

# MITIGATING THE “LGBT DISCONNECT”:<sup>1</sup> TITLE IX’S PROTECTION OF TRANSGENDER STUDENTS, BIRTH CERTIFICATE CORRECTION STATUTES, AND THE TRANSFORMATIVE POTENTIAL OF CONNECTING THE TWO

KYLE C. VELTE\*

*“Bathroom inequality is one of the greatest barriers to full integration of transgender people in American life.”<sup>2</sup>*

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1. See Marie-Amelie George, *The LGBT Movement Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503, 503 (2018).

\* Associate Professor, University of Kansas School of Law; LL.M., Harvard Law School; J.D., American University Washington College of Law. Many thanks to the University of Kansas School of Law for its support of my scholarship and to Marie-Amelie George for her thoughtful feedback on an earlier draft of the piece.

2. See Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 133 (2010).

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## INTRODUCTION

In recent years, transgender Americans have become more visible, thanks to the work of the transgender community and LGBT-rights organizations; as well as the emergence of transgender celebrities such as Laverne Cox, Chaz Bono, and Caitlyn Jenner in popular culture and the media.<sup>3</sup> One result of this increased visibility is the greater number of children coming out as transgender.<sup>4</sup> With more openly transgender children and adolescents, schools are tasked with creating safe and inclusive learning spaces for transgender youth—a task that often proves difficult given political hostility grounded in transphobia.<sup>5</sup>

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3. See Vincent J. Samar, *The Right to Privacy and the Right to Use the Bathroom Consistent with One’s Gender Identity*, 24 DUKE J. GENDER L. & POL’Y 33, 41-42 (2016) (describing the proliferation of transgender rights groups in the 1990s and the 2000s, and the emergence of “openly transgender celebrities like Chaz Bono, bureaucrats in agencies such the United States Department of Commerce, state legislators, West Point graduates, NCAA basketball players, and Texas’ first openly elected transgender judge, Phyllis Frye . . . This period . . . also witnessed Olympic gold medalist Bruce Jenner come out as Caitlyn Jenner on national television.”).

4. See Dianna Felberbaum, *Boys Will Be Girls, and Girls Will Be Boys: Urging the Supreme Court to Recognize a Transgender Student’s Right to Use the Appropriate Facilities in a Federally Funded School*, 33 TOURO L. REV. 1043, 1043 (2017); see also Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC’Y 301, 302-03 (2013) (“With increased awareness, acceptance, and support from parents and clinicians, there has been ‘a rapid increase’ in the number of children and adolescents presenting for treatment and socially transitioning. Thus, more and more students in elementary and secondary schools are undergoing or have undergone social role transition and are attending school in their affirmed gender.”); Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 92 (2015) (“In recent years, transgender children as young as five and six years old have grabbed the attention of the media . . . . Despite the societal expectations resulting from their physiological and anatomical presentation, young children are bravely claiming their own gender identity and pushing social norms to their limits.”). See generally TRANSGENDER LAW CTR., BEYOND THE BINARY: A TOOL KIT FOR GENDER IDENTITY ACTIVISM IN SCHOOLS 6 (2004), <http://translaw.wpengine.com/wp-content/uploads/2012/07/99640173-Beyond-the-Binary.pdf>

5. See Samar, *supra* note 3, at 42 (noting that the flood of “bathroom bills” introduced or passed in recent years “opens the door, if it hasn’t been opened already, to

With this greater visibility of transgender adults and youth alike, discrimination faced by transgender people has also been illuminated. Such discrimination exists in many areas of life, including employment, housing, education, health, identity documents, immigration, and access to public accommodation.<sup>6</sup> National organizations focusing on lesbian and gay civil rights have existed since the 1970s.<sup>7</sup> However, it was not until the 1990s and into the early 2000s that gay and lesbian organizations broadened their agendas to include transgender issues and transgender-specific civil rights organizations were born.<sup>8</sup> This increased visibility has led LGBT-rights organizations to develop strategies—from community-based to nationally focused—to fight against rampant discrimination.

Two of these recent, important legal reform movements are the subject of this Article: (1) legal challenges to identity document correction laws in those states that require Gender Confirmation Surgery (GCS),<sup>9</sup> including

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governmental discrimination against transgender people across many more states, especially in the ‘Bible belt’ where religion and private sector discrimination often oppose transgender rights.”).

6. See Anne E. Silver, *An Offer You Can’t Refuse: Coercing Consent to Surgery Through the Medicalization of Gender Identity*, 26 COLUM. J. GENDER & L. 488, 493-94 (2014); see also JAIME M. GRANT ET AL., NAT’L CTR. TRANSGENDER EQUAL. & NAT’L GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 1, 32-174 (2011), <https://www.ncgs.org/wp-content/uploads/2017/11/Injustice-at-Every-Turn-A-Report-of-the-National-Transgender-Discrimination-Survey.pdf>. See generally GLAAD, UNDERSTANDING ISSUES FACING TRANSGENDER AMERICANS 8-9 (2015), <http://www.glaad.org/sites/default/files/understanding-issues-facing-transgender-americans.pdf>.

7. See *Timeline of LGBT Organizations*, EQUALDEX, <https://www.equaldex.com/organizations/timeline> (last visited July 22, 2018) (noting that the 1970s saw the creation of Parents, Families and Friends of Lesbians and Gays (PFLAG), Lambda Legal, the National Gay & Lesbian Task Force, the National Center for Lesbian Rights, and Gay & Lesbian Advocates and Defenders).

8. See George, *supra* note 1, at 535-39 (stating that the first national transgender rights organization, the Transgender Law Center, was founded in 2002); see also *Timeline of LGBT Organizations*, *supra* note 7 (asserting that the National Center for Transgender Equality and the Transgender Legal Defense & Education Fund were founded in 2003).

9. See *Gender Confirmation Surgery*, MICH. MED., <https://www.uofmhealth.org/conditions-treatments/gender-confirmation-surgery> (last visited July 23, 2018) (stating that gender confirmation surgery, as used in this Article, was formerly known as “sex reassignment surgery” or “SRS” and is genital sex reassignment, known as penile inversion vaginoplasty for male-to-female transgender people and as phalloplasty for female-to-male transgender people.); see also Loren S. Schechter, ‘Gender Confirmation Surgery’: *What’s in a Name?*, HUFFINGTON POST [https://www.huffingtonpost.com/loren-s-schechter-md-facs/gender-confirmation-surgery\\_b\\_1442262.html](https://www.huffingtonpost.com/loren-s-schechter-md-facs/gender-confirmation-surgery_b_1442262.html) (last updated Feb. 6, 2018) (explaining use of the term “gender confirmation surgery”; “gender

laws regarding the correction of birth certificates,<sup>10</sup> and (2) Title IX actions asserted by K-12 students seeking to use sex-segregated facilities, particularly restrooms, that align with their gender identity.<sup>11</sup> While scholars have analyzed and theorized about these issues separately,<sup>12</sup> this project is

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confirming surgery” or “gender affirming surgery” and connotes any number of surgical procedures that a transgender person may chose during their transition); Genny Beemyn, *Transgender Terminology*, U. MASS STONEWALL CENTER, <https://hr.cornell.edu/sites/default/files/trans%20terms.pdf> (last visited July 23, 2018).

10. See, e.g., Complaint at 2, *B.D. v. State*, no. 2179401 (Colo. Dist. Ct. Apr. 24, 2018) [hereinafter *Complain, B.D.*]; Complaint at 4-13, *Corbitt v. Taylor*, No. 2:18-cv-91-MHT-GMB (N.D. Ala. Feb. 6, 2018) [hereinafter *Complaint, Corbitt*] (challenging Alabama’s regulation concerning gender marker changes on driver’s licenses); Petition for Judicial Review at 1, *Mott v. Kansas Dep’t of Health & Env’t*, 2016-cv-000150 (Kan. Dist. Ct. Feb. 19, 2016) (challenging Kansas’s refusal to correct birth certificates of transgender people); Complaint at 1, *Ray v. Himes*, No. 2:18-cv-00272-MHW-CMV (S.D. Ohio Mar. 29, 2018) [hereinafter *Complaint, Ray*] (challenging Ohio’s refusal to correct birth certificates of transgender people).

11. See, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034 (7th Cir. 2017); *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018); see also *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018). The phrase “gender-affirming restroom” used throughout this Article to refer to use by a transgender student of a sex-segregated facility that aligns with the student’s gender identity. In addition, this Article focuses on K-12 public schools and does not include discussion of the Title IX issues in private K-12 schools, religious schools, or colleges and universities.

12. See, e.g., 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 (2008) (finding that there is a robust body of legal scholarship addressing identity documents generally and birth certificates specifically); Annette Appell, *Certifying Gender*, 42 CAP. U. L. REV. 361 (2014); Amy Ballard, *Sex Change: Changing the Face of Transgender Policy in the United States*, 18 CARDOZO J.L. & GENDER 775 (2012); Shelby Hanssen, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR. L. REV. 283 (2017); Jenna Johnson, *Minnesota (Trans)Gender Markers: State Statutes and Policies on Amending Identity Documents*, 41 WM. MITCHELL L. REV. 213 (2015); M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science if Key to Transgender Rights*, 39 VT. L. REV. 943 (2015); Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373 (2013); Stephanie Markowitz, *Change of Sex Designation on Transsexuals’ Birth Certificates: Public Policy and Equal Protection*, 14 CARDOZO J.L. & GENDER 705 (2008); Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. & GENDER 213 (2005); Amy Rappole, *Trans People and Legal Recognition: What the U.S. Federal Government Can Learn from Foreign Nations*, 30 MD. J. INT’L LAW 191 (2015); Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 734 (2008); Brian T. Ruocco, *Our Antitotalitarian Constitution and the Right to Identity*, 165 U. PA. L. REV.

the first to unite them.

Currently, seventeen states require GCS before one may correct the gender marker on one's birth certificate.<sup>13</sup> Three additional states do not permit the correction of a gender marker on a birth certificate under any circumstance.<sup>14</sup> While there are pending cases challenging some of these states' policies, there is little scholarship that takes a comprehensive analysis of the constitutional deficiencies of these policies, namely Due Process, Equal Protection, and First Amendment issues. This Article builds on existing scholarship to offer that comprehensive doctrinal analysis.

The birth certificate correction issue intersects directly with the Title IX issue of transgender students' access to gender-affirming, sex-segregated facilities. In a recent Wisconsin Title IX case, the defendant school district argued that the transgender student would be prohibited from using a gender-affirming restroom unless he could provide "legal or medical

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193, 196 (2016); Silver, *supra* note 6; Kristin Wenstrom, *What the Birth Certificate Shows: An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 LAW & SEXUALITY 131 (2008); Anna James Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity Documents and the Possibility of Genderless Identity Documents*, 39 HARV. J.L. & GENDER 491 (2016); Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL'Y 1 (2016); Erin Buzuvis, "On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education, 28 WISC. J.L. GENDER & SOC'Y 219 (2013); Victoria L. Buzzelli, *Transforming Transgender Rights in Schools: Protection from Discrimination Under Title IX and the Equal Protection Clause*, 121 PENN ST. L. REV. 187 (2016); Dianna Felberbaum, *supra* note 4; see also Nathan Heffernan, *Potty Politics: G.G. ex rel. Grimm v. Gloucester County School Board, Title IX, and the Challenges Faced by Transgender Students Under the Trump Administration and Beyond*, 32 WISC. J.L. GENDER & SOC'Y 215 (2017); Alanna M. Jereb, *The Bathroom Right for Transgender Students and How the Entire LGBT Community Can Align to Guarantee This*, 7 WAKE FOREST J.L. & POL'Y 585 (2017); Mudasar Khan, et al., *Challenges Facing LGBT Youth*, 18 GEO. J. GENDER & L. 475 (2017); Marisa Pogofsky, *Transgender Persons Have a Fundamental Right to Use Public Bathrooms Matching Their Gender Identity*, 67 DEPAUL L. REV. 733 (2018); Tobin & Levi, *supra* note 4, at 302-303; Jillian T. Weiss, *Protecting Transgender Students: Application of Title IX to Gender Identity or Expression and the Constitutional Right to Gender Autonomy*, 28 WISC. J.L. GENDER & SOC'Y 331 (2013); Sam Williamson, *G.G. ex rel. Grimm v. Gloucester County School Board: Broadening Title IX's Protections for Transgender Students*, 76 MD. L. REV. 1102 (2017) (noting that legal scholarship has addressed the issue of K-12 transgender students' access to sex-segregated facilities under Title IX).

13. See *Identity Document Laws and Policies*, MOVEMENT ADVANCE PROJECT, [www.lgbtmap.org/equality-maps/identity\\_document\\_laws](http://www.lgbtmap.org/equality-maps/identity_document_laws) (last visited July 23, 2018).

14. *Id.*

documentation.”<sup>15</sup> The availability of a corrected birth certificate would have satisfied the school district’s requirement; however, because GCS is unavailable to minors, surgical requirements preclude school-aged students from obtaining the surgery necessary to correct their birth certificate.<sup>16</sup> In other words, it is impossible for transgender K-12 students to satisfy the surgical requirements to correct their birth certificates that are mandated by many states.

There is thus a synergy between the challenges to GCS-required birth certificate policies and the availability of Title IX relief for transgender students regarding the use of sex-segregated facilities. Until now, there has been little or no crossover, in terms of advocacy or organizing, between these two movements. On the issue of facilities access for transgender K-12 students, the path of least resistance—and thus speedy and complete relief—is the presentation of a corrected birth certificate to school officials. This is because most schools rely on the sex assigned at birth (and thus indicated on the birth certificate), rather than on the student’s gender identity, to decide which sex-segregated facilities the student must use. Thus, an analysis of the surgical requirement issue alongside a Title IX analysis is helpful in illuminating the path to relief for these students.

A failure by the LGBT-rights movement to recognize and capitalize on this synergy may exacerbate what Professor Marie-Amelie George calls the “LGBT disconnect”—the phenomenon through which “lesbian, gay, and transgender rights are sufficiently disconnected that many Americans are willing to accept the former (LG) and not the latter (T), and yet the two are integrated enough that one can be deployed against the other.”<sup>17</sup>

This Article proceeds in three parts. Part I introduces the concepts of sex, gender, and gender identity, as well as the importance of identity documents in the lives of transgender adults and students. Part II summarizes the legal landscape for both movements. Part III builds on existing scholarship and advocacy to create a comprehensive framework for challenging the surgical

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15. *Whitaker*, 858 F.3d at 1041.

16. See E. COLEMAN, ET AL., WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 17-21 (7<sup>th</sup> ed., 2011), <https://www.wpath.org/media/cms/Documents/Web%20Transfer/SOC/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf> (hereinafter WPATH SOC) Many, if not most, physicians will not perform GCS on a minor child. In fact, the World Professional Association for Transgender Health (WPATH), which disseminates standards of care (SOC) for treating transgender youth, adolescents, and adults, recommends that GCS only be performed on adults who have lived consistent with their gender identity for at least one year.

17. See generally George, *supra* note 1, at 506.

requirement, and ties that to the Title IX movement. Finally, Part IV presents a proposal to advance the interests of both transgender K-12 schoolchildren and transgender adults challenging surgical requirements for correcting identity documents.

I. LET'S TALK ABOUT SEX, BABY. AND GENDER. AND GENDER  
IDENTITY.

A. Terminology

In a world where sex and gender are often conflated and where gender identity often is misunderstood, it is important to begin with a brief definitional overview.

Sex is most often determined at birth and is based on biology, often solely using external indicators, particularly, genitalia: people born with a penis are assigned “male” as their sex and people born with a vagina are assigned “female” as their sex.<sup>18</sup> Sex based on genitalia is the basis for “legal sex”—the “M” or “F” on a person’s birth certificate.<sup>19</sup> The essentialism of legal sex—boiling sex down to one factor (external genitalia at birth)—stands in stark contrast to the determination of sex by medical professionals, who consider a variety of factors before declaring someone’s biological sex.<sup>20</sup> In medicine, “there is no simple or singular test for biological sex[.]”<sup>21</sup> rendering law’s construction of legal sex incorrect as a matter of fact and thus flawed as a matter of law and policy. The flawed construction of legal sex is exacerbated by the fact that it fails to recognize that one’s legal sex may not align with one’s gender identity.<sup>22</sup>

Gender is the socially constructed persona and identity associated with

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18. See generally Silver, *supra* note 6, at 490. Other biologically-based characteristics of one’s sex include hormone levels, internal reproductive organs, chromosomes, and gender identity. See also Samar, *supra* note 3, at 37 (noting the distinction between sex and gender: “the former is usually concerned with biological anatomy or chromosomes, the latter with cultural identity”); Complaint, *B.D.*, *supra* note 10, at 4; See Jessica Clarke, Identity and Form, 103 CALIF. L. REV. 747 (2015).

19. See generally Silver, *supra* note 6, at 490.

20. *Id.* at 490-91 (“By contrast, medical experts determine biological sex in a much more nuanced fashion by looking to a number of biological factors, including genetic or chromosomal sex (XX or XY); gonadal sex (reproductive sex glands); internal morphological sex (prostate, seminal vesicles, vagina, uterus, and fallopian tubes); external morphological sex (genitalia); hormonal sex; and phenotypic sex (secondary sex characteristics). Some experts also include assigned sex or gender of rearing and gender identity as part of the inquiry into biological sex.”) (internal citations omitted).

21. See *id.* at 491.

22. See *id.*

sex.<sup>23</sup> Because gender is the social and cultural manifestation of sex—the “beliefs, feelings, and behaviors that a specific culture attributes to individuals based on their perceived sex”<sup>24</sup>—the two are often conflated, notwithstanding that they are conceptually different.

Gender identity is the internal knowledge of one’s gender.<sup>25</sup> It is the deeply held, intrinsic understanding of the gender to which one belongs<sup>26</sup>—an “individual’s sense of being male, female, or something else.”<sup>27</sup>

Most often, one’s sex assigned at birth and one’s gender identity are congruent—a person born with a vagina and assigned the sex “female” at birth grows up with the intrinsic feeling of being a girl, i.e., with a female gender identity.<sup>28</sup> Cisgender is the term for a person whose sex assigned at birth and gender identity match.<sup>29</sup> Trans Student Resource Center defines transgender as a “term for people whose gender identity differs from the sex they were assigned at birth.”<sup>30</sup>

“Gender dysphoria” is the clinical diagnosis applied to transgender people who suffer from anxiety or other negative mental health symptoms because of the mismatch between their gender identity and their sex assigned at birth.<sup>31</sup> Importantly, being a transgender person is not, standing alone, an illness or pathology; many transgender people do not suffer any anxiety or negative health outcomes because they are transgender.<sup>32</sup> However, those that do suffer—often because of the discrimination and ostracization they face from others—receive the gender dysphoria diagnosis.<sup>33</sup> This diagnosis is controversial within the transgender community; a diagnosis remains a prerequisite for medical transition, but many disagree with the message that such a diagnosis sends, namely the pathologizing of being transgender,

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23. *See id.*

24. *See* Beemyn, *supra* note 9.

25. *See* *Frequently Asked Questions About Transgender People*, NAT’L CTR. FOR TRANSGENDER EQUALITY (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

26. *See id.*

27. *See* Beemyn, *supra* note 9.

28. *See* Janet Dolgin, *Discriminating Gender: Legal, Medical, and Social Presumptions about Transgender and Intersex People*, 47 SW. L. REV. 61, 65 (2017).

29. *See* *LGBTQ+ Definitions*, TRANS STUDENTS EDUCATIONAL RESOURCES, <http://www.transstudent.org/definitions/> (last visited July 23, 2018).

30. *Id.*

31. *See* NAT’L CTR. FOR TRANSGENDER EQUALITY, *supra* note 25.

32. *See id.*

33. *See id.*

which is just one of many gender identities.<sup>34</sup>

### B. *The Origins of Gender Identity*

Recent scientific research reveals that gender identity is informed by a myriad of factors, *not* just a person's genitalia. One scholar describes the advances that modern science has made in understanding sex and its connection to gender identity:

It is in the brain that individual identity lies, and indeed, gender identity. Scientists aided by powerful imaging technologies have discovered that there are slight, but noticeable differences in brain structure between the male and female brain. Scientists have also discovered that transgender individuals, both before and after hormone therapy, have brains that correspond more to their identified gender than to their genetic or anatomic sex . . . Gender is truly between the ears, not between the legs.<sup>35</sup>

Sometimes referred to as “brain sex,”<sup>36</sup> it is beyond dispute that gender identity is fixed at birth and has a biological basis.<sup>37</sup> The most recent research suggests that the biological underpinnings of gender identity are strongly influenced by the prenatal environment—specifically the exposure of the developing brain to particular hormones.<sup>38</sup> This research has transformative potential:

The significance of these studies is hard to understate: if neurological structures in the brain are sexually dimorphic, and if transgender individuals have neurological structures in their brain that correspond to the opposite sex, then transgender individuals are arguably . . . neurologically intersex. Phrased as “neurological

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34. *See id.*

35. *See* Blaise Vanderhorst, *Whither Lies the Self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex*, 9 HARV. L. & POL'Y REV. 241, 244-45 (2015).

36. *See id.*; *see also* Levasseur, *supra* note 12, at 955-56 (“Gender identity is also referred to as the ‘brain sex’ because it is hardwired in the brain . . . . Gender identity ‘is not subject to voluntary control and cannot be changed by therapy or other means.’”) (internal citations omitted).

37. *See* Vanderhorst, *supra* note 35, at 259-60.

38. *See id.* (“Research into the sexual dimorphism of the human brain has shown that several distinct regions of the brain in transgender individuals—both transmen and transwomen, including those who have yet to undergo hormone therapy—are more alike in structure to the brains of members of their identified gender than those of their genetic/anatomical sex. Some research has indicated hormone-mediated sexual differentiation of the genitals and the brain occur during different stages of pregnancy, which would explain how otherwise non-intersexual individuals could develop neurological features more like those of the opposite sex.”).

intersexuality,” transgenderism is removed from the realm of mental health completely, and placed into the purview of pure physical medicine. Further, a neurological basis for gender identity establishes it as an innate trait, which would then facilitate greater legal protection for transgender individuals.<sup>39</sup>

The conclusion to be drawn from these studies is that “sex” should be defined and determined by one’s gender identity. Thus, for all people, including transgender people, gender identity must carry the day in determining someone’s sex, rather than sex assigned at birth based on external genitalia.<sup>40</sup> Relying on gender identity rather than sex assigned at birth is critical for people to live integrated, whole, and psychologically healthy lives, and, for children, to academic success.<sup>41</sup> In short, gender identity is what constitutes a person’s sex, whether you are a transgender person or a cisgender person, and the law should reflect that reality.

### C. *Transitioning and the Treatment of Gender Dysphoria*

Internationally-accepted standards of care govern the treatment of gender dysphoria. The World Professional Association for Transgender Health (WPATH) was established in 1979 with the core mission of understanding transgenderism and treating transgender people.<sup>42</sup> Relying on current medical and scientific knowledge, WPATH writes and disseminates standards of care (SOC).<sup>43</sup> Those SOC include a protocol known as “transition” as the best practice for transgender people, including those with a gender dysphoria diagnosis. Social transition is the process in which a transgender person begins living their daily lives as the gender that aligns with their gender identity; thus, a transgender woman in social transition would begin dressing more femininely and be addressed by a name commonly associated with girls and women.<sup>44</sup>

Medical transition encompasses steps such as hormone therapy and

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39. *See id.*, at 260.

40. *See* Levasseur, *supra* note 12, at 947 (arguing that “of the multiple factors determining sex, gender identity must be given the most weight because it is, in fact, ‘biological’ and considered the primary determinant of an individual’s sex.”).

41. *See* Tobin & Levi, *supra* note 4, at 306 (noting that for students who have socially transitioned, “living and participating in school as their affirmed gender is essential to their psychological well-being and academic success.”).

42. *See* Mottet, *supra* note 12, at 405.

43. *See* WPATH SOC, *supra* note 16, at 1.

44. *See generally* *What do I need to know about transitioning?* PLANNED PARENTHOOD <https://www.plannedparenthood.org/learn/sexual-orientation-gender/trans-and-gender-nonconforming-identities/what-do-i-need-know-about-transitioning> (last visited July 23, 2018); *see also* Mottet, *supra* note 12, at 388.

surgery.<sup>45</sup> A variety of surgical treatments exist, ranging from a mastectomy for a transgender man, to laser hair removal for a transgender woman. Only a small percentage of transgender people undergo GCS.<sup>46</sup> Critically, not all transgender people desire surgical treatment, nor are all transgender people who desire surgical treatment medically eligible or able to afford it.<sup>47</sup> As a result, *it is not necessary for a person to undergo any surgical procedures to be accurately considered the sex other than the sex they were assigned at birth.*<sup>48</sup> Put another way, a transgender man is a man, and a transgender woman is a woman, even if they undergo no surgical procedures. This conclusion that surgical transition is *unnecessary* for a successful transition or for the successful treatment of gender dysphoria is widely accepted.<sup>49</sup>

Legal transition is the process of legally changing one's sex/gender marker on the litany of forms and documents required by the administrative state, such as on one's birth certificate, driver's license, passport, social security card, and the like.<sup>50</sup> It also often includes a legal change of the person's first name.<sup>51</sup>

#### D. *The Experiences of Transgender Children*

With the increased visibility of transgender people over the past decade, children are coming out as transgender earlier than in past generations.<sup>52</sup>

##### 1. *SOC for Transgender Youth*

There are different protocols for the treatment of transgender children, adolescents, and adults.<sup>53</sup>

Gender identity becomes stable in most people between the ages of three and four.<sup>54</sup> There is scant empirical evidence that transgender adolescents and adults revert to a gender identity consistent with their sex assigned at birth.<sup>55</sup> With regard to pre-adolescent transgender children who persistently

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45. See generally PLANNED PARENTHOOD, *supra* note 44.

46. See Mottet, *supra* note 12, at 407.

47. See *id.* at 407-08.

48. See *id.* at 409.

49. See *id.* at 407.

50. See *LGBTQIA Resource Center Glossary*, UC DAVIS, <https://lgbtqia.ucdavis.edu/educated/glossary.html> (last visited July 23, 2018).

51. See *id.*

52. See Tobin & Levi, *supra* note 4, at 302-03.

53. See WPATH SOC, *supra* note 16, at 110-11.

54. See *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 832, 834 (2015) [hereinafter *Guidelines*].

55. See *id.* See also Clarke, *supra* note 18, at 823. But see Jesse Singal, *When*

assert a gender identity different from the sex assigned at birth, there is increasing evidence that these children are more likely to continue living according to their gender identity into adolescence.<sup>56</sup> While there is some data suggesting that 12 percent to 50 percent of children with gender dysphoria do not continue along that path into adolescence and adulthood, “this research runs a strong risk of inflating estimates of the number of youth who do not persist with a [transgender] identity.”<sup>57</sup> Given the current status of the data, there is no consensus within the psychological community regarding best practices for treating and supporting prepubertal transgender children,<sup>58</sup> and there are strong opinions on both sides.<sup>59</sup> One approach advocates accepting and affirming the gender identity expressed by a child and thus assisting the child in social transition, while a second advocates encouraging the child to align their gender identity to their given bodies.<sup>60</sup> WPATH, however, has decried the second approach (aligning gender identity with body at birth) as unethical.<sup>61</sup> A third approach is an affirm-but-wait-and-see approach, in which children questioning their gender identity work with a supportive therapist to explore their gender identity but proceed

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*Children Say They're Trans*, THE ATLANTIC (July 2018), <https://www.theatlantic.com/magazine/archive/2018/07/when-a-child-says-shes-trans/561749/>.

56. See *Guidelines*, *supra* note 54, at 842 (noting that individuals who do not persist in expressing a gender identity different from their sex assigned at birth are more likely to identify as lesbian or gay than children whose gender identity always aligned with their sex at birth).

57. See *id.*; see also, Zinnia Jones, *When “Desisters” Aren’t: De-Desistance in Childhood and Adolescent Gender Dysphoria*, GENDER ANALYSIS, <https://genderanalysis.net/2017/10/when-desisters-arent-de-desistance-in-childhood-and-adolescent-gender-dysphoria/> (last visited Oct. 8, 2018). Those children who identify as transgender then, later in adolescence or adulthood, realize that they are, in fact, cisgender, are known as “desisters,” while those children who continue to identify as transgender into adulthood are known as “persisters.” *Id.* In addition, a new study has revealed a phenomenon known as “rapid onset gender dysphoria,” in which gender dysphoria appears suddenly at adolescence and may or may not persist. See Lisa Littman, *Rapid-Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, 18 PLOS ONE, Aug. 16, 2018, at 34-37 (arguing that even if the numbers concerning desisters are inflated, however, the fact that data show some number gender-questioning children ultimately desist from that questioning and thus are not transgender may influence some doctors to recommend against a birth certificate change for transgender K-12 students).

58. See *id.*

59. See Singal, *supra* note 55.

60. See *Guidelines*, *supra* note 56, at 842.

61. See *id.*

very slowly with social and medical transition.<sup>62</sup>

While the psychological community has yet to reach a consensus, there is much broader consensus concerning transgender adolescents.<sup>63</sup> This is because “the persistence of gender dysphoria into adulthood appears to be much higher for adolescents.”<sup>64</sup> Psychologists largely agree that treatment of gender dysphoria in teens may include medical intervention, specifically hormones that suppress the onset of puberty (which is reversible and gives adolescents time to work through their exploration of their gender identity) and, as an adolescent’s transgender identity solidifies, hormone therapy (which enables their body to develop secondary sex characteristics consistent with their gender identity).<sup>65</sup> The SOC direct that genital surgery should not be performed until a person reaches the age of legal majority to consent to medical procedures.<sup>66</sup> Because the age for medical consent in the United States is 18, nearly all K-12 students living in the 16 states that require GCS before correcting the gender marker on a birth certificate are precluded from obtaining a corrected birth certificate.

There is a robust medical and scientific consensus that transgender children are clinically and statistically more prone to negative mental health outcomes such as depression, suicidal ideation, suicide, and anxiety when they do not receive appropriate care vis-a-vis supporting their transgender identity.<sup>67</sup> Often, this care includes social transition for these students.<sup>68</sup>

## 2. *Transgender K-12 Students Face Hostile School Environments*

Schools have provided fertile ground for political, cultural, and normative fights over both sexual orientation and gender identity.<sup>69</sup> These fights began

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62. See Singal, *supra* note 55.

63. See American Psychological Association, *supra* note 56, at 842.

64. See WPATH SOC, *supra* note 16, at 11.

65. See *Guidelines*, *supra* note 56, at 842. (2015). See also WPATH SOC, *supra* note 16, at 19-20.

66. See WPATH SOC, *supra* note 16, at 21. The standards of care direct that the person seeking genital surgery should have lived consistent with their gender identity for at least twelve months. *Id.*

67. See generally Katherine Szczerbinski, *Education Connection: The Importance of Allowing Students to Use Bathrooms and Locker Rooms Reflecting Their Gender Identity*, 36 CHILD. LEGAL RTS. J. 153, 153 (2016).

68. See Tobin & Levi, *supra* note 4, at 302-03.

69. See generally Jason P. Murphy, *Does It Get Better? The Ongoing Political War Against Queer Youth*, in U.S. PUBLIC SCHOOLS AND THE POLITICS OF QUEER ERASURE 88-100 (C.A. Lugg ed., 2016).

as fights over LGBT-inclusive curricula and sex education,<sup>70</sup> and today include fights about restroom access for transgender students. As minors, K-12 students lack any meaningful political voice or power,<sup>71</sup> resulting in little to no gains in tolerance or acceptance, let alone inclusive policies: “Since the 1990s, the US public school system has been the only governmental site that appears to be largely impervious to the legal and political changes that have benefited adult queer Americans.”<sup>72</sup> As a result, LGBT youth are stripped “of voice, power, and agency while they attend public schools.”<sup>73</sup>

As a result, transgender students often face hostility, harassment, bullying, and even violence from peers, teachers and school administrators.<sup>74</sup> One of the ways a student is outed as transgender, before they even enter the classroom, is by the presentation of a birth certificate, which is required to register a child in public school.<sup>75</sup> The harms to transgender students when they are denied the opportunity to use gender-affirming facilities, including restrooms is real and extreme: “This severely disrupts their social development, instills extraordinary anxiety about how they are seen and treated by peers, and makes it nearly impossible for the student to focus on school.”<sup>76</sup> The distress caused by being refused access to gender-affirming facilities leads many transgender students to forgo participating in sports or physical education.<sup>77</sup> Others refuse to use any bathroom, which causes “physical and emotional discomfort, pain, and potential health complications [that] can hinder the student’s ability to participate in school.”<sup>78</sup> Moreover, denying access to gender-affirming facilities stigmatizes transgender students by sending a message “to the student and the entire community that he or she is not normal. This kind of obvious disparate treatment reinforces any bias that peers may have about the student and empowers them to engage

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70. *See id.* at 86 (“Since the 1990s, the vast majority of sexuality education was ‘abstinence until marriage’ education . . . . Beginning in the 1990s, various states and public school districts passed ‘no promo homo’ laws . . . . As a result, in some locales, any mention of queer identity and life was scrubbed from the curriculum.”).

71. *See id.* at 95 (“Educational policy is the last venue where one can vote one’s homophobic preferences . . . . Lacking real political power and voice means that queer kids become an easy target for political violence.”).

72. *See id.* at 94.

73. *See generally id.*

74. Tobin & Levi, *supra* note 4, at 303-04.

75. *See id.* at 305.

76. *See id.* 306-07.

77. *See id.* (internal footnotes omitted).

78. *See id.* (internal footnotes omitted).

in bullying.”<sup>79</sup>

Data from the Gay, Lesbian, Straight Education Network (GLSEN)’s 2015 National School Climate Survey reveal that the experience of being a transgender student in America’s schools is dismal:

- Over 43 percent of feel unsafe at school;
- Nearly 40 percent avoid using the restroom because of safety concerns;
- Over 54 percent were verbally harassed at school based on their gender expression;
- Over 20 percent were physically harassed based on their gender expression; and
- 9.4 percent were assaulted at school based on how they expressed their gender.<sup>80</sup>

National data further shows that many schools have explicit anti-transgender policies:

- 60 percent of transgender students had been required to use the bathroom or locker room of their legal sex;
- 50.9 percent of transgender students had been prevented from using their preferred name or pronoun; and
- 28 percent of transgender students had been prevented from wearing clothes because they were considered inappropriate based on their legal sex.<sup>81</sup>

In addition, the National Transgender Survey found:

- 78 percent of transgender K-12 students reported harassment;
- 35 percent of transgender K-12 students reported physical assault;
- 12 percent of transgender K-12 students reported sexual violence; and
- 15 percent of transgender K-12 students reported harassment so severe that it led them to leave school (K-12 settings or higher education).<sup>82</sup>

Data shows that hostile school climates result in transgender youth having lower academic aspirations, which leads to dropping out of school at higher rates than cisgender students.<sup>83</sup> In addition, transgender student enjoy less

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79. *See id.*

80. *See* JOSEPH G. KOSCIW ET AL., GLSEN THE 2015 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER YOUTH IN OUR NATION’S SCHOOLS 12-13, 22-24 (2015).

81. *See* KOSCIW ET AL., *supra* note 80, at 38.

82. *See* GRANT ET AL., *supra* note 6, at 3.

83. *See* KOSCIW ET AL., *supra* note 80, at 42.

academic success than their cisgender peers.<sup>84</sup> They are disciplined at higher rates than cisgender students.<sup>85</sup> Together, these negative educational outcomes lead to overall lower income levels for transgender people.<sup>86</sup>

In addition to these practical harms, there is grave psychological harm: Transgender students experience low self-esteem and depression at higher levels than do cisgender students because of hostile schools, as well as a higher rate of attempted suicide.<sup>87</sup> Those who reported being mistreated in school had higher rates of drug and alcohol abuse.<sup>88</sup> Finally, hostile school environments are responsible for negative physical health outcomes for transgender students, including medical problems resulting from dehydration (caused by restricting water intake to avoid restroom use) and from abstaining from restroom use (such as kidney and urinary tract infections).<sup>89</sup>

### 3. *A Note on this Article's Proposals Considering the Data on Transgender Youth*

This Article posits that invalidation of the surgical requirement will allow K-12 students to obtain correct birth certificates, which in turn will facilitate their use of gender-affirming sex-segregated facilities in ways that will minimize larger-scale fights over schools' discriminatory policies. However, these proposals should not be read as appropriate for all K-12 students or as the normative goal for creating safe schools for transgender students.

Ultimately, the treatment protocol for every transgender child and adolescent should be tailored to that person and depend on the person's particular clinical situation and goals.<sup>90</sup> Particularly given the data on

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84. *See id.* at xviii.

85. *See id.*

86. *See* GRANT ET AL., *supra* note 6, at 33 (explaining "[t]hose who reported mistreatment in school were 50% less likely to earn \$50,000/year than the general population," and noting that respondents in one survey "who said they were physically assaulted at school due to gender identity/expression were twice as likely to have done sex work and other work in the underground economy and were 50% more likely to be incarcerated").

87. *See* KOSCIW ET AL., *supra* note 80, at xviii, 49-49; GRANT ET AL., *supra* note 6, at 33.

88. *See* GRANT ET AL., *supra* note 6, at 33 ("For those who were physically assaulted or had to leave school due to harassment, rates of misuse of alcohol and drugs doubled.").

89. *See* GLSEN, SEPARATION AND STIGMA: TRANSGENDER YOUTH & SCHOOL FACILITIES, 2 (2017) [hereinafter SEPERATAION AND STIGMA], <https://www.glsen.org/sites/default/files/Separation%20and%20Stigma%20-%20Full%20Report.pdf>.

90. *See* WPATH SOC, *supra* note 16, at 3; *see also* Silver, *supra* note 6, at 500 ("The

prepubescent youth who question their gender identity, not every parent of an elementary-school-aged transgender child may desire to change their child's birth certificate to facilitate the use of gender-affirming restrooms for their child. Rather, they may prefer to take a more incremental approach—not seek a birth certificate correction—but instead work with school officials to devise a transition plan for their child that includes the use of gender-affirming facilities. This Article does not take the position that corrected birth certificates *must* be presented before schools permit transgender students to use gender-affirming facilities, or even that corrected birth certificates *ought* to be presented. Instead, this Article advocates for a removal of the surgical requirements from birth certificate correction statutes so parents of K-12 transgender student have the opportunity, option, and choice to seek a corrected birth certificate to more easily navigate the school system. This option would be particularly important in areas of the country in which schools are more hostile toward transgender students—those in small towns/rural areas,<sup>91</sup> those in the South and Midwest,<sup>92</sup> those without a Gay-Straight Alliance (GSA),<sup>93</sup> and religious schools.<sup>94</sup> For parents of a transgender child—one that has been clinically diagnosed with gender dysphoria and whose medical providers agree is highly likely to persist into adulthood as a transgender person via social, medical, and/or legal transition—seeking a corrected birth certificate should be an option. Transgender adolescents, who are statistically much more likely to persist in their transgender identity for life, should also have the opportunity to seek a corrected birth certificate with the support of their parents and medical caregivers.

## II. WHERE ARE WE NOW? THE CURRENT LEGAL LANDSCAPE FOR BIRTH CERTIFICATE CORRECTION AND TRANSGENDER CLAIMS UNDER TITLE IX

### A. *The Importance of Identity Documents*

Identity documents, including birth certificates, driver's licenses, passports, and social security cards are a foundational requirement to exist in modern society.<sup>95</sup> Inconsistency between lived gender and the sex

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medical model also fails to recognize the need for individual choice in deciding what procedures are necessary to express gender. Gender-confirming healthcare is a personalized process that must be tailored to meet individual needs and desires.”).

91. See *KOSCIW supra* note 80, at xxxiv, 107-08.

92. See *id.*, at 104-107, 127.

93. See *id.*, at 54, 61-64,

94. See *id.*, at xxiv, 97-103.

95. See *generally* Johnson, *supra* note 12, at 213-14 (“Identification documents are

indicated on identity documents creates obstacles and hardships for transgender people in both the social and economic realms,<sup>96</sup> an issue that has been powerfully and thoroughly canvassed by scholars, particularly Professor Dean Spade.<sup>97</sup> For the purposes of this Article, a general summary will suffice.

Professor Spade identifies three realms in which transgender people are particularly impacted by the government's insistence on categorizing people by gender: "(1) access to identity verifying documentation, (2) placement in sex-segregated facilities, and (3) access to gender-confirming health care."<sup>98</sup> The state's conclusion about a person's gender in each of these realms will "condition access to key resources and opportunities, and rules regarding reclassification of gender have a significant impact on those who seek to gain access in accordance with a gender classification different than the one they were assigned at birth."<sup>99</sup> The obstacles erected by the state's gender classification policies produce "a general economic and social marginalization of the transgender population."<sup>100</sup>

There are many contexts, such as traveling, obtaining employment, interacting with law enforcement, and purchasing alcohol, in which one is required to show an identity document such as a driver's license or birth certificate.<sup>101</sup> When there is a mismatch between the gender marker on the identity document and the gender presentation of the holder of the document, that person will be exposed to the possibility of harassment, ridicule, discrimination, or even violence from the person who recognizes the inconsistency.<sup>102</sup>

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relied on today more than ever. These documents are needed to travel, start new jobs, open bank accounts, apply to colleges, acquire funding for education or housing, rent a car, or to purchase alcohol and even certain cold medicines.").

96. *See generally* Spade, *supra* note 12, at 734.

97. *See id.*; *see also*, Ruocco, *supra* note 12, at 193-94.

98. *See generally* Spade, *supra* note 12, at 751.

99. *See id.*

100. *See id.*

101. *See* Ruocco, *supra* note 12, at 200 ("[L]egal gender is marked on documents that are ubiquitous and necessary to engage in ordinary activities.").

102. *See* Spade, *supra* note 12, at 737; *see also* Ruocco, *supra* note 12, at 197-99 (2016); Johnson, *supra* note 12, at 215 ("[G]ender incongruent identification exposes people to a range of negative outcomes, from denial of employment, housing, and public benefits to harassment and physical violence."); Wenstrom, *supra* note 12, at 136 (noting that the "inability to obtain legal recognition of their new gender has a devastating impact on transgender people" and summarizing the various ways this is true); Mottet, *supra* note 12, at 392 ("This is not an abstract issue; inspection of one's birth certificate (or documents it generates) can lead directly to discrimination and even violence, especially

*B. Birth Certificate Correction: The Current Legal Landscape*

Each state promulgates its own rules and procedures governing birth certificate content, issuance, and amendment/correction.<sup>103</sup> Although the states retain this power, the federal government is involved on several levels. The federal government promulgates guidelines for the gathering of vital statistics, and the states collect it pursuant to those guidelines.<sup>104</sup> More specifically, the federal government, through the Department of Health and Human Services, promulgates the Model Vital Statistics Act (MSVSA), which has been adopted by many states.<sup>105</sup> First promulgated in 1907, it addressed the issue of corrected birth certificates for transgender Americans in its 1977 update by recommending that birth certificate correction for transgender people be permitted upon a showing that the applicant underwent surgery to change their sex and upon the presentation of a court order noting that fact.<sup>106</sup> Last revised in 1992, the current MSVSA continues to include the surgical requirement.<sup>107</sup> States with the surgical requirement vary in whether they adopt the exact language of the MSVSA or write their own language based on the MSVSA.<sup>108</sup>

Birth certificates are used to access key societal institutions and resources, such as schools, insurance policies, and pension programs.<sup>109</sup> Moreover, “a birth certificate operates as one form of ‘breeder’ document, an ID from which other identity documents are created.”<sup>110</sup> All 50 states, plus the District of Columbia and New York City, have an agency responsible for issuing birth certificates.<sup>111</sup>

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when the situation involves interactions with security officers, employment, or access to sex-segregated facilities.”).

103. See Spade, *supra* note 12, at 764-65. (noting that the federal government has provided a template for states to gather and track such information through the promulgation of the Model Vital Statistics Act); see also *id.* at 767.

104. See *id.*

105. See Mottet, *supra* note 12, at 376-77; Rappole, *supra* note 12, at 192.

106. See Mottet, *supra* note 12, at 377, citing Model State Vital Statistics Act and Regulations § 21(e) (Ctr. for Disease Control & Prevention 1992), available at <http://www.cdc.gov/nchs/data/misc/mvsact92b.pdf>.

107. See *id.* at 401 (quoting CTR. FOR DISEASE CONTROL & PREVENTION, MODEL STATE VITAL STATISTICS ACT AND REGULATIONS 10 (1992)) (“[T]he sex of an individual born in this State has been changed by surgical procedure . . .”).

108. See *id.* at 400-01 and app. A (summarizing the nature of surgical requirements in all states and U.S. territories).

109. See Spade, *supra* note 12, at 766.

110. See Johnson, *supra* note 12, at 217.

111. See Spade, *supra* note 12, at 767 (noting that New York State has a process separate and apart from the process of New York City; thus, a resident of New York City

Currently, seventeen states require proof of GCS to correct a gender marker on a birth certificate.<sup>112</sup> Professor Anne Silver uses the term “medical model” to describe the policies of these states because they “place legal significance on the treatments and surgery that a person has completed” such that “[l]egal rights are inextricably bound up with medical treatment . . . .”<sup>113</sup> The American Medical Association has publicly criticized policies that require surgery to correct a gender marker on identity documents and called for such requirements to be abolished.<sup>114</sup>

Eighteen states and the District of Columbia will issue a corrected birth certificate with no surgery requirement and no requirement of a court order.<sup>115</sup> In nine states, it is not clear whether surgery or a court order is necessary to obtain a corrected birth certificate.<sup>116</sup> In three states, the requirements for correcting a birth certificate are not clear, not known, or unwritten.<sup>117</sup> Finally, three states prohibit the correction of gender markers on birth certificates.<sup>118</sup> Tennessee bars transgender people from correcting their birth certificate.<sup>119</sup> The Kansas Division of Vital Statistics takes the position that it lacks the authority to correct birth certificates for gender transition.<sup>120</sup> In Ohio, although state law provides that birth certificates may be amended with a court order, courts in that state refuse to issue such orders.<sup>121</sup>

Correcting gender markers on identity documents is not a “one stop shopping” endeavor, but rather often involves seeking such correction at

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will have a different avenue for changing their birth certificate than will a resident of New York State).

112. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 13.

113. See generally Silver, *supra* note 6, at 496.

114. See *Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients H-65.967*, AM. MED. ASS’N (2014), <http://bit.ly/2EhkCQy> (last visited July 23, 2018).

115. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 13. (Washington, Oregon, Idaho, California, Nevada, Minnesota, Illinois, Vermont, New York, Massachusetts, Rhode Island, Connecticut, Maryland, Florida, Delaware, and the District of Columbia).

116. See *id.* (South Dakota, Wyoming, Utah, Indiana, Mississippi, West Virginia, Pennsylvania, and New Hampshire).

117. See *id.* (Texas, Oklahoma, and South Carolina).

118. See *id.* (Kansas, Ohio, and Tennessee.).

119. See Tenn. Code Ann. § 68-3-203(d) (2006); see also Spade, *supra* note 12, at 735.

120. See TRANSGENDER LAW CTR., STATE-BY-STATE OVERVIEW: RULES FOR CHANGING GENDER MARKERS ON BIRTH CERTIFICATES 2 (2017), [hereinafter STATE-BY-STATE] (noting that the Transgender Law Center has filed suit challenging this position).

121. See *id.* at 3.

different administrative agencies, each of which may have different rules.<sup>122</sup> For example, to correct the gender marker in one's social security records, the Social Security Administration requires medical certification of "appropriate clinical treatment for gender transition" from a licensed physician, a full-validated ten-year passport with the correct gender marker, a birth certificate with the correct gender marker, *or* a court order directing recognition of the correct sex.<sup>123</sup> To correct the gender marker on one's U.S. passport, in addition to completing forms and providing photographs, one must provide medical certification of "appropriate clinical treatment for gender transition" from a licensed physician.<sup>124</sup> The same requirements adhere to correcting one's sex on a birth certificate if one was born abroad.<sup>125</sup> States vary on how one can change the gender marker on one's driver's license, with some requiring GCS and others having no surgical requirements. In some states, there is a surgical requirement to correct one's birth certificate but not to change one's driver's license.<sup>126</sup> These differing requirements, particularly within the same state, lead to confusion at best and concrete adverse consequences at worst.<sup>127</sup>

Given this incoherent patchwork of rules, it is not surprising that the National Transgender Discrimination Survey (NTDS) reveals that only 24 percent of transgender people seeking to correct their birth certificate were able to do so.<sup>128</sup> By comparison, nearly half had corrected their social security card and nearly 60 percent had corrected their driver's license.<sup>129</sup> Eighteen percent of those who sought to correct their birth certificates were rejected.<sup>130</sup> Over half of the survey respondents (53 percent) had not even

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122. *See generally* Spade, *supra* note 12, at 734-35; *see also* Ruocco, *supra* note 12, at 200-03 (describing the spectrum of state and federal mechanisms to change a gender marker on an identity document).

123. *See* TRANSGENDER LAW CTR. ID PLEASE! QUICK GUIDE FOR CHANGING FEDERAL IDENTITY DOCUMENTS TO MATCH YOUR GENDER IDENTITY 2 (2019) [hereinafter ID PLEASE!]; *see also* *Program Operations Manual System (POMS)*, SOC. SEC., <https://secure.ssa.gov/poms.nsf/lnx/0110212200> (last visited July 23, 2018).

124. *See*, ID PLEASE!, *supra* note 123, at 26.

125. *See* STATE-BY-STATE., *supra* note 120, at 5 (adding that birth certificates are known as "consular report of birth abroad").

126. *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 13 (Arizona, Colorado, Maine, Michigan, Missouri, Nebraska, New Mexico, Virginia, and Wisconsin).

127. *See generally* Spade, *supra* note 12, at 737-38.

128. *See generally* GRANT ET AL., *supra* note 6, at 139.

129. *See id.*

130. *See id.* at 143.

attempted to change their birth certificate.<sup>131</sup> The NTDS also revealed:

- 40 percent of those who presented ID (when it was required in the ordinary course of life) that did not match their gender identity/expression reported being harassed;
- 3 percent reported being attacked or assaulted; and
- 15 percent reported being asked to leave the setting in which they had presented incongruent identification.<sup>132</sup>

Birth certificates are particularly important for K-12 students, most of whom do not have other forms of identification, such as a driver's license.<sup>133</sup> Moreover, the birth certificate is often the document required by schools to register students and used by schools to enter biographical information about the student, including the student's name and sex, into the school system's information system.<sup>134</sup> The name and sex on the student's birth certificate, which are in turn made "official" through the school's information system, follow a student throughout the student's academic career—for example, on attendance sheets and standardized testing booklets—and the sex is used to sort students for physical education and other sex-segregated activities.<sup>135</sup> Schools that resist permitting transgender students to use gender-affirming facilities often cite a policy of segregating students based on the sex assigned at birth—the sex stated on their birth certificate—as the means of deciding how to categorize students.<sup>136</sup>

As noted above, it is a common misconception that all transgender people desire to undergo, and in fact do undergo, GCS.<sup>137</sup> In fact, many transgender people do not desire such surgery, or forgo it for other reasons.<sup>138</sup> To be

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131. *See id.*

132. *See id.* at 139.

133. *See generally* Complaint, *B.D.*, *supra* note 10, at 2.

134. *See* Asaf Orr et al., SCHOOLS IN TRANSITION: A GUIDE FOR SUPPORTING TRANSGENDER STUDENTS IN K-12 SCHOOLS 20 (2015) <https://www.genderspectrum.org/staging/wp-content/uploads/2015/08/Schools-in-Transition-2015.pdf>; *see also* Tobin & Levi, *supra* note 4, at 306 ("The challenges for Pat and his family began when Pat was ready to matriculate at the local elementary school. Registration at the school required Pat's parents to provide his birth record, which would disclose his assigned birth sex and make his transgender status public.").

135. *See generally* ORR, *supra* note 34, at 20.

136. *See generally* Khan, *supra* note 12, at 485.

137. *See* Spade, *supra* note 12, at 754 (noting the phrase "genital surgery" refers to the creation of a vagina (vaginoplasty) or the creation of a penis (phalloplasty)); *see also* Mottet, *supra* note 12, at 407 ("Sex reassignment surgeries are significantly less common than is popularly believed" and listing common reasons transgender people do not have surgery).

138. *See* Spade, *supra* note 12, at 755; *see also* Silver, *supra* note 6, at 498-500.

eligible for surgery, a transgender person must be diagnosed with gender dysphoria; those transgender people who do not receive that diagnosis, or who do not want to obtain such diagnosis, are ineligible for GCS.<sup>139</sup> As such, when a state has a surgical requirement, it “establishes medical authorities as gatekeepers with the power to regulate gender identity . . . . While non-trans people are free to modify their bodies at will through cosmetic surgery, trans people must first demonstrate that they fulfill a fixed set of criteria.”<sup>140</sup>

For K-12 students, the surgical requirement is a complete barrier because medical transition, in particular GCS, is not proper protocol for minor children; the younger the child, the less medical transition will be appropriate and available.<sup>141</sup>

### C. Accessing Gender-Segregated Facilities in K-12 Schools

#### 1. Sex-Segregated Facilities: A Note on Origins

Although an extended discussion of the origin and socio-cultural impact of sex-segregated facilities is beyond the scope of this Article, a quick summary is helpful as context for the discussion that follows.

Sex-segregated facilities first emerged in the nineteenth century as woman began to enter the U.S. workforce.<sup>142</sup> Sex-segregated restrooms, in particular, do not have their origin in any anatomical or biological differences between men and women, but rather emerged from legislators’ desire “to regulate public architectural spaces in order to preserve a Victorian social view of women.”<sup>143</sup> That Victorian view of women included the belief that women have weaker bodies than men, that women’s privacy must be ensured, and the widespread social morality that women and men occupied “separate spheres.”<sup>144</sup> The sex-segregation of restroom and other facilities

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139. See Silver, *supra* note 6, at 499-500.

140. See *id.*

141. See ORR ET AL., *supra* note 134, at 22; Khan, *supra* note 12, at 491; Tobin & Levi, *supra* note 4, at 322-23 (“Because of the medical requirements that still exist in many jurisdictions, updated identification is even less available to transgender youth.”).

142. See Jack B. Harrison, “To Sit or Stand”: *Transgender Persons, Gendered Restrooms, and the Law*, 40 U. HAW. L. REV. 49, 54 (2017).

143. See *id.* at 49.

144. See *id.* at 59-61; see also Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 20-24, 27-28 (2007) (summarizing the historical development of sex-segregated public spaces using critical architectural theory, which explains that the ways in which society uses spaces directly impacts the ways in which society understands gender; also noting that sex-segregated spaces grew not out of anatomical differences but to preserve the notion of gendered separate spheres).

thus “concretized and codified the belief that women are somehow weak and must be protected and that men are predatory by nature.”<sup>145</sup> This gendered and culturally-created basis for sex-segregated restrooms, rather than a biologically- or empirically-based rationale, is important to keep in mind as the discussion below turns to the topic of sex-segregated facilities in K-12 schools.

## 2. *The Importance of Restroom Access*

Access to any public restroom, including restrooms in public schools, is vitally important to everyone; without access to a restroom, one’s ability to partake in the public policy and engage as a citizen of the community is severely curtailed.<sup>146</sup> Without the opportunity to relieve oneself, one’s time in public spaces is limited. The possibility of being harassed or denied access to a public restroom often leads transgender people to avoid of public spaces to avoid possible humiliation.<sup>147</sup> The negative consequences related to lack of access to restrooms are exacerbated in the K-12 school context because these students are required to attend public school, and they have little autonomy within the school schedule to structure their own time. As explained in Part I, transgender students denied access to a gender-affirming restroom are more likely to develop physical and emotional health problems when denied access to gender-affirming restrooms.<sup>148</sup>

### D. *The Current Legal Landscape for K-12 Transgender Students*

Currently, four primary sources of legal protections exist for K-12 transgender students: (1) Title IX, (2) constitutional protections (state and federal), (3) state antidiscrimination law, and (4) school district policies.

#### 1. *Title IX*

Title IX provides that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>149</sup> Pursuant to delegated authority, the Department of Education has promulgated implementing regulations as

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145. See Harrison, *supra* note 142, at 62.

146. See Dolgin, *supra* note 28, at 99 (“Access to school and public bathrooms can significantly impact one’s everyday life—and one’s emotional responses.”).

147. See *id.* at 100.

148. See SEPARATION AND STIGMA, *supra* note 89, at 4; see also Harrison, *supra* note 142, at 51-53.

149. 20 U.S.C. § 1681(a) (1971).

well as guidance and “dear colleague letters” to assist schools in complying with the law.<sup>150</sup> The regulations permit schools to keep separate, sex-segregated restroom and locker room facilities for boys and girls, as long as they are comparable.<sup>151</sup>

Title IX provides a private right of action.<sup>152</sup> For an individual student to prevail in their Title IX claim, they must prove (1) they were excluded from participating in an education program based on sex, (2) the education institution they attended received federal financial assistance at the time of the alleged wrongdoing, and (3) the wrongful discrimination caused harm to the plaintiff.<sup>153</sup>

The meaning of the term “sex” as used in the statute is the central question that must be answered to determine whether transgender students are protected by Title IX. If “sex” is construed narrowly to mean only sex assigned at birth, transgender students will not fall within the statute’s protections. In contrast, if “sex” is construed to include gender identity, independently or through the theory of sex-stereotyping, then the statute will protect transgender students. The U.S. Supreme Court has not yet weighed in on this question.

When construing Title IX, courts often look at the precedent construing Title VII, the federal law that prohibits discrimination in employment.<sup>154</sup> Like Title IX, Title VII prohibits discrimination based on “sex.”<sup>155</sup> The Third, Sixth, Ninth, and Eleventh Circuits have held that Title VII’s prohibition on sex discrimination includes transgender employees, often based on the logic of *Price Waterhouse v. Hopkins*, namely that a plaintiff may state a claim for sex discrimination when they allege the discrimination was because they failed to comply with or adhere to characteristics typically associated with their gender.<sup>156</sup> A number of federal district courts have

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150. See generally Tobin & Levi, *supra* note 4, at 307.

151. See 34 C.F.R. § 106.33 (2019).

152. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283-84 (1998).

153. See *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994).

154. See *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1047 (7th Cir. 2017).

155. See, e.g., *id.* at 1046-47.

156. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that Title VII “intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”); *Doe v. Boyertown Area Sch. Dist.*, 893 F.3d 179, 199 (3rd Cir. 2018), *vacated by Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 515 (3rd Cir. 2018) (“Title IX prohibits discrimination against transgender students in school facilities . . . . Therefore a court may not issue an injunction that would subject the transgender students to different conditions than their cisgender peers are subjected to.”);

reached the same conclusion.<sup>157</sup>

The Obama Administration's Departments of Education and Justice issued guidance and "dear colleague letters" making express that the term "sex" in Title IX includes transgender students; thus schools are required to treat transgender students in every way—including restroom access—in accordance with their gender identity.<sup>158</sup> The Trump Administration, however, rescinded those guidance and dear colleague letters in February, 2017.<sup>159</sup> As a result, case law that construed Title IX to protect transgender

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EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 574-75 (6th Cir. 2018) (confirming that claims of discrimination on the basis of transgender status is per se sex discrimination under Title VII); Glenn v. Brumby, 663 F.3d 1312, 1316-20 (11th Cir. 2011) (recognizing that a "person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," and holding that terminating an employee because she is transgender violates the prohibition on sex-based discrimination under the Title VII); Kastl v. Maricopa Cty. Comty. Coll. Dist., 325 Fed. App'x. 492, 493 (9th Cir. 2009) ("After *Hopkins* . . . it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women."); Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (holding that discrimination against a transgender employee was a violation of Title VII because such discrimination was "based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.").

157. See *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostics Group, Inc.*, 542 F. Supp. 2d 653, 659–661 (S.D. Tex. 2008) ("Title VII and Price Waterhouse . . . do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and [a] 'macho' female who . . . is perceived by others to be in nonconformity with traditional gender stereotypes."); *Mitchell v. Axcan Scandipharm*, No. Civ.A. 05-2432006, WL 456173, at \*2 (W.D. Pa. Feb. 21, 2006) (holding that a transgender plaintiff may state a claim for sex discrimination by "showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions"); *Kastl v. Maricopa Cty. Comm. College Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at \*2–3 (D. Ariz. June 3, 2004), *aff'd* 325 Fed. Appx. 492 (9th Cir. 2009) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait."); *Tronetti v. Healthnet Lakeshore Hosp.*, No. 03-cv-0375E(SC), 2003 WL 22757935, at \*4 (W.D.N.Y. Sept. 26, 2003) (holding transsexual plaintiff may state a claim under Title VII "based on the alleged discrimination for failing to 'act like a man'").

158. See *Heffernan*, *supra* note 12, at 220 (summarizing the Obama-era guidelines concerning Title IX's coverage of transgender students).

159. See *id.* at 221 ("[I]n February of 2017, officials in the Trump Administration's Education Department unequivocally rejected the Obama-Era guidance documents and clarifications.").

students by relying on the Obama-era guidelines are no longer controlling authority. That is true of the most well-known transgender Title IX case, *G.G. v. Gloucester County School District* (the “Grimm case”),<sup>160</sup> in which the Fourth Circuit deferred to the Obama-era guidelines<sup>161</sup> to hold that Title IX does include transgender students within its protections. As a result, it held that the district court erred in denying a preliminary injunction directing the defendant school district to allow Gavin Grimm, a high school transgender boy, to use the boys’ restroom.<sup>162</sup>

Prior to the Trump Administration rescinding the Obama-era guidelines, the U.S. Supreme Court granted certiorari in the Grimm case,<sup>163</sup> and the nation hoped for a definitive ruling on whether Title IX protects transgender students. However, upon the rescission of the guidelines by the Trump Administration, the Court reversed course: it vacated and remanded the case to the Fourth Circuit “for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.”<sup>164</sup>

The few courts that have addressed the central question—whether “sex” as used in Title IX includes transgender students—since the Court’s remand have held that Title IX does, indeed, protect transgender students. In *Doe v. Boyertown Area School District*,<sup>165</sup> a group of cisgender students and their parents sued their school district, alleging, among other claims, that their Title IX rights were violated by the defendant school district’s policy allowing transgender students to use gender-affirming restrooms and locker rooms.<sup>166</sup> The Third Circuit upheld the district court’s denial of the plaintiffs’ request for a preliminary injunction, thus holding that the plaintiffs were unlikely to prevail on the merits of their Title IX claim.<sup>167</sup> The Third Circuit held, in pertinent part: “Title IX prohibits discrimination against transgender students in school facilities . . . . Therefore a court may not issue an injunction that would subject the transgender students to different conditions than their cisgender peers are subjected to.”<sup>168</sup> In support of this

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160. See *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 708, 709 (4th Cir. 2018).

161. See *id.* at 723.

162. See *id.* at 725-26.

163. See *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2016) (mem).

164. See *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017) (mem).

165. See *Doe v. Boyertown Area Sch. Dist.*, 893 F.3d 179, 199 (3rd Cir. 2018), vacated by *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 515 (3rd Cir. 2018).

166. See *id.*

167. See *id.*

168. See *id.* at 517.

statement, the *Boyertown* court relied on two Title VII cases, from the Sixth and Eleventh Circuits, holding that discriminating against transgender employees constitutes sex discrimination,<sup>169</sup> as well as the Seventh Circuit's decision in *Whitaker v. Kenosha Unified School District No. 1*.<sup>170</sup>

In *Whitaker*, a transgender boy sued his school district under Title IX and the Fourteenth Amendment's Equal Protection Clause after it prohibited him from using the boys' bathrooms and locker room.<sup>171</sup> The school district used a student's birth certificate to determine which sex-segregated facilities the student would be permitted to use.<sup>172</sup> After the school district lost at the trial court, the Seventh Circuit affirmed, finding that policy violated Title IX because it discriminated against transgender people based on their failure to conform to sex stereotypes.<sup>173</sup> The court relied on the Supreme Court's broad interpretation of "sex" under Title VII.<sup>174</sup> Two district courts have also reached the same conclusion.<sup>175</sup>

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169. See *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (“[A] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes . . . . Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination”); see also *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (holding that sex discrimination under Title VII “encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms”).

170. See *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1034 (7th Cir. 2017).

171. See *id.* at 1042.

172. See *id.* at 1053.

173. See *id.* at 1048–49 (“By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.”).

174. See *id.* at 1047–48 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)) (holding that Title VII “intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”).

175. See *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 323–25, 326–32 (M.D. Pa. 2017) (denying school district's motion to dismiss a transgender student's Title IX and Equal Protection Claims based on school district's bathroom policy “dictating that children must use the bathroom corresponding to the sex listed on the student's birth certificate”); see also *M.A.B. v. Board of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 715 (D. Md. 2018). *But see* *Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288, 295 (W.D. Pa. 2017) (“[T]his Court simply cannot conclude that the path to relief sought by the Plaintiffs under Title IX is at the moment sufficiently clear such that they have a reasonable likelihood of success on the merits of that claim. Put plainly, the law surrounding the Regulation and its interpretation and application to Title IX claims relative to the use of common restrooms by transgender students, including the impact of the 2017 Guidance, is at this moment so clouded with uncertainty that this Court is not in a position to conclude which party in this case has the likelihood of success on the

Finally, the court considering the Grimm case after its remand from the U.S. Supreme Court recently held that discrimination based on transgender status is sex-based discrimination under *Price Waterhouse*.<sup>176</sup> It thus concluded that “Mr. Grimm has properly brought a Title IX claim of discrimination “on the basis of sex”—that is, based on his transgender status.”<sup>177</sup>

Thus, the majority of courts to consider the question of Title IX’s protection of transgender students since the Court’s remand of the Grimm case have held that it does protect transgender students but have done so largely by analogizing to the Title VII sex-stereotyping cases.

## 2. *Constitutional Equal Protection*

The U.S. Supreme Court has not yet addressed the question of whether transgender people constitute a suspect or quasi-suspect class for purposes of equal protection analysis. However, the lower courts that have addressed equal protection claims asserted by transgender plaintiffs largely have found that discrimination based on transgender status does violate the promises of equal protection.<sup>178</sup> These lower courts have split, however, on the level of scrutiny applicable to transgender people as a class, with some courts applying the rational basis standard and others applying the intermediate standard of review.<sup>179</sup>

If discrimination against transgender students is considered discrimination based on sex, then intermediate scrutiny applies, meaning that the state must show an “exceedingly persuasive justification” for the discriminatory action.<sup>180</sup> To meet this standard, the government must show “at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”<sup>181</sup>

Assuming sex discrimination includes discrimination against transgender

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merits of that statutory claim.”).

176. *See Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 745-46 (E.D. Va. 2018) (“[T]ransgender discrimination is per se actionable sex discrimination under Title VII.”).

177. *See id.* at 747.

178. *See generally Khan, et al., supra* note 12, at 479.

179. *See id.; see also Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 872-74 (S.D. Ohio 2016) (holding transgender student’s claim of access to gender-affirming restrooms should be analyzed under heightened scrutiny).

180. *See United States v. Virginia*, 518 U.S. 515, 526-28, 531, 554 (1996).

181. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

students, the next step in the analysis is whether the state—in this context, the school—can offer an exceedingly persuasive justification for determining access to sex-segregated school facilities based on sex assigned at birth.<sup>182</sup>

The two most commonly offered state justifications to deny transgender people (including transgender students) access to a gender-affirming restroom are (1) the privacy interests of the cisgender people/students, who argue they are uncomfortable sharing a sex-segregated space with a transgender person,<sup>183</sup> and (2) permitting transgender people or students to use a gender-affirming restroom presents a safety risk, at least in the context of a transgender girl using the girls' restroom. This argument reasons that boys will pretend to be transgender girls to gain access to the girls' restroom and assault cisgender girls.<sup>184</sup> However, there is no empirical data that cisgender boys (or men) engage in this kind of deceit.<sup>185</sup> In addition, there are no reported assaults by transgender people against cisgender people in public restrooms.<sup>186</sup>

The notion of personal privacy articulated by anti-transgender advocates today traces its roots back to the Victorian era and its near-obsession with modesty vis-a-vis the human body and its functions.<sup>187</sup> The urbanization of America, coupled with advances in technology, which together created more populated areas with more crowded public spaces, caused anxiety and retrenchment on issues of bodily privacy, such that the “right of individual privacy . . . was elevated to sacred status, which everyone was bound to respect.”<sup>188</sup> Similarly, today, arguments about the privacy rights of cisgender students to use school restrooms free of the presence of transgender students are steeped in anxiety and retrenchment—anxiety created by the transgender

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182. See *Virginia*, 518 U.S. at 531.

183. See Tobin & Levi, *supra* note 4, at 317; see also *Bd. of Educ. of the Highland Local Sch. Dist.*, 208 F. Supp. at 874-75.

184. See *Bd. of Educ. of the Highland Local Sch. Dist.*, 208 F. Supp. 3d at 876; see generally Samar, *supra* note 3, at 51-58 (summarizing the privacy and safety rationale proffered by the state in support of legal-sex-based access to restrooms and locker rooms).

185. See Szczerbinski, *supra* note 67, at 154.

186. See Pogofsky, *supra* note 12, at 754 (“Despite there being no reported incidents of transgender violence against women or children in public restrooms, these arguments persist.”); see also Levi & Redman, *supra* note 2, at 160 (“Even in San Francisco (the U.S. city most likely to have the highest percentage of transgender women per capita), there has never been a single police report of a transgender woman harassing another woman in a bathroom.”) (internal citation omitted).

187. See generally Kogan, *supra* note 144, at 47.

188. See *id.*

student's disruption of the gender binary, a concept that for most people is inevitable, stable, "natural," and occupies a "sacred status."<sup>189</sup> Just as policymakers in the Victorian era "sought to reconcile the early [nineteenth] century vision of women with the realities of late century life[.]"<sup>190</sup> so too are today's policymakers seeking to reconcile the mid- to late-twentieth century notions of gender as unwaveringly binary with the realities of twenty-first century life, in which notions of the gender binary are continually challenged in the courts, in the classroom, on social media, and in popular culture.

Notwithstanding its deep historical roots, courts should reject this privacy argument, either because it is not legitimate, exceedingly persuasively, or compelling, or because policies hinging access to sex-segregated facilities are not rationally related or substantially related or narrowly tailored to the interest. To begin, there is no legally protected right to privacy grounded in a cisgender student's discomfort in sharing a sex-segregated space with a transgender peer.<sup>191</sup> In fact, in the employment context, the Eighth Circuit has held that permitting a transgender woman to use the women's restroom did not create a hostile work environment for an objecting cisgender woman.<sup>192</sup> By analogy, then, cisgender students' discomfort about sharing sex-segregated spaces with a transgender student is not a legitimate reason to exclude transgender students from these spaces. In fact, Title IX's enactment was to address this exact scenario, namely to guarantee that the educational opportunities of a student

[A]re not subordinated to another person's negative feelings about a group of people, however genuine those feelings may be. These feelings may be sincere, deeply felt, and not consciously malicious, but they are nevertheless a manifestation of bias, not a cognizable right or a justification for discriminatory conduct.<sup>193</sup>

The hollowness of the privacy and safety arguments are illustrated by the fact that schools do not ask all students using sex-segregated facilities to prove that they have the anatomy that corresponds with the facility's

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189. *See id.*

190. *See id.* at 55.

191. *See Tobin & Levi, supra* note 4, at 316 ("No court has ever held that there is any legal right to privacy that would be violated simply by permitting a transgender person to access a gender-specific facility that corresponds to his or her gender identity.").

192. *See Cruzan v. Special Sch. Dist., #1*, 294 F.3d 981, 983-84 (8th Cir. 2002); *see also Tobin & Levi, supra* note 4, at 317-18 (noting that in the employment context, termination of an employee because of customer preference—a customers' discomfort with an employee—is not a proper justification to terminate the employee).

193. *See Tobin & Levi, supra* note 4, at 318.

designation; rather, schools only ask for such proof from students who are transgender or suspected of being transgender.<sup>194</sup> These rationale, then, clearly are pretext for the real reason behind the policy: transphobia.<sup>195</sup>

Finally, the safety argument is overinclusive and thus not a legitimate interest on which to base a policy denying transgender students access to gender-affirming restrooms. Such policies are overbroad because “[i]t is a fallacy to include among the maliciously-disguised those people for whom their gender expression is not a disguise at all, but how they live their daily life and understand their deepest sense of self.”<sup>196</sup>

It is no more a disguise for a transgender person to dress in accordance with his or her gender identity than it is for a near-sighted person to wear glasses or a person with big feet to wear large shoes. Even granting, for argument’s sake, that transgender people are in “disguise,” which itself betrays a deep ignorance of transgender people’s lives and experiences, the laws are still impermissibly overinclusive because there is no significant risk of crime.<sup>197</sup>

Moreover, most courts that have considered the privacy and safety rationales have rejected them. In *Board of Education of the Highland Local School District v. U. S. Department of Education*,<sup>198</sup> the court soundly rejected both arguments in a case concerning a transgender student’s access to the girls’ restroom. It found no evidence that the transgender girl herself would infringe upon the privacy rights of any other students; thus, it reasoned, the school failed to provide the required exceedingly persuasive justification, “or even a rational one,” for preventing her from using the girls’ restroom.<sup>199</sup> The court also rejected the defendant’s “safety and lewdness” justifications, citing an amicus brief submitted by school administrators stating that “no incidents of individuals using an inclusive policy to gain access to sex-segregated facilities for an improper purpose have ever

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194. *See id.* at 322.

195. *See id.* (“This makes it clear that the real issue is bias against transgender students.”); *see also id.* at 325 (“[T]he very purpose of non-discrimination laws, such as Title IX, is to press against and shift norms and stereotypes, often outdated, which have the effect of interfering with a marginalized group’s ability to function or participate in society, and in the case of Title IX, for students reliant on public education Adopting and institutionalizing social discomfort with a specific group has the opposite effect of reifying the underlying social norms that give rise to the discriminatory attitudes in the first place.”).

196. *See Levi & Redman, supra* note 2, at 160 (internal citations omitted).

197. *See id.* at 160 (internal citations omitted).

198. *See* 208 F. Supp. 3d 850 (S.D. Ohio 2016).

199. *See id.* at 877.

occurred.”<sup>200</sup> Other courts agree that these purported state interests cannot carry the day.<sup>201</sup>

The most recent, post-remand decision in the *Grimm* case likewise held that a transgender student has an Equal Protection claim for being denied access to gender-affirming restrooms, and that such claims are properly considered using the intermediate scrutiny standard.<sup>202</sup> The court further held that the state’s alleged interest—protecting the privacy rights of cisgender students—was not substantially related to the policy of excluding Grimm from gender-affirming restrooms “because there are many other ways to protect privacy interests in a non-discriminatory and more effective manner than barring Mr. Grimm from using the boys’ restrooms.”<sup>203</sup> Other federal district courts have reached the same conclusion.<sup>204</sup>

Thus, in the most recent Equal Protection cases involving transgender students and exclusionary restroom policies, courts have soundly rejected the asserted state interests of privacy and safety.

### 3. *State Antidiscrimination Law*

The District of Columbia, along with thirteen states, have state laws that expressly protect transgender students.<sup>205</sup> In four states—Delaware, Maryland, Michigan, and Rhode Island—state agencies have issued policies that expressly require inclusion of transgender students in school facilities.<sup>206</sup>

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200. *See id.* at 876.

201. *See* *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017); *M.A.B. v. Talbot Cty. Bd. Educ.*, 286 F. Supp. 3d 704, 723-24 (D. Md. 2018); *see also* *Evanhco v. Pine-Richard Sch. Dist.*, 237 F. Supp. 3d 267, 288-89, 237 F. Supp. 3d 267, 288-89 (W.D. Pa. 2017).

202. *See* *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 748-51 (E.D. Va. 2018).

203. *See id.* at 752 (“For example, the Board had taken steps ‘to give all students the option for even greater privacy’ by installing partitions between urinals and privacy strips for stall doors . . . . Additionally, students who wanted greater privacy for any reason could have used one of the new single-stall restrooms made available upon implementation of the policy.”).

204. *See* *A.H.*, 290 F. Supp. 3d at 331; *see also* *M.A.B.*, 286 F. Supp. 3d at 723; *see also* *Students and Parents for Privacy v. U.S. Dep’t of Educ.*, No. 16-cv-4945, 2017 WL 6629520, at \*6 (N.D. Ill. Dec. 29, 2017) (rejecting cisgender students’ claim to privacy because it “flies in the face of *Whitaker* . . . . *Whitaker* is binding on this Court, and the stay in *G.G.* [Grimm] preserved the status quo. It does not create a privacy right of the nature that Plaintiffs assert.”).

205. *See* SEPARATION AND STIGMA, *supra* note 89, at 5 (California, Colorado, Connecticut, Illinois, Iowa, Maine, Massachusetts, Minnesota, New Jersey, New York, Oregon, Vermont, and Washington).

206. *See id.*

Moreover, some localities—cities and towns—have municipal antidiscrimination provisions that protect transgender people from discrimination.<sup>207</sup> These statutes have been interpreted in several contexts, including the school context, to mandate the use of gender-affirming restrooms and other sex-segregated facilities.<sup>208</sup> To exclude transgender students from gender-affirming restrooms would constitute unlawful discrimination based on the student's protected transgender identity.<sup>209</sup> These statutes, where available, offer another avenue for transgender students to gain access to gender-affirming sex-segregated facilities.

#### 4. *School District Policies*

As of early 2018, more than 300 school districts have enacted district-wide policies that permit transgender students to use gender-affirming facilities.<sup>210</sup> Where available, such policies mean that a transgender student will have no need to assert legal claims to gain access to gender-affirming facilities.

### III. THE SURGICAL REQUIREMENT IS COUNTERFACTUAL, UNCONSTITUTIONAL, UNLAWFUL, AND UNETHICAL

Building on pending litigation,<sup>211</sup> case law, and scholarship, this part provides a comprehensive overview of the legal, medical, and ethical bases for challenging the surgical requirement and provides a road map for litigators and courts to present and analyze such challenges. The surgical requirement should be invalidated because (1) it is factually incorrect based on current medical and scientific understandings of sex and gender, (2) it is unconstitutional under the First, Fourteenth and Fifth Amendments, (3) it

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207. See Tobin & Levi, *supra* note 4, at 311-12.

208. See *id.*; see, e.g., Doe v. Regional Sch. Unit 26, 86 A.3d 600, 607 (Me. 2014). But see R.M.A. v. Blue Springs R-IV Sch. Dist., WD 80005, 2017 WL 3026757, at \*7-9 (Mo. Ct. App. July 18, 2017). In *R.M.A.*, a transgender boy denied access to the school's male restrooms and locker rooms failed to state a claim under the sex discrimination provision of Missouri's Human Rights Act. However, in January 23, 2018, the Missouri Supreme Court ordered the case transferred to it, meaning that the issue is still open in Missouri. See *Minutes of January 23, 2018*, SUPREME COURT OF MO. (Jan. 23, 2018), <https://www.courts.mo.gov/SUP/index.nsf/cfc8c4b5bc15cb158625661d0073593c/cd4fbc140b6259f8625821a00774c5e?OpenDocument>.

209. See Tobin & Levi, *supra* note 4, at 311-12.

210. See MOVEMENT ADVANCEMENT PROJECT, TRANSGENDER STUDENTS AND TITLE IX (2018), <https://www.lgbtmap.org/file/Title-IX-Two-Page.pdf> (last visited July 23, 2018).

211. See, e.g., Complaint, *B.D.*, *supra* note 10, at 6; Complaint, *Ray*, *supra* note 10, at 6; Complaint, *Corbitt*, *supra* note 10 at 11; Petition for Judicial Review, *supra* note 10, at 13.

undermines the requirement of informed consent and principles of bioethics, (4) it contravenes the unconstitutional conditions doctrine, and (5) it violates state antidiscrimination law.

*A. Modern Science Demonstrates that the Surgical Requirement is Counterfactual*

Recent science makes clear that sex and gender are far more complex than mere reference to external genitalia at birth can convey. As noted in Part I, “there is a growing body of research supporting the position that there is an empirically measurable, anatomical explanation for transgenderism that lies in the brain.”<sup>212</sup> Thus, sex is the result of a variety of visible and invisible factors, the most important of which is gender identity. As a result, “birth certificates, which are based on cursory visual assessment at birth, are not a reliable standard” by which to determine legal sex.<sup>213</sup> Therefore, requiring GCS under the reasoning that if a transgender person does not have GCS, they are unable to become their “new” sex is counterfactual. The fact that surgical requirements “make self-realization and access to official documents . . . conditioned on conforming to a reductive definition of sex which ignores its complexity as a biological and social phenomenon,”<sup>214</sup> has led the WPATH to denounce surgical requirements,<sup>215</sup> as has the American Psychological Association (APA), and the National Association of Social Workers (NASW).<sup>216</sup>

Finally, state antidiscrimination law—when it includes transgender people as a protected class—does not require that the transgender person have any surgery before claiming the protections of the antidiscrimination law.<sup>217</sup> The absence of a surgical requirement in state antidiscrimination laws highlights that the requirement in birth certificate correction laws is myopic, outdated, and non-evidence-based.<sup>218</sup>

*B. Addressing the Four State Interests*

Before offering the affirmative constitutional claims that may be made to challenge the surgical requirement, this subpart addresses the commonly-asserted state interests for enacting the surgical requirements. Because the

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212. See Vanderhorst, *supra* note 35, at 259.

213. See *id.* at 267.

214. See *id.* at 268.

215. See Mottet, *supra* note 12, at 406.

216. See *id.*

217. See *id.* at 411.

218. See *id.*

states purported interests are balanced in constitutional claims, addressing them at the outset will streamline the discussion of the affirmative constitutional claims outlined below.

States have not often had the opportunity to provide their rationale for enacting the surgical requirement.<sup>219</sup> When they have, the most common state interests offered to support the surgical requirement are (1) the purported need to prevent fraud, (2) to ensure that the change is permanent, (3) to ensure the safety of cisgender women in sex-segregated facilities, and (4) to ensure the privacy of cisgender people in sex-segregated facilities.<sup>220</sup> None of these provide even a rational basis for the surgical requirement, let alone important or compelling state interests.

Regarding fraud, the state's argument usually has two parts. First, allowing the correction of a birth certificate without surgery could result in same-sex marriages, long-banned in many states;<sup>221</sup> this argument is no longer valid in the wake of marriage equality through *Obergefell v. Hodges*. Second, allowing the correction of a birth certificate without surgery could result in people "disguis[ing] their gender to be better able to commit crimes or terrorist acts."<sup>222</sup> This argument belies the reality that "the last thing a person who is trying to blend in and escape notice should do is dress in the opposite gender" as well as the fact that the federal government allows states to set their own policies to determine gender for identity documents under the Real ID Act.<sup>223</sup> Moreover, the U.S. government allows transgender people to change the gender marker on their passports and social security records without surgery.<sup>224</sup> The existence of these multiple gender marker change policies, none of which require surgery, indicates that the fraud and

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219. *See id.* at 413.

220. *See Mottet, supra* note 12, at 413-18.

221. *See id.* at 414.

222. *See id.*

223. *See id.* at 414-15; *see also Real ID*, DEP'T OF HOMELAND SECURITY, <https://www.dhs.gov/real-id> (last visited July 22, 2018) (establishing "minimum security standards for license issuance and production and prohibit[ing] Federal agencies from accepting for certain purposes driver's licenses and identification cards from states not meeting the Act's minimum standards"); *see also* H.B. 1268, 109th Cong. § 202(b)(3) (2005) (enacted) (stating gender is a required field on a driver's license under the act); Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5,271 (Jan. 29, 2008) (to be codified at 6 C.F.R. pt. 37) (requiring the regulations leave it to states to decide how gender will be determine.).

224. *See* NAT'L CTR. FOR TRANSGENDER EQUALITY, UNDERSTANDING THE PASSPORT GENDER CHANGE POLICY 2 (2014), [hereinafter PASSPORT] [https://transequality.org/sites/default/files/docs/kyr/passports\\_2014.pdf](https://transequality.org/sites/default/files/docs/kyr/passports_2014.pdf).

security interests proffered by states in support of the surgical requirement are not related to the requirement of surgery.<sup>225</sup>

Regarding the “permanence” interests, states argue that the surgical requirement is necessary to ensure that a transgender person will not change their mind about their gender identity and want to go back to their original sex or gender. Surgery, it is argued, prevents this possibility of such flip-flopping on gender identity.<sup>226</sup> This argument is incorrect as a matter of fact: available evidence demonstrates that it is exceptionally uncommon for a transgender person to desire to switch back, and on the rare occasions that happens it is often due to the discrimination experienced by the transgender person that came about because they transition in the first space.<sup>227</sup> Moreover, the concern for permanence should not be the record-keepers’ primary concern; rather, the primary concern should be accuracy.<sup>228</sup> Thus there is no “fit” between the surgery requirement and the asserted state interest in permanence, as is required under the rational basis test and, as a result, there can be no substantial relationship or narrow tailoring as is required by the intermediate and strict scrutiny regimes.

Regarding the alleged interests in the safety of cisgender women in sex-segregated spaces and privacy for cisgender people in sex-segregated spaces, these state interests fail the rational basis test, and thus every level of scrutiny, when it comes to gender-affirming restroom access, as described in Part II. They also fail as state interests to support the surgical requirement. States with antidiscrimination laws that protect transgender people permit, pursuant to those laws, transgender people to use gender-affirming restrooms *without any surgical requirement*, and they do so in the face of the same privacy and safety concerns that are offered to support the surgery requirement to correct birth certificates.<sup>229</sup> Given the data on attacks in restrooms—that they rarely occur and, when they do, it is not transgender people who are doing the attacking—and the fact that transgender people use gender-affirming restrooms, *regardless of their surgical status*, pursuant to trans-inclusive state antidiscrimination laws, there simply is no rational basis for the surgical requirement for correcting birth certificates, let alone an

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225. See Mottet, *supra* note 12, at 415.

226. See *id.* at 416.

227. See *id.*

228. See *id.* at 416 (“A record should be updated to maintain accuracy as often as there is a change to relevant data. For example, if a person changes his or her name four times over their life due for various reasons, and seeks to amend their birth certificate each time, updating the birth certificate several times maintains an accurate record for them throughout his or her entire life.”).

229. See *id.* at 420.

important or compelling state interest. And, even if the state were found to have a legitimate interest in safety, the “fit” between the state interest and the surgical requirement is not related in any way that serves the state interest. In fact, there are already laws that are directly related to the state interest in the safety of *all* women in restrooms—criminal laws prohibiting assault, battery and other crimes of violence.

In particular reference to privacy, Lisa Mottet explains, “on a daily basis and in almost all social situations, a person’s genitals remain entirely private, even inside sex-segregated facilities or in work situations where a person is performing gender-specific duties.”<sup>230</sup> She goes on to note that it is increasingly rare for people to be in situations in which they will be fully exposed to other people, such as open shower facilities in a prison or homeless shelter.<sup>231</sup> However, in the rare circumstances where that may be a possibility, transgender people most often will reveal their anatomical reality to the relevant authority.<sup>232</sup> Moreover, “transgender people who have not had genital surgery are very likely to go to great lengths to avoid having other people observe their unclothed bodies. If they are able to do so, their bodily characteristics should not be considered relevant.”<sup>233</sup> There are many ways in which to protect everyone’s privacy, such as curtains in changing areas and stalls with closing doors in restrooms, that fit much more closely with the state’s asserted privacy interest than excluding transgender people who have not had GCS. Like the other asserted state interests, then, the privacy argument is not a rational one, nor is the surgical requirement related to the interest in a way that would support a rational basis—or any other level of—review.

An amicus brief<sup>234</sup> supported by school administrators from thirty-one school districts and the District of Columbia filed in the U.S. Supreme Court in the *G.G.* case addressed these arguments head-on and noted that not one of the 31 school districts has *ever* had a problem with the privacy or safety of cisgender students:

[They] have addressed and in some cases personally grappled with many of the same fears and concerns in their own schools and districts. However, in [their] professional experience, none of those fears and concerns has materialized in the form of actual problems

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230. *See id.* at 417-18.

231. *See id.* at 418.

232. *See id.*

233. *See id.*

234. *See* Brief of the Amici Curiae School Administrators from Thirty-One States and the District of Columbia in Support of Respondent, Cloucester Cty. Sch. Bd. v. G.G. 137 S. Ct. 1239 (2017) (No. 16-273).

in their schools. Instead, inclusive policies not only fully support the reality of transgender students' circumstances, but also foster a safer and more welcoming learning environment for all students.<sup>235</sup>

Thus, the privacy and safety arguments asserted by states, assuming they are "legitimate" under the rational basis test, should be declared *not* to be rationally related to the policy requiring surgery. If intermediate scrutiny is applied, these interests, even if held to be "important," should be declared *not* to be substantially related to the policy requiring surgery. If strict scrutiny is applied, even if held to be a "compelling" state interest, the policy should be found *not* to be narrowly tailored.

### C. *The Surgical Requirement Violates the First Amendment*

#### 1. *The Surgical Requirement Violates the Right to Refrain from Speaking and the Right to Be Free from Endorsing a Government Message*

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . ." <sup>236</sup> This clause protects both the right to speak and the right to refrain from speaking.<sup>237</sup> As a result, a law that compels speech with which an individual disagrees violate the First Amendment.<sup>238</sup>

As explained above, many transgender people do not desire, cannot afford, or are clinically or medically ineligible for GCS. For these individuals, the surgical requirement is a complete bar to correcting their birth certificates. Transgender people who cannot satisfy the surgical requirement but do obtain a gender marker change on other identity documents (such as a passport or driver's license) will have mismatched identity documents. Moreover, each time the person presents their birth certificate, the mismatch will become apparent. This mismatch, created by the state's surgical requirement, thus compels speech by transgender people by compelling them to communicate their transgender status to strangers.

This speech will always be compelled in the case of K-12 transgender students, who are required to provide a birth certificate to register for public school and who are not eligible for GCS. These students, who retain their

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235. *See id.* at 2.

236. *See* U.S. CONST. amend. I.

237. *See* *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.").

238. *See* *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("[F]reedom of speech prohibits the government from telling people what they must say.").

First Amendment speech rights in school,<sup>239</sup> are forced to communicate that they are transgender from the first moment they interact with a school. Many transgender people, including transgender students, desire to keep the fact that they are transgender private. In fact, courts have held that one's transgender status is a type of private information that is constitutionally protected under the Due Process Clause.<sup>240</sup> Thus, forcing such disclosure, which is caused directly by the surgical requirement, violates the First Amendment right to refrain from speaking.

In addition, the First Amendment provides that individuals have a right not to speak a government message.<sup>241</sup> To find otherwise would force individuals to endorse a government message with which they disagree.<sup>242</sup> The surgical requirement is not a neutral one; by requiring GCS, the government is taking a position and making a statement on what constitutes a "real" man and a "real" woman and thus taking a position on what sex and gender mean. Many people, cisgender and transgender alike, disagree with this position and desire not to express the government's message about what defines sex and gender. Thus, the mere presence of the surgical requirement means that transgender people "are compelled to affirm a message that is inherently opposed to their identity, and their ability to communicate their disagreement with that compelled affirmation is vitiated by legal gender."<sup>243</sup> The surgical requirement thus unconstitutionally forces transgender people to "endorse the government's position as to their own gender, as well on the meaning of gender generally, through the birth certificate they must show to others."<sup>244</sup>

Because freedom of speech rights are fundamental, states must show that the surgical policies serve a compelling government interest and are narrowly tailored to meet that interest. For the reasons stated above, this

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239. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

240. See *infra* Part III.

241. See *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding students cannot be compelled to recite the Pledge of Allegiance).

242. See *Wooley*, 430 U.S. at 713 (holding that New Hampshire could not force its residents to accept the state motto on vehicle license plates; reasoning the government cannot require expression of "an ideological message by displaying it on [an individual's] private property in a manner and for the express purpose that it be observed and read by the public").

243. See Ruocco, *supra* 12, at 215; *id.* at 218 (arguing that the myriad of inconsistent gender marker change policies "constitutes an unconstitutional condition" because they compel transgender people "to choose between their bodily autonomy (i.e., avoiding unwanted surgeries or medical interventions) and their right to identity (i.e., self-defining their legal gender)").

244. See Complaint, *Ray*, *supra* note 10, at 26.

standard cannot be met.

## 2. *The Surgical Requirement Violates the Right to Expressive Conduct*

Characterizing the choice about whether to have GCS as expressive conduct under the First Amendment is another avenue for challenging the surgical requirement. Scholars have argued for this expressive conduct theory to challenge the exclusion of transgender adults and students from gender-affirming public restrooms.<sup>245</sup> The argument proceeds in three parts. First, gender expression communicates a message about a person's identity.<sup>246</sup> This is because transgender identity "communicates core elements of one's identity and is related to the free speech values of autonomy and self-realization."<sup>247</sup> Second, a transgender person's *desire* to use a gender-affirming restroom communicates a meaningful message to others about that person's identity (as would the *act* of using a gender-affirming restroom).<sup>248</sup> Third, and finally, this expressive conduct "falls within the protective umbrella of the First Amendment" such that "school officials must not improperly silence a transgender student's expressive conduct simply because the message conveyed (i.e., "I identify as a girl, even though I was born with male genitalia") makes them uncomfortable."<sup>249</sup>

This argument is grounded in U.S. Supreme Court precedent concerning expressive conduct and First Amendment rights, including those rights vis-a-vis students.<sup>250</sup> Also known as symbolic speech, expressive conduct has been held to be protected speech under the First Amendment.<sup>251</sup> Examples of protected expressive conduct include burning the American flag at a

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245. See Weatherby, *supra* note 4, at 119-28; see also Jeffrey Kosbie, *(No) State Interest in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 242-45 (2013).

246. See Weatherby, *supra* note 4, at 93; see also Kosbie, *supra* note 245, at 204 ("Gender nonconformity should be protected as speech because speakers and listeners understand the conduct as communicative.").

247. See Kosbie, *supra* note 245, at 195, 204 ("Gender nonconformity should be protected as speech because speakers and listeners understand the conduct as communicative.").

248. See Weatherby, *supra* note 4, at 93; see also Kosbie, *supra* note 245, at 243 (citing "Restroom choice is deliberate and intended to communicate a central aspect of identity: 'I am a woman', or 'I am a man.' . . . When a transgender man begins using the men's restroom, not only does his conduct communicate his gender, but he consciously chooses to do so in order to communicate his gender identity.").

249. See Weatherby, *supra* note 4, at 93.

250. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969).

251. See generally Kosbie, *supra* note 245, at 195.

protest,<sup>252</sup> engaging in a protest at a military funeral,<sup>253</sup> nude dancing,<sup>254</sup> and wearing a jacket with the phrase “Fuck the Draft” in a courthouse.<sup>255</sup>

Upon finding that a transgender student’s desire to use a gender-affirming restroom is protected expressive conduct—because (1) it constitutes symbolic speech,<sup>256</sup> and (2) those perceiving it understood it as such<sup>257</sup>—a school’s policy will then be subject to judicial scrutiny. The Court has held that when a school’s conduct is aimed at suppressing the content of the speech, “this will be an almost impossible hurdle for the school to overcome since the most exacting scrutiny will be applied.”<sup>258</sup>

In the school context, students’ expressive conduct is protected unless it impedes “the need to foster an educational atmosphere free from undue disruptions to appropriate discipline”<sup>259</sup> or the expressive conduct reasonably could lead to a “substantial disruption of or material interference with school activities.”<sup>260</sup> These standards are highly unlikely to be met, as the asserted government interests in suppressing the speech—the privacy and safety of cisgender students—have been soundly rejected by data.<sup>261</sup>

Similar arguments compel a finding that the surgical requirement violated the right to expressive speech.<sup>262</sup> Both the conduct of having surgery, as well as the conduct of *not* having surgery, have expressive qualities.<sup>263</sup> A transgender person’s decisions about how their body looks is intrinsically tied to the message they want to express about their gender.<sup>264</sup> Put another way, one’s conduct concerning one’s body embodies that person’s message

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252. See *Texas v. Johnson*, 491 U.S. 397, 405 (1989).

253. See *Snyder v. Phelps*, 131 S. Ct. 1207, 1211 (2011).

254. See *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000)

255. See *Cohen v. California*, 403 U.S. 15, 17-18 (1971).

256. See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974); see also *Johnson*, 491 U.S. at 404.

257. See *Bivens ex rel. Green v. Albuquerque Pub. Schs.*, 899 F. Supp. 556, 560-61 (D.N.M. 1995) (holding student failed to demonstrate his wearing saggy pants to express his African-American identity was understood by others); accord *Johnson*, 491 U.S. at 404.

258. See *Weatherby*, *supra* note 4, at 123 (internal citations omitted).

259. See *Bivens*, 899 F. Supp. at 559 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

260. See *Tinker*, 393 U.S. at 514.

261. See *Weatherby*, *supra* note 4, at 124 (describing the lack of disruption when transgender students are permitted to access gender-affirming restrooms).

262. See *id.* at 123.

263. See *id.* at 119.

264. See *id.* at 121.

to the rest of the world about one's gender expression and thus their lived gender.<sup>265</sup> The transgender person intends to send a message about their gender through their body and dress, and those interacting with them understand that the transgender person's body is intended to relay a message to others about that person's gender identity.<sup>266</sup> Requiring surgery to correct one's birth certificate infringes on this right to expressive conduct—the right to express one's identity through one's body, whether surgically altered or not.<sup>267</sup>

#### D. *Due Process*

The Fourteenth Amendment provides: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>268</sup> The Fifth Amendment states that “No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”<sup>269</sup> The federal government, through the Fifth Amendment, is also bound by the promise of Equal Protection.<sup>270</sup> These amendments have been held to prohibit sex discrimination and sexual orientation discrimination by the government. The surgical requirement implicates the substantive Due Process rights to liberty, dignity, and bodily autonomy, as well as the substantive Due Process right to privacy. It also implicates the promise of Equal Protection, based both on theories of sex discrimination and transgender discrimination.<sup>271</sup> Each is discussed in turn.

#### 1. *The Surgical Requirement Violates the Substantive Due Process Rights to Liberty, Dignity, Bodily Autonomy, Gender Autonomy, and Privacy*

##### a. *Liberty and Dignity*

Personal dignity and autonomy are rights of constitutional magnitude that the U.S. Supreme Court has held are grounded in the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>272</sup> In two cases addressing LGBT rights, the Court has expounded on this notion. In *Lawrence v.*

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265. *See id.*

266. *See id.*

267. *See generally* Mottet, *supra* note 12, at 424.

268. *See* U.S. CONST. amend. XIV § 1.

269. *See* U.S. CONST. amend. V.

270. *See* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that the Fifth Amendment includes an Equal Protection component applicable at the federal level).

271. *See* Mottet, *supra* note 12, at 422.

272. *See* U.S. CONST. amend. XIV.

*Texas*,<sup>273</sup> the Court held that statutory prohibitions on consensual, same-sex sodomy violated substantive Due Process.<sup>274</sup> In so holding, the Court held that individuals engaged in same-sex intimate conduct “are entitled to respect for their private lives”<sup>275</sup> and ruled that the government “cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”<sup>276</sup> In *Obergefell v. Hodges*, the Court held that the protections of the Fourteenth Amendment “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>277</sup>

Moreover, in the line of cases addressing marriage, family and reproductive rights, the Court has reinforced that individuals enjoy a constitutional interest in liberty and dignity in these kinds of personal matters.<sup>278</sup> The Court has held that “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.”<sup>279</sup> The Court continued: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>280</sup>

These cases demonstrate that when considering the promise of the Fourteenth Amendment, specifically substantive due process rights, the “Court has focused on the *affirmative* or *productive* consequences of the law in question[,]”<sup>281</sup> such that the Court will reject laws “that allow the State to submerge the individual, appropriate the individual’s means of identity-making, and affirmatively shape the individual’s life.”<sup>282</sup>

This line of cases thus stands for the principle that gay men, lesbians, and bisexual people have constitutional right to not only define their own identities vis-a-vis sexual orientation, but to live out those identities without

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273. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

274. See *id.* at 574.

275. See *id.*, at 578.

276. See *id.*

277. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015), (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

278. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992).

279. See *id.*

280. See *id.* at 851.

281. See generally *Ruocco*, *supra* note 12, at 208.

282. See *id.*

interference from the state when it comes to the daily embodiment of personal dignity, autonomy, and relationships with others that are grounded in their gay, lesbian, or bisexual identity.<sup>283</sup> It is a short line indeed to connect the Court's holdings regarding identity, dignity, and personal autonomy for LGB people to the identity, dignity, and personal autonomy for transgender people.<sup>284</sup> The formation and expression of one's gender identity forms the core of one's overall identity; thus, the representation of one's gender identity as one's legal sex is inherently and inextricably part and parcel of the right of individual autonomy to self-identify, just as the representation of one's sexual orientation is inherently and inextricably part and parcel of the right of individual autonomy to self-identify.<sup>285</sup> As one scholar notes, "gender, even more so than marital status, is a central point around which identity and interpersonal interactions are ordered. Compulsory gender identity thus 'do[es] not simply proscribe one act or remove one liberty; [it] inform[s] the totality of a person's life.'"<sup>286</sup> Another scholar has called for the recognition of a fundamental right to gender autonomy, which is recognized under international law and which is a logical extension of *Lawrence*, *Obergefell*, and the line of reproductive rights cases.<sup>287</sup>

The surgical requirement results in concrete and dignitary harms to transgender people as a result of the mismatch between their gender expression and their birth certificate.<sup>288</sup> As a result, surgical requirements "affirmatively shape the opportunities and security" of transgender Americans in a limiting fashion that is constitutionally improper.<sup>289</sup> States that restrict gender marker correction through the surgical requirement thus affirmatively—and unconstitutionally—deny transgender people the right to self-definition and autonomy as embodied in the substantive due process rights to identity, liberty, and autonomy.<sup>290</sup> As described above, none of the alleged state interests are compelling or narrowly tailored to the surgical requirement.

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283. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

284. See *id.* at 204-06.

285. See *id.* at 214.

286. See *id.* at 214 (quoting Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 747 (1989)).

287. See generally Mottet, *supra* note 12, at 424 (citing *Goodwin v. United Kingdom*, Eur. Ct. H.R. 1 (2002)).

288. See generally Ruocco, *supra* note 12, at 216.

289. See *id.* at 214.

290. See *id.*

*b. Bodily Autonomy*

The U.S. Supreme Court has issued several opinions that, taken together, stand for the proposition that there is a fundamental right to bodily autonomy, which is violated by the surgical requirement.<sup>291</sup> The Court has held that the right to refuse medical treatment is encompassed in substantive Due Process rights.<sup>292</sup> The line of cases addressing procreation and reproductive rights hold that one has a fundamental right to choose or reject parenthood and to control one's reproductive choices.<sup>293</sup> Finally, there is a substantive Due Process right to be free from sterilization.<sup>294</sup>

The surgical requirement implicates each of these rights. The coercive nature of the surgical requirement unduly burdens the right to be free from unwanted medical procedures each time a transgender person undergoes GCS, against their choosing, so that they can obtain a corrected birth certificate. Moreover, GCS results in sterilization, while "other effects on one's reproductive capacity are inherent in many sex reassignment surgeries."<sup>295</sup>

As described above, none of the alleged state interests are compelling or narrowly tailored to the surgical requirement.

*c. Privacy*

There are two types of protected privacy interests under the Fourteenth Amendment: (1) an individual's interest in avoiding disclosure of personal matters, sometimes referred to as "informational privacy"<sup>296</sup> and (2) "the interest in independence in making certain kinds of important decisions,"<sup>297</sup> sometimes known as "decisional privacy."<sup>298</sup> The informational privacy right includes the right to keep private information containing specific "details of one's personal life"<sup>299</sup> as well as information "which the individual is ordinarily entitled to retain within the private enclave where he

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291. See generally Mottet, *supra* note 12, at 424.

292. See, e.g., Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 262 (1990).

293. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 485 (1965); see also Roe v. Wade, 410 U.S. 113, 154 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

294. See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

295. See Mottet, *supra* note 12, at 424.

296. See, e.g., Bloch v. Ribar, 156 F.3d 673, 683 (6th Cir. 1998).

297. See Whalen v. Roe, 429 U.S. 589, 599 (1977); see also Nixon v. Administrator of General Services, 433 U.S. 425, 457-58 (1977).

298. See Gonzalez v. Nevares, 305 F. Supp. 3d 327, 333 (D.P.R. 2018).

299. See Scheetz v. Morning Call, Inc., 946 F.2d 202, 208 (3d Cir. 1991).

may lead a private life,”<sup>300</sup> and information containing “intimate facts of a personal nature.”<sup>301</sup>

A federal district court recently addressed the informational privacy right in the context of a challenge to Michigan’s policy for changing a gender marker on a driver’s license. In *Love v. Johnson*,<sup>302</sup> the court analyzed the transgender plaintiffs’ challenge to a Michigan policy that required providing a birth certificate with the transgender person’s corrected sex in order to change one’s sex on a drivers license. The plaintiffs contended that the surgical requirement to correct a birth certificate was onerous and unduly burdensome and that those transgender people who could not or did not desire to undertake GCS were thus forced—by the mismatch of their lived gender identity and the gender markers on their driver’s license—to divulge personal information in violation of the fundamental right to informational privacy.<sup>303</sup>

The Court held that the right to informational private is limited to “instances: (1) where the release of personal information could lead to bodily harm . . . , and (2) where the information released was of a sexual, personal, and humiliating nature.”<sup>304</sup> Moreover, the plaintiff must allege that the informational privacy asserted relates to a “fundamental liberty interest.”<sup>305</sup> The *Love* plaintiffs contended that Michigan’s driver’s license policy subjected them to bodily harm because it forced them to reveal their transgender status to third-party strangers, which in turn put them in harm’s way.<sup>306</sup> The Court accepted those allegations to deny the defendant’s motion to dismiss.<sup>307</sup> In so holding, the Court noted that the Second Circuit has also held that transgender people have a constitutional right to keep their transgender status private as a matter of medical confidentiality.<sup>308</sup> The *Love* Court concluded that the policy, by requiring transgender people to reveal that they are transgender, “directly implicates their fundamental right to

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300. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980).

301. *See id.*

302. *See Love v. Johnson*, 146 F. Supp. 3d 848, 851 (E.D. Mich. 2015).

303. *See id.* at 853; *see also* *K.L. v. Div. of Motor Vehicles*, Case No. 3AN-11-05431 CI, 2012 WL 2685183, at \*3 (Alaska Super. Ct. Mar. 12, 2012).

304. *See Johnson*, 146 F. Supp. 3d at 853 (citing *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1060 (6th Cir. 1998)); *see also* *Bloch v. Riber*, 156 F.3d 673, 683 (6th Cir. 1998).

305. *See id.* (quoting *Bloch*, 156 F.3d at 683).

306. *See id.* at 854

307. *See id.* at 855.

308. *See id.* (citing *Powell v. Schriver*, 175 F. 3d 107, 111 (2nd Cir. 1999)).

privacy.”<sup>309</sup>

Having found a fundamental right that was implicated by the policy, the Court next turned to the question of whether the policy furthered a compelling state interest in a way that was narrowly tailored.<sup>310</sup> The Court rejected both of the state interests offered by the defendant: (1) “maintaining accurate state identification documents” to “promote effective law enforcement” and, (2) ensuring “that the information on the license is consistent with other state records describing the individual.”<sup>311</sup> It reasoned that the policy of requiring an amended birth certificate was not the least restrictive means by which to achieve the state’s asserted goals.<sup>312</sup>

Decisional privacy protects “the interest in independence in making certain kinds of important decisions.”<sup>313</sup> This category is limited to “matters relating to marriage, procreation, contraception, family relationships, childrearing, and the like.”<sup>314</sup> At least one court has found that this right extends to one’s transgender status, holding that

[T]here are few areas which more closely intimate facts of a personal nature” than one’s transgender status . . . . The decision of who to tell and when to relate such information is an emotionally sensitive area fraught with serious implications for that individual. . . . Disclosing that one is transgender involves a deep personal choice which the government cannot compel, unless disclosure furthers a valid public interest.<sup>315</sup>

These cases thus suggest that the surgical requirement violates the right to both types of privacy. Because the surgical requirement is a bar for many transgender people, particularly K-12 students due to cost, personal preference, medical ineligibility, or the like, most transgender people in states that require surgery before correcting a birth certificate are left with mismatched identity documents. The mismatch between the gender marker on the birth certificate and other identity documents, or the mismatch between *all* identity documents and the transgender person’s everyday gender presentation, forces disclosure of information that is protected by the fundamental right to privacy, whether it is characterized as informational privacy or decisional privacy. This is particularly true for K-12 students, who have fewer identity documents than adults and who are required to

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309. *See id.* at 856.

310. *See id.*

311. *See id.*

312. *See id.*

313. *See Whalen v. Roe*, 429 U.S. 589, 600 (1977).

314. *See Gonzalez v. Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018).

315. *See id.* (internal citations omitted).

present a birth certificate to enroll in public school. At the first moment that a transgender K-12 student enters the public-school system, they are forced to disclose this highly sensitive personal information that is protected by the fundamental right to privacy.

## 2. *The Surgical Requirement Violates Equal Protection Based on Sex and Based on Transgender Status*

An Equal Protection claim is made out when the state treats one group of people differently than another, similarly-situated group of people in a discriminatory manner.<sup>316</sup> In the context of correcting the birth certificates, the relevant groups are transgender people, for whom surgery is required before obtaining a correct birth certificate, and cisgender people, who have accurate birth certificates with no surgical requirement.<sup>317</sup>

The analysis of the Equal Protection claim will depend on how the groups (classifications) are characterized; if the classification is held to be a sex-based one, then courts will apply intermediate scrutiny, pursuant to which the state will have to demonstrate that the classification is justified by an important government interest—an “exceedingly persuasive” justification—that is substantially related to the surgical requirement.<sup>318</sup> Several courts have held that classifications based on transgender status are, in fact, sex-based classifications.<sup>319</sup>

Other courts have held that transgender people, *by definition*, constitute a quasi-suspect class.<sup>320</sup> The U.S. Supreme Court considers four factors when deciding whether a group will be considered a quasi-suspect class: that the group (1) has been “historically subjected to discrimination,” (2) has a defining characteristic bearing no “relation to ability to perform or contribute to society,” (3) has “obvious, immutable, or distinguishing characteristics,” and (4) is “a minority or is politically powerless.”<sup>321</sup> Courts have recognized that there are persuasive arguments as to each of these four requirements<sup>322</sup>

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316. See generally *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

317. See Mottet, *supra* note 12, at 422-23.

318. See *United States v. Virginia*, 518 U.S. 515, 571-72 (1996).

319. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

320. See, e.g., *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1144-45 (D. Idaho 2018); see also *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 719-21 (D. Md. 2018); *Evancho, v. Pine-Richland Sch. Dist.*, 237 F. Supp.3d 267, 288, 288 (W.D. Pa. 2017); see also *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t. of Educ., et al.*, 208 F. Supp. 3d 850, 873-74 (S.D. Ohio 2016).

321. See *Barron*, 286 F. Supp. 3d at 1144 (internal citations omitted).

322. See Mottet, *supra* note 12, at 423, n.200.

and some courts have so held.<sup>323</sup>

If the classification is not held to be sex-based, then a court will be tasked with deciding what level of scrutiny transgender people, as a class, receive under the equal protection framework. If a court holds that transgender people are *not* members of a quasi-suspect class or a suspect class, then rational basis review applies. As noted above, none of the state interests proffered to support the surgical requirement satisfy this standard, either because they are simply not legitimate state interests or, if they are legitimate, the “fit”—the connection between the surgical requirement and the state interest—is not strong enough.

#### *E. State Antidiscrimination Law*

Public accommodation antidiscrimination laws in nineteen states and the District of Columbia explicitly include gender identity as a protected class;<sup>324</sup> another two states have interpreted their public accommodation laws to include protection based on gender identity.<sup>325</sup> Of the twenty-one states and the District of Columbia offering state-law protections from discrimination based on gender identity, three have a surgical requirement to correct a birth certificate—Iowa, Maine, and Michigan.<sup>326</sup> In these states, these antidiscrimination statutes provide another mechanism through which to challenge the surgical requirement.

In such a challenge, the argument would be that the surgical requirement is *per se* discrimination against transgender people in violation of the state antidiscrimination law because the surgical requirement only applies to transgender people seeking to correct the gender marker on their birth certificates. This is plainly discrimination based on gender identity, which is prohibited under the state law.

#### *F. Informed Consent & Biomedical Ethics*

While not binding on courts or legislatures, the bioethical principle of

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323. See, e.g., *Barron*, 286 F. Supp. 3d at 1144-45; *M.A.B.*, 286 F. Supp. 3d at 719-2221; *Evancho*, 237 F. Supp. 3d at 288; *Bd. of Educ. of the Highland Local Sch. Dist.*, 208 F. Supp. 3d at 873-74.

324. See, *Equality Maps: Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, [hereinafter *Nondiscrimination Laws*], [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) (last visited July 22, 2018) (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, Rhode Island, Oregon, Vermont, and Washington).

325. See *id.* (Michigan and New York).

326. See MOVEMENT ADVANCEMENT PROJECT, *supra* note 13.

informed consent underlies the legal concept of informed consent,<sup>327</sup> a legal doctrine that “changes what would otherwise be a tort and violation of constitutional rights into a legitimate medical intervention.”<sup>328</sup>

One scholar has persuasively argued that the surgical requirement amounts to state-sponsored coercion that vitiates the informed consent doctrine.<sup>329</sup> She contends that the tort concept of informed consent is illuminated by the constitutional Due Process guaranty of privacy, and that the alleged state interests in the medical model—preventing fraud, a reluctance to assist persons with a mental disorder, and the belief that the birth certificate is an historical record—do not justify violating the informed consent doctrine.<sup>330</sup>

### G. *The Unconstitutional Conditions Doctrine*

The unconstitutional conditions doctrine provides that “even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional rights.”<sup>331</sup> When considering an individual right, the unconstitutional conditions doctrine holds that “on at least some occasions receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the Constitution.”<sup>332</sup> The doctrine thus embodies the anti-totalitarian ethic that frames our entire constitutional democracy because “[f]orcing citizens to choose between accepting government

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327. See Silver, *supra* note 6, at 503-04 (citing that “[T]he doctrine of informed consent serves four fundamental bioethical norms: respect for autonomy, nonmaleficence, beneficence, and justice.”).

328. See *id.* at 502.

329. See *id.* at 510-18.

330. *Id.* 514-15, 517-18 (“The intrusion into individual liberty significantly outweighs such concerns. Genital surgery is highly invasive and concerns itself with an inherently private choice intrinsically linked to identity. On balance, the governmental interests are simply not compelling enough to justify such an extreme invasion into the right to consent to or refuse medical treatment.”); see also Harper Jean Tobin, *Against the Surgical Requirement of Change of Legal Sex*, 38 CASE W. RES. J. INT’L L. 393, 427 (2007) (“Bodily integrity is universally recognized as a fundamental human right, . . . [A] state violates that right by forcing individuals to undergo invasive medical procedures. The state, however, should not force an individual to forgo one basic right to enjoy another. This is precisely what states do whenever they make surgery a prerequisite for gender recognition.”).

331. See Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6-7 (1988).

332. See *id.*

benefits (or escaping harm) and exercising constitutional rights equates to a denial of those rights.<sup>333</sup> These kinds of conditions alter the balance of power between the government and individuals and diminish the individual's ability to maintain self-governing autonomy.

The doctrine has two parameters: first, the benefit (here, legal reclassification of sex via correcting a birth certificate) "may not be directly barred by independent constitutional grounds, nor can it be one that the government is required to provide."<sup>334</sup> Second, the doctrine is only triggered when a waiver of a constitutional right that implicates personal autonomy (like the right to privacy) is required.<sup>335</sup> Building on the notion that the surgical requirement is coercive, Professor Silver reasons that it may be an unconstitutional condition:

The right to refuse medical treatment is encompassed within the right to privacy, and has been characterized as a liberty right. Such a right is an autonomous choice that is normally within the constitutionally protected discretion of an individual. Thus, the right to decide what medical treatments are required to express gender, and the right to refuse treatments unwanted by a patient, is a constitutionally protected right.<sup>336</sup>

She then contends that the surgical requirement is an indirect burden on the constitutional right to refuse medical treatment, which should be analyzed within the unconstitutional conditions doctrine as if it were a direct burden on that right, triggering strict scrutiny.<sup>337</sup> The surgical requirement would fail strict scrutiny because a "rigid system that compels highly invasive and permanent body alteration is unlikely to be considered 'narrowly tailored' or the least restrictive method of protecting whatever governmental interest is at stake."<sup>338</sup>

Another scholar frames the unconstitutional conditions dilemma in this context as pitting the choice of unwanted surgery against the right to define one's own identity.<sup>339</sup> Because constructing identity, including gender identity, is the central, defining characteristic of one's autonomy, the "Constitution's anti-totalitarian principle prohibits state interjection into

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333. *See generally* Ruocco, *supra* note 12, at 217.

334. *See generally* Silver, *supra* note 6, at 519.

335. *See id.* at 520.

336. *See id.*

337. *See id.*

338. *See id.* ("[N]o governmental interest promoted by the medical model is as compelling as the interest in life, public safety, or the ethical integrity of the medical profession.").

339. *See* Ruocco, *supra* note 12, at 218.

identity-formation.”<sup>340</sup> Put another way, compelling transgender people to be undergo surgery in order to get a correct birth certificate is totalitarianism.<sup>341</sup>

#### *H. Title IX, Transgender Students, and Corrected Birth Certificates*

As has been described above, the surgical requirement is particularly burdensome for K-12 transgender students and their birth certificates are uniquely important in the school context.<sup>342</sup> As long as schools continue to rely on a transgender student’s birth certificate to decide which sex-segregated facilities that student will be allowed to use, the surgical requirement will continue to harm transgender students by erecting a total bar for the students to satisfy the school’s restroom-based-on-birth-certificate policy. For these reasons, eliminating the surgical requirement for correcting birth certificates is of vital importance not only to transgender adults, but also to transgender K-12 students. Eliminating the surgical requirement—and permitting the correction of a birth certificate by court order or letter from a treating physician or therapist stating that correcting the birth certificate is part of the appropriate treatment, along with an acknowledgement of an understanding that correcting the birth certificate operates as a change of legal sex for all purposes—would allow transgender students to avoid lengthy, costly, and emotionally grueling fights with school districts both in the schoolhouse and the courthouse.

Because of the unique importance of birth certificates for K-12 transgender students, the next section advocates for the creation of an intentional and strategic coalition between the gender marker correction movement and the Title IX and transgender students movement. Failure to work cooperatively in a strategic coalition likely will increase what Professor Marie-Amelie George has identified as the “LGBT disconnect.”<sup>343</sup>

#### IV. MITIGATING THE LGBT DISCONNECT THROUGH FORMAL IDENTITY

*Now that that major hurdle of securing fundamental constitutional rights for queer adults has been secured, it is time to refocus part of the “gay agenda” on our own children, ensuring their fundamental constitutional*

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340. *See id.* at 218-19.

341. *See id.* (“Defining gender is at the core of autonomy: individuals must be able to choose their identity or opt out of the gender system. Otherwise, they are submerged beneath the State.”).

342. *See generally* Vincent J. Samar, *The Right to Privacy and the Right to Use the Bathroom Consistent with One’s Gender Identity*, 24 DUKE J. GENDER L. & POL’Y 33, 57 (2016).

343. *See generally* George, *supra* note 1, at 503.

*rights are enshrined by public schools systems serving a democratic . . . republic.*<sup>344</sup>

*A. The Strategic Benefits of a Coalition*

An intentional coalition between the gender marker correction and the Title IX and transgender student movements provides benefits to both groups. Children lack political power. They cannot vote. They have limited rights.<sup>345</sup> Politicians are thus not beholden to their child-constituents as they are to the adult constituents.<sup>346</sup> For the Title IX and transgender student movement, the gender marker correction movement thus brings a political agency that is lacking in the Title IX movement because the latter movement is largely led by adult transgender people. These adults may vote, lobby, organize, disseminate information, rally, and engage in political and legal processes with relative ease.<sup>347</sup> The adults that comprise the gender marker correction movement thus bring a voice to transgender children toward the common goal of removing the surgical requirement for correcting birth certificates. They give transgender children a political boost.

Transgender adults are some of the most marginalized in our society. A majority of Americans do not know a transgender person.<sup>348</sup> Many Americans harbor disgust, animus, or fear toward transgender adults. Conservative politicians fuel these fears and biases by using campaign materials that pathologize and criminalize transgender lives. Children, in contrast, are largely seen differently by American society—as vulnerable, in need of protection, as pure and innocent. They are often cute; their stories can be more powerful than the stories of adults by pulling on the listener’s heartstrings. Adults generally do not fear children.<sup>349</sup> This common

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344. See Murphy, *supra* note 69, at 98.

345. See, e.g., Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 12-15 (1994) (asserting that of course, supportive cisgender parents may use the political process to advocate for their transgender children, but even then—as a child’s issue—lawmakers may continue to give the issue short shrift).

346. See *id.*, at 17 (“Children’s claims to our care and concern are not childish or inferior, of course, but so long as they serve no politically powerful adult purpose, those claims remain unvoiced.”).

347. While transgender adults may not form a politically powerful bloc given their generally marginalized status, they certainly have more access to political and legal processes than transgender children do.

348. See George, *supra* note 1, at 573.

349. *But cf.* Sandra E. Garcia, *Black Boys Feel Less Safe in White Neighborhoods, Study Shows*, N.Y. TIMES (Aug. 14, 2018) (noting that a glaring exception to this generality is the fear that many white people harbor about African-American boys).

perception of the American child benefits transgender children. It is much more difficult for a politician to malign a six-year-old transgender child seeking to socially transition than it is to pathologize and criminalize transgender adults, particularly if that child tells a story of bullying and harassment at school. The children of the Title IX movement may thus give the gender marker correction movement a “reputation boost.”

Simply put, it is likely that these two groups will be stronger and more successful working together to overturn the surgical requirement to correct birth certificates. This is true even if the number of transgender children for whom a corrected birth certificate is clinically appropriate is small;<sup>350</sup> their mere presence in the coalition will amplify the messages of both groups more powerfully and highlight more clearly the challenges faced by all transgender people.

However, one important piece of the strategy is still missing; getting the national LGBT-rights organizations getting on board. That issue is discussed below.

*B. Collaboration and Coalition-Building: Avoiding Further Disconnect in the LGBT Civil Rights Movement*

Professor George argues that there is an “LGBT disconnect,” a dilemma facing the LGBT civil rights movement in which “lesbian, gay, and transgender rights are sufficiently disconnected that many Americans are willing to accept the former (LG) and not the latter (T), and yet the two are integrated enough that one can be deployed against the other.”<sup>351</sup> Her extensive survey of historical sources, from the local to the national levels, taken over several decades reveals that while the national LGBT rights organizations formally and publicly include transgender rights on their agendas, “their strategies unintentionally created an internal hierarchy of interests, with gender conforming gays and lesbians at the top.”<sup>352</sup> Giving primacy to the legal goals of gender conforming gays and lesbians—such as marriage equality and access to the military—has resulted in legal victories and thus enhanced freedoms for this small slice of the LGBT community, namely heteronormative lesbians and gay men.<sup>353</sup> But the victories came at a cost to the transgender segment of the community.

The strategy to win the rights for gays and lesbians was one of assimilation—for example, making gay and lesbian couples come across

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350. *See supra* Part I.

351. *See generally* George, *supra* note 1, at 506.

352. *See id.*

353. *See id.* at 506-07.

“just like” middle-class heterosexual couples, or making gay and lesbian soldiers come across as just as patriotic as heterosexual soldiers.<sup>354</sup> These assimilationist strategies do not translate well to the fight for transgender people’s rights; as a result, these issues often were left by the wayside of the movement.<sup>355</sup> Thus, although the “LGBT” acronym is well known to the general population, most Americans are knowledgeable about and tolerant of (if not comfortable with) gays and lesbians, but not transgender people.<sup>356</sup> This discomfort with transgender people bleeds over into the continuing cultural and legal battles over lesbian and gay issues such that opponents of gay and lesbian rights now use the fact that the “T” is part of “LGBT” to leverage transgender issues—most typically, the restroom issue—to fight not only against “T” rights, but to dismantle the rights won for the “G” and the “L.”<sup>357</sup> As a result, everyone loses.<sup>358</sup>

Professor George uses the passage of H.B. 2, North Carolina’s “bathroom bill,” as one example of the disconnect in action: it was expressly targeted at transgender people, but it also repealed all local ordinances that offered wage and other labor protections.<sup>359</sup> Another example is the repeal of Houston’s anti-discrimination ordinance, which provided protection to access to public accommodations based on gender identity *but also* on a host of other protected classes, including sexual orientation, pregnancy, and the like.<sup>360</sup> Professor George concludes that “the disconnect between Americans’ support for gay and lesbian rights on the one hand, and transgender rights on the other, has been extremely harmful to the LGBT movement as a whole.”<sup>361</sup> In essence, anti-gay and lesbian people, who are also anti-transgender, can achieve the results of “throwing the baby out with the bathwater” when they leverage society’s transphobia to pass laws that explicitly harm transgender people *and also* to pass laws that harm gays and lesbians.

After describing the disconnect, Professor George connects it to social movement theory, which posits there are two levels of decision-making: goals and strategies, where both offer potential for dissent *within* a

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354. *See id.* at 5.

355. *See id.* at 533, 558, 570-71.

356. *See id.* at 561.

357. *See id.* at 510, 526.

358. *See id.* at 507.

359. *See id.* at 505-06, 517.

360. *See* Justin Wm. Moyer, *Why Houston’s gay rights ordinance failed: Fear of men in women’s bathrooms*, WASH. POST (Nov. 4, 2015).

361. *See* George, *supra* note 1, at 512.

movement.<sup>362</sup> Goals are chosen at the outset and reflect the normative choices of a movement.<sup>363</sup> Strategy is the second level, which is chosen after the goals are set, and is another site of intra-movement conflict.<sup>364</sup> Strategic decisions include “whether to seek legislative, administrative, or judicial remedies, or later issues of what remedies to accept.”<sup>365</sup> The assimilationist goals-and-strategy approach by national LGBT rights groups created the LGBT disconnect we see today: while the movement’s stated goals have included transgender rights since 2007, its strategies ended up leaving transgender rights largely by the wayside.<sup>366</sup>

Professor George offers three possible approaches for national LGBT rights organizations to mitigate the disconnect: “abandoning transgender rights from their mandate, pursuing an assimilationist transgender rights strategy, and/or transforming their tactics to emphasize all LGBT individuals’ gender non-conformity.”<sup>367</sup>

This Article asserts that two segments of the LGBT rights movement—that segment pursuing an end to the surgical requirement and that segment seeking access to gender-affirming restrooms for K-12 transgender students—have an opportunity to be intentional about the overlap of their causes and thus to be aligned in both their goals and strategies. Building on George’s notion of disconnect, national LGBT organizations have the opportunity to band together with these two segments of the community, with the intended result of mitigating the disconnect. The former segment seeks easier access to identity documents for transgender people most often, though not always,<sup>368</sup> for transgender adults; the latter segment seeks access for transgender students to gender-affirming sex-segregated facilities in K-12 schools. The “L,” “G,” and “B” segments of the community, as represented by national LGBT organizations in particular, are at a crossroads concerning the future of the movement; they must face the disconnect head-on and make decisions about how to mitigate it.<sup>369</sup>

For all the reasons explained herein, the synergies between these two

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362. *See id.* at 558.

363. *See id.* (using the examples of the Civil Rights movement choosing integration over uniform education funding and the LGBT rights movement choosing to seek marriage equality rather than seeking to have non-marital relationships recognized, as examples of such goals that were contested within their respective movements).

364. *See id.*

365. *See id.* at 558-59.

366. *See id.* at 507, 558.

367. *See id.* at 575.

368. *See e.g.* Complaint, *B.D.*, *supra* note 10, at 2.

369. *See* George, *supra* note 1, at 573-75.

segments of the transgender rights movement cry out for a strategic alliance to strive toward a common goal that benefits both. This Article further agrees with George that gay men, lesbians, and bisexual people will benefit if national LGBT-rights organizations actually implement strategies to achieve the stated goal of transgender rights,<sup>370</sup> and as a result contends that national organizations should work with these two segments of the community to develop strategies to achieve the goal shared by these two segments—the abolishment of the surgical requirement to obtain a corrected birth certificate.

Mitigating the disconnect by truly partnering with these two segments of the community has the potential to benefit LGB people as well as the two specific segments of the community at which the effort is aimed.<sup>371</sup> For example, such partnering likely will help LGB people who assert claims of employment discrimination under Title VII.<sup>372</sup> While that statute does not explicitly protect against discrimination based on sexual orientation or gender identity, some courts have held that LGBT litigants may state a claim under the law based on the “sex stereotyping” theory set forth in *Price Waterhouse v. Hopkins*.<sup>373</sup> However, some courts have limited claims to lesbians who appear “butch” and gay men who appear “effeminate”—in other words, “only those who physically manifested their sexual orientation” can state a Title VII claim.<sup>374</sup> Including transgender people in the LGBT-rights movement’s strategies thus “would help produce a thicker set of rights by challenging anti-LGBT assumptions and stereotypes, especially norms about how men and women should be.”<sup>375</sup>

This Article advocates for use of the assimilationist approach, pursuant to which LGBT-rights groups would highlight the ways that transgender people are similar to their cisgender counterparts. In the context of the surgical requirement and birth certificate issues, the assimilationist approach would mean that “LGBT rights lawyers . . . would lobby for simple procedures that permit transgender individuals to change their gender designation from male to female, and vice versa, without undergoing genital surgery.”<sup>376</sup>

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370. *See id.* at 563-64.

371. *See id.* at 563 (explaining that gays and lesbians benefit, albeit arguably indirectly, from including transgender rights in the movement: “[I]ncluding transgender individuals would help produce a thicker set of rights by challenging anti-LGBT assumptions and stereotypes”).

372. *See id.* at 562-64.

373. *See id.* at 562 (citing *Price Waterhouse v. Hopkins*, 490 U.S.228 (1989)).

374. *See id.*

375. *See id.* at 563.

376. *See id.* at 390-91 (“Lawyers following the transformative strategy would argue

Concretely, the movement could utilize images and interviews with transgender people, both adults and children, who have chosen not to undergo GCS but whose gender presentation is unmistakably aligned with their gender identity. Images of such non-GCS transgender people who fully “pass” in living their gender identity resonate strongly with cisgender people; these transgender people who look like “real” men and “real” women appeal the cisgender people’s gender norm expectations (i.e., to the gender binary). Such images thus make it more understandable why non-GCS transgender people should have access to a birth certificate amendment process that does not require surgery, and thus access to gender-affirming restrooms without a surgical requirement.<sup>377</sup>

There are, of course, normative and legal consequences of utilizing the assimilation approach. The potential negative consequences of the assimilation strategy—in which lesbian and gay people would stress that discrimination against them is, at its core, based on *their* gender non-conformity<sup>378</sup>—is the risk that “emphasizing gender non-conformity erodes some of the boundaries between male and female” in ways that increase cultural anxiety about LGBT rights writ large, thereby putting recent gains as risk of repeal.<sup>379</sup> Furthermore, by advocating through a trans normative lens, the assimilationist approach erases genderqueer people and their legal obstacles, as well as reinforces the false notion of a gender binary.<sup>380</sup>

The positive impact of the assimilationist strategy is that it has the potential to unite the movement in that we are “stronger together,” have access to more resources to fight these two particular battles, and to send a message to the broader society about the place of transgender people, and in particular transgender children, in our communities and laws. Finally, advocating for transgender students can make the lives of transgender students *and* gay, lesbian and bisexual students better, thus benefiting *all* of the letters of the LGBT label:

By advocating for transgender students’ right to use the bathroom consistent with their gender identity, the discordant LGBT community can find success and equality both for these students and for the broader LGBT public. This issue goes beyond

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that many identity documents do not need gender markers, and thus advocate for their removal. Should that fail, their next best solution would be a gender-neutral option for their clients.”)

377. *See id.* at 580-81 (describing the transnormative assimilationist approach taken by LGBT-rights organizers fighting a “bathroom bill” in Alaska).

378. *See id.* at 581.

379. *See id.* at 588-89.

380. *See id.* at 571-72.

permitting transgender students to use the proper bathroom and goes toward the need to secure safety in unsupervised spaces for all LGBT students in schools.<sup>381</sup>

In sum, the disconnect described by George may be mitigated by national LGBT rights organizations increasing their attention to and support of this particular transgender rights issue—abolishing the surgical requirement for gender marker correction on birth certificates. By helping to create, and then by joining, the coalition between these two segments of the transgender population, the “L,” “G,” and “B” segments of the community will facilitate a greater understanding of who transgender people are, as well as make transgender rights more intelligible to the general population. As a result of this increased understanding and who transgender people are and why this particular type of discrimination against them is harmful and misplaced, the mainstream LGBT rights movement could thus help normalize transgender people. That normalization, in turn, makes it more difficult for opponents of equality to leverage anti-transgender rhetoric to harm not only transgender people but also gay, lesbian, and bisexual people.

### C. “Formal Identity” Is a Beneficial Common Goal

In her article *Identity and Form*, Professor Jessica Clarke posits that recent legal battles implicating identity claims, including claims by transgender people to use gender-affirming sex-segregated facilities, might be resolved by adopting what she calls “formal identity”—the process by which the law would recognize legal sex by utilizing the execution of formalities. A transgender person’s self-identified gender identity would be reflected on a corrected birth certificate as long as that person fulfilled the required formalities.<sup>382</sup>

She proposes formal identity as a means to remedy the shortcomings of the two predominant models of identity: the ascriptive model, which uses biology and social measures that are considered objective to ascribe identity, and the elective model, through which individuals self-identify.<sup>383</sup> She borrows the concept of formalities, which include both the documentary and the ceremonial,<sup>384</sup> from the field of contract law, specifically from *Consideration and Form* by Lon Fuller.<sup>385</sup> In that classic writing, Fuller set forth three functions of legal formalities—evidentiary (proving the

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381. See generally Jereb, *supra* note 12, at 586-87.

382. See generally Clarke, *supra* note 18, at 750.

383. See *id.* at 751.

384. See *id.* at 750.

385. See *id.* at 751 (citing Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941)).

underlying claim's validity), cautionary (providing warning to the party about the gravity of their claim), and channeling ("ensuring that everyone understands and can organize their behavior around a clear distinction").<sup>386</sup> The formalities proposed by Clarke, building on Fuller, are "practices used to render a legal status an official designation[,]"<sup>387</sup> such that formal identity is "one that comes into being through the execution of a formality by the parties laying claim to a particular identity."<sup>388</sup>

In the context of birth certification correction for transgender people, Clarke explains:

Consider, for example, a requirement that a person designated male at birth change her birth certificate if she wishes for the law to recognize her as a woman. This requirement serves the evidentiary purpose of providing ready proof of her sex in the event of future controversies. It serves the cautionary purpose of ensuring that she has fully considered her choice and is serious enough about it to follow the requisite bureaucratic procedure for changing a birth certificate. And it serves the channeling purpose of making clear that if she fails to change her birth certificate, the law will continue to recognize her as a man rather than a woman.<sup>389</sup>

Courts and other state actors, such as public school officials, utilize what Clarke calls "identity determination doctrines—the legal frameworks used . . . to determine whether a particular group status . . . should be attributed to an individual."<sup>390</sup> In most contexts, including the context of transgender K-12 students, school officials rely on the student's birth certificate as the controlling identity determination doctrine to resolve the student's legal sex,<sup>391</sup> which in turn informs the school official's decision about which restroom the transgender student will be permitted to use. While the birth certificate produced at birth is not the type of formal identity imagined by Clarke (because it is ascribed at birth based on the allegedly objective criterion of external genitalia), the corrected birth certificate that is the focus of this Article is encompassed in Clarke's notion of formal identity because it argues that once corrected through administrative formalities that

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386. *See id.*

387. *See id.* at 769.

388. *See id.* at 770.

389. *See id.* at 751-52.

390. *See id.* at 754.

391. *See generally* Allison S. Bohm et al., *Challenges Facing LGBT Youth*, 17 *GEO. J. GENDER & L.* 125, 143 (2016) (noting that four state athletic associations "require transgender students to participate on the sports team that aligns with the sex listed on their birth certificate.").

do not include surgical requirements, the corrected birth certificate should be accepted without pause or challenge as the certificate holder's legal sex.<sup>392</sup> This is the evidentiary function of the birth certificate formality in action.<sup>393</sup> Constituting legal sex through formal identity makes the determination of legal sex simple and straightforward for officials tasked with determining legal sex for the purposes of access to sex-segregated facilities.<sup>394</sup>

While there certainly are downsides to adopting the formal identity model, particularly the potential obstacles based on class<sup>395</sup> and transphobia,<sup>396</sup> as well as the potential for legitimization of gender as binary,<sup>397</sup> this Article agrees with Clarke's proposal for formal identity and its benefits and thus adopts it, though not to the exclusion of other models. It builds on Clarke's proposal by arguing that the administrative formalities required for birth

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392. See Clarke, *supra* note 18, at 769 ("A theory of formal identity might support enforcement of sex designation changes."). This Article takes Clarke's position further to argue that formal identity through corrected birth certificates *should* be dispositive to the determination of legal sex.

393. See *id.* at 751.

394. See *id.* at 799 ("When recognized by the law, formal sex may allow . . . transgender individuals to achieve recognition and challenge the equation of certain biological traits with gender identities, norms, and stereotypes. Administrative and even medical treatment requirements for changes to sex designations might be understood as formalities, intended to ensure that individuals consider their decisions with caution, and to channel them into one of two binary identities, male or female, enabling sex-segregated institutions to readily categorize them without having to engage in debates about ascriptive versus elective meanings.").

395. See *id.* at 752-53 (describing the ways in which "requiring formality may perpetuate systems of inequality linked to identity status"); *id.* at 812 ("[R]ules requiring surgery or hormone therapy as prerequisites to birth certificate changes have operated to commodify sexual identity for many transgender persons unable to afford medical treatment.").

396. See generally Clarke, *supra* note 18, at 817 (noting that "[s]elective formalization may be discriminatory when those who do not meet ascriptive standards do not have the option to formalize their identities. When the formality is a state-issued license, the government may establish barriers that require individuals to meet certain ascriptive definitions before they may apply.") Clarke also illustrates the potential for discrimination with an example involving a transgender man who is required to have a mastectomy before being permitted to correct his birth certificate and notes that in this example, "ascriptive definitions play a leading role and formality is backstage. Formality merely moves the question of ascriptive meaning one level back, to the licensing authority. Yet the selectivity of these formalities may be forgotten in legal discussions." *Id.*

397. See *id.* at 827 (quoting Spade, *supra* note 12, at 738) ("Professor Spade has argued that 'administrative classification of identities does invisible work of naturalizing categories of classification, inviting the question: Why is gender identification taken for granted as a legitimate domain of governance?'").

certificate corrections should not, and as a matter of constitutional law cannot, include a surgical requirement. Instead, the only requirement needed to trigger the administrative formality of correcting a birth certificate should be a court order *or* letter from a doctor, psychologist, or other treating professional that states that correcting the person's birth certificate is a necessary part of the person's transition, which is a clinically necessary part of the person's gender dysphoria treatment.<sup>398</sup> Additionally, if executing the formalities of correcting one's birth certificate is made mandatory before becoming a transgender person's legal sex for all purposes, access to the formalities process must be ensured for all transgender people. This need for access for all is necessary so that historical barriers to GCS (and other surgeries), such as socioeconomic status and geographic location, are not by the adoption of the formal identity model.

In sum, the formal identity model advocated here is one that does not include a surgical requirement and one that ensures access to the model's formality requirements.<sup>399</sup> This version of formal identity offers the advantages of relative simplicity, administrative ease, and clarity, along with the three advantages articulated by Fuller and supported by Clarke.<sup>400</sup> The potential challenges, of course, are actually ensuring access to courts or clinicians for all transgender people who want to execute the formalities and countering arguments that the process may be *too* easy, such that people may seek to change their birth certificates more than once, which may lead to confusion.<sup>401</sup> With regard to the concern about multiple changes and the resulting confusion, available data show that such situations are rare, particularly for adolescents.<sup>402</sup> Even though the situation might be more common for prepubescent youth who correct their birth certificates,<sup>403</sup> the goal of accuracy in public health records should take precedence over fear that there could be a subsequent correction. Moreover, the SOC recommend that *all* gender-questioning youth be supported by parents and caregivers regardless of whether those youth ultimately identify as transgender.<sup>404</sup> Offering the opportunity, through the formal identity model, for these

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398. *See generally* CAL. HEALTH & SAFETY CODE § 103430 (West 2018) (requiring an affidavit from a doctor that correcting the birth certificate is “clinically appropriate treatment for the purpose of gender transition . . .”).

399. *See* Clarke, *supra* note 18, at 795 (noting some states' rejection of surgical requirements).

400. *See id.* at 807 (asserting that formal identity does have advantages).

401. *See id.* at 835.

402. *See* WPATH SOC, *supra* note 16 at 12.

403. *See supra* Part I.

404. *See generally* Singal, *supra* note 55.

children to correct their birth certificates before puberty so they can explore social transition at school would lead to healthier mental health outcomes for gender-questioning youth—those who ultimately transition and those who do not. The same can be said for the youth whose gender identity journey ends with an alignment of their body with their sex assigned at birth: permitting them to correct their birth certificate a second time will lead to positive mental health outcomes, which in turn means more healthy adults able to contribute to and engage with larger society.<sup>405</sup>

*D. A Note on the Scope of this Proposal*

A note on the scope and reach of this Article: while it proposes a narrow solution to the issue of restroom use that will have utility for some, but not all, transgender K-12 students,<sup>406</sup> that solution is not intended to be the singular solution, nor is it offered as the ideal solution. Scholars have persuasively argued that self-identification, standing alone, should be sufficient to determine legal sex and thus to correct a birth certificate,<sup>407</sup> a position with which I agree. Other scholars have made convincing arguments that because gender as a category is fluid and unstable,<sup>408</sup> the use of gender markers by the administrative state should be eradicated or limited, or that birth registration and birth certificates should be disaggregated<sup>409</sup>—positions that I also agree with.<sup>410</sup> All of these arguments and proposals offer the benefit of increasing liberty by increasing individual agency and autonomy or by dismantling a false binary that limits the freedoms of everyone, not just transgender people.<sup>411</sup> However, I consider these arguments to be more aspirational than pragmatic given the current legal and political climate. While I wholeheartedly support legal scholarship articulating aspirational

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405. *See generally id.*

406. *See* Part I.D.1 and 3.

407. *See, e.g.,* Matambanadzo, *supra* note 12, at 242-44.

408. *See* Ruocco, *supra* note 12, at 206.

409. *See* Appell, *supra* note 12, at 404.

410. *See* Ruocco, *supra* note 12, at 219-21 (arguing that the state “must eliminate or limit the use of legal gender” based on the constitution’s promise of anti-totalitarianism and that the state must accept self-identification of gender identity, as it currently does for self-identified religious beliefs); *see also* Wipfler, *supra* note 12, at 523-24 (arguing for the elimination of sex as a category in government documents).

411. *See* Appell, *supra* note 12, at 377-78 (“[T]he birth certificate’s promotion and reification of gender is among its fundamental foci . . . . There is no place (box) for ambiguity. In this way, the birth certificate constructs sex as biological, fixed, and binary. There are only two sexes from which to choose and a person can only select one. The certificate fails to acknowledge any other sex categories, such as intersex, undecided, androgynous, or ambiguous.”).

projects grounded in feminist,<sup>412</sup> queer,<sup>413</sup> and critical theories,<sup>414</sup> and have engaged in such projects myself,<sup>415</sup> this Article is decidedly pragmatic—it proposes a practical solution situated within an existing and deeply entrenched understanding and acceptance of (1) gender as binary and (2) the execution of formalities to create legal rights, obligations, and categories. By proposing a solution grounded in popular (albeit it cramped and contrary to science) understandings of gender and the functioning of the administrative state, this Article’s goal is to provide more immediate relief for K-12 transgender students while the important, more aspirational theoretical and doctrinal work continues. It largely proposes an assimilationist and trans normative approach.<sup>416</sup> This Article is thus meant to supplement, not supplant, the parallel projects dismantling the legal gender binary and promoting self-identification as legally dispositive for the recognition of a person’s legal sex.

#### CONCLUSION

There is much at stake, both individually for these transgender students and for our shared commitment to formal equality. The literal lives of transgender students hang in the balance. Moreover, the resiliency of our foundational commitment to equality, privacy, and liberty is at stake and must be fortified and reinforced by exposing the constitutional flaws of both birth certificate policies and interpretations of Title IX that exclude protections for transgender students. The way the state channels rights and protections to animate notions of liberty and equality is of paramount importance on both structural and individual levels. This Article has explored how these two legal and social institutions—birth certificates and Title IX—are tied together and attempt to help illuminate the path to victory for both.

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412. See, e.g., Matambanadzo, *supra* note 12, at 234.

413. See Appell, *supra* note 12, at 404 (“This commitment to binary sex identification . . . helps to create and facilitate heteronormativity in a variety of ways.”).

414. See *id.* at 362 (“[T]he birth certificate is also deeply connected to contested identity sites—including sex, race, gender, sexual identity, marriage, parentage, reproductive technologies, childhood and adulthood . . . . Thus, the birth certificate certifies birth registration, but it also creates identity and belonging according to normative terms cloaked in scientific discipline.”); *id.* at 370 (“[T]he birth certificate enforces heteronormativity for the child and the family, even in families headed by same-sex couples, and helps to perpetuate the construction of race and ethnicity as natural categories.”).

415. See Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 270 (2001).

416. See George, *supra* note 1, at 579-82.