

**TRANSGENDER AND NONBINARY PERSONS’ RIGHTS AND
ISSUES**

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I. INTRODUCTION

Transgender¹ people are more visible in mainstream society than ever before in the United States. In recent years, trans individuals have competed in the U.S. Open, graced the cover of *TIME* and *Vanity Fair*, and presided over courtrooms as judges.² In 2021, President Joe Biden nominated Rachel Levine, the first openly transgender federal official confirmed by the U.S. Senate, to serve as the Assistant Secretary of Health.³ Despite these strides, trans individuals continue to face disproportionate rates of discrimination and violence compared to non-trans individuals. These rates continue even though such discrimination was found unconstitutional by the Supreme Court. In *Bostock v. Clayton County*, the Supreme Court held that Title VII explicitly protects trans employees.⁴ Furthermore, high-profile trans individuals such as Sarah McBride, who recently became the United States' first openly trans state senator, are bringing heightened visibility and support to the struggle for transgender rights and social acceptance.⁵ 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 growing against rights for transgender persons. Trans people are still subject to disproportionate stigma, discrimination, and violence.⁶ Federal Bureau of Investigation ("FBI") data shows that the number of hate crimes motivated by gender identity rose from 33 reported incidents in 2013 to 307 in 2021, the most recent year for which data is available.⁷ Lack of uniform documentation procedures, failure to properly identify and distinguish gender identity from sexual orientation, and questionable reporting rates cast doubts on the accuracy of current data, and may suggest that hate crimes motivated by gender identity are more common than statistics indicate.⁸ These hate crimes can have serious implications on the health of transgender people, who suffer disproportionately high rates of serious mental health issues.⁹ For example, 39% of respondents in the U.S.

1. The term "transgender" is used interchangeably with the term "trans" throughout this Article.

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

3. 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>.

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

5. 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>.

6. *Measuring Sex, Gender Identity, and Sexual Orientation*, NAT'L ACAD. SCI., ENG'G, MED. 27, 59 (2022).

7. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., UNIFORM CRIME REPORT: HATE CRIME STATISTICS, 2013 at 4 (2014), <https://perma.cc/HT5M-BZNP>; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., UNIFORM CRIME REPORT: HATE CRIME STATISTICS, 2021 at 4 (2022).

8. 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>.

9. SANDY E. JAMES, JODY L. HERMAN, SUSAN RANKIN, MARA KEISLING, LISA MOTTET, & MA'AYAN ANAFI, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 5 (Nat'l Ctr. for Transgender Equal. 2016), <https://perma.cc/GK7Y-PPGZ> [hereinafter 2015 U.S. TRANSGENDER SURVEY].

Transgender Survey reported “serious psychological distress” in the previous month, compared to 5% of the general U.S. population.¹⁰

The movement for trans rights is also largely focused on the state level, resulting in differential treatment and recognition of trans people within the United States. 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.¹¹ 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 have low equality status, and fifteen states and three territories (American Samoa, Commonwealth of the Northern Mariana Islands, and Guam) have negative equality status.¹² Notably, legal protections explicitly covering gender identity lag significantly behind those covering sexual orientation.¹³

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.¹⁴ Sex refers to “a classification, generally as male or female, according to the reproductive organs and functions that derive from the chromosomal complement.”¹⁵ Sexual orientation refers to an individual’s emotional, affectional, and sexual attraction to individuals of the same gender or a different gender.¹⁶

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 health care, 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 challenges facing, and protections for, transgender people in accessing public accommodations, and Part V describes challenges and protections around

10. *Id.*

11. *Snapshot: LGBTQ Equality by State*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/H6AA-DD5E>.

12. *Id.*

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

14. *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>.

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

16. *Yogyakarta Principles*, *supra* note 14 at 6 n.1.

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. Twenty-four states and D.C. prohibit health insurance discrimination based on gender identity, but fifteen explicitly exclude transition services in state employee benefits.¹⁷

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.¹⁸ 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.¹⁹ For trans people, this care often includes hormone replacement therapy ("HRT"), cosmetic surgery, treatments to modify speech and communication, non-surgical genital tucking or packing, and chest binding.²⁰ 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.²¹ 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.²² To that end, WPATH has deemed all procedures necessary for

17. Elaina Rahrig, *Transgender and Nonbinary Persons' Rights and Issues*, 24 GEO. J. GENDER & L. 855, 865-68 (2023).

18. 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).

19. *Id.*

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

21. *Id.*

22. E. Coleman, A. E. Radix, W. P. Bouman, G. R. Brown, A. L. C. de Vries, M. B. Deutsch, R. Ettner, L. Fraser, M. Goodman, J. Green, A. B. Hancock, T. W. Johnson, D. H. Karasic, G. A. Knudson, S. F. Leibowitz, H. F. L. Meyer-Bahlburg, S. J. Monstrey, J. Motmans, L. Nahata, T. O. Nieder, S. L. Reisner, C. Richards, L. S. Schechter, V. Tangpricha, A. C. Tishelman, M. A. A. Van Trotsenburg, S. Winter, K. Ducheny, N. J. Adams, T. M. Adrián, L. R. Allen, D. Azul, H. Bagga, K. Başar, D. S. Bathory, J. J. Belinky, D. R. Berg, J. U. Berli, R. O. Bluebond-Langner, M.-B. Bouman, M. L. Bowers, P. J. Brassard, J. Byrne, L. Capitán, C. J. Cargill, J. M. Carswell, S. C. Chang, G. Chelvakumar, T. Corneil, K. B. Dalke, G. De Cuypere, E. de Vries, M. Den Heijer, A. H. Devor, C. Dhejne, A. D'Marco, E. K. Edmiston, L. Edwards-Leeper, R. Ehrbar, D. Ehrensaft, J. Eisfeld, E. Elaut, L. Erickson-Schroth, J. L. Feldman, A. D. Fisher, M. M. Garcia, L. Gijs, S. E. Green, B. P. Hall, T. L. D. Hardy, M. S. Irwig, L. A. Jacobs, A. C. Janssen, K. Johnson, D. T. Klink, B. P. C. Kreukels, L. E. Kuper, E. J. Kvach, M. A. Malouf, R. Massey, T. Mazur, C. McLachlan, S. D. Morrison, S. W. Mosser, P. M. Neira, U. Nygren, J. M. Oates, J. Obedin-Maliver, G. Pagkalos, J. Patton, N. Phanuphak, K. Rachlin, T. Reed, G. N. Rider, J. Ristori, S. Robbins-Cherry, S. A. Roberts, K. A. Rodriguez-Wallberg, S. M. Rosenthal, K. Sabir, J. D. Safer, A. I. Scheim, L. J. Seal, T. J. Schoole, K. Spencer, C. St. Amand, T. D. Steensma, J. F. Strang, G. B. Taylor, K. Tilleman, G. G. T'Sjoen, L. N. Vala, N. M. Van Mello, J. F. Veale, J. A. Vencill, B. Vincent, L. M. Wesp, M. A. West, & J. Arcelus, *Standards of Care for the Health of Transgender and*

gender affirmation to be medically necessary.²³ The American Medical Association, American Psychiatric Association, GLMA: Health Professionals 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.²⁴

However, serious structural barriers, such as economic stability and health insurance coverage, often prevent trans individuals from accessing gender-affirming care. First, procedures are expensive—typically costing thousands of dollars.²⁵ These medical costs can be flatly prohibitive for transgender people, who are more likely to experience compounding economic hardships than cisgender individuals.²⁶ Trans people also experience unemployment at a rate three times higher than the national average;²⁷ in the U.S., where health insurance is largely employment-based, this can create increased barriers to trans peoples' ability to access health care. Further, nearly one-third of trans individuals experience homelessness at some point in their lives.²⁸ 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.²⁹ 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.³⁰ 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.³¹ 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.³² Additionally,

Gender Diverse People, Version 8, 23 WORLD PRO. ASS'N FOR TRANSGENDER HEALTH S1, S17 (2022), <https://perma.cc/XYE6-6USV> [hereinafter *Standards of Care*].

23. *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>.

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

25. See, e.g., Kellen Baker & Arjee Restar, *Utilization and Costs of Gender-Affirming Care in a Commercially Insured Transgender Population*, 50 J. LAW, MED., ETHICS 456, 465–467 (2022).

26. See 2015 U.S. TRANSGENDER SURVEY, *supra* note 9, at 3.

27. *Id.* at 12.

28. *Id.* at 13.

29. *Id.* at 10.

30. *Id.*

31. See *What are my rights in health insurance coverage?*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/F4GU-2BKM>.

32. See *Masculinizing Chest Reconstruction*, UCSF TRANSGENDER CARE, <https://perma.cc/2MRV-556H>.

trans individuals are frequently denied care by healthcare providers due to personal prejudice,³³ even when federal and state law prohibit such discrimination.³⁴ Trans people living in rural areas may also have difficulty accessing services due to shortages in rural healthcare workforces.³⁵

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.³⁶ 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.³⁷ The prevalence of suicide attempts among trans individuals is 41%, compared to 4.6% in the overall U.S. population.³⁸ 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.³⁹ The psychological benefits of gender-affirming care also manifest in lower rates of substance abuse, suicide attempts, and anxiety.⁴⁰

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.⁴¹ 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.⁴²

Healthcare advocates also emphasize that it is cost-effective to enable trans individuals to access their desired gender-affirming care. One study of San

33. 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 9, at 10.

34. See *What Are My Rights in Health Insurance Coverage?*, *supra* note 31.

35. 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>.

36. AM. MED. ASS'N, *supra* note 24, at 4.

37. AM. MED. ASS'N, *supra* note 24, 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 24, at 3.

40. *Id.*

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

42. Curtis Crane, *Phalloplasty and Metoidioplasty: Overview and Postoperative Considerations*, UCSF TRANSGENDER CARE (June 17, 2016), <https://perma.cc/Y4C4-NHDE>.

Francisco's coverage of gender-affirming surgery found that the cost of these surgeries to insurance companies and employers was less than one dollar per enrollee for the first five years.⁴³ Proponents argue that from an insurer's perspective, the cost of insuring trans people is economical compared to the thousands of dollars of costs incurred from a suicide attempt.⁴⁴ Additionally, coverage of gender-affirming care leads to greater adherence to HIV medication, which reduces long-term medical bills associated with untreated HIV.⁴⁵

Those who oppose improving access to gender-affirming care 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."⁴⁶ These arguments are premised on beliefs that treatment does not achieve its desired effect or address underlying issues.⁴⁷ For example, opponents frequently contend that gender-affirming care cannot change a trans woman into a biological woman and therefore is not worth pursuing.⁴⁸ 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.⁴⁹

The implementation of the Affordable Care Act ("ACA," or the "Act"), its subsequent dismantling at the hands of the Trump Administration, and larger cultural changes have all resulted in wide fluctuations in trans individuals' access to health care. At the federal level, healthcare 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.⁵⁰ 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.⁵¹ Third, the fate of the Act itself is uncertain because the most recent challenge to its individual mandate was

43. AM. MED. ASS'N, *supra* note 24, 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., 485 F. Supp. 3d 1 (D.D.C. Sept. 2, 2020); Walker v. Azar, 480 F. Supp. 3d 417, 420, (E.D.N.Y. Aug. 17, 2020).

dismissed for lack of standing; the Court never reached the ACA question.⁵² Transgender individuals' access to health insurance is further subject to the laws of the states in which they live and are employed.⁵³ At present, states are divided between widening or restricting ACA protections using state laws.⁵⁴ States have taken a variety of approaches to implement their ideological positions, with many of the constraints premised upon religious or conscientious objections.⁵⁵ 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 substantial support to states seeking to elevate religious freedoms over rights for transgender people.⁵⁶ 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 healthcare coverage for trans people. Section 1557 of the Act prohibits denial of or discrimination in insurance coverage on the basis of any ground protected 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.⁵⁷ These provisions encompass discrimination based on "sex," which the HHS interpreted in May 2016 as including gender identity.⁵⁸

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.⁵⁹ The case challenging Section 1557, *Franciscan Alliance, Inc. v. Burwell*, was brought by eight states and three religiously affiliated healthcare providers.⁶⁰ During the Trump Administration, the federal government declined to enforce the HHS rule, citing *Franciscan Alliance*.⁶¹

52. See *California v. Texas*, 141 S. Ct. 2104 (2020).

53. See *Equality Maps: Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/JL7L-DKH3>.

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>.

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.⁶² The final rule eliminates nondiscrimination protections based on gender identity, including health insurance coverage protections for transgender individuals; adopts religious freedom exemptions for healthcare providers; and eliminates nondiscrimination protections in ten federal regulations other than Section 1557.⁶³ The Trump-Administration 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*.⁶⁴ Further, the Trump 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."⁶⁵

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."⁶⁶ In *Bostock*, the Supreme Court ruled that "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex."⁶⁷ 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*.⁶⁸ In a subsequent proceeding, the same court denied the plaintiffs' request for a blanket injunction against the 2020 regulation in its entirety.⁶⁹ In *Whitman-Walker Clinic v. U.S. Department of Health & Human Services*, the U.S. District Court for the District of Columbia preliminarily enjoined both the sex stereotyping provisions and the provisions imposing a religious freedom exemption to claims of sex discrimination, and it ruled that HHS's decision to eliminate gender identity from the definition of sex discrimination

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

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.

68. *Walker v. Azar*, 480 F. Supp. 3d 417, 420 (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).

without considering *Bostock* was arbitrary and capricious.⁷⁰ The Trump Administration defended the rule by arguing that *Bostock* only applies in the employment context, and that binary biological distinctions are appropriate in the healthcare context.⁷¹

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.⁷² 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.⁷³

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.⁷⁴ In their explanation of the new rule, HHS cited *Bostock* as well as the fact that discrimination in health care impacts health outcomes.⁷⁵

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.⁷⁶ The Supreme Court had ruled that the mandate is a valid exercise of congressional taxation powers in *NFIB v. Sebelius*.⁷⁷ 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.⁷⁸ The U.S. District Court for the Northern District of Texas ruled that the individual mandate was unconstitutional.⁷⁹ It also held that, because Congress deemed the individual

70. *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 485 F. Supp. 3d 25, 45 (D.D.C. Sept. 2, 2020); *The Trump Administration’s Final Rule*, *supra* note 63.

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

72. *Id.*

73. *Whitman-Walker Clinic*, 485 F. Supp. 3d 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 Proposed Rule to Strengthen Nondiscrimination in Health Care, (July 25, 2022), <https://perma.cc/4L5H-CPXT>.

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.*

mandate “essential” to the ACA, the mandate was inseverable from the entire ACA, and the whole law must be struck down.⁸⁰

On appeal, the Fifth Circuit affirmed the district court’s ruling that the individual mandate was unconstitutional.⁸¹ 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.”⁸² 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.”⁸³ Following this remand, petitioners filed for a rehearing *en banc*, which the Fifth Circuit denied.⁸⁴ The Supreme Court granted certiorari.⁸⁵ 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.”⁸⁶ Thus, trans individuals’ health care was not ultimately impacted because the rest of the ACA remains in effect.⁸⁷

B. STATE LAWS

Twelve states and D.C. have shield laws protecting trans individuals’ access to health care.⁸⁸ Three states have executive orders, but no legislation, protecting access to health care for trans people.⁸⁹ Statistically, 58% of trans people (ages 13+) “live in states that have no ‘shield’ law or policy protecting access to transgender health care.”⁹⁰ Nine states explicitly prohibit Medicaid from covering gender-affirming care,⁹¹ and fourteen exclude transition-related services from coverage under state employee insurance programs.⁹² LGBTQIA+ rights organizations have brought various legal challenges asking courts to strike down restrictive provisions.

1. Private Health Insurance Coverage for Trans Individuals

Twenty-four states and D.C. expressly prohibit transgender exclusions in health

80. *Id.*

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. *California v. Texas*, 141 S. Ct. 2104 (2021).

86. *Id.* at 2126 (2021) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)).

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

88. *Equality Maps: Healthcare Laws and Policies*, *supra* note 53 (California, Colorado, Connecticut, District of Columbia, Illinois, Massachusetts, Minnesota, New Mexico, New York, Oregon, Vermont, Washington).

89. See *Equality Maps: Transgender Healthcare “Shield” Laws*, *Movement Advancement Project*, <https://perma.cc/Z4SK-F47Y>.

90. See *id.*

91. See *Equality Maps: Medicaid Coverage of Transgender-Related Health Care*, *MOVEMENT ADVANCEMENT PROJECT*, <https://perma.cc/88P4-8L5A>.

92. See *Equality Maps: Healthcare Laws and Policies: State Employee Benefits*, *MOVEMENT ADVANCEMENT PROJECT*, <https://perma.cc/R4YM-GLXD>.

insurance.⁹³ Fifteen states, Puerto Rico, and D.C. prohibit health insurance discrimination on the basis of sexuality and gender identity.⁹⁴ Twenty-six states and four territories have no laws protecting health insurance coverage for LGBTQIA+ people. Two states, Arkansas and Mississippi, have passed laws that explicitly permit insurers to refuse coverage of gender-affirming care.⁹⁵ Ultimately, 44% of LGBTQIA+ people live in states where health insurance coverage is not guaranteed.⁹⁶

2. Gender-Affirming Healthcare Coverage in State Employee Benefits Plans

Twenty-four states and D.C. explicitly include gender-affirming care in the coverage available to state employees.⁹⁷ In some states where gender-affirming care is covered by the state's employee plan, barriers exist to actually receiving that care because pre-approval or pre-authorization may be required.⁹⁸ Fourteen states have insurance plans that explicitly exclude gender-affirming care for covered employees.⁹⁹ Twenty-nine percent of LGBTQIA+ people live in states that explicitly exclude gender-affirming care from health plans offered to state employees.¹⁰⁰

LGBTQIA+ rights organizations have brought legal challenges to remove such provisions from state codes. For example, Lambda Legal, an organization that advocates for LGBTQIA+ individuals and rights, and the 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 health care because they are transgender.¹⁰¹ One representative plaintiff, Connor Thonen-Fleck, is a young man who was insured through his father, a state employee.¹⁰² Connor's insurance denied coverage for

93. TRANS HEALTH PROJECT, *States with Explicit Guidance* (2023), <https://perma.cc/P7PT-BHC2> (California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin).

94. *See Equality Maps: Healthcare Laws and Policies: Private Insurance*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/5LB9-Q46Z> (California, Colorado, Delaware, Hawaii, Illinois, Maine, Michigan, Minnesota, Nevada, New Hampshire, New York, Oregon, Vermont, Washington, Wisconsin).

95. *Id.*

96. *See id.*

97. *See Equality Maps: Healthcare Laws and Policies: State Employee Benefits*, *supra* note 92.

98. *Id.* (Idaho, Indiana, Kentucky).

99. *Equality Maps: Healthcare Laws and Policies*, *supra* note 53 (Arkansas, Florida, Georgia, Louisiana, Mississippi, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, West Virginia).

100. *Id.*

101. *Kadel v. Folwell*, 620 F. Supp. 3d 339, 354 (M.D.N.C. 2022).

102. *Id.* at 355.

prescribed testosterone treatments and a mastectomy.¹⁰³ The plaintiffs are all current or former state employees, who either themselves or their dependents are trans and have been denied coverage for gender-affirming treatment.¹⁰⁴ District Court Judge Loretta C. Biggs held that North Carolina’s “categorical sex-and transgender-based exclusion of gender affirming treatments from coverage unlawfully discriminate[d] against Plaintiffs in violation of the U.S. Constitution and Title VII.”¹⁰⁵

An Arkansas law that explicitly prohibited doctors from providing referrals and allowed private insurers to refuse to cover gender-affirming care was blocked by a federal court in June 2023.¹⁰⁶ District Court Judge James M. Moody permanently blocked the bill and held that, “[t]he testimony of well-credentialed experts, doctors who provide gender-affirming medical care in Arkansas, and families that rely on that care directly refutes any claim by the State that the Act advances an interest in protecting children.”¹⁰⁷ Unfortunately, states continue to pass laws restricting gender-affirming care, even after federal courts strike down previous attempts to pass harmful and transphobic legislation. On March 13, 2023, legislators in Arkansas passed Senate Bill 199, also known as the Protecting Minors from Medical Malpractice Act of 2023.¹⁰⁸

3. Criminalizing Gender-Affirming Care for Trans Youth

As of 2024, twenty-three states have made providing best-practice medical care for trans youth a felony offense.¹⁰⁹ For example, 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.¹¹⁰ The statute also criminalizes nurses, counselors, teachers, and principals who do not notify minors’ parents when a student discloses that they are trans.¹¹¹ The statute is based in part on the unsupported proposition that “a substantial majority of children who experience

103. *Id.* at 355–56.

104. *Id.* at 356.

105. *Id.* at 392.

106. *Brandt v. Rutledge*, No. 21CV00450, 2023 WL 4073727, *1 (E.D. Ark. June 20, 2023).

107. *Id.* at 35.

108. Protecting Minors from Medical Malpractice Act, 2023 Ark. 274, <https://perma.cc/Y8FZ-XQZS> (prohibiting any surgeries, physician services, hospital services, or prescription drugs to trans minors unless that minor is intersex or seeks gender-affirming care that aligns with their sex assigned at birth).

109. See *Equality Maps: Bans on Best Practice Medical Care for Transgender Youth*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/AU32-WUTU> (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, & West Virginia).

110. Ala. Vulnerable Child Compassion and Protection Act, 2022 Al. ALS 289.

111. *Id.*

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.”¹¹² In April 2022, the Justice Department filed a complaint challenging the law as a violation of the Fourteenth Amendment’s Equal Protection Clause.¹¹³ 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 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.”¹¹⁴ Then, in the 2023 case, *Eknes-Tucker v. Governor, of the State of Alabama*, the Eleventh Circuit vacated the preliminary injunction.¹¹⁵ On Wednesday, April 19, 2023, North Dakota’s governor signed into law a bill that makes providing gender-affirming care to individuals under 18 years of age a crime.¹¹⁶ Under this law, a medical care provider could be jailed for up to a year and fined up to \$3,000 for providing trans youth with puberty blockers.¹¹⁷

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.¹¹⁸ Religious exemption health-care laws have existed in the U.S. since the 1970s through the implementation of measures intended to protect religious rights post-*Roe v. Wade*.¹¹⁹

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.¹²⁰ These amendments came in response to the Supreme Court’s decision in *Roe v. Wade*, which established a right to abortion.¹²¹ The

112. *Id.*

113. 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>.

114. *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1138 (M.D. Ala. 2022).

115. *Eknes-Tucker v. Governor, of the State of Alabama*, 80 F.4th 1205, 1231 (11th Cir. Ala. Aug. 21, 2023).

116. The Associated Press, *North Dakota governor signs law limiting trans health care*, NAT’L PUB. RADIO (Apr. 21, 2023), <https://perma.cc/L3ZR-7FTV>.

117. *Id.*

118. *Refusing to Provide Health Services*, GUTTMACHER INST. 2–3 (2023), <https://perma.cc/E7GJ-6SUL>.

119. *Refusing to Provide Health Services*, *supra* note 118.

120. *See Conscience and Religious Nondiscrimination*, U.S. DEP’T OF HEALTH AND HUM. SERVS., <https://perma.cc/R8RK-SEFA>; *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 83 Fed. Reg. 3880 (proposed Jan. 16, 2018).

121. *Refusing to Provide Health Services*, *supra* note 118; *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

Church Amendments specifically prohibit federal funding from being contingent on whether an entity helps facilitate or provides abortion or sterilization services.¹²² The Amendments' 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.¹²³ A hysterectomy, for instance, is a gender-affirming procedure undergone by many trans people that could be classified as a "sterilization service."¹²⁴ Congress enacted the Coats-Snowe Amendment in 1996.¹²⁵ 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.¹²⁶ The Weldon Amendment, enacted in 2005, restricts access to HHS funding for entities that discriminate against healthcare organizations that refuse to facilitate abortions.¹²⁷

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").¹²⁸ 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."¹²⁹

The Division implemented a final religious exemptions rule in May 2019 titled "Protecting Statutory Conscience Rights in Health Care" ("2019 Rule"),¹³⁰ but this rule was quickly challenged in courts and was vacated in some jurisdictions.¹³¹ In response, the Division proposed to partially rescind the rule in January 2023.¹³²

LGBTQIA+ rights advocates expressed concerns about increasingly sweeping religious exemptions and suggested that the underlying policy of exemptions is to

122. U.S. DEP'T OF HEALTH AND HUM. SERVS., *supra* note 120.

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

124. *Id.*

125. *See* 42 U.S.C. § 238n (2018).

126. *Id.*

127. 42 U.S.C.A. § 18023(b).

128. Press Release, OFF. FOR C.R., U.S. DEP'T OF HEALTH AND HUM. SERVS., HHS Takes Major Actions to Protect Conscience Rights and Life (Jan. 19, 2018), <https://perma.cc/7AX5-Y9U8>.

129. Sean Bland & Natalie Dobek, *New "Conscience and Religious Freedom Division" within Department of Health and Human Services* (Feb. 2, 2018), <https://perma.cc/T7HA-3ZKG>.

130. *Protecting Statutory Conscience Rights in Health Care* (2019), U.S. DEP'T OF HEALTH & HUM. SERVS., <https://perma.cc/5FZ3-FDT7>.

131. *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).

132. *Safeguarding the Rights of Conscience as Protected by Federal Statutes*, 88 Fed. Reg. 820-01 (proposed Jan. 5, 2023).

give medical providers permission to discriminate.¹³³ 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.”¹³⁴ 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. Outside of this rule, 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.¹³⁵

3. State Laws

As of March 2024, nine states have targeted religious exemption laws that allow medical service providers to refuse to treat LGBTQIA+ individuals: Alabama, Arkansas, Florida, Illinois, Mississippi, Montana, Ohio, South Carolina, and Tennessee.¹³⁶ Thirteen states allow state-licensed child welfare agencies to refuse placements and services for children and families, specifically LGBTQIA+ children and families, if doing so would violate the provider’s religious beliefs.¹³⁷ Twenty-four states have broad religious exemption laws that exempt people, churches, non-profit organizations, and companies from state laws that burden their religious beliefs.¹³⁸ Alabama has a religious exemption included in the state constitution.¹³⁹ Nine states have enacted religious exemption laws that deny gender-affirming care to trans individuals.¹⁴⁰ 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

133. *Religious Refusals in Health Care*, *supra* note 123, at 1.

134. 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>.

135. *Conscience Rule Vacated*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Nov. 8, 2019), <https://perma.cc/UN6V-GF2A>.

136. See *Equality Maps: Religious Exemption Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/A2SY-HF5S>.

137. See *id.* (Alabama, Arizona, Kansas, Michigan, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah & Virginia).

138. MOVEMENT ADVANCEMENT PROJECT, *Religious Exemption Laws* (2023), <https://perma.cc/ABC3-U6AN> (Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia & West Virginia).

139. See *id.*; ALA. CONST. art I, §3.01.

140. *Religious Exemption Laws*, *supra* note 138. (Alabama, Arkansas, Florida, Illinois, Mississippi, Montana, Ohio, South Carolina, & Tennessee).

religious or moral beliefs.¹⁴¹ 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.”¹⁴² Challenging the Mississippi statute has been ineffective.¹⁴³

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,¹⁴⁴ hate crimes,¹⁴⁵ police mistreatment and abuse,¹⁴⁶ and violence while incarcerated.¹⁴⁷ The rate at which transgender people are victimized is on the rise.¹⁴⁸ At the same time, some proposed protections, such as the repeal of gay and trans panic defenses, are stalling,¹⁴⁹ and other existing protections, like the Violence Against Women Act (“VAWA”), may be in jeopardy.¹⁵⁰ 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.¹⁵¹ Studies have shown that between 30% to 50% of transgender people experience domestic and intimate partner violence in their lifetime.¹⁵² A study that directly compared lifetime intimate partner violence between transgender and cisgender people found that approximately 30% of transgender people had experienced intimate partner violence, whereas approximately

141. MISS. CODE ANN. § 11-62-5(4) (West, Westlaw through the 2023 Reg. Sess. including changes and corrections authorized by the Joint Legis. Comm. on Compilation, Revision and Pub. of Legis.).

142. MISS. CODE ANN. § 11-62-3(c) (West, Westlaw through the 2023 Reg. Sess. including changes and corrections authorized by the Joint Legis. Comm. on Compilation, Revision and Pub. of Legis.).

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

144. Taylor N.T. Brown & Jody L. Herman, *Intimate Partner Violence and Sexual Abuse Among LGBT People*, WILLIAMS INST. (Nov. 2015), <https://perma.cc/V93H-MPRJ>; see also 2015 U.S. TRANSGENDER SURVEY, *supra* note 9, at 198 (finding that 54% of transgender survey respondents had experienced some form of intimate partner violence).

145. FED. BUREAU OF INVESTIGATION, CRIME DATA EXPLORER (2023), <https://perma.cc/L28D-PWDV>.

146. 2015 U.S. TRANSGENDER SURVEY, *supra* note 9, 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).

147. *Id.* at 191.

148. CRIME DATA EXPLORER, *supra* note 145.

149. For example, legislation to eliminate the Gay and Trans Panic defence, discussed in Section III-C below, was stalled in Congress, as was legislation intended to advance other protections for LGBTQIA+ 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), <https://perma.cc/UM8G-V4RS>.

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

151. Brown & Herman, *supra* note 144, at 3.

152. *Id.*

20% of cisgender people experienced intimate partner violence.¹⁵³ 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.¹⁵⁴ As a result, the data likely does not accurately reflect the extent to which transgender people experience domestic and intimate partner violence.¹⁵⁵

Trans people may be hesitant to report abuse for a number of reasons, including legal “definitions of domestic violence that may exclude LGBT[QIA+] individuals and couples.”¹⁵⁶ 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*.¹⁵⁷ 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.¹⁵⁸ Other, less formal barriers to reporting include a fear of “outing” oneself by reporting, a lack of awareness of or access to LGBTQIA+-friendly resources, potential transphobia and homophobia from service providers, and low levels of confidence in law enforcement and the judicial system.¹⁵⁹ 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.¹⁶⁰

Accessing adequate health care or support services can also be difficult because many resources are explicitly gendered, and domestic violence shelters open to women may not be welcoming to trans people.¹⁶¹ 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.¹⁶² 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.¹⁶³

153. *Id.*

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

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

156. Brown & Herman, *supra* note 144, at 5.

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

158. § 50B-1(b).

159. Brown & Herman, *supra* note 144, at 3.

160. *Id.* at 17.

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

162. *Id.* at 18.

163. *Id.* at 17.

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 survivor-led social justice organization aimed at ending intimate partner violence in LGBTQIA+ relationships.¹⁶⁴ The organization offers services to LGBTQIA+ survivors of domestic violence, such as a 24/7 telephone hotline, education and training programs, housing assistance, and support groups.¹⁶⁵ Similarly, the Community United Against Violence organization offers resources to LGBTQIA+ survivors of violence or abuse, including advocacy-based peer counseling.¹⁶⁶ 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 LGBTQIA+ community.¹⁶⁷ Before the onset of the Covid-19 Pandemic, the coalition put out a report each year about LGBTQIA+ Hate Violence and LGBTQIA+ Intimate Partner Violence in an effort to raise awareness of these issues and argue for policy change.¹⁶⁸ In 1994, an organization called FORGE was formed specifically to support transgender individuals.¹⁶⁹ 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.¹⁷⁰ 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 LGBTQIA+ victims of domestic violence, dating violence, sexual assault, and stalking.¹⁷¹

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 266 incidents recorded in 2021, the most recent year for which statistics are available.¹⁷² In 2022, at least 40 trans and gender nonconforming people were killed; in 2023, at least 32 trans and gender nonconforming people in the U.S. were killed.¹⁷³

164. *Mission, Principles, and Values*, THE NETWORK/LA RED, <https://perma.cc/H9ZW-MDZP>.

165. *Our Impact*, THE NETWORK/LA RED, <https://perma.cc/CX3U-9RE4>.

166. *Peer Advocacy Counseling*, CMTY. UNITED AGAINST VIOLENCE, <https://perma.cc/LP3E-3UQA>.

167. *National Coalition of Anti-Violence Programs*, NYC ANTI-VIOLENCE PROJECT, <https://perma.cc/W4C9-8XDD>.

168. *Reports*, NYC ANTI-VIOLENCE PROJECT, <https://perma.cc/68ZA-3VT7>.

169. *Our History*, FORGE, <https://perma.cc/4V3B-TT8U>.

170. *Id.*; see *Transgender Domestic Violence and Sexual Assault Resource Sheet*, FORGE, <https://perma.cc/DU96-QEF5>.

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

172. CRIME DATA EXPLORER, *supra* note 145.

173. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2022*, HUM. RTS. CAMPAIGN (2022), <https://perma.cc/6VE9-8SCM>; *Fatal Violence Against the Transgender*

Transgender women of color are disproportionately victims of hate crimes and violence due to their gender identity.¹⁷⁴ From 2013 to 2022, “over four in five (85%) of the 304 victims of fatal violence were transgender women”, at least 231 of whom were trans women of color.¹⁷⁵ Much like instances of domestic and intimate partner violence, hate crimes are often underreported due to stigma, fear of being “outed,”¹⁷⁶ victim misgendering, and fear or distrust of law enforcement.¹⁷⁷

1. Federal Legislation

In an attempt to address all forms of violence against LGBTQIA+ people, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act was signed into law in 2009.¹⁷⁸ 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.”¹⁷⁹ The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act specifically outlawed crimes motivated by a victim’s actual or perceived gender, sexual orientation, or gender identity.¹⁸⁰ 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.”¹⁸¹

The Act imposes up to ten years in prison and a fine for violations,¹⁸² or up to life in prison if the offense resulted in death, involved kidnapping or aggravated sexual abuse, or involved an attempt to kidnap, commit aggravated sexual abuse, or kill.¹⁸³ The Act has resulted in relatively few successful prosecutions—by one count, there were only sixty successful prosecutions brought under the Act for hate crimes against members of the LGBTQIA+ community between 2009 and

and *Gender Non-Conforming Community in 2023*, HUM. RTS. CAMPAIGN (2023), <https://perma.cc/24R3-W477>.

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

175. *An Epidemic of Violence 2022*, HUM. RTS. CAMPAIGN (2022), <https://perma.cc/M2YB-V8TB>.

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

177. 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 144, at 3.

178. 18 U.S.C. § 249(a)(2)(A) (2022).

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

180. § 249(a)(2)(A).

181. *Id.*

182. § 294 (a)(2)(A)(i).

183. § 294 (a)(2)(A)(ii).

2019.¹⁸⁴ This is perhaps in part due to the narrowness of the Act and the difficulty of proving the biased motivation in these cases.¹⁸⁵ Challenges to the Act were filed in federal courts across the country shortly after the Act's passage, but none was successful.¹⁸⁶

2. State Legislation

As of 2024, Arkansas, Indiana, South Carolina, and Wyoming are the only states that lack any type of hate crime statute.¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹ One such state is Ohio, where the state hate crime law prohibits “ethnic intimidation,” which involves committing certain misdemeanor crimes on the basis of the “race, color, religion, or national origin of another person or group of persons.”¹⁹⁰ In 2016, Ohio state legislators unsuccessfully attempted to pass an LGBTQIA+-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.”¹⁹¹

Eleven states have hate crime legislation that includes sexual orientation but not gender identity.¹⁹² Texas is one of these states.¹⁹³ Texas’s hate crime law covers offenses where a person chooses to target their victim or their victim’s

184. See *Eliminating Hate Crimes – The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, MATTHEW SHEPARD FOUND., <https://perma.cc/DE7W-CVSD>.

185. See generally Li, *supra* note 176 (“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.”).

186. See e.g., *United States v. Beebe*, 807 F. Supp. 2d 1045, 1047 (D.N.M. 2011); *United States v. Maybee*, No. 3:11-cr-30006, 23 (W.D. Ark. July 15, 2011); *Glenn v. Holder*, 738 F. Supp. 2d 718, 734 (E.D. Mich. 2010).

187. *Hate Crime Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/FU3R-2EF8> [hereinafter *Hate Crime Laws*]. However, note that “Both Arkansas and Indiana have laws that are sometimes mischaracterized as hate crime laws. However, the laws in these two states are written so broadly that they could be applied to virtually any circumstance, which is at odds with both the structure and purpose of hate crime law.” *Id.* In addition, three U.S. territories lack any type of hate crime law (American Samoa, Northern Mariana Islands & Guam). *Id.* See also *Hate Crimes Laws and Policies*, U.S. Dep’t of Just. (July 21, 2023), <https://perma.cc/3S7G-6UK9>.

188. *Hate Crime Laws*, *supra* note 187.

189. *Id.*

190. OHIO REV. CODE ANN. § 2927.12 (West, Westlaw through 2023 Reg. Sess. of the 135th Ohio Gen. Assemb.).

191. H.B. 569, 131ST GEN. ASSEMB., 2015–2016 REG. SESS. (Ohio 2016).

192. *Hate Crime Laws*, *supra* note 187.

193. *Id.*

property because of that person's "bias or prejudice against a group identified by . . . gender, or sexual preference . . ." ¹⁹⁴ At sentencing, the judge may require the defendant to attend an "educational program to further tolerance and acceptance of others."¹⁹⁵ 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.¹⁹⁶

Twenty-two states and D.C., as well as Puerto Rico and the U.S. Virgin Islands, have hate crime legislation that includes both sexual orientation and gender identity as protected categories.¹⁹⁷ One of these states is Massachusetts.¹⁹⁸ 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."¹⁹⁹

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.²⁰⁰ They are not themselves affirmative defenses.²⁰¹ 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.²⁰² 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.²⁰³

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.²⁰⁴ This theory of internal conflict was later used to

194. TEX. CODE CRIM. PROC. ANN. art. 42.014. (West, Westlaw through 2023 Reg. Sess. of the 88 Tex. Gen. Assemb.).

195. *Id.*

196. 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>.

197. *Hate Crime Laws*, *supra* note 187.

198. *Id.*

199. MASS. GEN. LAWS ch. 265, § 39(a) (2023).

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

201. 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> [hereinafter *Gay/Trans Panic Defense*].

202. *See* Lee, *supra* note 200, at 475.

203. *See id.* at 471.

204. *Id.* at 482.

support the idea of a gay panic defense, beginning in the 1960s.²⁰⁵ The defense has been used many times since the 1960s and has been applied both in the context of sexual orientation and gender identity.²⁰⁶ The defense is used relatively rarely, but when it is invoked by defendants, it is in an effort to justify or mitigate their conduct.²⁰⁷

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.²⁰⁸ A number of other states have legislation aimed at banning these defenses in committee.²⁰⁹ California's law amended the existing penal code sections on manslaughter to state:

For purposes of determining sudden quarrel or heat of passion . . . the provocation was not objectively reasonable if it resulted from the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted non forcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship.²¹⁰

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."²¹¹ There have also been unsuccessful efforts to ban these defenses at the federal level.²¹²

The gay and trans panic defenses remain controversial, and many organizations, including the American Bar Association²¹³ and the LGBTQ+ Bar, support banning them.²¹⁴ Others point out that a ban might be counterproductive, as it

205. *Id.* at 491.

206. *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. Parisie*, 287 N.E.2d 310, 313 (Ill. App. Ct. 1972) (same); *Schick v. State*, 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 200, at 514–15.

207. *See generally* *Lee, supra* note 200.

208. *The LGBTQ+ "Panic" Defense*, LGBT+ BAR, <https://perma.cc/YV6G-EPP3>.

209. *Gay/Trans Panic Defense, supra* note 201.

210. CAL. PENAL CODE § 192(f)(1) (West, Westlaw through Ch. 312 of 2023 Reg. Sess.).

211. CAL. PENAL CODE § 192(f)(2) (West, Westlaw through Ch. 312 of 2023 Reg. Sess.).

212. *See, e.g.*, *Gay and Trans Panic Defense Prohibition Act of 2021*, S.1137, 118th Cong. (2021).

213. *Gay/Trans Panic Defense, supra* note 201.

214. *LGBTQ+ "Panic" Defense, supra* note 208.

would simply make homophobic and transphobic defenses covert, something that might play even more effectively with some juries.²¹⁵

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.²¹⁶

Transgender individuals are subject to high rates of police profiling, harassment, and brutality.²¹⁷ 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.²¹⁸ This was even more of an issue for Native American (72%) and African American (70%) respondents.²¹⁹ Furthermore, 20% of respondents reported being verbally harassed by officers; 11% reported that officers assumed they were a sex worker; 9% 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.²²⁰ 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.²²¹ 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.²²² 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.²²³ On the night of the incident, Nizah was overly

215. *Gay/Trans Panic Defense*, *supra* note 201 at 549.

216. 2015 U.S. TRANSGENDER SURVEY, *supra* note 9, at 14.

217. *Id.* at 185.

218. *Id.* at 186.

219. *Id.*

220. *Id.* at 186–87.

221. *Id.* at 186.

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

223. 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>.

intoxicated, prompting her friends to call an ambulance to take her to hospital.²²⁴ A police officer intervened and said she would give Nizah a courtesy ride in lieu of the ambulance.²²⁵ 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.²²⁶ The Medical Examiner's Office found that Morris's death was a homicide, but the Philadelphia Police Department maintained it was accidental.²²⁷ The case remains unsolved.²²⁸ 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.²²⁹

More problems arise from a lack of privacy and potential misgendering in police custody, including during strip searches, booking, and holding. In response to these issues, some states and cities have tried to address the problem by adopting guidelines for police officers on how to respectfully and safely interact with transgender people.²³⁰ 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.²³¹ 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.²³² 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.²³³ The NCTE provides a model policy for police departments which would help address these issues.²³⁴ 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.

224. Jason Villez, *252 Articles, 14 Writers, and 19 Years of Nizah Morris*, PHILA. GAY NEWS (Dec. 22, 2021 5:56pm), <https://perma.cc/8JF5-EHXL>.

225. Tim Cwiek, *A Seventeen-year Saga for Transparency in the Nizah Morris Case*, PHILA. GAY NEWS (Oct. 5, 2020), <https://perma.cc/JGQ3-RLNT>.

226. *Id.*

227. 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>.

228. See Cwiek, *supra* note 225.

229. *Morris Home*, RES. FOR HUM. DEV., <https://perma.cc/2VJM-RHM5>.

230. See N.J. ATT'Y GEN., LAW ENFORCEMENT DIRECTIVE NO. 2019-3 (Nov. 20, 2019), <https://perma.cc/YDT8-J732>; SEATTLE POLICE DEP'T, MANUAL TIT. 16.200 (2019), <https://perma.cc/HYM6-VCXL>; ORLANDO POLICE DEP'T, POL'Y AND PROC. 1141.1 (2020), <https://perma.cc/PH9R-9ZDG>.

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

232. *Id.*

233. *Id.*

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

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.²³⁵ 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.²³⁶

In correctional facilities, trans individuals are “at the mercy of a hyper-gendered system.”²³⁷ Traditionally, transgender people who had not had gender affirmation 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.²³⁸ In 2012, the Department of Justice partially addressed this issue with a rule²³⁹ pursuant to the Prison Rape Elimination Act (“PREA”).²⁴⁰ 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.²⁴¹ 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.²⁴² 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.²⁴³ After the rule’s promulgation, California

235. NAT’L CTR. FOR TRANSGENDER EQUAL., *LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights* 6 (2018), <https://perma.cc/DLB5-WW89>; see generally 2015 U.S. TRANSGENDER SURVEY, *supra* note 9, at 184, 191.

236. See 2015 U.S. TRANSGENDER SURVEY, *supra* note 9, at 184.

237. 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).

238. 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 Western understanding of gender, which only includes male and female).

239. National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37105 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115).

240. The Prison Rape Elimination Act, 34 U.S.C.A. § 30301–09 (West, Westlaw through Pub. L. No. 118-41).

241. 28 C.F.R. § 115.41(a), (d)(7) (2012).

242. 28 C.F.R. § 115.42(a)–(c) (2012).

243. 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).

updated its operation manual so that a classification committee would review all transgender individuals' factors for institutional placement and housing assignment.²⁴⁴

While most prison systems currently comply with PREA standards or are working towards compliance,²⁴⁵ the PREA rule allows for "individualized determinations" about ensuring the safety of each person.²⁴⁶ While "[a] transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration," a prison system might still assign housing based on its own perception of an "inmate's health and safety . . . [and] management and security problems."²⁴⁷ The management and safety factors might permit prison systems to justify denying gender-affirming institutional assignments by emphasizing their interest in administrability or in addressing the privacy concerns of incarcerated cisgender women.²⁴⁸ For example, on May 11, 2018, the Bureau of Prisons Transgender Offender Manual restricted a previously expansive transgender housing policy, explicitly singling out "biological sex" as the initial determination for the assessment.²⁴⁹ 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."²⁵⁰ 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.²⁵¹ Because most transgender people do not undergo gender-affirming surgeries,²⁵² 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

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

245. Douglas Routh, Gassan Abess, David Makin, Mary K. Stohr, Craig Hemmens & Jihye Yoo, *Transgender Inmates in Prison: A Review of Applicable Statutes and Policies*, 61 INT'L J. OFFENDER THERAPY & CRIMINOLOGY 645, 654 (2015).

246. 28 C.F.R. § 115.42(b) (2012).

247. 28 C.F.R. § 115.42(c), (e).

248. 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).

249. FED. BUREAU OF PRISONS, Program Statement 5200.04 Cn-1: Transgender Offender Manual 6 (2018), <https://perma.cc/SY5F-24HY>.

250. *Id.*

251. *Id.*

252. 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).

different gender might actually increase security concerns. Trans individuals in institutions incompatible with their gender identity report disproportionate rates of violence and sexual assault.²⁵³ 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.²⁵⁴ 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.²⁵⁵ Administrative segregation may also deny transgender people “adequate recreation, living space, educational and occupational rehabilitation opportunities, and associational rights for nonpunitive reasons,”²⁵⁶ rendering it comparable to punitive segregation and imbuing it with the court-recognized potential for psychological damage.²⁵⁷ 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.²⁵⁸

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.²⁵⁹ Farmer, a transgender woman in a men’s prison, possessed distinctly traditional feminine physical characteristics.²⁶⁰ As a result of her placement in general population in a men’s prison, she was beaten and raped.²⁶¹ 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.²⁶² However, the Court in *Farmer* qualified

253. 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, 2011-12-Update (2014), <https://perma.cc/AMM7-DR8E> (“In 2011-2012, an estimated 4.0% of state and federal prison inmates and 3.2% of jail inmates reported . . . sexual victimization by another inmate or facility staff in the past 12 months or since admission to the facility, if less than 12 months.”).

254. 8 C.F.R. § 115.43; see Rosenblum, *supra* note 238, at 529.

255. Tarzwell, *supra* note 237, at 180.

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

257. Tarzwell, *supra* note 237, at 180 (citing Davenport v. DeRobertis, 844 F.2d 1310, 1313 (7th Cir. 1988)).

258. 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).

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

260. *Id.*

261. *Id.* at 830.

262. *Id.* at 832–33.

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.”²⁶³ 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 it was obvious.”²⁶⁴ *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.²⁶⁵

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.²⁶⁶ The Senate, which was controlled by Republicans at the time, did not bring the bill up for a vote.²⁶⁷ 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.²⁶⁸ 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.²⁶⁹

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.”²⁷⁰ “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.”²⁷¹ This decision is made by the Transgender Executive Council

263. *Id.* at 847.

264. *Id.* at 842.

265. *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.”).

266. Violence Against Women Act Reauthorization Act of 2019, H.R. 1585, 116TH CONG. § 1 (2019).

267. Actions - H.R.1585 - 116th Congress (2019-2020): Violence Against Women Reauthorization Act of 2019, H.R. 1585, 116th Cong. (2019).

268. H.R. 1585 § 1101.

269. Press Release, White House Briefing Room, Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA) (Mar. 16, 2022), <https://perma.cc/RU6C-54EY>.

270. Fed. Bureau of Prisons, Program Statement 5200.08: TRANSGENDER OFFENDER MANUAL 1 (2022), <https://perma.cc/8T8P-9WYY>.

271. *Id.* at 5.

(“TEC”), the bureau’s “official decision-making body on all issues affecting the transgender population.”²⁷² 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.²⁷³ 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.²⁷⁴

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.²⁷⁵ The manual also charges jail staff with using either gender-neutral or correct pronouns and identifiers and permits incarcerated trans people to request females perform their pat down searches absent exigent circumstances.²⁷⁶ 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.”²⁷⁷

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%²⁷⁸ of about 28,000²⁷⁹ surveyed transgender people reported a negative experience in a place of public accommodation, including denial of equal treatment, physical attacks and/or verbal attacks. 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.²⁸⁰ Some states have enacted anti-discrimination laws to protect trans people from discrimination and harassment in places of public accommodation.

272. *Id.* at 4.

273. *Id.*

274. *Id.* at 6.

275. *Id.*

276. Fed. Bureau of Prisons, Program Statement 5200.08: TRANSGENDER OFFENDER MANUAL 1, 10–11 (2022), <https://perma.cc/8T8P-9WYY>.

277. *Id.* at 8–9.

278. 2015 U.S. TRANSGENDER SURVEY, *supra* note 9, at 213.

279. *Id.* at 6.

280. *Id.* at 214.

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.²⁸¹ 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.²⁸² 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.²⁸³

A. ANTI-DISCRIMINATION LAWS

As of 2024, twenty-three states and D.C. have laws that protect transgender people from discrimination in places of public accommodation.²⁸⁴ Some states include gender identity and/or gender expression in their anti-discrimination laws. The District of Columbia takes this approach, which is representative of similar anti-discrimination statutes in this category. Under D.C.’s statute, denying service in a place of public accommodation because of a person’s gender identity is an unlawful discriminatory practice.²⁸⁵ 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.²⁸⁶ 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.²⁸⁷ Some states²⁸⁸ do not prohibit discrimination based on gender identity or expression, but do explicitly prohibit discrimination on the basis of sex or sexual orientation, and define sex or sexual orientation to include a person’s gender identity.²⁸⁹ For example, Hawaii includes gender identity or expression within its definition of sex.²⁹⁰

281. *Public Accommodations*, HUM. RTS. CAMPAIGN, <https://perma.cc/46B2-C8E4>.

282. See 42 U.S.C.A. § 2000a(b) (West, Westlaw through Pub. L. No. 118-41); 42 U.S.C.A. § 12181 (7)(A)–(L) (West, Westlaw through Pub. L. No. 118-41).

283. See, e.g., COLO. REV. STAT. ANN. § 24-34-301(16) (West, Westlaw through leg. effective Mar. 22, 2024 of the 2nd Reg. Sess., 74th Gen. Assemb. (2024)) (adopting the definition of public accommodation set out in Title III of the Americans with Disabilities Act).

284. *Equality Maps: Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/JC5S-FD7P>; *State Nondiscrimination Laws: Public Accommodations*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/A92D-9B7S>. The full list is as follows: California, Colorado, Connecticut, Delaware, D.C., Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington.

285. D.C. CODE ANN. § 2-1402.31(a)(1) (West, Westlaw current through Jan 5, 2024).

286. *Id.* at § 2-1402.31(a).

287. *Id.*

288. *Equality Maps: Nondiscrimination Laws*, *supra* note 284.

289. Illinois Human Rights Act, 775 ILL. COMP. STAT. 5/1-103 (West, Westlaw current through P.A. 103-583 of the 2023 Reg. Sess. (2023) (defining “sexual orientation” as “actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person’s designated sex at birth.”).

290. HAW. REV. STAT. ANN. § 489-3 (West, Westlaw through Act 1 of the 2024 Reg. Sess.).

Eight states interpret existing prohibitions against sex discrimination to include sexual orientation and/or gender identity.²⁹¹ 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.²⁹² 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."²⁹³ It further clarified that the prohibitions against sex discrimination in the PHRA and in case law also prohibit gender discrimination on the basis of sex assigned at birth, sexual orientation, transgender identity, gender transition, gender identity, and gender expression.²⁹⁴

Some states include statutory exemptions to the sexual orientation or gender identity provisions for people whose religious beliefs preclude them from abiding by the law.²⁹⁵ 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.²⁹⁶

The First Amendment argument has been successful for some plaintiffs challenging these public accommodations laws in both state and federal courts.²⁹⁷ However, these challenges have focused on discrimination based on sexual

291. *Equality Maps: Nondiscrimination Laws*, *supra* note 284; *State Nondiscrimination Laws: Public Accommodations*, *supra* note 284.

292. MICH. C.R. COMM'N, Interpretive Statement 2018-1, The Meaning of Sex in the Elliot Larsen Civil Rights Act (May 21, 2018), <https://perma.cc/32V3-BBSD>; see Elliot Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2101(1) (West, Westlaw through P.A. 2023, No. 146, of the 2023 Reg. Sess., 102nd Leg.).

293. PA. HUM. RELS. COMM'N, Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act, (Aug. 2, 2018), <https://perma.cc/8K8G-4AP5>; see Pennsylvania Human Relations Act, 43 PA. STAT. & CONS. STAT. ANN. § 955 (West, Westlaw through 2023 Reg. Sess. Act 8).

294. PA. HUM. RELS. COMM'N, *supra* note 293; see also *Pennsylvania Human Relations Commission Adopts Guidance Protecting LGBTQ People*, LAMBDA LEGAL (Aug. 17, 2018), <https://perma.cc/3G5A-FEER>.

295. MISS. CODE ANN. § 11-62-5(5) (West, Westlaw current with laws from the 2024 First Extraordinary Session effective through January 22, 2024) (prohibiting the state government from taking "discriminatory action" against someone for denying services based on their sincerely held religious belief or moral conviction); MISS. CODE ANN. § 11-62-3 (West, Westlaw current with laws from the 2024 First Extraordinary Session effective through January 22, 2024) (defining "sincerely held religious belief or moral conviction" as "Marriage is or should be recognized as the union of one man and one woman" and "Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth").

296. See *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1723–24 (2018); 303 Creative LLC v. Elenis, 143 S. Ct. 2298, 2315–16 (2023).

297. 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*

orientation, particularly with respect to providing services for same-sex weddings.²⁹⁸ Most notably, the Supreme Court created an exception to Colorado's public accommodation law in *303 Creative LLC v. Elenis*, finding that the First Amendment superseded the law when it required creation of "expressive content" by a website designer who objected to creating websites for same-sex couples on religious grounds.²⁹⁹ Unlike *Masterpiece Cakeshop* where a baker's objection to making a wedding cake for a gay couple was decided under the Free Exercise Clause,³⁰⁰ *303 Creative* decided the public accommodation law violated the website designer's freedom of speech because it would compel her to speak on an issue with which she vehemently disagreed.³⁰¹ Although she had never been asked to design a website for a LGBTQIA+ couple, the Court reasoned that a website design was the plaintiff's own unique, creative expression, not just an ordinary consumer good, and thus was pure speech entitled to First Amendment protection.³⁰²

The impact of *303 Creative* remains to be seen. Some commentators have decried the case as a major blow to all public accommodation laws and suggested that it opens the door for First Amendment challenges, while others predict that the decision, while narrower in impact, will still enable discrimination against transgender individuals.³⁰³ Such test cases are now working their way through state courts.³⁰⁴ However, other commentators have suggested the ruling of *303 Creative* is much more narrow: businesses may only refuse to serve LGBTQIA+

Urb. Cnty. Hum. Rts. Comm'n v. Hands on Originals, No. 2015-CA-000745-MR, 2017 WL 2211381, at *2 (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 GLSO, an organization, the case was dismissed. Lexington-Fayette Urb. Cnty. Hum. Rts. Comm'n v. Hands On Originals, 592 S.W.3d 291, 291 (Ky. 2019).

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

299. *303 Creative*, 143 S. Ct. at 588.

300. See *Masterpiece Cakeshop*, 138 S. Ct. at 1723–24. The free speech issue was raised, but not decided, in the Supreme Court decision's regarding sex discrimination, *Masterpiece Cakeshop*. The Court ruled on the narrow ground that the Colorado Civil Rights Commission showed anti-religious bias in its consideration of the case; as a result, it did not decide whether business owners may decline to serve individuals based on their sexual orientation or gender identity. *Id.* at 1731; see also Garrett Epps, *Justice Kennedy's Masterpiece Ruling*, THE ATLANTIC (June 4, 2018), <https://perma.cc/H9D2-EAQN>.

301. *303 Creative*, 143 S. Ct. at 2319–21.

302. *Id.* at 2318.

303. See, e.g., Michael R. Ulrich, *303 Creative, Transgender Rights, and the Ongoing Culture Wars*, BILL OF HEALTH (July 27, 2023), <https://perma.cc/4JJR-ZQEY> (explaining *303 Creative*'s impact on accommodations for LGBTQIA individuals in the public health context); Michael L. Smith, *Public Accommodations Laws, Free Speech Challenges, and Limiting Principles in the Wake of 303 Creative*, 84 LA. L. REV. 565, 566 (arguing that *303 Creative*'s logic could be used to justify any situation where a business claims its goods or services are expressive, including scenarios where a business objects to serving interracial couples); *303 Creative, Transgender Rights, and the Ongoing Culture Wars*, PETRIE-FLOMM CTR., HARVARD LAW SCHOOL (July 27, 2023), <https://perma.cc/2S8M-SZJF>.

304. See *Billard v. Charlotte Catholic High School*, No. 22-1440 (4th Cir. argued Sept. 20, 2023) (Catholic school appealing ruling that it discriminated against a substitute teacher when it fired him for

customers when they offer expressive goods for sale, such as speeches, arts or websites.³⁰⁵ The Court has yet to clearly define the bounds of what constitutes “expressive content,” and likewise has not specified whether this principle applies to other nondiscrimination laws.

B. DISCRIMINATORY LAWS

At least eighteen 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 sex.”³⁰⁶ 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 people³⁰⁷ or, more popularly, ban trans youth from participating in sports.³⁰⁸

As of 2024, twenty-five states ban trans students from participating in sports consistent with their gender identity.³⁰⁹ 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.³¹⁰ Although many of these bills have died in the state legislature, Idaho signed this bill into law.³¹¹ West Virginia requested to reinstate a law that would ban trans student athletes from participating in sports consistent with their gender identity, but was denied by the Supreme

coming out as gay, arguing their decision to terminate him falls under a ministerial exception to public accommodation laws).

305. See Dakota Bell, *The 303 Creative Decision: Impacts, Realities, and Action*, EQUALITY OHIO (Aug. 9, 2023), <https://perma.cc/EF7M-SQF2>.

306. These states include Alabama, Arkansas, Florida, Illinois, Indiana, 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 (Oct. 24, 2019), <https://perma.cc/L7ZP-RHBH>; Jazmin Orozco Rodriguez, *Bathroom Bills Are Back - Broader and Stricter - In Several States*, KFF HEALTH NEWS (Feb. 29, 2024), <https://perma.cc/URJ2-7VWQ>.

307. See Annette Choi & Will Mullery, *19 states have laws restricting gender-affirming care, some with the possibility of a felony charge*, CNN (June 6, 2023), <https://perma.cc/QCW3-MLEB> (listing Alabama, Florida, Idaho, North Dakota, and Oklahoma as states that criminalize gender-affirming medical care for minors).

308. See *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/HW66-NAXE> (listing Alabama, Arizona, Arkansas, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Montana, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, & Wyoming as states that have laws that prohibit transgender students from playing sports according to their gender identities). 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.

309. *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/YN5F-R5C7>.

310. 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>.

311. 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/EQN6-C3H3>.

Court.³¹² 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 that they are cisgender.³¹³ 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.³¹⁴ Additionally, Montana produced the “Save Women’s Sports Act,” which mimics Idaho’s law, but a judge declared Montana’s ban unconstitutional.³¹⁵

In 2018, a coalition of more than 300 sexual assault and domestic violence organizations signed a joint statement supporting full and equal access to restrooms and locker rooms for transgender individuals.³¹⁶ 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.³¹⁷

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.³¹⁸ Some states, including Oklahoma, pushed back and indicated that they would not follow federal guidance.³¹⁹ Additionally, some states sued the federal government over the guidance.³²⁰ In one case, the U.S. District Court for the Northern District of Texas issued a preliminary injunction in

312. Devin Dwyer, *Supreme Court refuses to reinstate West Virginia ban on transgender student sports participation*, ABC NEWS (Apr. 6, 2023, 3:08 PM), <https://perma.cc/WSR6-WAX8>.

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

314. *Id.*

315. Troy Oppie, *Idaho Exports Transgender Athlete Legislation To Montana*, NAT’L PUB. RADIO (Jan. 25, 2021), <https://perma.cc/KG24-N4FY>; *Judge declares state ban on transgender collegiate athletes unconstitutional*, NBC Mont. (Sept. 16, 2022), <https://perma.cc/UV7T-YVCR>.

316. *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>.

317. *Id.*

318. See Letter from Catherine E. Lhamon, Assistant Sec’y for C.R., U.S. Dep’t of Educ., & Vanita Gupta, Principal Deputy Assistant Att’y Gen. for C.R., U.S. Dep’t of Just., to Colleague, 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>.

319. See KFOR-TV and K. Querry, *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>.

320. 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).

plaintiff states.³²¹ 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.³²²

In February 2017, the Trump Administration rescinded the "Dear Colleague" letter.³²³ The Departments of Justice and Education argued that the guidance was issued "without due regard for the primary role of the states and local school districts in establishing educational policy."³²⁴ The Trump Administration did not offer replacement guidance.³²⁵

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.³²⁶ 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.³²⁷ 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.³²⁸ Similarly, in *Grimm v. Gloucester County School Board*,

321. 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).

322. *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).

323. 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>.

324. *Id.*

325. Letter from Sandra Battle, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ., & T.E. Wheeler, II, Acting Assistant Att'y Gen. for C.R., U.S. Dep't of Just., to Colleague, 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>.

326. 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).

327. *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 nonconformance, in violation of Title IX and the Equal Protection Clause).

328. *Adams*, 968 F.3d at 1303–05 (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

the U.S. Court of Appeals for the Fourth Circuit upheld the student's claims on both Title IX and equal protection grounds.³²⁹ 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 the Supreme Court's decision in *Bostock v. Clayton County*.³³⁰ Other courts have rejected claims on Title IX grounds but have allowed transgender students to claim protections under the Equal Protection Clause.³³¹ Transgender students also retain the option of challenging school bathroom policies for sex discrimination under state laws, including state public accommodations laws.³³²

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. Twenty states, Puerto Rico, and D.C. prohibit discrimination in schools on the bases of sexual orientation and gender identity.³³³ 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.³³⁴ 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.³³⁵ 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

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.

329. *Grimm*, 972 F.3d at 607, 616–19 (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).

330. *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'").

331. *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).

332. *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 2023 Reg. Sess. of the 102nd. Gen. Assemb.).

333. *Safe School Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/SK42-YMTB>.

334. *Id.*

335. *Parents for Priv. v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1110 (D. Or. 2018).

the opposite sex.³³⁶ 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.³³⁷ The U.S. Court of Appeals for the Ninth Circuit upheld the district court's dismissal of the claim.³³⁸ The Supreme Court denied certiorari in December 2020.³³⁹ Parents for Privacy challenged a similar policy enacted by an Illinois school district and made the same argument that the policy burdened students' free exercise of religion.³⁴⁰ 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.³⁴¹ The plaintiffs dropped the lawsuit in April 2019.³⁴²

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.³⁴³ 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."³⁴⁴ 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

336. *Id.*

337. *Id.*

338. *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).

339. *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>.

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

341. *Id.*

342. 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>.

343. *Parents for Priv. v. Dallas Sch. Dist. No. 2*, 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.

344. *Id.* at 1092.

intimate exposure of oneself to the opposite sex.”³⁴⁵ 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.³⁴⁶ The Northern District of Illinois also rejected this right to privacy argument.³⁴⁷

The Third Circuit rejected a privacy argument brought by cisgender students in *Doe v. Boyertown Area School District*, but this result was not grounded in an unwillingness to expand substantive due process rights.³⁴⁸ 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.”³⁴⁹ The Supreme Court later declined to hear the case.³⁵⁰

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.³⁵¹ 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.³⁵²

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 nonconforming individuals experiencing homelessness in the U.S.³⁵³ These individuals make up 0.6% and 0.2% of all individuals experiencing homelessness,

345. *Id.*

346. *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. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1217 (9th Cir. 2020) (agreeing with the district court that “there is no Fourteenth Amendment fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth”).

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

348. 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.*

349. *Id.* at 527–28.

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

351. *Housing & Homelessness*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/ZM2H-HLM6>.

352. Grant, Mottet, & Tanis, *supra* note 252, at 106.

353. 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. 2020), <https://perma.cc/L8DW-RGMG>.

respectively.³⁵⁴ One in five transgender individuals have reportedly experienced homelessness at some point in their lives.³⁵⁵ Other sources place this number at one in three.³⁵⁶ Transgender women of color experience disproportionately high rates of homelessness, with respective rates as follows: American Indian (59%), African American (51%), multiracial (51%), and Middle Eastern (49%).³⁵⁷ From 2016 to 2019, rates of transgender homelessness increased by 88%, and 63% of this population was unsheltered.³⁵⁸ Because of pervasive discrimination, transgender individuals are often turned away from shelters or are harassed by shelter staff.³⁵⁹ In 2015, 70% of transgender individuals who stayed in a shelter reported mistreatment on account of their gender identity.³⁶⁰

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.³⁶¹ HUD currently interprets the FHA’s prohibition on sex-based discrimination to include discrimination based on sexual orientation or gender identity.³⁶² Additionally, HUD issued its finalized Equal Access Rule in 2016.³⁶³ The rule requires equal access to HUD programs without

354. *Id.*

355. *Housing & Homelessness*, *supra* note 351.

356. 2015 U.S. TRANSGENDER SURVEY, *supra* note 9, at 5; 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>.

357. 2015 U.S. TRANSGENDER SURVEY, *supra* note 9, at 178.

358. *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>.

359. *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 a shelter were turned away, while fifty-five percent experienced harassment. *See also* Adam P. Romero, Shoshana K. Goldberg, & Luis A. Vasquez, *LGBT People and Housing Affordability, Discrimination, and Homelessness*, UCLA SCH. OF L. WILLIAMS INST. (Apr. 2020), <https://perma.cc/RE9Q-6EEA>.

360. 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. 2015 U.S. TRANSGENDER SURVEY, *supra* note 9.

361. 42 U.S.C. § 3604(a) (2018).

362. *Housing Discriminations and Persons Identifying as Lesbian, Gay, Bisexual, Transgender, and/or Queer/Questioning (LGBTQ)*, U.S. DEP’T OF HOUS. & URB. DEV., <https://perma.cc/P3DV-KCVS> [hereinafter *Housing Discriminations*].

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

regard to a person's actual or perceived sexual orientation or gender identity.³⁶⁴ 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.³⁶⁵ Housing providers that receive HUD funding, including shelters, or that have HUD-insured loans are subject to the rules.³⁶⁶ Thus, under the FHA, any landlord or housing provider is prohibited from discriminating against individuals because of their "actual or perceived . . . gender identity or any other reason that constitutes sex based discrimination."³⁶⁷

On July 24, 2020, HUD issued a proposed rule to modify the Equal Access Rule,³⁶⁸ 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."³⁶⁹ 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.³⁷⁰ 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."³⁷¹

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 was increasing during the pandemic.³⁷² They contended that the proposed rule's policy constituted sex discrimination under the FHA and *Bostock v. Clayton County*.³⁷³ Furthermore, they noted that the proposed physical factors for determining an

364. *Id.* §§ 5.106, 5.105(a)(2).

365. *Id.* § 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.

366. *Id.*

367. *Housing Discriminations*, *supra* note 362.

368. 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/YPZ4-LQJX>.

369. Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs, 84 Fed. Reg. 44811. 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.

370. *Id.*

371. *Id.*

372. *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>.

373. *Comments in Response to Proposed Rulemaking*, 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>.

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.³⁷⁴

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 business for all."³⁷⁵ A person who identifies as LGBTQIA+ who has experienced, or is about to experience, discrimination because of sexual orientation or gender identity may file a complaint with HUD.³⁷⁶ 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.³⁷⁷

B. STATE POLICY

As of 2024, twenty-three states and D.C. have laws prohibiting discrimination based on sexual orientation and gender identity.³⁷⁸ 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.³⁷⁹ Seven states—Florida, Kansas, Kentucky, Nebraska, North Dakota, Ohio, 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.³⁸⁰

Vermont's law prohibiting discrimination based on sexual orientation and gender identity is representative of the general type of protections against housing discrimination that states afford individuals. It is unlawful in Vermont to refuse

374. *Comments in Response to Proposed Rulemaking*, *supra* note 373; *ACLU Comment on HUD Anti-Trans Rule*, *supra* note 373.

375. Press release, HUD, 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>.

376. *Housing Discriminations*, *supra* note 362.

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

378. *Equality Maps: Nondiscrimination Laws*, *supra* note 284. The states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Virginia, and Washington. *Id.*

379. *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 including "a person's actual or perceived . . . gender identity or expression").

380. *Equality Maps: Nondiscrimination Laws*, *supra* note 284.

to sell or rent a dwelling or other type of real estate to a person because of their gender identity.³⁸¹ 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.³⁸² Discrimination in the terms of sale or rental for housing is also prohibited,³⁸³ as is posting or advertising anything that indicates the seller or landlord would limit the housing based on gender identity.³⁸⁴ 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.³⁸⁵

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.³⁸⁶ 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.³⁸⁷ 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. As of 2015, the National Center for Transgender Equality reports that out of 27,715 survey respondents who have shown an ID with a name or gender marker that did not accurately reflect their gender presentation, nearly 32% were "verbally harassed, denied benefits or service, asked to leave, or assaulted."³⁸⁸ 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;³⁸⁹ 3% reported being

381. VT. STAT. ANN. tit. 9, § 4503(a)(1) (West, Westlaw through Acts of the Adjourned Sess. of the 2023–2024 Vt. Gen. Assemb.).

382. *Id.*

383. *Id.* § 4503(a)(2).

384. *Id.* § 4503(a)(3).

385. *Id.* § 4503(a)(4).

386. *Understanding the Transgender Community*, HUM. RTS. CAMPAIGN, <https://perma.cc/CGR9-98TJ>.

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

388. 2015 U.S. TRANSGENDER SURVEY, *supra* note 9, at 9. This report, released in 2015, remains the most recent large-scale study of discrimination against the transgender community.

389. Grant, Mottet, & Tanis, *supra* note 252.

attacked or assaulted;³⁹⁰ and 15% reported being asked to leave.³⁹¹ 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.³⁹² States vary on requiring publication of a name change announcement.³⁹³ Twenty-five states include additional restrictions and/or requirements for those who wish to change their name who have criminal convictions.³⁹⁴

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.³⁹⁵ As of 2024, a name change can cost anywhere from \$50 to over \$400.³⁹⁶

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.”³⁹⁷ 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.³⁹⁸

The State Department no longer requires applicants to provide medical certification or a physician's letter if the gender marker selected for the applicant's U.S. passport does not match the gender on their citizenship evidence or photo ID.³⁹⁹ Social security and immigration documents, as well as veteran records, may be changed using various forms of evidence for changing a gender marker, including a valid passport with a correct gender, a state-issued birth certificate, a court order, or a signed letter from a physician indicating clinical treatment for gender transition.⁴⁰⁰

390. *Id.*

391. *Id.*

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

393. *Identity Document Laws and Policies: Name Change*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/PNW3-ABLE>.

394. *Id.*

395. 2015 U.S. TRANSGENDER SURVEY, *supra* note 9, at 9.

396. *See, e.g.,* *Change your name in California*, CAL. CTS., <https://perma.cc/8ACS-KPE2>; *Legal Name Change*, MICH. DEP'T OF HEALTH & HUM. SERVS., <https://perma.cc/LK93-R68B>.

397. *See, e.g.,* *Know Your Rights: Passports*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/HU9F-4RQD>.

398. *Id.*; *see also* *Standards of Care*, *supra* note 22 (outlining clinical treatment methods).

399. *Selecting your Gender Marker*, U.S. Dep't of State, <https://perma.cc/2K4K-W9Y4>.

400. *How do I change my gender on Social Security's records?*, SOC. SEC. ADMIN., <https://perma.cc/W2SX-VR5Q>; *Know Your Rights: Social Security*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/W2SX-VR5Q>.

One federal program—the Selective Service—does not recognize changes of gender, as it is an entirely birth-assigned sex system.⁴⁰¹ 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.⁴⁰² 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.⁴⁰³

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.⁴⁰⁴

1. Drivers' Licenses

Twenty-two states and D.C. allow residents to mark M, F, or X on their driver's license.⁴⁰⁵ These states also use an easy to understand identification form and do not require provider certification.⁴⁰⁶ Eight states and two territories require proof of surgery, a court order, or an amended birth certificate.⁴⁰⁷

Legal advocates have successfully challenged the processes for changing the gender marker on driver's licenses in Michigan, Alaska, and Alabama.⁴⁰⁸ Transgender individuals in Michigan may now use their passport to prove their gender.⁴⁰⁹ The American Civil Liberties Union 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.⁴¹⁰

A right to privacy argument was successful in Alaska state court in *K.L. v. Department of Administration, Division of Motor Vehicles*.⁴¹¹ Alaska's policy at

perma.cc/AJ9Y-GCED; see also *Policy Manual, Ch. 2: USCIS-Issued Secure Identity Documents*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://perma.cc/9XHX-S8WA>; *Know Your Rights: Immigration Documents*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/EZW9-F6YF>; *Know Your Rights: Military Records*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/LC7E-G4WM>.

401. *Selective Service and Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (Oct. 20, 2021), <https://perma.cc/46RZ-JLCK>.

402. *Id.*

403. *Id.*

404. *ID Documents Center*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/6NCJ-AHMY>.

405. *Identity Document Laws and Policies: Driver's License*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/PNW3-ABLE>.

406. *Id.*

407. *Id.*

408. *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).

409. *Love v. Johnson: ID Lawsuit*, ACLU MICH., <https://perma.cc/CT7E-3PFP>.

410. *Id.*

411. *K.L. v. State*, No. 3AN-11-05431 Cl., 2012 WL 2685183, *8 (Super. Ct. Alaska Mar. 12, 2012).

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.⁴¹² However, because the policy was deemed invalid, Alaskans were left without a procedure for changing the sex marker on their driver's licenses.⁴¹³ 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.⁴¹⁴ Alaska later changed its policy and no longer requires proof of surgery to change the gender marker on licenses.⁴¹⁵

In 2021, Alabama's policy for changing the gender marker on driver's licenses was deemed unconstitutional by the U.S. District Court for the Middle District of Alabama.⁴¹⁶ 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.⁴¹⁷ 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.⁴¹⁸ 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.⁴¹⁹ Therefore, Policy Order 63 did not survive the requisite intermediate scrutiny level and was deemed unconstitutional.⁴²⁰ Enforcement of Policy Order 63 was enjoined, and ALEA was ordered to issue plaintiffs new driver's licenses reflecting that they are women.⁴²¹

According to the NCTE's grading system, twenty-two states and D.C. earned a grade in the "A" range.⁴²² 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.⁴²³ Eight states and Puerto Rico earned grades in the "B" range.⁴²⁴

412. *Id.* at *3.

413. *Id.*

414. *Id.* at *6.

415. *Changing Identification Details*, ALASKA DEP'T OF ADMIN., DIV. OF MOTOR VEHICLES, <https://perma.cc/2V7R-8VY7>.

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

417. *Id.*

418. *Id.*

419. *Id.* at *11, 17.

420. *Id.*

421. *Id.*

422. *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>.

423. 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.*

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

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.⁴²⁵ Seven states are in the “C” range, with six requiring certification from a medical or mental health professional,⁴²⁶ while one state has what the NCTE characterizes as burdensome process requirements.⁴²⁷ Four states and four territories earned a “D” grade for having “unclear, unknown or unwritten policy.”⁴²⁸ Nine states earned an “F” because they require proof of surgery, a court order, or an amended birth certificate to change the gender marker on a driver’s license.⁴²⁹

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.⁴³⁰ Oklahoma and North Dakota specifically ban the use of an X option on birth certificates.⁴³¹ Twenty-seven 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.⁴³² Twelve states and Guam require proof of sex reassignment surgery in order to change gender markers.⁴³³ Five states do not allow for amending the gender marker on their birth certificates.⁴³⁴

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.⁴³⁵ For example, Georgia requires both a court order and proof of surgery.⁴³⁶ 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.⁴³⁷ A person must submit five

425. *Id.*

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

427. This includes Utah. *How Trans-Friendly Is the Driver’s License Gender Change Policy in Your State?*, *supra* note 422.

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

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

430. *Identity Document Laws and Policies: Birth Certificate*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/EFH7-7TTJ>.

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Summary of State Birth Certificate Gender Change Laws*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/BEW4-RVCS>; *Identity Document Laws and Policies: Birth Certificates*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/PW7P-TH33>.

436. GA. CODE ANN. § 31-10-23(e) (West, Westlaw through 2023 Reg. Sess of the Ga. Gen. Assemb.).

437. *Id.*

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.⁴³⁸ While Virginia previously required proof of surgery, that requirement has been abolished.⁴³⁹ 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.⁴⁴⁰

New York City changed its policy to allow an individual to change their birth certificate in 2014.⁴⁴¹ 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 \$30 fee.⁴⁴² As of January 1, 2019, New York City has allowed birth certificates to be updated with a gender-neutral "X" marker without the requirement of medical documentation—the applicant need only submit a self-attestation of their gender.⁴⁴³ Additionally, in March 2020, New York State changed its policy to allow transgender minors to correct their birth certificate to be consistent with their gender identity.⁴⁴⁴

Tennessee, Oklahoma, and West Virginia are the only states that prohibit correction of gender-markers on birth certificates entirely.⁴⁴⁵ Tennessee prohibits these corrections by statute,⁴⁴⁶ while Oklahoma and West Virginia prohibit them

438. *ID Documents Center—Georgia*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/6LM9-GZQU>.

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

440. *ID Documents Center—Virginia*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/P35L-GGGY>.

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

442. *ID Documents Center—New York*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/5MYQ-EWFL>.

443. *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>.

444. *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>.

445. *ID Documents Center—Tennessee*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/NKE8-35J6>; *ID Documents Center—Oklahoma*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/3XXH-JWJA>; *ID Documents Center—West Virginia*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://perma.cc/ZNP3-5C6U>.

446. TENN. CODE ANN. § 68-3-203(d) (West, Westlaw current through Ch. 554 of the 2024 Reg. Sess. of the 113th 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.").

as a matter of policy.⁴⁴⁷ Legal challenges to these policies and laws have been unsuccessful.⁴⁴⁸

Ohio had a discriminatory policy until it was struck down in December 2020.⁴⁴⁹ The ACLU filed *Ray v. Himes*, which challenged Ohio's policy on Equal Protection, Due Process, and First Amendment grounds.⁴⁵⁰ 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.⁴⁵¹ 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";⁴⁵² 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";⁴⁵³ and that the Equal Protection Clause is not violated because the policy is facially neutral and plaintiffs are not members of a protected class.⁴⁵⁴ 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.⁴⁵⁵ The Ohio Department of Health has since created a procedure for trans individuals to change the sex marker on their birth certificates so they can use them without outing themselves.⁴⁵⁶

In Tennessee, Lambda Legal filed *Gore v. Lee*, which, like *Ray*, challenges Tennessee's statute on Equal Protection, Due Process, and First Amendment

447. In Oklahoma, courts have upheld enforcement of an executive order prohibiting gender-marker amendments to birth certificates, reasoning that such amendments are inconsistent with state law. *See* Fowler v. Stitt, 2023 WL 4010694, at *3, *24 (N.D. Okla. June 8, 2023); Okla. Exec. Order No. 2021-24 (Nov. 8, 2021), <https://perma.cc/8WQD-7T3E>. *See also* OKLA. STAT. ANN. TIT. 63, § 1-321 (West, 2024); OKLA. ADMIN. CODE § 310:105-3-3 (2024). In West Virginia, courts have determined they lack statutory authority to issue orders to amend a birth certificate's gender-marker. *See* Hersom v. Crouch, 2022 WL 908503, at *1 (S.D.W. Va. Mar. 28, 2022) (citing *In re G.M.*, No. 19-0948, 2020 WL 3408589 (W. Va. June 18, 2020)). *See also* W. VA. CODE ANN. § 16-5-25 (West, 2024).

448. *See, e.g.*, *Gore v. Lee*, 2023 WL 4141665, slip op. at *37 (M.D. Tenn. June 22, 2023) (pending appeal after district court upheld the constitutionality of state birth certificate statute); Fowler v. Stitt, 2023 WL 4010694, at *24 (N.D. Okla. June 8, 2023) (same).

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

450. Complaint, *Ray v. Himes*, No. 2:18-cv-00272-MHW-CMV, at 2 (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>.

451. 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).

452. *Id.* at 2.

453. *Id.*

454. *Id.*

455. *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>.

456. Khan-Williamson, *supra* note 449.

grounds.⁴⁵⁷ On October 22, 2019, plaintiffs rejected defendants' settlement proposal and were unable to make a counterproposal.⁴⁵⁸ The court granted the defendants' motion to dismiss on June 22, 2023.⁴⁵⁹

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.⁴⁶⁰ Idaho conceded that the policy was unconstitutional under the Equal Protection Clause, but asserted that it needed a court order to change the rule.⁴⁶¹ 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.⁴⁶² 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.⁴⁶³ 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.⁴⁶⁴ Idaho officials are now banned from implementing this policy.⁴⁶⁵

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.⁴⁶⁶ The court found that this was a violation of transgender individuals' right to privacy under the Fourteenth Amendment because it forced them to disclose their transgender status—their "most private information"⁴⁶⁷—and the disclosure was neither a legitimate governmental interest nor a valid exercise of state police powers.⁴⁶⁸

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.⁴⁶⁹ The U.S. District Court for the District of Kansas issued a consent

457. 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>.

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

459. Order, *Gore v. Lee*, No. 3:19-cv-00328 (M.D. Tenn. June 22, 2023), ECF No. 111.

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

461. *Id.* at 1134.

462. *Id.* at 1146.

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

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

465. *Id.*; *Anti-transgender birth certificate law violates order*, *supra* note 463.

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

467. *Id.* at 333.

468. *Id.*

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

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.⁴⁷⁰ 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.⁴⁷¹ 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.

Finally, 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.⁴⁷² Sean Childers-Gray is a transgender man, who was assigned female at birth.⁴⁷³ Angie Rice was assigned male at birth.⁴⁷⁴ Both Childers-Gray and Rice petitioned the district court to change their names and sex on their birth certificates.⁴⁷⁵ 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."⁴⁷⁶ This decision offers "a plain-meaning interpretation of the duly enacted law allowing individuals to change their sex designations."⁴⁷⁷ 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 may be filed with the state registrar with an application form provided by the registrar."⁴⁷⁸

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.⁴⁷⁹ 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?"⁴⁸⁰ The court went on to

470. *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>.

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

472. *In re Childers-Gray*, 487 P.3d 96, 100 (Utah 2021).

473. *Id.*

474. *Id.* at 101.

475. *Id.* at 99.

476. *Id.*

477. *Id.* at 100.

478. UTAH CODE ANN. § 26-2-11 (West, Westlaw through 2023 Spec. Sess.).

479. *Childers-Gray*, 487 P.3d at 102.

480. *Id.* at 121.

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,”⁴⁸¹ and second, the petitioner must supply “evidence of appropriate clinical care or treatment for gender transitioning or change provided by a licensed medical professional.”⁴⁸² The court does “not require any specific procedure or treatment.”⁴⁸³ The second prong of this test is based on both Utah statutes and common law, as well as federal requirements for sex change.⁴⁸⁴ 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.⁴⁸⁵

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),⁴⁸⁶ demonstrate the legal and political advancements being achieved by the LGBTQIA+ 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.⁴⁸⁷ 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 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.,⁴⁸⁸ and in all likelihood this actually underestimates the true rate of violence against trans people.⁴⁸⁹ 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.

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

482. *Id.* at 125–26.

483. *Id.* at 126.

484. *Childers-Gray*, 487 P.3d at 126.

485. *Id.* at 129–30.

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

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

488. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., 2018 HATE CRIME STATISTICS (2018), FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., 2017 HATE CRIME STATISTICS (2017), FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., 2016 HATE CRIME STATISTICS (2016).

489. Stotzer, *supra* note 154.