

# TRANSGENDER AND NONBINARY PERSONS' RIGHTS AND ISSUES

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## I. INTRODUCTION

The 2020s have been monumental for the rights of transgender persons. While trans individuals continue to face disproportionate discrimination and violence, in *Bostock v. Clayton County*, the Supreme Court held that Title VII explicitly protects trans employees.<sup>1</sup> Furthermore, high-profile trans individuals such as Sarah McBride, who recently became the United States' (U.S.) first openly trans state senator, are bringing heightened visibility and support to the struggle for transgender rights and social acceptance.<sup>2</sup> 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.<sup>3</sup> The struggle for transgender equality has also been fought on the political and legal fronts. The first transgender lobbying day took place in 1995 in the District of Columbia (D.C.).<sup>4</sup> Thirteen years later, Stu Rasmussen was elected the first openly trans mayor of a U.S. city.<sup>5</sup> The following year, then-President Barack Obama nominated the first openly transgender federal appointees to serve in his Administration, later hiring the White House's first openly transgender staff member.<sup>6</sup> In 2021, newly elected President Joe Biden nominated Rachel Levine to serve as the Assistant Secretary of Health. Levine is the first openly transgender federal official confirmed by the U.S. Senate.<sup>7</sup>

As trans visibility in popular culture and media is increasing and efforts are being made to center transgender people in social movements, so too is backlash against rights for transgender persons. Trans people are still subject to disproportionate stigma, discrimination, and violence.<sup>8</sup> Federal Bureau of Investigation (FBI) data shows that the number of hate crimes motivated by gender identity rose from thirty-three incidents in 2013 to 118 in 2015 and has remained in the triple-digits in the years since.<sup>9</sup> Lack of uniform documentation procedures,

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

2. Veronica Stracqualursi, *Delaware Democrat Sarah McBride to become nation's first-ever transgender state senator*, CNN (Nov. 4, 2020, 10:19 AM), <https://perma.cc/SLS7-F7ME>.

3. *Milestones in the American Transgender Movement*, N.Y. TIMES (Aug. 28, 2015), <https://perma.cc/YUQ9-JQ5X>.

4. *Id.*

5. *Id.*

6. *Id.*

7. Samantha Schmidt, John Wagner, & Teo Armus, *Biden selects transgender doctor Rachel Levine as assistant health secretary*, WASH. POST (Jan. 19, 2021, 6:20 PM), <https://perma.cc/QYW2-XAUX>.

8. Kiara Brantley-Jones, Steve Osunsaml, & Ashley Schwartz-Lavares, *Black Trans Lives Matter: Activists call for inclusion in racial justice movement*, ABC NEWS (Oct. 20, 2020, 4:53 PM), <https://perma.cc/U2KM-W25D>.

9. See FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., UNIFORM CRIME REPORT: HATE CRIME STATISTICS, 2015 4 (2016), <https://perma.cc/NM83-2MCU> (last visited Mar. 3, 2023); FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., UNIFORM CRIME REPORT: HATE CRIME STATISTICS, 2013 4 (2014), <https://perma.cc/HT5M-BZNP>; see, e.g., FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., UNIFORM CRIME REPORT: HATE CRIME STATISTICS, 2017 4 (2018), <https://perma.cc/23AG-LWGP>.

failure to properly identify and distinguish gender identity from sexual orientation, and questionable reporting rates cast doubts on the accuracy of current data, suggesting that hate crimes motivated by gender identity are more common than statistics indicate.<sup>10</sup>

The movement for rights for transgender persons is also largely fought on the state level, resulting in a broad variation among the states in the rights granted to transgender people. 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. Sixteen states and D.C. have high gender identity equality status, five states and Puerto Rico are medium equality status, five states have fair equality status, nine states and the U.S. Virgin Islands are low equality status, and fifteen states and three territories (American Samoa, Commonwealth of the Northern Mariana Islands, and Guam) are negative equality status.<sup>11</sup> Notably, legal protections explicitly covering gender identity lag significantly behind those covering sexual orientation.<sup>12</sup>

This Article uses the terms “transgender” or “trans” to refer to a person whose gender identity is different from the sex assigned to them at birth. Gender identity is distinct from sex and sexual orientation. Gender identity refers “to each person’s deeply felt internal and individual experience of gender—which may or may not correspond with the sex assigned at birth—including the personal sense of the body and other expressions of gender” such as dress, speech, and mannerisms.<sup>13</sup> Sex refers to “a classification, generally as male or female, according to the reproductive organs and functions that derive from the chromosomal complement.”<sup>14</sup> Sexual orientation refers to an individual’s emotional, affectional, and sexual attraction to individuals of the same gender or a different gender.<sup>15</sup>

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 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 III provides an overview of violence against transgender individuals by various actors and discusses legislative efforts to address disparities across intersectional lines. Part IV summarizes

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10. See Daniel Engber, *The FBI Says Hate Crimes Are Soaring. It Actually Has No Idea*, SLATE (Nov. 14, 2018, 3:54 PM), <https://perma.cc/EU93-JZXL>.

11. *Snapshot: LGBTQ Equality by State*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/H6AA-DD5E> (last visited Mar. 5, 2023).

12. See *id.* (classifying fifteen states and three territories as negative equality regarding gender identity and four states as negative equality regarding sexual orientation).

13. *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, INT’L COMM’N OF JURISTS & INT’L SERV. FOR HUM. RTS., 6 n.2 (2007), <https://perma.cc/5GED-85Y8>.

14. Carolyn M. Mazure, *What Do We Mean by Sex and Gender?*, YALE SCH. MED. (Sept. 19, 2021), <https://perma.cc/4DBH-LT24>.

15. *Id.* at 6 n.1.

challenges facing, and protections for, transgender people in accessing public accommodations, and Part V describes challenges and protections around housing access. Part VI covers the importance of obtaining identity documents that reflect one's gender identity and discusses the varied difficulty with which trans people can obtain or change those documents at the federal and state levels. Since this Article was last published, fewer states prohibit health insurance discrimination based on gender identity and more explicitly exclude transition services in state employee benefits.<sup>16</sup>

## II. ACCESS TO GENDER-AFFIRMING HEALTH CARE

Gender-affirming health care refers to any treatment and/or procedure that helps transgender people achieve a gender expression which correlates with their gender identity.<sup>17</sup> This includes HRT, gender affirming surgery, treatments to modify speech and communication, genital tucking or packing, and chest binding.<sup>18</sup> Gender-affirming care may also involve procedures frequently accessed by cisgender individuals, which include, but are not limited to, breast augmentation, mastectomies, hysterectomies, orchiectomies, vaginectomies, and hair removal.<sup>19</sup> 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.<sup>20</sup> The current standard of care as articulated by the World Professional Association for Transgender Health (WPATH) is to support transgender individuals in seeking the specific care they consider necessary for their correct gender expression.<sup>21</sup> To that end, WPATH has deemed all procedures necessary for gender affirmation to be medically necessary.<sup>22</sup> The American Medical Association, American Psychiatric Association, GLMA: Health Professionals

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16. Rose Gilroy, Meredith Johnson, Rachel Keirstead, Kelley Kling, Elizabeth McGuire, Shea O'Meara, Fulton Wald, Katie Wiese, Ricky Yeager, & Melissa Zubizarreta, *Transgender Rights and Issues*, 22 GEO J. GENDER & L. 417, 418 (2021).

17. Jae A. Puckett, Peter Cleary, Kinton Rossman, Michael Newcomb, & Brian Mustanski, *Barriers to Gender-Affirming Care for Transgender and Gender-Nonconforming Individuals*, 15 SEX RES. SOC. POL'Y 48, 48–49 (2017).

18. Madeline B. Deutsch, *Overview of gender-affirming treatments and procedures*, USCF TRANSGENDER CARE (June 17, 2016), <https://perma.cc/9RPM-LJ6F>.

19. *Id.*

20. *Id.*

21. Eli Coleman, Walter Bockting, Marsha Botzer, Peggy Cohen-Kettenis, Griet DeCuypere, Jamie Feldman, Lin Fraser, Jamison Green, Gail Knudson, Walter J. Meyer, Stan Monstrey, Richard K. Adler, George R. Brown, Aaron H. Devor, Randall Ehrbar, Randi Ettner, Evan Eyler, Rob Garofalo, Dan H. Karasic, Arlene Istar Lev, Gal Mayer, Heino Meyer-Bahlburg, Blaine Paxton Hall, Friedmann Pfäfflin, Katherine Rachlin, Bean Robinson, Loren S. Schechter, Vin Tangpricha, Mick van Trotsenburg, Anne Vitale, Sam Winter, Stephen Whittle, Kevan R. Wylie, & Ken Zucker, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, WORLD PRO. ASS'N FOR TRANSGENDER HEALTH 170 (2012), <https://perma.cc/LP8U-2D7V> [hereinafter *Standards of Care*].

22. *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, WORLD PRO. ASS'N FOR TRANSGENDER HEALTH (Dec. 21, 2016), <https://perma.cc/8RG7-UDTN>.

Advancing LGBTQ Equality, and the American College of Obstetricians and Gynecologists, among others, have publicly called for medically necessary gender-affirming care to be covered by insurance.<sup>23</sup>

However, serious structural barriers, such as economic and health insurance issues, often prevent trans individuals from accessing gender-affirming care. As a primary barrier, procedures are expensive, typically costing thousands of dollars.<sup>24</sup> These medical costs can be flatly prohibitive for transgender people, who are more likely to experience compounding economic hardships than cisgender individuals.<sup>25</sup> Trans people also experience unemployment at a rate three times higher than the national average,<sup>26</sup> which in the U.S.'s current system of employer-provided health insurance, increases barriers to accessing health care. Further, nearly one-third of trans individuals experience homelessness at some point in their lives.<sup>27</sup> The resulting instability and economic stress can make the costs and logistics of accessing any health care prohibitive.

Stigma around the rights of trans people and gender-affirming care may continue to inhibit access even for those 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 trans.<sup>28</sup> 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.<sup>29</sup> These denials can occur for a host of reasons. A common problem is that treatment is deemed not medically necessary, thereby enabling insurance companies to avoid coverage.<sup>30</sup> For example, insurance usually does not cover liposuction to define pectoral shape as part of chest masculinization because it is not classified as medically necessary.<sup>31</sup> Additionally, trans individuals are frequently denied care by healthcare providers due to personal prejudice,<sup>32</sup> even when federal and state law prohibit

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23. AM. MED. ASS'N, ISSUE BRIEF: HEALTH INSURANCE COVERAGE FOR GENDER-AFFIRMING CARE OF TRANSGENDER PATIENTS 5 (2019), <https://perma.cc/6VSN-UT9A>.

24. See, e.g., Deepa Bharath, *Being Uninsured Poses Unique Health Care Challenges for the Transgender Community*, USC CTR. FOR HEALTH JOURNALISM COLLABORATIVE (July 12, 2019), <https://perma.cc/EZW3-2QES>.

25. See SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET, & MA'AYAN ANAFI, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 3 (Nat'l Ctr. for Transgender Equal. 2016), <https://perma.cc/GK7Y-PPGZ> [hereinafter 2015 U.S. TRANSGENDER SURVEY].

26. *Id.* at 12.

27. *Id.* at 13.

28. *Id.* at 10.

29. *Id.*

30. See *What are my rights in health insurance coverage?*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/F4GU-2BKM> (last visited Mar. 5, 2023).

31. See *Masculinizing Chest Reconstruction*, UCSF TRANSGENDER CARE, <https://perma.cc/2MRV-556H> (last visited Oct. 24, 2022).

32. 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. 2015 U.S. TRANSGENDER SURVEY, *supra* note 25, at 10.

such discrimination.<sup>33</sup> Trans people living in rural areas may also have difficulty accessing services due to shortages in rural healthcare workforces.<sup>34</sup>

Those supporting greater access to gender-affirming care often base their advocacy on intertwined human rights and anti-discrimination arguments. Proponents point out that surgically affirmed transgender individuals report higher levels of satisfaction and lower levels of mental health issues.<sup>35</sup> 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.<sup>36</sup> Transgender individuals who have had no gender-affirming treatment are twice as likely to experience moderate to severe depression, and they are four times more likely to experience anxiety than their surgically-affirmed peers.<sup>37</sup> The prevalence of suicide attempts among trans individuals is 41%, compared to 4.6% in the overall U.S. population.<sup>38</sup> 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.<sup>39</sup> The psychological benefits of gender-affirming care also manifest in lower rates of substance abuse, suicide attempts, and anxiety.<sup>40</sup>

Further, proponents of gender-affirming care argue that in the absence of gender-affirming care, trans individuals are driven to riskier treatment options that are less effective in reducing mental health issues. For example, transgender people who cannot afford HRT may buy unofficial hormones from an illegitimate source that may cause dangerous side effects, such as impairing the nervous system and affecting skin pigmentation.<sup>41</sup> In the absence of FDA-approved options for surgical gender-affirming care, some transgender men use erectile implants designed for cisgender men that can cause serious complications.<sup>42</sup>

Healthcare advocates also emphasize that it is cost-effective to enable trans 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

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33. See *What Are My Rights in Health Insurance Coverage?*, *supra* note 30.

34. See Keren Landman, *Fresh Challenges to State Exclusions on Transgender Health Coverage*, NAT’L PUB. RADIO (Mar. 12, 2019, 5:15 AM), <https://perma.cc/9CPB-UBEC>.

35. AM. MED. ASS’N, *supra* note 23, at 4.

36. 2015 U.S. TRANSGENDER SURVEY, *supra* note 25, at 10.

37. AM. MED. ASS’N, *supra* note 23, at 4.

38. ANN P. HAAS, PHILIP L. RODGERS, & JODY L. HERMAN, SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS 4–5 (UCLA Sch. of L. Williams Inst., Sept. 2019), <https://perma.cc/2AUJ-X9LD>.

39. AM. MED. ASS’N, *supra* note 23, at 3.

40. *Id.*

41. Bharath, *supra* note 24.

42. Curtis Crane, *Phalloplasty and metoidioplasty: overview and postoperative considerations*, UCSF TRANSGENDER CARE (June 17, 2016), <https://perma.cc/Y4C4-NHDE>.

five years.<sup>43</sup> Proponents argue that the cost of insuring trans people is economical compared to the thousands of dollars of costs incurred from a suicide attempt.<sup>44</sup> Additionally, coverage of gender-affirming care leads to greater adherence to HIV medication, which reduces long-term medical bills associated with HIV that goes untreated.<sup>45</sup>

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 pay through government health insurance programs. The Heritage Foundation, for instance, argues that “[n]either federal lawmakers nor courts should have the power to redefine what it is to be a man or a woman for all Americans.”<sup>46</sup> These arguments are premised on beliefs that treatment does not achieve its desired effect or address underlying issues.<sup>47</sup> For example, opponents frequently contend that gender-affirming care cannot change a trans woman into a biological woman and therefore is not worth pursuing.<sup>48</sup> 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.<sup>49</sup>

The implementation of the Affordable Care Act (ACA, or the Act), its subsequent dismantling at the hands of the Trump Administration, and larger cultural change have resulted in wide fluctuations in trans individuals’ access to health care. At the federal level, health care rights for transgender individuals based on nondiscrimination protections provided by the ACA is subject to ongoing questions on three fronts. First, the Department of Health and Human Services (HHS) reinterpreted the scope of protections under the ACA due to federal court decisions and the ascension of the Trump Administration.<sup>50</sup> 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.<sup>51</sup> Third, the fate of the Act itself is uncertain because of an ongoing challenge to its individual mandate.<sup>52</sup> Transgender individuals’ access to health insurance is further subject to the laws

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43. AM. MED. ASS’N, *supra* note 23, at 3.

44. *Id.*

45. *Id.*

46. Ryan T. Anderson, *Government Shouldn’t Impose Transgender Ideology on Nation*, HERITAGE FOUND. (June 7, 2016), <https://perma.cc/EAT6-PU2L>.

47. Ryan T. Anderson, *Sex Reassignment Doesn’t Work. Here’s the Evidence.*, HERITAGE FOUND. (Mar. 9, 2018), <https://perma.cc/R5Z2-BEV7>.

48. See, e.g., Dale O’Leary & Peter Sprigg, *Understanding and Responding to the Transgender Movement*, FAM. RES. COUNCIL 20 (June 2015), <https://perma.cc/ZB28-DK7T>.

49. *Id.* at 6.

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

51. See *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, No. CV 20-1630 (JEB), 2020 WL 5232076, at \*25, 45 (D.D.C. Sept. 2, 2020); *Walker v. Azar*, No. 20CV2834FBMSMG, 2020 WL 4749859, at \*10 (E.D.N.Y. Aug. 17, 2020).

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

of the states in which they live and are employed.<sup>53</sup> At present, states are divided between using state laws to restrict or widen ACA protections.<sup>54</sup> States have taken a variety of approaches to implement their ideological positions, with many of the constraints premised upon religious or conscientious objections.<sup>55</sup> Although some federal provisions were written to protect the rights of those seeking health care from the beliefs of individual providers, the Trump Administration provided crucial support to states seeking to elevate religious freedoms over rights for transgender people.<sup>56</sup> Trans individuals' right 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

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.<sup>57</sup> These provisions encompass discrimination based on "sex," which the HHS interpreted in May 2016 as including gender identity.<sup>58</sup>

##### 1. Health and Human Services Interpretations

At the end of 2016, the U.S. District Court for the Northern District of Texas preliminarily enjoined the Act's non-discrimination requirement.<sup>59</sup> The case challenging Section 1557, *Franciscan Alliance, Inc. v. Burwell*, was brought by eight states and three religiously affiliated health care providers.<sup>60</sup> During the Trump Administration, the federal government declined to enforce the HHS rule, citing *Franciscan Alliance*.<sup>61</sup>

In 2020, the Trump HHS announced a final rule that reversed interpretations of Section 1557 of the Act promulgated by HHS under the Obama Administration.<sup>62</sup>

53. See *Equality Maps: Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/C2P5-UQ8U> (last visited Jan. 18, 2021).

54. See *id.*

55. "You Don't Want Second Best": Anti-LGBT Discrimination in US Health Care, HUM. RTS. WATCH 11–12 (2018), <https://perma.cc/Y664-7ZCX>.

56. *Id.* at 4.

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

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

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

60. *Id.* at 670.

61. See *id.*; OFF. FOR C.R., U.S. DEP'T OF HEALTH & HUM. SERVS., FACT SHEET: HHS FINALIZES ACA SECTION 1557 RULE, 1, 2 (June 12, 2020), <https://perma.cc/AGS3-Q9UW>.

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



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.<sup>63</sup> Trump's HHS argued 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*.<sup>64</sup> Further, Trump's 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."<sup>65</sup>

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."<sup>66</sup> In *Bostock*, the Supreme Court ruled that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex."<sup>67</sup> In response, the U.S. District Court for the Eastern District of New York stayed the 2020 regulation'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*.<sup>68</sup> In a subsequent proceeding, the same court denied the plaintiffs' request for a blanket injunction against the 2020 regulation in its entirety.<sup>69</sup> In *Whitman-Walker Clinic v. U.S. Department of Health & Human Services*, the U.S. District Court for D.C. 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.<sup>70</sup> The Trump Administration defended the rule by arguing that *Bostock* only applies in the employment

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63. *Id.* at 37161–62, 37204–05; MaryBeth Musumeci, Jennifer Kates, Lindsey Dawson, Alina Salganicoff, Laurie Sobel, & Samantha Artiga, *The Trump Administration's Final Rule on Section 1557 Non-Discrimination Regulations Under the ACA and Current Status*, KAISER FAM. FOUND. (Sept. 18, 2020), <https://perma.cc/6AZG-LDR5> [hereinafter *The Trump Administration's Final Rule*].

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

65. *Id.* at 37162.

66. *The Trump Administration's Final Rule*, *supra* note 63.

67. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020).

68. *Walker v. Azar*, No. 20-CV-2834(FB)(SMG), 2020 WL 4749859, at \*10 (E.D.N.Y. Aug. 17, 2020); *The Trump Administration's Final Rule*, *supra* note 63.

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

70. *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, No. CV-20-1630 (JEB), 2020 WL 5232076, at \*25, 45 (D.D.C. Sept. 2, 2020); *The Trump Administration's Final Rule*, *supra* note 63.

context, and that binary biological distinctions are appropriate in the health care context.<sup>71</sup>

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.<sup>72</sup> Further, the U.S. District Court for D.C. 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.<sup>73</sup>

Since May 2021, under the Biden Administration and after the decision in *Bostock*, HHS has announced that the Office for Civil Rights will “interpret and enforce Section 1557 and Title IX’s prohibitions on discrimination based on sex to include” discrimination on the basis of sexual orientation and gender identity.<sup>74</sup> In their explanation of the new rule, HHS cited *Bostock* as well as the fact that discrimination in health care impacts health outcomes.<sup>75</sup>

## 2. Constitutional Challenges

In July 2019, the U.S. Court of Appeals for the Fifth Circuit heard arguments in *Texas v. United States*, a case which challenged the constitutionality of the ACA’s individual mandate.<sup>76</sup> The Supreme Court had ruled that the mandate is a valid exercise of congressional taxation powers in *NFIB v. Sebelius*.<sup>77</sup> The plaintiff argued that because the Tax Cuts and Jobs Act of 2017 reduced the tax penalty of the individual mandate to zero, the mandate no longer represented a valid exercise of taxation power since it produced no revenue.<sup>78</sup> The U.S. District Court for the Northern District of Texas ruled that the individual mandate was unconstitutional.<sup>79</sup> It 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.<sup>80</sup>

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71. *The Trump Administration’s Final Rule*, *supra* note 63.

72. *Id.*

73. *Whitman-Walker Clinic*, 2020 WL 6363970, at \*16–17; *The Trump Administration’s Final Rule*, *supra* note 63.

74. Press Release, PRESS OFF., DEP’T OF HEALTH & HUM. SERVS., HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity, (May 10, 2021), <https://perma.cc/NVP7-7SVP>.

75. *Id.*

76. MaryBeth Musumeci, *Explaining California v. Texas: A Guide to the Case Challenging the ACA*, KAISER FAM. FOUND. (Sept. 1, 2020), <https://perma.cc/KMV6-R8W4>.

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

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

79. *Id.*

80. *Id.*

On appeal, the Fifth Circuit affirmed the district court's ruling that the individual mandate was unconstitutional.<sup>81</sup> However, the Fifth Circuit remanded the case to the district court for a "finer-toothed" inquiry as to "which provisions of the ACA Congress intended to be inseverable from the individual mandate."<sup>82</sup> The Fifth Circuit also found remand appropriate in light of the U.S.'s new argument on appeal that the ACA should only be enjoined in plaintiff states and that "declaratory judgment should only reach ACA provisions that injure the plaintiffs."<sup>83</sup> Following this remand, petitioners filed for a rehearing *en banc*, which the Fifth Circuit denied.<sup>84</sup> The Supreme Court granted cert and heard arguments on this case in 2020.<sup>85</sup> In June 2021, the Court held that the petitioners did not have standing to bring the claim because they could not show injury that "[was] likely to be redressed by a favorable judicial decision."<sup>86</sup> Thus, trans individuals' healthcare was not ultimately impacted because the rest of the ACA remains in effect.<sup>87</sup>

## B. STATE LAWS

Twenty-two states, Puerto Rico, and D.C. expressly prohibit excluding transgender individuals in health insurance coverage.<sup>88</sup> However, barriers to gender-affirming healthcare still exist in many states. State Medicaid policies exclude transgender health coverage and care, and state employee benefits programs exclude transition-related care.<sup>89</sup> Statistically, 44% of the LGBTQ population "lives in states that do not have [LGBTQ]-inclusive insurance protections."<sup>90</sup> Ten states explicitly prohibit Medicaid from covering gender-affirming surgery,<sup>91</sup> and fifteen exclude transition-related services from coverage under state employee insurance programs.<sup>92</sup> LGBTQ rights organizations have brought various legal challenges asking courts to strike down restrictive provisions.

### 1. Prohibiting Health Insurance Coverage Exclusions

Twenty-four states and D.C. expressly prohibit transgender exclusions in health insurance.<sup>93</sup> New Jersey, for example, has five statutes specifically

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

82. *Id.* at 402.

83. *Id.* at 403.

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

85. Transcript of Oral Argument at 1, *California v. Texas*, 141 S. Ct. 2104 (2021) (No. 19-840).

86. *California v. Texas*, 141 S. Ct. 2104, 2126 (2021) (quoting *Spokeo, Inc. v. Robins*, 578 U. S. 330, 338 (2016)).

87. *The Trump Administration's Final Rule*, *supra* note 63.

88. MOVEMENT ADVANCEMENT PROJECT, *Equality Maps: Healthcare Laws and Policies*, *supra* note 53.

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

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

prohibiting discrimination against transgender individuals in health insurance coverage.<sup>94</sup> One provision provides that group health insurance policies are not to discriminate based on gender identity;<sup>95</sup> another provides that individual health insurance policies are not to discriminate on that basis;<sup>96</sup> and a third provides that small employer health benefits plans are not to discriminate against individuals based on their gender identity.<sup>97</sup> Transgender individuals in New Jersey may not be denied or obstructed from “health care services related to gender transition” such as “hormone therapy, hysterectom[ies], mastectom[ies], and vocal training.”<sup>98</sup>

## 2. Excluding Gender-Affirming Care from State Employee Benefits Plans

Fifteen states explicitly exclude transition-related services from coverage under their state employee insurance programs.<sup>99</sup> Additionally, Arkansas explicitly permits private insurers to refuse to cover gender-affirming care.<sup>100</sup> North Carolina, for example, expressly states in its State Health Plan for 2020 that the Plan does not cover “[p]sychological assessment and psychotherapy treatment in conjunction with proposed gender transformation,” nor does it cover “[t]reatment or studies leading to or in connection with sex changes or modifications and related care.”<sup>101</sup>

LGBTQ rights organizations have brought legal challenges to remove such provisions from state codes. For example, Lambda Legal, an organization that advocates for LGBTQ individuals and rights,<sup>102</sup> and Transgender Legal Defense & Education Fund filed a lawsuit in March 2019 in the U.S. District Court for the Middle District of North Carolina on behalf of “several current and former state employees and their children who were denied coverage under the plan for medically necessary healthcare because they are transgender.”<sup>103</sup> One representative plaintiff, Connor Thonen-Fleck, is a young man who was insured through his father, a state employee.<sup>104</sup> Connor’s insurance denied

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94. N.J. STAT. ANN. § 17:48A-7II (West, Westlaw through L. 2023, c. 9 and J.R. No. 1); N.J. STAT. ANN. § 17B:26-2.1ii (West, Westlaw through L. 2023, c. 9 and J.R. No. 1); N.J. STAT. ANN. § 17B:27A-19.26 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1); N.J. STAT. ANN. § 17B:27A-7.22 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1); N.J. STAT. ANN. § 17:48E-35.39 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1).

95. N.J. STAT. ANN. § 17B:27-46.100 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1).

96. N.J. STAT. ANN. § 17B:26-2.1ii (West, Westlaw through L. 2023, c. 9 and J.R. No. 1).

97. N.J. STAT. ANN. § 17B:27A-19.26 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1).

98. N.J. STAT. ANN. § 17B:27-46.100(4)(a) (West, Westlaw through L. 2023, c. 9 and J.R. No. 1).

99. MOVEMENT ADVANCEMENT PROJECT, *Equality Maps: Healthcare Laws and Policies*, *supra* note 53.

100. *Id.*

101. *Benefits Booklet*, N.C. STATE HEALTH PLAN FOR TCHRS. & STATE EMPs. 57, 61 (2020), <https://perma.cc/9TYD-8CL5>.

102. LAMBDA LEGAL, <https://perma.cc/YA68-VFBU> (last visited Mar. 5, 2023).

103. *Kadel v. Folwell*, LAMBDA LEGAL, <https://perma.cc/5Y5V-5J5V> (last visited Mar. 5, 2023).

104. *Kadel v. Folwell*, 2022 U.S. Dist. LEXIS 103780, \*6–7 (M.D.N.C. 2022).

coverage for prescribed testosterone treatments and a mastectomy.<sup>105</sup> The plaintiffs are all trans current or former state employees or their dependents who have been denied coverage for gender-affirming treatment.<sup>106</sup> They seek declaratory and injunctive relief, among other remedies, under the Fourteenth Amendment's Equal Protection Clause, the ACA, and other statutes.<sup>107</sup>

In March 2020, a U.S. District Court judge denied North Carolina state officials' request to dismiss the lawsuit.<sup>108</sup> In September 2021, the Fourth Circuit affirmed the lower court's denial of request to dismiss the lawsuit.<sup>109</sup> In June 2022, the U.S. District Court for the Middle District of North Carolina found that the exclusion "discriminates based on sex and transgender status in violation of the Equal Protection Clause and discriminates because of sex in violation of Title VII. The Court will reserve a ruling on claims alleged under the ACA pending further Order from this Court."<sup>110</sup>

### 3. Criminalizing Gender-Affirming Care for Trans Youth

States have also begun to criminalize providing gender-affirming care to trans youth. In April 2022, Alabama enacted the Alabama Vulnerable Child Compassion and Protection Act, which makes it a felony to provide care "for the purpose of attempting to alter the appearance of or affirm the minor's perception of his or her gender or sex," including puberty blockers, hormone therapy, sterilization surgeries, and removing healthy or non-diseased body parts or tissues.<sup>111</sup> The statute also criminalizes nurses, counselors, teachers, and principals who do not notify minors' parents when a student discloses that they are trans.<sup>112</sup> The statute is based in part on an unsupported proposition that "a substantial majority of children who experience discordance between their sex and identity will outgrow the discordance once they go through puberty, and will eventually have an identity that aligns with their sex."<sup>113</sup> In April 2022, the Justice Department filed a complaint challenging the law as a violation of the Fourteenth Amendment's Equal Protection Clause.<sup>114</sup> In May 2022, the Alabama Middle District Court enjoined enforcement of the puberty blockers portion of the law, but left in place "(1) the provision that bans sex-altering surgeries on minors; (2) the provision

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105. *Id.* at \*7.

106. *Id.* at \*9.

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

108. *Victory! North Carolina's Transgender Employees and Family Members to Have Their Day in Court*, TRANSGENDER LEGAL DEF. & EDUC. FUND, <https://perma.cc/E7HW-WXKW> (last visited Mar. 5, 2023).

109. Kadel v. N.C. State Health Plan, 12 F.4th 422, 466–67 (4th Cir. 2021).

110. Kadel v. Folwell, 2022 U.S. Dist. LEXIS 103780, at \*6 (M.D.N.C. 2022).

111. Ala. Vulnerable Child Compassion and Protection Act, 2022 AL. ALS 289.

112. *Id.*

113. *Id.*

114. Press Release, OFF. OF PUB. AFFS., U.S. DEP'T OF JUST., Justice Department Challenges Alabama Law that Criminalizes Medically Necessary Care for Transgender Youth (2022), <https://perma.cc/EJ5G-B7NF>.

prohibiting school officials from keeping certain gender-identity information of children secret from their parents; and (3) the provision that prohibits school officials from encouraging or compelling children to keep certain gender-identity information secret from their parents.”<sup>115</sup> Idaho’s House of Representatives has passed a similar bill, which is being considered in its Senate as of July 2022.<sup>116</sup>

### C. RELIGIOUS EXEMPTIONS

#### 1. Federal Law

Religious exemptions allow healthcare providers to decline to provide services without fear of legal, financial, or professional repercussions if such a denial is made because of their religious or moral beliefs.<sup>117</sup> Religious exemption healthcare laws have existed in the U.S. since the 1970s through the implementation of measures intended to protect religious rights post-*Roe v. Wade*.<sup>118</sup>

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.<sup>119</sup> These amendments came in response to the Supreme Court’s decision in *Roe v. Wade*, which established a right to abortion.<sup>120</sup> The Church Amendment, enacted in 1974, specifically prohibited federal funding from being contingent on whether an entity helps facilitate or provides abortion or sterilization services.<sup>121</sup> The Amendment’s exemption for “sterilization services” relates to transition-related medical care because it has implications for gender-affirming procedures, including hormone therapy and gender-affirming surgery.<sup>122</sup> A hysterectomy, for instance, is a gender-affirming procedure undergone by many trans people that could be classified as a “sterilization service.”<sup>123</sup> Congress enacted the Coats-Snowe Amendment in 1996.<sup>124</sup> 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.<sup>125</sup> The Weldon Amendment, enacted in 2005, restricts

115. *Eknes-Tucker v. Marshall*, No. 2:22-cv-184-LCB, 2022 U.S. Dist. LEXIS 87169, at \*7–8 (M.D. Al., N.D. May 13, 2022).

116. 2022 Bill Tracking ID H.B. 675.

117. *State Policies in Brief: Refusing to Provide Health Services*, GUTTMACHER INST. 2–3 (2021), <https://perma.cc/E7GJ-6SUL>; see, e.g., 42 U.S.C. §§ 300a-7(b)–(e) (2018); 42 U.S.C. § 238n (2018).

118. GUTTMACHER INST., *State Policies in Brief*, *supra* note 117.

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

120. GUTTMACHER INST., *State Policies in Brief*, *supra* note 117.

121. 42 U.S.C. § 300a-7(b).

122. *Religious Refusals in Health Care*, MOVEMENT ADVANCEMENT PROJECT 1 (2018), <https://perma.cc/L86F-U2K3>.

123. *Id.*

124. See 42 U.S.C. § 238n (2018).

125. *Id.*

access to HHS funding for entities that discriminate against healthcare organizations that refuse to facilitate abortions.<sup>126</sup>

## 2. Trump and Biden Administration Policies 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 HHS Office for Civil Rights (OCR).<sup>127</sup> The Division's stated mission is to "restore federal enforcement of our nation's laws that protect the fundamental and unalienable rights of conscience and religious freedom."<sup>128</sup>

After a sixty-day public commenting period, the Division implemented a final religious exemptions rule in May 2019 titled "Protecting Statutory Conscience Rights in Health Care" (2019 Rule),<sup>129</sup> but this rule was quickly challenged in court and was vacated pending appeal.<sup>130</sup> This rule was never enforced, and the Biden Administration is not set to try to impose a similar religious exemption rule. Religious exemptions in healthcare are still a prominent issue in the U.S. 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.<sup>131</sup> 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.<sup>132</sup> The rule reinforced the previous legal framework, including the Church, Coats-Snowe, and Weldon Amendments.<sup>133</sup> It also was intended to expand those protections.<sup>134</sup> Previously, medical providers such as doctors who had religious or "conscience" objections

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

127. Press Release, OFF. FOR C.R., U.S. DEP'T OF HEALTH AND HUM. SERVS., HHS Announces New Conscience and Religious Freedom Division (Jan. 18, 2018), <https://perma.cc/9CJH-PFN9>.

128. *Id.*

129. *Protecting Statutory Conscience Rights in Health Care (2019)*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://perma.cc/9DVL-FDME>.

130. *City & Cnty. 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).

131. Susan McNear Fradenburg, *HHS 'Conscience Rule' Defines Right Not to Provide Certain Health Care Services*, FOX ROTHSCHILD LLP (May 16, 2019), <https://perma.cc/MSM9-LNDE>.

132. *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://perma.cc/BE9P-7443>; Sanjana Karanth, *Legal Challenges Pour in Against Trump's Faith-Based Denial-of-Care Rule*, HUFFPOST (June 12, 2019, 9:52 PM), <https://perma.cc/LUN4-2DX2>.

133. *Protecting Statutory Conscience Rights in Health Care (2019)*, *supra* note 129.

134. Kodjak, *supra* note 132.

were permitted to refuse to participate in certain procedures.<sup>135</sup> 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.<sup>136</sup>

Additionally, where states had interpreted ambiguity in the previous federal framework to require providers to partake in some ancillary tasks, such as referral, the 2019 Rule explicitly would have prohibited states from forcing compliance by objecting professionals.<sup>137</sup> For example, Iowa previously required healthcare providers to take “all reasonable steps to transfer the patient to another health care provider,” notwithstanding a religious or moral objection to the care sought or to the individual seeking care.<sup>138</sup> Under the 2019 Rule, however, “referral” was defined to “include[e] the provision of any information . . . by any method.”<sup>139</sup> Healthcare workers in Iowa would have been protected if they refused to transfer patients to other providers because of a religious objection.<sup>140</sup>

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.<sup>141</sup> 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.”<sup>142</sup> 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”<sup>143</sup> and violated 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

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135. *Protecting Statutory Conscience Rights in Health Care (2019)*, *supra* note 129.

136. *Id.* at 147.

137. Fradenburg, *supra* note 131.

138. Iowa Code § 144D.3(5) (2012).

139. *Protecting Statutory Conscience Rights in Health Care (2019)*, *supra* note 129, at 130.

140. Iowa Code § 144D.3(5) (2012).

141. *Religious Refusals in Health Care*, *supra* note 122, at 1.

142. *See, e.g., Comments in Response to Proposed HHS Religious Refusal Rule*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Mar. 27, 2018), <https://perma.cc/YWR6-XQMS>.

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



services), among other healthcare-related statutes.<sup>144</sup> A similar suit was filed in the U.S. District Court for the Southern District of New York by a coalition of healthcare provider associations, local governments, and nineteen state governments and D.C.<sup>145</sup>

Ultimately, both district courts held that HHS violated the Administrative Procedure Act and constitutional provisions by promulgating the 2019 Rule.<sup>146</sup> Both courts vacated the rule before it went into effect on the grounds that HHS exceeded its rule-making and enforcement authority.<sup>147</sup> OCR was instructed to wait on implementing the rule until it received further instructions from the courts.<sup>148</sup> 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.<sup>149</sup> HHS appealed the decision in *New York v. Department of Health & Human Services* on January 3, 2020.<sup>150</sup> Plaintiffs sought to challenge the HHS rule in *National Family Planning & Reproductive Health Association v. Azar*; however, the Supreme Court dismissed the plaintiff's challenge.<sup>151</sup>

### 3. State 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.<sup>152</sup> Mississippi also protects care providers from state discrimination if they sincerely believe that “[m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”<sup>153</sup> Challenging the Mississippi statute has been ineffective.<sup>154</sup>

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144. *Id.* at 15–16.

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

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

147. *New York*, 414 F. Supp. 3d at 497; *Azar*, 411 F. Supp. 3d at 1025; see *Conscience Rule Vacated*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Nov. 8, 2019), <https://perma.cc/UN6V-GF2A>.

148. U.S. DEP’T OF HEALTH & HUM. SERVS., *Conscience Rule Vacated*, *supra* note 147.

149. See *id.*

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

151. *Title X Cases*, NAT’L FAM. PLANNING & REPROD. HEALTH ASS’N, <https://perma.cc/4XZG-3TSA> (last visited Mar. 4, 2023).

152. MISS. CODE ANN. § 11-62-5(4) (West, Westlaw through 2022 Reg. Sess. July 1, 2022).

153. MISS. CODE ANN. § 11-62-3(c) (West, Westlaw through 2022 Reg. Sess. July 1, 2022).

154. Merrit Kennedy, *Controversial Mississippi Law Limiting LGBT Rights Not Heading to Supreme Court*, NAT’L PUB. RADIO (Jan. 8, 2018, 5:13 PM), <https://perma.cc/23KA-NZK8>.

### III. VIOLENCE AGAINST TRANSGENDER INDIVIDUALS

Transgender people—especially trans people of color—are particularly vulnerable to violence. Trans people face high rates of domestic and intimate partner violence,<sup>155</sup> hate crimes,<sup>156</sup> police mistreatment and abuse,<sup>157</sup> and violence while incarcerated.<sup>158</sup> The rate at which transgender people are victimized is on the rise.<sup>159</sup> At the same time, some proposed protections, such as the repeal of gay and trans panic defenses, are stalling,<sup>160</sup> and other existing protections, like the Violence Against Women Act (VAWA), may be in jeopardy.<sup>161</sup> 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.<sup>162</sup> Studies have shown that between 30% to 50% of transgender people experience domestic and intimate partner violence in their lifetime.<sup>163</sup> A study that directly compared lifetime intimate partner violence between transgender and cisgender people found that approximately 30% of

155. Taylor N.T. Brown & Jody L. Herman, *Intimate Partner Violence and Sexual Abuse Among LGBT People 3* (The Williams Inst., 2015); see also 2015 U.S. TRANSGENDER SURVEY, *supra* note 25, at 198 (finding that 54% of transgender survey respondents had experienced some form of intimate partner violence).

156. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., *2018 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation* (2018), <https://perma.cc/9Y7A-S54H> (reporting 168 incidents of hate crimes motivated by gender identity in 2018, with 142 specified as “anti-transgender”).

157. 2015 U.S. TRANSGENDER SURVEY, *supra* note 25, at 185 (finding that 58% of transgender survey respondents who had interacted with the police within the last year had been mistreated in some way).

158. *Id.* at 191.

159. There were 168 incidents of hate crimes motivated by gender identity in 2018, 119 incidents in 2017, 124 incidents in 2016, 114 incidents in 2015, 98 incidents in 2014, and 31 reported incidents in 2013. *2018 Hate Crime Statistics*, *supra* note 156; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., *2017 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation* (2017), <https://perma.cc/4U5C-682W>; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., *2016 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation* (2016), <https://perma.cc/9Y7A-S54H>; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., *2015 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation*, (2015), <https://perma.cc/D92T-MFJQ>; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., *2014 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation* (2014), <https://perma.cc/9Y7A-S54H>; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., *2013 Hate Crime Statistics: Incidents, Offenses, Victims, and Known Offenders by Bias Motivation*, (2013), <https://perma.cc/UY2J-DUXG>.

160. For example, legislation to eliminate the Gay and Trans Panic defense, discussed in Section III-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://perma.cc/UM8G-V4RS>.

161. See Li Zhou, *The NRA tried to block an updated Violence Against Women Act in the House—and failed*, VOX (Apr. 4, 2019, 12:39 PM), <https://perma.cc/ZU3V-92P2>.

162. Brown & Herman, *supra* note 155, at 3.

163. *Id.*

transgender people had experienced intimate partner violence, whereas approximately 20% of cisgender people experienced intimate partner violence.<sup>164</sup> 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.<sup>165</sup> As a result, the statistics likely underrepresent the extent to which transgender people experience domestic and intimate partner violence.<sup>166</sup>

Trans 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.”<sup>167</sup> For instance, in North Carolina, the definition of “personal relationship” under the state’s general domestic violence statute includes married couples, which necessarily includes same-sex married couples post-*Obergefell*.<sup>168</sup> 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.<sup>169</sup> 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 transphobia and homophobia from service providers, and low levels of confidence in law enforcement and the judicial system.<sup>170</sup> This list, though extensive, does not 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.<sup>171</sup>

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 trans people.<sup>172</sup> Some studies have shown that LGBTQ people—particularly trans people—have low confidence in the ability of healthcare providers to help them address domestic violence and intimate partner violence.<sup>173</sup> These barriers make it less likely that trans survivors of violence will access the care and resources they need to recover and successfully move on from an abusive relationship.

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164. *Id.*

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

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

167. Brown & Herman, *supra* note 155, at 5.

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

169. § 50B-1(b).

170. Brown & Herman, *supra* note 155, at 3.

171. *Id.* at 17.

172. *Cf. id.* at 4 (“[T]ransgender people may be concerned that shelters are not open to them.”).

173. *Id.* at 18.

Efforts are being made to combat this resource gap. Various resources specifically geared toward trans 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.<sup>174</sup> 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.<sup>175</sup> Similarly, the Community United Against Violence organization offers resources to LGBTQ survivors of violence or abuse, including advocacy-based peer counseling.<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup> In 1994, an organization called FORGE was formed specifically to support transgender individuals.<sup>179</sup> 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.<sup>180</sup> 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. The Violence Against Women Act Reauthorization Act of 2022 included a provision which created grants for specific services for LGBTQ victims of domestic violence, dating violence, sexual assault, and stalking.<sup>181</sup>

## B. HATE CRIMES

Similarly, trans 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 31 recorded incidents in 2013 to 198 incidents recorded in 2019, the most recent year for which statistics are available.<sup>182</sup> In

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174. *Mission, Principles, and Values*, THE NETWORK/LA RED, <https://perma.cc/H9ZW-MDZP> (last visited Mar. 5, 2023).

175. *Our Impact*, THE NETWORK/LA RED, <https://perma.cc/CX3U-9RE4> (last visited Mar. 5, 2023).

176. *Peer Advocacy Counseling*, CMTY. UNITED AGAINST VIOLENCE, <https://perma.cc/93FQ-RTJT> (last visited Feb. 7, 2021).

177. *National Coalition of Anti-Violence Programs*, NYC ANTI-VIOLENCE PROJECT, <https://perma.cc/AAB9-XM5K> (last visited Mar. 5, 2023).

178. *Id.*

179. *Our History*, FORGE, <https://perma.cc/4V3B-TT8U> (last visited Mar. 5, 2023).

180. *Id.*; see *Transgender Domestic Violence and Sexual Assault Resource Sheet*, FORGE, <https://perma.cc/DU96-QEF5> (last visited Mar. 5, 2023).

181. Violence Against Women Act Reauthorization Act of 2022, 117 S. 3623 § 206 (2022).

182. FED. BUREAU OF INVESTIGATION, *Hate Crime Statistics 2021* (2021), <https://perma.cc/VH7D-NKUR>; FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., *Hate Crime Statistics 2019* (2020), <https://perma.cc/D4TM-B2MH>; 2018 *Hate Crime Statistics*, *supra* note 156; 2017 *Hate Crime*

2020, at least 37 trans and gender nonconforming people were killed.<sup>183</sup> Transgender women of color are disproportionately victims of hate crimes and violence due to their gender identity.<sup>184</sup> Since 2013, at least 170 trans women have been victims of fatal violence, 157 of whom were trans women of color.<sup>185</sup> This is a conservative estimate; by other reports, at least 375 trans people were murdered in 2021, and 350 in 2020.<sup>186</sup> Much like instances of domestic and intimate partner violence, hate crimes are often underreported due to stigma, fear of being “outed,”<sup>187</sup> victim misgendering, and fear or distrust of law enforcement.<sup>188</sup>

### 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.<sup>189</sup> 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,”<sup>190</sup> to specifically outlaw crimes motivated by a victim’s actual or perceived gender, sexual orientation, or gender identity.<sup>191</sup> The Act has two main provisions, the second of which makes it a crime to:

willfully cause[] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[] to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.<sup>192</sup>

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*Statistics, supra* note 159; *2016 Hate Crime Statistics, supra* note 159; *2015 Hate Crime Statistics, supra* note 159; *2014 Hate Crime Statistics, supra* note 159; *2013 Hate Crime Statistics, supra* note 159.

183. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2022*, HUM. RTS. CAMPAIGN (2022), <https://perma.cc/F7Y7-PFR9>.

184. See, e.g., *Violence Against the Transgender Community in 2019*, HUM. RTS. CAMPAIGN, <https://perma.cc/CJ77-BBPM> (last visited Mar. 5, 2023); Petula Dvorak, *The murder of black transgender women is becoming a crisis*, WASH. POST (June 17, 2019, 4:24 PM), <https://perma.cc/U5MJ-8VLP>.

185. *Violence Against the Transgender Community in 2019, supra* note 184, at 56.

186. Jamie Wareham, *375 Transgender People Murdered In 2021— ‘Deadliest Year’ Since Records Began*, FORBES (Nov. 11, 2021, 4:00 AM), <https://perma.cc/Y9RX-C4FD>.

187. Weihua Li, *Why Police Struggle to Report One of The Fastest-Growing Hate Crimes*, MARSHALL PROJECT (Nov. 26, 2019), <https://perma.cc/PN2S-WSXZ>.

188. Emma Keith & Katie Gagliano, *Lack of trust in law enforcement hinders reporting of LGBTQ crimes*, CTR. FOR PUB. INTEGRITY (Aug. 24, 2018), <https://perma.cc/W93D-DGWY>; see also Brown & Herman, *supra* note 155, at 3.

189. 18 U.S.C. § 249(a)(2)(A) (2018).

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

191. § 249(a)(2)(A).

192. *Id.*

The Act imposes up to ten years in prison and a fine for violations,<sup>193</sup> or up to life in prison if the offense results in death, involves kidnapping or aggravated sexual abuse, or involves an attempt to kidnap, commit aggravated sexual abuse, or kill.<sup>194</sup> 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.<sup>195</sup> This is perhaps in part due to the narrowness of the Act and the difficulty of proving the bias motivation in these cases.<sup>196</sup>

## 2. State Legislation

Arkansas, South Carolina, Wyoming, and Indiana, as well as the territories of Guam, American Samoa, and Commonwealth of the Northern Mariana Islands, do not have hate crime statutes at all, although there have been recent, ongoing attempts to enact such legislation in Arkansas<sup>197</sup> and South Carolina.<sup>198</sup> Previously, 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.<sup>199</sup> The 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.<sup>200</sup>

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.<sup>201</sup> 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.<sup>202</sup> One such state is Ohio,

193. § 294 (a)(2)(A)(i).

194. § 294 (a)(2)(A)(ii).

195. See Prosecutions & Convictions under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act 1, MATTHEW SHEPARD FOUND. (2017), <https://perma.cc/8U9B-WC2B>.

196. See generally Li, *supra* note 187 (“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.”).

197. Andrew DeMillo, *Arkansas governor says state needs hate crime law*, A.P. NEWS (Aug. 6, 2019), <https://perma.cc/G2D8-DNRD>; Veronica Stracqualursi, *Arkansas governor and legislators introduce “long overdue” hate crimes legislation*, CNN POL. (Aug. 20, 2020), <https://perma.cc/J6BB-PQ4D>.

198. Nicholas Papantonis, *South Carolina state senator to introduce ‘Hate Crime’ Bill*, WPDE News (Aug. 5, 2019), <https://perma.cc/MG6L-YK4V>; Gregory Yee, *How South Carolina lawmakers, community groups are working to pass a state hate crime law*, POST & COURIER (Dec. 1, 2020), <https://perma.cc/5EAW-KTCS>.

199. Grace Hauck, *Georgia governor signs hate crime law in wake of Ahmaud Arbery shooting*, USA TODAY (June 26, 2020), <https://perma.cc/97EM-RQ7M>.

200. H.B. 426, Gen. Assemb., Reg. Sess. (Ga. 2020), <https://perma.cc/GD7V-76TF>.

201. *Hate Crime Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/A5C8-UMKV> (last visited Jan. 5, 2020).

202. *Id.*

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.”<sup>203</sup> In 2016, Ohio state legislators unsuccessfully attempted to pass an LGBTQ-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.”<sup>204</sup>

Eleven states have hate crime legislation that includes sexual orientation but not gender identity.<sup>205</sup> Texas is one of these states.<sup>206</sup> 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 . . .”<sup>207</sup> At sentencing, the judge may require the defendant to attend an “educational program to further tolerance and acceptance of others.”<sup>208</sup> 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.<sup>209</sup>

Twenty-three states and D.C. as well as Puerto Rico and the U.S. Virgin Islands have hate crime legislation, which includes both sexual orientation and gender identity as protected categories.<sup>210</sup> One of these states is Massachusetts.<sup>211</sup> Massachusetts law explicitly 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.”<sup>212</sup>

### 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.<sup>213</sup> They are not themselves

203. OHIO REV. CODE ANN. § 2927.12 (West, Westlaw through File 177 (End) of the 134th Gen. Assemb. (2021–2022)).

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

205. *Hate Crime Laws*, *supra* note 201.

206. *Id.*

207. TEX. CRIM. PROC. CODE ANN. art. 42.014 (West, Westlaw through 2021 Reg. and Called Sess. of the 87th Leg.).

208. *Id.*

209. Andrew Weber, *Despite Outsized Risks, Transgender Texans Aren’t Protected by the State’s Hate Crime Law*, KUT (Jan. 10, 2019), <https://perma.cc/DG6J-EHUQ>.

210. *Hate Crime Laws*, *supra* note 201.

211. *Id.*

212. MASS. GEN. LAWS ANN. ch. 265, § 39(a) (West, Westlaw through the 2022 2nd Ann. Sess.).

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

affirmative defenses.<sup>214</sup> The defense strategy involves arguing that the revelation that a victim was gay or transgender caused the perpetrator to “panic” and hurt or kill the victim.<sup>215</sup> The defense generally arises in the context of an alleged sexual advance or encounter between the perpetrator and victim, with the perpetrator’s deep-seeded homophobia or transphobia allegedly triggering a “panic” response, leading them to assault the victim.<sup>216</sup>

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.<sup>217</sup> This theory of internal conflict was later used to support the idea of a gay panic defense, beginning in the 1960s.<sup>218</sup> The defense has been used many times since the 1960s, and has been applied both in the context of sexual orientation and gender identity.<sup>219</sup> The defense is relatively rarely used, but when it is invoked by defendants, it is in an effort to justify or mitigate their conduct.<sup>220</sup>

Recently, some states have moved to ban gay and trans panic defenses. California was the first state to ban the defense in 2014, and fifteen other states—Illinois, Rhode Island, Nevada, Connecticut, Maine, Hawaii, New York, New Jersey, Washington, Colorado, Virginia, Vermont, Oregon, Maryland, and New Mexico—and D.C. subsequently banned it.<sup>221</sup> A number of other states have legislation aimed at banning these defenses in committee.<sup>222</sup> California’s law amended the existing penal code sections on manslaughter to state:

For purposes of determining sudden quarrel or heat of passion . . . the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim’s

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214. Alexandra Holden, *The Gay/Trans Panic Defense: What It is, and How to End It*, AM. BAR ASS’N (Mar. 31, 2020), <https://perma.cc/2BFP-ZJTX>.

215. See Lee, *supra* note 213, at 475.

216. See *id.* at 471.

217. *Id.* at 482.

218. *Id.* at 491.

219. See, e.g., *People v. Merel*, No. A113056, 2009 WL 1314822, at \*9 (Cal. Ct. App. May 12, 2009) (discussing use of trans panic defense); see also *People v. Rodriguez*, 64 Cal. Rptr. 253, 255 (Cal. Ct. App. 1967) (discussing use of gay panic defense); *People v. Parisi*, 287 N.E.2d 310, 313 (Ill. App. Ct. 1972) (same); *Schick v. Indiana*, 570 N.E.2d 918, 929 (Ind. Ct. App. 1991) (same); *People v. Schmitz*, 586 N.W.2d 766, 767 (Mich. Ct. App. 1998) (same); *Mills v. Shepherd*, 445 F. Supp. 1231, 1237 (W.D. N.C. 1978) (same); *State v. Bell*, 805 P.2d 815, 816 (Wash. Ct. App. 1991) (same); Lee, *supra* note 213, at 514–15.

220. See generally Lee, *supra* note 213.

221. *The LGBTQ+ Panic Defense*, LGBT BAR, <https://perma.cc/YV6G-EPP3> (last visited Feb. 19, 2021).

222. Alexandra Holden, *The Gay/Trans Panic Defense: What It is, and How to End It*, AM. BAR ASS’N (Mar. 31, 2020), <https://perma.cc/48PV-BC44>.



actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.<sup>223</sup>

The code section further defines “gender” to include “a person’s gender identity and gender-related appearance and behavior regardless of whether that appearance or behavior is associated with the person’s gender as determined at birth.”<sup>224</sup> There have also been unsuccessful efforts to ban these defenses at the federal level.<sup>225</sup>

The gay and trans panic defenses remain controversial, and many organizations, including the American Bar Association<sup>226</sup> and the LGBTQ+ Bar, support banning them.<sup>227</sup> 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.<sup>228</sup>

#### D. POLICE MISTREATMENT

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.<sup>229</sup>

Transgender individuals are subject to high rates of police profiling, harassment, and brutality.<sup>230</sup> 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% said that they were never or only sometimes treated with respect by officers.<sup>231</sup> This was even more of an issue for Native American (72%) and African American (70%) respondents.<sup>232</sup> Furthermore, 20% of respondents reported being verbally harassed by officers; 11% reported that officers

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223. CAL. PENAL CODE § 192(f)(1) (West, Westlaw through Ch. 997 of 2022 Reg. Sess.).

224. CAL. PENAL CODE § 192(f)(2) (West, Westlaw through Ch. 997 of 2022 Reg. Sess.).

225. *See, e.g.*, Gay and Trans Panic Defense Prohibition Act of 2019, H.R. 3133, 116th Cong. (2019), <https://perma.cc/9HN5-M63F>.

226. Holden, *supra* note 222.

227. *The LGBTQ+ Panic Defense*, *supra* note 221.

228. Lee, *supra* note 213, at 477.

229. 2015 U.S. TRANSGENDER SURVEY, *supra* note 25, at 1.

230. *Id.* at 185.

231. *Id.* at 186.

232. *Id.*

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.<sup>233</sup> 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.<sup>234</sup> 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.

There may also be an issue with the inherent conflict of interest in local prosecutors bringing charges against local police officers.<sup>235</sup> For example, Nizah Morris was a Black trans woman who was allegedly killed by a Philadelphia police officer in 2002, but whose case has failed to be investigated by police over the past twenty years.<sup>236</sup> On the night of the incident, Nizah was overly intoxicated, prompting her friends to call an ambulance to take her to hospital.<sup>237</sup> A police officer intervened and said he would give Nizah a courtesy ride in lieu of the ambulance.<sup>238</sup> Twelve minutes after the officer notified 911 of the courtesy ride, a passing motorist called 911 after finding Morris unconscious in the street, bleeding from the head.<sup>239</sup> The Medical Examiner's Office found that Morris's death was a homicide, but the Philadelphia Police Department maintained it was accidental.<sup>240</sup> The case remains unsolved.<sup>241</sup> In April 2022, Philadelphia became home to Morris Home, the first addiction recovery program in the U.S. that specifically supports trans and gender-nonconforming individuals, named after Nizah Morris.<sup>242</sup>

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

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233. *Id.* at 186–87.

234. *Id.* at 186.

235. Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016).

236. Mari Haywood, *Philadelphia LGBT community asks what - or who - killed transgender woman Nizah Morris 10 years ago*, GLAAD (Apr. 23, 2013), <https://perma.cc/U6KG-TCGS>.

237. Jason Villemez, *252 articles, 14 writers, and 19 years of Nizah Morris*, PHILA. GAY NEWS (Dec. 22, 2021), <https://perma.cc/8JF5-EHXL>.

238. Tim Cwiek, *A seventeen-year saga or transparency in the Nizah Morris case*, PHILA. GAY NEWS (Oct. 5, 2020), <https://perma.cc/JGQ3-RLNT>.

239. *Id.*

240. Maggie Macnini, *Addiction recovery program that serves trans and gender non-conforming people opens center in West Philly*, PHILLY VOICE (Apr. 12, 2022), <https://perma.cc/B3W2-CGAQ>.

241. See Cwiek, *supra* note 238.

242. *Morris Home*, RES. FOR HUM. DEV. <https://perma.cc/2VJM-RHM5> (last visited Mar. 5, 2023).

transgender people.<sup>243</sup> However, the National Center for Transgender Equality (NCTE) found that only ten of the twenty-five largest police departments in the U.S. had non-discrimination policies which included gender identity, while fourteen included sexual orientation.<sup>244</sup> 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.<sup>245</sup> 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.<sup>246</sup> The NCTE provides a model policy for police departments which would help address these issues.<sup>247</sup> Fear and lack of trust in law enforcement exacerbates many issues faced by transgender people, including by raising the barrier to reporting violence and making access to justice more difficult.

#### E. VIOLENCE IN PRISON

Transgender people are also the victims of violence in prison. Incarcerated trans people are approximately ten times more likely to be sexually assaulted than the general prison population, with nearly 40% of transgender people in state and federal prisons reporting a sexual assault in the previous year.<sup>248</sup> Much of this problem arises from trans people being misgendered by the legal system, which results in them being incarcerated according to their birth sex and not their gender identity.<sup>249</sup>

In correctional facilities, trans individuals are “at the mercy of a hyper-gendered system.”<sup>250</sup> 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.<sup>251</sup> In 2012, the Department of Justice partially addressed this issue

243. See N.J. Att’y Gen. Law Enforcement Directive No. 2019-3 (Nov. 20, 2019), <https://perma.cc/YDT8-J732>; Seattle Police Department Manual Tit. 16.200, <https://perma.cc/HYM6-VCXL>; Orlando Police Department Policy and Procedure 1141.1, <https://perma.cc/PH9R-9ZDG>.

244. *Failing to Protect and Serve: Police Department Policies Towards Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL., 103 (May 2019), <https://perma.cc/N3CG-4JJC>.

245. *Id.*

246. *Id.* at 104.

247. *Police Department Model Policy on Interactions with Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUAL. (May 2019), <https://perma.cc/W7UX-F3J7>.

248. *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights*, NAT’L CTR. FOR TRANSGENDER EQUAL., 6 (2018), <https://perma.cc/DLB5-WW89>; 2015 U.S. TRANSGENDER SURVEY, *supra* note 25, at 184, 191.

249. See 2015 U.S. TRANSGENDER SURVEY, *supra* note 25, at 184, 191.

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

251. 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).

with a rule<sup>252</sup> pursuant to the Prison Rape Elimination Act (PREA).<sup>253</sup> The PREA implements standards requiring 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.<sup>254</sup> 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.<sup>255</sup> 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.<sup>256</sup> After the rule's promulgation, California updated its operation manual so that a classification committee would review all transgender individuals' factors for institutional placement and housing assignment.<sup>257</sup>

While most prison systems currently comply with PREA standards or are working towards compliance,<sup>258</sup> the PREA rule allows for "individualized determinations" about ensuring the safety of each person.<sup>259</sup> 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."<sup>260</sup> The management and safety factors might permit prison systems to justify denying gender-conforming institutional assignments by emphasizing their interest in administrability or in addressing the privacy concerns of incarcerated cisgender women.<sup>261</sup> For example, on May 11, 2018, the Bureau of Prisons Transgender Offender Manual restricted a previously expansive transgender housing policy, explicitly

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

253. The Prison Rape Elimination Act, 34 U.S.C.A. § 30301–09 (West, Westlaw through Pub. L. No. 117-262.).

254. 28 C.F.R. § 115.41(a), (d)(7) (2012).

255. 28 C.F.R. § 115.42(a)–(c) (2012).

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

257. CAL. CODE REGS. tit. 15 § 3269(g) (2018); Cal. Dep't of Corrs. and Rehab., Operations Manual § 62080.14 (2020).

258. Douglas Routh, Gassan Abess, & Jihye Yoo, *Transgender Inmates in Prison: A Review of Applicable Statutes and Policies*, INT'L J. OFFENDER THERAPY & CRIMINOLOGY 1, 10 (2015).

259. 28 C.F.R. § 115.42(b) (2012).

260. 28 C.F.R. § 115.42(c), (e).

261. 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).

singling out “biological sex” as the initial determination for the assessment.<sup>262</sup> 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.”<sup>263</sup> This policy fails to specify what medical or mental history is needed for a person to qualify for housing and program assignments that correlate to their gender.<sup>264</sup> Because most transgender people do not undergo gender-affirming surgeries,<sup>265</sup> and because people in prison cannot simply elect to have medical procedures without some level of institutional approval, requiring that people demonstrate 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 identity.

Contrary to arguments made by prisons against putting people in housing that is gender appropriate, housing incarcerated transgender people with people of a different gender might actually increase security concerns. Trans individuals in institutions incompatible with their gender identity report disproportionate rates of violence and sexual assault.<sup>266</sup> To address this, one solution permissible by PREA standards—and, according to some, commonly used by prison authorities—is to separate trans people into protective or administrative custody.<sup>267</sup> 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.<sup>268</sup> Administrative segregation may also deny transgender people “adequate recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for non-punitive reasons,”<sup>269</sup> rendering it comparable to punitive segregation and imbuing it with the court-recognized potential for

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262. Fed. Bureau of Prisons, Program Statement 5200.04 Cn-1: Transgender Offender Manual 6 (May 11, 2018).

263. *Id.*

264. *Id.*

265. Jaime M. Grant, Lisa A. Mottet, & Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT’L CTR. FOR TRANSGENDER EQUAL., 78–79, 84 (2011), <https://perma.cc/3R9Q-FZ5C> (finding that only 62% of transgender individuals undergo hormone therapy, while a vast minority undergo surgery).

266. *Compare* Bureau of Just. Stats., NCJ 248824, PREA Data Collection Activities, 2015, 2 (2015), <https://perma.cc/ML5N-GVP9> (“An estimated 35% of transgender inmates held in prisons and 34% held in local jails reported . . . sexual victimization by another inmate or facility staff in the past 12 months or since admission, if less than 12 months.”), *with* Bureau of Just. Stats., NCJ 241399, Sexual Victimization In Prisons And Jails Reported By Inmates, 2011-2012, 6 (2013), <https://perma.cc/3FAQ-TYU6> (“In 2011-2012, an estimated 4% of state and federal prison inmates and 3.2% of jails reported . . . sexual victimization by another inmate or facility staff in the past 12 months or since admission, if less than 12 months.”).

267. 8 C.F.R. § 115.43; *see* Rosenblum, *supra* note 251, at 529.

268. Tarzwell, *supra* note 250, at 180.

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

psychological damage.<sup>270</sup> Furthermore, placing trans 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.<sup>271</sup>

The Eighth Amendment's Cruel and Unusual Punishment Clause can be used by transgender people to challenge mistreatment they experience 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.<sup>272</sup> Farmer, a transgender woman in a men's prison, possessed distinctly traditional feminine physical characteristics.<sup>273</sup> As a result of her placement in general population in a men's prison, she was beaten and raped.<sup>274</sup> The Court recognized that prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement, which includes protecting prisoners from violence at the hands of other prisoners.<sup>275</sup> However, the Court in *Farmer* qualified that a prison official may be held liable only "if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."<sup>276</sup> Therefore, prison officials are held to a subjective test of "deliberate indifference," though a fact-finder might still find that the official "knew of a substantial risk from the very fact that the risk was obvious."<sup>277</sup> *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.<sup>278</sup>

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.<sup>279</sup> The Senate, which

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270. Tarzwell, *supra* note 250, at 180 (citing *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988)).

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

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

273. *Id.*

274. *Id.* at 830.

275. *Id.* at 832–33.

276. *Id.* at 847.

277. *Id.* at 842.

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

279. Violence Against Women Act Reauthorization Act of 2019, H.R. 1585, 116th Cong. § 1 (2019), <https://perma.cc/TD3V-D38U>.

was controlled by Republicans at the time, did not bring the bill up for a vote.<sup>280</sup> The bill would have added a provision to VAWA to require the Bureau of Prisons to consider the safety and protection of incarcerated transgender people when making housing assignments.<sup>281</sup> 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 would not have fully addressed that issue itself, and did not require individuals to be housed according to their gender identity as opposed to their birth sex. In March 2022, President Biden reauthorized VAWA.<sup>282</sup>

However, in 2022, the Bureau of Prison created a new manual to “ensure that the Bureau of prisons [] properly identifies, tracks, and provides services to the transgender population.”<sup>283</sup> “In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates . . . the agency shall consider on a case-by-case basis whether a placement would ensure the inmate’s health and safety, and whether the placement would present management or security problems.”<sup>284</sup> This decision is made by the Transgender Executive Council (TEC), the bureau’s “official decision-making body on all issues affecting the transgender population.”<sup>285</sup> When deciding where to house trans people initially, the manual charges the council with considering

factors including, but not limited to, an inmate’s security level, criminal and behavioral/disciplinary history, current gender expression, programming, medical, and mental health needs/information, vulnerability to sexual victimization, and likelihood of perpetrating abuse. The TEC may also consider facility-specific factors, including inmate populations, staffing patterns, and physical layouts (e.g., types of showers available). The TEC will consider the wellbeing of all inmates while exploring appropriate options available to assist with mitigating risk to the inmate, to include but not limited to cell and/or unit assignments, application of management variables, programming missions of the facility, and security of the institution.<sup>286</sup>

The manual clarifies that “[i]n making housing unit and programming assignments, a transgender or intersex inmate’s own views with respect to his/her own safety must be given serious consideration” and trans individuals shall be provided individual-stall or private showers.<sup>287</sup> The manual also charges jail staff

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280. *Feinstein on One-Year Anniversary of VAWA Reauthorization Introduction*, SENATE COMM. ON THE JUDICIARY (Nov. 12, 2020), <https://perma.cc/7NEV-D669>.

281. H.R. 1585 § 1101.

282. 34 U.S.C. § 11291.

283. TRANSGENDER OFFENDER MANUAL 1 (BUREAU OF PRISONS 2022), <https://perma.cc/8T8P-9WYY>.

284. *Id.* at 5.

285. *Id.* at 4.

286. *Id.* at 6.

with using either gender-neutral or correct pronouns and identifiers and permits incarcerated trans people to request females perform their pat down searches so long as they have not violated contraband rules.<sup>288</sup> It permits hormone therapy and other gender-affirming care, as well as gender-affirming surgery after “one year of clear conduct and compliance with mental health, medical, and programming services at the gender-affirming facility.”<sup>289</sup>

#### IV. PUBLIC ACCOMMODATIONS

Transgender individuals experience a significant amount of harassment and disrespect in public places. The 2015 U.S. Transgender Survey found that 31%<sup>290</sup> of about 28,000<sup>291</sup> surveyed transgender people reported a negative experience in a place of public accommodation, including being denied equal treatment, or verbally or physically attacked. 14% of respondents to the same survey reported being denied equal treatment or service at least once in the past year at one or more types of public accommodation.<sup>292</sup> Some states have enacted anti-discrimination 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.<sup>293</sup> 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.<sup>294</sup> 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.<sup>295</sup>

##### A. ANTI-DISCRIMINATION LAWS

As of 2022, twenty-one states and D.C. have laws that protect transgender people from discrimination in places of public accommodation.<sup>296</sup> Some states

287. *Id.*

288. *Id.* at 10–11.

289. *Id.* at 8–9.

290. 2015 U.S. TRANSGENDER SURVEY, *supra* note 25, at 213.

291. *Id.* at 6.

292. *Id.* at 214.

293. *Public Accommodations*, HUM. RTS. CAMPAIGN, <https://perma.cc/B65J-93FP> (last updated Mar. 5, 2023).

294. *See* 42 U.S.C.A. § 2000a(b) (West through Pub. L. No. 116–259); 42 U.S.C.A. § 12181(7)(A)–(L) (West through Pub. L. No. 116–259).

295. *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-301(5.1) (West, Westlaw through leg. effective Mar. 3, 2023 of the 1st Reg. Sess., 74th Gen. Assemb. (2023)) (adopting the definition of public accommodation set out in Title III of the Americans with Disabilities Act).

296. *Equality Maps: Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/4L73-KWR3> (last visited Aug. 1, 2022); *State Nondiscrimination Laws: Public Accommodations*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/5482-N4EJ> (last updated Mar. 5, 2023). The full list is as follows: California, Colorado, Connecticut, Delaware, D.C., Hawaii, Illinois, Iowa, Maine,



include gender identity and/or gender expression in their anti-discrimination laws. D.C. takes this approach, and its anti-discrimination statute is representative of most anti-discrimination 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.<sup>297</sup> It does not matter if the person's gender identity is the entire reason for the discrimination or if it is only part of the reason for the discrimination.<sup>298</sup> Additionally, for the purpose of the anti-discrimination law, a person's gender identity may be based either on their actual gender identity or their perceived gender identity.<sup>299</sup> 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.<sup>300</sup> For example, Colorado's anti-discrimination statute prohibits discrimination on the basis of sexual orientation and does not explicitly list gender identity as a protected characteristic.<sup>301</sup> Trans 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."<sup>302</sup> Similarly, Hawaii includes gender identity or expression within its definition of sex.<sup>303</sup>

Seven states interpret existing prohibitions against sex discrimination to include sexual orientation and/or gender identity.<sup>304</sup> 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.<sup>305</sup> The Pennsylvania Human Relations Commission's Guidance document indicates that "sex" under the Pennsylvania Human Relations Act (PHRA) "may refer to sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and/or gender expression depending on the individual facts of the case."<sup>306</sup> It

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Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington.

297. D.C. CODE ANN. § 2-1402.31(a)(1) (West, Westlaw Current through Dec. 28, 2022).

298. § 2-1402.31(a).

299. *Id.*

300. *Equality Maps: Nondiscrimination Laws*, *supra* note 296.

301. COLO. REV. STAT. ANN. § 24-34-601(2)(a) (West, Westlaw through leg. effective Feb. 24, 2023 of the 1st Reg. Sess., 74th Gen. Assemb. (2023)).

302. *Id.* § 24-34-301(7).

303. HAW. REV. STAT. ANN. § 489-3 (West, Westlaw through end of the 2022 Reg. Sess.).

304. *Equality Maps: Nondiscrimination Laws*, *supra* note 296; *State Nondiscrimination Laws: Public Accommodations*, *supra* note 296.

305. *Interpretive Statement 2018-1, The Meaning of Sex in the Elliot Larsen Civil Rights Act*, MICH. C.R. COMM'N (May 21, 2018), <https://perma.cc/32V3-BBSD>; *see* Elliot Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2302(a) (West, Westlaw through P.A. 2023, No. 3, of the 2023 Reg. Sess., 102nd Leg.).

306. *Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act*, PA. HUM. RELS. COMM'N (Aug. 2, 2018), <https://perma.cc/8K8G-4AP5>; *see* Pennsylvania Human

further clarified that the prohibitions against sex discrimination in the PHRA and in case law also prohibit gender discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression.<sup>307</sup>

Some states include statutory exemptions to the sexual orientation or gender identity provisions for those people who believe that their religious beliefs preclude them from abiding by the law. For example, Iowa law states that the anti-discrimination 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.”<sup>308</sup> In the absence of a statutory exemption, a number of lawsuits have been filed in recent years by faith-based organizations and religious individuals asking courts to recognize exemptions from these laws, typically on First Amendment grounds.<sup>309</sup> The First Amendment argument has been successful for some plaintiffs challenging these laws in both state and federal courts.<sup>310</sup> However, these challenges have focused on discrimination based on sexual orientation, particularly with respect to providing services for same-sex weddings.<sup>311</sup>

## B. DISCRIMINATORY LAWS

At least sixteen states have considered legislation that would restrict access to multi-user restrooms, locker rooms, and other sex-segregated facilities on the basis of a definition of gender consistent with sex assigned at birth or “biological

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Relations Act, 43 PA. STAT. & CONS. STAT. ANN. § 955 (West, Westlaw through 2022 Reg. Sess. Act 166).

307. PA. HUM. RELS. COMM’N, *supra* note 306; *see also Pennsylvania Human Relations Commission Adopts Guidance Protecting LGBTQ People*, LAMBDA LEGAL (Aug. 17, 2018), <https://perma.cc/3G5A-FEER>.

308. IOWA CODE ANN. § 216.7(2)(a) (West, Westlaw Current with leg. effective Feb. 20, 2023 from the 2023 Reg. Sess.).

309. This issue was raised in the Supreme Court’s past decision regarding sex discrimination, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. 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://perma.cc/H9D2-EAQN>.

310. *See, e.g., Country Mills Farm v. City of E. Lansing*, 280 F. Supp. 3d 1029, 1037–38 (W.D. Mich. 2017); *Brush & Nib Studio v. City of Phoenix*, 448 P.3d 890, 926 (Ariz. 2019); *Lexington-Fayette Urb. Cnty. Hum. Rts. Comm’n v. Hands on Originals*, NO. 2015–CA–000745–MR, 2017 WL 2211381, at \*1 (Ky. Ct. App. May 12, 2017). In *Hands on Originals*, the defendant prevailed on its First Amendment claims in front of the Court of Appeals of Kentucky. Plaintiffs appealed the decision to the Kentucky Supreme Court, which upheld the Circuit Court’s order. However, its grounds for upholding the order was for lack of statutory standing. The Kentucky Supreme Court found that only an individual or individuals could file a claim under the local anti-discrimination law; because the lawsuit was filed by an organization, GLSO, the case was dismissed. *Lexington-Fayette Urb. Cnty. Hum. Rts. Comm’n v. Hands On Originals*, No. 2017-SC-000278-DG, 2019 WL 5677638, at \*1 (Ky. Oct. 31, 2019).

311. *See Country Mills Farm*, 280 F. Supp. 3d at 1038; *Brush & Nib Studio*, 448 P.3d at 895.

sex.”<sup>312</sup> Due to the lack of success of bathroom bills, states have changed tactics. State legislators now push to pass bills that would either criminalize providing gender-affirming medical care to transgender people<sup>313</sup> or, more popularly, ban trans youth from participating in sports.<sup>314</sup>

Eighteen states currently ban trans students from participating in sports consistent with their gender identity.<sup>315</sup> 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.<sup>316</sup> Although many of these bills have died in the state legislature, Idaho signed this bill into law.<sup>317</sup> Several states are still debating similar legislation.<sup>318</sup> 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.<sup>319</sup> Many worry this would be used primarily against Black and brown female athletes, as gender testing has been used to target these groups in the past.<sup>320</sup> In light of this, Montana produced the “Save Women’s Sports Act,” which mimics Idaho’s law; it is currently being debated by the state legislature.<sup>321</sup>

In 2018, a coalition of more than 300 sexual assault and domestic violence organizations signed a joint statement supporting full and equal access to rest

312. These states are Alabama, Arkansas, Illinois, Kansas, Kentucky, Minnesota, Missouri, Montana, New York, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wyoming. Joellen Kralik, “*Bathroom Bill*” *Legislative Tracking*, NAT’L CONF. OF STATE LEGISLATURES (July 7, 2017), <https://perma.cc/L7ZP-RHBH>.

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

314. See *State Action Center*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/YV6Y-LFYF> (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.

315. *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/33Z3-NNZ5> (last visited Aug. 10, 2022).

316. George B. Cunningham, Erin Buzuvis, & Chris Mosier, *Inclusive Spaces and Locker Rooms for Transgender Athletes*, 7 HUM. KINETICS J. 365 (2017), <https://perma.cc/5L36-DYJG>.

317. Kevin Richert, *A flurry of filings: Opponents urge federal court to strike down Idaho’s transgender athletics ban*, MAGIC VALLEY (Dec. 23, 2020), <https://perma.cc/HR9N-DCDW>.

318. See *State Action Center*, *supra* note 314.

319. John Riley, *Athletes, women’s and civil rights groups support Idaho transgender athlete’s lawsuit*, METRO WKLY. (Dec. 28, 2020), <https://perma.cc/KX5C-P56X>.

320. *Id.*

321. Troy Oppie, *Idaho Exports Transgender Athlete Legislation to Montana*, NAT’L PUB. RADIO (Jan. 25, 2021), <https://perma.cc/KG24-N4FY>.

rooms and locker rooms for transgender individuals.<sup>322</sup> 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.<sup>323</sup>

### C. 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 their gender identity.<sup>324</sup> Some states, including Oklahoma, pushed back and indicated that they would not follow federal guidance.<sup>325</sup> Additionally, some states sued the federal government over the guidance.<sup>326</sup> In one case, the U.S. District Court for the Northern District of Texas issued a preliminary injunction in plaintiff states.<sup>327</sup> However, some courts did defer to the Obama Administration’s guidance. For example, in *Grimm v. Gloucester County School Board*, the U.S. Court of Appeals for the Fourth Circuit ruled that the “Dear Colleague” letter was entitled to deference regarding Title IX’s protection of transgender individuals’ right to use the bathroom consistent with their gender identity.<sup>328</sup>

In February 2017, the Trump Administration rescinded the “Dear Colleague” letter.<sup>329</sup> The Departments of Justice and Education argued that the guidance was issued “without due regard for the primary role of the states and local school

322. *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community*, NAT’L TASK FORCE TO END SEXUAL DOMESTIC VIOLENCE (Apr. 13, 2018), <https://perma.cc/3TMD-QBBS>.

323. *Id.*

324. See *May 2016 Dear Colleague Letter on Transgender Students*, U.S. DEP’T OF JUST. C.R. DIV. & U.S. DEP’T OF EDUC. OFF. FOR C.R. (May 13, 2016), <https://perma.cc/KK8R-G4AZ>.

325. See *Oklahoma attorney general says state will “vigorously defend” itself against transgender bathroom guidelines*, OKLA. NEWS 4 (May 13, 2016, 4:06 PM), <https://perma.cc/5KQK-2UVR>; Tim Willert, *Feds direct schools to permit transgender restroom access*, OKLAHOMAN (May 13, 2016, 9:34 PM), <https://perma.cc/7YXA-SQSL>.

326. See *Nebraska v. United States*, No. 4:16-cv-03117-JMG-CRZ (D. Neb. July 8, 2016) (including plaintiff states of Nebraska, South Carolina, Arkansas, Kansas, Michigan, Montana, North Dakota, South Dakota, and Wyoming). The *Nebraska* plaintiffs voluntarily dismissed the case because of the Trump Administration’s rescission. Plaintiffs’ Notice of Voluntary Dismissal Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), *Nebraska v. United States*, No. 4:16-cv-03117-JMG-CRZ (D. Neb. Mar. 16, 2017).

327. See *Texas v. United States*, No. 7:16-cv-00054-O, 2016 WL 7852330 (N.D. Tex. Nov. 20, 2016) (including plaintiff states of Alabama, Georgia, Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee, Utah, West Virginia, and Wisconsin).

328. *G.G. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016). The Supreme Court scheduled a hearing on the case but canceled it in light of the Trump Administration’s February 22, 2017 letter rescinding the policy. See *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017) (mem.) (vacating judgment and remanding case to the Fourth Circuit for further consideration).

329. Jeremy W. Peters, Jo Becker, & Julie Hirschfeld, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://perma.cc/5PAD-E6GW>.

districts in establishing educational policy.”<sup>330</sup> The Trump Administration did not offer replacement guidance.<sup>331</sup>

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 have upheld protections for transgender students under Title IX despite the Trump Administration’s policy.<sup>332</sup> For example, in *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, the U.S. 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.<sup>333</sup> In *Adams v. School Board of St. Johns County*, the U.S. Court of Appeals for the Eleventh Circuit held that the school’s bathroom policy violated both the Equal Protection Clause and Title IX.<sup>334</sup> Similarly, in *Grimm v. Gloucester County School Board*, the U.S. Court of Appeals for the Fourth Circuit upheld the student’s claims on both Title IX and equal protection grounds.<sup>335</sup> In *Adams* and *Grimm*, the Eleventh and Fourth Circuits concluded that Title IX protects students from discrimination on the basis of their transgender identity, citing to the Supreme Court’s recent decision in *Bostock v. Clayton County*.<sup>336</sup> Other courts have rejected claims on Title IX grounds but have allowed transgender students to claim protections on Equal

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330. *Id.*

331. *February 2017 Dear Colleague Letter on Transgender Students*, U.S. DEP’T OF JUST. C.R. DIV. & U.S. DEP’T OF EDUC. OFF. FOR C.R. (Feb. 22, 2017), <https://perma.cc/QLF6-B4FY>; see also Ariane de Vogue, *Trump administration withdraws federal protections for transgender students*, CNN (Feb. 23, 2017, 10:16 AM), <https://perma.cc/3RXG-XLTQ>.

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

333. *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 their gender non-conformance, in violation of Title IX and the Equal Protection Clause).

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

335. *Grimm*, 972 F.3d at 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).

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

Protection grounds.<sup>337</sup> Transgender students also retain the option of challenging school bathroom policies for sex discrimination under state laws, including state public accommodations laws.<sup>338</sup>

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. Eighteen states, Puerto Rico, and D.C. prohibit discrimination in schools on the bases of sexual orientation and gender identity.<sup>339</sup> Three ban trans students from using school facilities consistent with their gender identity, and two states have laws which prevent schools and districts from adding LGBTQ protections to nondiscrimination policies.<sup>340</sup> 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.<sup>341</sup> They alleged 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.<sup>342</sup> The U.S. District Court for the District of Oregon rejected this argument and found 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 was burdensome was overly generalized and inapplicable to any plaintiff.<sup>343</sup> The U.S. Court of Appeals for the Ninth Circuit upheld the district court's dismissal of the claim.<sup>344</sup> The Supreme Court denied certiorari in December 2020.<sup>345</sup> Parents for Privacy challenged a similar policy enacted by an Illinois school district and made the same argument that the policy

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337. 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).

338. See *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420 (Mo. 2019) (en banc) (holding that a transgender student adequately alleged the elements of a sex discrimination claim under the Missouri Human Rights Law when his school denied him access to the boys' restrooms and locker rooms); see also MO. ANN. STAT. § 213.065 (West, Westlaw through 2022 Reg. Sess. of the 101st. Gen. Assemb.).

339. *Safe School Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/SK42-YMTB> (last visited Aug. 11, 2022).

340. *Id.*

341. 326 F. Supp. 3d 1075, 1110 (D. Or. 2018).

342. *Id.*

343. *Id.*

344. *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).

345. *Parents for Priv. v. Barr*, No. 20-62, 2020 WL 7132263 (Dec. 7, 2020); see also Andrew Chung, *U.S. Supreme Court rejects challenge to transgender student accommodations*, REUTERS (Dec. 17, 2020, 12:17 PM), <https://perma.cc/X223-EPSW>.

burdened students' free exercise of religion.<sup>346</sup> Though the district court noted the school's policy was facially neutral, it nevertheless found that plaintiffs had stated a plausible claim under the Free Exercise Clause of the First Amendment because the school district had apparently indicated that students who objected to the policy are bigots or intolerant, which could be a departure from neutrality.<sup>347</sup> The plaintiffs dropped the lawsuit in April 2019.<sup>348</sup>

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 individuals' right to privacy under the Fourteenth Amendment.<sup>349</sup> Parents for Privacy argued that cisgender students' "ability to be clothed in the presence of the opposite biological sex and to use facilities away from the presence of the opposite biological sex . . . is fundamental to most people's sense of self-respect and personal dignity, including plaintiffs', who should be free from State-compelled risk of exposure of their bodies, or their intimate activities."<sup>350</sup> In other words, Parents for Privacy claimed there is a fundamental "right to privacy of one's fully or partially unclothed body and the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex."<sup>351</sup> 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.<sup>352</sup> The Northern District of Illinois also rejected this right to privacy argument.<sup>353</sup>

The Third Circuit rejected a privacy argument brought by cisgender students in *Doe v. Boyertown Area School District*, but not because the court did not want to

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

347. *Id.*

348. Moriah Balingit, *Parents drop legal fight over an Illinois school system's transgender policy*, WASH. POST (Apr. 17, 2019, 7:33 PM), <https://perma.cc/C3Q7-2LPK>.

349. 326 F. Supp. 3d 1075 (D. Or. 2018). Parents for Privacy also argued that the school's policy violated the Oregon state public accommodations law because transgender students present in school facilities denies equal access to those students who "are ashamed or embarrassed to share [school facilities] with transgender students." *Id.* at 1106–07. The district court rejected this argument because the students were not actually denied access to any facilities and because feelings of embarrassment or shame do not amount to unlawful discrimination in a public accommodation. *Id.* at 1107.

350. *Id.* at 1092.

351. *Id.*

352. *Id.* at 1099–1101. The Ninth Circuit upheld the district court's dismissal of the claim for failure to state a claim upon which relief could be granted. *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.").

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

expand substantive due process rights.<sup>354</sup> 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."<sup>355</sup> The Supreme Court later declined to hear the case.<sup>356</sup>

## V. HOUSING

Transgender people are frequently denied access to housing. One in five transgender people in the U.S. has been discriminated against when seeking a home, and more than one in ten have been evicted from their homes because of their gender identity.<sup>357</sup> According to another survey, 19% of transgender respondents reported being denied a home or apartment because they were transgender, and 11% reported being evicted because they were transgender.<sup>358</sup>

Transgender individuals are also more likely to experience homelessness than cisgender individuals. According to the U.S. Department of Housing and Urban Development (HUD)'s 2019 Annual Homeless Assessment Report to Congress, there are 3,255 transgender individuals experiencing homelessness and 1,362 gender non-conforming individuals experiencing homelessness in the U.S.<sup>359</sup> These individuals make up 0.6% and 0.2% of all individuals experiencing homelessness, respectively.<sup>360</sup> One in five transgender individuals have reportedly experienced homelessness at some point in their lives.<sup>361</sup> Other sources place this number at one in three.<sup>362</sup> Transgender women of color experienced disproportionately high rates of homelessness: American Indian (59%), African American (51%), multiracial (51%), and Middle Eastern (49%).<sup>363</sup> From 2016 to 2019, rates of transgender homelessness increased by

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

355. *Id.* at 527–28.

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

357. *Housing & Homelessness*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/ZM2H-HLM6> (last visited Feb. 14, 2021).

358. Grant, Mottet, & Tanis, *supra* note 265, at 106.

359. Meghan Henry, Rian Watt, Anna Mahathey, Jillian Ouellette, & Aubrey Sitler, *The 2019 Annual Homeless Assessment Report (AHAR) to Congress*, U.S. DEP'T OF HOUS. & URB. DEV. (Jan. 2019), <https://perma.cc/L8DW-RGMG>.

360. *Id.*

361. *Housing & Homelessness*, *supra* note 357.

362. Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet, & Ma'ayan Anafi, *The 2015 Report of the U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Dec. 2016), <https://perma.cc/FAC2-GUEE>; Tracy Jan, *Proposed HUD rule would strip transgender protections at homeless shelters*, WASH. POST (May 22, 2019, 3:05 PM), <https://perma.cc/6C3S-TBKG>.

363. James, Herman, Rankin, Keisling, Mottet, & Anafi, *supra* note 362.



88%, and 63% of this population was unsheltered.<sup>364</sup> Because of pervasive discrimination, transgender individuals are often turned away from shelters or are harassed by staff in the shelters.<sup>365</sup> In 2015, 70% of transgender individuals who stayed in a shelter reported mistreatment on account of their gender identity.<sup>366</sup>

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.

#### A. 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.<sup>367</sup> HUD currently interprets the FHA's prohibition on sex-based discrimination to include discrimination based on sexual orientation or gender identity.<sup>368</sup> Additionally, HUD issued its finalized Equal Access Rule in 2016.<sup>369</sup> The rule requires equal access to HUD programs without regard to a person's actual or perceived sexual orientation or gender identity.<sup>370</sup> 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.<sup>371</sup> Housing providers that receive HUD funding, including shelters, or that have HUD-insured loans are subject to the rules.<sup>372</sup> Thus, under the FHA, any landlord or housing provider is prohibited from discriminating against individuals

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364. Jackie Janosko, *Changes to HUD's Equal Access Rule Could Exclude More Transgender People From Shelter*, NAT'L ALL. TO END HOMELESSNESS (July 29, 2020), <https://perma.cc/H335-3KY6>.

365. *LGBTQ Homelessness*, NAT'L COAL. FOR THE HOMELESS (June 2017), <https://perma.cc/CF84-VPK2>. Twenty-nine percent of transgender individuals who tried to access shelter were turned away, while 55% experienced harassment. See also *LGBT People and Housing Affordability, Discrimination, and Homelessness*, UCLA SCH. OF L. WILLIAMS INST. (Apr. 2020), <https://perma.cc/RE9Q-6EEA>.

366. 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. James, Herman, Rankin, Keisling, Mottet, & Anafi, *supra* note 362.

367. 42 U.S.C. § 3604(a) (2018).

368. *Housing Discriminations and Persons Identifying as LGBTQ*, U.S. DEP'T OF HOUS. & URB. DEV., <https://perma.cc/P3DV-KCVS> (last visited Feb. 14, 2021).

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

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

371. § 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.

372. *Id.*

because of their “real or perceived gender identity or any other reason that constitutes sex-based discrimination.”<sup>373</sup>

On July 23, 2020, HUD issued a proposed rule to modify the Equal Access Rule,<sup>374</sup> which threatened to weaken protections for transgender individuals in shelters. The proposed rule would have allowed 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.”<sup>375</sup> The rule would have required any determination of sex to be based on “a good faith belief” and reasonable considerations of an individual’s physical characteristics.<sup>376</sup> 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.”<sup>377</sup>

Opponents of this proposed rule argued that the rule would enable 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.<sup>378</sup> They contended that the proposed rule’s policy constituted sex discrimination under the FHA and *Bostock v. Clayton County*.<sup>379</sup> Furthermore, they noted that the proposed physical factors for determining an individual’s “sex” (like height, facial hair, or Adam’s apple) would harm gender-nonbinary, intersex, and cisgender individuals who do not align with rigid sex stereotypes.<sup>380</sup>

In April 2021, HUD withdrew the proposed rule, stating that “Access to safe, stable housing-and-shelter-is a basic necessity . . . Today, we are taking a critical step in affirming HUD’s commitment that no person be denied access to housing or other critical services because of their gender identity. HUD is open for

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373. *HUD LGBTQ Resources*, U.S. DEP’T OF HOUS. & URB. DEV., <https://perma.cc/9MRG-X5C6> (last visited Jan. 19, 2021).

374. Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 84 Fed. Reg. 44811 (proposed July 2020) (to be codified at 24 C.F.R. pt. 5); *see also HUD Updates Equal Access Rule, Returns Decision Making to Local Shelter Providers*, U.S. DEP’T OF HOUS. & URB. DEV. (July 1, 2020), <https://perma.cc/6JWZ-NYEZ>.

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

376. *Id.*

377. *Id.*

378. *HUD Proposes Discriminatory Rules in Shelters*, NAT’L CTR. FOR TRANSGENDER EQUAL. (July 1, 2020), <https://perma.cc/P5GY-F6VF>; *HUD Publishes Proposed Anti-Transgender Rule in the Federal Register*, NAT’L LOW INCOME HOUS. COAL. (July 27, 2020), <https://perma.cc/D4TX-TNNS>.

379. *Comments in Response to the Proposed Rule*, NAT’L WOMEN’S L. CTR. (Sept. 22, 2020), <https://perma.cc/FH9B-WZLK>; *ACLU Comment on HUD Anti-Trans Rule (2020)*, AM. C.L. UNION (Sept. 22, 2020), <https://perma.cc/V8PE-TA4N>.

380. *Comments in Response to the Proposed Rule*, *supra* note 379; *ACLU Comment on HUD Anti-Trans Rule*, *supra* note 379.

business for all.”<sup>381</sup> A person who identifies as LGBTQ who has experienced, or is about to experience, discrimination because of sexual orientation or gender identity may file a complaint with HUD.<sup>382</sup> Some transgender individuals who have been discriminated against by landlords have been successful in suing those landlords for sex discrimination. In one such case, the U.S. District Court for the District of Colorado found that one landlord’s refusal to rent to a transgender woman and her family was based on sex stereotypes, which amounted to sex discrimination in violation of the FHA.<sup>383</sup>

## B. STATE POLICY

Currently, twenty-one states and D.C. have laws prohibiting discrimination based on sexual orientation and gender identity.<sup>384</sup> Like the laws prohibiting discrimination in places of public accommodation, some states do not enumerate gender identity as a protected class, but the protection reaches transgender individuals through the state’s definition of sexual orientation.<sup>385</sup> Six states—Florida, Michigan, North Dakota, Nebraska, and Pennsylvania—have human or civil rights commissions which have explicitly stated they interpret existing protections against sex discrimination to include both sexual orientation and gender identity, but they do not codify this protection in a statute.<sup>386</sup>

Vermont’s law is representative of the general type of protections against housing discrimination that states afford individuals. It is unlawful in Vermont to refuse to sell or rent a dwelling or other type of real estate to a person because of their gender identity.<sup>387</sup> It is similarly unlawful to refuse to negotiate the sale or rental of a dwelling or other real estate to someone because of their gender identity.<sup>388</sup> Discrimination in the terms of sale or rental for housing is also prohibited,<sup>389</sup> as is posting or advertising anything that indicates the seller or landlord

381. Press release, HUD, HUD No. 21-069, *HUD Withdraws Proposed Rule, Reaffirms Its Commitment to Equal Access to Housing, Shelters, and Other Services Regardless of Gender Identity* (Apr. 22, 2021), <https://perma.cc/LQ33-ABRZ>.

382. 24 C.F.R. § 5.106 (2016); *Resources on housing discrimination and persons identifying as Lesbian, Gay, Bisexual, Transgender, and/or Queer/Questioning (LGBTQ)*, U.S. DEP’T OF HOUS. & URB. DEV., <https://perma.cc/Y9GZ-M2LJ> (last visited Jan. 19, 2021).

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

384. *Equality Maps: Nondiscrimination Laws*, *supra* note 296. The states are California, Colorado, Connecticut, Delaware, D.C., Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Virginia, and Washington. *Id.*

385. See, e.g., ME. REV. STAT. ANN. tit. 5, § 4581-A (West, Westlaw through Ch. 3 of the 2023 1st Reg. Sess. of the 131st Leg.) (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, Westlaw through Ch. 3 of the 2023 1st Reg. Sess. of the 131st Leg.) (defining sexual orientation as “a person’s actual or perceived . . . gender identity or expression”).

386. *Equality Maps: Nondiscrimination Laws*, *supra* note 296.

387. VT. STAT. ANN. tit. 9, § 4503(a)(1) (West, Westlaw through Ch’s 186 (End) and M-19 (End) of the Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb.).

388. *Id.*

389. *Id.* § 4503(a)(2).

would limit the housing based on gender identity.<sup>390</sup> 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.<sup>391</sup>

## VI. IDENTITY DOCUMENTS

The importance of having identity documents that match a person's gender identity cannot be overstated. Without accurate identity documents, a person can face severe hardship in their day-to-day life—a person without identification cannot travel, cannot register for school, and may be prevented from accessing emergency housing or other public services.<sup>392</sup> Lack of access to appropriate identity documents can interfere with transgender individuals' ability to secure employment, as inaccuracies may disclose transgender status to prospective public employers through "gender matching," which means the Social Security Administration notifies prospective employers when the gender marker on an individual's job application does not match the Administration's records.<sup>393</sup> This practice means qualified individuals could risk losing job opportunities due to discrimination.

Additionally, transgender individuals whose identity documents do not accurately reflect their gender identity experience harassment. The National Center for Transgender Equality reports that nearly 32% of 27,715 respondents to its 2015 U.S. Transgender Survey who have shown an ID with a name or gender marker that did not accurately reflect their gender presentation were "verbally harassed, denied benefits or service, asked to leave, or assaulted."<sup>394</sup> 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;<sup>395</sup> 3% reported being attacked or assaulted,<sup>396</sup> and 15% reported being asked to leave.<sup>397</sup> 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.<sup>398</sup> States vary on requiring publication of a name change

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390. *Id.* § 4503(a)(3).

391. *Id.* § 4503(a)(4).

392. *Understanding the Transgender Community*, HUM. RTS. CAMPAIGN, <https://perma.cc/CGR9-98TJ> (last visited Feb. 21, 2021).

393. *Identity Documents*, LAMBDA LEGAL (Nov. 17, 2016), <https://perma.cc/6XE2-LUDW>.

394. 2015 U.S. TRANSGENDER SURVEY, *supra* note 25, at 9. This report, released in 2015, remains the most recent large-scale study of discrimination against the transgender community.

395. Grant, Mottet, & Tanis, *supra* note 265.

396. *Id.*

397. *Id.*

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

announcement.<sup>399</sup> Twenty-five states include additional restrictions and/or requirements for those who wish to change their name who have criminal convictions.<sup>400</sup>

Barriers to acquiring adequate identity documents exist not only because the process in many states is restrictive or complex, but also because it can be cost prohibitive. The 2015 U.S. Transgender Survey reported that 35% of those who have not changed their legal name and 32% of those who have not changed the gender markers on their identity documents have not done so because they could not afford it.<sup>401</sup> As of 2022, a name change can cost anywhere from \$100 to over \$400.<sup>402</sup>

#### A. FEDERAL RULES

There is no overarching federal policy governing the correction of identity documents. In general, various federal agencies, including the State Department, Social Security Administration, Department of Homeland Security, and Veterans Health Administration do not require proof of any surgery and instead require proof of “appropriate clinical treatment for gender transition.”<sup>403</sup> This phrase is meant to capture a variety of clinical treatment methods that people use to facilitate gender transition, including changes in gender expression, psychotherapy, hormone therapy, or surgery.<sup>404</sup>

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.<sup>405</sup> How long a passport will be valid depends on what stage of transition a person is in—an adult who has completed appropriate clinical treatment for gender transition (as determined by that person’s physician) will have a passport that is valid for ten years, while a person in the process of getting appropriate clinical treatment will have a passport that is valid for two years.<sup>406</sup> Those in the process of transition may apply for a full-validity passport once their doctor indicates that they have completed their treatment.<sup>407</sup>

Social security and immigration documents, as well as veteran records, may be changed using various forms of evidence for changing a gender marker, including

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399. *Identity Document Laws and Policies: Name Changes*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/PNW3-ABLE> (last visited Aug. 11, 2022).

400. *Id.*

401. 2015 U.S. TRANSGENDER SURVEY, *supra* note 25, at 9.

402. *See, e.g., Change your name in California*, CAL. CTS., <https://perma.cc/8ACS-KPE2> (last visited Aug. 11, 2022); *Legal Name Change*, STATE OF MICH., <https://perma.cc/LK93-R68B> (last visited Aug. 11, 2022).

403. *See, e.g., Know Your Rights: Passports*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/39E6-MRZX> (last visited Feb. 21, 2021).

404. *Id.*; *see also Standards of Care*, *supra* note 21 (outlining clinical treatment methods).

405. *Selecting your Gender Marker*, U.S. DEP’T OF STATE, <https://perma.cc/2K4K-W9Y4> (last visited Feb. 21, 2021).

406. *Id.*

407. *Id.*

a valid passport with a correct gender, a state-issued birth certificate, a court order, or a signed letter from a physician indicating clinical treatment for gender transition.<sup>408</sup>

One federal program—the Selective Service—does not recognize changes of gender, as it is an entirely birth-assigned sex system.<sup>409</sup> 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.<sup>410</sup> Individuals who are assigned male at birth and who have changed their names are required to notify the Selective Service of the change by letter and within ten days.<sup>411</sup>

## 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.<sup>412</sup>

### 1. Drivers' Licenses

Twenty-two states and D.C. allow residents to mark M, F, or X on their driver's license.<sup>413</sup> These states also use an easy to understand identification form and do not require provider certification.<sup>414</sup> Eight states and two territories require proof of surgery, a court order, or an amended birth certificate.<sup>415</sup>

Legal advocates have successfully challenged the processes for changing the gender marker on driver's licenses in Michigan, Alaska, and Alabama.<sup>416</sup>

408. *How do I change my gender on Social Security's records?*, SOC. SEC. ADMIN., <https://perma.cc/CN43-ZP74> (last updated Jan. 31, 2019); *Know Your Rights: Social Security*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/AJ9Y-GCED> (last visited Feb. 21, 2021); see also *Policy Manual, Ch. 2: USCIS-Issued Secure Identity Documents*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/9XHX-S8WA> (last visited Mar. 5, 2023); *Know Your Rights: Immigration Documents*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/EZW9-F6YF> (last visited Feb. 21, 2021); *Know Your Rights: Military Records*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/LC7E-G4WM> (last visited Feb. 21, 2021).

409. *Selective Service and Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Dec. 3, 2019), <https://perma.cc/46RZ-JLCK>.

410. *Id.*

411. *Id.*

412. *ID Documents Center*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/6NCJ-AHMY> (last visited Feb. 21, 2021); *National Equality Map*, TRANSGENDER L. CTR., <https://perma.cc/4YNT-VBKN> (last visited Feb. 21, 2021); *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, LAMBDA LEGAL, <https://perma.cc/3QEZ-P36G> (last updated Sept. 17, 2018).

413. *Identity Document Laws and Policies: Driver's License*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/PNW3-ABLE> (last visited Aug. 11, 2022).

414. *Id.*

415. *Id.*

416. *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015); *Corbitt v. Taylor*, No. 2:18cv91-MHT, 2021 WL 142282 (M.D. Ala. Jan. 15, 2021); *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431 Cl., 2012 WL 2685183 (Super. Ct. Alaska Mar. 12, 2012).

Transgender individuals in Michigan may now use their passport to prove their gender.<sup>417</sup> The American Civil Liberties Union (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.<sup>418</sup>

A right to privacy argument was successful in Alaska state court in *K.L. v. Department of Administration, Division of Motor Vehicles*.<sup>419</sup> Alaska's policy at the time required proof of gender-affirmation surgery in order to change the gender marker on a driver's license, which both parties agreed was invalid.<sup>420</sup> However, because the policy was deemed invalid, Alaskans were left without a 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.<sup>421</sup> Alaska later changed its policy and no longer requires proof of surgery to change the gender marker on licenses.<sup>422</sup>

Alabama's policy for changing the gender marker on driver's licenses was recently deemed unconstitutional by the U.S. District Court for the Middle District of Alabama.<sup>423</sup> 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.<sup>424</sup> 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.<sup>425</sup> 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.<sup>426</sup> Therefore, Policy Order 63 did not

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417. *Love v. Johnson: ID Lawsuit*, AM. C.L. UNION OF MICH., <https://perma.cc/CT7E-3PFP> (last visited Oct. 21, 2020).

418. *Id.*

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

420. *Id.* at \*3.

421. *Id.* at \*6.

422. *Changing Identification Details*, ALASKA DEP'T OF ADMIN., DIV. OF MOTOR VEHICLES, <https://perma.cc/2V7R-8VY7> (last visited Oct. 21, 2020).

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

424. *Id.*

425. *Id.*

426. *Id.* at \*11, 17.

survive the requisite intermediate scrutiny level and was deemed unconstitutional.<sup>427</sup> Enforcement of Policy Order 63 was enjoined, and ALEA was ordered to issue plaintiffs new driver's licenses reflecting that they are women.<sup>428</sup>

According to the NCTE's grading system, twenty-two states and D.C. earned a grade in the "A" range.<sup>429</sup> Twenty states and D.C. do not require certification from a medical provider to change the gender marker on a driver's license; nineteen states and D.C. offer a gender-neutral "X" option in place of an "M" or "F" gender marker.<sup>430</sup> Ten states and Puerto Rico earned grades in the "B" range.<sup>431</sup> These states 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.<sup>432</sup> Six states are in the "C" range, requiring certification from a medical or mental health professional,<sup>433</sup> while one state has what the NCTE characterizes as burdensome process requirements.<sup>434</sup> Four states and two territories earned a "D" grade for having "unclear, unknown or unwritten policy."<sup>435</sup> Eight states and two territories earned an "F" because they require proof of surgery, a court order, or an amended birth certificate to change the gender marker on a driver's license.<sup>436</sup>

## 2. Birth Certificates

States vary significantly more on procedures for changing the gender marker on birth certificates than they do for driver's licenses. Sixteen states and D.C. allow residents to mark M, F, or X on their birth certificates.<sup>437</sup> Oklahoma specifically bans the use of an X option on birth certificates.<sup>438</sup> Twenty-six states, the Commonwealth of the Northern Mariana Islands, and D.C. issue new birth certificates and do not require sex reassignment surgery or a court order to change their gender marker.<sup>439</sup> Twelve states and Guam require proof of sex

427. *Id.*

428. *Id.*

429. *How Trans-Friendly Is the Driver's License Gender Change Policy in Your State?*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/WZ5K-SX2V> (last visited Jan. 21, 2021).

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

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

432. *Id.*

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

434. This includes Utah. *Id.*

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

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

437. *Identity Document Laws and Policies: Birth Certificate*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/R7V9-E37V> (last visited Aug. 11, 2022).

438. *Id.*

439. *Id.*



reassignment surgery in order to change gender markers.<sup>440</sup> Four states do not allow for amending the gender marker on their birth certificates.<sup>441</sup>

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.<sup>442</sup> For example, Georgia requires both a court order and proof of surgery.<sup>443</sup> 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.<sup>444</sup> A person must submit five documents to successfully change their birth certificate: an affidavit for amendment, a certified copy of the court order changing 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.<sup>445</sup> While Virginia previously required proof of surgery, that requirement has been abolished.<sup>446</sup> Now, individuals in Virginia seeking to change the gender marker on a birth certificate need to submit an application, a certified copy of the court ordered gender change, a copy of identification, and fee payment.<sup>447</sup>

New York City changed its policy to allow an individual to change their birth certificate in 2014.<sup>448</sup> 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.<sup>449</sup> 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

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440. *Id.*

441. *Id.*

442. *Summary of State Birth Certificate Gender Change Laws*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/BEW4-RVCS> (last updated Apr. 2020); *Identity Document Laws and Policies: Birth Certificates*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/PW7P-TH33> (last updated Aug. 10, 2019).

443. GA. CODE ANN. § 31-10-23(e) (West, Westlaw through 2022 Reg. Sess of the Ga. Gen. Assemb.).

444. *Id.*

445. *ID Documents Center—Georgia*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/6LM9-GZQU> (last visited Feb. 22, 2021).

446. Rodney Robinson, *Bill allows new birth certificate for transgender people*, ASSOCIATED PRESS (Feb. 28, 2020), <https://perma.cc/6PBJ-RADS>.

447. *ID Documents Center—Virginia*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/P35L-GGGY> (last visited Feb. 22, 2021).

448. *New York State Modernizes Requirements for Birth Certificate Gender Markers*, NAT’L CTR. FOR TRANSGENDER EQUAL. (June 5, 2014), <https://perma.cc/QSX5-8E32>.

449. *ID Documents Center—New York*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/PE8U-XJA9> (last visited Oct. 25, 2020).

gender.<sup>450</sup> 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.<sup>451</sup>

Tennessee, Oklahoma, West Virginia, and Montana are the only states that prohibit correction of gender-markers on birth certificates entirely. Tennessee prohibits correcting birth certificates by statute.<sup>452</sup> Lawsuits have been filed in both states challenging these policies.

Ohio had a discriminatory policy until it was struck down in December 2021.<sup>453</sup> The ACLU filed *Ray v. Himes*, which challenged Ohio's policy on Equal Protection, Due Process, and First Amendment grounds.<sup>454</sup> Ohio argued that plaintiffs have no constitutional right to change their birth certificates to reflect their gender identity, as Ohio birth certificates only reflect sex assigned at birth.<sup>455</sup> It argues that birth certificates are not compelled speech in violation of the First Amendment, but rather "governmental speech that is a historical reflection of what was reported at the time of a child's birth, not an opinion, objectionable viewpoint, or ideology";<sup>456</sup> that the policy is not a violation of informational privacy under the Due Process Clause because the birth certificates are "public records, and public records cannot form the basis for an informational privacy claim";<sup>457</sup> and that the Equal Protection Clause is not violated because the policy is facially neutral and plaintiffs are not members of a protected class.<sup>458</sup> 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.<sup>459</sup> The Ohio Department of Health has since created a procedure

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450. *Notice of Adoption of Amendment to Article 207 of the New York City Health Code*, NYC DEP'T OF HEALTH & MENTAL HYGIENE BD. OF HEALTH, 3, <https://perma.cc/RJ3S-JP8V> (last visited Oct. 25, 2020).

451. *Victory! New York State Changes Policy to Allow Transgender Minors to Correct Birth Certificates After Lambda Legal Lawsuit*, LAMBDA LEGAL (Mar. 10, 2020), <https://perma.cc/R25C-B7C9>.

452. TENN. CODE ANN. § 68-3-203(d) (West, Westlaw Current with laws from 2022 2nd Reg. Sess. of the 112th Tenn. Gen. Assemb.) ("The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.").

453. Sarah Khan-Williamson, *Trans Folks Born in Ohio, Here's How to Finally Correct the Gender Marker on Your Ohio Birth Certificate*, AM. C.L. UNION OHIO (May 26, 2021, 11:15 AM), <https://perma.cc/GZS5-SGSW>.

454. Complaint, *Ray v. Himes*, No. 2:18-cv-00272-MHW-CMV (S.D. Ohio Mar. 29, 2018); see also Julie Moreau, *Four transgender people sue Ohio over state's birth certificate policy*, NBC NEWS (Apr. 3, 2018), <https://perma.cc/SL2N-8R8D>.

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

456. *Id.* at 2.

457. *Id.*

458. *Id.*

459. *Ray v. McCloud*, No. 2:18-cv-00272, 2020 WL 8172750, at \*6–9 (S.D. Ohio Dec. 16, 2020), <https://perma.cc/3BZ3-ZUG7>.

for trans individuals to change the sex marker on their birth certificates so they can use them without outing themselves.<sup>460</sup>

In Tennessee, Lambda Legal filed *Gore v. Lee*, which, like *Ray*, challenges Tennessee's statute on Equal Protection, Due Process, and First Amendment grounds.<sup>461</sup> On October 22, 2019, plaintiffs rejected defendants' settlement proposal and were unable to make a counterproposal.<sup>462</sup> Plaintiffs' motion for summary judgment and defendants' motion to dismiss have been pending since November 16, 2020.<sup>463</sup>

Plaintiffs in Idaho challenged a state law which prohibited changes to the sex marker on birth certificates unless there was an error in recording the assigned sex at birth.<sup>464</sup> Idaho conceded that the policy was unconstitutional under the Equal Protection Clause, but asserted that it needed a court order to change the rule.<sup>465</sup> 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.<sup>466</sup> 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.<sup>467</sup> However, the U.S. District Court for the District of Idaho found the new legislation was effectively the same as Ohio's previous policy, thus violating the injunction.<sup>468</sup> Idaho officials are now banned from implementing this policy.<sup>469</sup>

Plaintiffs also successfully challenged Puerto Rico's policy, which required that birth certificates reflect sex assigned at birth and prohibited transgender individuals from correcting this designation.<sup>470</sup> The court found that this was a violation of transgender individuals' right to privacy under the Fourteenth Amendment because it forced them to disclose their transgender status—their

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460. Khan-Williamson, *supra* note 453.

461. Complaint at 33–41, *Gore v. Lee*, No. 3:19-cv-00328 (M.D. Tenn. Apr. 23, 2019); *see also* Gwen Aviles, *Transgender plaintiffs sue Tennessee to change birth certificate gender*, NBC NEWS (Apr. 24, 2019, 10:38 AM), <https://perma.cc/ABF5-Q67K>.

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

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

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

465. *Id.* at 1134.

466. *Id.* at 1146.

467. *Anti-transgender birth certificate law violates order, judge rules*, NBC NEWS (Aug. 11, 2020, 9:39 AM), <https://perma.cc/7Q27-D3DW>.

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

469. *Id.*; *Anti-transgender birth certificate law violates order*, *supra* note 467.

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

“most private information”<sup>471</sup>—and the disclosure was neither a legitimate governmental interest nor a valid exercise of state police powers.<sup>472</sup>

Finally, parties in Kansas agreed to settle a lawsuit challenging the state’s policy of prohibiting transgender individuals from correcting the sex marker on their birth certificates.<sup>473</sup> The U.S. District Court for the District of Kansas issued a consent judgment stipulating that the policy violated the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment and ordered the Kansas Department of Health and Environment and other Kansas officials to provide accurate birth certificates.<sup>474</sup> 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 their professional opinion.<sup>475</sup> Pursuant to these successful challenges in Idaho, Puerto Rico, Ohio, and Kansas, the *Gore* plaintiffs are likely to be successful, as they raise similar claims.

In May 2021, the Utah Supreme Court published *In re Gray and Rice*, which stated that individuals could change their sex on their birth certificate to match their current gender identity.<sup>476</sup> When Sean Childers-Gray was born, the hospital gave him a birth certificate that identified him as female.<sup>477</sup> Angie Rice was assigned male at birth.<sup>478</sup> Both Childers-Gray and Rice petitioned the district court to change their names and sex on their birth certificates.<sup>479</sup> The Utah Supreme Court found that the district court should have granted this petition and that “a person has a common-law right to change facets of their personal legal status, including their sex designation.”<sup>480</sup> This decision offers “a plain-meaning interpretation of the duly enacted law allowing individuals to change their sex designations.”<sup>481</sup> The duly enacted law in question was Utah Code § 26-2-11, which states, in part, “(1) When a person born in this state has a name change or sex change approved by an order of a Utah district court or a court of competent jurisdiction of another state or a province of Canada, a certified copy of the order

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471. *Id.* at 333.

472. *Id.*

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

474. *Id.* at 2–3; see also *Victory! Kansas Agrees to Issue Accurate Birth Certificates to Transgender People*, LAMBDA LEGAL (June 24, 2019), <https://perma.cc/GA88-USWX>; Tim Carpenter, *Transgender birth certificate changes OK’d*, TOPEKA CAP. J. (June 24, 2019), <https://perma.cc/B6V8-VQQ9>.

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

476. *In re Childers-Gray*, 487 P.3d 96, 99 (Utah 2021).

477. *Id.* at 100.

478. *Id.* at 101.

479. *Id.* at 99.

480. *Id.*

481. *Id.* at 100.

may be filed with the state registrar with an application form provided by the registrar.<sup>482</sup>

The court determined that a sex change petition is a petition for a change in legal status, and that such changes in legal identification are within the court's jurisdiction.<sup>483</sup> To counter the dissent's conception of "sex" as an immutable and biological category, rather than a legal one, the court asked: "[I]f 'sex' on a birth certificate indicates a purely biological trait and not an identifier of legal status, then why does one need a court order to change it?"<sup>484</sup> The court went on to provide a two-prong test for determining whether a change via court order is permissible. First, the sex-change petition must not be "sought for a fraudulent or unlawful purpose,"<sup>485</sup> and second, the petitioner must supply "evidence of appropriate clinical care or treatment for gender transitioning or change provided by a licensed medical professional."<sup>486</sup> The court does "not require any specific procedure or treatment."<sup>487</sup> The second prong of this test is based on both Utah statutes and common law, as well as on federal requirements for sex change.<sup>488</sup> District courts in Utah have thus been instructed to grant sex change petitions, based on the above test, for the purpose of conforming legal documents to a petitioner's gender identity.<sup>489</sup>

## 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 protected categories),<sup>490</sup> demonstrate the legal and political advancements being achieved by the LGBTQ+ community. Similarly, in holding that trans 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.<sup>491</sup> 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 FBI demonstrates

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482. UTAH CODE ANN. § 26-2-11 (West, Westlaw through 2022 Spec. Sess.).

483. Childers-Gray, 487 P.3d at 102.

484. *Id.* at 121.

485. *Id.* at 123 (quoting *In re Porter*, 31 P.3d 519 (Utah, 2001)).

486. *Id.* at 125–26.

487. *Id.* at 126.

488. *Id.*

489. *Id.* at 129–30.

490. H.B. 426, 155th Gen. Assemb., (Ga. 2020), <https://perma.cc/GD7V-76TF>.

491. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

that there are still consistently more than one hundred instances of hate crimes motivated by the victim's gender identity each year in the U.S.,<sup>492</sup> and in all likelihood this actually underestimates the true rate of violence against trans people.<sup>493</sup> Thus, while the rights for transgender persons movement is clearly making strides in its pursuit of 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.

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492. 2018 *Hate Crime Statistics*, *supra* note 156; 2017 *Hate Crime Statistics*, *supra* note 159; 2016 *Hate Crime Statistics*, *supra* note 159.

493. Stotzer, *supra* note 165.