's innate sense of belonging to a particular gender – differs from the sex they were assigned at birth, causing clinically significant distress. Compl. ¶ 14.

in men's prisons, with male cellmates or in isolation, at the following prisons: CRAF, South Woods State Prison (SWSP), New Jersey State Prison (NJSP), Northern State Prison (NSP), and since July 29, 2019, SWSP again. *Id.* ¶ 9.

Ms. Doe has repeatedly told NJDOC officers and staff that she is a woman and should be treated like a woman. *Id.* ¶ 10. Nevertheless, NJDOC and its officers and staff refuse to treat her like other women and discriminate against her because she is transgender, including without limitation by: consistently referring to her using male pronouns, responding to her concerns by saying "this is a male prison," denying her access to female undergarments and female commissary items, denying her access to appropriate levels of her prescribed hormone therapy medications, ignoring or failing to meaningfully consider her self-reported concerns related to her safety, and participating in or allowing her to be subject to verbal and sexual harassment and physical assault. *Id.* ¶¶ 13-16.

Among other incidents, the following has occurred in the four men's prisons at which Ms. Doe has been confined: At CRAF, she was forced to walk topless, with her female breasts exposed, in front of male prisoners and male officers after being strip searched. She received sexually explicit and harassing notes from male prisoners. *Id.* ¶¶ 19, 31. At SWSP in March 2018, corrections officers jeered at her and shouted that they could not wait to strip search her and "see some titties." *Id.* ¶ 20. Ms. Doe was verbally harassed by her male cellmate and prevented from entering the cell. She ultimately received disciplinary charges for refusing to enter the cell with him and in retaliation for filing a Prison Rape Elimination Act (PREA) complaint, which resulted in her spending nine months in isolation at NJSP. *Id.* ¶¶ 20-27.

At NJSP, Ms. Doe was also forced to go topless after being strip searched. Male prisoners made lewd remarks, wrote her notes that were sexually harassing, and/or visibly masturbated while staring at her. *Id.* ¶¶ 28-29.

At NSP, male prisoners also made lewd remarks to her and/or visibly masturbated while staring at her. There too, male prisoners wrote her sexually explicit and harassing notes, which included detailed descriptions of sexual acts they wished to perform with her and referred explicitly to genitalia. Ms. Doe estimates that in her time in NJDOC custody, she has received at least one hundred such notes, which made her feel sick and fearful for her safety. *Id.* ¶¶ 30-35.

On May 24, 2019, Ms. Doe was severely assaulted by three NSP correctional staff after she corrected their use of male pronouns for her, complained that her breasts had been groped under the guise of a pat down search, and said that she would be filing a grievance. Ms. Doe suffered extensive physical injury: the NSP doctor's initial diagnosis noted a probable broken nose, fractured jaw, and possible damage to her spine and the nerves in her hand. Rather than hold the officers to account, the NJDOC charged Ms. Doe with two disciplinary charges. She was adjudicated guilty and sanctioned with 270 days of administrative segregation, which she experienced in conditions of isolation, confined to her cell for more than 20 hours per day, and often for 23 or 24 hours a day. *Id.* ¶¶ 44-102.

On July 29, 2019, after Ms. Doe had spent 67 days in isolation, the Superior Court, Appellate Division stayed the NJDOC's disciplinary decision. Ms. Doe was released from administrative segregation at NSP and transported to SWSP that night, where she has remained in general population with, she believes, minimum custody status prisoners. *Id.* ¶¶ 103, 104; Compl. ¶¶ 99-100.

At SWSP, the NJDOC has continued to treat Ms. Doe differently from other women and to subject her to discrimination. For example, she overheard three officers talking about her, saying: “That’s the one they call [Sonia].” “Yeah, did you see her titties?” “No, *his* titties.” Doe Cert. ¶¶ 36, 37. Male prisoners have made comments about her “titties” and “booty,” as well as comments that she has interpreted as threats. Like at NJSP and NSP, on two occasions a male prisoner at SWSP pulled out his penis and masturbated while staring at Ms. Doe, which her male cellmate and other prisoners on the tier saw and/or learned of from others. *Id.* ¶¶ 38, 40.

These incidents, at all four men’s prisons at which Ms. Doe has been confined, make her fear for her safety and feel at risk of physical and sexual assault. She believes these incidents will continue, and escalate, if she remains confined in men’s prisons. *Id.* ¶ 41.

The NJDOC maintains a policy on Transgender/Intersex Inmates, PCS.001.006, which was approved and issued by Commissioner Hicks on January 15, 2019. Compl. ¶ 39. Section VI(C) of the policy provides a process by which “an inmate [can] request[] correctional facility housing based on a gender identity that differs from the inmate’s sex[.]” *Id.* ¶ 44.

Yet despite this policy, upon information and belief, the NJDOC’s practice has been and continues to be to house prisoners according to their genitalia only, such that all women who have penises are assigned to men’s prisons solely on that basis. *Id.* ¶ 46. Upon information and belief, the NJDOC houses only two women who are transgender at EMCFW because they have undergone genital surgery. *Id.* ¶ 48. The NJDOC’s practice of restricting housing at EMCFW to only those transgender women who have undergone genital surgery is inconsistent with PREA, the NJDOC’s own policy, and state and federal law. The practice also violates clear treatment protocols for the treatment of gender dysphoria and is counter to recommendations of the National Commission on Correctional Health Care. *Id.* ¶ 49.

On April 29, 2019, through undersigned counsel, Ms. Doe filed a formal request to be moved to EMCFW, in line with her gender expression and identity, pursuant to the NJDOC's Policy on Transgender/Intersex Inmates. Doe Cert. ¶ 42. The NJDOC has acknowledged receipt of the letter but has provided no final decision, or substantive update, as to the transfer request since May, nor any assurance that it recognizes the urgent nature of Ms. Doe's request. Doe Cert. ¶ 43; Compl. ¶¶ 74, 109. Because each day she spends in men's prisons increases her vulnerability to and experience of discrimination and verbal and physical attack, and exacerbates her gender dysphoria, Ms. Doe seeks the instant emergency relief from this Court. Doe Cert. ¶ 107.

### **ARGUMENT**

To be entitled to interim relief pursuant to *R. 4:52-1*, a party must show (a) that the restraint is necessary to prevent irreparable harm, *i.e.*, that the injury suffered cannot be adequately addressed by money damages, which may be inadequate because of the nature of the right affected; (b) that the party seeking the injunction has a likelihood of success on the merits; (c) that the equities favor the party seeking the restraint; and (d) that the restraint does not alter the *status quo ante*. *Crowe v. De Gioia*, 90 N.J. 126, 132-136 (1982). Plaintiff easily satisfies these requirements.

#### **I. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS OF HER CLAIMS REQUIRING HER TRANSFER TO EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN.<sup>3</sup>**

##### **A. Ms. Doe's Claims of Discrimination on the Basis of Gender Identity or Expression and on the Basis of Sex under N.J.S.A. 10:5-1 to 14.1 Are Likely to Succeed.**

New Jersey has a strong history of protecting transgender people from unlawful discrimination. The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to 14.1 (LAD),

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<sup>3</sup> Plaintiff alleges additional violations of the Law Against Discrimination and New Jersey Constitution in her Verified Complaint but limits the instant motion to Counts One through Three as they relate to her improper confinement in a men's prison.

prohibits Defendants from discriminating on the basis of gender identity or expression and on the basis of sex in their treatment of prisoners, including Ms. Doe. The LAD provides:

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, disability, nationality, sex, **gender identity or expression** or source of lawful income used for rental or mortgage payments, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

[N.J.S.A. § 10:5-4 (emphasis added).]<sup>4</sup>

When New Jersey courts evaluate claims under the LAD, they look to federal precedent for guidance. *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 189 N.J. 381, 405 (2007). In particular, the Supreme Court has applied the framework of the federal anti-discrimination statute, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to its LAD analysis. *Grigoletti v. Ortho Pharm. Corp.*, 118 N.J. 89, 97 (1990).

Under *McDonnell Douglas*, the plaintiff must establish a *prima facie* case of discrimination under the LAD, which gives rise to a presumption of unlawful discrimination. The

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<sup>4</sup> Even before the LAD was amended in 2006 to explicitly prohibit discrimination on the basis of gender identity or expression, New Jersey courts interpreted the LAD to include it implicitly. *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501, 514 (App. Div. 2001) (relying in part on New Jersey's "historic policy of liberally construing the LAD."). When he signed the amendment to add "gender identity or expression" into law, then-Governor Corzine explained, "[t]he New Jersey Law Against Discrimination is one of the most powerful tools we have in government to protect our citizens. I am pleased to sign legislation to ensure gender identity or expression is a protected class against discrimination in New Jersey." New Jersey Governor's Message, 2006 S.B. 362. This statement by the governor aligns with the New Jersey Supreme Court's recognition that "the overarching goal of the [LAD] is nothing less than the eradication 'of the cancer of discrimination.'" *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988) (quoting *Jackson v. Concord Co.*, 54 N.J. 113, 124 (1969)).

burden then shifts to the defendant to rebut the presumption by articulating a legitimate, nondiscriminatory reason for the treatment. Finally, the plaintiff has the opportunity to prove by a preponderance of evidence that this articulated reason was “not the true reason for the [challenged] decision but was merely a pretext for discrimination.” *Andersen v. Exxon Co.*, 89 N.J. 483, 492 (1982) (explaining the *McDonnell Douglas* test). Plaintiff Sonia Doe easily satisfies this test for her LAD claims of discrimination on the basis of gender identity or expression and on the basis of sex.

*i. NJDOC facilities are places of public accommodation.*

New Jersey correctional facilities, including but not limited to South Woods State Prison, are places of public accommodation such that the protections of the LAD apply to prisoners confined there. *Brown v. N.J. Dep’t Corr.*, MER-L-00503-18, Order Granting Pl.’s Mot. Partial Summary Judgment (July 6, 2018) (holding “the Edna Mahan Correctional Facility for Women (‘EMCFW’) is hereby declared a place of public accommodation pursuant to the Law Against Discrimination (‘LAD’), and the LAD therefore applies to Plaintiffs’ claims against Defendant, State of New Jersey Department of Corrections (‘NJDOC’)”).

Even if this Court had not already found NJDOC facilities to constitute places of public accommodation under the LAD, it should clearly do so here. First, this conclusion is justified in light of the interpretative guidance of federal standards. *Turner v. Wong*, 363 N.J. Super. 186, 211 (App. Div. 2003); *Jones v. Aluminum Shapes*, 339 N. J. Super. 412, 421 (App. Div. 2001). For purposes of prisoners’ rights to accommodation, Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131–12135, is a federal statutory analogue to the LAD. The ADA indisputably applies to correctional facilities. *See Jones*, 339 N. J. Super. at 425; *Chisolm v. McManimon*, 275 F.3d 315, 325 (3d Cir. 2001).

Second, NJDOC facilities “maintain[] close relationships with the government or other public accommodations [and are] similar to enumerated or other previously recognized public accommodations[,]” which are among the factors courts examine to determine whether an entity is a public accommodation. *Dale v. Boy Scouts of America*, 160 N.J. 562, 590 (1999).

Finally, as early as 2000, the U.S. District Court for the District of New Jersey predicted the New Jersey Supreme Court would consider jails and prisons places of public accommodation. *Chisolm v. McManimon*, 97 F. Supp. 2d 615, 621-22 (D.N.J. 2000), *rev'd & remanded on other grounds*, 275 F.3d 315 (3d Cir. 2001). The Superior Court, Appellate Division cited this prediction in concluding a police department, its police force and individual officers, as well as any state government agency is a place of public accommodation for purposes LAD claims. *Ptaszynski v. Uwaneme*, 371 N.J. Super. 333, 347-48 (App. Div. 2004). If NJDOC’s women’s prison – as well as township police departments, forces and individual officers, and state agencies – has been found to be a public accommodation under the LAD, clearly so too should the four men’s prisons at which Ms. Doe has been confined.

***ii. Ms. Doe has established a prima facie case of discrimination in a public accommodation.***

The LAD specifically bars discrimination in places of public accommodation on the basis of gender identity or expression or on the basis of sex. Moreover, it provides that when the use of a public accommodation “is in its nature reasonably restricted exclusively to individuals of one sex, . . . individuals shall be admitted based on their gender identity or expression.” N.J.S.A. § 10:5-12(f)(1).

Ms. Doe has established a *prima facie* case of public accommodation discrimination on the basis of gender identity or expression under the LAD. Ms. Doe indisputably has a female gender identity and expression. Assuming NJDOC facilities, which are places of public accommodation,

are reasonably classified as men's and women's facilities, Defendants have indisputably refused Ms. Doe entry to the women's facility, despite her female gender identity or expression. Instead, Defendants have denied Ms. Doe transfer to the women's prison simply because she has a penis, which discriminates against her on the basis of her gender identity and expression and is in direct contravention of N.J.S.A. § 10:5-12(f)(1).

Additionally, whereas the NJDOC classifies transgender women who have had genital surgery as "female" in NJDOC records and house them at the women's prison, Defendants continue to classify Ms. Doe as "male" and refuse to house her at EMCFW because she has a penis. As applied to Ms. Doe, this practice of housing prisoners according to their genitalia, regardless of their gender identity or transgender status, also amounts to *prima facie* discrimination under the LAD on the basis of her sex.<sup>5</sup>

Finally, Ms. Doe has put forward a *prima facie* showing of a "hostile environment" under the LAD based on her allegations of Defendant's participation in or allowance of persistent and ongoing sexual harassment, verbal abuse, and physical assault on the basis of her gender identity, sex, and transgender status. In *Holmes v. Jersey City Police Dep't*, the Superior Court, Appellate Division reversed a grant of summary judgment for the police department, finding that the plaintiff, a transgender man, had alleged "conduct [that] was sufficiently severe that a reasonable transgender person in plaintiff's position would find the environment to be hostile, threatening and

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<sup>5</sup> Courts across the country have considered discrimination on the basis of transgender status to be a form of sex discrimination, including in New Jersey under the LAD before it was amended. *EEOC v. R.G.*, 884 F.3d 560, 571 (6th Cir. 2018); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Doe v. Mass. Dep't of Corr.*, No. 17-12255-RGS, 2018 U.S. Dist. LEXIS 99925, at \*24 (D. Mass. June 14, 2018); *DePiano v. Atl. Cty.*, No. 02-5441 (RBK), 2005 U.S. Dist. LEXIS 20250, at \*20-21 (D.N.J. Sep. 2, 2005). *See also Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that discrimination on the basis of sex stereotypes is sex discrimination under Title VII); *Zalewski v. Overlook Hosp.*, 300 N.J. Super. 202 (Law Div. 1996) (concluding that harassment based on behavior that does not conform to gender stereotypes is actionable under the LAD).

demeaning.” 449 N.J. Super. 600, 603 (App. Div. 2017). Here, Ms. Doe’s allegations are so severe that other transgender prisoners in her position would – and, in light Defendants’ practices, unfortunately likely do – find the environment of a men’s prison hostile, threatening, and demeaning to a woman who is transgender.

***iii. Any rationale the NJDOC could put forward for the discrimination is pretextual.***

Defendants cannot put forward a non-pretextual reason that they cannot confine a woman who is transgender in the women’s prison.

Defendants are likely to cite some combination of security interests or concerns about resources as the reason they cannot transfer Ms. Doe to Edna Mahan Correctional Facility for Woman. Each of those purported reasons will fail to justify treating Ms. Doe differently on the basis of her gender identity or expression, her sex, or her transgender status, and each of those reasons will be discriminatory and pretextual.

***a) People who are transgender are not dangerous.***

Any argument suggesting that Ms. Doe is more dangerous to women merely by virtue of being transgender perpetuates the stigma attached to transgender identity. There is no evidence that transgender prisoners in general pose a greater threat to security than other prisoners. *Hampton v. Baldwin*, No. 3:18-CV-550-NJR-RJD, 2018 U.S. Dist. LEXIS 190682, at \*35 (S.D. Ill. Nov. 7, 2018). Courts have appropriately rejected such arguments: “generalized concerns for prison security are insufficient to meet the ‘demanding’ burden placed on the State to justify sex-based classifications.” *Doe*, 2018 U.S. Dist. LEXIS 99925, at \*28 (quoting *United States v. Virginia*, 518 U.S. 515, 531 (1996)).

Such a generalized argument about dangerousness would also reiterate Defendants’ refusal to recognize Ms. Doe as a woman in fact, because of their preoccupation with genitalia: the

NJDOC's practice of only housing transgender women who have had gender-affirming surgery at EMCFW promotes an uninformed and deeply discriminatory notion of what it means to be a woman.

To the extent this practice of making housing determinations based on genitalia suggests Defendants will claim Ms. Doe – or any other woman who is transgender – is a security threat to other women because of her genitals, that is a heteronormative and discriminatory misunderstanding of the realities and risks of sexual assault in prison. *See Hampton*, 2018 U.S. Dist. LEXIS 190682, at \*37 (concluding that a housing policy based solely on assigned sex at birth was not substantially related to the state's interest in prison security). Of course, such an argument would be entirely untethered to Ms. Doe's history. But even if she had a prior history of sex offenses, any suggestion that that should have a bearing on the appropriateness of placement in a men's versus women's prison would be discriminatory and highly unworkable: the NJDOC would hardly maintain it could not house cisgender<sup>6</sup> men at men's prisons if they were convicted of sex offenses involving male victims.

***b) Ms. Doe's placement at the women's prison is not dangerous.***

Defendants cannot point to any particularized reason why Ms. Doe would pose a greater security threat at the women's prison than at a men's prison. Ms. Doe's disciplinary history does not provide that reason: indeed, her recent adjudication for assault, when in fact she was assaulted

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<sup>6</sup> The term "cisgender" refers to "being a person whose gender identity corresponds with the sex the person had or was identified as having at birth." Merriam-Webster, *Definition of cisgender*, <https://www.merriam-webster.com/dictionary/cisgender>

by correctional staff, actually demonstrates the great risk she faces at a men's prison because of her identity as a woman.

But even if Defendants continue to maintain, without evidence, that Ms. Doe committed the assault, that fact would have no bearing on her relative security risk at a women's prison versus a men's prison. Any such arguments would themselves implicate discriminatory gender and sex stereotypes and belie the reality that women incarcerated at EMCFW have themselves sometimes been convicted of violent crimes and adjudicated guilty of serious disciplinary infractions. It would be absurd for Defendants to claim a cisgender woman could not be housed at EMCFW because her record was too violent; similarly, they cannot claim Ms. Doe cannot be housed there because of her disciplinary record, no matter the facts underlying it.

***c) The NJDOC should invest resources in protecting transgender prisoners, not cite them as a pretext for discrimination.***

As explained in Point II(B), any concern about the resources required to house a transgender woman in the women's prison – including, for example, training officers and other NJDOC personnel – is not sufficient to justify discrimination. To the contrary, the NJDOC should invest resources in forward-looking policy changes to better protect prisoners on the basis of their gender identity and expression and should affirmatively train its officers and staff to appropriately accommodate, treat and communicate with prisoners who are transgender. Citing the resources such steps would require as a pretext for discrimination is just that: pretext.

Refusing to transfer Ms. Doe to EMCFW not only fails to satisfy the test under *McDonnell Douglas*, it actually undermines the government interest in ensuring prisoners' physical and mental health, because it causes such irreparable damage to hers. *See* Point II(A). Accordingly, Ms. Doe

is likely to succeed on her claims of discrimination on the basis of gender identity or expression and on the basis of sex under the LAD.

**B. Ms. Doe’s Equal Protection Claim Under Article I, Paragraph 1 Is Likely to Succeed.**

The New Jersey Constitution, Article I, Paragraph 1, provides that “[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.” The Supreme Court has found Article I, Paragraph 1 to guarantee a right of equal protection of the law. *Doe v. Poritz*, 142 N.J. 1, 94 (1995). This right can, in some cases, be more expansive than that afforded by the Fourteenth Amendment to the U.S. Constitution. *Id.*; *B.C. ex rel. C.C. v. Bd. of Educ.*, 220 N.J. Super. 214, 224 (App. Div. 1987). *See also Lewis v. Harris*, 188 N.J. 415, 442-44 (2006).

To survive an equal protection challenge under Article I, Paragraph 1, the challenged action must bear a substantial relationship to an important government purpose. *See Lewis*, 188 N.J. at 443; *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017) (holding that classifications based on transgender status are quasi-suspect). New Jersey’s equal protection jurisprudence requires courts to consider three factors: the nature of the right being protected, the extent to which the government is interfering with that right, and the public need for the interference. *Id.*; *Poritz*, 142 N.J. at 94.

Ms. Doe’s equal protection claim will likely succeed on the merits because she can easily meet New Jersey’s balancing test. *Lewis*, 188 N.J. at 443. Ms. Doe’s right to be treated in accordance with her identity as a woman substantially outweighs any interest NJDOC has in confining her with men. By confining her at SWSP, or any other men’s prison, Defendants are treating Ms. Doe differently than other women in NJDOC custody and depriving her of equal protection of the law. The extent to which Defendants are interfering with Ms. Doe’s

constitutionally protected right is great. Until she is transferred to EMCFW, she is at severe risk of sexual harassment, verbal abuse, physical assault, and extreme mental and emotional distress. *See Greene v. Bowles*, 361 F.3d 290 (6th Cir. 2004); *Keohane v. Jones*, 328 F. Supp. 3d 1288 (N.D. Fla. 2018); *Hampton*, 2018 U.S. Dist. LEXIS 190682. Finally, there is no public need for Ms. Doe to remain at SWSP, or any other men's prison, because Ms. Doe poses neither a general nor a particularized security threat at EMCFW. *See Hampton*, 2018 U.S. Dist. LEXIS 190682, at \*36-37. To the contrary, as explained below, a transfer would actually serve the public interest.

Ms. Doe's right to be treated like other women outweighs any government interest Defendants may attempt to articulate. Accordingly, Ms. Doe's equal protection claim under the New Jersey Constitution, Article I, Paragraph 1, is likely to succeed.

## **II. PLAINTIFF EASILY MEETS THE REMAINING STANDARDS FOR GRANTING TEMPORARY RESTRAINTS.**

### **A. Absent Interim Relief, Ms. Doe Will Continue to Suffer Harm Because the Only Sufficient Remedy for her Ongoing Injury Is an Injunction.**

The harm Ms. Doe's has suffered and continues to suffer is irreparable. New Jersey courts consider harm to be irreparable if monetary damages are insufficient for redress. *Crowe*, 90 N.J. at 132-33. That is the case here.

Transgender prisoners, in particular women who are transgender, experience high rates of harassment, violence, and damage to their mental health relative to the general prison population, as evidenced by Ms. Doe's own experience as well as extensive scholarship and litigation brought by transgender women across the country. *See, e.g., Greene*, 361 F.3d at 292 (describing a severe physical attack against a transgender woman by another prisoner); *Keohane*, 328 F. Supp. 3d at 1303 (explaining severe mental health problems suffered by a transgender woman housed in a men's facility); *Hampton*, 2018 U.S. Dist. LEXIS 190682, at \*7, \*19 (describing incidents of severe sexual misconduct against a transgender woman by prison staff and physical attack by a

male prisoner). According to one study by the U.S. Department of Justice’s Bureau of Justice Statistics, nearly 40 percent of transgender prisoners in state and federal prisons experience sexual victimization, a rate ten times higher than that for prisoners in general. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12: SUPPLEMENTAL TABLES: PREVALENCE OF SEXUAL VICTIMIZATION AMONG TRANSGENDER ADULT INMATES (2014).

Notably, transgender prisoners are often “singled out” as targets of harassment and abuse when they are housed incongruously with their gender identity. Women who are transgender are at especially high rates of risk: twenty-one percent of transgender women housed in men’s facilities suffer physical abuse. *Testimony of Organizations Supporting LGBT Equality, Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights*, Lambda Legal (June 9, 2012), [https://www.lambdalegal.org/sites/default/files/ltr\\_sjsccrhr\\_20120619\\_solitary-confinement.pdf](https://www.lambdalegal.org/sites/default/files/ltr_sjsccrhr_20120619_solitary-confinement.pdf).

These statistics have been borne out by Ms. Doe’s own experience in NJDOC custody. As outlined extensively in her Verified Complaint and Certification, Ms. Doe has been the victim of verbal and sexual harassment and physical assault by corrections officers and other prisoners because Defendants refuse to recognize her identity as a woman. Ms. Doe is at grave risk of suffering additional, serious harm if she is not moved to the women’s prison. The seriousness of this harm demands immediate injunctive relief. Damages after the fact are insufficient.

**B. The Balance of the Equities, Including the Public Interest, Favors the Issuance of an Immediate Injunction.**

Defendants will suffer no hardship by confining Ms. Doe at the women’s prison. The NJDOC has a policy that explicitly contemplates housing transgender prisoners in line with their gender identity or expression, and Ms. Doe, through counsel, has made a formal request under that

policy to be transferred to EMCFW, citing the risk of irreparable harm. Upon information and belief, the NJDOC already houses two transgender women at EMCFW because they have undergone genital surgery.<sup>7</sup> Clearly, confining a transgender woman in the women's prison is not too burdensome for Defendants.

Other states' corrections departments have transferred transgender women to women's facilities in response to litigation similar to the instant case. Michael Levenson, *Transgender inmate moved to women's prison*, THE BOSTON GLOBE (Jan. 24, 2019), <https://www.bostonglobe.com/metro/2019/01/24/transgender-inmate-moved-women-prison/Nf2k5Oqa3Ojnh1yH1IwWkL/story.html> (explaining the transfer to a women's prison of the plaintiff in *Doe*, 2018 U.S. Dist. LEXIS 99925); Angie Leventis Lourgos, *Transgender inmate moved to Illinois women's prison after alleging years of abuse*, CHICAGO TRIBUNE (Dec. 27, 2018), <https://www.chicagotribune.com/news/ct-met-transgender-prisoner-transfer-illinois-20181227-story.html> (explaining the transfer to a women's prison of the plaintiff in *Hampton*, 2018 U.S. Dist. LEXIS 190682). Additionally, Connecticut and Massachusetts each have statutory provisions, effective in July and December 2018, respectively, that presumptively require prisoners to be housed in facilities that match their gender identity.<sup>8</sup>

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<sup>7</sup> Genital surgery for transgender women includes "surgery to remove [the] testicles (orchiectomy), create a vagina using penile or colon tissue (vaginoplasty), create a vulva (vulvoplasty), create a clitoris (clitoroplasty), and create labia (labiaplasty)." Mayo Clinic, *Feminizing Surgery* (Sept. 26, 2017), <https://www.mayoclinic.org/tests-procedures/feminizing-surgery/about/pac-20385102>.

<sup>8</sup> Specifically, the Connecticut statute requires that a person "with a birth certificate, passport, or driver's license that reflects his or her gender identity, or who can meet established standards for obtaining such a document to confirm the inmate's gender identity, must presumptively be placed in a correctional institution with inmates of the gender consistent with the inmate's gender identity." Conn. SB 13. Massachusetts' statute provides that a person with "a gender identity . . . that differs from the prisoner's sex assigned at birth, with or without a diagnosis of gender dysphoria or any other physical or mental health diagnosis, shall be: . . . housed in a correctional facility with inmates of the same gender identity; provided further, that the placement shall be

Defendants would suffer no hardship if compelled to move Ms. Doe as Massachusetts and Illinois did in the previous court cases, or as Massachusetts and Connecticut contemplate for all transgender prisoners by statute. Any burden of administrability in transferring Ms. Doe to EMCFW would be either akin to the routine burdens of classification and custody changes, or else would be those that derive from having to train officers and NJDOC personnel in the proper treatment of transgender prisoners. The latter should be an endeavor the NJDOC is not only required to undertake as a matter of law, but also one in which it should be proud to invest.

By contrast, Ms. Doe has and will continue to face extreme hardship if this Court does not order immediate temporary relief. Transgender women in prison are at unique risk of violence, sexual assault, and emotional trauma when their gender identity is not respected. With every new day in a men's prison, Ms. Doe's experience and risk of harassment and assault grow.

Lastly, and importantly, issuing an immediate injunction will further the public interest. When the public interest is implicated, "courts, in the exercise of their equitable powers, 'may, and frequently do, go much farther both to give and withhold relief . . . than they are accustomed to go when only private interests are involved.'" *Waste Mgmt. of New Jersey, Inc. v. Union Cty. Utils. Auth.*, 399 N.J. Super. 508, 520-21 (App. Div. 2008) (quoting *Yakus v. United States*, 321 U.S. 414, 441 (1944)). Allowing Defendants' discriminatory conduct to continue would constitute an endorsement of an antiquated and intolerant view of gender in our modern society. Ms. Doe is a woman, and she should be treated as such. In a state that explicitly protects people of all gender identities from discrimination, continuing to house Ms. Doe at a men's prison – when she is not a man – is a strong departure from the public interest in New Jersey. Our state takes great pride, as

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consistent with the prisoner's request," with a limited exception for health, safety, management or security. Mass. Gen. L. c.127 § 32A.

it should, in being a leader in protecting civil rights and promoting inclusion and non-discrimination in our communities, institutions, and governing principles. An order requiring Ms. Doe's immediate transfer to the women's prison upholds that leadership role and therefore the public interest.

For these reasons, the balance of the equities, including the public interest, clearly supports immediate injunctive relief for Ms. Doe.

**C. The Restraint Does Not Alter the *Status Quo Ante*.**

The Supreme Court has explained, "the point of temporary relief is to maintain the parties in substantially the same condition 'when the final decree is entered as they were when the litigation began.'" *Crowe*, 90 N.J. at 134 (quoting *Peters v. Public Service Corp. of N.J.*, 132 N.J. Eq. 500 (Ch.1942), *aff'd o.b.*, 133 N.J. Eq. 283 (E. & A. 1943)). Transferring Ms. Doe to EMCFW will not substantially alter the *status quo ante*. Defendants will still continue to confine her in prison for the duration of her sentence.

Moreover, this Court should consider the *status quo ante* to reach back to the genesis of this dispute, and not just the initiation of litigation. When Ms. Doe entered NJDOC custody in March 2018, the *status quo* was that she publicly lived as a woman and was legally recognized by her typically feminine name. Defendants altered conditions for Ms. Doe by assigning her to men's prisons and treating her like a man. Without access to the NJDOC's policy regarding transgender prisoners or to assistance of counsel, Ms. Doe did not know she could seek relief for the discriminatory housing assignments. Providing temporary restraints and requiring Defendants to cease treating her like a man would partially restore her to the same position as when she entered prison.

Ms. Doe simply requests that Defendants cease their discriminatory behavior and house her properly, with other women, according to her gender identity and expression. Doing so would not substantially alter the *status quo* of her confinement: Ms. Doe remains a prisoner in the custody of the NJDOC, which is precisely why she is so vulnerable as a transgender woman and requires immediate relief from this Court.

**CONCLUSION**

For the reasons set forth above, Plaintiff requests that her Order to Show Cause be granted, enjoining Defendants from confining her in a men's prison and requiring an immediate transfer to Edna Mahan Correctional Facility for Women, in line with her gender identity and expression.

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