

TRANSGENDER RIGHTS AND ISSUES

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I. INTRODUCTION

2020 was a monumental year for the transgender rights movement, which presents unique legal issues within the broader struggle for LGBTQ+ equality. While trans individuals continue to face disproportionate discrimination and violence, in *Bostock v. Clayton County*, the Supreme Court monumentally held that Title VII explicitly protects trans employees.¹ Furthermore, high-profile trans individuals, such as Sarah McBride, who recently became the United States' first trans state senator, are bringing heightened visibility and support to the struggle for transgender rights and social acceptance.² In recent years, trans individuals have competed in the U.S. Open, graced the cover of *TIME* and *Vanity Fair*, presided over courtrooms as judges, and served with distinction in the military.³ 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.⁴ Thirteen years later, the first transgender mayor of a U.S. city, Stu Rasmussen, was elected.⁵ The following year, President Barack Obama nominated the first

1. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

2. Veronica Stracqualursi, *Delaware Democrat Sarah McBride to Become Nation's First-Ever Transgender State Senator*, CNN (Nov. 4, 2020, 10:19 AM), <https://www.cnn.com/2020/11/04/politics/sarah-mcbride-delaware-state-senate/index.html>.

3. *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>.

4. *Id.*

5. *Id.*

openly transgender federal appointees to serve in his administration, later hiring the White House's first openly transgender staff member.⁶ In 2021, newly elected President Joe Biden nominated Rachel Levine to serve as the Assistant Secretary of Health. Levine will be the first openly transgender federal official confirmed by the U.S. Senate.⁷

While trans visibility in popular culture and media is increasing, and efforts are being made to center trans people in social movements, such as #BlackLivesMatter, trans people are still subject to stigma, discrimination, and violence at disproportionate levels.⁸ Federal Bureau of Investigation data shows that incidents of hate crimes motivated by gender identity rose from 33 in 2013 to 118 in 2015 and have remained in the triple-digits in the years since.⁹ Lack of uniform documentation procedures, 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.¹⁰

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. Fifteen states and the District of Columbia have high gender identity equality status; nine states are medium equality states; twelve states are low equality states; and fourteen states are negative equality states.¹¹ Notably, legal protections explicitly covering gender identity lag significantly behind those covering sexual orientation.¹²

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

6. *Id.*

7. Samantha Schmidt et al., *Biden Selects Transgender Doctor Rachel Levine as Assistant Health Secretary*, WASH. POST (Jan. 19, 2021, 6:20 PM), <https://www.washingtonpost.com/health/2021/01/19/rachel-levine-transgender-biden-hhs-pick/>.

8. Kiara Brantley-Jones et al., *Black Trans Lives Matter: Activists Call for Inclusion in Racial Justice Movement*, ABC NEWS (Oct. 20, 2020, 4:53 PM), <https://abcnews.go.com/US/black-trans-lives-matter-activists-call-inclusion-racial/story?id=73571954>.

9. See FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 2015, 4 (2016), https://ucr.fbi.gov/hate-crime/2015/topic-pages/incidentsandoffenses_final.pdf; FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 2013, 4 (2014), https://ucr.fbi.gov/hate-crime/2013/topic-pages/incidents-and-offenses/incidentsandoffenses_final.pdf; see, e.g., FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 2017, 4 (2018), <https://ucr.fbi.gov/hate-crime/2017/topic-pages/incidents-and-offenses.pdf>.

10. 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>.

11. *Snapshot: LGBT Equality by State, Gender Identity*, MOVEMENT ADVANCEMENT PROJECT, <http://www.lgbtmap.org/equality-maps> (last visited Feb. 7, 2021).

12. See *id.* (classifying fourteen states as negative equality regarding gender identity and two states as negative equality regarding sexual orientation).

and other expressions of gender” such as dress, speech, and mannerisms.¹³ 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.¹⁴

On both the state and federal level, trans people lack the legal protections 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 gender identity, and it 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.¹⁵ Under *Price Waterhouse v. Hopkins*, the statute was interpreted to mean that an impermissible consideration of sex cannot be a motivating factor in an employment practice.¹⁶ In 2020, the Supreme Court extended protections to transgender employees holding that “[a]n employer who fires an individual merely for being gay or transgender violates Title VII,” in *Bostock v. Clayton County*.¹⁷ This decision produces a uniform system of federal interpretation.

A. FEDERAL LAW ON EMPLOYMENT DISCRIMINATION AND THE UNITED STATES MILITARY

Bostock v. Clayton County gave transgender Americans federal employment discrimination protections protection under the Civil Rights Act of 1964, falling in line with a number of federal courts that previously recognized Title VII sex

13. INT’L COMM’N OF JURISTS & INT’L SERV. FOR HUMAN RTS., 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.

14. *Id.* at 6 n.1.

15. 42 U.S.C. § 2000e-2(a).

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

17. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1734 (2020).

discrimination claims from trans plaintiffs.¹⁸ In the military context, divergences between the Obama and Trump Administrations reveal disagreement in an area of strong executive authority but changing social understanding. While the Trump Administration called into question the future of service of thousands of transgender troops, the Biden Administration will likely return to, and expand on, the Obama-era guidelines. Either way, in the wake of *Bostock*, many lawmakers argue that Title VII must now be read as prohibiting discrimination against transgender members of the military.

1. Federal Laws on Employment Discrimination Against Transgender People

In the Title VII suits leading up to *Bostock*, transgender plaintiffs followed two main legal theories, choosing to file either sex discrimination claims or sex stereotyping claims.¹⁹ 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 a woman, the employee might allege that the employer discriminated against her based on sex and violated Title VII.²⁰ Alternatively, a trans plaintiff could assert a discrimination claim on a sex or gender stereotyping theory.²¹ 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.²² Under this theory, a trans woman employee could argue that she was fired because the employer believed she should dress in male clothing and present as male.²³ The stereotyping theory is supported largely by *Price Waterhouse v. Hopkins*. The *Price Waterhouse* employee was denied promotion due, in part, to comments made by colleagues that reflected negative stereotypes of how women should behave in the workplace.²⁴ The Supreme Court found that, when an

18. This article will refer to three consolidated Supreme Court cases on LGBTQ+ rights, *Bostock v. Clayton Cty.*, *Altitude Express v. Zarda*, and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, as *Bostock*.

19. See Vanita Gupta & Sharon McGowan, *Symposium: Let's Talk About Sex: Why Title VII Must Cover Sexual Orientation and Gender Identity*, SCOTUSBLOG (Sept. 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/>.

20. See *Macy v. Holder*, EEOC Decision No. 0120120821, 2012 WL 1435995, at *10 (Apr. 20, 2012) (explaining that proving sex discrimination does not require showing evidence of gender stereotyping).

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

22. See Gupta & McGowan, *supra* note 19.

23. See *Macy*, 2012 WL 1435995, at *10.

24. 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.

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.²⁵

Trans plaintiffs generally were more successful when they utilized the sex stereotyping theory articulated by *Price Waterhouse*. While some courts recognized claims by transgender plaintiffs as sex discrimination under Title VII,²⁶ others were hesitant in the absence of an explicit gender stereotype non-conformity argument.²⁷ The Seventh and Tenth Circuits 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 Title VII.²⁸ On the other hand, some courts accepted such claims, reasoning that by requiring the employer to first take the plaintiff's sex into account, adverse actions due to transgender status constituted discrimination "because . . . of sex."²⁹ For example, in *Schroer v. Billington*, the United States District Court for the District of Columbia 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.³⁰

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.³¹ The agency noted that Title VII must be interpreted to proscribe gender-based discrimination as well as biological

25. *Id.* at 244-45.

26. *See Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (quoting *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)) ("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."); *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"); *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"); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (quoting *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007)) ("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].'").

27. *See Etsitty*, 502 F.3d at 1215 (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).

28. *Etsitty*, 502 F.3d at 1222; *Ulane v. E. Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1981).

29. *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

30. *See id.* at 306-308 (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).

31. *Macy*, 2012 WL 1435995, at *7.

sex-based discrimination.³² 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*.³³ 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."³⁴

In 2019, plaintiff Aimee Stephens's case, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,³⁵ made its way to the Supreme Court for a decision on whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse*.³⁶ Aimee Stephens, a transgender woman, was employed as a funeral director at R. G. & G.R. Harris Funeral Homes from April 2008 to August 2013.³⁷ Throughout her employment, Stephens presented as a man and used her then-legal name.³⁸ Funeral home policy required male employees to wear suits and ties and required female employees to wear skirts and business jackets.³⁹ The funeral home provided male employees with clothing and allowances and did not do the same for female employees.⁴⁰ In July 2013, Stephens provided her employer with a letter stating her lifelong struggles with gender identity and her intentions to return to work as a woman in appropriate attire following a scheduled vacation.⁴¹ Before the vacation, Stephens was fired.⁴² Her employer testified that the reason for the termination was that "[Stephens] was no longer going to represent himself as a man. He wanted to dress as a woman."⁴³

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.⁴⁴ After failing to conciliate, the EEOC filed a complaint against the funeral home in the district court on September 25, 2014.⁴⁵ The district court agreed with the funeral home that transgender status is not a protected class under Title VII and held that the EEOC

32. *Id.* at *6.

33. *Id.* at *7.

34. *Id.* at *10.

35. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *aff'd in part*, 139 S. Ct. 1599 (2019).

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

37. *Harris Funeral Homes*, 884 F.3d at 567.

38. *Id.*

39. *Id.* at 568.

40. *Id.*

41. *Id.* at 568–69.

42. *Id.* at 569.

43. *Id.*

44. *Id.*

45. *Id.*

could not bring a claim based solely on transgender status.⁴⁶ 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.⁴⁷ Despite recognizing Stephens's 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.⁴⁸

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.⁴⁹ The court relied on a sex stereotyping theory under *Price Waterhouse v. Hopkins*.⁵⁰ 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.⁵¹

The Supreme Court heard oral argument in the case on October 8, 2019. The EEOC, Stephens, and some *amici* asked the Court to uphold the Sixth Circuit's judgment.⁵² The funeral home and federal respondents in the case sought reversal. The Trump Administration urged the EEOC to switch its position before the Supreme Court and argue that businesses can discriminate against trans employees.⁵³ The EEOC declined to do so and refused to sign onto the government's amicus brief in *Harris Funeral Homes*.⁵⁴

The United States and the Department of Justice 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.⁵⁵ Petitioners further argued that Title VII requires showing that an employer treated members of one sex less favorably than

46. 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).

47. *Id.* at 603.

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

49. *Harris Funeral Homes*, 884 F.3d at 574–75.

50. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989); *Harris Funeral Homes*, 884 F.3d at 576.

51. *Id.* at 576–77.

52. See Brief for Respondent at 1, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107), 2019 WL 2745392.

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

54. See Marcia 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/eeoc-doesnt-sign-trump-doj-supreme-court-brief-against-transgender-employees>.

55. Brief for Fed. Respondent Supporting Reversal at 19, 22, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107), 2019 WL 3942898.

members of the opposite sex.⁵⁶ By treating all transgender persons—regardless of whether they identify as male or female—in a uniform manner, the government argued that no disparate treatment exists.⁵⁷ The government argued that, since Stephens was not alleging that the dress code would treat an individual assigned female at birth more favorably, she could not show that the dress code imposed disadvantageous terms or conditions of employment based on sex.⁵⁸ The government also disagreed with Stephens’s interpretation of *Price Waterhouse*, arguing that it did not establish sex stereotyping as a freestanding theory of Title VII liability.⁵⁹

On June 15, 2020, the Supreme Court delivered the *Bostock* opinion, and ruled with a 6-3 vote that Title VII’s prohibition on sex discrimination protects employees who are fired for being transgender. Justice Neil Gorsuch wrote the majority opinion in which he employed simple textualism and the sex-stereotyping argument articulated in *Price Waterhouse*. Gorsuch found that “transgender status” is “inextricably bound up with sex . . . because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.”⁶⁰ Exemplifying the Court’s reasoning, Gorsuch wrote:

Take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.⁶¹

Title VII explicitly “prohibits employers from taking certain actions ‘because of’ sex,” which the majority read as therefore banning discrimination against trans employees.⁶²

Before *Bostock*, protections for trans employees varied greatly throughout the United States. Twenty-three states were located in federal circuits that explicitly interpreted Title VII as including gender identity,⁶³ and twenty-two states and the District of Columbia had passed laws including gender identity as a protected class in employment.⁶⁴ *Bostock* creates a uniform system of interpretation for lower courts and makes routes to relief outside of Title VII less necessary.

56. *Id.* at 31–32, 34.

57. *Id.*

58. *Id.* at 39–40.

59. *Id.* at 45.

60. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1742 (2020).

61. *Id.* at 1741.

62. *Id.* at 1739.

63. *Federal Court Decisions*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/federal_court_decisions (last visited Jan. 16, 2020).

64. *Non-Discrimination Laws: Employment*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Jan. 16, 2020).

However, the Court made it clear that the ruling is limited, and it explicitly stated that it does not address religious exemptions to anti-discrimination laws or the ever-present topic of bathroom access.⁶⁵ Furthermore, exemptions to Title VII still allow many employers to fire trans employees on the basis of their gender identity because Title VII does not apply to businesses with fewer than fifteen employees.

Aimee Stephens, the transgender plaintiff in *Bostock*, died on May 12, 2020, just over a month before the Supreme Court ruled in her favor.⁶⁶

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.⁶⁷ The DOD listed “transsexualism” as a psychosexual condition that precluded military service.⁶⁸ The policy called for the administrative separation of those diagnosed with “mental disorders” that were so severe that the disorder significantly impaired “the member’s ability to function effectively in the military environment.”⁶⁹

In June 2016, Secretary of Defense Ashton Carter lifted the transgender military ban.⁷⁰ Defense Secretary Ashton B. Carter issued Directive Type Memo 16-005, which allowed transgender servicemembers to serve openly in the Armed Forces.⁷¹ The repeal followed completion of two directives:⁷² the first directive established working groups to study the policy and readiness implications of open transgender service, and the second directive delegated decision-making authority for administrative separations related to transgender persons to Brad Carson, the Acting Under Secretary of Defense for Personnel and Readiness.⁷³ Secretary Carter explained the move, in part, by emphasizing that the military needs to

65. *Bostock*, 140 S. Ct. at 1753.

66. Amy Howe, *Opinion Analysis: Federal Employment Discrimination Law Protects Gay and Transgender Employees (Updated)*, SCOTUSBLOG (June 15th, 2020 12:28 PM), <https://www.scotusblog.com/2020/06/opinion-analysis-federal-employment-discrimination-law-protects-gay-and-transgender-employees/>.

67. See Terri Moon Cronk, *Transgender Service Members Can Now Serve Openly, Carter Announces*, DOD NEWS (June 30, 2016), <https://www.defense.gov/Explore/News/Article/Article/822235/transgender-service-members-can-now-serve-openly-carter-announces/>.

68. KRISTY N. KAMARCK, CONG. RESEARCH SERV., IN10264, WHAT ARE THE DEPARTMENT OF DEFENSE (DOD) POLICIES ON TRANSGENDER SERVICE? (2015), <https://fas.org/sgp/crs/natsec/IN10264.pdf>.

69. U.S. DEP’T OF DEF., INSTRUCTION NO. 1332.14, ENLISTED ADMINISTRATION SEPARATIONS (2014).

70. Cronk, *supra* note 67.

71. U.S. DEP’T OF DEF., DIRECTIVE-TYPE MEMORANDUM 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.

72. 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>.

73. *Id.*

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.”⁷⁴

The DOD, 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.⁷⁵ A later report by the Palm Center, which was based on Pentagon data, estimated the number of transgender service people in the military at a much higher 14,707 servicemembers, comprised of 8,980 active duty servicemembers and 5,727 reservists.⁷⁶ Directive Type Memo 16-005 included a timeline for military services to “provide gender transition medical care to servicemembers based on medical guidance” after July 1, 2017.⁷⁷

Before the changes first announced by Secretary Carter could be implemented, the Trump Administration reversed the Obama Administration’s policy. In a series of tweets on the morning of July 26, 2017,⁷⁸ President Trump claimed transgender service members caused “tremendous medical costs and disruption” and that, after consultation with “[his] Generals and military experts,” he would be banning transgender servicemembers from the military entirely.⁷⁹ While the issue of funding healthcare for transgender servicemembers had become a controversial component of a defense and security funding package under debate that month, Trump’s announcement that transgender servicemembers would be banned from serving in the military entirely was a surprise to many—even Secretary of Defense James Mattis was given only one day’s notice of the ban.⁸⁰ 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 longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016

74. 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/>.

75. Agnes Gereben 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.

76. *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>.

77. U.S. DEP’T OF DEF., *supra* note 71.

78. See Matt Thompson, *How to Spark Panic and Confusion in Three Tweets*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/donald-trump-tweets-transgender-military-service-ban/579655/>.

79. *Id.*

80. 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>.

until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have . . . negative effects.”⁸¹

The Presidential Memorandum was almost immediately enjoined by federal courts.⁸² 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 to “exercise their authority to implement any appropriate policies concerning military service by transgender individuals.”⁸³ However, the Memorandum mentioned policies by Secretary Mattis and stated that those with a diagnosis of gender dysphoria may require significant medical treatment and are thus “disqualified from military service except under certain limited circumstances.”⁸⁴ The new Memorandum, in essence, green-lit policies by the DOD (shared by the Department of Homeland Security and Secretary Kirstjen Nielsen) to reinstate the ban on 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.⁸⁵ 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.”⁸⁶ 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.”⁸⁷

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 no empirical evidence exists to show that transgender individuals disrupt unit cohesion. A bipartisan letter from fifty senators sent on April 26, 2018 to Secretary Mattis outlined these arguments.⁸⁸ First, the senators cited statements from the American Medical

81. 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).

82. *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).

83. Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security: Military Service by Transgender Individuals, 83 Fed. Reg. 13,367.

84. *Id.*

85. Dep't of Def, Memorandum to the President (Feb. 22, 2018), <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF>.

86. *Id.*

87. *Id.*

88. Letter from Kirsten Gillibrand, Sen. NY, to James Mattis, Sec'y of Def., (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->

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 military service.⁸⁹ The surgeons general quoted by 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.”⁹⁰ Additionally, the letter pointed out that 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 servicemembers, and few servicemembers per year will undergo gender-affirming surgery.⁹¹ Finally, the senators cited research from eighteen countries that concluded that transgender servicemembers have not negatively impacted their country’s military performance or their unit cohesion.⁹²

Many legislators have gone beyond just criticizing the transgender military ban and have taken active steps to end it. In February 2019, Senators Kirsten Gillibrand and Susan Collins reached introduced bipartisan legislation to end the transgender military ban.⁹³ In the same year, Representative Jackie Speier introduced an amendment to the National Defense Authorization Act (NDAA) that would end the transgender military ban and codify anti-discrimination protections for servicemembers.⁹⁴ The policy implemented in April 2019 by President Trump permits waivers, but Speier thinks these waivers are virtually nonexistent.⁹⁵ Speier’s amendment, although adopted by voice vote, did not make it into the final version of the NDAA that was signed into law in 2020.⁹⁶ In July 2020, Representative Speier reintroduced the amendment to the Defense Spending Bill.⁹⁷

Also in July 2020, over one hundred House Democrats wrote a letter to Defense Secretary Esper and Attorney General Barr calling for an end to the transgender military ban in light of the landmark Supreme Court decision in

89. *Id.*

90. *Id.*

91. Schaefer, *supra* note 75, at 33–37.

92. Letter from Kirsten Gillibrand to James Mattis, *supra* note 88; *see also* Schaefer, *supra* note 75, at 45.

93. *Transgender Military Service*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/transgender-military-service> (last updated Mar. 2, 2020).

94. *Id.*

95. Mark Satter, *House Votes to End Military Ban on Transgender Troops*, ROLL CALL (July 30, 2020, 1:36 PM), <https://www.rollcall.com/2020/07/30/house-votes-to-end-military-ban-on-transgender-troops/>.

96. *Transgender Military Service*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/transgender-military-service> (last updated Mar. 2, 2020); Connor O’Brien, *House Votes to Stymie Trump’s Transgender Troop Ban*, POLITICO (July 30, 2020, 2:28 PM ET), <https://www.politico.com/news/2020/07/30/house-blocks-trump-transgender-troop-ban-388573>.

97. Letter from House Democrats to Mark Esper, Sec’y of Def., and William Barr, Att’y Gen. (July 8, 2020), https://delbene.house.gov/uploadedfiles/delbene_transgender_service_members_letter_to_dod_doj_final.pdf?mc_cid=a8ec695ea1&mc_eid=53119031df.

Bostock.⁹⁸ According to the letter, the *Bostock* decision “unambiguously clarified that Title VII’s prohibition against discrimination on the basis of sex includes protections for LGBTQ workers.”⁹⁹ Not only did the House Democrats demand an end to the transgender military ban, but they also urged the government to negotiate an end to the four outstanding lawsuits challenging the ban because the litigation would most certainly be defeated by this new Supreme Court ruling.¹⁰⁰ Ultimately, neither Gillibrand and Collins’ bipartisan legislation nor Speier’s amendment were included in the final NDAA for the 2021 fiscal year, which passed in early January 2021.¹⁰¹

All hope was not lost in the fight to end the transgender military ban, however, as President-Elect Biden vowed to lift the Trump Administration’s ban on military service for transgender people.¹⁰² Indeed, in one of his first actions as President, Biden repealed the Trump Administration’s transgender military ban.¹⁰³ As of January 2021, any qualified transgender person who wishes to serve in the military may do so.

The military’s transgender ban was almost immediately challenged in a series of federal lawsuits filed in California, Washington, Maryland, and the District of Columbia.¹⁰⁴ In all four lawsuits, preliminary injunctions were put in 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.

98. Harm Venhuizen, *House Democrats Call on Military to End Ban on Transgender Service*, MIL. TIMES (July 8, 2020), <https://www.militarytimes.com/newsletters/daily-news-roundup/2020/07/08/house-democrats-call-on-military-to-end-ban-on-transgender-service/>.

99. Letter from House Democrats to Mark Esper, Sec’y of Def., and William Barr, Att’y Gen., *supra* note 97.

100. Dawn Ennis, *House Votes to End Trump’s Transgender Military Ban*, FORBES (July 30, 2020, 4:39 PM), <https://www.forbes.com/sites/dawnstaceyennis/2020/07/30/house-votes-to-end-trumps-transgender-military-ban/#248b18ed3c28>.

101. Rebecca Kheel, *Overnight Defense: Pentagon to Get \$696B in Year-end Funding Deal: House Preps for Dec. 28 Veto Override on Defense Bill if Necessary*, THE HILL (Dec. 21, 2020, 6:21 PM), <https://thehill.com/policy/defense/overnights/531203-overnight-defense-pentagon-to-get-696b-in-year-end-funding-deal>; Cole Blum, *Defense Policy Negotiations Near Completion in Congress, With Human Rights Provisions in Play*, JUST SEC. (Nov. 25, 2020), <https://www.justsecurity.org/73569/defense-policy-negotiations-near-completion-in-congress-with-human-rights-provisions-in-play/>.

102. David Crary & Elana Schor, *Lifting Near-Total Ban on Transgender People from Military Service Among Biden Plans to Protect LGBTQ Rights*, MIL. TIMES (Nov. 29, 2020), <https://www.militarytimes.com/news/pentagon-congress/2020/11/29/lifting-near-total-ban-on-transgender-people-from-military-service-among-biden-plans-to-protect-lgbtq-rights/>.

103. Executive Order on Enabling All Qualified Americans to Serve Their Country in Uniform (Jan. 25, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-enabling-all-qualified-americans-to-serve-their-country-in-uniform/>.

104. 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. 17-36009, 2017 WL 8229552 (9th Cir. Dec. 30, 2017); *Stockman v. Trump*, No. EDCV171799JGBKX, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017).

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.¹⁰⁵ 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.”¹⁰⁶ The Department of Justice appealed to the D.C. Circuit to stay the preliminary injunction, but the request was denied on December 22, 2017.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰ On November 21, 2017, the Court issued a preliminary injunction against the Presidential Memorandum.¹¹¹ The Department of Justice appealed the preliminary injunction to the Fourth Circuit, which denied the appeal.¹¹² 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.¹¹³

The California and Washington lawsuits were the subject of a 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.¹¹⁴ *Stockman v. Trump* was filed in the Central District of California on behalf of seven transgender plaintiffs, including Aiden Stockman, a transgender man who wanted to join the Air Force.¹¹⁵ On December 11, 2017, the *Karnoski* Court issued a preliminary injunction ordering the military to immediately halt

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

106. *Id.* at 217.

107. *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).

108. *Doe 2 v. Shanahan*, 755 F. App’x 19 (D.C. Cir. 2019); *see Stone*, 280 F. Supp. 3d at 758 (D. Md. 2017).

109. *Doe 2*, 755 F. App’x at 25.

110. *Stone*, 280 F. Supp. 3d at 758.

111. *Id.* at 769.

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

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

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

115. *Stockman v. Trump*, No. EDCV171799JGBKXX, 2017 WL 9732572, at *4 (C.D. Cal. Dec. 22, 2017).

the ban.¹¹⁶ On December 22, 2017, the *Stockman* Court also issued a preliminary injunction blocking the ban from taking place.¹¹⁷

After litigation proceeded following the amendment to the Memorandum in early 2018, the Trump Administration petitioned for a writ of certiorari to the Supreme Court.¹¹⁸ 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 proceeded in lower courts.¹¹⁹ Justices Breyer, Kagan, Ginsburg, and Sotomayor would have denied the application, demonstrating the Supreme Court was split along ideological lines.¹²⁰

Doe v. Esper, filed in March 2020 by GLBTQ Legal Advocates & Defenders (GLAD), was the first lawsuit to challenge the transgender military ban once it went into effect in April 2019.¹²¹ Lieutenant Doe, a transgender woman, is a committed member of the U.S. Navy who came out as transgender after April 2019 while serving in the military.¹²² After being diagnosed with gender dysphoria by a military physician in June 2019, Lieutenant Doe informed her commanding officer of the diagnosis.¹²³ Although Lieutenant Doe followed the proper protocol, Doe risked involuntary discharge from the Navy because she came out as transgender and sought to undergo a gender transition which was impermissible under the policy in place.¹²⁴

B. STATE LAWS ON EMPLOYMENT DISCRIMINATION AGAINST TRANSGENDER PEOPLE

Twenty-two states and the District of Columbia explicitly prohibit employment discrimination based on gender identity.¹²⁵ The laws in these states protect against both sexual orientation and gender identity discrimination in the workplace.¹²⁶ In 2020, Virginia became the first state in over ten years to include

116. *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).

117. *Stockman*, 2017 WL 9732572, at *16.

118. *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>.

119. 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>.

120. *Id.*

121. *Doe v. Esper*, GLAD, <http://www.glad.org/cases/doe-v-esper/>.

122. Complaint for Declaratory and Injunctive Relief at 1, *Doe v. Esper*, (1:20-cv-10530-FDS), https://notransmilitaryban.org/wp-content/uploads/2020/03/ECF-1_Complaint.pdf.

123. *Id.* at 2.

124. *Id.*

125. *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (last visited Jan. 14, 2021), http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

126. *2019 State Equality Index: A Review of State Legislation Affecting the Lesbian, Gay, Bisexual, Transgender and Queer Community and a Look Ahead in 2020*, THE HUM. RTS. CAMPAIGN FOUND. 2, 14 (2019), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/resources/2019-SEI-Final-Report.pdf?mtime=20200807165244&focal=none>.

sexual orientation and gender identity to their preexisting employment discrimination laws.¹²⁷ Minnesota became the first state to extend protection to transgender individuals with the passage of the Minnesota Human Rights Act in 1993.¹²⁸ The Act bans employment discrimination on the basis of sexual orientation.¹²⁹ 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.”¹³⁰ 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.¹³¹

Other states, including Massachusetts, extend protections to transgender people by explicitly naming gender identity as a protected category in its employment discrimination law. In November 2011, Massachusetts Governor Deval Patrick signed Chapter 199 of the Acts of 2011, “An Act Relative to Gender Identity.”¹³² 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.”¹³³ 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.”¹³⁴

Connecticut passed a law in 2011 protecting transgender individuals in the workplace by adding “gender identity or expression” as a protected category to Connecticut’s anti-discrimination laws.¹³⁵ Connecticut’s definition of “gender identity” is the same as that of Massachusetts, but it also includes ways in which employees can demonstrate their gender identity, such as “providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity.”¹³⁶ The definition makes it clear that a transgender person is protected against discrimination because of both their “gender identity” and “gender expression” (which includes appearance or behavior).¹³⁷

127. *Id.* at 12.

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

129. MINN. STAT. ANN. § 363A.08 (West).

130. MINN. STAT. ANN. § 363A.03 (West).

131. Preston, *supra* note 128, at 81–82.

132. 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/>.

133. MASS. GEN. LAWS ANN. ch.151B, § 4 (West 2019).

134. *Id.*

135. *Connecticut: Legal Protections for Transgender People*, GLAD 1, 1 (Oct. 2012), <https://www.glad.org/wp-content/uploads/2017/01/ct-trans-legal-protections.pdf>.

136. CONN. GEN. STAT. ANN. § 46a-51 (West).

137. *Connecticut: Legal Protections for Transgender People*, *supra* note 135 at 1.

Some states do not explicitly protect transgender individuals from employment discrimination, but they apply and expand existing state law protections against sex discrimination to prohibit 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.¹³⁸

The Michigan Civil Rights Commission issued similar guidance that “sex” in the state’s Elliott-Larsen Civil Rights Act includes “discrimination because of gender identity.”¹³⁹

In June 2020, the Supreme Court issued a landmark decision in which it declared that the prohibition against sex discrimination under Title VII of the Civil Rights Act of 1964 encompasses discrimination based on sexual orientation and gender identity.¹⁴⁰ Title VII is not as protective of transgender employees as some state laws, however. For example, Title VII only applies if an employer has fifteen or more employees.¹⁴¹ But states may—and some do—extend antidiscrimination protections to workplaces with fewer than 15 employees.¹⁴² California’s

138. *Pennsylvania Human Relations Commission Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act*, PA. HUM. RELS. COMM’N 1, 3 (July 30, 2018), <https://www.phrc.pa.gov/About-Us/Publications/Documents/General%20Publications/APPROVED%20Sex%20Discrimination%20Guidance%20PHRA.pdf>.

139. *Michigan Civil Rights Commission Interpretative Statement on “Sex,”* CIVIL RTS. COMM’N 1, 1 (May 21, 2018), https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf.

140. Sharita Gruber, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS 1, 1 (Aug. 26, 2020, 9:01 AM), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/08/26/489772/beyond-bostock-future-lgbtq-civil-rights/>.

141. Cathryn Oakley, *What the Supreme Court Ruling in Bostock Means for State Legislative Efforts*, HUM. RTS. CAMPAIGN (July 15, 2020), <https://www.hrc.org/news/what-the-supreme-court-ruling-in-bostock-means-for-state-legislative-effort>.

142. *Id.*

employment discrimination law applies to workplaces with five employees, while Colorado's employment discrimination law applies to workplaces with just one employee.¹⁴³ Thus, while *Bostock* affords unprecedented protection to transgender employees who live in states that did not protect them against employment discrimination, it may have less of an impact on those living in states like California and Colorado.¹⁴⁴ In fact, transgender individuals living there will be even more protected under their state law than under federal law.¹⁴⁵

III. ACCESS TO GENDER-AFFIRMING HEALTH CARE

Gender-affirming health care refers to any treatment and/or procedure that helps transgender people achieve their desired gender expression.¹⁴⁶ This includes hormone replacement therapy (HRT), gender confirmation surgery, treatments to modify speech and communication, genital tucking or packing, and chest binding.¹⁴⁷ Gender-affirming care may also include procedures frequently accessed by cisgender individuals, which includes, but is not limited to, breast augmentation, mastectomies, hysterectomies, orchiectomies, vaginectomies, and hair removal.¹⁴⁸ HRT is the most frequently sought form of gender-affirming care, but a trans person may desire any combination of treatments (or none at all) to express their gender identity.¹⁴⁹ 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.¹⁵⁰ To that end, WPATH has deemed all procedures necessary for gender affirmation to be medically necessary.¹⁵¹ 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.¹⁵²

143. Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, *CTR. FOR AM. PROGRESS* 1, 25-27 (June 2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf.

144. *See id.* at 25-27.

145. *See id.* at 25-27.

146. Jae A. Puckett et al., *Barriers to Gender-Affirming Care for Transgender and Gender-Nonconforming Individuals*, 15 *SEX RES. SOC. POL'Y* 48, 48-49 (2017).

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

148. *Id.*

149. *Id.*

150. ELI COLEMAN ET AL., *STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE* 170 (2012).

151. *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>.

152. *AM. MED. ASS'N, 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>.

However, serious structural barriers, such as economic and health insurance issues, often prevent transgender individuals from accessing gender-affirming care. As a primary barrier, procedures are expensive—they typically cost thousands of dollars.¹⁵³ These medical costs can be flatly prohibitive for many trans individuals who are more likely to experience compounding economic hardships than cisgender individuals.¹⁵⁴ Trans people also experience unemployment at a rate three times higher than the national average,¹⁵⁵ which in the United States' current system of employer-provided health insurance, increases barriers to accessing health care. Further, nearly one-third of transgender individuals experience homelessness at some point in their lives.¹⁵⁶ The resulting instability and economic stress can make the costs and logistics of receiving any health care prohibitive, especially for gender-affirming care that often comes with significant barriers of its own.

Stigma around the rights of transgender people and gender-affirming care may continue to inhibit access even for trans individuals who have insurance. The 2015 U.S. Transgender Survey found that one-fourth of those surveyed were denied coverage within the past year—even for routine care—because they were transgender.¹⁵⁷ Additionally, 55% of respondents who sought coverage for transition-related surgery in the past year were denied, and 25% of respondents who sought coverage for hormones in the past year were denied.¹⁵⁸ These denials can occur for a host of reasons. A common problem is that treatment is sometimes deemed not medically necessary, thereby enabling insurance companies to shirk their payment responsibilities.¹⁵⁹ For example, insurance usually does not cover liposuction to define pectoral shape as part of top-surgery because it may be classified as not medically necessary.¹⁶⁰ Additionally, trans individuals are frequently denied care by healthcare providers based on their personal prejudices,¹⁶¹ even when federal and state law prohibit such discrimination.¹⁶² Transgender people

153. See, e.g., Deepa Bharath, *Being Uninsured Poses Unique Health Care Challenges for the Transgender Community*, USC CTR. FOR HEALTH JOURNALISM COLLABORATIVE (July 12, 2019), <https://www.centerforhealthjournalism.org/being-uninsured-poses-unique-health-care-challenges-transgender-community>.

154. See 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-Full-Report-Dec17.pdf>.

155. *Id.* at 12.

156. *Id.* at 13.

157. *Id.* at 10.

158. *Id.*

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

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

161. 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 154, at 10.

162. See *What Are My Rights in Health Insurance Coverage?*, *supra* note 159.

who live in rural areas also may have difficulty accessing services due to shortages in rural healthcare workforces.¹⁶³

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 satisfaction and lower levels of mental health issues.¹⁶⁴ Overall, 39% of respondents in the U.S. Transgender Survey reported “serious psychological distress” in the previous month, compared to 5% of the general U.S. population.¹⁶⁵ Those who have had no gender-affirming treatment are twice as likely to experience moderate to severe depression as people who can access gender-affirming care; they are four times more likely to experience anxiety than their surgically-affirmed peers.¹⁶⁶ The prevalence of suicide attempts among transgender individuals is 41%, compared to 4.6% in the overall U.S. population.¹⁶⁷ In promulgating 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.¹⁶⁸ The psychological benefits of gender affirming care also manifest in lower rates of substance abuse and other negative behaviors.¹⁶⁹

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.¹⁷⁰ In the absence of FDA-approved options for surgical gender-affirming care, some trans males use erectile implants designed for cisgender males that can cause serious complications.¹⁷¹

Healthcare advocates also emphasize the cost-effective nature of enabling transgender individuals to access their desired gender-affirming care. One study of San Francisco’s coverage of gender-affirming surgery found that the cost to insurance companies and employers was less than one dollar per enrollee for the first five years.¹⁷² Proponents argue that the cost of insuring trans people is

163. See Keren Landman, *Fresh Challenges to State Exclusions on Transgender Health Coverage*, NAT’L PUB. RADIO (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>.

164. AM. MED. ASS’N, *supra* note 152, at 4.

165. JAMES ET AL., *supra* note 154, at 10.

166. AM. MED. ASS’N, *supra* note 152, at 4.

167. ANN P. HAAS, PHILIP L. RODGERS, & JODY L. HERMAN, *SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS 4-5* (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>.

168. AM. MED. ASS’N, *supra* note 152, at 3.

169. *Id.*

170. Bharath, *supra* note 153.

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

172. AM. MED. ASS’N, *supra* note 152, at 3.

economical compared to the thousands of dollars of costs incurred from a suicide attempt¹⁷³ or the myriad costs of HIV treatment that can increase when gender dysphoria goes untreated.¹⁷⁴

Those opposed to making gender-affirming care more accessible argue that the government should not force employers, insurance companies, or doctors to provide gender-affirming care or force taxpayers to foot the bill through government health insurance programs. Their arguments are premised on the belief that these treatments do not achieve their desired effect or address underlying psychological issues.¹⁷⁵ Opponents frequently contend that this care cannot change a trans woman into a biological woman, for example, and therefore the treatment is not worth pursuing.¹⁷⁶ In the same vein, opponents point to survey results which indicate 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.¹⁷⁷ Further, opponents argue that high suicide rates among trans people, even after they receive gender-affirming care, indicate that underlying psychological issues remain unaddressed.¹⁷⁸ Finally, opponents of gender-affirming care argue that gender dysphoria should be addressed through counseling, and not through gender-affirming physical treatments.¹⁷⁹

To bolster their argument that providers should not be coerced into providing gender-affirming care, opponents assert that gender-affirming treatments, including those involving “the amputation of healthy body parts,” are a violation of medical ethics.¹⁸⁰ 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.”¹⁸¹ Alternatively, 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.¹⁸²

Access to gender-affirming care is also subject to regulations and policies at the federal and state levels. 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 health care has fluctuated widely. At the federal level, the assurance of health care rights for transgender

173. *Id.*

174. *Id.* at 4.

175. 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>.

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

177. *Id.* at 19.

178. *Id.* at 4.

179. *Id.* at 24.

180. *Id.* at 6.

181. 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>.

182. O'Leary & Sprigg, *supra* note 176, at 6.

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) has reinterpreted the scope of protections under the ACA due to federal court decisions and the ascension of the Trump Administration.¹⁸³ Second, the U.S. Supreme Court's decision in *Bostock v. Clayton County* has led two federal district courts to enjoin parts of the HHS rule.¹⁸⁴ Lastly, the fate of the Act itself is uncertain because of an ongoing challenge to its individual mandate.¹⁸⁵ Trans individuals' access to health insurance is further subject to the laws of the states in which they live and are employed.¹⁸⁶ At present, states are divided between using state laws to restrict or widen ACA protections.¹⁸⁷ Each group of states has taken a variety of approaches to implement their ideological positions, with many of the constraints being premised upon religious or conscientious objection.¹⁸⁸ Despite federal provisions intended to protect the rights of those seeking health care from the beliefs of individual providers, the Trump Administration has provided crucial support to states seeking to elevate religious freedoms over trans rights.¹⁸⁹ The rights of transgender people to access health care 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 was enacted during the Obama Administration and partially bridged gaps in health care coverage for trans people. Section 1557 of the Act prohibits denial of or discrimination in insurance coverage on the basis of any ground protected by 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 federal funding or administrative support under the Act.¹⁹⁰ These provisions encompass discrimination based on "sex," which the HHS interpreted in May 2016 as including gender identity.¹⁹¹

183. Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37160 (June 19, 2020).

184. See *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, No. CV 20-1630 (JEB), 2020 WL 5232076, at *25, 45 (D.D.C. Sept. 2, 2020); *Walker v. Azar*, No. 20CV2834FBSMG, 2020 WL 4749859, at *10 (E.D.N.Y. Aug. 17, 2020).

185. See *Texas v. California*, 140 S. Ct. 1262 (2020) (Mem.) (granting writ of certiorari).

186. See *Equality Maps: Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last visited Jan. 18, 2021).

187. See *id.*

188. HUM. RTS. WATCH, "YOU DON'T WANT SECOND BEST": ANTI-LGBT DISCRIMINATION IN US HEALTH CARE 11–12 (2018), https://www.hrw.org/sites/default/files/report_pdf/us_lgbt0718_web.pdf.

189. *Id.* at 4.

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

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

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.¹⁹² The case challenging Section 1557, *Franciscan Alliance, Inc. v. Burwell*, was brought by eight states and three religiously affiliated health care providers.¹⁹³ Since President Trump entered office in 2017, his administration has declined to enforce the HHS rule, citing *Franciscan Alliance*.¹⁹⁴

In 2020, the Trump HHS announced a final rule that reverses interpretations of Section 1557 of the Act promulgated by the Obama Administration's HHS.¹⁹⁵ The final rule eliminates nondiscrimination protections based on gender identity, including health insurance coverage protections for transgender individuals; adopts religious freedom exemptions for health care providers; and eliminates nondiscrimination protections in ten federal regulations other than Section 1557.¹⁹⁶ Trump's HHS argued that the changes were necessary because the Obama Administration's interpretation was in conflict with "express exemptions in Title IX" and the court order in *Franciscan Alliance*.¹⁹⁷ Further, HHS reasoned that the changes were appropriate on policy grounds because the Obama rule "would have imposed confusing or contradictory demands on providers . . . and potentially burdened their consciences," explaining that states must be given discretion to balance "the various sensitive considerations relating to medical judgment and gender identity."¹⁹⁸ The Biden Administration could revise or replace this rule, but the revised rule would probably need to go through the time-consuming notice-and-comment process first.¹⁹⁹ It is possible that the administration will choose to go through this process, as President Biden's choice for HHS Secretary, Xavier Becerra, is known as an ally to trans people and a champion of the ACA.²⁰⁰

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

193. *Id.* at 670.

194. *See id.*; *Fact Sheet: HHS Finalizes ACA Section 1557 Rule*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1, 2 (June 12, 2020), <https://www.hhs.gov/sites/default/files/1557-final-rule-factsheet.pdf>.

195. *Nondiscrimination in Health and Health Education Programs or Activities*, 85 Fed. Reg. 37160 (June 19, 2020).

196. *Id.* at 37161–62, 37204–05; MaryBeth Musumeci et al., *The Trump Administration's Final Rule on Section 1557 Non-Discrimination Regulations Under the ACA and Current Status*, KAISER FAM. FOUND. (Sept. 18, 2020), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/the-trump-administrations-final-rule-on-section-1557-non-discrimination-regulations-under-the-aca-and-current-status/>.

197. *Nondiscrimination in Health and Health Education Programs or Activities*, 85 Fed. Reg. at 37161–62.

198. *Id.* at 37162.

199. *See* Cynthia Cox et al., *Potential Health Policy Administrative Actions Under President Biden*, KAISER FAM. FOUND. (Dec. 8, 2020), <https://www.kff.org/report-section/potential-health-policy-administrative-actions-under-president-biden-issue-brief/>; *A Guide to the Rulemaking Process*, OFF. FED. REG. 1, 10, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Jan. 17, 2021).

200. Kate Sosin, *Transgender Americans see new health care champion in Biden's HHS pick*, 19TH NEWS (Dec. 8, 2020, 3:55 PM), <https://19thnews.org/2020/12/transgender-americans-see-new-health-care-champion-in-bidens-hhs-pick/>.

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

Before the Trump Administration’s 2020 regulation could take effect, parts of it were preliminarily enjoined by two federal courts, which found that the Supreme Court’s interpretation of “sex” in *Bostock v. Clayton County* foreclosed the rule’s elimination of “gender identity” from the definition of “sex.”²⁰¹ In *Bostock*, the Supreme Court ruled that “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex.”²⁰² In response, the United States District Court for the Eastern District of New York stayed the 2020 rule’s changes to the definition of “discrimination on the basis of sex” and invited the plaintiffs to submit a list of rule provisions that should be enjoined because of *Bostock* in *Walker v. Azar*.²⁰³ In a subsequent proceeding, the same court denied the plaintiffs’ request for a blanket injunction against the 2020 rule in its entirety.²⁰⁴ In *Whitman-Walker Clinic v. U.S. Department of Health & Human Services*, the United States District Court for the District of Columbia preliminarily enjoined both the sex stereotyping provisions and the provisions imposing a religious freedom exemption to claims of sex discrimination, and it ruled that HHS’s decision to eliminate gender identity from the definition of sex discrimination without considering *Bostock* was arbitrary and capricious.²⁰⁵ The Trump Administration has defended the rule by arguing that *Bostock* only applies in the employment context and that binary biological distinctions are appropriate in the health care context.²⁰⁶

These preliminary injunctions, while a positive step for transgender advocates, are not a complete victory. Both preliminary injunctions block the implementation of the 2020 regulations and revert to the 2016 regulations; however, because of *Franciscan Alliance*, these regulations do not include gender identity in the definition of sex discrimination.²⁰⁷ Further, the United States District Court for the District of Columbia declined to enjoin a number of other provisions that affect transgender individuals, including the elimination of provisions blocking insurers from categorically denying coverage for gender-affirming care.²⁰⁸

Looking ahead, there likely will be continued activity in courts and state legislatures to address the effects of the rule. A number of legal challenges to the final rule are currently pending.²⁰⁹ Further, although the current version of the 2020 rule substantially narrows the scope of HHS’s civil rights enforcement,

201. Musumeci et al., *supra* note 196.

202. *Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1747 (2020).

203. *Walker v. Azar*, No. 20-CV-2834(FB)(SMG), 2020 WL 4749859, at *10 (E.D.N.Y. Aug. 17, 2020); Musumeci et al., *supra* note 196.

204. *Walker*, No. 20-CV-2834(FB)(SMG), 2020 WL 6363970, at *1 (E.D.N.Y. Oct. 29, 2020).

205. *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, No. CV-20-1630 (JEB), 2020 WL 5232076, at *25, 45 (D.D.C. Sept. 2, 2020); Musumeci et al., *supra* note 196.

206. Musumeci et al., *supra* note 196.

207. *Id.*

208. *Whitman-Walker Clinic*, 2020 WL 6363970, at *16–17; Musumeci et al., *supra* note 196.

209. Musumeci et al., *supra* note 196.

transgender plaintiffs may continue to seek redress in court—indeed, some courts may continue to interpret Section 1557’s statutory protections more broadly than the rule does.²¹⁰ In addition, states may enact their own legislation to block health care discrimination.²¹¹

3. Constitutional Challenges to the ACA

In July 2019, the United States Court of Appeals for the Fifth Circuit heard arguments in *Texas v. United States*, a case which challenges the constitutionality of the ACA’s individual mandate.²¹² The Supreme Court ruled that the mandate is a valid exercise of congressional taxation powers in *NFIB v. Sebelius*,²¹³ so 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.²¹⁴ The United States District Court for the Northern District of Texas ruled that the individual mandate was unconstitutional.²¹⁵ The district court also 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.²¹⁶

On appeal, the Fifth Circuit affirmed the district court’s ruling that the individual mandate was unconstitutional.²¹⁷ 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.”²¹⁸ 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.”²¹⁹ Following this remand, petitioners filed for a rehearing *en banc*, which the Fifth Circuit denied.²²⁰

If the court ultimately finds that the individual mandate is severable, protections to trans individuals’ healthcare will not be affected because the rest of the ACA will remain in effect.²²¹ However, if the court holds that the entire Act is unconstitutional, current antidiscrimination protections will fall by the wayside and would need to be reimagined. The United States House of Representatives—

210. *Id.*

211. *Id.*

212. 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/>.

213. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012).

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

215. *Id.*

216. *Id.*

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

218. *Id.* at 402.

219. *Id.* at 403.

220. *Texas v. United States*, 949 F.3d 182, 186 (5th Cir. 2020).

221. Musumeci, *supra* note 196.

stepping in for the United States—petitioned the Supreme Court for certiorari on January 3, 2020.²²² The petition for writ of certiorari was granted in March 2020, with oral arguments completed on November 10, 2020.²²³ Following the confirmation of Judge Amy Coney Barrett in late October 2020, the future of the ACA is even more uncertain, given her strong view that Chief Justice Robert “pushed the Affordable Care Act beyond its plausible meaning to save the statute.”²²⁴ As of February 2021, the Supreme Court has not yet issued a decision.

B. STATE LAWS ON GENDER-AFFIRMING HEALTH CARE

Twenty-four states and the District of Columbia expressly prohibit excluding transgender individuals in health insurance coverage.²²⁵ However, barriers to gender-affirming healthcare still exist in many states either because state Medicaid policies exclude transgender health coverage and care or because state employee benefits programs exclude transition-related care.²²⁶ Statistically, 45% of the LGBTQ population “lives in states that do not have [LGBTQ]-inclusive insurance protections.”²²⁷ Ten states explicitly prohibit Medicaid from covering gender-affirming surgery,²²⁸ and twelve exclude transition-related services from coverage under state employee insurance programs.²²⁹ LGBTQ rights organizations have brought various legal challenges asking courts to strike down restrictive provisions.

1. States Which Prohibit Transgender Exclusions in Health Insurance Coverage

Twenty-four states and the District of Columbia expressly prohibit transgender exclusions in health insurance.²³⁰ New Jersey, for example, has five statutes specifically prohibiting discrimination against transgender individuals in health insurance coverage.²³¹ One provision provides that group health insurance policies are not to discriminate based on gender identity,²³² another provides that individual health insurance policies are not to discriminate on that basis,²³³ and a third provides that small employer health benefits plans are not to discriminate against individuals based on their gender identity.²³⁴ Transgender individuals in New

222. *Texas*, 945 F.3d at 393, *petition for cert. filed* (U.S. Jan. 3, 2020) (No. 19-841).

223. *Texas v. California*, 140 S. Ct. 1262 (2020) (Mem.).

224. Amy Coney Barrett, *Countering the Majoritarian Difficulty*, CONST. COMMENT. 61, 80 (2017).

225. *Equality Maps: Healthcare Laws and Policies*, *supra* note 186.

226. *Id.* Ten states have Medicaid policies which explicitly exclude transgender health coverage and care; twelve states explicitly exclude transition-related healthcare in their state employee health benefits.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. 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).

232. § 17B:27-46.100.

233. § 17B:26-2.1ii.

234. § 17B:27A-19.26.

Jersey may not be denied or obstructed from “health care services related to gender transition” such as “hormone therapy, hysterectomy[ies], mastectomy[ies], and vocal training.”²³⁵

2. States Which Exclude Gender-Affirming Services from State Employee Benefits Plans

Twelve states explicitly exclude transition-related services from coverage under their state employee insurance programs.²³⁶ North Carolina, for example, expressly states in its State Health Plan for 2020 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.”²³⁷

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,²³⁸ 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 healthcare because they are transgender.”²³⁹ The plaintiffs are seeking declaratory and injunctive relief, among other remedies, under the Fourteenth Amendment’s Equal Protection Clause, the ACA, and other statutes.²⁴⁰ In March 2020, a U.S. District Court judge denied North Carolina state officials’ request to dismiss the lawsuit.²⁴¹ The case is ongoing.²⁴²

C. RELIGIOUS EXEMPTIONS AND GENDER-AFFIRMING HEALTHCARE

1. Federal 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.²⁴³ Religious exemption

235. § 17B:27-46.100(4)(a).

236. *Equality Maps: Healthcare Laws and Policies*, *supra* note 186.

237. N.C. STATE HEALTH PLAN FOR TEACHERS AND STATE EMPs., DEP’T OF STATE TREASURER, BENEFITS BOOKLET 57, 61 (2020), <https://files.nc.gov/ncshp/documents/open-enrollment-documents/2020/BenefitBooks/80-20BenBookFinal4.1.20.pdf>.

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

239. *Kadel v. Folwell*, LAMBDA LEGAL, <https://www.lambdalegal.org/in-court/cases/kadel-v-folwell> (last visited Jan. 20, 2021).

240. Complaint, *Kadel v. Folwell*, 466 F. Supp. 3d 1 (M.D.N.C. 2019) (No. 1:19-cv-00272).

241. *Victory! North Carolina’s Transgender Employees and Family Members to Have Their Day in Court*, TRANSGENDER LEGAL DEF. & EDUC. FUND, <https://transgenderlegal.org/stay-informed/victory-north-carolinas-transgender-employees-and-family-members-have-their-day-court/> (last visited Feb. 13, 2021).

242. *Kadel v. Folwell*, LAMBDA LEGAL, <https://www.lambdalegal.org/in-court/cases/kadel-v-folwell> (last visited Feb. 13, 2021).

243. *State Policies in Brief: Refusing to Provide Health Services*, GUTTMACHER INST. 2-3 (2021), <https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services#>; *see, e.g.*, 42 U.S.C. § 300a-7(b)-(e) (2018); 42 U.S.C. § 238n (2018).

healthcare laws have existed in the United States since the 1970s through the implementation of measures intended to protect religious rights post-*Roe v. Wade*.²⁴⁴

The Church, Coats-Snowe, and Weldon Amendments are designed to protect individuals and entities from being denied federal funding because they refused to perform abortions or sterilizations that would violate their religious beliefs or moral convictions.²⁴⁵ These amendments came in response to the Supreme Court's decision in *Roe v. Wade*, which established a right to abortion.²⁴⁶ The Church Amendment, enacted in 1974, specifically prohibited federal funding from being contingent on whether or not an entity helps facilitate or provides abortion or sterilization services.²⁴⁷ The Amendment's exemption for "sterilization services" relates to transition-related medical care in that it has implications for gender-affirming procedures, including hormone therapy and gender-affirming surgery.²⁴⁸ A hysterectomy, for instance, is a gender-affirming procedure undergone by many transgender persons that could be classified as a "sterilization service."²⁴⁹ Congress enacted the Coats-Snowe Amendment in 1996.²⁵⁰ The Amendment forbids government entities that receive federal funding from discriminating against any healthcare entity that refuses to perform, provide referrals for, or provide training for abortions.²⁵¹ The Weldon Amendment, enacted in 2005, restricts access to HHS funding for entities that discriminate against healthcare organizations that refuse to facilitate abortions.²⁵²

2. Religious Exemptions in the Trump Administration and Resulting Legal Challenges

The Trump Administration 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).²⁵³ The Division's stated mission is to "restore federal enforcement of our nation's laws

244. *State Policies in Brief*, *supra* note 243.

245. *See id.*; 42 U.S.C. § 300a-7; 42 U.S.C. § 238n; *see* "Weldon Amendment" to Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 508(d)(1), 123 Stat. 3034 (2009).

246. *State Policies in Brief*, *supra* note 243.

247. 42 U.S.C. § 300a-7(b).

248. *Religious Refusals in Health Care*, MOVEMENT ADVANCEMENT PROJECT & NAT'L CTR. FOR TRANSGENDER EQUAL., 1 (2018), <http://www.lgbtmap.org/file/Healthcare-Religious-Exemptions.pdf>.

249. *Id.*

250. *See* 42 U.S.C. § 238n (2018).

251. *Id.*

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

253. U.S. Dep't of Health and Hum. Servs., Press Release, HHS Announces New Conscience and Religious Freedom Division (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

that protect the fundamental and unalienable rights of conscience and religious freedom.”²⁵⁴

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).²⁵⁵ But this rule was quickly challenged in court and was vacated pending appeal.²⁵⁶ This rule was never enforced, and the Biden Administration is not set to try and impose a similar religious exemption rule. Religious exemptions in healthcare is still a prominent issue in the United States even though the Trump Administration is no longer in power. Accordingly, an overview of what would have happened if the 2019 Rule was implemented is provided below to highlight both the desired policy outcomes of those who support expanding religious exemptions and the legal arguments that opponents of these exemptions made.

As written, the 2019 Rule would have required 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.²⁵⁷ Relevant here, the rule would have permitted 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.²⁵⁸ The rule reinforced the previous legal framework, including the Church, Coats-Snowe, and Weldon Amendments.²⁵⁹ It also was intended to expand those protections.²⁶⁰ Previously, medical providers such as doctors who had religious or “conscience” objections were permitted to refuse to participate in certain procedures.²⁶¹ The 2019 Rule would have 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.²⁶²

254. *Id.*

255. U.S. DEP’T OF HEALTH AND HUM. SERVS., PROTECTING STATUTORY CONSCIENCE RIGHTS IN HEALTH CARE (2019), <https://www.hhs.gov/sites/default/files/final-conscience-rule.pdf>.

256. *City & Cty. of S.F. v. Azar*, 411 F. Supp. 3d 1001, 1025 (N.D. Cal. 2019); *New York v. U.S. Dep’t of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 497 (S.D.N.Y. 2019).

257. Susan McNear Fradenburg, *HHS ‘Conscience Rule’ Defines Right 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/>.

258. *Id.*; Alison Kodjak, *New Trump Rule Protects Health Care Workers Who Refuse Care for Religious Reasons*, NAT’L PUB. RADIO (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, 9:52 PM), https://www.huffpost.com/entry/legal-challenges-trump-conscience-protection_n_5d0190a4e4b0985c41978d31.

259. U.S. DEP’T OF HEALTH AND HUM. SERVS., *supra* note 255.

260. Kodjak, *supra* note 258.

261. U.S. DEP’T OF HEALTH AND HUM. SERVS., *supra* note 255.

262. *Id.* at 147.

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 would have prohibited 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.²⁶³ Under the 2019 Rule, however, “referral” was defined to “include[e] the provision of any information . . . by any method.”²⁶⁴ Healthcare workers in Iowa would have been protected if they refused on religious grounds to transfer patients to other providers.²⁶⁵

LGBTQ rights advocates expressed concerns about increasingly sweeping religious exemptions and suggested that the underlying policy of exemptions is to give medical providers permission to discriminate.²⁶⁶ Moreover, trans rights advocates fear that the regulations would justify denying transgender patients routine treatment that is unrelated 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.”²⁶⁷ If interpreted this way, the 2019 Rule would have protected healthcare providers who refused *any* care to transgender patients—potentially preventing these patients from accessing anything from antibiotics to diabetes treatment—if doing so would violate the provider’s sincerely-held religious beliefs.

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 “invite[d] refusals” of health services to “transgender and gender-nonconforming patients seeking gender-affirming care”²⁶⁸ and violate[d] 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.²⁶⁹ A similar suit was filed in the United States District Court for the Southern District of New York by a coalition of healthcare provider associations, local governments, and nineteen state governments and the District of Columbia.²⁷⁰

263. IOWA CODE § 144D.3(5) (2012).

264. U.S. DEP’T OF HEALTH AND HUM. SERVS., *supra* note 255, at 130.

265. IOWA CODE § 144D.3(5) (2012).

266. *Religious Refusals in Health Care*, *supra* note 248, at 1.

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

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

269. *Id.* at 15–16.

270. *New York v. U.S. Dep’t of Health & Hum. Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019).

Ultimately, both district courts held that HHS violated the Administrative Procedure Act and constitutional provisions by promulgating the 2019 Rule.²⁷¹ Both courts vacated the rule before it went into effect on the grounds that HHS exceeded its rulemaking and enforcement authority.²⁷² OCR was instructed to wait on implementing the rule until it received further instructions from the courts.²⁷³ The Conscience and Religious Freedom Division continues to receive and investigate claims under the authority of existing religious and conscience laws, namely the Church, Coats-Snowe, and Weldon Amendments.²⁷⁴ HHS appealed the decision in *New York v. Department of Health & Human Services* on January 3, 2020; it is currently being litigated in the Second Circuit as *National Family Planning & Reproductive Health Association v. Azar*.²⁷⁵

3. State Religious Exemptions Laws

Some states enacted religious exemption laws that deny gender-affirming care to trans individuals. For example, Mississippi prohibits the state government from discriminatory action 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” because of that provider’s religious or moral beliefs.²⁷⁶ 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.”²⁷⁷

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 protects.²⁷⁸ Lambda Legal sought a preliminary injunction to prevent the enforcement of the law before it went into effect in October 2017.²⁷⁹ The injunction was initially granted, but the ruling was reversed by the United States Court of Appeals for the Fifth Circuit on the reasoning that the plaintiffs did not have standing to assert a violation of the Establishment Clause and that “stigmatic

271. *Id.*; *City & Cty. of S.F. v. Azar*, 411 F. Supp. 3d 1001, 1011 (N.D. Cal. 2019).

272. *New York*, 414 F. Supp. 3d at 497; *Azar*, 411 F. Supp. 3d at 1025; see *Conscience Rule Vacated*, U.S. DEP’T OF HEALTH AND HUM. SERVS. (Nov. 8, 2019), <https://www.hhs.gov/conscience/conscience-rule-vacated/index.html>.

273. *Conscience Rule Vacated*, *supra* note 272.

274. *See id.*

275. *New York*, 414 F. Supp. 3d at 475 (appealed as *Nat’l Fam. Planning & Reprod. Health Ass’n v. Azar*, No. 20-00032 (2d Cir. Jan. 3, 2020)).

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

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

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

279. *See Merrit Kennedy, Controversial Mississippi Law Limiting LGBT Rights Not Heading to Supreme Court*, NAT’L PUB. RADIO (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>.

injury alone was insufficient to establish injury-in-fact for purposes of [an] Equal Protection claim.”²⁸⁰ The United States Supreme Court denied certiorari.²⁸¹ The Mississippi law remains in effect.²⁸²

IV. VIOLENCE AGAINST TRANSGENDER INDIVIDUALS

Transgender people—especially transgender people of color—are particularly vulnerable to violence. Transgender people face high rates of domestic and intimate partner violence,²⁸³ hate crimes,²⁸⁴ police mistreatment and abuse,²⁸⁵ and violence while incarcerated.²⁸⁶ The rate at which transgender people are victimized is on the rise.²⁸⁷ At the same time some proposed protections, such as the repeal of gay and trans panic defenses, are stalling,²⁸⁸ and other existing protections, like the Violence Against Women Act, may be in jeopardy.²⁸⁹ This section will outline the types of violence that transgender people often face as well as certain legal protections that exist to combat that violence.

A. DOMESTIC VIOLENCE

Transgender people face high rates of victimization due to domestic and intimate partner violence.²⁹⁰ Studies have shown that between thirty and fifty percent

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

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

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

283. TAYLOR N.T. BROWN & JODY L. HERMAN, *INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE 3* (The Williams Inst., 2015); *see also* JAMES ET AL. *supra* note 154, at 198 (finding that 54% of transgender survey respondents had experienced some form of intimate partner violence.).

284. *2018 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation*, FED. BUREAU OF INVESTIGATIONS (2018), <https://ucr.fbi.gov/hate-crime/2018/tables/table-1.xls> (reporting 168 incidents of hate crimes motivated by gender identity in 2018, with 142 specified as “anti-transgender.”).

285. JAMES ET AL. *supra* note 154, at 185 (finding that 58% of transgender survey respondents who had interacted with the police within the last year had been mistreated in some way.).

286. *Id.* at 191.

287. There were 168 incidents of hate crimes motivated by gender identity in 2018, 119 incidents in 2017, 124 incidents in 2016, 114 incidents in 2015, 98 incidents in 2014, and 31 reported incidents in 2013. *See 2018 Hate Crime Statistics, supra* note 284; *2017 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation, supra* note 9; *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, supra* note 9; *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, supra* note 9.

288. For example, legislation to eliminate the Gay and Trans Panic defense, discussed in Part IV.C below, was stalled in Congress, as was 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>.

289. *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>.

290. BROWN & HERMAN, *supra* note 283, at 3.

of transgender people experience domestic and intimate partner violence in their lifetime.²⁹¹ A study that directly compared lifetime intimate partner violence between transgender and cisgender people found that approximately 30% of transgender people had experienced intimate partner violence, whereas approximately 20% of cisgender people experienced intimate partner violence.²⁹² However, gathering accurate data in this area is incredibly difficult. Issues including inconsistent survey methods and confusion about what is meant by the term “transgender” often make it difficult for researchers to fully approximate the rates at which transgender people experience domestic violence.²⁹³ As a result, the statistics we do have likely underrepresent the extent to which transgender people experience domestic and intimate partner violence.²⁹⁴

Transgender people may be hesitant to report abuse for a number of reasons, including legal “definitions of domestic violence that may exclude LGBT[Q] individuals and couples.”²⁹⁵ For instance, in North Carolina, the definition of “personal relationship” under the state’s general domestic violence statute includes married couples, which necessarily includes same-sex married couples post-*Obergefell*.²⁹⁶ But the statute 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 remaining covered categories such as parents of children and members of the same household.²⁹⁷ Other, less formal barriers to reporting include a fear of “outing” oneself by reporting, a lack of awareness of or access to LGBTQ-friendly resources, potential trans- and homophobia from service providers, and low levels of confidence in law enforcement and the judicial system.²⁹⁸ This list, though extensive, does not even account for the additional factors that prevent reporting that transgender victims have in common with heterosexual and cisgender victims, such as fear, stigma, and lack of available resources.²⁹⁹

Accessing trans-friendly resources can also be difficult because many resources are explicitly gendered, and domestic violence shelters open to women may not be welcoming to transgender people.³⁰⁰ Some studies have shown that LGBTQ people—particularly transgender people—have low confidence in the

291. *Id.*

292. *Id.*

293. Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 *AGGRESSION AND VIOLENT BEHAV.* 170, 177 (2009).

294. *Id.* (noting that existing survey methods “are only allowing hints of the scope of the problem of violence against transgender people”).

295. BROWN & HERMAN, *supra* note 283, at 5.

296. N.C. GEN. STAT. § 50B-1(b) (2019); *see* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

297. § 50B-1(b).

298. BROWN & HERMAN, *supra* note 283, at 3.

299. *Id.* at 17.

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

ability of healthcare providers to help them address domestic violence and intimate partner violence.³⁰¹ These barriers make it less likely that transgender survivors of violence will access the care and resources they need to recover and successfully move on from an abusive relationship.

There are efforts being made to combat this resource gap, however. Various resources specifically geared toward transgender survivors of domestic violence are available through organizations like The Network/La Red, which is a social justice organization aimed at ending intimate partner violence in LGBTQ relationships.³⁰² The organization offers services to LGBTQ survivors of domestic violence such as a 24/7 telephone hotline, education and training programs, housing assistance, and support groups.³⁰³ Similarly, the Community United Against Violence organization offers resources to LGBTQ survivors of violence or abuse, including advocacy-based peer counseling.³⁰⁴ Other organizations have been supporting transgender survivors of violence more generally, such as The National Coalition of Anti-Violence Programs, a coalition made up of local organizations that work to prevent violence within and against the LGBTQ community.³⁰⁵ To that end, the coalition puts out a report each year about LGBTQ Hate Violence and LGBTQ Intimate Partner Violence in an effort to raise awareness of these issues and argue for policy change.³⁰⁶ In 1994, an organization called FORGE was formed specifically to support transgender individuals.³⁰⁷ In 2009 and 2011, FORGE received federal grant money to develop sexual assault resources specific to transgender victims and to provide assistance to victim service agencies offering help to survivors of domestic violence.³⁰⁸ The availability of these resources is promising, but more efforts are needed to make sure that they are accessible to all people who could benefit from them.

B. HATE CRIMES

Similarly, transgender people are frequently the victims of hate crimes. The rate of hate crimes committed against transgender people has been steadily increasing since 2013, the first time that gender identity was included as a motivation in the FBI's hate crime statistics, from thirty-one recorded incidents in 2013 to 168 incidents recorded in 2018, the most recent year for which statistics are

301. *Id.* at 18.

302. *Mission, Principles, and Values*, THE NETWORK/LA RED, <https://www.tnlr.org/en/mission-principles-and-values/> (last visited Feb. 7, 2021).

303. *Our Impact*, THE NETWORK/LA RED, <https://www.tnlr.org/en/our-impact/> (last visited Feb. 7, 2021).

304. *Programs*, CMTY. UNITED AGAINST VIOLENCE, <https://www.cuav.org/services> (last visited Feb. 7, 2021).

305. *National Coalition of Anti-Violence Programs*, NYC ANTI-VIOLENCE PROJECT, <https://avp.org/ncavp/> (last visited Feb. 7, 2021).

306. *Id.*

307. *Our History*, FORGE, <https://forge-forward.org/about/our-history/> (last visited Feb. 7, 2021).

308. *Id.*; see *Transgender Domestic Violence and Sexual Assault Resource Sheet*, FORGE, https://avp.org/wp-content/uploads/2017/04/2011_FORGE_Trans_DV_SA_Resource_Sheet.pdf.

available.³⁰⁹ By the end of September, there were eighteen reported murders of transgender women in 2019.³¹⁰ Transgender women of color are disproportionately victims of hate crimes and violence due to their gender identity.³¹¹ Much like instances of domestic and intimate partner violence, hate crimes are often underreported due to stigma, fear of being “outed,”³¹² misgendering of victims, and fear or distrust of law enforcement.³¹³

1. Federal Legislation

In an attempt to address all forms of violence against LGBTQ people, the Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act was signed into law in 2009.³¹⁴ The Act built on the existing Federal Hate Crimes Law from 1968, which already prohibited the injury or intimidation of persons based on “race, color, religion, or national origin,”³¹⁵ to specifically outlaw crimes motivated by a victim’s actual or perceived gender, sexual orientation, or gender identity.³¹⁶ 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.³¹⁷

The Act imposes up to ten years in prison and a fine on those who violate it,³¹⁸ or up to life in prison if the offense results in death, involves kidnapping or

309. 2018 *Hate Crime Statistics*, *supra* note 284; 2017 *Hate Crime Statistics*, *supra* note 9; 2016 *Hate Crime Statistics*, *supra* note 287; 2015 *Hate Crime Statistics*, *supra* note 9; 2014 *Hate Crime Statistics*, *supra* note 287; 2013 *Hate Crime Statistics*, *supra* note 9.

310. 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>.

311. *See, e.g., Violence Against the Transgender Community in 2019*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019> (last visited Feb. 7, 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.

312. Weihua Li, *Why Police Struggle to Report One of The Fastest-Growing Hate Crimes*, THE MARSHALL PROJECT (Nov. 26, 2019), <https://www.themarshallproject.org/2019/11/26/why-police-struggle-to-report-one-of-the-fastest-growing-hate-crimes>.

313. Emma Keith & Katie Gagliano, *Lack of Trust in Law Enforcement Hinders Reporting of LGBTQ Crimes*, THE CTR. FOR PUB. INTEGRITY (Aug. 24, 2018), <https://publicintegrity.org/politics/lack-of-trust-in-law-enforcement-hinders-reporting-of-lgbtq-crimes/>; *see also* BROWN & HERMAN, *supra* note 283, at 3.

314. 18 U.S.C. § 249(a)(2)(A) (2018).

315. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

316. § 249(a)(2)(A).

317. *Id.*

318. § 294 (a)(2)(A)(i).

aggravated sexual abuse, or involves an attempt to kidnap, commit aggravated sexual abuse, or kill.³¹⁹ The Act has resulted in relatively few successful prosecutions—by one count, there were only twenty-five successful prosecutions brought under the Act for hate crimes against members of the LGBTQ community between 2009 and 2017.³²⁰ This is perhaps in part due to the narrowness of the Act and the difficulty of proving the bias motivation in these cases.³²¹

The Act was first used to prosecute a hate crime motivated by the victim's gender identity in 2016.³²² Joshua Vallum pleaded guilty to the assault and murder of his former girlfriend,³²³ whom he murdered after one of his friends found out that she was transgender.³²⁴ At the time of Mr. Vallum's prosecution, Mississippi had no state level hate crime protections for victims on the basis of their sexual orientation or gender identity.³²⁵ Thus, the Act supplemented the tools available to the prosecutors in this case and filled a crucial gap in the protection of transgender victims.

2. State Legislation

Arkansas, South Carolina, and Wyoming do not have hate crime statutes at all, although in Arkansas³²⁶ and South Carolina³²⁷ there have been recent, ongoing attempts to enact such legislation. Until very recently, Georgia was also included in the list of states with no hate crime legislation, but in June 2020, a new hate crime law was passed, which imposes penalties on bias-motivated crimes.³²⁸ The

319. § 294 (a)(2)(A)(ii).

320. See MATTHEW SHEPARD FOUND., 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>.

321. See generally Li, *supra* note 312 (“Another challenge is police officers often do not recognize the bias motive or ask the victim if they believe the incident is a hate crime.”).

322. Colin Dwyer, *1st Man Prosecuted for Federal Hate Crime Targeting Transgender Victim Gets 49 Years*, NAT'L PUB. RADIO (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>.

323. United States v. Vallum, No. 116CR00114, 2016 WL 8969558 (S.D. Miss. Dec. 21, 2016).

324. Dwyer, *supra* note 322.

325. *Id.*; 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/>.

326. Andrew DeMillo, *Arkansas Governor Says State Needs Hate Crime Law*, A.P. NEWS (Aug. 6, 2019), <https://www.apnews.com/e7f63bf0e8ae4281b60fd981ae762182>; Veronica Stracqualursi, *Arkansas Governor and Legislators Introduce “Long Overdue” Hate Crimes Legislation*, CNN POLS. (Aug. 20, 2020), <https://www.cnn.com/2020/08/20/politics/arkansas-hate-crimes-draft-bill/index.html>.

327. 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/>; Gregory Yee, *How South Carolina Lawmakers, Community Groups Are Working to Pass a State Hate Crime Law*, POST AND COURIER (Dec. 1, 2020), https://www.postandcourier.com/news/how-south-carolina-lawmakers-community-groups-are-working-to-pass-a-state-hate-crime-law/article_17ec209a-f456-11ea-a49b-3f6ecdaee39c.html.

328. Grace Hauck, *Georgia Governor Signs Hate Crime Law in Wake of Ahmaud Arbery Shooting*, USA TODAY (June 26, 2020), <https://www.usatoday.com/story/news/nation/2020/06/26/georgia-governor-signs-hate-crime-law-following-ahmaud-arbery-shooting/3266901001/>.

new law provides for the imposition of additional jail time or monetary fines when it is found that a specified crime was motivated by the victim's sex, sexual orientation, or gender, among other protected categories.³²⁹

States that *do* have hate crime laws take three main approaches to that legislation: some states do not include either sexual orientation or gender identity as protected categories; others include sexual orientation but not gender identity; and still others protect against crimes on the basis of both sexual orientation and gender identity.³³⁰ A representative state in each category is discussed below.

Thirteen states have hate crime legislation that does not include either sexual orientation or gender identity as a protected category.³³¹ One such state is Ohio, where the state hate crime law prohibits “ethnic intimidation,” which involves committing certain misdemeanor crimes on the basis of the “race, color, religion, or national origin of another person or group of persons.”³³² In 2016, Ohio state legislators unsuccessfully attempted to pass an LGBT-inclusive hate crime bill, which would have broadened the categories included under the existing ethnic intimidation law to encompass “specified crimes committed based on a person’s actual or perceived ethnicity, gender, sexual orientation, gender identity, or disability.”³³³

Eleven states have hate crime legislation that includes sexual orientation but not gender identity.³³⁴ Texas is one of these states.³³⁵ Texas’s hate crime law covers offenses where a person chooses to target their victim or their victim’s property because of that person’s “bias or prejudice against a group identified by . . . gender, or sexual preference. . . .”³³⁶ At sentencing, the judge may require the defendant to attend an “educational program to further tolerance and acceptance of others.”³³⁷ There have been some attempts to amend the statute to include gender identity or expression, but each bill has stalled in committee or after public hearing.³³⁸

Twenty-three states and the District of Columbia have hate crime legislation which includes both sexual orientation and gender identity as protected categories.³³⁹ One of these states is Massachusetts.³⁴⁰ Massachusetts law explicitly

329. H.B. 426, Gen. Assemb., Reg. Sess. (Ga. 2020), <http://www.legis.ga.gov/Legislation/20192020/194575.pdf>.

330. *Hate Crime Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/hate_crime_laws (last visited Jan. 5, 2020).

331. *Id.*

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

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

334. *Hate Crime Laws*, *supra* note 330.

335. *Id.*

336. TEX. CRIM. PROC. CODE ANN. art. 42.014 (West 2017).

337. *Id.*

338. 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>.

339. *Hate Crime Laws*, *supra* note 330.

340. *Id.*

includes sexual orientation and gender identity as protected categories in the state's hate crime statute, which prohibits assault and battery or destruction of property with the intent to intimidate the victim based on the victim's "race, color, religion, national origin, sexual orientation, gender identity, or disability."³⁴¹

C. GAY AND TRANS PANIC DEFENSES

The so-called "gay panic" or "trans panic" defenses are legal strategies used to bolster affirmative defenses such as insanity, diminished capacity, provocation or self-defense in cases involving assaults or murders committed on the basis of the victim's sexual orientation or gender identity.³⁴² They are not themselves affirmative defenses.³⁴³ The defense strategy involves arguing that the revelation that a victim was gay or transgender caused the perpetrator to "panic" and hurt or kill them.³⁴⁴ 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.³⁴⁵

The gay panic defense has its origins in 1920s psychology, when psychologist 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.³⁴⁶ This theory of internal conflict was later used to support the idea of a gay panic defense, beginning in the 1960s.³⁴⁷ The defense has been used many times since the 1960s, and has been applied both in the context of sexual orientation and gender identity.³⁴⁸ The defense is relatively rarely used, but when it is invoked by defendants it is in an effort to justify or mitigate their alleged crime.³⁴⁹

Recently, some states have moved to ban gay and trans panic defenses. California was the first state to ban the defense in 2014, and eleven other states—

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

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

343. Alexandra Holden, *The Gay/Trans Panic Defense: What It Is, and How to End It*, AM. BAR ASS'N (Apr. 1, 2020), <https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/>.

344. See Lee, *supra* note 342 at 475.

345. See *id.* at 471.

346. *Id.* at 482.

347. *Id.* at 491.

348. See, e.g., *People v. Merel*, No. A113056, 2009 WL 1314822, at *9 (Cal. Ct. App. May 12, 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. Parisi*, 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 342, at 514–15.

349. See generally Lee, *supra* note 342.

Illinois, Rhode Island, Nevada, Connecticut, Maine, Hawaii, New York, New Jersey, Washington, and Colorado—and the District of Columbia subsequently banned it.³⁵⁰ A number of other states have legislation aimed at banning these defenses in committee.³⁵¹ 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.³⁵²

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.”³⁵³

There have been efforts to ban these defenses at the federal level. 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.”³⁵⁴ The bill was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security on June 28, 2019.³⁵⁵ There was no movement on the bill after it was introduced in the House Subcommittee and it failed on December 31, 2020.³⁵⁶ The bill proposed to 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.”³⁵⁷ The bill also proposed 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,

350. *The LGBTQ+ Panic Defense*, THE LGBT BAR, <https://lgbtbar.org/programs/advocacy/gay-trans-panic-defense/> (last visited Feb. 19, 2021).

351. Alexandra Holden, *The Gay/Trans Panic Defense: What It Is, and How to End It*, AM. BAR ASS’N (Apr. 1, 2020), <https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/>.

352. CAL. PENAL CODE § 192(f)(1) (West 2015).

353. CAL. PENAL CODE § 192(f)(2) (West 2015).

354. *The LGBTQ+ Panic Defense*, *supra* note 350.

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

356. U.S. H.R. 3133, *Gay and Trans Panic Defense Prohibition Act of 2019*, BILL TRACK 50, <https://www.billtrack50.com/BillDetail/1131527> (last visited Feb. 25, 2021).

357. *See* H.R. 3133.

bisexual, or transgender individuals that were motivated by the victim's gender, gender identity or expression, or sexual orientation."³⁵⁸ 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."³⁵⁹ The bill has not been reintroduced to the 117th Congress as of January 2021.³⁶⁰

The gay and trans panic defenses remain controversial, and many organizations, including the American Bar Association³⁶¹ and the LGBTQ+ Bar, support banning them.³⁶² Others point out that a ban might be counterproductive, as it would simply make homophobic and transphobic defenses covert, something that might play even more effectively with some juries.³⁶³

D. POLICE MISTREATMENT OF TRANSGENDER INDIVIDUALS AND VIOLENCE IN PRISON

Transgender people often face mistreatment and violence during encounters with law enforcement, including being harassed, misgendered, and assaulted by police and corrections officers. Many of these experiences give rise to fear and mistrust of law enforcement and the legal system, contributing to the problem of underreporting abuse and violence discussed above. In fact, 57% of transgender people report being somewhat or very uncomfortable going to the police for help when they need it.³⁶⁴

1. Police Mistreatment

Transgender individuals are subject to high rates of police profiling, harassment and brutality.³⁶⁵ A 2015 report by the National Transgender Center for Equality showed that 40% of transgender people surveyed had some form of interaction with the police in the past year; of those who had interacted with police, 57% percent said that they were never or only sometimes treated with respect by officers.³⁶⁶ This was even more of an issue for Native American (72%)

358. H.R. 3133 § 28(c).

359. Press Release, Senators 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>.

360. *The LGBTQ+ Panic Defense*, *supra* note 350.

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

362. *The LGBTQ+ Panic Defense*, *supra* note 350.

363. Lee, *supra* note 342, at 477.

364. JAMES ET AL., *supra* note 154, at 1.

365. *Id.* at 185.

366. *Id.* at 186.

and African-American (70%) respondents.³⁶⁷ Twenty percent of respondents reported being verbally harassed by officers; 11% reported that officers assumed they were a sex worker; 6% reported being physically attacked, sexually assaulted, and/or forced to engage in sexual activity to avoid arrest; and 58% of respondents reported having one or more of these issues with officers.³⁶⁸ Again, the issues disproportionately impacted transgender people of color, with 74% of Native American respondents reporting one or more issue, compared to 71% of multiracial respondents, 66% of Latinx respondents, 61% of Black respondents, and 52% of white respondents.³⁶⁹ Another potential source of anxiety for transgender people when interacting with police stems from having identity documents that 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 custody, including during strip searches, booking, and holding. In response to these issues, some states and cities have tried to address the problem by adopting 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 included gender identity, while fourteen included sexual orientation.³⁷⁰ It 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 pronouns.³⁷¹ A majority of departments—sixteen out of twenty-five—failed to provide guidance for search procedures for transgender people, or require searches to be performed by officers based on biological sex.³⁷² The NCTE provides a model policy for police departments which would help address these issues.³⁷³ 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 40% of transgender

367. *Id.*

368. *Id.* at 186–87.

369. *Id.* at 186.

370. NAT'L CTR. FOR TRANSGENDER EQUAL., FAILING TO PROTECT AND SERVE: POLICE DEPARTMENT POLICIES TOWARDS TRANSGENDER PEOPLE 103 (May 2019), https://transequality.org/sites/default/files/docs/resources/FTPS_FR_v3.pdf.

371. *Id.*

372. *Id.* at 104.

373. NAT'L CTR. FOR TRANSGENDER EQUAL., POLICE DEPARTMENT MODEL POLICY ON INTERACTIONS WITH TRANSGENDER PEOPLE (May 2019), https://transequality.org/sites/default/files/docs/resources/FTPS_MP_v6.pdf.

people in state and federal prisons reporting a sexual assault in the previous year.³⁷⁴ Much of this problem arises from transgender people being misgendered by the legal system, which results in them being incarcerated according to their birth sex and not their gender identity.³⁷⁵

In correctional facilities, transgender individuals are “at the mercy of a hyper-gendered system.”³⁷⁶ Traditionally, transgender people who had not had gender confirmation surgery and who were incarcerated were assigned to housing that correlated with their assigned sex at birth instead of their gender, regardless of other factors.³⁷⁷ In 2012, the Department of Justice partially addressed this issue with a rule³⁷⁸ pursuant to the Prison Rape Elimination Act (PREA).³⁷⁹ The codified regulation implements standards that requires prisons and jails to assess incarcerated people for sexual victimization and/or abusiveness risk factors, including whether the person was (or was perceived as) LGBT or gender nonconforming.³⁸⁰ The regulation further requires that prisons use the screening results in housing, bed, education, and work assignments, with each determination being made on a case-by-case basis in light of the inmate’s health and safety, among other factors.³⁸¹ States have developed more comprehensive internal standards and policies for screening transgender inmates to comply with federal laws and regulations. For example, before the PREA rule was promulgated, 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.³⁸² 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.³⁸³

374. 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 154, at 184, 191.

375. See JAMES ET AL. *supra* note 154, at 184, 191.

376. 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).

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

378. 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).

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

380. 28 C.F.R. § 115.41(a), (d)(7) (2012).

381. 28 C.F.R. § 115.42(a)–(c) (2012).

382. 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).

383. CAL. CODE REGS. tit. 15 § 3269(g) (2018); CAL. DEP’T OF CORRS. AND REHAB., OPERATIONS MANUAL § 62080.14 (2020).

While most prison systems currently comply with PREA standards or are working towards compliance,³⁸⁴ the PREA rule allows for “individualized determinations” about ensuring the safety of each person.³⁸⁵ While “serious consideration shall 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.”³⁸⁶ 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 cisgender women.³⁸⁷ 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.³⁸⁸ The update made clear that assigning transgender and intersex people to federal prisons correlated to their gender identity would “be appropriate only in rare cases” and would be limited to individuals making “significant progress towards transition as demonstrated by medical and mental health history.”³⁸⁹ This policy fails to specify what medical or mental history is needed for a person to qualify for housing and program assignments that correlates to their gender.³⁹⁰ Because most transgender people do not undergo gender-affirming surgeries,³⁹¹ and because people in prison cannot simply elect to have medical procedures without some level of institutional approval, requiring that people demonstrate that they have made serious progress towards transition undoubtedly has the effect of barring most transgender individuals housed by the Bureau of Prisons from placements that align with their gender.

Housing incarcerated transgender people with people of the opposite gender might actually increase security concerns, contrary to arguments made by prisons against putting people in housing that is gender appropriate. Transgender individuals in institutions incompatible with their gender identity report disproportionate rates of violence and sexual assault.³⁹² To address this, one solution permissible

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

385. 28 C.F.R. § 115.42(b) (2012).

386. 28 C.F.R §§ 115.42(c), (e).

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

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

389. *Id.*

390. *Id.*

391. 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).

392. Compare BUREAU OF JUST. STATS., NCJ 248824, PREA DATA COLLECTION ACTIVITIES, 2015, 2 (2015), <https://www.bjs.gov/content/pub/pdf/pdca15.pdf> (“An estimated 35% of transgender inmates held in prisons and 34% held in local jails reported . . . sexual victimization by another inmate or facility

by PREA standards—and, according to some, commonly used by prison authorities—is to separate transgender people into protective or administrative custody.³⁹³ Although administrative segregation may protect transgender people from abuse at the hands of people with whom they are incarcerated, it also isolates them with potentially predatory staff and eliminates witnesses who could report abuse.³⁹⁴ Administrative segregation may also deny transgender people “adequate recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for non-punitive reasons,”³⁹⁵ rendering it comparable to punitive segregation and imbuing it with the court-recognized potential for psychological damage.³⁹⁶ Furthermore, placing transgender people in confinement deprives them of the opportunity to form positive communities and relationships that can help those who are targets of violence to survive.³⁹⁷

The Eighth Amendment’s Cruel and Unusual Punishment Clause can be used by transgender people to challenge mistreatment they are subjected to while in prison, but success is difficult to attain. 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.³⁹⁸ Farmer, a transgender woman in a men’s prison, possessed distinctly traditional female physical characteristics. As a result of her placement in general population in a men’s prison, she was beaten and raped.³⁹⁹ 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.⁴⁰⁰ 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.”⁴⁰¹ 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

staff in the past 12 months or since admission, if less than 12 months.”), with BUREAU OF JUST. STATS., NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-2012, 6 (2013), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4923> (“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.”).

393. 8 C.F.R. § 115.43; see Rosenblum, *supra* note 377, at 529.

394. Tarzwell, *supra* note 376, at 180.

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

396. Tarzwell, *supra* note 376, at 180 (citing Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988)).

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

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

399. *Id.* at 830.

400. *Id.* at 832–33.

401. *Id.* at 847.

obvious.”⁴⁰² *Farmer* challenges brought by transgender people have focused on whether denial of gender-affirming care while in prison constitutes an Eighth Amendment violation and have been mostly unsuccessful.⁴⁰³

The Violence Against Women Reauthorization Act of 2019 was viewed as a potential new source for protecting transgender people. The bill was passed by the House of Representatives and was sent to the Senate.⁴⁰⁴ The Senate, which was controlled by Republicans at the time, did not bring the bill up for a vote.⁴⁰⁵ The bill would have added a provision to the existing Violence Against Women Act (VAWA) to require the Bureau of Prisons to consider the safety and protection of incarcerated transgender people when making housing assignments.⁴⁰⁶ This provision would have helped to 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. All hope may not be lost for VAWA reauthorization, however. President Biden stated that he would make enacting the law a priority in his first 100 days in office.⁴⁰⁷ This goal seems readily accomplishable now that both chambers of Congress are controlled by Democrats.

V. PUBLIC ACCOMMODATIONS & HOUSING

A. PUBLIC ACCOMMODATIONS

Transgender individuals experience a significant amount of harassment and disrespect in public places. The 2015 U.S. Transgender Survey found that 31%⁴⁰⁸ of about 28,000⁴⁰⁹ surveyed transgender people reported a negative experience in a place of public accommodation, including being denied equal treatment, or verbally or physically attacked. Fourteen percent of respondents to the same survey reported being denied equal treatment or service at least once in the past year at

402. *Id.* at 842.

403. *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 Texas prison’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.”).

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

405. *Feinstein on One-Year Anniversary of VAWA Reauthorization Introduction*, SENATE COMM. ON THE JUDICIARY (Nov. 12, 2020), <https://www.judiciary.senate.gov/press/dem/releases/feinstein-on-one-year-anniversary-of-vawa-reauthorization-introduction>.

406. H.R. 1585 § 1101.

407. Joe Biden, *The Biden Plan to End Violence Against Women*, <https://joebiden.com/vawa/> (last visited Jan. 31, 2021).

408. JAMES ET AL., *supra* note 154, at 213.

409. *Id.* at 6.

one or more types of public accommodation.⁴¹⁰ Some states have enacted antidiscrimination laws to protect trans people from discrimination and harassment in places of public accommodation.

The term “public accommodations” generally refers to both governmental entities and private businesses that provide services to the general public, but it does not encompass private clubs with membership or dues processes.⁴¹¹ The Civil Rights Act and the Americans with Disabilities Act both define public accommodation broadly to include most places that either provide lodging, entertainment, or recreation, or that serve food.⁴¹² Many states have adopted a definition of public accommodation(s) that is either identical or largely similar to the one in the Americans with Disabilities Act.⁴¹³

1. Anti-Discrimination Laws

As of 2021, twenty-one states and the District of Columbia have laws that protect transgender people from discrimination in places of public accommodation.⁴¹⁴ Some states include gender identity and/or gender expression in their antidiscrimination laws. The District of Columbia takes this approach, and its antidiscrimination statute is representative of most antidiscrimination statutes in this category. 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.⁴¹⁵ 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.⁴¹⁶ 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.⁴¹⁷ Some states explicitly prohibit discrimination on the basis of sex or sexual orientation, not gender identity or expression, but define sex or sexual orientation to include a person’s gender identity.⁴¹⁸ For example, Colorado’s antidiscrimination statute prohibits discrimination on the

410. *Id.* at 214.

411. *Public Accommodations*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/state-maps/public-accommodations> (last updated Apr. 15, 2020).

412. *See* 42 U.S.C.A. § 2000a(b) (West through P.L. 116–259); 42 U.S.C.A. § 12181(7)(A)–(L) (West through P.L. 116–259).

413. *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-301(5.1) (West 2020) (explicitly adopting the definition of public accommodation set out in Title III of the Americans with Disabilities Act).

414. *Equality Maps: Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Jan. 20, 2021); *State Public Accommodations Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/img/maps/citations-nondisc-public-accom.pdf> (last updated Dec. 10, 2020). 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, Virginia, and Washington.

415. D.C. CODE ANN. § 2-1402.31(a)(1) (West 2006).

416. § 2-1402.31(a).

417. *Id.*

418. *Equality Maps: Nondiscrimination Laws*, *supra* note 414.

basis of sexual orientation and does not explicitly list gender identity as a protected characteristic.⁴¹⁹ 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.”⁴²⁰ Similarly, Hawaii includes gender identity or expression within its definition of sex.⁴²¹

Five states interpret existing prohibitions against sex discrimination to include sexual orientation and/or gender identity.⁴²² Michigan and Pennsylvania are examples of this approach. 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.⁴²³ 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.”⁴²⁴ 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.⁴²⁵

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. For example, Iowa law states that the antidiscrimination statute “shall not apply to: [a]ny 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.”⁴²⁶ 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

419. COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West 2014).

420. *Id.* at § 24-34-301(7).

421. HAW. REV. STAT. ANN. § 489-3 (West 2019).

422. *Equality Maps: Nondiscrimination Laws*, *supra* note 414; *State Public Accommodations Nondiscrimination Laws*, *supra* note 414.

423. MICH. C.R. COMM’N, INTERPRETIVE STATEMENT 2018-1, THE MEANING OF SEX IN THE ELLIOT LARSEN CIVIL RIGHTS ACT (May 21, 2018), https://www.michigan.gov/documents/mdcr/MCRC_Interpretive_Statement_on_Sex_05212018_625067_7.pdf; *see* Elliot Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2302(a) (West 2019).

424. PA. HUM. RELS. COMM’N, GUIDANCE ON DISCRIMINATION ON THE BASIS OF SEX UNDER THE PENNSYLVANIA HUMAN RELATIONS ACT (Aug. 2, 2018), https://www.phrc.pa.gov/About-Us/Publications/Documents/General_Publications/APPROVED_Sex_Discrimination_Guidance_PHRA.pdf; *see* Pennsylvania Human Relations Act, 43 PA. STAT. AND CONS. STAT. ANN. § 955 (West 2020).

425. PA. HUM. RELS. COMM’N, *supra* note 424; *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.

426. IOWA CODE ANN. § 216.7(2)(a) (West 2019).

First Amendment grounds.⁴²⁷ The First Amendment argument has been successful for some plaintiffs challenging these laws in both state and federal courts.⁴²⁸ However, these challenges have focused on discrimination based on sexual orientation, particularly with respect to providing services for same-sex weddings.

2. Discriminatory Laws

Sixteen states have considered legislation that would restrict access to multiuser 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.”⁴²⁹

In March 2016, North Carolina passed HB2, which required restrooms in all public places to designate multiple occupancy bathrooms for use only by persons based on their biological sex.⁴³⁰ The law triggered an immediate public outcry and caused massive financial losses for North Carolina, as companies either cancelled or delayed planned expansions in the state. Businesses lost an estimated \$525 million by the end of 2017.⁴³¹ Financial losses included halted plans for a PayPal facility, estimated to bring \$2.66 billion to the state’s economy,⁴³² a cancelled Ringo Starr concert which cost a town roughly \$33,000,⁴³³ the NBA

427. This issue was raised in the Supreme Court’s past decision regarding sex 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 Garrett 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/>.

428. See, e.g., *Country Mills Farm v. City of E. Lansing*, 280 F. Supp. 3d 1029, 1037–38 (W.D. Mich. 2017); *Brush & Nib Studio v. City of Phx.*, 448 P.3d 890, 926 (Ariz. 2019); see also *Lexington-Fayette Urb. Cty. Hum. Rts. Comm’n v. Hands on Originals*, NO. 2015–CA–000745–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; because the lawsuit was filed by an organization, GLSO, the case was dismissed. *Lexington-Fayette Urb. Cty. Hum. Rts. Comm’n v. Hands On Originals*, No. 2017-SC-000278-DG, 2019 WL 5677638, at *1 (Ky. Oct. 31, 2019).

429. 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 CONF. OF STATE LEGISLATURES (July 7, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>.

430. 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.

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

432. “*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>.

433. *Id.*

removing its 2017 All-Star Game from Charlotte,⁴³⁴ and the NCAA pulling seven championship events from the state.⁴³⁵ Seven hundred part-time workers at the PNC Arena in Raleigh lost at least \$130,000 in wages after various performers cancelled events.⁴³⁶

Because of this backlash, the North Carolina law was repealed on March 30, 2017.⁴³⁷ 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.⁴³⁸ 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.⁴³⁹ 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."⁴⁴⁰ Shortly after HB142 passed, a lawsuit challenging it was filed.⁴⁴¹ 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."⁴⁴² Defendants were also permanently enjoined from using the statute to prohibit transgender individuals from using facilities under its control which are consistent with their gender identity.⁴⁴³

434. 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>.

435. 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, 8:31 PM), <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/>.

436. *Bathroom bill' to cost North Carolina \$3.76 billion*, *supra* note 432.

437. 2017 N.C. Sess. Laws 4.

438. 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.*

439. Berman & Phillips, *supra* note 435; Camila Domonoske & James Doubek, *North Carolina Repeals Portions Of Controversial 'Bathroom Bill'*, NAT'L PUB. RADIO (Mar. 30, 2017, 3:11 AM), <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>.

440. "Fake Repeal" of HB2 (HB142), ACLU OF N.C., <https://www.acluofnorthcarolina.org/en/legislation/fake-repeal-hb2-hb142> (last visited Feb. 18, 2021).

441. Carcaño v. Cooper, 350 F. Supp. 3d 388, 408 (M.D.N.C. 2018).

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

443. *Id.* at *3.

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.⁴⁴⁴ 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.⁴⁴⁵ 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.⁴⁴⁶ 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.⁴⁴⁷ 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.⁴⁴⁸ On March 29, 2017, Collins-Smith withdrew the bill from consideration for further study.⁴⁴⁹ A different bill, SB 346, was introduced but the language was never finalized and it ultimately failed.⁴⁵⁰

Due to the lack of success of bathroom bills, states have changed tactics. State legislators now push to pass bills that would either criminalize the provision of gender-affirming medical care to transgender people or,⁴⁵¹ more popularly, ban transgender youth from participating in sports.⁴⁵² These legislators pursue restrictions on youth sports as a means to continue to carry out the objectives of the bathroom bills—a common argument against transgender students playing sports

444. Tafi Mukunyadzi, *Arkansas ‘bathroom bills’ fail, critics still vexed*, ARK. DEMOCRAT GAZETTE (Apr. 10, 2017, 4:30 AM), <https://www.arkansasonline.com/news/2017/apr/09/arkansas-bathroom-bills-fail-critics-still-vexed/>.

445. *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>.

446. *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-unnecess/>; Mukunyadzi, *supra* note 444.

447. See DeMillo, *supra* note 435; see also *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/>.

448. DeMillo, *supra* note 435.

449. Mukunyadzi, *supra* note 444.

450. Kralik, *supra* note 429.

451. See *id.* (listing Alabama, Kentucky, Missouri, Mississippi, Tennessee as states that are considering criminalizing gender-affirming medical care).

452. See *State Action Center*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/2020-state-action-center> (last visited Feb. 21, 2021) (listing Alabama, Arizona, Georgia, Idaho, Indiana, Louisiana, Michigan, Missouri, Mississippi, New Hampshire, Tennessee, Washington, and West Virginia as states currently considering banning transgender people from participating in sports, or as states that have already passed a bill to ban transgender people from participating in sports) (Note that this bill has become popular because it involves discussions of whether trans athletes should be able to enter locker rooms aligned with their gender identity; this is essentially the same argument of the “Bathroom Bills” under a new name.).

is that this would create discomfort in locker rooms.⁴⁵³ Although many of these bills have died in the state legislature, Idaho signed this bill into law, though it is currently being litigated.⁴⁵⁴ Several states are still debating similar legislation.⁴⁵⁵ One consequence of the Idaho bill is that opposing athletes and coaches can accuse their competition of being transgender, whether or not the accusation has merit; the athlete then has to submit to “sex verification” testing to prove they are cisgender.⁴⁵⁶ Many worry that this would be used primarily against Black and brown female athletes, as gender testing has been used to target these groups in the past.⁴⁵⁷ In light of this, Montana produced the “Save Women’s Sports Act,” which mimics Idaho’s successful law; it is currently being debated by the state legislature.⁴⁵⁸

In 2018, a coalition of more than 300 sexual assault and domestic violence organizations signed a joint statement supporting full and equal access to restrooms and locker rooms for transgender individuals.⁴⁵⁹ The coalition criticized legislation and policies that restrict access to facilities consistent with gender identity, arguing that these policies will not enhance public safety nor reduce sexual violence.⁴⁶⁰

3. Discrimination in Schools

Access to appropriate bathroom facilities is also a critical issue 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

453. George B. Cunningham et al., *Inclusive Spaces and Locker Rooms for Transgender Athletes*, 7 HUMAN KINETICS J. 365 (2017), <https://journals.humankinetics.com/view/journals/kj/7/4/article-p365.xml>.

454. Kevin Richert, *A flurry of filings: Opponents urge federal court to strike down Idaho’s transgender athletics ban*, MAGIC VALLEY (Dec. 23, 2020), https://magicvalley.com/news/local/education/a-flurry-of-filings-opponents-urge-federal-court-to-strike-down-idaho-s-transgender-athletics/article_d4f4ed82-a786-576c-84dd-3a3d5152d574.html.

455. See *State Action Center*, supra note 452.

456. John Riley, *Athletes, women’s and civil rights groups support Idaho transgender athlete’s lawsuit*, METRO WKLY. (Dec. 28, 2020), <https://www.metroweekly.com/2020/12/athletes-womens-and-civil-rights-groups-support-idaho-transgender-athletes-lawsuit/>.

457. *Id.*

458. Troy Oppie, *Idaho Exports Transgender Athlete Legislation to Montana*, NAT’L PUB. RADIO (Jan. 25, 2021), <https://www.boisestatepublicradio.org/post/idaho-exports-transgender-athlete-legislation-montana#stream/0>.

459. *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community*, NAT’L TASK FORCE TO END SEXUAL DOMESTIC VIOLENCE (Apr. 13, 2018), <http://www.4vawa.org/ntf-action-alerts-and-news/2018/4/12/national-consensus-statement-of-anti-sexual-assault-and-domestic-violence-organizations-in-support-of-full-and-equal-access-for-the-transgender-community>.

460. *Id.*

their gender identity.⁴⁶¹ Some states, including Oklahoma, pushed back and indicated that they would not follow federal guidance.⁴⁶² 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.⁴⁶³ 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.⁴⁶⁴

In February 2017, the Trump Administration rescinded the "Dear Colleague" letter.⁴⁶⁵ 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."⁴⁶⁶ The Trump Administration did not offer replacement guidance.⁴⁶⁷

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

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

462. 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>.

463. 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).

464. *G.G. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016). The 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) (judgment vacated and case remanded to the Fourth Circuit for further consideration).

465. 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>.

466. *Id.*

467. February 2017 Dear Colleague Letter on Transgender Students, U.S. DEP'T OF JUST. C.R. DIV. & U.S. DEP'T OF EDUC. OFF. FOR C.R. (Feb. 22, 2017), <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>.

have upheld protections for transgender students under Title IX despite the Trump Administration's policy.⁴⁶⁸ 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, thereby securing a transgender student's access to the bathroom consistent with his gender identity.⁴⁶⁹ In *Adams v. School Board of St. Johns County*, the United States Court of Appeals for the Eleventh Circuit held that the school's bathroom policy violated both the Equal Protection Clause and Title IX.⁴⁷⁰ Similarly, in *Grimm v. Gloucester County School Board*, the United States Court of Appeals for the Fourth Circuit upheld the student's claims on both Title IX and equal protection grounds.⁴⁷¹ In *Adams* and *Grimm*, the Eleventh and Fourth Circuits concluded that Title IX protects students from discrimination on the basis of their transgender identity, citing to the Supreme Court's recent decision in *Bostock v. Clayton County*.⁴⁷² Other courts have rejected claims on Title IX grounds but have allowed transgender students to claim protections on equal protection grounds.⁴⁷³ Transgender students also retain the option of challenging school bathroom policies for sex discrimination under state laws, including state public accommodations laws.⁴⁷⁴

468. See *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *A.H. v. Minersville Area Sch. Dist.*, 408 F. Supp. 3d 536 (M.D. Penn. Oct. 2, 2019).

469. *Whitaker*, 858 F.3d at 1049–50, 1051–54 (allowing a transgender student to proceed on sex-discrimination claims under Title IX based on the theory that forbidding a student from using restrooms 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).

470. *Adams*, 968 F.3d 1286, 1303–05 (11th Cir. 2020) (holding that the policy violated the Equal Protection Clause because the school board failed to show a substantial relationship between excluding transgender students and protecting student privacy; and the policy constituted discrimination under Title IX because Title IX protects students from discrimination on the basis of their transgender identity). The Eleventh Circuit noted that the Equal Protection holding is consistent with the Seventh Circuit's holding in *Whitaker*, as well as the majority of district courts that have addressed the issue. *Adams*, 968 F.3d at 1303–04.

471. *Grimm*, 972 F.3d 586, 607, 616–19 (4th Cir. 2020) (holding that the bathroom policy violated the Fourteenth Amendment because the policy was not substantially related to the objective of protecting student privacy; in respect to the Title IX claim, the court held that the restroom policy discriminated against plaintiff on the basis of sex and that the plaintiff suffered harm based on this discrimination).

472. *Adams*, 968 F.3d at 1305 (concluding that with the Supreme Court's guidance in *Bostock*, "Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex"); *Grimm*, 972 F.3d at 607 (concluding that after the Supreme Court's decision in *Bostock*, "we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex.'").

473. See, e.g., *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 295, 301 (W.D. Pa. 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).

474. 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

Plaintiffs have challenged the constitutionality of 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*, Plaintiffs 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.⁴⁷⁵ They alleged that the school policy was not generally applicable because it burdened those students whose Christian faith dictated that they adhere to certain standards of modesty, which included not using restrooms or changing in front of members of the opposite sex.⁴⁷⁶ 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.⁴⁷⁷ The United States Court of Appeals for the Ninth Circuit upheld the district court's dismissal of the claim.⁴⁷⁸ The Supreme Court denied certiorari in December 2020.⁴⁷⁹ 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.⁴⁸⁰ Though the district court noted that the school's policy was facially neutral, it nevertheless found that plaintiffs had stated 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.⁴⁸¹ The plaintiffs dropped the lawsuit in April 2019.⁴⁸²

Groups have also used right to privacy arguments to challenge the constitutionality of school restroom policies. For example, in *Parents for Privacy v. Dallas School District No. 2*, plaintiffs argued that the school's policy violated cisgender

Human Rights Law when his school denied him access to the boys' restrooms and locker rooms); see also MO. ANN. STAT. § 213.065 (West 2017).

475. 326 F. Supp. 3d 1075, 1110 (D. Or. 2018).

476. *Id.*

477. *Id.*

478. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1217 (9th Cir. 2020) (holding that the school's bathroom policy does not infringe on plaintiffs' First Amendment rights because the policy does not target religious conduct).

479. *Parents for Priv. v. Barr*, No. 20-62, 2020 WL 7132263 (Dec. 7, 2020); see also Andrew Chung, *U.S. Supreme Court rejects challenge to transgender student accommodations*, REUTERS (Dec. 17, 2020, 12:17 PM), <https://www.reuters.com/article/usa-court-transgender/u-s-supreme-court-rejects-challenge-to-transgender-student-accommodations-idUSKBN28H2A2>.

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

481. *Id.*

482. Mariah Balingit, *Parents drop legal fight over an Illinois school system's transgender policy*, WASH. POST (Apr. 17, 2019, 7:33 PM), https://www.washingtonpost.com/local/education/parents-drop-legal-fight-over-an-illinois-school-systems-transgender-policy/2019/04/17/776f22a2-614e-11e9-9ff2-abc984dc9eec_story.html.

individuals' right to privacy under the Fourteenth Amendment.⁴⁸³ 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."⁴⁸⁴ 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."⁴⁸⁵ The court rejected this argument, finding 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 right to not share school facilities with transgender classmates whose gender identities are the same as their own.⁴⁸⁶ This right to privacy argument was also rejected by the Northern District of Illinois.⁴⁸⁷

A privacy argument brought by cisgender students in *Doe v. Boyertown Area School District* was rejected by the Third Circuit, but not because the court did not want to expand substantive due process rights.⁴⁸⁸ Instead, the court 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."⁴⁸⁹ The Supreme Court later declined to hear the case.⁴⁹⁰

B. HOUSING

Transgender people are frequently denied access to housing, one of our most basic needs. One in five transgender people in the United States has been

483. 326 F. Supp. 3d 1075 (D. Or. 2018). 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.

484. *Id.* at 1092.

485. *Id.*

486. *Id.* at 1099–1101. The United States Court of Appeals for the Ninth Circuit upheld the district court's dismissal of the claim for failure to state a claim upon which relief could be granted. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1217 (9th Cir. 2020) (agreeing with the district court that "there is no Fourteenth Amendment fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth").

487. *Students and Parents for Priv. v. Sch. Dirs. of Twp. High Sch. Dist. 211*, 377 F. Supp. 3d 891, 902 (N.D. Ill. 2019).

488. *See Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2636 (2019). The Third Circuit noted that "adopting the appellants' position would very publicly brand all transgender students with a scarlet 'T' and they should not have to endure that as the price of attending their public school." *Id.* at 530.

489. *Id.* at 527–28.

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

discriminated against when seeking a home, and more than one in ten have been evicted from their homes because of their gender identity.⁴⁹¹ 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.⁴⁹²

Transgender individuals are also more likely to experience homelessness than cisgender individuals. According to the United States Department of Housing and Urban Development (HUD)'s 2019 Annual Homeless Assessment Report (AHAR) to Congress, there are 3,255 transgender individuals experiencing homelessness and 1,362 gender non-conforming individuals experiencing homelessness in the United States.⁴⁹³ These individuals make up 0.6% and 0.2% of all individuals experiencing homelessness, respectively.⁴⁹⁴ One in five transgender individuals have reportedly experienced homelessness at some point in their lives;⁴⁹⁵ other sources place this number at one in three.⁴⁹⁶ Transgender women of color experienced disproportionately high rates of homelessness: American Indian (59%), African American (51%), multiracial (51%), and Middle Eastern (49%).⁴⁹⁷ From 2016 to 2019, rates of transgender homelessness increased by 88%, and 63% of this population was unsheltered.⁴⁹⁸ Due to pervasive discrimination, transgender individuals are often turned away from shelters or are harassed or assaulted by staff or residents while they are at the shelters.⁴⁹⁹ In 2015,

491. *Housing & Homelessness*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/housing-homelessness> (last visited Feb. 14, 2021).

492. 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), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

493. U.S. DEP'T OF HOUSING & URB. DEV., *THE 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS* (2019), available at <https://www.huduser.gov/portal/sites/default/files/pdf/2019-AHAR-Part-1.pdf>.

494. *Id.*

495. *Housing & Homelessness*, *supra* note 491.

496. NAT'L CTR. FOR TRANSGENDER EQUAL., *THE 2015 REPORT OF THE U.S. TRANSGENDER SURVEY* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>; 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/>.

497. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 496.

498. Jackie Janosko, *Changes to HUD's Equal Access Rule Could Exclude More Transgender People From Shelter*, NAT'L ALL. TO END HOMELESSNESS (July 29, 2020), <https://endhomelessness.org/changes-to-huds-equal-access-rule-could-exclude-more-transgender-people-from-shelter/>.

499. *LGBT Homelessness*, NAT'L COAL. 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. See also UCLA SCH. OF L. WILLIAMS INST., *LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS* (Apr. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>.

70% of transgender individuals who stayed in a shelter reported mistreatment on account of their gender identity.⁵⁰⁰

Although significant discrimination poses a barrier for transgender individuals to access housing, there are protections in place at both the federal and state levels. Most notably at the federal level is the Fair Housing Act (FHA). 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 anti-discrimination statutes that offer similar protections as the FHA does on the state level.

1. Federal Policy

The 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.⁵⁰¹ HUD currently interprets the FHA's prohibition on sex-based discrimination to include discrimination based on sexual orientation or gender identity.⁵⁰² Additionally, HUD issued its finalized Equal Access Rule in 2016.⁵⁰³ The rule requires equal access to HUD programs without regard to a person's actual or perceived sexual orientation or gender identity.⁵⁰⁴ It also ensures that, where it is appropriate to consider gender or sex in housing, an individual's own self-identified gender will determine access to housing facilities.⁵⁰⁵ Housing providers that receive HUD funding, including shelters, or that have HUD-insured loans are subject to the rules.⁵⁰⁶ 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."⁵⁰⁷

On July 23, 2020, HUD issued a proposed rule to modify the Equal Access Rule,⁵⁰⁸ which threatened to weaken protections for transgender individuals in

500. More than half of transgender individuals who stayed in a shelter were verbally harassed, physically attacked, or sexually assaulted. Nearly one in ten individuals were forced to leave the shelter when staff discovered their gender identity. NAT'L CTR. FOR TRANSGENDER EQUAL., *supra* note 496.

501. 42 U.S.C. § 3604(a) (2018).

502. *Housing Discriminations and Persons Identifying as LGBTQ*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/housing_discrimination_and_persons_identifying_lgbtq (last visited Feb. 14, 2021).

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

504. *Id.*; 24 C.F.R. § 5.105(a)(2) (2016).

505. § 5.106. 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.

506. *Id.*

507. *HUD LGBTQ Resources*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/LGBT_resources (last visited Jan. 19, 2021).

508. Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 84 Fed. Reg. 44811 (proposed July 2020) (to be codified at 24 C.F.R. 5); *see also HUD Updates Equal Access Rule, Returns Decision Making to Local Shelter*

shelters. The proposed rule would allow single-sex shelter providers under HUD programs “to establish a policy that places and accommodates individuals on the basis of their biological sex, without regard to their gender identity.”⁵⁰⁹ The rule requires shelters to uniformly and consistently apply any policy.⁵¹⁰ For example, if a single sex facility’s policy is only to serve individuals assigned female at birth, then the shelter can decline to accommodate a transgender woman, but not a transgender man.⁵¹¹ The rule would require any determination of sex to be based on “a good faith belief” and reasonable considerations may include height, presence of facial hair, presence of an Adam’s apple, and “other physical characteristics which, when considered together, are indicative of a person’s biological sex.”⁵¹² If the shelter has a good faith belief that an individual is not the same biological sex served by the facility, the shelter may request evidence of the individual’s biological sex.⁵¹³ The rule would require shelters to provide transfer recommendations if they turn an individual away.⁵¹⁴ HUD justified the proposed rule change by arguing that the 2016 Equal Access Rule “impermissibly restricted single-sex facilities in a way not supported by congressional enactment, minimized local control, burdened religious organizations, manifested privacy issues, and imposed regulatory burdens.”⁵¹⁵ HUD Secretary Carson stated that “this important update will empower shelter providers to set policies that align with their missions, like safeguarding victims of domestic violence or human trafficking.”⁵¹⁶

Opponents of this proposed rule argue that the rule enables discrimination against transgender individuals and would severely limit their access to necessary housing services, particularly at a time when homelessness is increasing during the public health pandemic.⁵¹⁷ They contend that the proposed rule’s policy constitutes sex discrimination under the FHA and *Bostock v. Clayton County*.⁵¹⁸

Providers, U.S. DEP’T OF HOUS. & URB. DEV. (July 1, 2020), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_099.

509. *Id.* The proposed rule would eliminate paragraphs (b)(1)-(b)(4) of 24 C.F.R. § 5.106 (2016), which currently require facilities to ensure accommodation in accordance with an individual’s gender identity.

510. *Id.*

511. *Id.*

512. *Id.*

513. *Id.*

514. *Id.*

515. *Id.*

516. *HUD Updates Equal Access Rule, Returns Decision Making to Local Shelter Providers*, *supra* note 508.

517. *HUD Proposes Discriminatory Rules in Shelters*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 1, 2020), <https://transequality.org/blog/hud-proposes-discriminatory-rules-in-shelters>; *HUD Publishes Proposed Anti-Transgender Rule in the Federal Register*, NAT’L LOW INCOME HOU. COAL. (July 27, 2020), <https://nlihc.org/resource/hud-publishes-proposed-anti-transgender-rule-federal-register>.

518. *Comments in Response to the Proposed Rule*, NAT’L WOMEN’S L. CTR. (Sept. 22, 2020), <https://nwlc.org/wp-content/uploads/2020/09/NWLC-Comment-for-HUD-202-0047-Shelter-Admission-or-Placement-Decisions-Based-on-Sex.pdf>; *Comments in Response to the Proposed Rule*, ACLU (Sept. 22, 2020), <https://www.aclu.org/letter/aclu-comment-hud-anti-trans-rule-2020>.

Furthermore, they note that the proposed physical factors for determining an individual's "sex" (like height, facial hair, or Adam's apple) will harm gender-nonbinary, intersex, and cisgender individuals who do not align with rigid sex stereotypes.⁵¹⁹ Additionally, opponents argue that the rule's requirement of providing a referral is wholly inadequate because many communities have limited shelters, or all shelters in a community could adopt a policy discriminating against transgender individuals.⁵²⁰ In one survey, 67% of transgender women said they would need to travel more than ten to twenty miles to find an alternative shelter if they were refused admittance.⁵²¹

In June 2020, Congresswomen Maxine Waters and Jennifer Wexton sent HUD a letter stating that the change to the Equal Access Rule contradicts the Supreme Court's guidance in *Bostock*.⁵²² Secretary Carson replied that the Supreme Court's ruling in *Bostock* has no impact on the proposed rule and that the shelter facilities do not qualify as housing under the FHA.⁵²³ As of January 2021, the rule had not been finalized and the rule is expected to be rejected by the Biden Administration.⁵²⁴

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.⁵²⁵ 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.⁵²⁶

519. NAT'L WOMEN'S L. CTR., *supra* note 518; ACLU, *supra* note 518.

520. Ann Oliva, *HUD's Proposed Rule Would Allow Discrimination Against Transgender People*, CTR. ON BUDGET & POL'Y PRIORITIES (July 23, 2020), <https://www.cbpp.org/press/statements/huds-proposed-rule-would-allow-discrimination-against-transgender-people>.

521. Theo Santos et al., *The Trump Administration's Latest Attack on Transgender People Facing Homelessness*, CTR. FOR AM. PROGRESS (Sept. 3, 2020, 9:01 AM), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/09/03/490004/trump-administrations-latest-attack-transgender-people-facing-homelessness/>.

522. Letter from Rep. Maxine Waters, Chairwoman, House Fin. Servs. Comm., and Rep. Jennifer Wexton, Member, House Fin. Servs. Comm., to Benjamin Carson, Sec'y, U.S. Dep't of Hous. & Urb. Dev. (June 29, 2020), https://financialservices.house.gov/uploadedfiles/6.29.20_ltr_to_hud_ea_scd_wexton_waters.pdf.

523. Letter from Benjamin Carson, Sec'y, U.S. Dep't of Hous. & Urb. Dev. to Maxine Waters, Chairwoman, House Fin. Servs. Comm., and Rep. Jennifer Wexton, Member, House Fin. Servs. Comm. (July 13, 2020), https://wexton.house.gov/uploadedfiles/hud_response_to_waters-wexton_6.29.20_letter.pdf.

524. Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 84 Fed. Reg. 44811 (to be codified at 24 C.F.R. pt. 5); *see also* Emily Wax-Thibodeaux, *Biden's ambitious LGBT agenda poises him to be nation's most pro-equality president in history*, WASH. POST (Jan. 11, 2021, 8:00 AM), <https://www.washingtonpost.com/politics/2021/01/11/biden-lgbtq-policies/>.

525. 24 C.F.R. § 5.106 (2016); *HUD LGBTQ Resources*, U.S. DEP'T OF HOUS. & URB. DEV., https://hud.gov/LGBT_resources (last visited Jan. 19, 2021).

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

2. State Policy

Currently, twenty-two states and the District of Columbia have laws prohibiting discrimination based on sexual orientation and gender identity.⁵²⁷ 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.⁵²⁸ Six states—Florida, Michigan, North Dakota, Nebraska, and Pennsylvania—have human or civil rights commissions which have explicitly stated that they interpret existing protections against sex discrimination to include both sexual orientation and gender identity but do not codify this protection in a statute.⁵²⁹

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.⁵³⁰ 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.⁵³¹ Discrimination in the terms of sale or rental for housing is also prohibited,⁵³² as is posting advertising anything that indicates the seller or landlord would limit the housing based on gender identity.⁵³³ Finally, sellers and landlords cannot tell a person that a unit is unavailable because of the person's gender identity when in fact it is available.⁵³⁴

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.⁵³⁵ 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

527. *Equality Maps: Nondiscrimination Laws*, *supra* note 414. 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, Virginia, and Washington. *Id.*

528. *See, e.g.*, ME. REV. STAT. ANN. tit. 5., § 4581-A (West 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) (West 2019) (defining sexual orientation as "a person's actual or perceived . . . gender identity or expression").

529. *Equality Maps: Nondiscrimination Laws*, *supra* note 414.

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

531. *Id.*

532. *Id.* at § 4503(a)(2).

533. *Id.* at § 4503(a)(3).

534. *Id.* at § 4503(a)(4).

535. *Understanding the Transgender Community*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/understanding-the-transgender-community> (last visited Feb. 21, 2021).

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.⁵³⁶ 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.”⁵³⁷ In a different survey conducted by the National Center for Transgender Equality (NCTE) 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;⁵³⁸ 3% reported being attacked or assaulted;⁵³⁹ and 15% reported being asked to leave.⁵⁴⁰ Beyond just harassment, 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.⁵⁴¹

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 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.⁵⁴²

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.”⁵⁴³ This phrase is meant to capture a variety of clinical treatment methods that people use

536. *Identity Documents*, LAMBDA LEGAL (Nov. 17, 2016), https://www.lambdalegal.org/sites/default/files/transgender_booklet_-_documents.pdf.

537. JAMES ET AL. *supra* note 154, at 9. This report, released in 2015, remains the most recent large-scale study of discrimination against the transgender community.

538. JAIME M. GRANT ET AL., *supra* note 391.

539. *Id.*

540. *Id.*

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

542. JAMES ET AL., *supra* note 154, at 9.

543. *See, e.g.*, *Know Your Rights: Passports*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/passports> (last visited Feb. 21, 2021).

to facilitate gender transition, including changes in gender expression, psychotherapy, hormone therapy, or surgery.⁵⁴⁴

To change 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.⁵⁴⁵ 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 ten years, while a person in the process getting appropriate clinical treatment will have a passport that is valid for two years.⁵⁴⁶ Those in the process of transition may apply for a full-validity passport once their doctor indicates that they have completed their treatment.⁵⁴⁷

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.⁵⁴⁸

One federal program—the Selective Service—does not recognize changes of gender, as it is an entirely birth-assigned sex system.⁵⁴⁹ This means that those assigned male at birth must register regardless of transition status, though it is unclear at this time whether they will be allowed to serve as openly transgender persons.⁵⁵⁰ 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 ten days.⁵⁵¹

544. *Id.*; see also ELI COLEMAN ET AL., STANDARDS OF CARE FOR THE HEALTH OF TRANSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE, THE WORLD PRO. ASS’N FOR TRANSGENDER HEALTH (2012), https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English2012.pdf?_t=1613669341 (outlining clinical treatment methods).

545. *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 Feb. 21, 2021).

546. *Id.*

547. *Id.*

548. *How do I change my gender on Social Security’s records?*, SOC. SEC. 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 Feb. 21, 2021); see also Policy Manual, Ch. 2: USCIS-issued secure identity documents, U.S. CITIZENSHIP AND IMMIGR. SERVS. (last updated Oct. 15, 2020), <https://www.uscis.gov/policy-manual/volume-11-part-a-chapter-2>; *Know Your Rights: Immigration Documents*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/immigration-documents> (last visited Feb. 21, 2021); *Know Your Rights: Military Records*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/military-records> (last visited Feb. 21, 2021).

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

550. *Id.*

551. *Id.*

B. STATE RULES

The process by which identity documents may be changed to accurately reflect a person's gender identity varies widely based on state laws and administrative policies. NCTE's Identity Documents Center provides relevant information about each state's procedures.⁵⁵²

1. Drivers' Licenses

Legal advocates have successfully challenged the processes for changing the gender marker on driver's licenses in Michigan, Alaska, and Alabama.⁵⁵³ The ACLU filed a civil rights lawsuit against the Michigan Secretary of State, challenging 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.⁵⁵⁴ The United States District Court for the Eastern District of Michigan found that plaintiffs stated a cognizable claim that the state's policy unconstitutionally infringed on their right to privacy under the Fourteenth Amendment by forcing transgender individuals to reveal their transition status to strangers.⁵⁵⁵ After the district court denied Michigan's motion to dismiss, Michigan changed its policy and the lawsuit was dismissed.⁵⁵⁶ Transgender individuals in Michigan may now use their passport to prove their gender.⁵⁵⁷ The ACLU of Michigan notes that this is an improvement from the previous policy because surgery is no longer required, but it is still burdensome on transgender individuals who either do not have a passport or who cannot acquire one due to citizenship status or financial strain.⁵⁵⁸

A right to privacy argument was similarly successful in Alaska state court in *K. L. v. Department of Administration, Division of Motor Vehicles*.⁵⁵⁹ 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.⁵⁶⁰ However, because the policy was deemed invalid, Alaskans were left without a

552. *ID Documents Center*, NAT'L CTR. FOR TRANSGENDER EQUAL, <https://transequality.org/documents> (last visited Feb. 21, 2021); *National Equality Map*, TRANSGENDER LAW CTR., <https://transgenderlawcenter.org/equalitymap> (last visited Feb. 21, 2021); *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).

553. *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015); *Corbitt v. Taylor*, No. 2:18cv91-MHT, 2021 WL 142282 (M.D. Ala. Jan. 15, 2021); *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).

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

555. *Id.* at 856–57.

556. *Love v. Johnson*, No. 15-11834, 2016 WL 4437667, at *1 (E.D. Mich. 2016).

557. *Love v. Johnson: ID Lawsuit*, ACLU OF MICH., <https://www.aclumich.org/en/cases/love-v-johnson-id-lawsuit> (last visited Oct. 21, 2020).

558. *Id.*

559. *K.L. v. State*, No. 3AN-11-05431 Cl., 2012 WL 2685183 (Super. Ct. Alaska Mar. 12, 2012).

560. *Id.* at *3.

procedure for changing the sex marker on their driver's licenses. The court found this 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.⁵⁶¹ Alaska later changed its policy and no longer requires proof of surgery to change the gender marker on licenses.⁵⁶²

Alabama's policy for changing the gender marker on driver's licenses was recently deemed unconstitutional by the United States District Court for the Middle District of Alabama.⁵⁶³ Alabama Law Enforcement Agency's (ALEA) Policy Order 63 prohibited transgender individuals from changing the gender marker on their driver's licenses unless they provided proof that they had undergone a form of gender-affirming surgery approved by the state.⁵⁶⁴ Plaintiffs in *Corbitt v. Taylor* argued that this policy violates the Equal Protection Clause of the Fourteenth Amendment, their right to privacy, their right to refuse unwanted medical treatment, and their First Amendment protection against compelled speech by forcing them to disclose private information about their transgender status.⁵⁶⁵ The district court found Alabama failed to demonstrate how its policy serves an important government objective and how the policy substantially related to the achievement of those objectives.⁵⁶⁶ Therefore, Policy Order 63 did not survive the requisite intermediate scrutiny level and was deemed unconstitutional.⁵⁶⁷ Enforcement of Policy Order 63 was enjoined, and ALEA was ordered to issue plaintiffs new driver's licenses reflecting that they are women.⁵⁶⁸

According to the NCTE's grading system, twenty-two states and the District of Columbia earned a grade in the "A" range.⁵⁶⁹ Twenty states and the District of Columbia do not require certification from a medical provider to change the gender marker on a driver's license; nineteen states and the District of Columbia offer a gender-neutral "X" option in place of an "M" or "F" gender marker.⁵⁷⁰ Eight states and Puerto Rico earned grades in the "B" range.⁵⁷¹ These states

561. *Id.* at *6.

562. *Changing Identification Details*, ALASKA DEP'T OF ADMIN., DIV. OF MOTOR VEHICLES, <https://doa.alaska.gov/dmv/akol/namchg.htm> (last visited Oct. 21, 2020).

563. *Corbitt v. Taylor*, No. 2:18cv91-MHT, 2021 WL 142282, at *1 (M.D. Ala. Jan. 15, 2021).

564. *Id.*

565. *Id.*

566. *Id.* at *11, 17.

567. *Id.*

568. *Id.*

569. *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/images/Drivers%20License%20Grades%20May%202020.pdf> (last visited Jan. 21, 2021).

570. Arkansas, California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Vermont, Virginia, Washington, Massachusetts, Michigan, Rhode Island, Indiana, and New Hampshire. Massachusetts, Michigan, and Rhode Island do not offer a gender-neutral option. *See id.*

571. This includes Alaska, Delaware, Missouri, North Carolina, Ohio, Puerto Rico, Wyoming, Nebraska, and West Virginia. *See id.*

require certification from a licensed professional and they generally have what the NCTE characterizes as an easy-to-understand form for changing the gender marker.⁵⁷² Seven states are in the “C” range: six states require certification from a medical or mental health professional,⁵⁷³ while one state has what the NCTE characterizes as burdensome process requirements.⁵⁷⁴ Thirteen states and four territories round out the bottom tier of grades as assigned by the NCTE.⁵⁷⁵ Four states and four territories earned a “D” grade for having “unclear, unknown or unwritten policy.”⁵⁷⁶ Nine states 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.⁵⁷⁷

2. Birth Certificates

States vary significantly more on procedures for changing the gender marker on birth certificates 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 combination to change the gender marker on a birth certificate.⁵⁷⁸ For example, Georgia requires both a court order and proof of surgery.⁵⁷⁹ The statute provides that, to correct a birth certificate, a person must present a certified copy of a court order indicating both that the person has had surgery and that they have changed their name.⁵⁸⁰ A person must submit five documents to successfully change their birth certificate: an affidavit for amendment, a certified copy of the court order changing their name and sex, a medical certification signed by the individual’s physician, a valid government issued photo ID, and a money order or cashier’s check for the fees.⁵⁸¹ While Virginia previously required proof of surgery, that requirement has been abolished.⁵⁸² Now, individuals in Virginia seeking to change the gender marker on a birth certificate need to submit an

572. *Id.*

573. This includes Arizona, Florida, Idaho, Kansas, New York, and Wisconsin. *Id.*

574. This includes Utah. *Id.*

575. *Id.*

576. These states are Mississippi, Montana, North Dakota, South Dakota, American Samoa, Guam, Northern Marianas Island, and U.S. Virgin Islands. *Id.*

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

578. *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%20Apr%2028%202020.pdf> (last updated Apr. 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).

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

580. *Id.*

581. *ID Documents Center—Georgia*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/georgia> (last visited Feb. 22, 2021).

582. Rodney Robinson, *Bill allows new birth certificate for transgender people*, ASSOCIATED PRESS (Feb. 28, 2020), <https://apnews.com/article/9cb01e7f60b0dda4d12654f491431604>.

application, a certified copy of the court ordered gender change, a copy of identification, and fee payment.⁵⁸³

Twenty-three states, the District of Columbia, Puerto Rico, and New York City do not require proof of surgery to change the gender marker on a birth certificate.⁵⁸⁴ New York City changed its policy to allow an individual to change their birth certificate in 2014.⁵⁸⁵ An individual must submit a birth certificate correction application form, a signed and notarized attestation of gender identity, a signed photocopy of current photo identification, and a check or money order for the \$55 fee.⁵⁸⁶ 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.⁵⁸⁷ Additionally, as of March 10, 2020, New York State has changed its policy to allow transgender minors to correct their birth certificate to be consistent with their gender identity.⁵⁸⁸

Tennessee and Ohio are the only states that prohibit correction of gender-markers on birth certificates entirely. Tennessee prohibits correcting birth certificates by statute,⁵⁸⁹ while Ohio prohibits it as a matter of policy.⁵⁹⁰ 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.⁵⁹¹ 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.⁵⁹² It argues that birth certificates are not compelled speech in violation of the First Amendment, but rather

583. *ID Documents Center—Virginia*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/virginia> (last visited Feb. 22, 2021).

584. *Summary of State Birth Certificate Gender Change Laws*, *supra* note 578.

585. *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>.

586. *ID Documents Center—New York*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/new-york> (last visited Oct. 25, 2020).

587. *Notice of Adoption of Amendment to Article 207 of the New York City Health Code*, NYC DEP’T OF HEALTH & MENTAL HYGIENE BD. OF HEALTH at 3, <https://www1.nyc.gov/assets/doh/downloads/pdf/notice/2018/noa-amend-article207-section207-05.pdf> (last visited Oct. 25, 2020).

588. *Victory! New York State Changes Policy to Allow Transgender Minors to Correct Birth Certificates After Lambda Legal Lawsuit*, LAMBDA LEGAL (March 10, 2020), https://www.lambdalegal.org/blog/20200310_victory-new-york-state-transgender-minors-birth-certificates.

589. 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”).

590. *See Summary of State Birth Certificate Gender Change Laws*, *supra* note 578; *ID Documents Center—Ohio*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents/state/ohio> (last visited Oct. 25, 2020).

591. 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>.

592. 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).

“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”;⁵⁹³ 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 form the basis for an informational privacy claim”;⁵⁹⁴ and that the Equal Protection Clause is not violated because the policy is facially neutral and plaintiffs are not members of a protected class.⁵⁹⁵ In December 2020, the district court granted the plaintiff’s motion for summary judgment and found that Ohio’s policy violated the First and Fourteenth Amendments.⁵⁹⁶ 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.⁵⁹⁷ On October 22, 2019, the Plaintiffs rejected defendants’ settlement proposal and were unable to make a counterproposal.⁵⁹⁸ Plaintiffs’ motion for summary judgment and defendants’ motion to dismiss are pending as of November 16, 2020.⁵⁹⁹

Prior lawsuits challenging states’ 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 certificates unless there was an error in recording the assigned sex at birth.⁶⁰⁰ The state conceded that the policy was unconstitutional under the Equal Protection Clause, but asserted that it needed a court order to change the rule.⁶⁰¹ The court agreed that the policy violated the Equal Protection Clause, permanently enjoining the state from enforcing its policy of rejecting transgender individuals’ applications to change the sex marker on their birth certificates and ordering the state to begin accepting those applications.⁶⁰² Idaho’s Republican lawmakers passed new legislation in 2020 setting strict criteria for changing birth certificate gender markers, including a requirement that individuals obtain a court order that would only be granted if the sex listed on the birth certificate was mistakenly entered, entered fraudulently, or entered under duress.⁶⁰³ However, the United States District Court for the District of Idaho found the new legislation was effectively

593. *Id.* at 2.

594. *Id.*

595. *Id.*

596. *Ray v. McCloud*, No. 2:18-cv-00272, 2020 WL 8172750, at *6–9 (S.D. Ohio Dec. 16, 2020).

597. 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, 10:38 AM), <https://www.nbcnews.com/feature/nbc-out/transgender-plaintiffs-sue-tennessee-change-birth-certificate-gender-n997996>.

598. Joint Case Resolution Status Report at 1, *Gore v. Lee*, No. 3:19-cv-00328 (M.D. Tenn. Oct. 22, 2019), ECF No. 46.

599. Order, *Gore v. Lee*, No. 3:19-cv-00328 (M.D. Tenn. Nov. 16, 2020), ECF No. 101.

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

601. *Id.* at 1134.

602. *Id.* at 1146.

603. Associated Press, *Anti-Transgender Birth Certificate Law Violates Order, Judge Rules*, NBC NEWS (Aug. 11, 2020, 9:39 AM), <https://www.nbcnews.com/feature/nbc-out/anti-transgender-birth-certificate-law-violates-order-judge-rules-n1236369>.

the same as Ohio's previous policy, thus violating the injunction in place.⁶⁰⁴ Idaho officials are now banned from implementing this policy.⁶⁰⁵

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.⁶⁰⁶ 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"⁶⁰⁷—and the disclosure was neither a legitimate governmental interest nor a valid exercise of state police powers.⁶⁰⁸

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.⁶⁰⁹ 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.⁶¹⁰ The gender marker on a Kansas birth certificate now may be changed if the applicant submits a sworn statement requesting the change along with 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.⁶¹¹ Pursuant to these successful challenges in Idaho, Puerto Rico, and Kansas, the *Ray* and *Gore* Plaintiffs are likely to be successful, as they raise similar claims.

VII. CONCLUSION

The movement for transgender equality has grown over time, with increased media visibility and social understanding surrounding the challenges and hardships unique to the transgender community. Recent legislation such as Georgia's new hate crime law, which imposes additional penalties on defendants who commit crimes motivated by the victim's sexual orientation or gender (among other

604. *F.V. v. Jeppesen*, No. 1:17-cv-00170-CWD, 2020 WL 4726274, at *4 (D. Idaho Aug. 7, 2020).

605. *Id.*; Associated Press, *supra* note 603.

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

607. *Id.* at 333.

608. *Id.*

609. Consent Judgment at 2, *Foster v. Anderson*, No. 2:18-cv-02552-DDC-KGG (D. Kan. June 21, 2019), ECF No. 33.

610. *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/blog/20190624_kansas-agrees-accurate-birth-certificates-transgender-people; Tim Carpenter, *Kansas Settles Lawsuit to Allow Birth Certificate Changes for Transgender People*, TOPEKA CAPITAL-JOURNAL (June 24, 2019), <https://www.cjonline.com/news/20190624/kansas-settles-lawsuit-to-allow-birth-certificate-changes-for-transgender-people>.

611. Consent Judgment at 2-3, *Foster v. Anderson*, No. 2:18-cv-02552-DDC-KGG (D. Kan. June 21, 2019), ECF No. 33.

protected categories),⁶¹² demonstrate the legal and political advancements being achieved by the LGBTQ+ community. Similarly, in holding that transgender employees are protected by Title VII in the monumental *Bostock v. Clayton County* decision, the Supreme Court affirmatively provided support for the transgender community at the federal level.⁶¹³ On the other hand, transgender people still suffer disproportionately from stigma, discrimination, and violence compared to cisgender people. Despite an increase in social acceptance, data from the Federal Bureau of Investigation demonstrates that there are still consistently more than one hundred instances of hate crimes motivated by the victim's gender identity each year in the United States,⁶¹⁴ and in all likelihood this actually underestimates the true rate of violence against transgender people.⁶¹⁵ Thus, while the transgender rights movement is clearly making strides in its pursuit for equality, it is equally obvious that there is still more work to be done to ensure that transgender people across the country are able to live their lives safely, happily, and with the respect they deserve.

612. H.B. 426, Gen. Assemb., (Ga. 2020), <http://www.legis.ga.gov/Legislation/20192020/194575.pdf>.

613. *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020).

614. 2018 *Hate Crime Statistics*, *supra* note 284; 2017 *Hate Crime Statistics*, *supra* note 287; 2016 *Hate Crime Statistics*, *supra* note 287.

615. Stotzer, *supra* note 293.