

# TRANSGENDER RIGHTS AND ISSUES

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#### I. INTRODUCTION

As a part of the larger struggle for LGBTQ rights, the transgender equality movement presents unique challenges and struggles. Trans visibility and social acceptance has furthered the trans rights movement, with a number of high profile trans people bringing conversations about transgender rights and struggles to the national forefront. Trans people have competed in the U.S. Open, graced the covers of *TIME* and *Vanity Fair*, presided over courtrooms as judges, and served with distinction in the military.<sup>1</sup> The struggle for trans equality has also been fought on the political and legal fronts. The first transgender lobbying day took place in 1995 in Washington, D.C.<sup>2</sup> Thirteen years later, the first transgender mayor of a U.S city, Stu Rasmussen, was elected.<sup>3</sup> The following year, President Barack Obama nominated the first openly transgender federal appointees to serve in his Administration, later hiring the White House's first openly transgender staff member.<sup>4</sup>

While trans visibility in popular culture and media is increasing, trans people are still subject to stigma, discrimination, and violence at disproportionate levels. Federal Bureau of Investigation data shows that incidents of hate crimes motivated by gender identity rose from 31 in 2013 to 114 in 2015 and have remained in the triple-digits in the years since.<sup>5</sup> Lack of uniform documentation procedures,

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1. *Milestones in the American Transgender Movement*, Opinion, N.Y. TIMES (Aug. 28, 2015), <https://www.nytimes.com/interactive/2015/05/15/opinion/editorial-transgender-timeline.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT, HATE CRIME STATISTICS 2013 2 (2014); FBI, UNIFORM CRIME REPORT, HATE CRIME STATISTICS 2015, TABLE 1 (2016); see, e.g., FBI, UNIFORM CRIME REPORT, HATE CRIME STATISTICS 2017, TABLE 1 (2018).

failure to properly identify and distinguish gender identity from sexual orientation, and questionable reporting rates cast doubts on the accuracy of current data, suggesting that hate crimes motivated by gender identity are more common than statistics indicate.<sup>6</sup>

The transgender rights movement is also largely fought on the state level. Research by the Movement Advancement Project summarizes legal rights and protections afforded to transgender individuals in each state and considers laws that both negatively and positively affect trans rights. Eleven states and the District of Columbia have high gender identity equality status; seven states are medium equality states; eight states are low equality states; and nineteen states are negative equality states.<sup>7</sup> Notably, legal protections explicitly covering gender identity lag significantly behind those covering sexual orientation.<sup>8</sup>

This Article uses the terms “transgender” or “trans” to refer to a person whose gender identity is different from the sex assigned to them at birth. Gender identity is distinct from sexual orientation. Gender identity refers “to each person’s deeply felt internal and individual experience of gender—which may or may not correspond with the sex assigned at birth—including the personal sense of the body and other expressions of gender” such as dress, speech, and mannerisms.<sup>9</sup> Sexual orientation, meanwhile, refers to an individual’s emotional, affectional, and sexual attraction to individuals of a different gender, the same gender, or any gender.<sup>10</sup>

On both the state and federal level, trans people lack legal protections that are needed to lead healthy, safe, and dignified lives. This Article addresses the current state of legal protections for transgender people. Part II describes workplace discrimination protections based on gender identity at the state and federal level. Part III covers access to gender-affirming healthcare, including challenges with insurance and discrimination when accessing care such as hormone replacement therapy (HRT) under the Affordable Care Act and its state-level companions. Part IV provides an overview of violence against transgender individuals by various actors and discusses legislative efforts to address disparities across intersectional lines. Part V summarizes challenges facing, and protections for, transgender people in accessing public accommodations and housing. Part VI emphasizes the importance of obtaining identity documents that reflect one’s

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6. See Daniel Engber, *The FBI Says Hate Crimes Are Soaring. It Actually Has No Idea*, SLATE (Nov. 14, 2018, 3:54 PM), <https://slate.com/technology/2018/11/hate-crimes-fbi-data-insufficient.html>.

7. *Snapshot: LGBT Equality by State, Gender Identity*, MOVEMENT ADVANCEMENT PROJECT, <http://www.lgbtmap.org/equality-maps> (last visited Jan. 16, 2020).

8. See *id.* (classifying nineteen states as negative equality regarding gender identity and four states as negative equality regarding sexual orientation).

9. INT’L COMM’N OF JURISTS, THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 6 n.2 (2007), [http://data.unaids.org/pub/manual/2007/070517\\_yogyakarta\\_principles\\_en.pdf](http://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf).

10. *Id.* at 6 n.1.

gender identity, and discusses the varied difficulty with which trans people can obtain or change those documents on the federal and state levels.

## II. WORKPLACE DISCRIMINATION BASED ON GENDER IDENTITY

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to refuse to hire, discharge, or otherwise discriminate in the terms, conditions, or privileges of employment because of an individual's sex.<sup>11</sup> The statute has been interpreted to mean that an impermissible consideration of sex cannot be a motivating factor in an employment practice under *Price Waterhouse v. Hopkins*.<sup>12</sup> In 2019, the Supreme Court heard argument on whether Title VII protects against discrimination based on gender identity in *EEOC v. R.G. & G.R. Funeral Homes, Inc.* The Court is expected to produce a uniform system of federal interpretation. Separate from federal protections, many states have legislated to include gender identity as a protected class.

### A. FEDERAL LAW AND THE UNITED STATES MILITARY

Trans plaintiffs are currently on the forefront of the legal fight for federal employment discrimination protections under the Civil Rights Act of 1964. While a number of federal courts currently recognize their claims as sex discrimination under two leading theories, the Supreme Court's upcoming opinion in *EEOC v. R.G. & G.R. Funeral Homes, Inc.* is expected to determine what rights trans employees have under Title VII. In the military context, divergences between the Obama and Trump administrations reveal disagreement in an area of strong executive authority but changing social understanding. Meanwhile, the future of service for thousands of transgender troops has been called into question.

#### 1. Federal Laws on Employment Discrimination Against Transgender People

Transgender plaintiffs have taken two main approaches in Title VII suits: sex discrimination claims and sex stereotyping claims.<sup>13</sup> Sex discrimination claims rely on the theory that the employer took an adverse action against the trans employee after learning of their gender identity (including whether the employee changes their gender identity, intends on changing it, or has previously changed it). For example, if an employer was willing to hire the plaintiff when the employer believed the plaintiff was a man but rescinds the offer upon learning that the plaintiff is (now) a woman, the employee might allege that the employer

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11. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012).

12. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–40 (1989).

13. See Vanita Gupta and Sharon McGowan, *Symposium: Let's talk about sex: why Title VII must cover sexual orientation and gender identity*, SCOTUSBLOG (Sep. 5, 2019, 3:53 PM), <https://www.scotusblog.com/2019/09/symposium-lets-talk-about-sex-why-title-vii-must-cover-sexual-orientation-and-gender-identity/>.

discriminated against them based on sex and violated Title VII.<sup>14</sup> Alternatively, a trans plaintiff may assert a discrimination claim on a sex or gender stereotyping theory.<sup>15</sup> Under the stereotyping theory, the plaintiff argues that they were subjected to an adverse employment decision because of their failure to comply with the employer's subjective gender expectation.<sup>16</sup> For example, a trans woman employee may argue that she was fired because the employer believed she should dress in male clothing and present as male.<sup>17</sup> The stereotyping theory is supported largely by *Price Waterhouse v. Hopkins*. The *Price Waterhouse* employee was denied a promotion due, in part, to comments made by colleagues that reflected negative stereotypes of how women should behave in the workplace.<sup>18</sup> The Supreme Court found that, when an employee's gender (including their conformity to gender stereotypes) played a motivating part in an employment decision, the employer can avoid liability only through a finding that the same decision would have been made regardless of the impermissible consideration.<sup>19</sup>

Trans plaintiffs have generally been more successful on the sex stereotyping theory articulated by *Price Waterhouse*. While some courts have recognized claims by transgender plaintiffs as sex discrimination under Title VII,<sup>20</sup> others are hesitant in the absence of an explicit gender stereotype non-conformity argument.<sup>21</sup> The Seventh and Tenth Circuits have rejected claims by trans plaintiffs under a "discrimination because of sex" theory, arguing that discrimination based on one's changing gender identity was not within the legislative spirit or intent of

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14. See *Macy v. Holder*, EEOC Doc. 0120120821, 2012 WL 1435995, at \*10 (Apr. 20, 2012) (explaining that proving sex discrimination does not require showing evidence of gender stereotyping).

15. *Id.* For a full explanation of the sex stereotyping theory, see *Price Waterhouse*, 490 U.S. at 250–53.

16. See Gupta and McGowan, *supra* note 13.

17. See *Macy*, 2012 WL 1435995, at \*10.

18. Negative comments included the word "macho" and suggestions that a "lady [should not use] foul language" and should "talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry." See *Price Waterhouse*, 490 U.S. at 235.

19. *Id.* at 236–37, 258.

20. See *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) ("A label, such as 'trans [gender],' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.") (quoting *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (noting that Title VII prohibits "discrimination because one fails to act in the way expected of a man or woman"); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (finding a valid sex discrimination claim when bank treated "a woman who dresses like a man differently than a man who dresses like a woman"); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) ("Plaintiff's claim that she was discriminated against 'because of her obvious transgender[ ]' status is a cognizable claim of sex discrimination under Title VII. To hold otherwise would be 'to deny trans[gender] employees the legal protection other employees enjoy merely by labeling them as trans[gender].'" (quoting *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007)).

21. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (upholding termination of transgender bus driver due to legitimate, non-discriminatory reason of liability concerns raised when person with male genitalia uses female restrooms during work hours.); *Dobre v. Nat'l R.R. Passenger Corp. (AMTRAK)*, 850 F. Supp. 284 (E.D. Pa. 1993) (finding no sex discrimination against trans employee when employee conformed to gender stereotypes).

Title VII.<sup>22</sup> On the other hand, courts accepting such claims reason that by requiring the employer to first take the plaintiff's sex into account, adverse actions due to transgender status are literally discrimination "because . . . of sex."<sup>23</sup> For example, in *Schroer v. Billington*, the U.S. District Court for D.C. explained that an employee who is fired because of a change in status within a protected category (i.e., male to female) has a discrimination claim under Title VII, regardless of any clear animosity toward a particular subset.<sup>24</sup>

In 2012, the EEOC issued *Macy v. Holder*, clarifying its position that discrimination claims based on gender identity, change of gender, and/or transgender status are cognizable under Title VII.<sup>25</sup> The agency noted that Title VII must be interpreted to proscribe gender-based discrimination as well as biological sex-based discrimination.<sup>26</sup> Regardless of an employer's motivation, the agency found that discrimination against an employee because of transgender status first requires drawing a gender-based classification, which is impossible to separate from sex discrimination and was admonished in *Price v. Waterhouse*.<sup>27</sup> The EEOC views the various strategies taken by trans plaintiffs not as many different legal questions, but rather as "simply different ways of describing sex discrimination."<sup>28</sup>

The Supreme Court has agreed to hear *EEOC v. R.G. & G.R. Funeral Homes, Inc.*<sup>29</sup> and will rule on whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse*.<sup>30</sup> Aimee Stephens, a transgender woman who was assigned male at birth, was employed as a Funeral Director at R.G. & G.R. Harris Funeral Homes from April 2008 to August 2013.<sup>31</sup> Throughout her employment, Stephens presented as a man and used her then-legal name, William.<sup>32</sup> Funeral home policy requires male employees to wear suits and ties and requires female employees to wear skirts and business jackets.<sup>33</sup> The funeral home provides male employees with clothing and allowances and does not do the same for female employees.<sup>34</sup> In July 2013, Stephens provided her employer with a letter stating

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22. *Ulane v. E. Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1981); *Etsitty*, 502 F.3d at 1222; *see also* *Schroer v. Billington*, 577 F. Supp. 2d 293, 307–08 (D.D.C. 2008).

23. *Schroer*, 577 F. Supp. 2d at 308.

24. *See id.* at 307–308 (D.D.C. 2008) (comparing a hypothetical employee fired because of change in gender identity with one fired because of change in religion and finding a claim due to change in status regardless of a particular animosity against, e.g., Judaism or Christianity).

25. *Macy v. Holder*, EEOC Doc. 0120120821, 2012 WL 1435995, at \*7 (Apr. 20, 2012).

26. *Id.* at \*6.

27. *Id.* at \*7.

28. *Id.* at \*10.

29. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

30. *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019).

31. *R.G. & G.R. Harris Funeral Homes, Inc.*, 885 F.3d at 567.

32. *Id.*

33. *Id.* at 568.

34. *Id.*

her lifelong struggles with gender identity and her intentions to return to work as a woman in appropriate attire following a scheduled vacation.<sup>35</sup> Before the vacation, Stephens was fired.<sup>36</sup> Her employer testified that the decision was because “[Stephens] was no longer going to represent himself as a man. He wanted to dress as a woman.”<sup>37</sup>

Stephens filed a charge with the EEOC, which issued a determination of reasonable cause to believe the funeral home discharged Stephens because of her sex and gender identity in violation of Title VII.<sup>38</sup> After failing to conciliate, the EEOC filed a complaint against the funeral home in the district court on September 25, 2014.<sup>39</sup> The district court agreed with the funeral home that transgender status is not a protected class under Title VII and held that the EEOC could not bring a claim based solely on transgender status.<sup>40</sup> However, the district court agreed that the EEOC had adequately stated a claim that Stephens was fired because of her failure to conform to her employer’s sex- or gender-based expectations, stereotypes, or preferences.<sup>41</sup> Despite recognizing Stephens’ claim as sex discrimination, the district court ultimately granted summary judgment on the grounds that the Religious Freedom and Restoration Act (“RFRA”) precluded enforcement against the funeral home, which offered evidence as to the religious nature of its operations.<sup>42</sup>

On appeal, the Sixth Circuit reversed, holding that discrimination based on transgender status is necessarily discrimination based on sex and sufficiently supports a claim under Title VII.<sup>43</sup> The court relied on a sex stereotyping theory under *Price Waterhouse v. Hopkins*.<sup>44</sup> Like the *Price Waterhouse* employee, the court held that though she was not discriminated against for being a woman *per se*, discrimination against a subset of women (those who fail to conform to stereotypical gender norms) was no less prohibited.<sup>45</sup> Using this theory, the Sixth Circuit found that the funeral home’s decision to fire Stephens for failing to conform to gender expectations was analogous to the treatment of the employee in *Price Waterhouse*. The court noted that it is analytically impossible to fire an employee based on transgender status without first considering, and being motivated

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35. *Id.* at 568–69.

36. *Id.* at 569.

37. *Id.*

38. *Id.*

39. *Id.*

40. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 598–99 (E.D. Mich. 2015), *rev’d in part*, 884 F.3d 560 (6th Cir. 2018).

41. *Id.* at 603.

42. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 862–63 (E.D. Mich. 2016).

43. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–575 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

44. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989); *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 576.

45. *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 576–77.

by, the employee's sex.<sup>46</sup> The court applied the "but-for" test and determined that had Stephens been a cisgender woman attempting to conform to the funeral home's dress code, she would not have been fired. Therefore, the court found that the funeral home impermissibly used sex as consideration in an adverse employment decision.<sup>47</sup>

The Supreme Court heard oral argument in the case on October 8, 2019. The EEOC, Stephens, and some *amici* have asked the Court to uphold the Sixth Circuit's judgment.<sup>48</sup> The funeral home and federal respondents in the case are seeking reversal. The Trump Administration urged the EEOC to switch its position before the Supreme Court and argue that businesses can discriminate against trans employees.<sup>49</sup> The EEOC declined to do so and refused to sign onto the government's brief in *Harris Funeral Homes*.<sup>50</sup>

The United States and the Department of Justice have both sided with the employer, arguing that the ordinary public meaning of "sex" in 1964 did not include transgender status and that subsequent legislation has explicitly included gender identity as a protected class.<sup>51</sup> Petitioners further argue that Title VII requires showing that an employer treated members of one sex less favorably than members of the opposite sex.<sup>52</sup> By treating all transgender persons—regardless of whether they identify as male or female—in a uniform manner, the government argues that no disparate treatment exists.<sup>53</sup> The government argues that, since Stephens does not allege that the dress code would treat a biological female more favorably, she cannot show that the dress code imposed disadvantageous terms or conditions of employment based on sex.<sup>54</sup> The government also disagrees with Stephens' interpretation of *Price Waterhouse*, arguing that it did not establish sex stereotyping as a freestanding theory of Title VII liability.<sup>55</sup>

The Supreme Court's decision will produce a uniform system of interpretation for lower courts applying Title VII's prohibition on sex discrimination. It will resolve whether Title VII protects employees who are fired for being trans. As of oral arguments in *Harris Funeral Homes*, twenty-three states are located in

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46. *Id.*

47. *See id.*

48. *See* Brief for Respondent Aimee Stephens at 1, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (June 26, 2019).

49. *See* Ben Penn, Chris Opfer & Paige Smith, *Justice Department Urges Civil Rights Agency to Flip LGBT Stance*, BLOOMBERG LAW (Aug. 13, 2019, 5:02 PM), <https://news.bloomberglaw.com/daily-labor-report/justice-department-urges-civil-rights-agency-to-flip-lgbt-stance>.

50. *See* Macia Coyle, *EEOC Doesn't Sign Trump DOJ's Supreme Court Brief Against Transgender Employees*, NAT'L L.J. (Aug. 16, 2019, 5:39 PM), <https://www.law.com/nationallawjournal/2019/08/16/eec-doesnt-sign-trump-doj-s-supreme-court-brief-against-transgender-employees>.

51. Brief for the Federal Respondent Supporting Reversal at 19, 22, R.G. & G.R. Harris Funeral Homes, Inc., v. EEOC, No. 18-107, (Aug. 16, 2019).

52. *Id.* at 31–32, 34.

53. *Id.*

54. *Id.* at 39–40.

55. *Id.* at 45.



federal circuits that explicitly interpret Title VII as including gender identity.<sup>56</sup> The Supreme Court's ruling will change that number to either fifty or zero. Regardless of the court's ruling, state laws and other federal legislative efforts will affect the status of gender identity discrimination in employment nationwide. Twenty-one states and the District of Columbia have passed laws including gender identity as a protected class in employment, providing a separate route for relief outside of Title VII.<sup>57</sup>

Even if the Supreme Court interprets Title VII to include gender identity, exemptions to the law could still allow many employers to fire trans employees. Title VII does not apply to businesses with fewer than fifteen employees (representing roughly four million, or seventy-eight percent, of individual firms) or the federal government and its over two million employees.<sup>58</sup> President Obama signed Executive Order 13672, which included gender identity as a protected class for federal employment, providing separate protections outside of Title VII.<sup>59</sup> However, President Trump rescinded Executive Order 13673, which was issued in tandem with E.O. 13672 and required federal contractors to provide documentation to prove their compliance with the law.<sup>60</sup> This has led some to doubt the efficacy of the earlier protection.<sup>61</sup>

Finally, should the Court agree with the funeral home that "sex" does not include transgender status, Congress may act independently and amend the law to include such protections. The "Equality Act," which passed in the House of Representatives on May 17, 2019 and currently awaits consideration in the Senate, would amend Title VII to explicitly cover sexual orientation and gender identity.<sup>62</sup>

## 2. Discrimination Against Transgender People in the United States Military

Until 2016, the U.S. Department of Defense (DOD) prohibited transgender people from serving in the Armed Forces. The DOD listed "transsexualism" as a psychosexual condition that precluded military service.<sup>63</sup> The policy also allowed administrative separation of those diagnosed with "mental disorders" when a

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56. *Federal Court Decisions*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/federal\\_court\\_decisions](https://www.lgbtmap.org/equality-maps/federal_court_decisions) (last visited Jan. 16, 2020).

57. *Non-Discrimination Laws: Employment*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](https://www.lgbtmap.org/equality-maps/non_discrimination_laws) (last visited Jan. 16, 2020).

58. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2012).

59. Exec. Order No. 13672, 79 Fed. Reg. 42,971 (Jul. 21, 2014).

60. See Zack Ford, *Trump Revokes Executive Order, Weakens Protections for LGBT Workers*, THINK PROGRESS (Mar. 29, 2017), <https://archive.thinkprogress.org/trump-gutted-lgbt-executive-order-8dd0e3be69a/>.

61. *Id.*

62. Equality Act, H.R. 5 § 701A, 116th Cong. (2019).

63. Kristy N. Kamarck, *What are the Department of Defense (DOD) Policies on Transgender Service?*, CONG. RESEARCH SERV. (July 15, 2015), <https://fas.org/sgp/crs/natsec/IN10264.pdf>.

medical provider deemed it sufficiently severe to significantly impair “the member’s ability to function effectively in the military environment.”<sup>64</sup>

In June 2016, Secretary of Defense Ashton Carter lifted the transgender military ban. Secretary Carter issued Directive Type Memo 16-005, which allowed transgender servicemembers to serve openly in the Armed Forces.<sup>65</sup> The repeal followed completion of two directives:<sup>66</sup> the first established working groups to study the policy and readiness implications of open transgender service, and the second delegated decision-making authority for administrative separations relating to transgender persons to Brad Carson, the acting undersecretary of defense for personnel and readiness.<sup>67</sup> Secretary Carter explained the move, in part, by emphasizing the need for the military to recruit from the broadest possible pool of Americans, saying, “We have to have access to 100 percent of America’s population for our all-volunteer forces to be able to recruit from among them the most highly qualified — and to retain them.”<sup>68</sup>

The Department of Defense, in issuing the directive, relied on a study commissioned by the RAND Corporation, which estimated that there are 2,450 transgender active duty servicemembers, along with 1,510 reservists.<sup>69</sup> A later report by the Palm Center, based on Pentagon data, estimated the number of transgender service people in the military at a much higher 14,707 servicemembers, of whom 8,980 are active duty servicemembers and 5,727 are reservists.<sup>70</sup> Directive Type Memo 16-005 included a timeline for military services to “provide gender transition medical care to service members based on medical guidance” after July 1, 2017.<sup>71</sup>

Before the changes first announced by Secretary Carter could be carried out, the Trump Administration reversed the Obama administration’s policy. In a series of tweets on the morning of July 26, 2017,<sup>72</sup> President Trump said transgender

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64. U.S. DEP’T OF DEF., Instruction No. 1332.14, Enlisted Administration Separations (2014).

65. U.S. DEP’T OF DEF., Directive-Type Memo 16-005, “Military Service of Transgender Service Members” (June 30, 2016), [https://dod.defense.gov/Portals/1/features/2016/0616\\_policy/DTM-16-005.pdf](https://dod.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf).

66. *See Statement by Secretary of Defense Ash Carter on DOD Transgender Policy*, U.S. DEP’T OF DEF. (July 13, 2015), <http://www.defense.gov/News/News-Releases/News-Release-View/Article/612778>.

67. *Id.*

68. Dan Lamothe, *The Pentagon’s Ban on Transgender Service Just Fell – But the Details are Complicated*, WASH. POST., (June 30, 2016), <https://www.washingtonpost.com/news/checkpoint/wp/2016/06/30/the-pentagons-ban-on-transgender-service-just-fell-but-the-details-are-complicated/>.

69. AGNES GEREKEN SCHAEFER ET AL., ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY 12, RAND CORP. (2016), [https://www.rand.org/pubs/research\\_reports/RR1530.html](https://www.rand.org/pubs/research_reports/RR1530.html).

70. *Department of Defense Issues First-Ever Official Count of Active Duty Transgender Service Members*, PALM CTR. (Feb. 13, 2018), <https://www.palmcenter.org/wp-content/uploads/2019/06/14700-Transgender-Troops-.pdf>.

71. *DoD Transgender Policy Timeline*, U.S. DEP’T OF DEF., [https://dod.defense.gov/Portals/1/features/2016/0616\\_policy/Transgen-Policy.jpg](https://dod.defense.gov/Portals/1/features/2016/0616_policy/Transgen-Policy.jpg).

72. Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 5:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864>; Donald J. Trump (@realDonaldTrump), Twitter (July

service members caused “tremendous medical costs and disruption” and that, after consultation with “my Generals and military experts,” he would be banning transgender service members from the military entirely.<sup>73</sup> While the issue of funding healthcare for transgender service members had become a controversial part of a defense and security funding package under debate that month, Trump’s announcement that transgender service members would be banned entirely was a surprise to many—even Secretary of Defense James Mattis was given only one day’s notice.<sup>74</sup> On August 25, 2017, the White House followed up on President Trump’s announcement by issuing a Presidential Memorandum directing the Secretary of Defense and Secretary of Homeland Security to “return to the long-standing policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have . . . negative effects.”<sup>75</sup>

That Presidential Memorandum was almost immediately enjoined by federal courts.<sup>76</sup> In March 2018, the President filed a revised Presidential Memorandum, revoking the August 2017 Memorandum and directing that the Secretaries of Defense and Homeland Security “exercise their authority to implement any appropriate policies concerning military service by transgender individuals.”<sup>77</sup> However, the Memorandum cited policies by Secretary Mattis concluding that those with a diagnosis of gender dysphoria may require significant medical treatment and are thus ineligible for military service except in “certain limited circumstances.”<sup>78</sup> The new Memorandum, in essence, green-lit policies by the Department of Defense (shared by the Department of Homeland Security and Secretary Kirstjen Nielsen) reinstating a ban for transgender servicemembers.

Those in favor of banning transgender individuals from military service often argue that gender dysphoria is a mental illness which makes it difficult for transgender individuals to serve and disrupts cohesion within military units.<sup>79</sup> According to this argument, because gender dysphoria is a mental illness,

26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472>; Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 6:08 AM), <https://twitter.com/realDonaldTrump/status/890197095151546369>.

73. *Id.*

74. Julie Hirschfield Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html>.

75. Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security: Military Service by Transgender Individuals, 83 Fed. Reg. 13,367 (Mar. 23, 2018).

76. *See, e.g., Doe 1 v. Trump*, 275 F. Supp. 3d 167, 177 (D.D.C. 2017), *vacated sub nom. Doe 2 v. Shanahan*, 75 F. App’x 19 (D.C. Cir. 2019).

77. Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security, *supra* note 75.

78. *Id.*

79. Memorandum from James Mattis, Sec’y of Defense to the President, *Military Service by Transgender Individuals*, (Feb. 22, 2018), <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF>.

transgender individuals face significant barriers to serving in the military. As Secretary Mattis wrote in his Memorandum to the President on Military Service by Transgender Individuals: “I firmly believe that compelling behavioral health reasons require the Department to proceed with caution before compounding the significant challenges inherent in treating gender dysphoria with the unique, highly stressful circumstances of military training and combat operations.”<sup>80</sup> Secretary Mattis further wrote that the inclusion of transgender individuals “could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.”<sup>81</sup>

Those opposed to banning transgender individuals from military service argue that gender dysphoria does not create a bar to service, that healthcare costs for treating transgender individuals are manageable, and that there is no empirical evidence that inclusion of transgender individuals disrupts unit cohesion. A bipartisan letter from fifty senators sent on April 26, 2018 to Secretary Mattis outlined these arguments.<sup>82</sup> First, the senators cited statements from the American Medical Association, American Psychological Association, and two former U.S. Surgeons General explaining that gender dysphoria is a treatable condition and should not be used as a pretext to ban transgender individuals from service.<sup>83</sup> The senators argued that “transgender troops are as medically fit as their non-transgender peers and there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude them from military service.”<sup>84</sup> Additionally, gender dysphoria would be relatively inexpensive for the military to treat; costs for hormone treatment are not high compared with regular health care costs for cisgender service members, and few servicemembers per year will undergo gender-affirming surgery.<sup>85</sup> Finally, the senators cited research from 18 countries finding that transgender servicemembers have not negatively impacted either performance or unit cohesion.<sup>86</sup>

The military’s new transgender ban was almost immediately challenged in a series of federal lawsuits filed in California, Washington, Maryland, and the District of Columbia.<sup>87</sup> In all four lawsuits, preliminary injunctions were put in

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80. *Id.*

81. *Id.*

82. Letter from Kirstin Gillibrand, Sen. NY, to James Mattis, Sec’y of Defense, (Apr. 26, 2018), <https://www.gillibrand.senate.gov/news/press/release/after-all-four-military-service-chiefs-confirm-transgender-troops-have-not-harmed-unit-cohesion-discipline-or-morale-gillibrand-leads-bipartisan-group-of-50-senators-in-telling-defense-secretary-mattis-transgender-troop-ban-is-harmful-to-military->

83. *Id.*

84. *Id.*

85. SCHAEFER, *supra* note 69, at 33–37.

86. Letter from Gillibrand, *supra* note 82; *see also* SCHAEFER, *supra* note 69, at 45.

87. *See Doe 1 v. Trump*, 2017 WL 6816476 (D.D.C. Dec. 11, 2017), *appeal dismissed sub nom.*, *Doe v. Trump*, No. 17-5267, 2018 WL 411236 (D.C. Cir. Jan. 4, 2018); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017), *appeal dismissed*, No. 17-2398, 2018 WL 2717050 (4th Cir. Feb. 2, 2018); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017), *appeal dismissed*, No. 17-

place against the ban, but each injunction was eventually vacated by a higher court, allowing the ban to go into effect on April 12, 2019, as litigation proceeded in lower courts.

*Doe v. Trump* was filed in the District Court for the District of Columbia on behalf of five anonymous “current and aspiring” transgender service members.<sup>88</sup> The Court granted a preliminary injunction against the ban on October 30, 2017, finding the government’s arguments in favor of vacating the preliminary injunction “wither[ed] away under scrutiny.”<sup>89</sup> The Department of Justice appealed to the D.C. Circuit to stay the preliminary injunction, but the request was denied on December 22, 2017.<sup>90</sup> After the revised memorandum was issued, the D.C. Circuit overturned the preliminary injunction in January 2019, holding it was clear error to say the revised memorandum contained no substantial change in policy.<sup>91</sup> However, the court declined to rule on the merits of the ban itself, allowing litigation to proceed even as the preliminary injunction against the ban was lifted.<sup>92</sup>

*Stone v. Trump* was filed in the District of Maryland on behalf of transgender plaintiffs including Brock Stone, an 11-year veteran of the United States Navy.<sup>93</sup> On November 21, 2017, the Court issued a preliminary injunction against the Presidential Memorandum.<sup>94</sup> The Department of Justice appealed the preliminary injunction to the Fourth Circuit, which denied the appeal.<sup>95</sup> However, after a January 22, 2019 Supreme Court order vacating the preliminary injunctions in two of the other cases, the District of Maryland issued an order in March 2019 vacating the preliminary injunction, allowing the ban to take effect as litigation proceeded.<sup>96</sup>

The California and Washington lawsuits were the subject of Supreme Court order vacating the preliminary injunction. *Karnoski v. Trump* was filed in the Western District of Washington on behalf of nine transgender plaintiffs, including Ryan Karnoski, a 22-year-old social worker who wished to join the military.<sup>97</sup> *Stockman v. Trump* was filed in the Central District of California in half of seven transgender plaintiffs, including Aiden Stockman, a transgender man who wished

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36009, 2017 WL 8229552 (9th Cir. Dec. 30, 2017); *Stockman v. Trump*, No. EDCV171799JGBKXX, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017).

88. *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 175 (D.D.C. 2017).

89. *Id.* at 217.

90. *Doe 1 v. Trump*, 2017 WL 6816476, at \*2 (D.D.C. Dec. 11, 2017), *appeal dismissed sub nom. Doe v. Trump*, No. 17-5267, 2018 WL 411236 (D.C. Cir. Jan. 4, 2018).

91. *Doe 2 v. Shanahan*, 755 F. App’x 19 (D.C. Cir. 2019); *Stone v. Trump*, 280 F. Supp. 3d 747, 758 (D. Md. 2017), *appeal dismissed*, No. 17-2398, 2018 WL 2717050 (4th Cir. Feb. 2, 2018).

92. *Id.* at 25.

93. *Stone v. Trump*, 280 F. Supp. 3d 747, 758 (D. Md. 2017), *appeal dismissed*, No. 17-2398, 2018 WL 2717050 (4th Cir. Feb. 2, 2018).

94. *Id.* at 769.

95. *Stone v. Trump*, No. 17-2398, 2017 WL 9732004, at \*1 (4th Cir. Dec. 21, 2017).

96. *Stone v. Trump*, No. CV GLR-17-2459, 2019 WL 5697228, at \*3 (D. Md. Mar. 7, 2019).

97. See “*Karnoski v. Trump*,” LAMBDA LEGAL, <https://www.lambdalegal.org/in-court/cases/karnoski-v-trump> (last visited Jan. 26, 2020).

to join the Air Force.<sup>98</sup> On December 11, 2017, the *Karnoski* Court issued a preliminary injunction ordering the military to immediately halt the ban.<sup>99</sup> On December 22, 2017, the *Stockman* Court also issued a preliminary injunction blocking the ban from taking place.<sup>100</sup>

After litigation proceeded following the amendment to the memorandum in early 2018, the Trump administration petitioned for certiorari to the Supreme Court.<sup>101</sup> In January 2019, the Supreme Court vacated the two injunctions by granting an application to stay the injunction, allowing the military ban to take effect while litigation proceeds in lower courts.<sup>102</sup> Justices Breyer, Kagan, Ginsburg, and Sotomayor would have denied the application, showing the Supreme Court split along ideological lines.<sup>103</sup>

## B. STATE LAWS ON EMPLOYMENT DISCRIMINATION AGAINST TRANSGENDER PEOPLE

Twenty-one states and the District of Columbia explicitly prohibit employment discrimination based on gender identity.<sup>104</sup> In 1993, Minnesota became the first state to extend protection to transgender individuals with the passage of the Minnesota Human Rights Act.<sup>105</sup> The Act bans employment discrimination on the basis of sexual orientation.<sup>106</sup> It broadly defines “sexual orientation” to include “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.”<sup>107</sup> The Act’s drafters were intentionally vague so that it would “[cover] everyone” while “[steering] the debate away from any one group” in the months leading up to its passage.<sup>108</sup>

Other states, including Massachusetts, extend protections to transgender people by explicitly naming gender identity as a protected category. In November 2011, Massachusetts Governor Deval Patrick signed Chapter 199 of the Acts of

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98. *Stockman v. Trump*, No. EDCV171799JGBKX, 2017 WL 9732572, at \*4 (C.D. Cal. Dec. 22, 2017).

99. *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at \*10 (W.D. Wash. Dec. 11, 2017), *appeal dismissed*, No. 17-36009, 2017 WL 8229552 (9th Cir. Dec. 30, 2017).

100. *Stockman*, 2017 WL 9732572, at \*16.

101. *See Trump administration asks Supreme Court to hear transgender military case*, PBS NEWSHOUR (Nov. 23, 2018), <https://www.pbs.org/newshour/politics/trump-administration-asks-supreme-court-to-hear-transgender-military-case>.

102. Matthew Kahn, *Document: Supreme Court Stays Injunctions in Transgender Servicemember Ban Cases*, LAWFARE (Jan. 22, 2019, 10:00 AM), <https://www.lawfareblog.com/document-supreme-court-stays-injunctions-transgender-servicemember-ban-cases>.

103. *Id.*

104. *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (Jan. 15, 2020), [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws).

105. Joshua Preston, *Senator Allan Spear and the Minnesota Human Rights Act*, MINN. HISTORY 65, 84 (2016).

106. MINN. STAT. § 363A.08 (West).

107. MINN. STAT. § 363A.03 (West).

108. Preston, *supra* note 105, at 81–82.

2011, “An Act Relative to Gender Identity.”<sup>109</sup> The law added “gender identity” as a protected characteristic to Massachusetts’ employment laws, amending previous law and making it unlawful for “an employer . . . because of the . . . gender identity . . . of any individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.”<sup>110</sup> Massachusetts defines “gender identity” as “a person’s gender-related identity, appearance or behavior, whether or not that gender-related identity or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.”<sup>111</sup>

Some states do not explicitly protect transgender individuals from employment discrimination, but apply existing state law protections against sex discrimination to include discrimination based on gender identity. For example, while Pennsylvania does not explicitly protect transgender individuals from employment discrimination, the Pennsylvania Human Relations Commission has indicated that existing state law against sex discrimination can be used to protect transgender individuals:

The term “sex” under the PHRA may refer to sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and/or gender expression depending on the individual facts of the case. The prohibitions contained in the PHRA and related case law against discrimination on the basis of sex, in all areas of jurisdiction where sex is a protected class, prohibit discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression. The Commission will accept for filing sex discrimination complaints arising out of the complainant’s sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression using any and all legal theories available depending on the facts of the individual case.<sup>112</sup>

The Michigan Civil Rights commission has similarly issued guidance that “sex” in the Elliott-Larsen Civil Rights Act includes “discrimination because of gender identity.”<sup>113</sup>

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109. Jamie Reese, *Massachusetts passes gender anti-discrimination bill*, JURIST (Nov. 16, 2011), <https://www.jurist.org/news/2011/11/massachusetts-passes-transgender-anti-discrimination-bill/>.

110. MASS. GEN. LAWS. ch.151B, § 4 (2019).

111. *Id.* at ch. 4, § 7.

112. *Pennsylvania Human Relations Commission Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act*, PA. HUMAN RELATIONS COMM’N, <https://phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf> (last visited Feb. 24, 2020).

113. *Michigan Civil Rights Commission Interpretative Statement on “Sex,”* CIVIL RIGHTS COMM’N (May 21, 2018), [https://www.michigan.gov/documents/mdcr/MCRC\\_Interpretive\\_Statement\\_on\\_Sex\\_05212018\\_625067\\_7.pdf](https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf).

### III. ACCESS TO GENDER-AFFIRMING HEALTH CARE

Gender-affirming health care refers to any treatments and procedures that can help transgender people achieve their desired gender expression. These include hormone replacement therapy (HRT), gender confirmation surgeries, treatments to modify speech and communication, genital tucking or packing, and chest binding.<sup>114</sup> Gender-affirming care can also include procedures frequently accessed by cisgender individuals, which include, but are not limited to, breast augmentation, mastectomies, hysterectomies, orchiectomies, vaginectomies, and hair removal.<sup>115</sup> While HRT is the most frequently sought form of gender-affirming care, a trans individual may desire any combination of these treatments or none at all in order to express their gender identity.<sup>116</sup> The current standard of care as articulated by the World Professional Association for Transgender Health (WPATH) is to support transgender individuals in seeking the specific care that they consider necessary for this goal.<sup>117</sup> In support of this, WPATH deemed all procedures necessary for gender affirmation to be medically necessary.<sup>118</sup> The American Medical Association, American Psychiatric Association, GLMA, and the American College of Obstetricians and Gynecologists, among others, have publicly called for medically necessary gender-affirming care to be covered by insurance.<sup>119</sup>

However, serious structural barriers often prevent transgender individuals from accessing gender-affirming care. Trans people face difficulties both in obtaining the procedures they need—frequently due to discrimination—and in securing health insurance that will cover that care. As a primary barrier, each procedure is expensive—typically running into the thousands of dollars.<sup>120</sup> These medical costs would be daunting to most Americans without insurance. They can be flatly prohibitive for trans individuals, who are more likely to experience compounding economic hardships than cis individuals.

The same web of structural inequities that makes trans people less likely to have health insurance also hampers their ability to pay out of pocket. First and

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114. Madeline B. Deutsch, *Overview of Gender-Affirming Treatments and Procedures*, UCSF TRANSGENDER CARE (June 17, 2016), <https://transcare.ucsf.edu/guidelines/overview>.

115. *Id.*

116. *Id.*

117. ELI COLEMAN ET AL., STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 2–3 (2012).

118. *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH (Dec. 21, 2016), <https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH-Position-on-Medical-Necessity-12-21-2016.pdf>.

119. AMERICAN MEDICAL ASSOCIATION, ISSUE BRIEF: HEALTH INSURANCE COVERAGE FOR GENDER-AFFIRMING CARE OF TRANSGENDER PATIENTS 5 (2019) <https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf>.

120. *See, e.g.*, Deepa Bharath, *Being Uninsured Poses Unique Health Care Challenges for the Transgender Community*, USC CENTER FOR HEALTH JOURNALISM COLLABORATIVE (2019), <https://www.centerforhealthjournalism.org/being-uninsured-poses-unique-health-care-challenges-transgender-community>.



foremost, trans people are more likely to live in poverty than the general population.<sup>121</sup> Trans people also experience unemployment at a rate three times higher than the national average,<sup>122</sup> which in our current system of employer-provided health insurance, further increases their barriers to accessing health care. Along the same lines, nearly a third of transgender individuals experience homelessness at some point in their lives.<sup>123</sup> The resulting instability and economic stress can make the costs and logistics of receiving any health care forbidding, especially for gender-affirming care that often comes with significant barriers of its own.

Even where trans individuals have insurance, stigma around the rights of transgender people and gender-affirming care continue to inhibit access. The U.S. Transgender Survey found that a full fourth of those surveyed had experienced problems with their coverage due to their status as transgender within just the previous year—even for routine care.<sup>124</sup> Of those who sought coverage for hormone therapy in the past year, 25% were denied, and more than half of respondents were denied coverage for transition-related surgeries.<sup>125</sup> These denials can occur for a host of reasons. Trans patients have been and continue to be denied coverage on purely discriminatory grounds even when federal and state law prohibit such discrimination.<sup>126</sup> Another common problem is treatment being deemed not medically necessary, enabling insurance companies to shirk their payment responsibilities. For example, trans men have reported being denied liposuction to define pectoral shape as part of top-surgery on the grounds that it was not medically necessary.<sup>127</sup> Additionally, trans individuals are frequently denied care by providers based on their personal prejudice<sup>128</sup> or have difficulty accessing services from rural areas.<sup>129</sup>

Those supporting greater access to gender-affirming care often base their advocacy on intertwined human rights and anti-discrimination arguments. Proponents point out that surgically affirmed transgender individuals report higher levels of

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121. SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY EXECUTIVE SUMMARY 3 (2016) <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

122. *Id.* at 10.

123. *Id.* at 11.

124. *Id.* at 8.

125. *Id.*

126. *What Are My Rights in Health Insurance Coverage?*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/health-care> (last visited Nov. 13, 2019).

127. *Masculinizing Chest Reconstruction*, UCSF TRANSGENDER CARE, <https://transcare.ucsf.edu/masculinizing-chest-reconstruction-top-surgery> (last visited Nov. 13, 2019).

128. A third of transgender individuals surveyed in the 2015 U.S. Transgender Study reported a negative healthcare experience in the previous year as a result of their gender identity. These experiences include being refused treatment and being verbally or sexually harassed or assaulted. JAMES ET AL., *supra* note 121, at 8.

129. Keren Landman, *Fresh Challenges to State Exclusions on Transgender Health Coverage*, NPR (Mar. 12, 2019 5:15 AM), <https://www.npr.org/sections/health-shots/2019/03/12/701510605/fresh-challenges-to-state-exclusions-on-transgender-health-coverage>.

satisfaction and lower levels of mental health issues.<sup>130</sup> Overall, 39% of respondents in the U.S. Transgender Survey reported ‘serious psychological distress’ in the previous month, as compared to 5% of the general U.S. population.<sup>131</sup> Trans individuals who have had no gender-affirming treatment experience moderate to severe depression at twice the rate of those who can access gender-affirming care and are four times more likely to experience anxiety.<sup>132</sup> At 41%, trans individuals have a nearly nine-times greater likelihood of lifetime suicide attempts than the overall American population.<sup>133</sup> Leading to the promulgation of regulations prohibiting discrimination, the California Department of Insurance determined that providing trans-inclusive care would reduce suicide attempts and improve the mental health of affected communities.<sup>134</sup> The psychological benefits of gender affirming care also manifest in lower rates of substance abuse and other positive behaviors.<sup>135</sup>

Further, proponents of gender-affirming care argue that in its absence, trans individuals are driven to riskier treatment options that are less effective in reducing mental health issues. For example, many trans people in Los Angeles who cannot afford HRT have been driven to buying hormones off the street, which often cause sickness and come with other harmful side-effects.<sup>136</sup> In the absence of FDA-approved options for surgical gender-affirming care, many trans males use erectile implants designed for cisgender males that can cause serious complications.<sup>137</sup>

In addition, advocates emphasize the cost-effective nature of enabling transgender individuals to access the gender-affirming care they desire. One study found that the cost of insurance covering gender-affirming care was less than a dollar per enrollee to insurance companies and employers.<sup>138</sup> Proponents argue that the cost of insuring trans people is plainly economical compared to the thousands of dollars of costs incurred in a suicide attempt<sup>139</sup> or the myriad costs of HIV treatment that go up when gender dysphoria goes untreated.<sup>140</sup>

Those opposed to trans people accessing gender-affirming care argue that the government should not force employers, insurance companies, or doctors to

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130. AMERICAN MEDICAL ASSOCIATION, *supra* note 119, at 4.

131. JAMES ET AL., *supra* note 121, at 8.

132. *Id.*

133. Rates of lifetime suicide attempts are higher for trans populations at the intersections of other vulnerable communities, including those who are multiracial, indigenous, disabled, HIV-positive, and youth—rising above 50% prevalence for each group. ANN P. HAAS, PHILIP L. RODGERS, & JODY L. HERMAN, SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS 2 (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>.

134. AMERICAN MEDICAL ASSOCIATION, *supra* note 119, at 3.

135. *Id.*

136. Bharath, *supra* note 120.

137. Curtis Crane, *Phalloplasty and Metoidioplasty: Overview and Postoperative Considerations*, UCSF TRANSGENDER CARE (June 17, 2016), <https://transcare.ucsf.edu/guidelines/phalloplasty>.

138. AMERICAN MEDICAL ASSOCIATION, *supra* note 119, at 3.

139. *Id.*

140. *Id.* at 4.

provide gender-affirming care or force taxpayers to foot the bill through government subsidies. Their arguments are premised on the belief that these treatments do not achieve their desired affect or address trans people's underlying psychological issues.<sup>141</sup> Opponents frequently contend that this care cannot change a trans woman into a biological woman, for example, and therefore argue that the treatment is ultimately not worth pursuing.<sup>142</sup> In the same vein, they point to survey results indicating that only 21% of trans individuals can "pass" all the time as evidence that transitioning does not achieve the desired result and ultimately does more harm than good.<sup>143</sup> Further, opponents argue that high suicide rates among trans people, even after they receive gender-affirming care, indicate that underlying psychological issues remain unaddressed.<sup>144</sup> Instead of gender-affirming physical treatments, opponents of gender-affirming care argue that gender dysphoria should be addressed through counseling.<sup>145</sup>

To bolster their argument that providers should not be coerced into providing gender-affirming care, opponents assert that gender-confirming treatments, including those involving "the amputation of healthy body parts," are a violation of medical ethics.<sup>146</sup> The Heritage Foundation argues that "[n]either federal lawmakers nor courts should have the power to redefine what it is to be a man or a woman for all Americans."<sup>147</sup> In the alternative, opponents argue that these procedures are not medically necessary, and therefore deserve the same secondary level of treatment and coverage as any other cosmetic surgery.<sup>148</sup>

Ultimately, transgender individuals' access to gender-affirming care is subject to regulations and policies at the federal and state level. As a result of the Affordable Care Act (ACA or the Act), its dismantling at the hands of the Trump Administration, and larger cultural change, trans individuals' concrete access to healthcare has fluctuated chaotically at both federal and state levels. At the federal level, the assurance of healthcare rights for transgender individuals is subject to ongoing questions on three frontiers based on nondiscrimination protections provided by the ACA. First, the Department of Health and Human Services (HHS) is in the midst of reinterpreting the scope of protections under the ACA due to federal court decisions and the ascension of the Trump Administration. Second, two recent federal cases go to the heart of the definition of "sex" under

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141. Ryan T. Anderson, *Sex Reassignment Doesn't Work. Here's the Evidence.*, HERITAGE FOUND. (Mar. 9, 2018), <https://www.heritage.org/gender/commentary/sex-reassignment-doesnt-work-here-the-evidence>.

142. See, e.g., Dale O'Leary & Peter Sprigg, *Understanding and Responding to the Transgender Movement*, FAMILY RESEARCH COUNCIL 20 (June 2015), <https://downloads.frc.org/EF/EF15F45.pdf>.

143. *Id.* at 19.

144. *Id.* at 4.

145. *Id.* at 24.

146. *Id.* at 6.

147. Ryan T. Anderson, *Government Shouldn't Impose Transgender Ideology on Nation*, HERITAGE FOUND. (June 7, 2016), <https://www.heritage.org/civil-society/commentary/government-shouldnt-impose-transgender-ideology-nation>.

148. O'Leary and Sprigg, *supra* note 142, at 6.

the ACA and may circumvent HHS interpretation. Lastly, the fate of the Act itself is up in the air as a result of an ongoing challenge to its individual mandate. Trans individuals' access to health insurance is further subject to the laws of the states they live and are employed in. At present, states are divided between restricting ACA protections and affirming or widening the Act's protections in state laws. Each camp has taken a variety of approaches to implement their ideological positions, with many of the constraints being premised upon religious and conscientious objection. Despite federal provisions intended to protect the rights of those seeking healthcare from the beliefs of individual providers, the Trump Administration is providing crucial support to states seeking to elevate religious freedoms over trans rights. The rights of transgender people to access healthcare free from discrimination is currently caught in the crosshairs of political and social change and will likely continue to be subject to legal battles and shifting policies for years to come.

#### A. FEDERAL LAW: THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

##### 1. HHS Interpretations of Nondiscrimination in the ACA

The Patient Protection and Affordable Care Act, enacted during the Obama Administration, partially bridged the gaps in healthcare coverage for trans people. Section 1557 of the Act prohibits denial of or discrimination in insurance coverage on the basis of any ground protected in Title VI of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, the Age Discrimination Act, or the Rehabilitation Act in any health program receiving any federal funding or set up under the Act.<sup>149</sup> These provisions encompass discrimination based on "sex," which the Department of Health and Human Services interpreted in May 2016 as including gender identity.<sup>150</sup>

However, at the end of 2016, the U.S. District Court for the Northern District of Texas preliminarily enjoined the Act's non-discrimination requirement.<sup>151</sup> The case challenging Section 1557, *Franciscan Alliance, Inc. v. Burwell*, was brought by by eight states and three religiously affiliated health care providers.<sup>152</sup> Since President Trump entered office in 2017, his Administration has declined to enforce the HHS rule, citing *Franciscan Alliance*.<sup>153</sup>

In 2019, the Trump HHS announced a proposed rule that would undo interpretations of § 1557 of the Act promulgated by the Obama Administration's Department of Health and Human Services.<sup>154</sup> The changes, announced in May

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149. Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 (2018).

150. Nondiscrimination in Health Programs, 45 C.F.R. § 92.207 (2019).

151. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 2016).

152. *Id.* at 670.

153. *Id.*; *Section 1557 of the Patient Protection and Affordable Care Act*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Apr. 25, 2018), <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>.

154. Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 115 (proposed June 14, 2019).

and opened to public comment on June 14, 2019 for 60 days, would truncate any nondiscrimination requirement where it threatened to violate “applicable Federal statutory protections for religious freedom and conscience.”<sup>155</sup> In announcing the rule, HHS officials referenced *Franciscan Alliance*, as well as “the position of the Department of Justice” as grounds for the policy change.<sup>156</sup> The Department received more than 150,000 comments on its proposed changes and has not yet issued the final rule.<sup>157</sup> Once promulgated, the rule would likely face legal challenges. An implemented rule would mean that insurance companies could deny coverage to transgender individuals without fear of legal consequences.

## 2. Legal Interpretations of “Sex” as Implemented in the ACA

HHS’s Obama-era interpretation of the ACA is premised upon discrimination based on “gender identity” qualifying as sex-based discrimination under Title VII of the Civil Rights Act. However, the Supreme Court’s current consideration of *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* puts that interpretation in jeopardy.<sup>158</sup> As the central question of the case is whether Title VII’s prohibition on sex discrimination includes discrimination against an employee based on their status as transgender, a negative ruling by the Court would endanger the possibility that the ACA could be used to protect trans individuals.<sup>159</sup> An affirmative ruling would solidify the ACA’s prohibition on gender identity-based discrimination independent of HHS interpretation. The Court’s ruling is anticipated in June 2020.<sup>160</sup> Until then, insurers remain in limbo as to what coverage options will ultimately be required of them.

The U.S. District Court for the Southern District of California hinted at a possible circumvention of *Franciscan Alliance*—and thus any HHS rulemaking—in their ruling on *Prescott v. Rady Children’s Hospital-San Diego*.<sup>161</sup> That case saw the mother of a transgender boy suing the hospital that repeatedly discriminated against her son by referring to him as a ‘her’ and discharging him rather than providing treatment for his gender dysphoria and suicidal ideation.<sup>162</sup> Her son, Kyler Prescott, committed suicide one month later.<sup>163</sup> The court decided *Prescott* in a

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155. *Id.*

156. Abby Goodnough et al., *Trump Administration Proposes Rollback of Transgender Protections*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/us/politics/donald-trump-transgender-protections.html>.

157. Nondiscrimination in Health and Health Education Programs or Activities, *supra* note 154.

158. *See supra* Part II.A.

159. *Id.*

160. Shannon Kelly, *Employers and LGBT Community Waiting for 2020 Supreme Court Decisions*, LAW.COM (Dec. 24, 2019), <https://www.law.com/dailybusinessreview/2019/12/24/employers-and-lgbt-community-waiting-for-2020-supreme-court-decisions>.

161. *See Prescott v. Rady Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1105 (S.D. Cal. 2017).

162. *Id.* at 1090, 1097.

163. *Id.*

motion to dismiss, and so did not go to the merits of the claim, but held that the Prescotts' discrimination claim was plausible.<sup>164</sup> They further provided a powerful tool to those interested in restoring the ACA's protections of transgender coverage by holding that discrimination claims based on Kyler's transgender identity arose from the language of the Act itself and not from HHS's promulgated rule.<sup>165</sup> This line of argument could potentially supersede the Trump Administration's proposed rule.

### 3. Constitutional Challenges to the ACA

In July 2019, the U.S. Court of Appeals for the 5th Circuit heard arguments in *Texas v. U.S.*, a case challenging the constitutionality of the ACA's 'individual mandate.'<sup>166</sup> Although the Supreme Court already ruled the mandate to be a valid exercise of congressional taxation powers in *NFIB v. Sebelius*,<sup>167</sup> this challenge argues that because the Tax Cuts and Jobs Act of 2017 reduced the tax penalty of the individual mandate to zero, the mandate no longer represents a valid exercise of taxation power since it produces no revenue.<sup>168</sup> The U.S. District Court for the Northern District of Texas ruled that the individual mandate was unconstitutional.<sup>169</sup> The court additionally held that, because Congress deemed the individual mandate "essential" to the ACA, the mandate was inseverable from the entire ACA, and the whole law must be struck down.<sup>170</sup>

On appeal, the Fifth Circuit affirmed the district court's ruling that the individual mandate was unconstitutional.<sup>171</sup> However, the Fifth Circuit remanded the case to the district court for a "finer-toothed" inquiry as to "which provisions of the ACA Congress intended to be inseverable from the individual mandate."<sup>172</sup> The Fifth Circuit also found remand appropriate in light of the United States' new argument on appeal that the ACA should only be enjoined in plaintiff states and that "declaratory judgment should only reach ACA provisions that injure the plaintiffs."<sup>173</sup>

Should the court ultimately find the individual mandate severable, protections to trans individuals' health care will not be affected by its ultimate constitutionality, because the rest of the ACA will remain in effect.<sup>174</sup> However, if the court holds the entire Act unconstitutional, current anti-trans discrimination protections

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164. *Id.* at 1098, 1105.

165. *See id.* at 1100.

166. MaryBeth Musumeci, *Explaining Texas v. U.S.: A Guide to the 5th Circuit Appeal in the Case Challenging the ACA*, KFF (July 3, 2019), <https://www.kff.org/health-reform/issue-brief/explaining-texas-v-u-s-a-guide-to-the-5th-circuit-appeal-in-the-case-challenging-the-aca/>.

167. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 585 (2012).

168. *See Texas v. United States*, 340 F. Supp. 3d 579, 596 (N.D. Tex. 2018).

169. *Id.*

170. *Id.*

171. *Texas v. United States*, 945 F.3d 355, 393 (5th Cir. 2019).

172. *Id.* at 402.

173. *Id.* at 403.

174. Musumeci, *supra* note 166.

will fall by the wayside and need to be reimagined. The United States House of Representatives—stepping in for the United States—petitioned the Supreme Court for certiorari on January 3, 2020.<sup>175</sup>

## B. STATE LAW ON GENDER-AFFIRMING HEALTH CARE

Section 1557 of the ACA created many safeguards for transgender patients.<sup>176</sup> In agreement with the ACA, twenty-one states and the District of Columbia expressly prohibit excluding transgender individuals in health insurance coverage.<sup>177</sup> However, many state laws continue to serve as barriers to gender-affirming healthcare. Statistically, 60 percent of the Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning (LGBTQ) population “lives in states that do not have [LGBTQ]-inclusive insurance protections.”<sup>178</sup> Ten states explicitly prohibit Medicaid from covering gender-affirming surgery,<sup>179</sup> and twelve exclude transition-related services from coverage under state employee insurance programs.<sup>180</sup> LGBTQ rights organizations have brought various legal challenges, asking courts to strike down restrictive provisions.

### 1. States Which Prohibit Excluding Transgender Individuals in Health Insurance

Twenty-one states and the District of Columbia expressly prohibit transgender exclusions in health insurance.<sup>181</sup> New Jersey, for example, has five statutes specifically prohibiting discrimination in health insurance coverage of transgender individuals.<sup>182</sup> For example, one section provides that group health insurance policies are not to discriminate based on gender identity,<sup>183</sup> another provides that individual health insurance policies are not to discriminate on that basis,<sup>184</sup> and a third provides that small employer health benefits plans are also not to discriminate against individuals based on their gender identities.<sup>185</sup> Transgender individuals in New Jersey may also not be denied or obstructed from “health care services

175. *Texas v. United States*, 945 F.3d 355, 393 (5th Cir. 2019), *petition for cert filed* (U.S. Jan. 3, 2020) (No. 19-841).

176. *Section 1557 - Summary*, U.S. DEP’T OF HEALTH AND HUMAN SERV., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/summary/index.html> (last visited Nov. 17, 2019).

177. *Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/healthcare\\_laws\\_and\\_policies](https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies) (last visited Jan. 30, 2019).

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. N.J. STAT. ANN. § 17B:27-46.100 (West 2017); N.J. STAT. ANN. § 17B:26-2.1ii (West 2017); N.J. STAT. ANN. § 17B:27A-19.26 (West 2017); N.J. STAT. ANN. § 17B:27A-7.22 (West 2017); N.J. STAT. ANN. § 17:48E-35.39 (West 2017).

183. N.J. STAT. ANN. § 17B:27-46.100 (West 2017).

184. N.J. STAT. ANN. § 17B:26-2.1ii (West 2017).

185. N.J. STAT. ANN. § 17B:27A-19.26 (West 2017).

related to gender transition” such as “hormone therapy, hysterectomy[ies], mastectomy[ies], and vocal training.”<sup>186</sup>

Some states, such as Rhode Island, not only prohibit transgender exclusions in health insurance, but also cover transition-related services for state employees.<sup>187</sup> Under Rhode Island’s state employee plan, beneficiaries are guaranteed health coverage for “Treatment of Gender Dysphoria (Gender Identity Disorder),” which includes surgical and non-surgical treatment.<sup>188</sup>

## 2. States Which Prohibit Medicaid from Covering Gender-Affirming Services

Twelve states, however, explicitly exclude transition-related services from coverage under their state employee insurance programs.<sup>189</sup> North Carolina,<sup>190</sup> for example, expressly states in its State Health Plan for 2019 that the Plan does not cover “[p]sychological assessment and psychotherapy treatment in conjunction with proposed gender transformation,” nor does it cover “[t]reatment or studies leading to or in connection with sex changes or modifications and related care.”<sup>191</sup>

LGBTQ rights organizations have brought legal challenges to remove such provisions from state codes. For example, Lambda Legal, an organization that advocates for LGBTQ individuals and rights,<sup>192</sup> and Transgender Legal Defense & Education Fund (TLDEF) filed a lawsuit in March 2019 in the United States District Court for the Middle District of North Carolina on behalf of “several current and former state employees and their children who were denied coverage under the plan for medically necessary health care because they are transgender.”<sup>193</sup> The complaint states that the plaintiffs are seeking declaratory and injunctive relief, among other remedies, under the Fourteenth Amendment’s Equal Protection Clause, the ACA, and other statutory authorities.<sup>194</sup> The case is ongoing.<sup>195</sup>

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186. N.J. STAT. ANN. § 17B:27-46.1oo(4)(a) (West 2017).

187. Lynn Arditi, *R.I. to provide state workers with health coverage for sexual transition services*, PROVIDENCE J. (Jun. 23, 2016, 6:55 PM), <https://www.providencejournal.com/news/20160623/ri-to-provide-state-workers-with-health-coverage-for-sexual-transition-services>.

188. R.I. DEP’T OF ADMIN., STATE OF RI MEDICAL 2014 ACTIVE EMPLOYEES HEALTH PLAN CHOICE PLUS (2014), <https://www.documentcloud.org/documents/2897052-State-of-RI-Medical-2014-Active-Employees-Health.html>.

189. *Healthcare Laws and Policies*, *supra* note 177.

190. STATE TREASURER OF N.C., BENEFITS BOOKLET (2019), [https://files.nc.gov/ncshp/documents/open-enrollment-documents/2019\\_80-20\\_benefit\\_booklet.pdf](https://files.nc.gov/ncshp/documents/open-enrollment-documents/2019_80-20_benefit_booklet.pdf)

191. *Id.* at 30.

192. LAMBDA LEGAL, <https://www.lambdalegal.org/> (last visited Nov. 15, 2019).

193. *Kadel v. Folwell*, LAMBDA LEGAL, <https://www.lambdalegal.org/in-court/cases/kadel-v-folwell> (last visited Jan. 24, 2020).

194. Complaint, *Kadel v. Folwell*, No. 1:19-cv-00272 (M.D.N.C. 2019).

195. *Kadel v. Folwell*, LAMBDA LEGAL, <https://www.lambdalegal.org/in-court/cases/kadel-v-folwell> (last visited Jan. 24, 2020).



### 3. Religious Exemptions and Gender-Affirming Care

Religious exemptions allow healthcare providers to decline to provide services without fear of legal, financial, or professional repercussions if such a denial is made because of their religious or moral beliefs.<sup>196</sup> Religious exemption health-care laws have existed in the United States since the 1970s through the implementation of measures intended to protect religious rights post-*Roe v. Wade*.<sup>197</sup> The Church Amendment prohibits federal funding from being contingent on whether an entity provides abortion services,<sup>198</sup> the Coats-Snowe Amendment forbids federally-funded government entities from discriminating against healthcare entities that refuse to facilitate abortions,<sup>199</sup> and the Weldon Amendment restricts access to HHS funding for entities that discriminate against healthcare organizations that refuse to facilitate abortions.<sup>200</sup>

*a. The Church, Coats-Snowe, and Weldon Amendments.* The Church, Coats-Snowe, and Weldon Amendments were enacted beginning in 1974 and were passed to protect individuals and entities from being denied federal funding for refusal to perform abortions or sterilizations that would violate their religious beliefs or moral convictions.<sup>201</sup> These amendments were enacted in response to the Supreme Court decision in *Roe v. Wade*, which protected women's rights to abortion.<sup>202</sup> The Church Amendment specifically prohibited federal funding from being contingent on whether or not an entity helps facilitate or provides abortion or sterilization services.<sup>203</sup> The amendment's exemption for "sterilization services" implicates gender-affirming procedures, including hormone therapy and gender-affirming surgery.<sup>204</sup> A hysterectomy, for instance, is a gender-affirming procedure undergone by many transgender persons that could be classified as a "sterilization service."

Congress enacted the Coats-Snowe Amendment in 1996.<sup>205</sup> The amendment forbids government entities that receive federal funding from discriminating against any healthcare entity that refuses to perform, provide referrals for, or

196. GUTTMACHER INST. STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES 2-3 (2014), archived at <http://perma.cc/66-QB-FAVN>; see, e.g., 42 U.S.C. § 300a-7(b)-(e) (2018); 42 U.S.C. § 238n (2018).

197. GUTTMACHER, *supra* note 196.

198. 42 U.S.C. § 300a-7(b).

199. 42 U.S.C. § 238n(a).

200. See Weldon Amendment, Pub. L. No. 111-117, § 508(d)(1), 123 Stat. 3034 (2009) (amending Consolidated Appropriations Act).

201. See *id.*; 42 U.S.C. § 300a-7; 42 U.S.C. § 238n.

202. GUTTMACHER, *supra* note 196.

203. § 300a-7(b).

204. MOVEMENT ADVANCEMENT PROJECT & NAT'L CTR. FOR TRANSGENDER EQUAL., RELIGIOUS REFUSALS IN HEALTH CARE 1 (2018), available at <http://www.lgbtmap.org/file/Healthcare-Religious-Exemptions.pdf>.

205. See 42 U.S.C. § 238n.

provide training for abortions.<sup>206</sup> The Weldon Amendment, enacted in 2005, restricted access to Health and Human Services funding for entities that discriminate against healthcare organizations based on whether or not such an organization facilitates abortions.<sup>207</sup>

*b. Religious Exemptions in the Trump Administration.* The Trump administration has broadened protections for religious entities in a multitude of ways. In January 2018, the Administration announced the creation of a Conscience and Religious Freedom Division under the United States Department of Health and Human Services Office for Civil Rights (OCR).<sup>208</sup> The Division's stated mission is to "restore federal enforcement of our nation's laws that protect the fundamental and unalienable rights of conscience and religious freedom."<sup>209</sup>

After a sixty-day public commenting period, the Division implemented a final religious exemptions rule in May 2019 titled "Protecting Statutory Conscience Rights in Health Care" (2019 Rule),<sup>210</sup> but it was quickly challenged in court and has been vacated pending appeal.<sup>211</sup> As written, the 2019 Rule requires federal agencies, state and local governments, entities that receive federal funding through HHS, and other federally-funded entities to apply the protections listed in the regulations.<sup>212</sup> Relevant here, the rule permits healthcare providers to refuse to carry out procedures such as sterilization and gender-affirming surgery if doing so would violate the providers' sincerely held religious or moral convictions.<sup>213</sup> The rule reinforced the previous legal framework, including the Church, Coats-Snowe, and Weldon Amendments.<sup>214</sup> It also expanded those

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206. *Id.*

207. *See, e.g.*, "Weldon Amendment" to Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 § 3034 (2009).

208. Press Release, HHS Announces New Conscience and Religious Freedom Division, U.S. DEP'T OF HEALTH AND HUMAN SERVS., (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

209. *Id.*

210. U.S. DEP'T OF HEALTH AND HUMAN SERVS., PROTECTING STATUTORY CONSCIENCE RIGHTS IN HEALTH CARE (2019), *available at* <https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf>.

211. *City & Cty. of San Francisco v. Azar*, No. C 19-02405 WHA, 2019 WL 6139750, (N.D. Cal. Nov. 19, 2019); *New York v. U.S. Dep't of Health & Human Servs.*, No. 19 CIV. 4676 (PAE), 2019 WL 5781789, (S.D.N.Y. Nov. 6, 2019).

212. Susan McNear Fradenburg, *HHS 'Conscience Rule' Defines Rights Not to Provide Certain Health Care Services*, FOX ROTHSCHILD LLP (May 16, 2019), <https://www.foxrothschild.com/publications/hhs-conscience-rule-defines-right-not-to-provide-certain-health-care-services/>.

213. *Id.*; Alison Kodjack, *New Trump Rule Protects Health Care Workers Who Refuse Care for Religious Reasons*, NPR (May 2, 2019, 12:50 PM), <https://www.npr.org/sections/health-shots/2019/05/02/688260025/new-trump-rule-protects-health-care-workers-who-refuse-care-for-religious-reason>; Sanjana Karanth, *Legal Challenges Pour in Against Trump's Faith-Based Denial-of-Care Rule*, Huffpost (June 12, 2019 9:52PM), [https://www.huffpost.com/entry/legal-challenges-trump-conscience-protection\\_n\\_5d0190a4e4b0985c41978d31](https://www.huffpost.com/entry/legal-challenges-trump-conscience-protection_n_5d0190a4e4b0985c41978d31).

214. U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 210.

protections.<sup>215</sup> Previously, providers such as medical doctors with religious or “conscience” objections were permitted to refuse to participate in certain procedures.<sup>216</sup> However, the 2019 Rule extended those protections to all individuals who are part of the healthcare “workforce,” a term defined as “employees, volunteers, trainees, contractors, and other persons whose conduct . . . is under the direct control of” the health care or other entity subject to the regulations.<sup>217</sup>

Additionally, where states had interpreted ambiguity in the previous federal framework to require providers to partake in some ancillary tasks, such as referral, the 2019 Rule explicitly prohibits states from forcing compliance by objecting professionals. For example, Iowa previously required healthcare providers to take “all reasonable steps to transfer the patient to another health care provider,” notwithstanding a religious or moral objection to the care sought or to the individual seeking care.<sup>218</sup> Under the 2019 Rule, however, “referral” is defined to “includ[e] the provision of any information . . . by any method.” Healthcare workers in Iowa would now be protected if they refused on religious grounds to transfer patients to other providers.<sup>219</sup>

*c. Legal Challenges to Religious Exemptions.* LGBTQ rights advocates expressed concerns about increasingly sweeping religious exemptions, suggesting that the policy behind them gives medical providers permission to discriminate.<sup>220</sup> Moreover, trans rights advocates fear that the regulations would justify denying all treatment to transgender individuals regardless of whether the care would be related to gender dysphoria, stating that in the past “many [health plans] have even refused to cover treatments unrelated to gender dysphoria simply because a beneficiary is transgender.”<sup>221</sup> If interpreted this way, the 2019 Rule would protect healthcare providers who refuse *any* care to transgender patients if doing so would violate sincerely-held religious beliefs, potentially denying transgender patients anything from antibiotics to diabetes treatment without repercussions for the denying healthcare provider.

These concerns, among others, resulted in two legal challenges immediately upon the rule’s promulgation. San Francisco County, joined by the state of California and advocacy groups, argued that the 2019 Rule “invites refusals” of health services to “transgender and gender-nonconforming patients seeking

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215. Kodjack, *supra* note 213.

216. U.S. DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 210.

217. *Id.*

218. IOWA CODE § 144D.3(5) (2012).

219. *See, e.g.*, “Weldon Amendment” to Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 § 3034 (2009).

220. MOVEMENT ADVANCEMENT PROJECT & NAT’L CTR. FOR TRANSGENDER EQUAL, *supra* note 204, at 1.

221. *See, e.g.*, *Comments in Response to Proposed HHS Religious Refusal Rule*, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS (Mar. 27, 2018), <https://civilrights.org/resource/comments-response-proposed-hhs-religious-refusal-rule/>.

gender-affirming care,”<sup>222</sup> and violates ACA Sections 1554 (which states that HHS shall not create “unreasonable barriers” to medical care, among other provisions) and 1557 (which protects against sex discrimination in the provision of health services), among other healthcare-related statutes.<sup>223</sup> A similar suit was filed in the U.S. District Court for the Southern District of New York by a coalition of healthcare provider associations, local governments, and 19 state governments and D.C.<sup>224</sup>

Ultimately, both cases held that the Department of Health and Human Services violated the Administrative Procedure Act and constitutional provisions in promulgating the rule.<sup>225</sup> Judges in both courts vacated the rule before it went into effect on the grounds that HHS exceeded its rulemaking and enforcement authority.<sup>226</sup> HHS appealed the Southern District of New York case and it went to the Second Circuit on January 3, 2020 as *National Family Planning and R v. Azar*.<sup>227</sup> OCR was instructed to wait on implementing the rule until it receives further instructions from the courts.<sup>228</sup> Until such instruction, the agency will continue to receive and investigate claims under the authority of existing religious and conscience laws—namely the Church, Coats-Snowe, and Weldon Amendments.<sup>229</sup>

*d. State Religious Exemptions Laws.* Some states have also enacted religious exemption laws that deny gender-affirming care to trans individuals. For example, Mississippi prohibited discriminatory action by the state government against any healthcare provider who “declines to participate in the provision of treatments. . .or surgeries related to sex reassignment or gender identity transitioning or declines to participate in the provision of psychological, counseling, or fertility services” due to that provider’s religious or moral beliefs.<sup>230</sup> Mississippi also protects care providers from state discrimination if they sincerely believe that “[m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”<sup>231</sup>

Lambda Legal challenged the Mississippi statute on behalf of clergy who felt their religious beliefs were not reflected in the law, members of groups impacted by the law, and citizens of Mississippi who disagreed with the beliefs the law

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222. Complaint for Declaratory and Injunctive Relief at 2, *City & Cty. of San Francisco v. Azar*, No. C 19-02405 WHA, 2019 WL 6139750, (N.D. Cal. Nov. 19, 2019).

223. *Id.* at 15–16.

224. *New York v. United States Dep’t of Health & Human Servs.*, No. 19 CIV. 4676 (PAE), 2019 WL 5781789, (S.D.N.Y. Nov. 6, 2019).

225. *Id.*; *City & Cty. of San Francisco v. Azar*, 2019 WL 6139750.

226. *New York v. U.S. Dep’t of Health & Human Servs.*, 2019 WL 5781789; *City & Cty. of San Francisco v. Azar*, 2019 WL 6139750; see U.S. DEP’T OF HEALTH AND HUMAN SERVS., *Conscience Rule Vacated* (Nov. 8, 2019) <https://www.hhs.gov/conscience/conscience-rule-vacated/index.html>.

227. *New York v. United States Dep’t of Health & Human Servs.*, 2019 WL 5781789 (appealed as *Nat’l Family Planning and R. v. Azar*, Docket Number 20-32 (2d Cir. Jan. 3, 2020)).

228. U.S. DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 226.

229. *Id.*

230. MISS. CODE ANN. § 11-62-5(4) (2019).

231. MISS. CODE ANN. § 11-62-3(c) (2019).

protects.<sup>232</sup> Lambda Legal sought a preliminary injunction to prevent the enforcement of the law before it went into effect in October 2017.<sup>233</sup> The injunction was initially granted, but the ruling was reversed by the Fifth Circuit Court of Appeals on the reasoning that the plaintiffs did not have standing to assert a violation of the Establishment Clause, and that “stigmatic injury alone was insufficient to establish injury-in-fact for purposes of [an] Equal Protection claim.”<sup>234</sup> The United States Supreme Court denied certiorari.<sup>235</sup> The Mississippi law remains in effect.<sup>236</sup>

#### IV. VIOLENCE AGAINST TRANSGENDER INDIVIDUALS

Transgender people, and especially transgender people of color, are particularly vulnerable to violence. Transgender people face high rates of domestic and intimate partner violence,<sup>237</sup> hate crimes,<sup>238</sup> police mistreatment and abuse,<sup>239</sup> and violence while incarcerated.<sup>240</sup> The rates at which transgender people are victimized is on the rise,<sup>241</sup> while proposed protections, such as the repeal of gay and trans panic defenses, are stalling,<sup>242</sup> and other protections, like the Violence

232. *Barber v. Bryant*, 860 F.3d 345, 351 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 652 (2018).

233. Merrit Kennedy, *Controversial Mississippi Law Limiting LGBT Rights Not Heading to Supreme Court*, NPR (Jan. 8, 2018, 5:13 PM), <https://www.npr.org/sections/thetwo-way/2018/01/08/576500364/controversial-mississippi-law-limiting-lgbt-rights-not-heading-to-supreme-court>.

234. *Barber*, 860 F.3d at 346.

235. *Barber v. Bryant*, 138 S. Ct. 652 (2018) (denying cert.).

236. MISS. CODE ANN. § 11-62-3(c) (2019).

237. TAYLOR N.T. BROWN & JODY L. HERMAN, WILLIAMS INST., *INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE 3* (The Williams Institute, 2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Intimate-Partner-Violence-and-Sexual-Abuse-among-LGBT-People.pdf>.

238. *2017 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation*, FED. BUREAU OF INVESTIGATION (2017), <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls> (reporting 137 hate crimes motivated by gender identity in 2017).

239. JAMES ET AL. *supra* note 121 at 185.

240. *Id.* at 191.

241. There were 137 hate crimes motivated by gender identity in 2017, 124 incidents in 2016, 114 incidents in 2015, 98 incidents in 2014, and 31 reported incidents in 2013. *See 2017 Hate Crime Statistics, supra* note 238; *2016 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation*, FED. BUREAU OF INVESTIGATION (2016), <https://ucr.fbi.gov/hate-crime/2016/tables/table-1>; *2015 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation* FED. BUREAU OF INVESTIGATION (2015), <https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/1tabledatadecpdf>; *2014 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation*, FED. BUREAU OF INVESTIGATION (2014), <https://ucr.fbi.gov/hate-crime/2014/tables/table-1>; *2013 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation*, FED. BUREAU OF INVESTIGATION (2013), [https://ucr.fbi.gov/hate-crime/2013/tables/1tabledatadecpdf/table\\_1\\_incidents\\_offenses\\_victims\\_and\\_known\\_offenders\\_by\\_bias\\_motivation\\_2013.xls](https://ucr.fbi.gov/hate-crime/2013/tables/1tabledatadecpdf/table_1_incidents_offenses_victims_and_known_offenders_by_bias_motivation_2013.xls).

242. For example, legislation to eliminate the Gay and Trans Panic defense, discussed in Part IV.C below, is currently stalled in Congress, as is legislation intended to advance other protections for LGBTQ people, such as the Equality Act. *See* Ronald Brownstein, *McConnell's Blockade of House Legislation Is About to Face its Toughest Test*, CNN (June 18, 2019, 8:38 AM), <https://www.cnn.com/2019/06/18/politics/mitch-mcconnell-nancy-pelosi-legislation-standoff/index.html>.

Against Women Act, may be in jeopardy.<sup>243</sup> This section will outline some of the types of violence that transgender people face due to their gender identities, as well as certain areas of legal protections that exist against that violence.

#### A. DOMESTIC VIOLENCE

Transgender people face high rates of victimization due to domestic and intimate partner violence. Studies have shown that between thirty and fifty percent of transgender people experience domestic and intimate partner violence in their lifetime, compared to approximately twenty percent of cisgender people.<sup>244</sup> However, accurately gathering data in this area is particularly difficult, and statistics likely underrepresent the magnitude of domestic and intimate partner violence experienced by transgender people.

Transgender people may be hesitant to report abuse for a number of reasons, including legal definitions of domestic violence that exclude LGBTQ people and couples. For instance, in North Carolina, the definition of “personal relationship” includes married couples—necessarily including same-sex married couples post-*Obergefell*—but limits other categories of application to “persons of opposite sex who live together or have lived together,” and “persons of the opposite sex who are in a dating relationship or have been in a dating relationship,” in addition to the other covered categories such as parents of children and members of the same household.<sup>245</sup> Other, less formal barriers to reporting include a fear of “outing” oneself by reporting, a lack of awareness of and access to LGBT-friendly resources, potential trans- and homophobia from service providers, low levels of confidence in law enforcement and the judicial system, as well as other factors preventing reporting common with heterosexual and cisgender victims, such as fear, stigma, and lack of resources.<sup>246</sup>

Accessing trans-friendly resources can also be difficult, as many resources are explicitly gendered, and some shelters open to women may not be transgender friendly.<sup>247</sup> Some studies have shown that LGBT people, and transgender people in particular, have low confidence in the ability of healthcare providers to help them address domestic violence and intimate partner violence.<sup>248</sup> These barriers make it less likely that survivors of violence are able to access the care and resources they need to recover and successfully move on from an abusive relationship.

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243. See Li Zhou, *The NRA Tried to Block an Updated Violence Against Women Act in the House—and Failed*, VOX (Apr. 4, 2019, 12:39 PM), <https://www.vox.com/2019/4/4/18294057/violence-against-women-act-house-democrats-national-rifle-association>.

244. BROWN & HERMAN, *supra* note 237, at 3.

245. N.C. GEN. STAT. § 50B-1(b) (2019).

246. BROWN & HERMAN, *supra* note 237, at 3.

247. *Cf. id.* at 4 (noting that “transgender people may be convinced that shelters are not open to them”).

248. *Id.* at 18.

## B. HATE CRIMES

Similarly, transgender people are frequently the victims of hate crimes. Since 2013, the first time that gender identity was included as a motivation in the FBI's hate crime statistics, the rate of hate crimes committed against transgender people has been steadily increasing, from thirty-one recorded incidents in 2013 to 137 incidents recorded in 2017, the most recent year for which statistics are available.<sup>249</sup> As of September, there have been eighteen reported murders of transgender women in 2019.<sup>250</sup> Transgender women of color are disproportionately victims of hate crimes and violence due to their gender identity.<sup>251</sup> Much like with domestic and intimate partner violence, hate crimes are often underreported due to stigma, mis-gendering of victims, fear of police, and a lack of trust in law enforcement from victims.

### 1. Federal Legislation

In an attempt to address violence against LGBTQ people generally, the Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act was signed into law in 2009.<sup>252</sup> The Act built on the existing Federal Hate Crimes Law from 1969 to add crimes motivated by a victim's actual or perceived gender, sexual orientation or gender identity.<sup>253</sup> The act has two main provisions, the second of which makes it a crime to:

willfully cause[] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[] to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.<sup>254</sup>

The Act imposes up to ten years in prison and a fine,<sup>255</sup> or if the offense results in death or includes kidnapping, aggravated sexual abuse, or an attempt to

249. 2017 *Hate Crime Statistics*, *supra* note 238; 2016 *Hate Crime Statistics*, *supra* note 241; 2015 *Hate Crime Statistics*, *supra* note 241; 2014 *Hate Crime Statistics*, *supra* note 241; 2013 *Hate Crime Statistics*, *supra* note 241.

250. Advocacy groups such as the Human Rights Campaign play a crucial role in tracking this data, as official data from law enforcement is largely unavailable. Rick Rojas & Vanessa Swales, *18 Transgender Killings This Year Raise Fears of an 'Epidemic'*, N.Y. TIMES (Sept. 30, 2019), <https://www.nytimes.com/2019/09/27/us/transgender-women-deaths.html>.

251. *Violence Against the Transgender Community in 2019*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019> (last visited Jan. 13, 2020); Petula Dvorak, *The Murder of Black Transgender Women Is Becoming a Crisis*, WASH. POST (June 17, 2019, 4:24 PM), [https://www.washingtonpost.com/local/the-murder-of-black-transgender-women-is-becoming-a-crisis/2019/06/17/28f8dba6-912b-11e9-b570-6416efdc0803\\_story.html](https://www.washingtonpost.com/local/the-murder-of-black-transgender-women-is-becoming-a-crisis/2019/06/17/28f8dba6-912b-11e9-b570-6416efdc0803_story.html).

252. 18 U.S.C. § 249(a)(2)(A) (2018).

253. *Id.*

254. *Id.*

255. § 294 (a)(2)(A)(i).

kidnap, commit aggravated sexual abuse, or kill, up to life in prison.<sup>256</sup> The Act has resulted in relatively few successful prosecutions—by one count, twenty-five between 2009 and 2017<sup>257</sup>—perhaps in part due to the narrowness of the Act and the difficulty of proving the bias motivation in some such cases.

In 2016, the Act was used for the first time to prosecute a hate crime with a transgender victim.<sup>258</sup> Joshua Vallum pleaded guilty to the assault and murder of his former girlfriend,<sup>259</sup> who he murdered after one of his friends found out that she was transgender.<sup>260</sup> At the time of Mr. Vallum's prosecution, and at present, Mississippi had no state level hate crime protections for victims on the basis of sexual orientation or gender identity.<sup>261</sup> Thus, the Act supplemented the tools available to prosecutors in the case and filled a crucial gap in protections for transgender victims.

## 2. State Legislation

At the state level, there are three general approaches to hate crime legislation.<sup>262</sup> Four states (Arkansas, Georgia, South Carolina and Wyoming) have no hate crime legislation, although in three of these states there have been recent, but ultimately unsuccessful, attempts to enact such legislation: in Arkansas,<sup>263</sup> Georgia,<sup>264</sup> and South Carolina.<sup>265</sup> Of the states which do have hate crime laws, there are three main approaches: some states have legislation which does not include sexual orientation or gender identity as a protected category; some have legislation which includes sexual orientation and not gender identity; and some have legislation protecting against crimes on the basis of both sexual orientation and gender identity. A representative state in each category is discussed below.

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256. § 294 (a)(2)(A)(ii).

257. See MATTHEW SHEPARD FOUNDATION, PROSECUTIONS & CONVICTIONS UNDER THE MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT, 1 (2017), <https://1e0cf40b52337e50815e-e71e132bd957a89bd4220c79dfec8f56.ssl.cf1.rackcdn.com/wp-content/uploads/2017/07/Download-File-1.pdf>.

258. Colin Dwyer, *1st Man Prosecuted for Federal Hate Crime Targeting Transgender Victim Gets 49 Years*, NPR (May 16, 2017, 12:12 PM), <https://www.npr.org/sections/thetwo-way/2017/05/16/528602477/1st-man-prosecuted-for-federal-hate-crime-targeting-transgender-victim-gets-49-y>.

259. *United States v. Vallum*, No. 116CR00114, 2016 WL 8969558 (S.D. Miss. 2016).

260. Dwyer, *supra* note 258.

261. Alison Spann & Lindsay Knowles, *Mississippi Lawmakers Push to Amend State Law on Hate Crimes to Protect LGBT*, WLBT (Feb. 4, 2019, 11:32 AM), <https://www.wlbt.com/2019/02/04/mississippi-lawmakers-push-amend-state-law-hate-crimes-protect-lgbt/>.

262. *Hate Crime Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/hate\\_crime\\_laws](http://www.lgbtmap.org/equality-maps/hate_crime_laws) (last updated Jan. 5, 2020).

263. Andrew DeMillo, *Arkansas Governor Says State Needs Hate Crime Law*, A.P. NEWS (Aug. 6, 2019), <https://www.apnews.com/e7f63bf0e8ae4281b60fd981ae762182>.

264. Sanya Mansoor, *Georgia Still Has No Hate Crimes Law Despite Many Tries*, A.P. NEWS (June 2, 2019), <https://www.apnews.com/6e3f2a79c8cf45698d3b1c5140d10c89>.

265. Nicholas Papantonis, *South Carolina State Senator to Introduce 'Hate Crime' Bill*, WPDE NEWS (Aug. 5, 2019), <https://wpde.com/news/local/south-carolina-state-senator-to-introduce-hate-crime-bill>.



*a. Neither Sexual Orientation nor Gender Identity.* Fifteen states have hate crime legislation which does not include either sexual orientation or gender identity.<sup>266</sup> One such state is Ohio, where the hate crime law prevents “ethnic intimidation,” and makes it an offense to commit certain misdemeanor crimes on the basis of the “race, color, religion, or national origin of another person or group of persons.”<sup>267</sup> In 2016, Ohio state legislators unsuccessfully attempted to pass an LGBT inclusive hate crime bill, which also would have broadened the crimes covered under the existing ethnic intimidation law.<sup>268</sup>

*b. Sexual Orientation but not Gender Identity.* Eleven states have hate crime legislation which includes sexual orientation but not gender identity.<sup>269</sup> One such state is Texas. Texas’s hate crime law covers offenses where the defendant chose their victim, or targeted their victim’s property, because of the defendant’s “bias or prejudice against a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference or by status as a peace officer or judge,”<sup>270</sup> and at sentencing, the judge may require the defendant to attend an educational program to further tolerance and acceptance of others.<sup>271</sup> There have been some attempts to pass legislation to amend the statute to include gender identity, but each bill has stalled in committee or after public hearing.<sup>272</sup>

*c. Both Sexual Orientation and Gender Identity.* Twenty-one states and the District of Columbia have hate crime legislation which includes both sexual orientation and gender identity.<sup>273</sup> One such state is Massachusetts. Massachusetts law explicitly includes gender identity as a protected category in the state’s hate crime statute, preventing assault and battery with the intent of intimidating the victim due to the victim’s “race, color, religion, national origin, sexual orientation, gender identity, or disability.”<sup>274</sup>

### C. GAY AND TRANS PANIC DEFENSES

The so-called “gay panic” or “trans panic” defenses are two arguments used to bolster affirmative defenses such as insanity, diminished capacity, provocation or self-defense, which have been used to partially or completely excuse a defendant’s assault or murder of a person on the basis of the victim’s sexual orientation

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266. *Hate Crime Laws*, *supra* note 262.

267. OHIO REV. CODE ANN. § 2927.12 (West 2019).

268. OH H.B. 569, 131st Gen. Assemb., 2015–2016 Sess. (Ohio 2016).

269. *Hate Crime Laws*, *supra* note 262.

270. TEX. CRIM. PROC. CODE ANN. § 42.014 (West 2017).

271. *Id.*

272. Andrew Weber, *Despite Outsized Risks, Transgender Texans Aren’t Protected by the State’s Hate Crime Law*, KUT (Jan. 10, 2019), <https://www.kut.org/post/despite-outsized-risks-transgender-texans-arent-protected-states-hate-crime-law>.

273. *Hate Crime Laws*, *supra* note 262.

274. MASS. GEN. LAWS ANN. ch. 265 § 39(a) (West 2019).

or gender identity.<sup>275</sup> The defense generally claims that the revelation that the victim is gay or transgender caused the perpetrator to “panic” and hurt or kill their victim. The defense generally arises in the context of an alleged sexual advance or encounter between the perpetrator and victim, with the perpetrator’s deep-seeded homophobia or transphobia allegedly triggering a “panic” response, leading them to assault the victim.<sup>276</sup>

The gay panic defense has its origins in 1920s psychology, when psychologist Dr. Edward Kempf observed that men who thought of themselves as heterosexual, but were nevertheless attracted to other men, would experience great discomfort, anxiety, and internal conflict due to their perception of societal norms that condemned homosexuality.<sup>277</sup> This theory of internal conflict was later used to support the idea of a gay panic defense, beginning in the 1960s.<sup>278</sup> The defense has been used many times since the 1960s, and has been applied both in the context of sexual orientation and gender identity.<sup>279</sup> The defense is relatively rarely used, but nonetheless continues to be invoked by defendants in an effort to justify or mitigate their actions.

Recently, some states have moved to ban gay and trans panic defenses. California was the first state to ban the defense in 2014, and seven other states—Illinois, Rhode Island, Nevada, Connecticut, Maine, Hawaii, and New York—have subsequently banned it.<sup>280</sup> California’s law amended the existing penal code sections on manslaughter to state:

For purposes of determining sudden quarrel or heat of passion . . . the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim’s actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.<sup>281</sup>

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275. Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 475 (2008).

276. *See id.* at 471.

277. *Id.* at 482.

278. *Id.* at 491.

279. *See, e.g.*, *People v. Merel*, No. A113056, 2009 WL 1314822, at \*9 (Cal. Ct. App. 2009) (discussing use of trans panic defense); *see also* *People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967) (discussing use of gay panic defense); *People v. Parisie*, 287 N.E.2d 310, 313 (Ill. App. Ct. 1972) (same); *Schick v. Indiana*, 570 N.E.2d 918, 929 (Ind. Ct. App. 1991) (same); *People v. Schmitz*, 586 N.W.2d 766, 767 (Mich. Ct. App. 1998) (same); *Mills v. Shepherd*, 445 F. Supp. 1231, 1237 (W.D. N.C. 1978) (same); *State v. Bell*, 805 P.2d 815, 816 (Wash. Ct. App. 1991) (same); Lee, *supra* note 275, at 514–15.

280. *The LGBTQ+ Panic Defense*, THE LGBT BAR, <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/> (last visited Jan. 19, 2020).

281. Cal. Penal Code § 192(f)(1) (West 2015).

The code section further defines “gender” to include “a person’s gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person’s gender as determined at birth.”<sup>282</sup>

Federally, there is also a push to ban the defense. In July 2018, Senator Ed Markey (D-MA) introduced a bill in the Senate, and Congressman Joe Kennedy (D-MA) introduced a companion bill in the House, entitled “The Gay and Trans Panic Defense Prohibition Act of 2018.”<sup>283</sup> The bill remains pending, and was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security on June 28, 2019.<sup>284</sup> The bill would amend Title 18, Chapter 1 of the United States Code to prohibit a defendant from using a “nonviolent sexual advance or perception or belief . . . of the gender, gender identity or expression, or sexual orientation of an individual” to “excuse or justify the conduct of an individual or mitigate the severity of an offense.”<sup>285</sup>

The bill would also institute a reporting requirement, which would require the Attorney General to provide an annual report to Congress on federal prosecutions “involving capital and noncapital crimes committed against lesbian, gay, bisexual, or transgender individuals that were motivated by the victim’s gender, gender identity or expression, or sexual orientation.”<sup>286</sup> Congressman Kennedy explained his support for the bill by saying, “Claiming a victim’s sexual orientation or gender identity justify murder or assault expressly tells entire segments of our society that their lives are not worthy of protection . . . As long as gay and trans panic defenses are allowed in our state and federal courts, the LGBTQ community will be deprived of the justice all Americans deserve.”<sup>287</sup>

The gay and trans panic defenses remain controversial, with many calling to ban them, including the ABA<sup>288</sup> and the LGBTQ+ Bar,<sup>289</sup> while others suggest that a ban would simply make homophobic and transphobic defenses covert, which might play even more effectively with some juries.<sup>290</sup>

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282. *Id.* § 192(f)(2).

283. *The LGBTQ+ Panic Defense*, *supra* note 280.

284. See Gay and Trans Panic Defense Prohibition Act of 2019, H.R. 3133, 116th Cong. (2019), available at <https://www.congress.gov/bill/116th-congress/house-bill/3133?s=1&r=80> (tracking the bill).

285. *Id.* § 2 (2019).

286. *Id.*

287. Press Release, Senator Ed Markey, Kennedy & Markey Introduce Legislation to Ban Use of Gay and Trans Panic Defense (June 5, 2019), <https://www.markey.senate.gov/news/press-releases/kennedy-and-markey-introduce-legislation-to-ban-use-of-gay-and-trans-panic-defense>.

288. Alexandra Holden, *The Gay/Trans Panic Defense: What It is, and How to End It*, ABA (July 10, 2019), <https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/>.

289. *The LGBTQ+ Panic Defense*, *supra* note 280.

290. Lee, *supra* note 275, at 477.

#### D. POLICE MISTREATMENT OF TRANSGENDER INDIVIDUALS AND VIOLENCE IN PRISON

Transgender people also often face mistreatment and violence during encounters with law enforcement, including being harassed, misgendered, and assaulted by police and during incarceration. Many of these experiences also give rise to fear and mistrust of law enforcement and the legal system, contributing to many of the problems of underreporting abuse and violence discussed above. In fact, fifty-seven percent of transgender people report being somewhat or very uncomfortable with going to the police for help when they need it.<sup>291</sup>

##### 1. Police Mistreatment

Transgender individuals are subject to high rates of police profiling, harassment and brutality.<sup>292</sup> A 2015 report by the National Transgender Center for Equality showed that forty percent of transgender people surveyed had interacted with the police in some way in the past year, and of those who had interacted with police, fifty-seven percent said that they were never or only sometimes treated with respect by officers.<sup>293</sup> This was even more of an issue for Native American (seventy-two percent) and African-American (seventy percent) respondents.<sup>294</sup> Twenty percent of respondents reported being verbally harassed by officers, eleven percent reported that the officers assumed they were a sex worker, six percent reported being physically attacked, sexually assaulted, and/or being forced to engage in sexual activity to avoid arrest, with fifty eight percent of respondents having one or more of these issues with officers.<sup>295</sup> Again, the issues disproportionately impacted transgender people of color, with seventy four percent of Native American respondents reporting one or more issue, compared to seventy one percent of multiracial people, sixty six percent of Latinx people, and sixty one percent of African American people.<sup>296</sup> Another potential source of anxiety for transgender people interacting with police stems from having identity documents which do not accurately reflect their gender identity, which can result in misunderstandings and escalate already tense interactions.

More problems arise from a lack of privacy and potential misgendering in police detention, including during strip searches, booking, and holding. In response to these issues, some states and cities have tried to address the problem through the adoption of guidelines for police officers on how to respectfully and safely interact with transgender people. However, the National Center for Transgender Equality (NCTE) found that only ten of the twenty-five largest police departments in the United States had non-discrimination policies which

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291. JAMES ET AL. *supra* note 121 at 1.

292. *Id.* at 185.

293. *Id.* at 186.

294. *Id.*

295. *Id.* at 186–87.

296. *Id.* at 186.

included gender identity, while fourteen included sexual orientation.<sup>297</sup> They also found that only one department fully addressed how gendered policies apply to non-binary people, and only one department required officers to record an individual's preferred pronouns.<sup>298</sup> A majority of departments, sixteen out of twenty-five, fail to provide guidance for search procedures for transgender people, or require searches to be performed by officers based on biological sex.<sup>299</sup> The NCTE provides a model policy for police departments which would help address these issues.<sup>300</sup> Fear and lack of trust in law enforcement exacerbates many issues faced by transgender people, including by raising the barrier to reporting violence and making access to justice more difficult.

## 2. Violence in Prison

Transgender people are also the victims of violence in prison. Incarcerated transgender people are approximately ten times more likely to be sexually assaulted than the general prison population, with nearly forty percent of transgender people in state and federal prisons reporting a sexual assault in the previous year.<sup>301</sup> Much of this problem arises from transgender people being misgendered by the legal system, and being incarcerated according to their birth sex and not their gender identity.

In correctional facilities, transgender individuals are “at the mercy of a hyper-gendered system.”<sup>302</sup> Traditionally, prison housing for transgender prisoners who have not had gender-confirmation surgery was determined according to gender assigned at birth regardless of other factors.<sup>303</sup> In 2012, the DOJ partially addressed this issue with a rule<sup>304</sup> pursuant to the Prison Rape Elimination Act (PREA).<sup>305</sup> Its rule implemented standards requiring prisons and jails to assess

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297. NAT'L CTR. FOR TRANSGENDER EQUAL., *FAILING TO PROTECT AND SERVE: POLICE DEPARTMENT POLICIES TOWARDS TRANSGENDER PEOPLE* 103 (May 2019), available at [https://transequality.org/sites/default/files/docs/resources/FTPS\\_FR\\_v3.pdf](https://transequality.org/sites/default/files/docs/resources/FTPS_FR_v3.pdf).

298. *Id.*

299. *Id.* at 104.

300. NAT'L CTR. FOR TRANSGENDER EQUAL., *POLICE DEPARTMENT MODEL POLICY ON INTERACTIONS WITH TRANSGENDER PEOPLE* (May 2019), available at [https://transequality.org/sites/default/files/docs/resources/FTPS\\_MP\\_v6.pdf](https://transequality.org/sites/default/files/docs/resources/FTPS_MP_v6.pdf).

301. NAT'L CTR. FOR TRANSGENDER EQUAL., *LGBTQ PEOPLE BEHIND BARS: A GUIDE TO UNDERSTANDING THE ISSUES FACING TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS* 6 (2018), <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf>; JAMES ET AL. *supra* note 121, at 184, 191.

302. Sydney Tarzwell, Note, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 176-77 (2006).

303. See Darren Rosenblum, “Trapped” in *Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499, 522 (2000) (explaining that prisoners are mostly placed in facilities according to their genitalia due to the traditional understanding of gender, which only includes male and female).

304. National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,105 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115).

305. The Prison Rape Elimination Act, 34 U.S.C.A. § 30301-09 (West 2017).

prisoners for risk of sexual victimization or abuse-risk factors, including whether the prisoner was (or was perceived as) LGBT or gender nonconforming.<sup>306</sup> The rule further required that prisons use the screening results in housing, bed, education, and work assignments, each determination being made on a case-by-case basis in light of the inmate's health and safety, among other factors.<sup>307</sup> In pursuit of compliance, states have developed more comprehensive internal standards and policies for screening transgender inmates. For example, before the PREA rule, the California Department of Corrections and Rehabilitation classified inmates for housing based on characteristics such as an inmate's history of violence or nonviolence, mental-health history, age, and repeat offender status but failed to account for sexual orientation, gender, and risk of victimization.<sup>308</sup> After the rule's promulgation, California updated its operation manual so that a classification committee would review all transgender individuals' factors for institutional placement and housing assignment.<sup>309</sup>

While most prison systems currently comply with PREA standards or are working towards compliance,<sup>310</sup> the PREA rule allows for "individualized determinations."<sup>311</sup> While "serious consideration" might be given to a "transgender or intersex inmate's own views[.]" a prison system might still assign housing based on its own perception of an "inmate's health and safety . . . [and] management and security problems."<sup>312</sup> The management and safety factors might permit prison systems to justify denying gender-conforming institutional assignments by emphasizing their interest in administrability or in addressing the privacy concerns of incarcerated cis-women.<sup>313</sup> For example, on May 11, 2018, the Bureau of Prisons Transgender Offender Manual restricted a previously expansive transgender housing policy, explicitly singling out "biological sex" as the initial determination for the assessment.<sup>314</sup> The update made clear that assigning transgender and intersex inmates to federal prisons in conformity with gender identity would "be appropriate only in rare cases" and would be limited to individuals making "serious progress towards transition as demonstrated by medical and mental health history."<sup>315</sup> This policy fails to specify what medical or mental history is

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306. 28 C.F.R. § 115.41 (d)(7) (2012).

307. *Id.* § 115.42 (a)-(c) (2012).

308. Angela Okamura, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 HASTINGS RACE & POVERTY L. J. 109, 111 (2011).

309. Cal. Code Regs. tit. 15 § 3269(g) (2018); CALIFORNIA DEP'T OF CORRECTIONS AND REHABILITATION, OPERATIONS MANUAL § 62080.14 (2012).

310. Douglas Rourth et al., *Transgender Inmates in Prison: A Review of Applicable Statutes and Policies*, INT'L J. OFFENDER THERAPY & CRIMINOLOGY 1, 10 (2015).

311. 28 C.F.R. § 115.42(b) (2012).

312. *Id.* at §§ 115.42(c), (e).

313. See *Kosilek v. Spencer*, 774 F.3d 63, 93–94 (1st Cir. 2014) (denying a transgender person identifying as female gender reassignment surgery because of security concerns regarding housing a male-to-female transgender prisoner in a women's prison).

314. FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5200.04 CN-1: TRANSGENDER OFFENDER MANUAL 6 (May 11, 2018) [hereinafter TRANSGENDER OFFENDER MANUAL].

315. *Id.*

needed to qualify for housing and program assignments conforming with individuals' gender identity.<sup>316</sup> Because a majority of transgender people do not undergo gender-confirmation surgeries,<sup>317</sup> requiring serious progress likely has the effect of barring most transgender individuals housed by the BOP from placements aligned to their gender identity.

Housing transgender prisoners with those who do not share their gender identity, however, might actually increase security concerns. Transgender individuals in institutions incompatible with their gender identity report disproportionate rates of violence and sexual assault.<sup>318</sup> To address this, one solution permissible by PREA standards – and, according to some, commonly used by prison authorities – is to separate transgender prisoners into protective or administrative custody.<sup>319</sup> Although administrative segregation may protect transgender prisoners from abuse at the hands of fellow inmates, it can also isolate prisoners with predatory staff and eliminate the possibility of witnesses who could report abuse.<sup>320</sup> Administrative segregation may also deny transgender prisoners “adequate recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for non-punitive reasons,”<sup>321</sup> thereby rendering it comparable to punitive segregation and imbuing it with the court-recognized potential for psychological damage.<sup>322</sup> Furthermore, placing transgender prisoners in confinement deprives them of the means to form positive communities and relationships that can help those who are targets of violence to survive.<sup>323</sup>

In *Farmer v. Brennan*, the Supreme Court held that prison officials acted with deliberate indifference to a transgender woman's safety and violated her Eighth Amendment right to be free from cruel and unusual punishment when prison officials incarcerated her according to her sex assigned at birth.<sup>324</sup> Farmer, a transgender woman in a men's prison, possessed distinctly female physical characteristics. As a result of her placement in a men's general population prison,

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316. *Id.*

317. JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 78–79, 84 (2011) (finding that only 62% of transgender individuals undergo hormone therapy, while a vast minority undergo surgery).

318. Compare BUREAU OF JUSTICE STATISTICS, NCJ 248824, PREA DATA COLLECTION ACTIVITIES, 2015 2 (2015) (“An estimated 35% of transgender inmates held in prisons and 34% held in local jails reported . . . sexual victimization by another inmate or facility staff in the past 12 months or since admission, if less than 12 months.”), with BUREAU OF JUSTICE STATISTICS, NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-2012 6 (2013) (“In 2011-2012, an estimated 4% of state and federal prison inmates and 3.2% of jails reported . . . sexual victimization by another inmate or facility staff in the past 12 months or since admission, if less than 12 months.”).

319. 8 C.F.R. § 115.43; see Rosenblum, *supra* note 303, at 529.

320. Tarzwell, *supra* note 302, at 180.

321. Meriwether v. Faulkner, 821 F.2d 408, 416 (7th Cir. 1987).

322. Tarzwell, *supra* note 302, at 180 (citing Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988)).

323. Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 518 (2009).

324. *Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

she was beaten and raped.<sup>325</sup> The Court recognized that prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement, which includes protecting prisoners from violence at the hands of other prisoners.<sup>326</sup> However, the Court in *Farmer* qualified that a prison official may be held liable only “if he [sic] knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”<sup>327</sup> Therefore, prison officials are held to a subjective test of “deliberate indifference,” though a factfinder might still find that the official “knew of a substantial risk from the very fact that the risk was obvious.”<sup>328</sup> *Farmer* challenges brought by transgender inmates have focused on whether denial of gender affirming care while in prison constitutes an Eighth Amendment violation and have been mostly unsuccessful.<sup>329</sup>

A potential new source for protection for transgender individuals is the 2019 Violence Against Women Reauthorization Act, which was passed by the House of Representatives and is currently pending in the Senate.<sup>330</sup> The bill would add a provision to the existing Violence Against Women Act to require the Bureau of Prisons to consider the safety and protection of incarcerated transgender individuals when making housing assignments.<sup>331</sup> This provision would help address some of the problems and vulnerabilities that stem from transgender people being misgendered by the criminal justice system, but does not fully address that issue itself, and does not require individuals to be housed according to their gender identity as opposed to their birth sex. This provision would be an important step in the direction of addressing the violence experienced by transgender women housed in men’s prisons.

## V. PUBLIC ACCOMMODATIONS & HOUSING

### A. PUBLIC ACCOMMODATIONS

Transgender individuals experience a significant amount of harassment and disrespect in public places. A survey conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force found that

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325. *Id.* at 830.

326. *Id.* at 832–33.

327. *Id.* at 847.

328. *Id.* at 842.

329. *See, e.g.,* *Kosilek v. Spencer*, 774 F.3d 63, 68 (1st Cir. 2014) (finding that the MA DOC was not deliberately indifferent to a transgender prisoner’s needs when they refused to provide a sex reassignment surgery); *Gibson v. Collier*, 920 F.3d 212, 224 (5th Cir. 2019) (finding no deliberate indifference in TX’s refusal to provide a sex reassignment surgery); *cf. Edmo v. Corizon, Inc.*, 935 F.3d 757, 803 (9th Cir. 2019) (“We hold that where, as here, the record shows that the medically necessary treatment for a prisoner’s gender dysphoria is gender confirmation surgery, and responsible prison officials deny such treatment with full awareness of the prisoner’s suffering, those officials violate the Eighth Amendment’s prohibition on cruel and unusual punishment.”).

330. Violence Against Women Act Reauthorization Act of 2019, H.R. 1585, 116th Cong. § 1 (2019), available at <https://www.congress.gov/bill/116th-congress/house-bill/1585/text>.

331. *Id.* at § 1101.



53 percent of 6,450 surveyed transgender people reported being verbally harassed or disrespected in a place of public accommodation.<sup>332</sup> 44 percent of respondents in the same survey reported being denied equal treatment at least once at one or more types of public accommodation.<sup>333</sup> The discrimination is not limited to verbal assaults or refusal of service, as 8% of respondents also reported being victim to physical attacks or assaults in places of public accommodation.<sup>334</sup> Some states have enacted antidiscrimination laws which protect transgender individuals from this type of discrimination and harassment in places of public accommodation.

Public accommodations generally refer to both governmental entities and private businesses that provide services to the general public, but does not encompass private clubs with membership or dues processes.<sup>335</sup> The Civil Rights Act and the Americans with Disabilities Act both define public accommodation broadly to include most places that either provide lodging for guests, serve foods, or provide entertainment or recreation.<sup>336</sup> Many states have adopted a definition of public accommodation that is identical to the one in the Americans with Disabilities Act or that is largely similar.<sup>337</sup>

### 1. Anti-Discrimination Laws

Twenty states and the District of Columbia have laws prohibiting discrimination in places of public accommodation based on sexual orientation and gender identity.<sup>338</sup> All twenty states protect transgender individuals from discrimination, although the states vary in the wording that extends transgender individuals this protection. Some states explicitly prohibit discrimination on the basis of sex or sexual orientation and define sex or sexual orientation to include a person's gender identity.<sup>339</sup> The most common approach, however, is to explicitly protect gender identity and/or gender expression in the statute and consider these

332. NAT'L CTR. FOR TRANSGENDER EQUAL. AND NAT'L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 5 (2011), available at [https://www.transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf).

333. *Id.* at 124.

334. *Id.*

335. *State Maps of Laws & Policies: Public Accommodations*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/state-maps/public-accommodations> (last updated June 11, 2018).

336. See 42 U.S.C.A. § 2000a(b) (West 2020); 42 U.S.C.A. § 12181(7)(A)–(L) (West 2020).

337. See, e.g., COLO. REV. STAT. ANN. § 24-34-301(5.3) (West 2014) (explicitly adopting the definition of public accommodation set out in Title III of the Americans with Disabilities Act).

338. *State Maps of Laws & Policies: Public Accommodations*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/state-maps/public-accommodations> (last updated June 11, 2018). The full list is as follows: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington.

339. For example, Colorado's antidiscrimination statute prohibits discrimination on the basis of sexual orientation and does not explicitly list gender identity as a protected characteristic. COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West 2014). Transgender individuals are protected because sexual orientation is defined as "an individual's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual's perception thereof." *Id.* at § 24-34-301(7). Similarly,

characteristics as separate from sex or sexual orientation.<sup>340</sup> The District of Columbia adopted this approach; its antidiscrimination statute is an example of the form that most states antidiscrimination statutes take. Under the District's statute, denying service in a place of public accommodation because of a person's gender identity is an unlawful discriminatory practice.<sup>341</sup> It does not matter if the person's gender identity is the entire reason for the discrimination or if it is only part of the reason for the discrimination.<sup>342</sup> Additionally, for the purpose of the antidiscrimination law, a person's gender identity may be based either on their actual gender identity or their perceived gender identity.<sup>343</sup>

Two states—Michigan and Pennsylvania—have antidiscrimination laws that do not explicitly enumerate protections for transgender individuals, either by including gender identity and/or expression as a protected class or by defining sex or sexual orientation to cover transgender individuals.<sup>344</sup> However, agencies in both states have extended antidiscrimination protections to transgender individuals as a matter of policy. In May 2018, the Michigan Civil Rights Commission adopted Interpretive Statement 2018-1, which clarified that sex-based discrimination prohibited by the State Civil Rights Act should be interpreted to include discrimination based on gender identity.<sup>345</sup> The Pennsylvania Human Relations Commission's Guidance document indicates that “sex” under the Pennsylvania Human Relations Act (“PHRA”) “may refer to sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and/or gender expression depending on the individual facts of the case.”<sup>346</sup> It further clarified that the prohibitions against sex discrimination in the PHRA and in case law also prohibit gender discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression.<sup>347</sup>

Missouri's antidiscrimination law, like Michigan and Pennsylvania's laws, does not explicitly protect transgender individuals.<sup>348</sup> However, the Missouri Supreme Court expanded the meaning of sex discrimination under the law to protect transgender individuals from discrimination. On February 26, 2019, the Missouri Supreme Court issued *en banc* opinions in two separate cases, finding

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Hawaii includes gender identity or expression within its definition of sex. HAW. REV. STAT. ANN. § 489-3 (West 2019).

340. See, e.g., D.C. CODE ANN. § 2-1402.31(a) (West 2006).

341. *Id.* at § 2-1402.31(a)(1).

342. *Id.* at § 2-1402.31(a).

343. *Id.*

344. See MICH. COMP. LAWS ANN. § 37.2302 (West 2019).

345. *Interpretive Statement 2018-1*, MICH. CIVIL RIGHTS COMM'N (May 21, 2018), [https://www.michigan.gov/documents/mdcr/MCRC\\_Interpretive\\_Statement\\_on\\_Sex\\_05212018\\_625067\\_7.pdf](https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf).

346. *Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act*, PA. HUMAN RELATIONS COMM'N (Aug. 2, 2018), <https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf>.

347. *Id.*; see also *Pennsylvania Human Relations Commission Adopts Guidance Protecting LGBTQ People*, LAMBDA LEGAL (Aug. 17, 2018), [https://www.lambdalegal.org/blog/20180817\\_pa-hrc-adopts-guidance-protecting-lgbtq-people](https://www.lambdalegal.org/blog/20180817_pa-hrc-adopts-guidance-protecting-lgbtq-people).

348. See MO. ANN. STAT. § 213.065 (West 2017).

that discriminating based on sex stereotypes violated the Missouri Human Rights Act's ("MHRA") prohibition against sex discrimination.<sup>349</sup> In *R.M.A.*, the Plaintiff, a transgender student, was prohibited from using the boys' restrooms and boys' locker rooms in accordance with his gender identity, and the court found that the student adequately alleged the elements of a sex discrimination claim because his school denied him access to the boys' restrooms and locker rooms based on sex stereotyping, which was a form of sex discrimination prohibited by the statute.<sup>350</sup>

Some states include statutory exemptions to the sexual orientation or gender identity provisions for those people who believe that their religious beliefs preclude them from abiding by the law.<sup>351</sup> In the absence of a statutory exemption, a number of lawsuits have been filed in recent years by faith-based organizations and religious individuals asking courts to recognize exemptions from these laws, typically on First Amendment grounds.<sup>352</sup> The First Amendment argument has been successful for some plaintiffs challenging these laws in both state and federal courts.<sup>353</sup> However, these challenges have focused on discrimination based

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349. *R.M.A. ex rel. Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 424 (Mo. 2019) (en banc); *Lampley v. Mo. Comm'n on Human Rights*, 570 S.W.3d 16, 25 (Mo. 2019) (en banc); *See also* Dan Margolies, *In Major Ruling, Missouri Supreme Court Expands Definition of Sex Discrimination*, KSMU OZARKS PUB. RADIO (Feb. 28, 2019), <https://www.kcur.org/post/major-ruling-missouri-supreme-court-expands-definition-sex-discrimination#stream/0>.

350. *R.M.A. ex rel. Appleberry*, 568 S.W.3d at 428-29.

351. For example, IOWA CODE ANN. § 216.7(2)(a) (West 2019) states that the antidiscrimination statute "shall not apply to: Any bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose." In contrast, some states like Mississippi takes a more robust approach and codify the right to discriminate in places of public accommodation based on religious beliefs. Mississippi law prohibits the government from taking "any discriminatory action" against a person on the basis of three enumerated sincerely held religious beliefs or moral convictions, including "the belief that male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth." MISS. CODE ANN. § 11-62-3(c) (West 2016). Thus Mississippi explicitly allows discrimination against transgender individuals by certain public service providers without government intervention so long as the discrimination is pursuant to such a religious belief or moral conviction. *Id.* at § 11-62-5(5). Individuals acting on these beliefs are protected from adverse tax, benefit, and employment decisions made by the state, as well as the imposition of fines and the denial of occupational licenses. *Id.* at § 11-62-7. The law also provides individuals with a course of action against state officials who violate the law as well as a defense to any discrimination law suits that they may face. *Id.* at § 11-62-9. *See also* *Barber v. Bryant*, 860 F.3d 345, 358 (5th Cir. 2017) (dismissing for plaintiffs' lack of standing).

352. This issue was raised in the Supreme Court's most recent decision regarding gender discrimination, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1723-24 (2018), but the Court ruled on the narrow ground that the Colorado Civil Rights Commission showed anti-religious bias in its consideration of the case, and as a result it did not decide whether business owners may decline to serve individuals based on their sexual orientation or gender identity. *See* Garret Epps, *Justice Kennedy's Masterpiece Ruling*, THE ATLANTIC (June 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/06/the-court-slices-a-narrow-ruling-out-of-masterpiece-cakeshop/561986/>.

353. *See, e.g.*, *Country Mills Farm v. City of East Lansing*, 280 F. Supp. 3d 1029, 1037-38 (W.D. Mich. 2017); *Brush & Nib Studio v. City of Phoenix*, 448 P.3d 890, 926 (Ariz. 2019); *see also* *Lexington-Fayette Urban Cty. Human Rights Comm'n v. Hands on Originals*, NO. 2015-CA-000745-

on sexual orientation, particularly with respect to providing services for same-sex weddings.

## 2. Discriminatory Laws

Sixteen<sup>354</sup> states have considered legislation that would restrict access to multi-user restrooms, locker rooms, and other sex-segregated facilities on the basis of a definition of sex or gender consistent with sex assigned at birth or “biological sex.”

In March 2016, North Carolina passed a bill requiring restrooms in all public places to designate multiple occupancy bathrooms for use only by persons based on their biological sex. North Carolina is the only state<sup>355</sup> to have passed a Bathroom Bill, HB2.<sup>356</sup> HB2 triggered an immediate public outcry and caused massive financial losses for the state, as companies either cancelled or delayed planned expansions in the state. Businesses lost an estimated \$525 million just by the end of 2017.<sup>357</sup> Financial losses included halted plans for a PayPal facility, estimated to bring \$2.66 billion to the state’s economy,<sup>358</sup> a cancelled Ringo Starr concert which cost a town roughly \$33,000,<sup>359</sup> the NBA removing its 2017 All-

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MR, 2017 WL 2211381, at \*1 (Ky. Ct. App. May 12, 2017). In *Hands on Originals*, Defendant prevailed on its First Amendment claims in front of the Court of Appeals of Kentucky. Plaintiffs appealed the decision to the Kentucky Supreme Court, which upheld the Circuit Court’s order. However, its grounds for upholding the order was for lack of statutory standing. The Kentucky Supreme Court found that only an individual or individuals could file a claim under the local antidiscrimination law; however, because the lawsuit was filed by an organization, GLSO, the case was dismissed. *Lexington-Fayette Urban Cty. Human Rights Comm’n v. Hands On Originals*, No. 2017-SC-000278-DG, 2019 WL 5677638, at \*1 (Ky. Oct. 31, 2019).

354. These states are: Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington and Wyoming. Joellen Kralik, “*Bathroom Bill*” *Legislative Tracking*, NAT’L CONFERENCE OF STATE LEGISLATURES (July 7, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.

355. It is worth noting that while a state may not have a “bathroom bill” on the books, it may still provide protections for providers of public accommodations who prevent transgender individuals from using restrooms or other facilities consistent with their gender. For example, the Mississippi statute, (*supra* note 351), prevents the state government from taking action against people who establish sex-specific standards or policies regarding access to restrooms and other “intimate facilities or settings” when these standards are established “based upon or consistent with a sincerely held religious belief or moral conviction.” MISS. CODE ANN. § 11-62-5(6) (West 2019).

356. N.C. GEN. STAT. ANN. § 143-760(b), (d) (West, repealed 2017). The exceptions allowed people to enter restrooms of the opposite sex for custodial, maintenance, or inspection purposes; to render medical assistance or accompany a person requiring medical assistance; to accompany a child younger than seven; or because it was temporarily designated for use by members of their biological sex.

357. Ese Olumhense, *Anti-transgender ‘bathroom bill’ could cost North Carolina nearly \$4 billion*, FOX 43 (Mar. 27, 2017, 3:12pm), <https://fox43.com/2017/03/27/anti-transgender-bathroom-bill-could-cost-north-carolina-nearly-4-billion-tmwsp/>.

358. *‘Bathroom bill’ to cost North Carolina \$3.76 billion*, CNBC (Mar. 27, 2017 7:00 AM), <https://www.cnn.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html>.

359. *Id.*

Star Game from Charlotte,<sup>360</sup> and the NCAA pulling seven championship events from the state.<sup>361</sup> Seven hundred part-time workers at the PNC Arena in Raleigh lost at least \$130,000 in wages after various performers cancelled events.<sup>362</sup>

Because of this backlash, the North Carolina law was repealed on March 30, 2017.<sup>363</sup> However, as a compromise, North Carolina passed HB142 on the same day. Although transgender people are no longer prohibited from using restrooms that correspond to their gender, the statute preempts state institutions' authority to regulate access to multiple occupancy restrooms and gives that power to the state legislature.<sup>364</sup> Lawmakers also agreed to a ban on passing new antidiscrimination ordinances until 2020 in exchange for the repeal of the bathroom bill, which has been characterized as an unsatisfying compromise for all sides.<sup>365</sup> The ACLU of North Carolina has described HB142 as a "fake repeal" of HB2 and has stated that it "doubles down on the dangerous lie that transgender people are a threat to privacy and public safety."<sup>366</sup> Shortly after HB142 passed, a lawsuit challenging it was filed.<sup>367</sup> The parties ultimately settled, with Defendants representing the Executive branch agreeing not to construe the bill "to prevent transgender people from lawfully using public facilities in accordance with their gender identity."<sup>368</sup> Defendants were also permanently enjoined from using the

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360. Khorri Atkinson, *Battle over North Carolina "bathroom bill" returns to federal court*, AXIOS (June 24, 2018), <https://www.axios.com/north-carolina-transgender-rights-bathroom-bill-federal-court-4fcca319-588f-40fd-b59a-eab83e4a17a4.html>.

361. Andrew DeMillo, *Arkansas' 'bathroom bill' is ripping apart Republican politics*, LGBTQ NATION (Feb. 30, 2017), <https://www.lgbtqnation.com/2017/02/arkansas-bathroom-bill-ripping-apart-republican-politics/>; see also Mark Berman & Amber Phillips, *North Carolina governor signs bill repealing and replacing transgender bathroom law amid criticism*, WASH. POST (Mar. 30, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/30/north-carolina-lawmakers-say-theyve-agreed-on-a-deal-to-repeal-the-bathroom-bill/>.

362. *'Bathroom bill' to cost North Carolina \$3.76 billion*, CNBC (Mar. 27, 2017 7:00 AM), <https://www.cnn.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html>.

363. 2017 N.C. Sess. Laws 4.

364. N.C. GEN. STAT. ANN. § 143-761 (West 2019). The full text of the statute is as follows: "State agencies, boards, offices, departments, institutions, branches of government, including The University of North Carolina and the North Carolina Community College System, and political subdivisions of the State, including local boards of education, are preempted from regulation of access to multiple occupancy restrooms, showers, or changing facilities, except in accordance with and act of the General Assembly." *Id.*

365. Mark Berman & Amber Phillips, *North Carolina governor signs bill repealing and replacing transgender bathroom law amid criticism*, WASH. POST (Mar. 30, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/30/north-carolina-lawmakers-say-theyve-agreed-on-a-deal-to-repeal-the-bathroom-bill/>; Camila Domonoske & James Doubek, *North Carolina Repeals Portions Of Controversial 'Bathroom Bill'*, NPR (Mar. 30, 2017), <https://www.npr.org/sections/thetwo-way/2017/03/30/522009335/north-carolina-lawmakers-governor-announce-compromise-to-repeal-bathroom-bill/>; Dan Levin, *North Carolina Reaches Settlement on 'Bathroom Bill'*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/us/north-carolina-transgender-bathrooms.html>.

366. "Fake Repeal" of HB2 (HB142), ACLU OF N.C., <https://www.acluofnorthcarolina.org/en/legislation/fake-repeal-hb2-hb142> (last visited Feb. 27, 2020).

367. See *Carcaño v. Cooper*, 350 F. Supp. 3d 388 (M.D.N.C. 2018).

368. *Carcaño v. Cooper*, No. 1:16-cv-236, 2019 WL 3302208, at \*2, (M.D.N.C. Jul. 23, 2019).

statute to prohibit transgender individuals from using facilities under its control which are consistent with their gender identity.<sup>369</sup>

Arkansas legislators considered two “bathroom bills,” both of which failed to become law. State Senator Linda Collins-Smith proposed SB 774, which would have required all government buildings to designate multi-user restrooms and changing facilities for use by one sex or another.<sup>370</sup> Collins-Smith proposed the bill on privacy grounds, stating that it would protect students’ privacy by preventing someone of the opposite sex from changing or showering in front of them.<sup>371</sup> The bill was opposed by Arkansas’ Governor, Asa Hutchinson, who said that there was no need for a controversial bill like North Carolina’s HB2, which triggered a massive backlash and boycotts and which ultimately cost the state \$3.76 billion in lost business.<sup>372</sup> The Republican Governor Hutchinson’s fear of economic fallout may have involved the fear of losing future sports championships, which happened to North Carolina and with which Texas was warned.<sup>373</sup> The tourism industry also opposed the bill because of the adverse economic effects on its convention and sports-related business interests that the bill would have.<sup>374</sup> On March 29, 2017, Collins-Smith withdrew the bill from consideration for further study.<sup>375</sup> A different bill, SB 346, was introduced but the language was never finalized and it ultimately failed.<sup>376</sup>

### 3. Discrimination in Schools

Access to appropriate bathroom facilities has also come up in the school context. In 2016, the Obama Administration issued a “Dear Colleague” letter, which provided guidance to schools, clarifying that they had a Title IX obligation to provide a nondiscriminatory environment for all students and to allow transgender students to access sex-segregated activities and facilities consistent with their

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369. *Id.* at \*3.

370. Tafi Mukunyadzi, *Arkansas ‘bathroom bills’ fail, critics still vexed*, ARK. DEMOCRAT GAZETTE (Apr. 9, 2017, 5:31 PM), <https://www.arkansasonline.com/news/2017/apr/09/arkansas-bathroom-bills-fail-critics-still-vexed/>.

371. *Id.*; see also Brooke Sopelsa, *Texas, Arkansas Advance Anti-Transgender ‘Bathroom Bills,’* NBC NEWS (Mar. 16, 2017, 11:52 AM), <https://www.nbcnews.com/feature/nbc-out/texas-arkansas-advance-anti-transgender-bathroom-bills-n734381>.

372. *Arkansas Gov. Asa Hutchinson: Bathroom bill unnecessary*, WASH. TIMES (Jan. 4, 2017), <https://www.washingtontimes.com/news/2017/jan/4/arkansas-gov-asa-hutchinson-bathroom-bill-unnessess/>; Mukunyadzi, *supra* note 370.

373. See Andrew DeMillo, *Arkansas’ ‘bathroom bill’ is ripping apart Republican politics*, LGBTQ NATION (Feb. 30, 2017), <https://www.lgbtqnation.com/2017/02/arkansas-bathroom-bill-ripping-apart-republican-politics/>; *Arkansas ‘bathroom bill’ would cover government buildings*, WREG MEMPHIS (Mar. 6, 2017 8:45 PM), <https://wreg.com/2017/03/06/arkansas-bathroom-bill-would-cover-government-buildings/>.

374. DeMillo, *supra* note 373.

375. Mukunyadzi, *supra* note 370.

376. Joellen Kralik, *“Bathroom Bill” Legislative Tracking*, NAT’L CONFERENCE OF STATE LEGISLATURES (July 7, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.

gender identity.<sup>377</sup> Some states, including Oklahoma, pushed back and indicated that it would not follow federal guidance.<sup>378</sup> Additionally, some states sued the federal government over the guidance, and in one case the United States District Court for the Northern District of Texas issued a preliminary injunction in plaintiff states.<sup>379</sup> Some courts did defer to the Obama Administration's guidance, however. For example, in *Grimm v. Gloucester County School Board*, the United States Court of Appeals for the Fourth Circuit ruled that the "Dear Colleague" letter was entitled to deference regarding Title IX's protection of transgender individuals' right to use the bathroom consistent with their gender identity.<sup>380</sup>

In February 2017, the Trump Administration rescinded the "Dear Colleague" letter.<sup>381</sup> The Departments of Justice and Education argued that the guidance was issued "without due regard for the primary role of the states and local school districts in establishing educational policy."<sup>382</sup> The Trump Administration has not offered replacement guidance.<sup>383</sup>

Although the Trump Administration rescinded the Obama Administration's guidelines, a number of lawsuits are ongoing which challenge school policies which prohibit transgender students from using facilities consistent with their gender identity. Courts have taken varying approaches to these challenges. Some

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377. See May 2016 Dear Colleague Letter on Transgender Students, U.S. DEP'T OF JUST. CIV. RTS. DIV. & U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS. (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

378. See *Oklahoma attorney general says state will "vigorously defend" itself against transgender bathroom guidelines*, OKLA. NEWS 4 (May 13, 2016, 4:06 PM), <https://kfor.com/2016/05/13/oklahoma-attorney-general-says-state-will-vigorously-defend-itself-against-transgender-bathroom-guidelines/>; Tim Willert, *Feds direct schools to permit transgender restroom access*, OKLAHOMAN (May 13, 2016, 9:34 PM), <https://oklahoman.com/article/5497943/feds-direct-schools-to-permit-transgender-restroom-access>.

379. See *Nebraska v. United States*, No. 4:16-cv-03117-JMG-CRZ (D. Neb. July 8, 2016) (plaintiff states included Nebraska, South Carolina, Arkansas, Kansas, Michigan, Montana, North Dakota, South Dakota, and Wyoming. The *Nebraska* plaintiffs voluntarily dismissed the case because of the Trump Administration's rescission. Plaintiffs' Notice of Voluntary Dismissal Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), *Nebraska v. United States*, No. 4:16-cv-03117-JMG-CRZ (D. Neb. Mar. 16, 2017)); *Texas v. United States*, No. 7:16-cv-00054-O, 2016 WL 7852330 (N.D. Tex. Nov. 20, 2016) (plaintiff states included Alabama, Georgia, Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee, Utah, West Virginia, and Wisconsin).

380. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016). The U.S. Supreme Court scheduled a hearing on the case but cancelled it in light of the Trump Administration's February 22, 2017 letter rescinding the policy. See *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S.Ct. 1239 (Mem.) (2017).

381. Jeremy W. Peters et. al, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html>.

382. *Id.*

383. February 2017 Dear Colleague Letter on Transgender Students, U.S. DEP'T OF JUST. CIV. RTS. DIVISION & U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS. (Feb. 22, 2017), available at <http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf>; see also Ariane de Vogue, *Trump administration withdraws federal protections for transgender students*, CNN (Feb. 23, 2017 10:16 AM), <https://www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protections-on-transgender-bathrooms-in-schools/index.html>.

courts have upheld protections for transgender students under Title IX despite the Trump Administration's policy.<sup>384</sup> For example, in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, the United States Court of Appeals for the Seventh Circuit upheld a preliminary injunction securing a transgender student's access to the bathroom consistent with his gender identity.<sup>385</sup> The most recent decision by the United States District Court for the Eastern District of Virginia in the still-ongoing *Grimm* litigation reached a similar conclusion as the Seventh Circuit—the court upheld the student's claims on Title IX sex-discrimination grounds as well as Fourteenth Amendment Equal Protection grounds.<sup>386</sup> Other courts have rejected claims on Title IX grounds but have allowed transgender students to claim protections on Equal Protection grounds.<sup>387</sup> Transgender students also retain the option of challenging school bathroom policies for sex discrimination under state laws, including state public accommodations laws.<sup>388</sup>

Plaintiffs have also mounted constitutional challenges against policies which permit transgender students to use school restrooms, locker rooms, and showers, that are consistent with their gender identity. In *Parents for Privacy v. Dallas School District No. 2*, Plaintiff argued that a school policy allowing transgender students to access facilities consistent with their gender identity violated the Free Exercise Clause of the First Amendment.<sup>389</sup> They alleged that the policy was not generally applicable because it burdened those students whose Christian faith

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384. See *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *Adams v. Sch. Bd. of St. Johns Cty., Fl.*, 318 F. Supp. 3d 1293, 1325 (M.D. Fla. 2018) (interpreting the meaning of "sex" in Title IX to include "gender identity" with respect to its application to transgender students and rejecting the school board's argument that its bathroom policy, which separates students on the basis of assigned sex at birth, was substantially related to its interest in either student privacy or student safety). The Eleventh Circuit is expected to announce a decision in Adams' case early 2020. *Case Concerning Restroom Access for Transgender Students*, FREEDOM FOR ALL AMERICANS <https://www.freedomforallamericans.org/adams-v-school-board-st-johns-county-florida/> (last visited Dec. 28, 2019).

385. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049–50, 1051–54 (7th Cir. 2017) (allowing a transgender student to proceed on sex-discrimination claims under Title IX based on the theory that forbidding student from using restroom in conformity with their gender identity punishes that person for his or her gender non-conformance, in violation of Title IX and the Equal Protection Clause based on sex stereotyping theory).

386. *Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-54, 2019 WL 3774118, at \*11, \*13 (E.D. Va. Aug. 9, 2019). An appeal of the district court's ruling to the Fourth Circuit was filed on September 3, 2019. *Grimm v. Gloucester Cty. Sch. Bd.*, Docketing Notice, No. 19-952 (No. 4:15-CV-00054-AWA-RJK) (4th Cir.) (Filed Sept. 3, 2019).

387. See, e.g., *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 295, 301 (W.D. Penn. 2017) (finding student-plaintiffs reasonably likely to succeed on equal protection grounds and granting a preliminary injunction preventing the school district from enforcing its bathroom policy but finding that student-plaintiffs were unlikely to succeed on Title IX claim and denying their request for injunctive relief on that ground); see also *A.H. v. Minersville Area Sch. Dist.*, No. 3:17-CV-391, 2019 WL 4875331, at \*28, 34 (M.D. Penn. Oct. 2, 2019).

388. See *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420 (Mo. 2019) (en banc) (holding that a transgender student adequately alleged the elements of a sex discrimination claim under the Missouri Human Rights Law when his school denied him access to the boys' restrooms and locker rooms); MO. ANN. STAT. § 213.065 (West 2017).

389. 326 F. Supp. 3d 1075, 1110 (D. Or. 2018) (oral arguments heard by the 9th Cir. on July 11, 2019).



dictated that they adhere to certain standards of modesty, which included not using restrooms or changing in front of members of the opposite sex.<sup>390</sup> The United States District Court for the District of Oregon rejected this argument and found that the policy was neutral and generally applicable with respect to religion because the school district did not force anyone to embrace a particular religious belief or punish anyone for expressing their beliefs and the claim that the policy is overly burdensome was overly generalized and inapplicable to any plaintiff.<sup>391</sup> Parents for Privacy challenged a similar policy enacted by an Illinois school district and made the same argument—that the policy burdened students’ free exercise of religion—and had more success there.<sup>392</sup> Though the district court in that case noted that the school’s policy was facially neutral, it nevertheless found that Plaintiffs had made a plausible claim under the Free Exercise Clause of the First Amendment because the school district had apparently indicated that students who objected to the policy are bigots or intolerant, which could be a departure from neutrality.<sup>393</sup>

Right to privacy arguments have also been raised to challenge the constitutionality of these policies. For example, in *Parents for Privacy v. Dallas School District No. 2*, Plaintiffs also argued that the school’s policy violated cisgender individuals’ right to privacy under the Fourteenth Amendment.<sup>394</sup> Parents for Privacy argued that cisgender students’ “ability to be clothed in the presence of the opposite biological sex and to use facilities away from the presence of the opposite biological sex . . . is fundamental to most people’s sense of self-respect and personal dignity, including plaintiffs’, who should be free from State-compelled risk of exposure of their bodies, or their intimate activities.”<sup>395</sup> In other words, Parents for Privacy claimed that there is a fundamental “right to privacy of one’s fully or partially unclothed body and the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex.”<sup>396</sup> This argument was rejected by the court, which found that there is no such fundamental right to privacy like the one Plaintiffs mentioned under the Fourteenth Amendment, and that cisgender high school students do not have a fundamental privacy to not share school facilities with transgender classmates whose gender identities are the

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390. *Id.*

391. *Id.*

392. *Students and Parents for Privacy v. Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891, 907 (N.D. Ill. 2019).

393. *Id.*

394. *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075 (D. Or. 2018) (oral argument heard by 9th Cir. on July 11, 2019). Parents for Privacy also argued that the school’s policy violated the Oregon state public accommodations law because transgender students present in school facilities denies equal access to those students who “are ashamed or embarrassed to share [school facilities] with transgender students.” *Id.* at 1106–07. The district court rejected this argument because the students were not actually denied access to any facilities and because feelings of embarrassment or shame do not amount to unlawful discrimination in a public accommodation. *Id.* at 1107.

395. *Id.* at 1092.

396. *Id.*

same as their own.<sup>397</sup> This argument was also rejected by the Northern District of Illinois.<sup>398</sup>

A privacy argument brought by cisgender students in *Doe v. Boyertown Area School District* was rejected by the Third Circuit, but not because it did not want to expand substantive due process rights.<sup>399</sup> Instead, it held that a school district's policy of allowing transgender students to use bathrooms and locker rooms consistent with their gender identities "'served a compelling state interest in not discriminating against transgender students' and was narrowly tailored to that interest."<sup>400</sup> The Supreme Court later declined to take this case.<sup>401</sup>

## B. HOUSING

Transgender individuals are frequently denied access to one of our most basic needs, housing. One in five transgender people in the United States have faced discrimination when seeking a home, and more than one in ten have been evicted from their homes because of their gender identity.<sup>402</sup> According to another survey, 19% of transgender respondents reported being denied a home or apartment because they were transgender, and 11% reported being evicted because they were transgender.<sup>403</sup>

Transgender individuals are also more likely to experience homelessness than cisgender individuals. According to HUD's 2018 Annual Homeless Assessment Report (AHAR) to Congress, there are 2446 transgender individuals experiencing homelessness and 1075 gender non-conforming individuals experiencing homelessness.<sup>404</sup> These individuals make up 0.7% and 0.3% of all individuals experiencing homelessness, respectively.<sup>405</sup> One in five transgender individuals have reportedly experienced homelessness at some point in their lives;<sup>406</sup> other sources place this number at one in three.<sup>407</sup> Because of pervasive discrimination,

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397. *Id.* at 1099–1101.

398. *Students and Parents for Privacy v. Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891, 901 (N.D. Ill. 2019).

399. *See* 897 F.3d 518 (3d Cir. 2018), *cert denied*, 139 S. Ct. 2636 (2019).

400. *Id.* at 528.

401. *Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019).

402. *Housing & Homelessness*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/housing-homelessness> (last visited Jan. 31, 2020).

403. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. AND NAT'L GAY AND LESBIAN TASK FORCE, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 106* (2011), *available at* [https://www.transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf).

404. U.S. DEP'T OF HOUSING & URBAN DEV., *THE 2018 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 23* (2018), *available at* <https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>.

405. *Id.*

406. *Housing & Homelessness*, *supra* note 402.

407. Tracy Jan, *Proposed HUD rule would strip transgender protections at homeless shelters*, WASH. POST (May 22, 2019, 3:05 PM), <https://www.washingtonpost.com/business/2019/05/22/proposed-hud-rule-would-strip-transgender-protections-homeless-shelters/>.

transgender individuals are often turned away from shelters or are harassed by staff or residents while they are there.<sup>408</sup>

Although there is significant discrimination acting as a barrier for transgender individuals to access housing, there are protections in place at both the federal and state levels. Most notably on the federal level is the Fair Housing Act. The U.S. Department of Housing and Urban Development (HUD) has issued rulings that extend gender identity protections to individuals seeking housing in facilities covered by the FHA. Additionally, a number of states have antidiscrimination statutes that offer similar protections as the FHA does on the state level.

### 1. Federal Policy

The Fair Housing Act (FHA) is the major federal statute regarding housing discrimination. It prohibits housing discrimination on the basis of race, color, national origin, religion, sex, familial status, and disability.<sup>409</sup> The U.S. Department of Housing and Urban Development (HUD) currently interprets the Fair Housing Act's prohibition on sex-based discrimination to include discrimination based on sexual orientation or gender identity.<sup>410</sup> Additionally, HUD issued its finalized Gender Identity Rule in 2016.<sup>411</sup> The Rule requires equal access to HUD programs without regard to a person's actual or perceived sexual orientation or gender identity.<sup>412</sup> It also ensures that, where it is appropriate to consider gender or sex in housing, an individual's own self-identified gender will govern access to housing facilities.<sup>413</sup> Housing providers that receive HUD funding, including shelters, or have HUD-insured loans are subject to the Rules.<sup>414</sup> Thus, under the FHA, any landlord or housing provider is prohibited from discriminating against individuals because of their "real or perceived gender identity or any other reason that constitutes sex-based discrimination."<sup>415</sup>

A proposed revision to HUD's Gender Identity Rule threatens to weaken the rule's protections for transgender individuals. It would allow shelter providers under HUD programs that permit single-sex or sex-segregated

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408. *LGBT Homelessness*, NAT'L COALITION FOR THE HOMELESS (June 2017), <https://nationalhomeless.org/wp-content/uploads/2017/06/LGBTQ-Homelessness.pdf>. Twenty-nine percent of transgender individuals who tried to access shelter were turned away, while fifty-five percent experienced harassment.

409. 42 U.S.C. § 3604(a) (2018).

410. *Housing Discriminations and Persons Identifying as LGBTQ*, U.S. DEP'T OF HOUSING & URBAN DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/housing\\_discrimination\\_and\\_persons\\_identifying\\_lgbtq](https://www.hud.gov/program_offices/fair_housing_equal_opp/housing_discrimination_and_persons_identifying_lgbtq) (last visited Feb. 27, 2020).

411. Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs Rule, 24 C.F.R. § 5.106 (2016).

412. *Id.*

413. *Id.* The Rule mentions a facility that provides temporary, short-term shelter that is not covered by the FHA and which is legally permitted to operate as a single-sex facility as an example of when it may be appropriate to consider an individual's gender identity or sex.

414. *Id.*

415. *HUD LGBTQ Resources*, U.S. DEP'T OF HOUSING & URBAN DEV., [hud.gov/LGBT\\_resources](https://www.hud.gov/LGBT_resources) (last visited Feb. 27, 2020).

facilities to consider “an individual’s sex for the purposes of determining accommodation within such shelters and for purposes of determining sex for admission to any facility or portion thereof.”<sup>416</sup> Pursuant to this revision, shelter providers would be permitted to consider various factors when deciding whether to admit a person to such a facility, including “privacy, safety, practical concerns, religious beliefs, any relevant considerations under civil under civil rights and nondiscrimination authorities, the individual’s sex as reflected in official government documents, as well as the gender which a person identifies with.”<sup>417</sup> On May 21, 2019, HUD Secretary Ben Carson testified in front of the U.S. House Committee on Financial Services and indicated that he did not intend to change the Rule.<sup>418</sup> However Carson indicated that he did not plan to change the Rule one day before HUD announced its proposed change.<sup>419</sup> Later, Carson suggested that permitting transgender women to seek safety in women’s shelters would, in his opinion, afford those women “special rights,”<sup>420</sup> and would make the cisgender women at those shelters uncomfortable.<sup>421</sup> He further suggested that such discomfort and “the rights of everybody”<sup>422</sup> should be considered when evaluating HUD policies.

A person who identifies as LGBTQ who has experienced (or is about to experience) discrimination because of sexual orientation or gender identity may file a complaint with HUD.<sup>423</sup> Some transgender individuals who have been discriminated against by landlords have been successful in suing those landlords for sex discrimination. In one such case, the United States District Court for the District of Colorado found that one landlord’s refusal to rent to a transgender woman and her wife and children was based on sex stereotypes, which amounted to sex discrimination in violation of the FHA.<sup>424</sup>

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416. Revised Requirements Under Community Planning and Development Housing Programs, 84 Fed. Reg. 6152 (proposed Sept. 2019) (to be codified at 24 C.F.R. 5).

417. *Id.*

418. Catherine Lizette Gonzalez, *HUD Rule Allows Homeless Shelters to Deny Admission to Transgender People*, COLORLINES (May 23, 2019, 5:12 PM), <https://www.colorlines.com/articles/hud-rule-allows-homeless-shelters-deny-admission-transgender-people/>; Jan, *supra* note 407.

419. Jan, *supra* note 407.

420. Tracy Jan, *As Democrats call for his resignation, HUD Secretary Ben Carson defends his controversial comments about transgender people*, WASH. POST BUS. (Sept. 20, 2019, 10:50 PM), <https://www.washingtonpost.com/business/2019/09/20/democrats-call-his-resignation-hud-secretary-ben-carson-defends-his-controversial-comments-about-transgender-people/>.

421. *Id.*

422. Katy O’Donnell, *Ben Carson defends transgender remarks, blames media ‘mischaracterizations.’* POLITICO (Sept. 20, 2019, 6:25 PM), <https://www.politico.com/story/2019/09/20/ben-carson-defends-transgender-remarks-1506883>.

423. 24 C.F.R. §5.106 (2016).

424. *See Smith v. Avanti*, 249 F. Supp. 3d 1194, 1201 (D. Colo. 2017).

## 2. State Policy

There are currently twenty-one states which have laws prohibiting discrimination based on sexual orientation and gender identity.<sup>425</sup> Like the laws prohibiting discrimination in places of public accommodation, some states do not enumerate gender identity as a protected class, but the protection reaches transgender individuals through the state's definition of sexual orientation.<sup>426</sup> There is also overlap with the interpretation of public accommodations laws and housing discrimination laws in Michigan, Pennsylvania, and Missouri. As discussed above, interpretive statements issued by the Michigan Civil Rights Commission and the Pennsylvania Human Relations Agency counsel that sex discrimination prohibited by statutes includes gender identity.<sup>427</sup> Similarly, the Missouri Supreme Court opinions expanding the prohibitions against sex discrimination to sexual orientation and gender identity would apply to interpretations of Missouri housing discrimination laws.<sup>428</sup>

Vermont's law is representative of the general type of protections against housing discrimination that states afford individuals. It is unlawful in Vermont to refuse to sell or rent a dwelling or other type of real estate to a person because of their gender identity.<sup>429</sup> It is similarly unlawful to refuse to negotiate the sale or rental of a dwelling or other real estate to someone because of their gender identity.<sup>430</sup> Discrimination in the terms of sale or rental for housing is also prohibited,<sup>431</sup> as is posting advertising anything that indicates the seller or landlord would limit the housing based on gender identity.<sup>432</sup> Finally, sellers and landlords

425. *Equality Maps: State Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) (last visited Nov. 17, 2019); *State Maps of Laws & Policies: Housing*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/state-maps/housing> (last updated June 11, 2018). The states are: California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, and Washington. Wisconsin prohibits discrimination based on sexual orientation only. *See, e.g.*, WIS. STAT. ANN. § 106.50 (West 2018). Sexual orientation is not defined to include transgender individuals—per Wisconsin law, sexual orientation “means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference.” WIS. STAT. ANN. §§ 111.32(13m) (West 2016); WIS. STAT. ANN. § 106.50(1)(t) (West 2018).

426. *See, e.g.*, ME. REV. STAT. ANN. tit. 5., § 4581-A (2012) (providing protection against housing discrimination on the basis of sexual orientation but not gender identity); ME. REV. STAT. ANN. tit. 5 § 4553(9-C) (2019) (defining sexual orientation as “a person’s actual or perceived. . . gender identity or expression”).

427. *See* Mich. Civil Rights Comm’n, Interpretive Statement 2018-1; Pa. Human Relations Comm’n, Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act. The relevant statutes prohibiting housing discrimination are MICH. COMP. LAWS ANN. § 37.2502 (West 2019) and 43 PA. STAT. ANN. § 955 (West 2019).

428. *See* R.M.A. v. Blue Ridge Springs R-IV Sch. Dist., 568 S.W.3d 420 (Mo. 2019) (en banc); *Lampley v. Mo. Comm’n on Human Rights*, 570 S.W.3d 16 (Mo. 2019) (en banc).

429. VT. STAT. ANN. tit. 9, § 4503(a)(1) (West 2019).

430. *Id.*

431. VT. STAT. ANN. tit. 9, § 4503(a)(2) (West 2019).

432. *Id.* at § 4503(a)(3).

cannot tell a person that a unit is unavailable because of the person's gender identity when in fact it is available.<sup>433</sup>

## VI. IDENTITY DOCUMENTS

The importance of having identity documents that match a person's gender identity cannot be overstated. Without accurate identity documents, a person can face severe hardship in their day-to-day life—a person without identification cannot travel, cannot register for school, and may be prevented from accessing emergency housing or other public services.<sup>434</sup> Lack of access to appropriate identity documents can interfere with transgender individuals' ability to secure employment, as inaccuracies may disclose transgender status to prospective public employers through "gender matching," which means that the Social Security Administration notifies prospective employers when the gender marker on an individual's job application does not match the Administration's records.<sup>435</sup> This practice means that qualified individuals could risk losing job opportunities due to discrimination.

Additionally, transgender individuals whose identity documents do not accurately reflect their gender identity experience harassment. The National Center for Transgender Equality reports that nearly 32% of 27,715 respondents to its 2015 U.S. Transgender Survey who have shown an ID with a name or gender marker that did not accurately reflect their gender presentation were "verbally harassed, denied benefits or service, asked to leave, or assaulted."<sup>436</sup> In a different survey conducted by, the National Center for Transgender Equality and the National Gay and Lesbian Task Force, 40% of those who presented an ID that did not match their gender identity reported being harassed;<sup>437</sup> 3% reported being attacked or assaulted;<sup>438</sup> and 15% reported being asked to leave.<sup>439</sup> Beyond just harassment, the presenting an identity document that does not accurately reflect an individual's gender identity forces transgender individuals to reveal intimate details about their personal lives—this invasion of privacy has been a basis for challenging state policies prohibiting corrections to gender or sex markers on identity documents.<sup>440</sup>

Barriers to acquiring adequate identity documents exist not only because the process in many states is restrictive or complex, but also because it can be cost

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433. *Id.* at § 4503(a)(4).

434. *Understanding the Transgender Community*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/understanding-the-transgender-community> (last visited Jan. 19, 2020).

435. *Identity Documents*, LAMBDA LEGAL (Nov. 17, 2016), [https://www.lambdalegal.org/sites/default/files/transgender\\_booklet\\_-\\_documents.pdf](https://www.lambdalegal.org/sites/default/files/transgender_booklet_-_documents.pdf).

436. JAMES ET AL. *supra* note 121, at 7.

437. JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 5 (2011), *available at* [https://www.transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf).

438. *Id.*

439. *Id.*

440. *See, e.g.,* *Love v. Johnson*, 146 F. Supp. 3d 848, 850–51 (E.D. Mich. 2015).

prohibitive. The 2015 U.S. Transgender Survey reported that 35% of those who have not changed their legal name and 32% of those who have not changed the gender markers on their identity documents have not done so because they could not afford it.<sup>441</sup>

#### A. FEDERAL RULES

There is no overarching federal policy governing the correction of identity documents. In general, various federal agencies including the State Department, Social Security Administration, Department of Homeland Security, and Veteran's Health Administration do not require proof of any surgery and instead require proof of "appropriate clinical treatment for gender transition."<sup>442</sup> This phrase is meant to capture a variety of clinical treatment methods that people use to facilitate gender transition, including changes in gender expression, psychotherapy, hormone therapy, or surgery.<sup>443</sup>

To change update the gender marker on an existing passport, the State Department requires a certification letter from a licensed physician who has provided the applicant with gender-related care.<sup>444</sup> How long a passport will be valid depends on what stage of transition a person is in—an adult who has completed appropriate clinical treatment for gender transition (as determined by that person's physician) will have a passport that is valid for 10 years, while a person in the process getting appropriate clinical treatment will have a passport that is valid for 2 years.<sup>445</sup> Those in the process of transition may apply for a full-validity passport once their doctor indicates that they have completed their treatment.<sup>446</sup>

Social security and immigration documents as well as veteran records may be changed using various forms of evidence for changing a gender marker, including a valid passport with a correct gender, a state-issued birth certificate, a court order, or a signed letter from a physician indicating clinical treatment for gender transition.<sup>447</sup>

441. JAMES ET AL., *supra* note 121.

442. See, e.g., *Know Your Rights*, NAT'L CTR. FOR TRANSGENDER EQUAL. COMMUNITY, <https://transequality.org/know-your-rights> (last visited Jan. 19, 2020).

443. *Id.*; see also ELI COLEMAN ET AL., STANDARDS OF CARE, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE, THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH (2012), available at [https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care\\_V7%20Full%20Book\\_English.pdf](https://www.wpath.org/media/cms/Documents/SOC%20v7/Standards%20of%20Care_V7%20Full%20Book_English.pdf) (outlining clinical treatment methods).

444. *Change of Sex Marker*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/passports/need-passport/change-of-sex-marker.html> (last visited Jan. 19, 2019).

445. *Id.*

446. *Id.*

447. *How do I change my gender on Social Security's records?*, SOCIAL SECURITY ADMIN., <https://faq.ssa.gov/en-us/Topic/article/KA-01453> (last updated Jan. 31, 2019); *Know Your Rights: Social Security*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/social-security> (last visited Jan. 19, 2020); see also Policy Memorandum on Change of Gender Designation on Documents, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Jan. 19, 2017), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-1-19ChangeGenderDesignation-PM-602-0141.pdf>; *Know Your Rights: Immigration Documents*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://>

One federal program—the Selective Service—does not recognize changes of gender, as it is an entirely birth-assigned sex system.<sup>448</sup> This means that those assigned male at birth must register regardless of transition status.<sup>449</sup> Individuals who are assigned male at birth and who have changed their names are required to notify the Selective Service of the change by letter and within 10 days.<sup>450</sup>

## B. STATE RULES

The process by which identity documents may be changed to accurately reflect an individual's name and/or gender identity vary widely based on state laws and administrative policies. The National Center for Transgender Equality's Identity Documents Center provides relevant information about each state's procedures.<sup>451</sup>

### 1. Drivers' Licenses

Successful legal challenges to the process for changing the gender marker on driver's licenses have been made in Michigan and Alaska.<sup>452</sup> The ACLU brought suit against the Michigan Secretary of State, in which it challenged the department's policy of requiring transgender individuals who applied to change the sex marker on their driver's licenses to present a birth certificate—the only acceptable form of proof—with the appropriate sex marker, which in turn required that the individual undergo gender-affirmation surgery, in *Love v. Johnson*.<sup>453</sup> In ruling on Michigan's motion to dismiss, the United States District Court for the Eastern District of Michigan found that Plaintiffs made out a cognizable claim that the state's policy infringed on their right to privacy under the Fourteenth Amendment by forcing transgender individuals to reveal their transition status to strangers.<sup>454</sup> After the district court denied Michigan's motion to dismiss, the state changed its policy and the lawsuit was dismissed.<sup>455</sup> Transgender individuals

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transequality.org/know-your-rights/immigration-documents (last visited Jan. 19, 2020); *Know Your Rights: Military Records*, NAT'L CTR. FOR TRANSGENDER EQUAL, <https://transequality.org/know-your-rights/military-records> (last visited Jan. 19, 2020).

448. *Selective Service and Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL (Dec. 3, 2019), <https://transequality.org/issues/resources/selective-service-and-transgender-people>.

449. *Id.*

450. *Id.*

451. *ID Documents Center*, NAT'L CTR. FOR TRANSGENDER EQUAL, <https://transequality.org/documents> (last visited Jan. 19, 2020); *National Equality Map*, TRANSGENDER LAW CTR., <https://transgenderlawcenter.org/equalitymap> (last visited Jan. 19, 2020); *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> (last updated Sept. 17, 2018).

452. *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015); *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431 Cl., 2012 WL 2685183 (Super. Ct. Alaska Mar. 12, 2012)

453. *Love*, 146 F. Supp. 3d at 850–51.

454. *Id.* at 856–57.

455. *Love v. Johnson*, No. 15-11834, 2016 WL 4437667 (E.D. Mich. 2016).



may now use their passport to prove their gender.<sup>456</sup> The ACLU of Michigan notes that this is an improvement from the previous policy because no surgery is required, but it is still burdensome on transgender individuals who either do not need a passport or who cannot acquire one, either because it is cost prohibitive or because they are not a citizen.<sup>457</sup>

A right to privacy argument was similarly successful in Alaska state court in *K.L. v. Department of Administration, Division of Motor Vehicles*.<sup>458</sup> Alaska's policy at the time required proof of gender-affirmation surgery in order to change the gender marker on a driver's license, which both parties agreed was invalid.<sup>459</sup> Because the policy was deemed invalid, however, Alaska then had no procedure for changing the sex marker on driver's licenses, which the court found violated transgender individuals' rights under the state constitution, as furnishing a license with an incorrect gender marker to third parties forced transgender individuals to disclose that they are transgender.<sup>460</sup> Alaska later changed its policy and no longer requires proof of surgery to change the gender marker on licenses.

Litigation is ongoing to change Alabama's policy for changing the gender markers on driver's licenses. Alabama currently has an "F" rating from the National Center for Transgender Equality (NCTE), an organization that grades each state's policies for changing gender markers on identity documents.<sup>461</sup> Like Michigan and Alaska, Alabama prohibits transgender individuals from changing the gender marker on their driver's licenses unless they provide proof that they have undergone a form of gender-affirming surgery approved by the state.<sup>462</sup> Plaintiffs argue that this policy violates their Fourteenth Amendment due process rights to privacy and to make private medical decisions without government intrusion,<sup>463</sup> their First Amendment right to refrain from speaking by forcing them to disclose private information about their transgender status,<sup>464</sup> and the Fourteenth Amendment Equal Protection Clause by discriminating against transgender individuals on the basis of sex.<sup>465</sup> The district court heard arguments on

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456. *Love v. Johnson: ID Lawsuit*, ACLU OF MICH., <https://www.aclumich.org/en/cases/love-v-johnson-id-lawsuit> (last visited Jan. 19, 2020).

457. *Id.*

458. *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431 Cl., 2012 WL 2685183 (Super. Ct. Alaska Mar. 12, 2012).

459. *Id.* at \*3.

460. *Id.* at \*6.

461. *How Trans-Friendly Is the Driver's License Gender Change Policy in Your State?*, NAT'L CTR. FOR TRANSGENDER EQUAL, <https://transequality.org/sites/default/files/docs/resources/Drivers%20License%20Grades%20Jan%202020.pdf> (last visited Jan. 19, 2020). The Movement Advancement Project also grades the various identity document policies of each state with an adapted version of the NCTE's letter grading system. *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/img/maps/citations-id-drivers-license.pdf> (last updated Nov. 18, 2019).

462. *Id.*

463. First Amended Complaint for Declaratory and Injunctive Relief at 19-21, *Corbett v. Taylor*, No. 2:18cv91-MHT (M.D. Ala. July 25, 2018).

464. *Id.* at 21-22.

465. *Id.* at 22-23.

summary judgment in July 2019 and denied both parties' motions for summary judgment, so the case is still ongoing.<sup>466</sup>

According to the NCTE's grading system, 15 states earned a grade in the "A" range.<sup>467</sup> Thirteen states and the District of Columbia do not require a certification from a medical provider to change the gender marker on a driver's license; 11 of those states offer a gender-neutral "X" option in place of an "M" or "F" gender marker.<sup>468</sup> Some of these states—Hawaii, Illinois, New Hampshire, Pennsylvania, and Washington—have passed legislation to allow gender-neutral markers but the option has not been implemented yet.

Thirteen states and Puerto Rico earned grades in the "B" range. These states require certification from a licensed professional—some states have more limited ranges of licensed professionals than others—and they generally have what the NCTE characterizes as an easy to understand form for changing the gender marker.<sup>469</sup> In the "C" range are eight states: six do not require proof of surgery or a court order, but do require certification from a medical or mental health professional,<sup>470</sup> the other two states—Michigan and Utah—do not require proof of surgery, a court order, or an amended birth certificate but do have what the NCTE characterizes as burdensome process requirements.<sup>471</sup> Michigan requires an updated passport and Utah requires an updated passport or birth certificate, and it also has a gender-neutral "X" option.<sup>472</sup>

Thirteen states round out the bottom tier of grades as assigned by the NCTE. Four states earned a "D" grade for having "unclear, unknown or unwritten polic[ies]."<sup>473</sup> Six states, including Alabama as discussed earlier, earned an "F" because they require proof of surgery, a court order, or an amended birth certificate to change the gender marker on a driver's license.<sup>474</sup>

## 2. Birth Certificates

States vary much more on standards for changing the gender marker on a birth certificate than they do for driver's licenses. The majority of states require either proof of surgery, "proof of appropriate treatment," a court order, or some

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466. Order Dismissing Motion for Summary Judgment, *Corbitt v. Taylor*, No. 2:18cv91-MHT (M.D. Ala. July 30, 2019).

467. *How Trans-Friendly Is the Driver's License Gender Change Policy in Your State?*, *supra* note 461.

468. These states include Arkansas, California, District of Columbia, Maryland, Minnesota, Nevada, Oregon, Pennsylvania, Vermont, New Hampshire, Hawaii, Illinois, Massachusetts, and Rhode Island. Massachusetts and Rhode Island do not offer a gender-neutral option, *see id.*

469. These states are Alaska, Connecticut, Delaware, Missouri, New Jersey, New Mexico, North Carolina, Virginia, Washington, Wyoming, Nebraska, Ohio, and West Virginia, *see id.*

470. This includes Arizona, Florida, Idaho, Kansas, New York, and Wisconsin, *id.*

471. *Id.*

472. *Id.*

473. These states are Mississippi, Montana, North Dakota, and South Dakota, *id.*

474. These states are Alabama, Georgia, Iowa, Kentucky, Louisiana, Oklahoma South Carolina, Tennessee, and Texas. *Id.*

combination to change the gender marker on a birth certificate.<sup>475</sup> Georgia requires both a court order and proof of surgery.<sup>476</sup> The statute provides that, to correct a birth certificate, a person must present a certified copy of a court order that indicates both that the person has had surgery and that they have changed their name.<sup>477</sup> A person must submit five documents to successfully change their birth certificate: an affidavit for amendment, a certified copy of the court order changing name and sex, a medical certification signed by the individual's physician, a valid government photo ID, and a money order or cashier's check for the fees.<sup>478</sup>

Twenty-two states and New York City do not require proof of surgery to change the gender marker on a birth certificate.<sup>479</sup> New York City changed its policy to allow an individual to change their birth certificate in 2014.<sup>480</sup> An individual must first submit a birth certificate correction application form, and then may submit a notarized affidavit from one of three types of medical professionals—a physician, nurse practitioner, or physician assistant—that confirms they have undergone “appropriate clinical treatment for gender transition.”<sup>481</sup> Aside from that affidavit, the applicant must submit an application to correct the birth certificate, a notarized affidavit of gender error, a certified copy of their current birth certificate, and a check or money order for the \$30 fee.<sup>482</sup> Separately, as of January 1, 2019, New York City has allowed birth certificates to be updated with a gender-neutral “X” marker without the requirement of medical documentation—the applicant need only submit a self-attestation of their gender.<sup>483</sup>

475. *Summary of State Birth Certificate Gender Change Laws*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/sites/default/files/images/Summary%20of%20State%20Birth%20Certificate%20Laws%20Mar%202020.pdf> (last visited Jan. 19, 2020); *Identity Document Laws and Policies: Birth Certificates*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/img/maps/citations-id-birth-certificate.pdf> (last updated Aug. 10, 2019).

476. GA. CODE ANN. § 31-10-23(e) (West 2004).

477. *Id.*

478. *ID Documents Center—Georgia*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/georgia> (last visited Jan. 19, 2020).

479. *Summary of State Birth Certificate Gender Change Laws*, *supra* note 475.

480. *BREAKING NEWS: New York State Modernizes Requirements for Birth Certificate Gender Markers*, NAT'L CTR. FOR TRANSGENDER EQUAL. (June 5, 2014), <https://transequality.org/blog/breaking-news-new-york-state-modernizes-requirements-for-birth-certificate-gender-markers>.

481. *ID Documents Center—New York*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/new-york> (last visited Jan. 19, 2020); *Correcting the Gender Marker on Your NYC Birth Certificate*, TRANSGENDER LEGAL DEFENSE & EDUC. FUND, [http://tldf.org/headline\\_show.php?id=580](http://tldf.org/headline_show.php?id=580) (last visited Jan 19, 2020). There does not seem to be a specific definition of what constitutes “appropriate medical treatment.” Sample letters for medical professionals are short and simply provide that, in their professional medical judgment, the applicant has had some form of gender-related treatment and should have their gender markers changed. Sample letters for New York are available at [http://www.transgenderlegal.org/media/uploads/doc\\_622.pdf](http://www.transgenderlegal.org/media/uploads/doc_622.pdf) and <https://srp.org/resources/changeid/#sample>.

482. *ID Documents Center—New York*, *supra* note 481.

483. *Notice of Adoption of Amendment to Article 207 of the New York City Health Code*, N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE BD. OF HEALTH, <https://www1.nyc.gov/assets/doh/downloads/pdf/notice/2018/noa-amend-article207-section207-05.pdf> (last visited Jan. 19, 2020).

Tennessee and Ohio are the only states which prohibit correction of gender-markers on birth certificates entirely. Tennessee prohibits correcting birth certificates by statute,<sup>484</sup> while Ohio does not correct birth certificates as a matter of policy.<sup>485</sup> Lawsuits have been filed in both states challenging these policies. In Ohio, the ACLU filed *Ray v. Himes*, which challenges the state's policy on Equal Protection, Due Process, and First Amendment grounds.<sup>486</sup> Ohio argues that Plaintiffs have no constitutional right to change their birth certificates to reflect their gender identity, as Ohio birth certificates only reflect sex assigned at birth.<sup>487</sup> It argues that birth certificates are not compelled speech in violation of the First Amendment but "governmental speech that is a historical reflection of what was reported at the time of a child's birth, not an opinion, objectionable viewpoint, or ideology"<sup>488</sup>; that the policy is not a violation of informational privacy under the Due Process Clause because the birth certificates are "public records, and public records cannot or the basis for an informational privacy claim"<sup>489</sup>; and that the Equal Protection Clause is not violated because the policy is facially neutral and plaintiffs are not members of a protected class.<sup>490</sup> Most recently, the district court denied the state's motion to dismiss, and the case is still ongoing, with cross-motions for summary judgment due on February 13, 2020.<sup>491</sup> In Tennessee, Lambda Legal filed *Gore v. Lee*, which like *Ray*, challenges the state's statute on Equal Protection, Due Process, and First Amendment grounds.<sup>492</sup> On October 22, 2019, the Plaintiffs rejected Defendants' settlement proposal and were unable to make a counterproposal, thus the case is still ongoing.<sup>493</sup>

Prior lawsuits also challenging the policies for changing birth certificate gender markers under similar circumstances have proved successful. Plaintiffs in Idaho challenged an Idaho law which prohibited changes to the sex marker on birth

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484. TENN. CODE ANN. § 68-3-203(d) (West 2011) ("The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery").

485. See *ID Documents Center – Georgia*, *supra* note 478; *Identity Document Laws and Policies*, *supra* note 461.

486. Complaint, *Ray v. Himes*, No. 2:18-cv-00272-MHW-CMV, (S.D. Ohio Mar. 29, 2018); see also Julie Moreau, *Four transgender people sue Ohio over state's birth certificate policy*, NBC NEWS (Apr. 3, 2018), <https://www.nbcnews.com/feature/nbc-out/four-transgender-people-sue-ohio-over-state-s-birth-certificate-n862411>.

487. Memorandum in Support of Defendants' Motion to Dismiss at 1-2, *Ray v. Himes*, No. 2:18-cv-00272-MHW-CMV (S.D. Ohio July 6, 2018).

488. *Id.* at 2.

489. *Id.*

490. *Id.*

491. Opinion and Order at 33, *Ray v. Himes*, No. 2:18-cv-00272-MHW-CMV (S.D. Ohio Sept. 12, 2019).

492. Complaint at 33-41, *Gore v. Lee*, No. 3:19-cv-00328, (M.D. Tenn. April 23, 2019); see also Gwen Aviles, *Transgender plaintiffs sue Tennessee to change birth certificate gender*, NBC NEWS (Apr. 24, 2019), <https://www.nbcnews.com/feature/nbc-out/transgender-plaintiffs-sue-tennessee-change-birth-certificate-gender-n997996>.

493. Joint Resolution Status Report at 1, *Gore v. Lee*, No. 3:19-cv-00328 (M.D. Tenn. Oct. 22, 2019).

certificates unless there was an error in recording the assigned sex at birth.<sup>494</sup> The state conceded that the policy was unconstitutional under the Equal Protection Clause, but it asserted that it needed an order from the court to change the rule.<sup>495</sup> The court agreed that the policy violated the Equal Protection Clause and permanently enjoined the state from enforcing the policy of rejection transgender individuals' applications to change the sex marker on their birth certificates and also ordered it to begin accepting those applications.<sup>496</sup> Plaintiffs were also successful in challenging Puerto Rico's policy which required that birth certificates reflect sex assigned at birth and prohibited transgender individuals from correcting this designation.<sup>497</sup> The court found that this was a violation of transgender individuals' right to privacy under the Fourteenth Amendment because it forced them to disclose their transgender status—their “most private information”<sup>498</sup>—and the disclosure was neither a legitimate governmental interest of a valid exercise of state police powers.<sup>499</sup> Finally, parties in Kansas agreed to settle a lawsuit challenging the state's policy of prohibiting transgender individuals from correcting the sex marker on their birth certificates.<sup>500</sup> The United States District Court for the District of Kansas issued a consent judgment stipulating that the policy violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment and ordered the Kansas Department of Health and Environment and other Kansas officials to provide accurate birth certificates.<sup>501</sup> The gender marker on a Kansas birth certificate now may be changed if the applicant submits a sworn statement requesting the change as well as a passport or driver's license that reflects the applicant's “true sex” or a certification issued by a healthcare or mental health professional stating the true gender identity of the applicant in his or her professional opinion.<sup>502</sup> Pursuant to these successful challenges in Idaho, Puerto Rico, and Kansas, the *Ray* and *Gore* Plaintiffs seem likely to be successful, as they raise similar claims.

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494. *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1136 (D. Idaho 2018).

495. *Id.* at 1134.

496. *Id.* at 1146.

497. *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 330 (D.P.R. 2018).

498. *Id.* at 333.

499. *Id.*

500. Consent Judgment at 2, *Foster v. Anderson*, No. 2:18-cv-02552-DDC-KGG (D. Kan. June 21, 2019).

501. *Id.* at 2–3; see also *Victory! Kansas Agrees to Issue Accurate Birth Certificates to Transgender People*, LAMBDA LEGAL (June 24, 2019), [https://www.lambdalegal.org/news/ks\\_20190624\\_ks-agrees-to-issue-accurate-birth-certificates-to-trans-people](https://www.lambdalegal.org/news/ks_20190624_ks-agrees-to-issue-accurate-birth-certificates-to-trans-people); Tim Carpenter, *Kansas settles lawsuit to allow birth certificate changes for transgender people*, THE TOPEKA CAPITAL-JOURNAL (June 24, 2019), <https://www.cjonline.com/news/20190624/kansas-settles-lawsuit-to-allow-birth-certificate-changes-for-transgender-people>.

502. Consent Judgment at 2-3, *Foster v. Anderson*, No. 2:18-cv-02552-DDC-KGG (D. Kan. June 21, 2019).