

## VOTING WHILE TRANS: HOW TO COMBAT VOTER ID LAWS & DISENFRANCHISEMENT OF THE TRANSGENDER COMMUNITY

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In early 2020, a transgender woman filed a suit against North Carolina election officials after poll workers questioned her identity when she attempted to cast her ballot.<sup>1</sup> The woman alleged that while North Carolina’s controversial voter identification law was placed on hold due to pending litigation, the election official asked to see her ID “because [her] face doesn’t match [her] name.”<sup>2</sup> After a lengthy altercation, the woman was ultimately allowed to vote, but not before being publicly humiliated at the polling station.<sup>3</sup> Unfortunately, this is not an isolated incident. According to The Williams Institute, approximately 81,000 people may have faced discrimination and disenfranchisement at the polls in 2020 due to strict photo ID laws.<sup>4</sup>

As of 2020, a total of thirty-six states have some type of law on the books requesting or requiring voters to show a form of identification.<sup>5</sup> These “voter ID” laws are widely criticized for their role in creating barriers to voter participation with a disproportionate impact on racial minority, low-income, and disabled populations.<sup>6</sup> Notably, these laws also pose a particular threat to the transgender community.

While the fact that an individual’s identification does not match their gender identity should not impact their right to vote, in practice, trans voters face additional barriers at the polls.<sup>7</sup> First, it can be difficult for trans people to obtain an ID that correctly reflects their name and gender, and current presentation. Many states require “burdensome process requirements and/or provider certification” for updating the gender marker on identity documents. Nine states even go so far as to “require proof of surgery, court order, or amended birth certificates” to allow the change.<sup>8</sup> Coincidentally, all nine of these states also require some form of voter identification in order to vote. According to a study conducted by the Williams Institute, “about 260,000 voting-eligible transgender

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<sup>1</sup> Bruce Henderson, *Transgender Voter Sues NC, Mecklenburg Election Official For Questioning Identity*, THE CHARLOTTE OBSERVER (Feb. 12, 2020), <https://www.charlotteobserver.com/news/politics-government/election/article240227061.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Kathryn O’Neill & Jody L. Herman, *The Potential Impact of Voter Identification Laws On Transgender Voters in the 2020 General Election*, UCLA SCH. OF L. WILLIAMS INST. (Feb. 2020), <https://williamsinstitute.law.ucla.edu/publications/trans-voter-id-impact/>.

<sup>5</sup> *Voter Identification Requirements*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 25, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

<sup>6</sup> *Oppose Voter ID Legislation Fact Sheet*, AM. C.L. UNION (May 2017), <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet>.

<sup>7</sup> *#VotingWhileTrans Guide*, TRANSFORM THE VOTE (2020), <https://transformthevote.org/voting>.

<sup>8</sup> *Equality Maps: Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT (Last Updated: Oct. 14, 2020), [https://www.lgbtmap.org/equality-maps/identity\\_document\\_laws](https://www.lgbtmap.org/equality-maps/identity_document_laws).

people live in the 35 states that have voter ID laws and have no IDs that correctly reflect their name and/or gender.”<sup>9</sup> A non-updated ID may be deemed invalid by election officials, creating obstacles for trans voters both in registering to vote and casting their ballot.

Second, while there is little evidence of trans people actually being blocked from voting at the polls due to voter ID requirements, the additional barriers and harassment faced by trans individuals impose a clear burden on their right to vote.<sup>10</sup> Just the discomfort of being invalidated may be enough to deter people from participating in the electoral process.<sup>11</sup> Third, transgender people are more likely to experience poverty and homelessness, which creates difficulties when it comes to obtaining a government issued ID. According to the National Transgender Discrimination Survey, “one in five transgender people report having experienced homelessness at some time in their lives.”<sup>12</sup> Finally, to make matters worse, trans people are also at risk of disenfranchisement as a result of being incarcerated, with sixteen percent of trans people overall, and twenty-one percent of trans women, reporting time spent in prison or jail.<sup>13</sup>

The most comprehensive solution to this problem would be the repeal or modification of all voter ID laws. However, given political realities in many states, a legislative path to change is likely not politically viable. Voter ID requirements are allegedly motivated by concerns with regards to voter fraud, but data shows that such fraud via impersonation is practically nonexistent.<sup>14</sup> In reality, these claims of rampant voter fraud serve as a front to justify disenfranchisement. In addition to their impact on the trans community, voter ID laws pose significant barriers to voters who are low-income, or of racial minorities, who are less likely to have the required ID. The ACLU reports that “up to twenty-five percent of African-American citizens of voting age lack government-issued ID, compared to only eight percent of whites.”<sup>15</sup> Additionally, states often disallow forms of identification disproportionately relied on by Black voters such as public assistance IDs, state employee IDs, and student IDs.<sup>16</sup> Unsurprisingly, red states tend to have the strictest voter ID laws, and these measures likely contribute to Republican victories, as the communities most

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<sup>9</sup> Kathryn O’Neill & Jody L. Herman, *The Potential Impact of Voter Identification Laws On Transgender Voters in the 2020 General Election*, UCLA SCH. OF L. WILLIAMS INST. (Feb. 2020), <https://williamsinstitute.law.ucla.edu/publications/trans-voter-id-impact/>.

<sup>10</sup> Scottie Andrew, *Why Some Transgender Voters Have an Even Bigger Challenge to Casting Their Ballots*, CNN (Oct. 13, 2020), <https://www.cnn.com/2020/10/13/politics/transgender-voter-suppression-2020-election-trnd/index.html>.

<sup>11</sup> *Id.*

<sup>12</sup> Center for American Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails Transgender People*, (May 2016), <https://www.lgbtmap.org/file/lgbt-criminal-justice-trans.pdf>.

<sup>13</sup> *Id.* at 1.

<sup>14</sup> Max Feldman, *10 Voter Fraud Lies Debunked*, THE BRENNAN CTR. FOR JUST. (May 27, 2020), <https://www.brennancenter.org/our-work/research-reports/10-voter-fraud-lies-debunked>.

<sup>15</sup> *Oppose Voter ID Legislation Fact Sheet*, AM. C.L. UNION (May 2017), <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet>.

<sup>16</sup> *Id.*

impacted by such barriers tend to vote for Democrats.<sup>17</sup> Thus, legislative solutions are unlikely to come to fruition where they are most needed, leaving a judicial remedy as the only remaining course of action.

The path to a judicial victory is also very uncertain. The Supreme Court ruled in *Crawford v. Marion County* that voter ID laws are not facially unconstitutional.<sup>18</sup> In determining whether ID requirements violated the Equal Protection Clause of the Fourteenth Amendment, the Court employed a balancing test, weighing the “asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule.’”<sup>19</sup>

Here, balancing the burden of the voter ID law at issue on voters against the state’s interests in promoting electoral integrity, the majority concluded that the law “impose[d] only a limited burden on voters’ rights,” and thus upheld the statute.<sup>20</sup> *Crawford* thereby foreclosed the possibility of a facial challenge on voter ID laws, meaning a plaintiff could only successfully challenge such restrictions as applied to a particular class of people.<sup>21</sup> Yet, the Court’s jurisprudence may have created space for a challenge to voter ID laws as applied to the transgender community. While this would not mean the end of identification requirements, it could help gradually erode barriers to enfranchisement. In *Crawford*, the Court held the evidence in the record did not demonstrate an unjustified burden severe enough to warrant invalidation of the statute on its face.<sup>22</sup> The Court acknowledged its holding did leave room for an as-applied challenge if presented with a different set of facts. Unfortunately, that path remains narrow, as the Court warned, “even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners’ right to the relief they seek in this litigation.”<sup>23</sup>

Under this heightened standard, the trans community could still make a compelling case that voter ID laws, while facially neutral, impose a special burden on their ability to vote, making the laws unconstitutional as applied to transgender voters. In conducting the balancing test, the court could conclude that due to the increased difficulty for trans individuals to obtain a state ID that reflects their name, gender identity, and presentation, the burden on trans voters to satisfy the requirement is higher than that presented to the general public. This burden far outweighs the state interest of promoting election integrity, particularly given the almost nonexistent rates of voter fraud via impersonation. Additionally,

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<sup>17</sup> Aaron Blake, *Republicans Keep Admitting That Voter ID Helps Them Win, For Some Reason*, WASH. POST (Apr. 7, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-should-really-stop-admitting-that-voter-id-helps-them-win/>.

<sup>18</sup> *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008).

<sup>19</sup> *Id.* at 190.

<sup>20</sup> *Id.* at 202-03.

<sup>21</sup> Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 73 HOFSTRA L. REV., 635, 635-36 (2009).

<sup>22</sup> *Id.* at 202 (“We cannot conclude that the statute imposes ‘excessively burdensome requirements’ on any class of voters”).

<sup>23</sup> *Id.* at 200.

even if eventually allowed to cast their ballot, the harassment and ensuing discomfort associated with being forced to produce an ID that does not match the way one identifies creates additional barriers that may dissuade trans voters from feeling safe exercising their right to vote. As the *Crawford* court favored a narrow remedy, emphasizing its hesitance in invalidating an entire statute which it deemed “a neutral, nondiscriminatory regulation of voting procedure,” remedies in accordance with the caselaw would likely be narrow in scope.<sup>24</sup> For instance, reforms to benefit the trans community could entail a mandatory diversity training for poll workers, as well as updating the identity document laws to remove the administrative barriers to obtaining photo ID that reflects ones’ gender identity. Of course, due to the current makeup of the Supreme Court, the majority may not be amendable to this argument, but this reasoning remains a viable strategy in front of a court that is more sympathetic to disenfranchisement issues.

Alternatively, state supreme courts could offer a broader remedy, depending on their state constitution and the makeup of their courts. As seen in the Missouri Supreme Court’s recent decision invalidating the state’s voter ID law,<sup>25</sup> some states have equivalents to the Fourteenth Amendment Equal Protection Clause that they are willing to read more broadly. In striking down the voting restriction as in violation of the state constitution’s equal protection provision, the Missouri court wrote, “unlike in *Crawford* . . . Respondents in the instant case have demonstrated that requiring photo identification burdens their right to vote.”<sup>26</sup> Here, the Missouri court reasoned they were not bound by *Crawford* as they were interpreting the state constitution, not the Fourteenth Amendment. Conceivably, a similar case could be made in other states with regards to the trans community, since as deemed sufficient by the Missouri court, the record would certainly include “ample evidence of the difficulties individuals . . . have faced or potentially face in the future if photo identification were required for their votes to be counted.”<sup>27</sup> One should note that the Missouri court explicitly stated that “both the right to vote and right to equal protection under the [state] constitution are even more extensive than those provided by the federal constitution.”<sup>28</sup> Given this victory, state courts may turn out to be hospitable to anti-voter suppression litigation for the trans community and other disenfranchised populations.

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<sup>24</sup> *Id.* at 203.

<sup>25</sup> *Priorities USA v. State*, 591 S.W.3d 448, 452 (Mo. 2020).

<sup>26</sup> *Id.* at 459 n.80.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*