# 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

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4. Id.
5. Id.
openly transgender federal appointees to serve in his administration, later hiring the White House’s first openly transgender staff member. 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.

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. 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. 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.

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. Notably, legal protections explicitly covering gender identity lag significantly behind those covering sexual orientation.

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.

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6. Id.
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

14. Id. at 6 n.1.
discrimination claims from trans plaintiffs. 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 \textit{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 \textit{Bostock}, transgender plaintiffs followed two main legal theories, choosing to file either sex discrimination claims or sex stereotyping claims. 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. Alternatively, a trans plaintiff could assert a discrimination claim on a sex or gender stereotyping theory. 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. 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. The stereotyping theory is supported largely by \textit{Price Waterhouse v. Hopkins}. The \textit{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. The Supreme Court found that, when an
employee’s gender (including their conformity to gender stereotypes) played a motivating part in an employment decision, the employer can avoid liability only through a finding that the same decision would have been made regardless of the impermissible consideration.  

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, others were hesitant in the absence of an explicit gender stereotype non-conformity argument. 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. 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.” 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.

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. 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).
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).
sex-based discrimination. 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.* 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.”

In 2019, plaintiff Aimee Stephens’s case, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 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.* 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. Throughout her employment, Stephens presented as a man and used her then-legal name. Funeral home policy required male employees to wear suits and ties and required female employees to wear skirts and business jackets. The funeral home provided male employees with clothing and allowances and did not do the same for female employees. 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. Before the vacation, Stephens was fired. 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.”

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. After failing to conciliate, the EEOC filed a complaint against the funeral home in the district court on September 25, 2014. The district court agreed with the funeral home that transgender status is not a protected class under Title VII and held that the EEOC

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32. *Id.* at *6.*
33. *Id.* at *7.*
34. *Id.* at *10.*
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{49} The court relied on a sex stereotyping theory under \textit{Price Waterhouse v. Hopkins}.\textsuperscript{50} Like the \textit{Price Waterhouse} employee, the court held that though she was not discriminated against for being a woman \textit{per se}, discrimination against a subset of women (those who fail to conform to stereotypical gender norms) was no less prohibited.\textsuperscript{51}

The Supreme Court heard oral argument in the case on October 8, 2019. The EEOC, Stephens, and some \textit{amici} asked the Court to uphold the Sixth Circuit’s judgment.\textsuperscript{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.\textsuperscript{53} The EEOC declined to do so and refused to sign onto the government’s \textit{amicus} brief in \textit{Harris Funeral Homes}.\textsuperscript{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.\textsuperscript{55} Petitioners further argued that Title VII requires showing that an employer treated members of one sex less favorably than

\begin{flushright}
\textsuperscript{47} \textit{Id.} at 603.
\textsuperscript{49} \textit{Harris Funeral Homes}, 884 F.3d at 574–75.
\textsuperscript{50} Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989); \textit{Harris Funeral Homes}, 884 F.3d at 576.
\textsuperscript{51} \textit{Id.} at 576–77.
\textsuperscript{52} \textit{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.
\end{flushright}
members of the opposite sex.\footnote{Id. at 31–32, 34.} 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.\footnote{Id. at 39–40.} 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.\footnote{Id. at 45.} The government also disagreed with Stephens’s interpretation of \textit{Price Waterhouse}, arguing that it did not establish sex stereotyping as a freestanding theory of Title VII liability.\footnote{Bostock v. Clayton Cty., 140 S. Ct. 1731, 1742 (2020).}

On June 15, 2020, the Supreme Court delivered the \textit{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 \textit{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.”\footnote{Id at 1741.} Exemplifying the Court’s reasoning, Gorsuch wrote:

\begin{quote}
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.\footnote{Id at 1739.}
\end{quote}

Title VII explicitly “prohibits employers from taking certain actions ‘because of’ sex,” which the majority read as therefore banning discrimination against trans employees.\footnote{Id. at 1741.}

Before \textit{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,\footnote{Federal Court Decisions, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/federal_court_decisions (last visited Jan. 16, 2020).} and twenty-two states and the District of Columbia had passed laws including gender identity as a protected class in employment.\footnote{Non-Discrimination Laws: Employment, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Jan. 16, 2020).} \textit{Bostock} creates a uniform system of interpretation for lower courts and makes routes to relief outside of Title VII less necessary.
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. 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.

2. Discrimination Against Transgender People in the United States Military

Until 2016, the U.S. Department of Defense (DOD) prohibited transgender people from serving in the Armed Forces. The DOD listed “transsexualism” as a psychosexual condition that precluded military service. 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.”

In June 2016, Secretary of Defense Ashton Carter lifted the transgender military ban. Defense Secretary Ashton B. Carter issued Directive Type Memo 16-005, which allowed transgender servicemembers to serve openly in the Armed Forces. The repeal followed completion of two directives, 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. Secretary Carter explained the move, in part, by emphasizing that the military needs to

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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.”

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. 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. 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.

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, 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. 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. 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.

77. U.S. DEPT’ OF DEF., supra note 71.
79. Id.
until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have . . . negative effects.”

The Presidential Memorandum was almost immediately enjoined by federal courts. 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.” 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.” 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. 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.” 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.”

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. First, the senators cited statements from the American Medical

84. Id.
85. Dep’t of Def, Memorandum to the President (Feb. 22, 2018), https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF.
86. Id.
87. Id.
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. 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.” 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. 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.

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. 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. The policy implemented in April 2019 by President Trump permits waivers, but Speier thinks these waivers are virtually nonexistent. 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. In July 2020, Representative Speier reintroduced the amendment to the Defense Spending Bill.

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

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89. Id.
90. Id.
92. Letter from Kirsten Gillibrand to James Mattis, supra note 88; see also Schaefer, supra note 75, at 45.
94. Id.
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.” 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. 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.

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. Indeed, in one of his first actions as President, Biden repealed the Trump Administration’s transgender military ban. 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. 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.

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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. 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.” The Department of Justice appealed to the D.C. Circuit to stay the preliminary injunction, but the request was denied on December 22, 2017. 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. 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.

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

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. 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. On December 11, 2017, the Karnoski Court issued a preliminary injunction ordering the military to immediately halt
the ban. On December 22, 2017, the Stockman Court also issued a preliminary injunction blocking the ban from taking place.

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. 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. Justices Breyer, Kagan, Ginsburg, and Sotomayor would have denied the application, demonstrating the Supreme Court was split along ideological lines.

*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. 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. After being diagnosed with gender dysphoria by a military physician in June 2019, Lieutenant Doe informed her commanding officer of the diagnosis. 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.

### 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. The laws in these states protect against both sexual orientation and gender identity discrimination in the workplace. In 2020, Virginia became the first state in over ten years to include

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120. Id.
123. Id. at 2.
124. Id.
sexual orientation and gender identity to their preexisting employment discrimination laws. Minnesota became the first state to extend protection to transgender individuals with the passage of the Minnesota Human Rights Act in 1993. The Act bans employment discrimination on the basis of sexual orientation. 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.” 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.

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.” 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.” 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.”

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. 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.” 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).

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127. Id. at 12.
129. MINN. STAT. ANN. § 363A.08 (West).
130. MINN. STAT. ANN. § 363A.03 (West).
131. Preston, supra note 128, at 81–82.
133. MASS. GEN. LAWS ANN. ch.151B, § 4 (West 2019).
134. Id.
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

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142. Id.
employment discrimination law applies to workplaces with five employees, while Colorado’s employment discrimination law applies to workplaces with just one employee. 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. In fact, transgender individuals living there will be even more protected under their state law than under federal law.

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. This includes hormone replacement therapy (HRT), gender confirmation surgery, treatments to modify speech and communication, genital tucking or packing, and chest binding. 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. 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. 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. To that end, WPATH has deemed all procedures necessary for gender affirmation to be medically necessary. 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.

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.
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. These medical costs can be flatly prohibitive for many trans individuals who are more likely to experience compounding economic hardships than cisgender individuals. Trans people also experience unemployment at a rate three times higher than the national average, 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. 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. 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. 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. 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. Additionally, trans individuals are frequently denied care by healthcare providers based on their personal prejudices, even when federal and state law prohibit such discrimination.


155. Id. at 12.

156. Id. at 13.

157. Id. at 10.

158. Id.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{166} The prevalence of suicide attempts among transgender individuals is 41\%, compared to 4.6\% in the overall U.S. population.\textsuperscript{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.\textsuperscript{168} The psychological benefits of gender affirming care also manifest in lower rates of substance abuse and other negative behaviors.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{172} Proponents argue that the cost of insuring trans people is

\begin{itemize}
  \item \textsuperscript{163} See Keren Landman, \textit{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.
  \item \textsuperscript{164} AM. MED. ASS’N, supra note 152, at 4.
  \item \textsuperscript{165} JAMES ET AL., supra note 154, at 10.
  \item \textsuperscript{166} AM. MED. ASS’N, supra note 152, at 4.
  \item \textsuperscript{168} AM. MED. ASS’N, supra note 152, at 3.
  \item \textsuperscript{169} Id.
  \item \textsuperscript{170} Bharath, supra note 153.
  \item \textsuperscript{171} Curtis Crane, \textit{Phalloplasty and Metoidioplasty: Overview and Postoperative Considerations}, UCSF TRANSGENDER CARE (June 17, 2016), https://transcare.ucsf.edu/guidelines/phalloplasty.
  \item \textsuperscript{172} AM. MED. ASS’N, supra note 152, at 3.
\end{itemize}
economical compared to the thousands of dollars of costs incurred from a suicide attempt\textsuperscript{173} or the myriad costs of HIV treatment that can increase when gender dysphoria goes untreated.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{178} Finally, opponents of gender-affirming care argue that gender dysphoria should be addressed through counseling, and not through gender-affirming physical treatments.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{173} Id.
  \item \textsuperscript{174} Id. at 4.
  \item \textsuperscript{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.
  \item \textsuperscript{177} Id. at 19.
  \item \textsuperscript{178} Id. at 4.
  \item \textsuperscript{179} Id. at 24.
  \item \textsuperscript{180} Id. at 6.
  \item \textsuperscript{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.
  \item \textsuperscript{182} O’Leary & Sprigg, supra note 176, at 6.
\end{itemize}
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. 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. Lastly, the fate of the Act itself is uncertain because of an ongoing challenge to its individual mandate. Trans individuals’ access to health insurance is further subject to the laws of the states in which they live and are employed. At present, states are divided between using state laws to restrict or widen ACA protections. 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. 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. 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. These provisions encompass discrimination based on “sex,” which the HHS interpreted in May 2016 as including gender identity.

187. See id.
189. Id. at 4.
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. The case challenging Section 1557, *Franciscan Alliance, Inc. v. Burwell*, was brought by eight states and three religiously affiliated health care providers. Since President Trump entered office in 2017, his administration has declined to enforce the HHS rule, citing *Franciscan Alliance*. 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. 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. 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*. 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.” 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. 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.

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193. *Id.* at 670.
198. *Id.* at 37162.
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.” In *Bostock*, the Supreme Court ruled that “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex.” 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*. In a subsequent proceeding, the same court denied the plaintiffs’ request for a blanket injunction against the 2020 rule in its entirety. 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. 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.

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. 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.

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. Further, although the current version of the 2020 rule substantially narrows the scope of HHS’s civil rights enforcement,

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201. Musumeci et al., *supra* note 196.
206. Musumeci et al., *supra* note 196.
207. *Id.*
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.\textsuperscript{210} In addition, states may enact their own legislation to block health care discrimination.\textsuperscript{211}

3. Constitutional Challenges to the ACA

In July 2019, the United States Court of Appeals for the Fifth Circuit heard arguments in \textit{Texas v. United States}, a case which challenges the constitutionality of the ACA’s individual mandate.\textsuperscript{212} The Supreme Court ruled that the mandate is a valid exercise of congressional taxation powers in \textit{NFIB v. Sebelius};\textsuperscript{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.\textsuperscript{214} The United States District Court for the Northern District of Texas ruled that the individual mandate was unconstitutional.\textsuperscript{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.\textsuperscript{216}

On appeal, the Fifth Circuit affirmed the district court’s ruling that the individual mandate was unconstitutional.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{219} Following this remand, petitioners filed for a rehearing \textit{en banc}, which the Fifth Circuit denied.\textsuperscript{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.\textsuperscript{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—

\textsuperscript{210}. Id.
\textsuperscript{211}. Id.
\textsuperscript{215}. Id.
\textsuperscript{216}. Id.
\textsuperscript{217}. \textit{Texas v. United States}, 945 F.3d 355, 393 (5th Cir. 2019).
\textsuperscript{218}. Id. at 402.
\textsuperscript{219}. Id. at 403.
\textsuperscript{220}. \textit{Texas v. United States}, 949 F.3d 182, 186 (5th Cir. 2020).
\textsuperscript{221}. Musumeci, \textit{supra} note 196.
stepping in for the United States—petitioned the Supreme Court for certiorari on January 3, 2020.\textsuperscript{222} The petition for writ of certiorari was granted in March 2020, with oral arguments completed on November 10, 2020.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{226} Statistically, 45% of the LGBTQ population “lives in states that do not have [LGBTQ]-inclusive insurance protections.”\textsuperscript{227} Ten states explicitly prohibit Medicaid from covering gender-affirming surgery,\textsuperscript{228} and twelve exclude transition-related services from coverage under state employee insurance programs.\textsuperscript{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.\textsuperscript{230} New Jersey, for example, has five statutes specifically prohibiting discrimination against transgender individuals in health insurance coverage.\textsuperscript{231} One provision provides that group health insurance policies are not to discriminate based on gender identity,\textsuperscript{232} another provides that individual health insurance policies are not to discriminate on that basis,\textsuperscript{233} and a third provides that small employer health benefits plans are not to discriminate against individuals based on their gender identity.\textsuperscript{234} Transgender individuals in New

\begin{itemize}
\item \textsuperscript{222} Texas, 945 F.3d at 393, petition for cert. filed (U.S. Jan. 3, 2020) (No. 19-841).
\item \textsuperscript{223} Texas v. California, 140 S. Ct. 1262 (2020) (Mem.).
\item \textsuperscript{224} Amy Coney Barrett, Countering the Majoritarian Difficulty, CONST. COMMENT. 61, 80 (2017).
\item \textsuperscript{225} Equality Maps: Healthcare Laws and Policies, supra note 186.
\item \textsuperscript{226} 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.
\item \textsuperscript{227} 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.
\item \textsuperscript{228} § 17B:27-46.100.
\item \textsuperscript{229} § 17B:26-2.1ii.
\item \textsuperscript{231} § 17B:27-46.100.
\item \textsuperscript{232} § 17B:26-2.1ii.
\item \textsuperscript{233} § 17B:27A-19.26.
\end{itemize}
Jersey may not be denied or obstructed from “health care services related to gen-
der transition” such as “hormone therapy, hysterectom[ies], mastectom[ies], and
vocal training.”

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. 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 lead-
ing to or in connection with sex changes or modifications and related care.”

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, 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 transgen-
der.”

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

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. Religious exemption

235. § 17B:27-46.100(4)(a).
237. N.C. STATE HEALTH PLAN FOR TEACHERS AND STATE EMP., D EP’T OF STATE TREASURER,
(last visited Jan. 20, 2021).
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-
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

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244. *State Policies in Brief,* supra note 243.
247. 42 U.S.C. § 300a-7(b).
249. Id.
251. Id.
that protect the fundamental and unalienable rights of conscience and religious freedom.\footnote{Id.}

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).\footnote{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.} But this rule was quickly challenged in court and was vacated pending appeal.\footnote{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).} 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.\footnote{Susan McNear Fradenburg, HHS ‘Conscience Rule’ Defines Right Not to Provide Certain Health Care Services, FOX ROTHSCILD LLP (May 16, 2019), https://www.foxrothschild.com/publications/hhs-conscience-rule-defines-right-not-to-provide-certain-health-care-services/.} 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.\footnote{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/2019/05/02/7488268025/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_a_5d0190ae4b0985c41978d31.} The rule reinforced the previous legal framework, including the Church, Coats-Snowe, and Weldon Amendments.\footnote{U.S. DEP’T OF HEALTH AND HUM. SERVS., supra note 255.} It also was intended to expand those protections.\footnote{Kodjak, supra note 258.} Previously, medical providers such as doctors who had religious or “conscience” objections were permitted to refuse to participate in certain procedures.\footnote{Id.} 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.\footnote{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. Under the 2019 Rule, however, “referral” was defined to “include[e] the provision of any information . . . by any method.” Healthcare workers in Iowa would have been protected if they refused on religious grounds to transfer patients to other providers.

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. 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.” 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’ 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.” 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.

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266. Religious Refusals in Health Care, supra note 248, at 1.
269. Id. at 15–16.
Ultimately, both district courts held that HHS violated the Administrative Procedure Act and constitutional provisions by promulgating the 2019 Rule.\textsuperscript{271} Both courts vacated the rule before it went into effect on the grounds that HHS exceeded its rulemaking and enforcement authority.\textsuperscript{272} OCR was instructed to wait on implementing the rule until it received further instructions from the courts.\textsuperscript{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.\textsuperscript{274} HHS appealed the decision in \textit{New York v. Department of Health & Human Services} on January 3, 2020; it is currently being litigated in the Second Circuit as \textit{National Family Planning & Reproductive Health Association v. Azar}.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{278} Lambda Legal sought a preliminary injunction to prevent the enforcement of the law before it went into effect in October 2017.\textsuperscript{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

\textsuperscript{271} Id.; City & Cty. of S.F. v. Azar, 411 F. Supp. 3d 1001, 1011 (N.D. Cal. 2019).
\textsuperscript{273} \textit{Conscience Rule Vacated}, supra note 272.
\textsuperscript{274} See id.
\textsuperscript{276} MISS. CODE ANN. § 11-62-5(4) (West 2019).
\textsuperscript{277} MISS. CODE ANN. § 11-62-3(c) (West 2019).
\textsuperscript{278} Barber v. Bryant, 860 F.3d 345, 351 (5th Cir. 2017), cert. denied, 138 S. Ct. 652 (2018).
injury alone was insufficient to establish injury-in-fact for purposes of [an] Equal Protection claim.” The United States Supreme Court denied certiorari. The Mississippi law remains in effect.

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, hate crimes, police mistreatment and abuse, and violence while incarcerated. The rate at which transgender people are victimized is on the rise. At the same time some proposed protections, such as the repeal of gay and trans panic defenses, are stalling, and other existing protections, like the Violence Against Women Act, may be in jeopardy. 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. Studies have shown that between thirty and fifty percent

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.).
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.
290. Brown & Herman, supra note 283, at 3.
of transgender people experience domestic and intimate partner violence in their lifetime.\textsuperscript{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.\textsuperscript{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.\textsuperscript{293} As a result, the statistics we do have likely underrepresent the extent to which transgender people experience domestic and intimate partner violence.\textsuperscript{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.”\textsuperscript{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-\textit{Obergefell}.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{300} Some studies have shown that LGBTQ people—particularly transgender people—have low confidence in the

\textsuperscript{291.} \textit{Id.}
\textsuperscript{292.} \textit{Id.}
\textsuperscript{294.} \textit{Id.} (noting that existing survey methods “are only allowing hints of the scope of the problem of violence against transgender people”).
\textsuperscript{295.} \textit{BROWN & HERMAN, supra} note 283, at 5.
\textsuperscript{297.} § 50B-1(b).
\textsuperscript{298.} \textit{BROWN & HERMAN, supra} note 283, at 3.
\textsuperscript{299.} \textit{Id.} at 17.
\textsuperscript{300.} \textit{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. 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. 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. Similarly, the Community United Against Violence organization offers resources to LGBTQ survivors of violence or abuse, including advocacy-based peer counseling. 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. 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. In 1994, an organization called FORGE was formed specifically to support transgender individuals. 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. 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 available.
available.\textsuperscript{309} By the end of September, there were eighteen reported murders of transgender women in 2019.\textsuperscript{310} Transgender women of color are disproportionately victims of hate crimes and violence due to their gender identity.\textsuperscript{311} Much like instances of domestic and intimate partner violence, hate crimes are often underreported due to stigma, fear of being “outed,”\textsuperscript{312} misgendering of victims, and fear or distrust of law enforcement.\textsuperscript{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.\textsuperscript{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,”\textsuperscript{315} to specifically outlaw crimes motivated by a victim’s actual or perceived gender, sexual orientation, or gender identity.\textsuperscript{316} The Act has two main provisions, the second of which makes it a crime to:

\begin{quote}
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.\textsuperscript{317}
\end{quote}

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

\begin{itemize}
\item \textsuperscript{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.
\item \textsuperscript{315} Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.
\item \textsuperscript{316} § 249(a)(2)(A).
\item \textsuperscript{317} Id.
\item \textsuperscript{318} § 294 (a)(2)(A)(i).
\end{itemize}
aggravated sexual abuse, or involves an attempt to kidnap, commit aggravated sexual abuse, or kill.\textsuperscript{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.\textsuperscript{320} This is perhaps in part due to the narrowness of the Act and the difficulty of proving the bias motivation in these cases.\textsuperscript{321} The Act was first used to prosecute a hate crime motivated by the victim’s gender identity in 2016.\textsuperscript{322} Joshua Vallum pleaded guilty to the assault and murder of his former girlfriend,\textsuperscript{323} whom he murdered after one of his friends found out that she was transgender.\textsuperscript{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.\textsuperscript{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 Arkansas\textsuperscript{326} and South Carolina\textsuperscript{327} 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.\textsuperscript{328}

\begin{itemize}
  \item \textsuperscript{319}§ 294 (a)(2)(A)(ii).
  \item \textsuperscript{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.”).
  \item \textsuperscript{324}Dwyer, supra note 322.
  \item \textsuperscript{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/.
\end{itemize}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{333}

Eleven states have hate crime legislation that includes sexual orientation but not gender identity.\textsuperscript{334} Texas is one of these states.\textsuperscript{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. . . .”\textsuperscript{336} At sentencing, the judge may require the defendant to attend an “educational program to further tolerance and acceptance of others.”\textsuperscript{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.\textsuperscript{338}

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

\begin{thebibliography}{9}
\bibitem{331} Id.
\bibitem{332} OHIO REV. CODE ANN. § 2927.12 (West 2019).
\bibitem{334} Hate Crime Laws, supra note 330.
\bibitem{335} Id.
\bibitem{336} TEX. CRIM. PROC. CODE ANN. art. 42.014 (West 2017).
\bibitem{337} Id.
\bibitem{339} Hate Crime Laws, supra note 330.
\bibitem{340} Id.
\end{thebibliography}
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.”

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. They are not themselves affirmative defenses. 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. The defense generally arises in the context of an alleged sexual advance or encounter between the perpetrator and victim, with the perpetrator’s deep-seated homophobia or transphobia allegedly triggering a “panic” response, leading them to assault the victim.

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. This theory of internal conflict was later used to support the idea of a gay panic defense, beginning in the 1960s. The defense has been used many times since the 1960s, and has been applied both in the context of sexual orientation and gender identity. 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.

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).
344. See Lee, supra note 342 at 475.
345. See id. at 471.
346. Id. at 482.
347. Id. at 491.
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. A number of other states have legislation aimed at banning these defenses in committee. 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.

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.”

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.” The bill was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security on June 28, 2019. There was no movement on the bill after it was introduced in the House Subcommittee and it failed on December 31, 2020. 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.”

354. The LGBTQ+ Panic Defense, supra note 350.
357. See H.R. 3133.
bisexual, or transgender individuals that were motivated by the victim’s gender, gender identity or expression, or sexual orientation.” 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.” The bill has not been reintroduced to the 117th Congress as of January 2021.

The gay and trans panic defenses remain controversial, and many organizations, including the American Bar Association and the LGBTQ+ Bar, support banning them. 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.

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.

1. Police Mistreatment

Transgender individuals are subject to high rates of police profiling, harassment and brutality. 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. This was even more of an issue for Native American (72%)

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358. H.R. 3133 § 28(c).
360. The LGBTQ+ Panic Defense, supra note 350.
363. Id. at 477.
364. JAMES ET AL., supra note 154, at 1.
365. Id. at 185.
366. Id. at 186.
and African-American (70%) respondents. Thirty-six 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. 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.
371. Id.
372. Id. at 104.
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

375. See JAMES ET AL. supra note 154, at 184, 191.
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).
381. 28 C.F.R. § 115.42(a)–(c) (2012).
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,\(^\text{384}\) the PREA rule allows for “individualized determinations” about ensuring the safety of each person.\(^\text{385}\) 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.”\(^\text{386}\) 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.\(^\text{387}\) 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.\(^\text{388}\) 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.”\(^\text{389}\) 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.\(^\text{390}\) Because most transgender people do not undergo gender-affirming surgeries,\(^\text{391}\) 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.\(^\text{392}\) To address this, one solution permissible


\(^{385}\) 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).


\(^{389}\) 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.⁴⁹³ 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.⁴⁹⁴ Administrative segregation may also deny transgender people “adequate recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for non-punitive reasons,”⁴⁹⁵ rendering it comparable to punitive segregation and imbuing it with the court-recognized potential for psychological damage.⁴⁹⁶ 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.⁴⁹⁷

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.⁴⁹⁸ 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.⁴⁹⁹ 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.⁵⁰⁰ 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.”⁵⁰¹ 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

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⁴⁹³. 8 C.F.R. § 115.43; see Rosenblum, supra note 377, at 529.
⁴⁹⁴. Tarzwell, supra note 376, at 180.
⁴⁹⁵. Meriwether v. Faulkner, 821 F.2d 408, 416 (7th Cir. 1987).
⁴⁹⁶. Tarzwell, supra note 376, at 180 (citing Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988)).
⁴⁹⁷. 8 C.F.R. § 115.43; see Rosenblum, supra note 377, at 529.
⁴⁹⁹. Id. at 830.
⁵⁰⁰. Id. at 832–33.
⁵⁰¹. Id. at 847.
obvious.”

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. 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. The Senate, which was controlled by Republicans at the time, did not bring the bill up for a vote. 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. 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. 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% of about 28,000 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 places of public accommodations.
one or more types of public accommodation. 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. 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. 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.

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. 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. 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. 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. 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. For example, Colorado’s antidiscrimination statute prohibits discrimination on the

410. Id. at 214.
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).
416. § 2-1402.31(a).
417. Id.
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
First Amendment grounds. The First Amendment argument has been successful for some plaintiffs challenging these laws in both state and federal courts. 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.”

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. 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. Financial losses included halted plans for a PayPal facility, estimated to bring $2.66 billion to the state’s economy, a cancelled Ringo Starr concert which cost a town roughly $33,000, 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/.


429. 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. Id.


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

Because of this backlash, the North Carolina law was repealed on March 30, 2017. 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. 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. 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.” Shortly after HB142 passed, a lawsuit challenging it was filed. The parties ultimately settled, with defendants representing the Executive branch agreeing not to construe the bill “to prevent transgender people from using public facilities in accordance with their gender identity.” 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.

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.”
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.\footnote{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/} 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.\footnote{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} 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.\footnote{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;} 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.\footnote{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/} 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.\footnote{Mukunyadzi, supra note 444.} On March 29, 2017, Collins-Smith withdrew the bill from consideration for further study.\footnote{Kralik, supra note 429.} A different bill, SB 346, was introduced but the language was never finalized and it ultimately failed.\footnote{See id. (listing Alabama, Kentucky, Missouri, Mississippi, Tennessee as states that are considering criminalizing gender-affirming medical care).}

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,\footnote{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.).} more popularly, ban transgender youth from participating in sports.\footnote{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.).} 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.
is that this would create discomfort in locker rooms.\textsuperscript{453} Although many of these bills have died in the state legislature, Idaho signed this bill into law, though it is currently being litigated.\textsuperscript{454} Several states are still debating similar legislation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{455} See State Action Center, supra note 452.

\textsuperscript{456} John Riley, \textit{Athletes, women’s and civil rights groups support Idaho transgender athlete’s lawsuit}, \textit{Metro WKLY.} (Dec. 28, 2020), \textcolor{blue}{https://www.metroweekly.com/2020/12/athletes-womens-and-civil-rights-groups-support-idaho-transgender-athletes-lawsuit/}.

\textsuperscript{457} \textit{Id.}


\textsuperscript{460} \textit{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


466. Id.

have upheld protections for transgender students under Title IX despite the Trump Administration’s policy.\textsuperscript{468} For example, in \textit{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.\textsuperscript{469} In \textit{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.\textsuperscript{470} Similarly, in \textit{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.\textsuperscript{471} In \textit{Adams} and \textit{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 \textit{Bostock v. Clayton County}.\textsuperscript{472} Other courts have rejected claims on Title IX grounds but have allowed transgender students to claim protections on equal protection grounds.\textsuperscript{473} Transgender students also retain the option of challenging school bathroom policies for sex discrimination under state laws, including state public accommodations laws.\textsuperscript{474}


\textsuperscript{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).

\textsuperscript{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 \textit{Whitaker}, as well as the majority of district courts that have addressed the issue. Adams, 968 F.3d at 1303–04.

\textsuperscript{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).

\textsuperscript{472} Adams, 968 F.3d at 1305 (concluding that with the Supreme Court’s guidance in \textit{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 \textit{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.’’”).

\textsuperscript{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).

\textsuperscript{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. 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. 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. The United States Court of Appeals for the Ninth Circuit upheld the district court’s dismissal of the claim. The Supreme Court denied certiorari in December 2020.

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).

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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).
481. Id.
individuals’ right to privacy under the Fourteenth Amendment.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{486} This right to privacy argument was also rejected by the Northern District of Illinois.\textsuperscript{487}

A privacy argument brought by cisgender students in \textit{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.\textsuperscript{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.”\textsuperscript{489} The Supreme Court later declined to hear the case.\textsuperscript{490}

\textbf{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

\begin{itemize}
\item \textsuperscript{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.” \textit{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. \textit{Id.} at 1107.
\item \textsuperscript{484} \textit{Id.} at 1092.
\item \textsuperscript{485} \textit{Id.}
\item \textsuperscript{486} \textit{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”).
\item \textsuperscript{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).
\item \textsuperscript{488} \textit{See} Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018), \textit{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.” \textit{Id.} at 530.
\item \textsuperscript{489} \textit{Id.} at 527–28.
\item \textsuperscript{490} Doe v. Boyertown Area Sch. Dist., 139 S. Ct. 2636 (2019) (mem.).
\end{itemize}
discriminated against when seeking a home, and more than one in ten have been evicted from their homes because of their gender identity.\footnote{Housing & Homelessness, Nat’l Ctr. for Transgender Equal., https://transequality.org/issues/housing-homelessness (last visited Feb. 14, 2021).} 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.\footnote{Jaime M. Grant et al., Nat’l Ctr. for Transgender Equal. and Nat’l Gay and Lesbian Task Force, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 106 (2011), available at https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.}

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.\footnote{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.} These individuals make up 0.6\% and 0.2\% of all individuals experiencing homelessness, respectively.\footnote{Id.} One in five transgender individuals have reportedly experienced homelessness at some point in their lives;\footnote{Housing & Homelessness, supra note 491.} other sources place this number at one in three.\footnote{Id.} Transgender women of color experienced disproportionately high rates of homelessness: American Indian (59\%), African American (51\%), multiracial (51\%), and Middle Eastern (49\%).\footnote{LGBT Homelessness, Nat’l Coal. for the Homeless (June 2017), https://nationalhomeless.org/wp-content/uploads/2017/06/LGBTQ-Homelessness.pdf.} From 2016 to 2019, rates of transgender homelessness increased by 88\%, and 63\% of this population was unsheltered.\footnote{Id.} 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.\footnote{Id.} In 2015,
70% of transgender individuals who stayed in a shelter reported mistreatment on account of their gender identity.\footnote{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.}

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.\footnote{42 U.S.C. § 3604(a) (2018).} HUD currently interprets the FHA’s prohibition on sex-based discrimination to include discrimination based on sexual orientation or gender identity.\footnote{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).} Additionally, HUD issued its finalized Equal Access Rule in 2016.\footnote{Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs Rule, 24 C.F.R. § 5.106 (2016).} The rule requires equal access to HUD programs without regard to a person’s actual or perceived sexual orientation or gender identity.\footnote{Id.} 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.\footnote{§ 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.} Housing providers that receive HUD funding, including shelters, or that have HUD-insured loans are subject to the rules.\footnote{Id.} 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.”\footnote{Id.}


\footnote{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.}

\footnote{501. 42 U.S.C. § 3604(a) (2018).}


\footnote{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).}

\footnote{504. Id.; 24 C.F.R. § 5.105(a)(2) (2016).}

\footnote{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.}

\footnote{506. Id.}


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.
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.
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 poses 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/.
2. State Policy

Currently, twenty-two states and the District of Columbia have laws prohibiting discrimination based on sexual orientation and gender identity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{531} Discrimination in the terms of sale or rental for housing is also prohibited,\textsuperscript{532} as is posting advertising anything that indicates the seller or landlord would limit the housing based on gender identity.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{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”).

\textsuperscript{529}. Equality Maps: Nondiscrimination Laws, supra note 414.

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

\textsuperscript{531}. \textit{Id.}

\textsuperscript{532}. \textit{Id.} at § 4503(a)(2).

\textsuperscript{533}. \textit{Id.} at § 4503(a)(3).

\textsuperscript{534}. \textit{Id.} at § 4503(a)(4).

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.\footnote{536. \textit{Identity Documents}, LAMBDA LEGAL (Nov. 17, 2016), \url{https://www.lambdalegal.org/sites/default/files/transgender_booklet_-_documents.pdf}.} 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.”\footnote{537. JAMES ET AL. \textit{supra} note 154, at 9. This report, released in 2015, remains the most recent large-scale study of discrimination against the transgender community.} 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;\footnote{538. JAIME M. GRANT ET AL., supra note 391.} 3\% reported being attacked or assaulted;\footnote{539. Id.} and 15\% reported being asked to leave.\footnote{540. Id. 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.\footnote{541. \textit{See, e.g.}, Love v. Johnson, 146 F. Supp. 3d 848, 850–51 (E.D. Mich. 2015).}}

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.\footnote{542. JAMES ET AL., supra note 154, at 9.}

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.\footnote{543. \textit{See, e.g.}, Know Your Rights: Passports, NAT’L CTR. FOR TRANSGENDER EQUAL., \url{https://transequality.org/know-your-rights/passports} (last visited Feb. 21, 2021).}

**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.”\footnote{544. \textit{See, e.g.}, Know Your Rights: Passports, NAT’L CTR. FOR TRANSGENDER EQUAL., \url{https://transequality.org/know-your-rights/passports} (last visited Feb. 21, 2021).} This phrase is meant to capture a variety of clinical treatment methods that people use
to facilitate gender transition, including changes in gender expression, psychotherapy, hormone therapy, or surgery.\footnote{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.\footnote{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 of getting appropriate clinical treatment will have a passport that is valid for two years.\footnote{546} Those in the process of transition may apply for a full-validity passport once their doctor indicates that they have completed their treatment.\footnote{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.\footnote{548}

One federal program—the Selective Service—does not recognize changes of gender, as it is an entirely birth-assigned sex system.\footnote{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.\footnote{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.\footnote{551}

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\footnote{546. \textit{Id.}}

\footnote{547. \textit{Id.}}


\footnote{550. \textit{Id.}}

\footnote{551. \textit{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


555. Id. at 856–57.


558. Id.


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

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561. Id. at *6.
564. Id.
565. Id.
566. Id. at *11, 17.
567. Id.
568. 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 Mariana Islands, and U.S. Virgin Islands. Id.
577. These states are Alabama, Georgia, Iowa, Kentucky, Louisiana, Oklahoma, South Carolina, Tennessee, and Texas. Id.
579. GA. CODE ANN. § 31-10-23(e) (West 2004).
580. Id.
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

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”).
“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.
601. Id. at 1134.
602. Id. at 1146.
the same as Ohio’s previous policy, thus violating the injunction in place.\textsuperscript{604} Idaho officials are now banned from implementing this policy.\textsuperscript{605}

Plaintiffs were also successful in challenging Puerto Rico’s policy, which required that birth certificates reflect sex assigned at birth and prohibited trans-gender individuals from correcting this designation.\textsuperscript{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”\textsuperscript{607}—and the disclosure was neither a legitimate governmental interest nor a valid exercise of state police powers.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{611} Pursuant to these successful challenges in Idaho, Puerto Rico, and Kansas, the \textit{Ray} and \textit{Gore} Plaintiffs are likely to be successful, as they raise similar claims.

\textbf{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

\begin{thebibliography}{99}
\bibitem{note605} Id.; Associated Press, \textit{supra} note 603.
\bibitem{note607} Id. at 333.
\bibitem{note608} Id.
\end{thebibliography}
protected categories), 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. 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, and in all likelihood this actually underestimates the true rate of violence against transgender people. 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.

615. Stotzer, supra note 293.