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James A. Haynes

Indiana University - Bloomington, haynesjames@gmail.com

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Identification Problems and Voting Obstacles for Transgender Americans

JAMES HAYNES*

INTRODUCTION

Transgender Americans often face discrimination when attempting to take part in activities that most citizens can participate in with relative ease.¹ One of these activities is often considered the most important right of citizens in democratic countries—the act of voting.² Within the last several years, Congress and the states have enacted legislation purportedly intended to protect Americans from terrorists³ and prevent voter fraud.⁴ This Note will discuss how such legislation, in conjunction with current state policies concerning gender designations on identification documents, has led to increasing barriers to voting for transgender individuals.

* Indiana University Maurer School of Law, 2013.

1 See generally Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman & Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY & LESBIAN TASK FORCE (2011), http://www.endtransdiscrimination.org/PDFs/NTDS_Report.pdf (finding that transgender Americans face discrimination in education, employment, health, family life, housing, public accommodations, and police interactions).

2 *Elections & Voting*, THE WHITE HOUSE, <http://www.whitehouse.gov/our-government/elections-and-voting>.

3 Daniela Gerson, *With Bush's Backing, Congress Weighing Law to Require National ID*, N.Y. SUN Apr. 28, 2005, <http://www.nysun.com/national/with-bushs-backing-congress-weighing-law/12951/> (“Supporters of what is called the Real ID Act . . . said it will make America more secure by enhancing internal security and border controls.”).

4 Wendy R. Weiser & Lawrence Norden, *Voting Law Changes in 2012*, BRENNAN CTR. FOR JUST. 4 (2011), http://www.brennancenter.org/page/-/Democracy/VRE/Brennan_Voting_Law_V10.pdf (Noting that proponents of voter ID laws “maintain that they are reasonable measures to prevent fraud . . .”).

Every state includes a gender designation marker on its driver's licenses, but requirements for changing that designation vary substantially.⁵ In addition, a homeland security measure known as the REAL ID Act of 2005⁶ seeks to require a gender designation marker on all identification cards used for federal purposes, but does not mandate specific policies for changing one's gender on such an identification card. Such a requirement would preclude states from creating gender-neutral identification cards even if they wished to make such a change in order to address the difficulties faced by transgender individuals. The difficulty that can be involved in changing one's gender designation on identification cards,⁷ when combined with the rise of new state-level voter photo identification legislation,⁸ can make exercising one's right to vote an onerous task for many transgender Americans. Without gender-congruent identification, transgender individuals in states with voter photo identification laws may be subjected to suspicion, harassment,⁹ and discrimination¹⁰ at the polls. Given the pervasive discrimination against transgender individuals,¹¹ legislators should be encouraging the active participation of these groups in

5 See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 822–29 (2008).

6 See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No 109–13, § 201, 119 Stat. 231, 311–316 (2005) (codified as amended in note to 49 U.S.C. § 30301 (2006)).

7 See discussion *infra* Part II.A.

8 See discussion *infra* Part II.B.

9 Grant et al., *supra* note 1, at 153.

10 *Id.*

11 *Id.* at 8 (“Sixty-three percent (63%) of our participants had experienced a serious act of discrimination—events that would have a major impact on a person’s quality of life and ability to sustain themselves financially or emotionally.”).

the political process by making the voting process less difficult instead of more burdensome.

Part I of this Note provides the lexicon needed to understand transgender issues in order to assist the reader in circumstances where a word is used differently in this context than its use in common conversation. Part II explains the policies that surround the changing of gender designation markers on identification documents and explores the implications of state voter photo identification legislation for transgender voters. The obstacles transgender individuals must face in order to obtain identification that reflects the gender they prefer, in conjunction with new state-level voter identification laws, can mean fewer votes from this minority group. Finally, Part III proposes recommendations for ensuring these individuals do not lose their opportunity to vote due to poorly written legislation, burdensome requirements, and pervasive discrimination.

I. UNDERSTANDING TRANSGENDER ISSUES

As evidenced by the widespread discrimination of transgender individuals in American society,¹² many people do not fully understand the lives and behaviors of transgender individuals.¹³ Before a discussion of transgender issues can begin, it is necessary to define some of the unique language surrounding the subject.

12 For example, “[t]hose [individuals] who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%) and sexual violence (12%)” *Id.* at 3.

13 See KATHY DANIELS & LYNDA MACDONALD, EQUALITY, DIVERSITY AND DISCRIMINATION: A STUDENT TEXT 4 (2005) (“Discrimination also occurs because groups have a lack of understanding about each other.”).

Though sex and gender are often used interchangeably in everyday speech, more specific definitions are necessary to fully understand transgender issues. People are assigned a *sex* shortly after birth¹⁴ based upon their “biological and physiological characteristics.”¹⁵ In contrast, the word *gender*¹⁶ describes “socially constructed roles, behaviours, activities, and attributes.”¹⁷ *Transgender*, then, is the term used for people whose personal sense of gender identity differs from their birth-assigned sex.¹⁸ This disconnect between a person’s own gender identity and the sex one was assigned at birth can result in considerable distress and suffering for the individual involved; this suffering is known as *gender dysphoria*.¹⁹

14 See Nat’l Ctr. for Health Stat., *Birth Edit Specifications for the 2003 Proposed Revision of the U.S. Standard Certificate of Birth*, CTR. FOR DISEASE CONTROL & PREVENTION, Item 3, at 1 (2005), http://www.cdc.gov/nchs/data/dvs/birth_edit_specifications.pdf. The “[d]elivery record” and the “[i]nfant’s medical record” are listed as the “[p]referred source[s]” for obtaining information related to the sex of an individual for birth certificate purposes. *Id.*

15 *What Do We Mean by “Sex” and “Gender”?*, WORLD HEALTH ORG., <http://www.who.int/gender/whatisgender/en/>.

16 From a legal perspective, courts have used a variety of factors to determine gender, with many acknowledging that the relevant factors extend past external morphologic sex (genitalia). See, e.g., *In re Heilig*, 816 A.2d 68, 73 (Md. 2003) (“There is a recognized medical viewpoint that gender is not determined by any single criterion, but that the following seven factors may be relevant: (1) Internal morphologic sex (seminal vesicles/prostate or vagina/uterus/fallopian tubes); (2) External morphologic sex (genitalia); (3) Gonadal sex (testes or ovaries); (4) Chromosomal sex (presence or absence of Y chromosome); (5) Hormonal sex (predominance of androgens or estrogens); (6) Phenotypic sex (secondary sex characteristics, e.g. facial hair, breasts, body type); and (7) Personal sexual identity.”).

17 *What Do We Mean by “Sex” and “Gender”?*, *supra* note 15.

18 GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, MEDIA REFERENCE GUIDE 8 (2010), <http://www.glaad.org/files/MediaReferenceGuide2010.pdf>.

19 The most recent update to the proposed revisions for the American Psychiatric Association’s upcoming fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) defines gender dysphoria as a condition meeting the following criteria:

A. A marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months duration, as manifested by 2 or more of the following indicators:

II. GENDER DESIGNATION MARKERS AND VOTER PHOTO IDENTIFICATION

LAWS

Even outside the context of voting, it is often very important for transgender individuals to obtain identification that affirms their gender identity.²⁰ Unfortunately, many transgender individuals are unable to update some or all of their identification documents.²¹ According to the National Transgender Discrimination Survey (NTDS), only fifty-nine

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1. a marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or, in young adolescents, the anticipated secondary sex characteristics)
 2. a strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or, in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics)
 3. a strong desire for the primary and/or secondary sex characteristics of the other gender
 4. a strong desire to be of the other gender (or some alternative gender different from one's assigned gender)
 5. a strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender)
 6. a strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender)

B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning, or with a significantly increased risk of suffering, such as distress or disability.

Am. Psychiatric Ass'n, *Gender Dysphoria in Adolescents or Adults, Proposed Revision*, DSM-5 (2011), <http://www.dsm5.org/ProposedRevision/Pages/proposedrevision.aspx?rid=482>.

I mention gender dysphoria because obtaining gender-congruent identification is considered helpful in alleviating this distress. WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE 5 (2012), <http://www.wpath.org/documents/SOC%20V7%2003-17-12.pdf>.

²⁰ Pooja Gehi, *Struggles From the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315, 328 (2009) ("For transgender individuals, attaining identification that matches one's gender identity is essential for protection from discrimination, legal interactions, consistency, gender affirmation, and self-esteem.").

²¹ Grant et al., *supra* note 1, at 152. Forty-six percent of transgender individuals surveyed indicated that they had been able to update some, but not all, of their identification documents and records, while one-third indicated that none of their identification documents or records matched their current gender identity. *Id.*

percent of respondents who had transitioned had been able to change the gender designation marker on their driver's license.²² When transgender Americans are unable to update their identification documents, they may be subjected to harassment,²³ violence,²⁴ and discrimination.²⁵ In fact, forty percent of respondents in the NTDS study who had presented gender-incongruent identification reported harassment, three percent reported being assaulted or attacked, and fifteen percent reported that they had been asked to leave the premises.²⁶

Due to the difficulties associated with changing the gender designation marker on one's identification documents and the prevalence of the harassment reported by individuals when presenting gender-incongruent identification, there is growing concern that state voter photo identification laws will have a considerable impact on transgender voters.²⁷

A. Difficulties in Changing Gender Designation Markers

Both birth certificates and social security accounts can substantially affect the ability of an individual to obtain state identification. In many places, presenting a birth certificate and Social Security card is the most common way for people to obtain identification

22 *Id.* at 140.

23 *Id.* at 153.

24 *Id.*

25 *Id.*

26 *Id.*

27 See generally Jody L. Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters*, WILLIAMS INST. (2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Voter-ID-Apr-2012.pdf>.

cards.²⁸ Unfortunately, providing proof that an individual has undergone a surgical sex-change procedure and other arduous obstacles must often be overcome before he or she is allowed to change the gender designation marker on these identification documents.²⁹

1. Birth Certificates

Different jurisdictions have their own rules concerning the changing of the gender designation on birth certificates, and many states make such a change unnecessarily burdensome or even impossible.³⁰ The Model Vital Statistics Act and Regulations³¹ (“the Model”) serves as a model for the states on the issue of amending birth certificates.³² The Model recommends that an individual wishing to change the gender designation marker on a birth certificate be required to obtain and present a court order certifying that they have undergone a surgical sex-change procedure.³³

The problems with using the Model’s approach are twofold. First, the Model does not give any guidance as to what the new birth certificate should look like. Instead of issuing a new birth certificate that shows the amended gender, some states will issue a certificate that identifies both the previous and amended genders, or note on the new

28 See, e.g., Katherine Crowell, *Lack of Identification Increases Plight of Homeless*, APOSTILLE USA, (June 3, 2007), http://www.apostilleinusa.com/news/lack_of_identification_increases_plight_of_homeless.shtml.

29 See *infra* note 51.

30 James McGrath, *Are You a Boy or a Girl? Show Me Your REAL ID*, 9 NEV. L.J. 368, 401–02 (2009).

31 CTRS. FOR DISEASE CONTROL & PREVENTION & NAT’L CTR. FOR HEALTH STAT., MODEL STATE VITAL STAT. ACT AND REGS. (1992), <http://www.cdc.gov/nchs/data/misc/mvsact92b.pdf>.

32 Nat’l Ctr. for Transgender Equal., *Policy Brief: Birth Certificate Gender Markers*, ADVANCING TRANSGENDER EQUALITY (June 22, 2011, 10:07 PM),

<http://transgenderequality.wordpress.com/2011/06/22/policy-brief-birth-certificate-gender-markers/>.

33 CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 31, at 10.

certificate that the gender has been changed.³⁴ New York City is unique in that the city government will not change the gender on a birth certificate, but will simply remove the gender designation marker altogether.³⁵ With such obvious signals on the face of a birth certificate, the possibility of being outed—and possibly harassed—in every instance where they must present their birth certificate may discourage some transgender individuals from making the gender correction.³⁶

The surgical requirement, however, is the most problematic recommendation of the Model. Many transgender individuals do not want to have surgery.³⁷ Additionally, the requirement of a surgical procedure relies on an outdated understanding of transgender health.³⁸ In fact, the U.S. Department of State cited current medical standards and recommendations when it updated the gender change policy for passports in June 2010.³⁹

34 See *Sources of Authority to Amend Sex Designation on Birth Certificates*, LAMBDA LEGAL (Jan. 3, 2012), <http://www.lambdalegal.org/publications/sources-of-authority-to-amend> (showing that amended birth certificates in Alabama, Alaska, Wyoming, and possibly other states will note that the sex designation has been changed).

35 See N.Y. CITY DEP'T OF HEALTH & MENTAL HYGIENE BD. OF HEALTH, NOTICE OF INTENTION TO AMEND ARTICLE 207 OF THE NEW YORK CITY HEALTH CODE, (2008).

36 Many transgender individuals report being harassed as a result of their transgender status or gender nonconformity. Grant et al., *supra* note 1, at 5. For example, twenty-two percent of transgender individuals polled reported that they had been subjected to verbal harassment or disrespect from a government agency or official. *Id.*

37 See C. Christine Wheeler, *A Second View of Gender Diversity*, in CONTINUUM COMPLETE INT'L ENCYCLOPEDIA OF SEXUALITY 1224–25 (Robert T. Francoeur & Raymond J. Noonan eds., 2004) (“Today, many clients are taking control of their own management and deciding not to take the option of genital surgery.”).

38 Cole Thaler, *What Does It Mean to Be Real? Transgender Identity and the Law*, A.B.A (2010), http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/thaler.html.

39 *New Policy on Gender Change in Passports Announced*, U.S. DEP'T OF STATE (June 9, 2010), <http://www.state.gov/r/pa/prs/ps/2010/06/142922.htm>.

The announcement of the new policy removing the surgical requirement for gender designation changes on passports stated that the change was “based on standards and recommendations of the World Professional Association for Transgender Health (WPATH), recognized by the American Medical Association as the authority in this field.”⁴⁰

Surgery is not always or even often⁴¹ necessary for the alleviation of gender dysphoria in transgender individuals.⁴² The latest publication of the World Professional Association for Transgender Health’s Standards of Care states:

What helps one person alleviate gender dysphoria might be very different from what helps another person. This process may or may not involve a change in gender expression or body modifications. Medical treatment options include, for example, feminization or masculinization of the body through hormone therapy and/or surgery, which are effective in alleviating gender dysphoria and are medically necessary for many people. Gender identities and expressions are diverse, and hormones and surgery are just two of many options available to assist people with achieving comfort with self and identity.⁴³

Surgical procedures can also cause pain, unnecessary risk, or unwanted side effects.⁴⁴ In addition, religious beliefs may discourage some transgender individuals from

40 *Id.*

41 See Kari Ann Martin, *Transsexualism: Clinical Guide to Gender Identity Disorder*, J. FAM. PRAC. (2007), <http://www.jfponline.com/pages.asp?aid=4784> (indicating that sexual reassignment surgery is medically indicated in *severe* cases of gender dysphoria).

42 See *FAQ For New Transgender Birth Certificate Regulations Proposed In New York City*, SYLVIA RIVERA L. PROJECT, <http://archive.srlp.org/faq-new-transgender-birth-certificate-regulations-proposed-new-york-city> (stating that transgender person’s treatment plan is individualized and may not include sex reassignment surgery). Hormone therapy is actually the most prevalent treatment for transgender people. *Id.*

43 WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH, *supra* note 19, at 5.

44 See Harper Jean Tobin, *Against the Surgical Requirement for Change of Legal Sex*, 38 CASE W. RES. J. INT’L L. 393, 401 (2006–2007) (“Some find the results of available surgical techniques unsatisfactory in light of the high cost, painful recovery, and risks of complications and diminished sensation.”).

obtaining sexual reassignment surgery.⁴⁵ For these reasons, decisions concerning surgery should be left to the individual,⁴⁶ and should not be compelled by the state as a prerequisite to obtaining identification congruent with one's gender identity. Even if an individual does want to undergo sexual reassignment surgery, the cost can be over \$70,000 and the procedures are very frequently not covered by health insurance,⁴⁷ likely making an operation prohibitively expensive for many individuals.⁴⁸

Persons in one subset of transgender individuals, female-to-male transsexuals, undergo genital surgery of any kind in less than ten percent of instances.⁴⁹ Because many state courts interpret "surgical sex-change procedure" to include only genital surgery,⁵⁰ a large portion of these transgender men will continue to be unable to update the gender designation on their birth certificates.

45 See *id.* at 400–01. Many followers of both Islam and Judaism believe their respective holy scriptures prohibit sexual reassignment surgery. *Id.*

46 WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, *supra* note 19, at 27 ("It is important for mental health professionals to recognize that decisions about surgery are first and foremost a client's decisions – as are all decisions regarding healthcare.").

47 Kristin Wenstrom, Comment, "*What the Birth Certificate Shows*": *An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 L. & SEXUALITY REV. LESBIAN GAY BISEXUAL & LEGAL ISSUES 131, 140 (2008) ("These surgeries may be prohibitively expensive, some cost over \$70,000 and very few medical insurance providers cover such surgeries in their plans.").

48 Many transgender individuals live in extreme poverty, with the NTDS sample reporting annual household income below \$10,000 at a rate nearly four times that of the general population. Grant et al., *supra* note 1, at 2. With that information, it is unsurprising that only thirty-three percent of respondents in the NTDS survey reported that they had surgically transitioned even though a majority of respondents that had not received surgery "wanted to someday." *Id.* at 26, 72.

49 See *Birth Certificate Sex Designation: An Overview of the Issues*, SYLVIA RIVERA L. PROJECT, <http://srlp.org/birth-certificate-sex-designation-overview-issues>.

50 See Tobin, *supra* note 44, at 4–14.

2. Social Security Accounts

The Social Security Administration (SSA) also uses proof of a surgical sex-change procedure as a prerequisite to changing one's gender designation with the SSA.⁵¹ An inability to change the gender designation marker with the SSA can pose a serious problem for transgender individuals when they wish to obtain other forms of identification. All fifty states use SSA records to verify driver's license information.⁵² If the gender information on file with the SSA does not match the gender information provided to the motor vehicle administrator, the mismatch serves to create another obstacle that must be overcome on the path to obtaining gender-congruent identification. This obstacle can delay issuance of a driver's license,⁵³ or may possibly even discourage the individual from taking the extra steps necessary to obtain gender-congruent identification.

Even in places where surgery is not required in order to change the gender designation marker on identification documents like birth certificates and driver's licenses,

51 SOC. SEC. ADMIN. PROGRAM OPERATING MANUAL SYS., RM 00203.215 CHANGING NUMIDENT DATA—OTHER THAN NAME CHANGE (2008), *available at* <https://secure.ssa.gov/apps10/poms.nsf/517e83681a5eb8b28525688d0058721c/365ce12725551b178525754c000589bf!OpenDocument> (In order to change designation with SSA, “[t]he surgeon or attending physician must provide a letter verifying the sex change surgery has been **completed**.”).

52 See *Social Security Online Verification (SSOLV)*, AM. ASS'N OF MOTOR VEHICLE ADM'RS (March 7, 2013), <http://www.aamva.org/SSOLV/> (click on the “Participants” tab).

53 See, e.g., *Social Security Online Verification (SSOLV)*, WIS. DEP'T OF TRANSP. (Sept. 27, 2012), <http://www.dot.wisconsin.gov/drivers/drivers/renew/ssolv.htm> (“Records that cannot be verified through SSOLV will take additional time to process and could require you to correct your records with SSA and/or make a return visit to the DMV service center.”).

a letter or signature from a health professional is usually necessary.⁵⁴ For some low-income transgender individuals without access to free medical clinics, the cost of going to a health professional for an evaluation can be prohibitively high.⁵⁵

3. Gender-Neutral Identification and the REAL ID Act

State governments are theoretically currently free to create gender-neutral identification cards in order to avoid the problems associated with changing gender designation markers. However, a federal law currently threatens to preclude states from issuing such cards in the future. The REAL ID Act (“REAL ID”) was signed into law by President George W. Bush on May 11, 2005,⁵⁶ ostensibly to better protect American citizens from terrorist attacks.⁵⁷ Among other things,⁵⁸ REAL ID requires states to include a

54 As of 2008, California, Connecticut, Delaware, Illinois, Indiana, Maryland, Minnesota, Nebraska, New York, Oregon, Vermont, Virginia, Washington, Wisconsin, and the District of Columbia require a note from a medical professional in lieu of a surgical requirement for gender designation changes on driver’s licenses. Spade, *supra* note 5, at 830–31. For an example of the documentation required, see *Gender Designation on a License or Identification Card*, D.C. DEP’T OF MOTOR VEHICLES (2006), http://dmv.dc.gov/sites/default/files/dc/sites/dmv/publication/attachments/Gender_Change_Policies.pdf.

55 Lisa Mottet & John M. Ohle, *Transitioning Our Shelters: A Guide to Making Homeless Shelters Safe for Transgender People*, NAT’L GAY AND LESBIAN TASK FORCE POL’Y INST. 17–18 (2003), <http://www.thetaskforce.org/downloads/reports/reports/TransitioningOurShelters.pdf>.

56 *Real ID Act of 2005 Driver’s License Title Summary*, NAT’L CONF. OF STATE LEGISLATORS, <http://www.ncsl.org/print/standcomm/sctran/realidssummary05.pdf>.

57 Jason Allen, *A Quest for Acceptance: The Real ID Act and the Need for Comprehensive Gender Recognition Legislation in the United States*, 14 MICH. J. GENDER & L. 169, 171 (2008).

58 In total, driver’s licenses and identification cards issued by the state must include:

- (1) The person’s full legal name.
- (2) The person’s date of birth.
- (3) The person’s gender.
- (4) The person’s driver’s license or identification card number.
- (5) A digital photograph of the person.
- (6) The person’s address of principle residence.
- (7) The person’s signature.
- (8) Physical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes.
- (9) A common machine-readable technology, with defined minimum data elements.

gender designation marker on identification cards if the cards are to be eligible for use for federal purposes.⁵⁹ REAL ID also sets minimum requirements for documentation that must be presented before such an identification card can be issued.⁶⁰ These minimum requirements are as follows:

- (A) A photo identity document, except that a non-photo identity document is acceptable if it includes both the person's full legal name and date of birth.
- (B) Documentation showing the person's date of birth.
- (C) Proof of the person's social security account number or verification that the person is not eligible for a social security account number.
- (D) Documentation showing the person's name and address of principal residence.⁶¹

Note that the minimum documentation requirements do not necessarily require a photo identity document or any proof of an individual's gender. So even though REAL ID seeks to require gender designation markers on all identification cards eligible for federal use, it does not seek to require any proof of an individual's gender at the time the identification card is issued. The fact that REAL ID would allow an individual to obtain a state identification card without requiring photo identity documentation or proof of gender suggests that gender may not actually be an important factor in tracking and identifying people.

Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 202(b), 119 Stat. 231, 312 (2005) (codified as amended in note to 49 U.S.C. § 30301 (2006)).

⁵⁹ *Id.* § 202(a)(1).

⁶⁰ *Id.* § 202(c)-(d).

⁶¹ *Id.* § 202(c).

Though REAL ID went into effect on January 15, 2013, states that are not in compliance with it will receive deferment of enforcement for at least six months.⁶² After the deferment period, the U.S. Department of Human Services is currently planning to announce a schedule for phased-in enforcement no later than fall 2013.⁶³ Unfortunately, it seems unlikely that a state would take any meaningful steps toward the creation of gender-neutral identification cards with the possibility of forced compliance with REAL ID on the horizon.

*B. State-Level Voter Identification Legislation*⁶⁴

An April 2012 report from the Williams Institute estimated that the strictest photo identification laws would create significant barriers for over 25,000 transgender Americans in the November 2012 election.⁶⁵ Thirty states require voters to show identification at the polls.⁶⁶ Of these thirty, seven states⁶⁷ require a photo ID and four more⁶⁸ require a “strict”

62 *The History of Federal Requirements for State Issued Driver’s Licenses and Identification Cards*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/transport/history-behind-the-real-id-act.aspx>.

63 *Id.*

64 For more information on how photo voter identification laws affect all Americans, see *Citizens Without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification*, BRENNAN CTR. FOR JUST. (2006), http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

65 Herman, *supra* note 27, at 1. This number assumed that the new laws in Mississippi, South Carolina, and Texas will receive pre-clearance before the November 2012 election. *Id.* at 9 n.18. It further assumes that the decision holding Wisconsin’s strict photo ID law unconstitutional will be reversed by a higher court before the November 2012 election. *Id.* Without including Mississippi, South Carolina, Texas, and Wisconsin, the number of transgender Americans likely affected by strict voter ID laws is just over 15,000. *Id.* at 6.

66 *Voter Identification Requirements*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16602>.

67 *Id.* (Idaho, Florida, Louisiana, Michigan, South Dakota, Hawaii, and New Hampshire).

68 *Id.* (Georgia, Indiana, Kansas, and Tennessee).

photo ID.⁶⁹ Three more states have enacted voter photo identification laws, but are awaiting pre-clearance under Section 5 of the Voting Rights Act.⁷⁰

With such requirements in place, transgender voters may experience obstacles and discrimination at the voting booth.⁷¹ For example, if a transgender woman shows her photo identification with a male name or gender designation marker, poll workers may have questions about her identity. These questions may be justifiable because the identification does not seem to match the voter.⁷² However, the NTDS recently reported that forty percent of transgender individuals polled reported experiencing harassment when presenting gender-incongruent identification.⁷³ So a voter, fearing the public attention that a poll worker might bring to the voter's transgender identity and the harassment that might follow, may rather stay away from the polls on Election Day.⁷⁴

Supporters of voter photo identification laws argue that they are necessary to prevent voter fraud, but a 2007 study by the Brennan Center for Justice determined that one

⁶⁹ *Id.*

⁷⁰ *Id.* Mississippi and Texas have new strict photo identification laws. *Id.* Alabama's photo identification law will become effective in 2014 if it receives pre-clearance. *Id.*

⁷¹ See *Transgender Communities and Voting Access*, MASS. TRANSGENDER POL. COAL., <http://www.masstpc.org/pubs/MTPC%20Trans%20Communities%20and%20voting%20access.pdf> ("Registered voters who are transgender may face discrimination and/or may be challenged when trying to cast a ballot in Massachusetts.").

⁷² If the individual is suspected of being fraudulent, he or she will usually be able to cast a provisional ballot. See Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J.L. & POL. 329, 330 (2009). However, the practice of allowing provisional ballots does not necessarily substantially improve the voter's chances of having his or her vote counted. *Id.* For example, in Indiana's 2008 general election, only 137 of 1039 provisional ballots were ultimately counted. *Id.*

⁷³ Grant et al., *supra* note 1, at 139.

⁷⁴ Voters who experience trouble at the polls are encouraged to call the Election Protection Coalition at 1-866-OUR-VOTE, or a similar voters' rights organization.

person impersonating another at the polls is “an occurrence more rare [sic] than getting struck by lightning.”⁷⁵ For example, in the 2004 general election, only 0.0004% of the votes cast in New Jersey were the result of voters knowingly casting invalid votes, none of which would have been prevented by the use of a photo identification requirement.⁷⁶ Similar studies were conducted in other states, yielding comparable results.⁷⁷ According to the Brennan Center study; clerical or typographical errors, bad matching, voter mistakes, and election officials jumping to conclusions are more likely explanations for the perceived prevalence of voter fraud than actual fraud on the part of voters.⁷⁸ Given the extremely low prevalence of voter fraud, people should not be presumed to be engaging in fraud simply because they are currently going through gender transition or because their state will not allow them to change the gender designation marker on their identification.

III. GOING FORWARD

A. Increased Focus on the Voting Rights of Transgender Americans

Both academics and government agencies should be encouraged to study the effects of gender designation change requirements and voter photo identification laws on the voting behavior of transgender Americans. There is currently very little information available

⁷⁵ Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUST. 6 (2007), <http://www.brennancenter.org/page/-/The%20Truth%20About%20Voter%20Fraud.pdf>. This may be because “fraud by individual voters is a singularly foolish and ineffective way to attempt to win an election.” *Id.* at 7. The penalties for individual voter fraud far outweigh the return to be expected from a single vote. *Id.* ⁷⁶ *Id.* at 27.

⁷⁷ As of April 2012, eight studies in five states had been conducted, with the highest rate of voter fraud amounting to 0.0006%. *See Levitt, supra* note 75, at 16.

⁷⁸ *Id.* at 7–11.

regarding transgender voter turnout with which to gauge the voter suppressive effects of these laws.

B. Less Burdensome Requirements for Gender Designation Changes

Government entities should not require proof of surgery or any other specific method of treatment as a prerequisite to changing gender designations on identity documents because treatment methods for gender dysphoria are unique to the individual. Instead, such entities should simply require a statement or form in which the individual and the individual's therapist, social worker, physician, or other qualifying professional may certify that the individual has sufficiently completed a gender transition to the point at which gender designations on identifying documents should be changed.

Some jurisdictions⁷⁹ and the U.S. Department of State⁸⁰ have already stopped requiring proof of surgery. For example, the District of Columbia Department of Motor Vehicles only requires an individual to fill out a designation form that is signed by a physician, licensed therapist, licensed counselor, case worker, social worker, or other qualifying professional verifying the person's gender identity and an expectation that the individual will continue to identify with that gender for the foreseeable future.⁸¹ Such a system is more compatible with modern medical knowledge concerning transgender

⁷⁹ See, e.g., *Gender Designation on a License or Identification Card*, *supra* note 54.

⁸⁰ See *New Policy on Gender Change in Passports Announced*, *supra* note 39.

⁸¹ *Gender Designation on a License or Identification Card*, *supra* note 54.

individuals,⁸² and removes one of the most difficult obstacles for transgender individuals trying to obtain valid identification.

Additionally, REAL ID should be repealed or amended so that it does not require states to include gender designation makers on state identification cards, preferably before the federal government begins forcing compliance with it. The necessity of a gender designation requirement for the purposes of properly identifying individuals has not been shown,⁸³ and REAL ID would serve to prevent states from creating gender-neutral IDs as a way to address the problems faced by transgender Americans. In addition to making life more difficult for transgender individuals by requiring gender designations on state identification cards, REAL ID is opposed by immigrants, seniors, racial minorities, and low-income Americans for the increased difficulty it imposes on obtaining important identification documents.⁸⁴ As of 2009, the ACLU reported twenty-five states that had passed statutes or resolutions denouncing or prohibiting the implementation of REAL ID.⁸⁵

C. Repeal Strict Photo Identification Requirements

In at least five states,⁸⁶ strict photo identification requirements create a voting obstacle for transgender, low-income, unemployed, and homeless Americans. Fear of being

82 See *New Policy on Gender Change in Passports Announced*, *supra* note 39 and accompanying text.

83 As one author noted, “The fact that the Act itself requires a nonphoto identity document that includes only name and date of birth indicates that gender is not of great significance for the purpose of tracking and identifying people.” Wenstrom, *supra* note 47, at 146.

84 See Spade, *supra* note 5, at 731–32.

85 American Civil Liberties Union, *Anti-Real ID Legislation in the States*, REALNIGHTMARE.ORG (2009), <http://www.realnightmare.org/news/105/>.

86 See *Voter Identification Requirements*, *supra* note 66.

“outed” by a poll worker and possibly harassed by other voters may keep transgender voters away from the polls in these states. Those that do attempt to vote may face suspicion, accusations, harassment, or discrimination at the voting booth.

Not only do strict photo identification requirements fail to remedy the rare crime of voter fraud, but also provide barriers to voting that must be overcome by legitimate voters. Such requirements must be repealed to avoid the further deterrence of transgender, low-income, unemployed, and homeless American voters.

CONCLUSION

The discrimination faced by transgender Americans in their day-to-day lives has no place in our society. Due to discrimination, transgender Americans are more likely than the average American to find themselves unemployed,⁸⁷ low-income,⁸⁸ and even homeless.⁸⁹ When faced with such pervasive discrimination, it is especially important for such a minority group to have unburdened access to the voting booth—the most basic avenue through which American citizens can achieve political change.

The ability to cast a vote in a democratic election without undue burden is a fundamental political right that serves to preserve other basic rights.⁹⁰ When this right is

⁸⁷ Grant et al., *supra* note 1, at 55.

⁸⁸ *Id.* at 22.

⁸⁹ *Id.* at 106.

⁹⁰ Reynolds v. Sims, 377 U.S. 533, 562 (1964) (“[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . .”).

obstructed by federal, state, or local laws, those laws should either be amended to remedy the obstructions or repealed altogether.

To help alleviate the problems faced by transgender Americans when attempting to vote, changes need to be made. Because they reflect an outdated understanding of transgender health and present an extraordinarily burdensome obstacle to obtaining accurate identification, surgical requirements for changing gender designations must be removed. In addition, REAL ID should be repealed or amended to remove the false binary of gender as an identifying characteristic. Finally, voter identification requirements must be less restrictive in order to allow transgender, low-income, and minority individuals equal access to the democratic process. Until these actions are taken, many transgender Americans will continue to live in a democratic country in which they are obstructed from participating democratically.