

**RUNNER-UP OF THE NATIONAL LGBT
BAR ASSOCIATION MICHAEL
GREENBERG WRITING
COMPETITION**

Strengthening the Trans Franchise

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I. INTRODUCTION22

II. VOTER ID LAWS: WHAT THEY DO AND WHY THEY DO IT25

 A. *The Current Landscape of Voter ID Laws* 25

 B. *A History of Voter ID and Its Challengers* 29

III. THE POWER OF BIRTH CERTIFICATES32

IV. VOTER IDs AND THE TRANS FRANCHISE.....34

 A. *Name Match*..... 34

 1. Name Amendments on IDs.....35

 2. Name Match Requirements and Voter ID Laws40

 B. *Gender Marker Match* 41

 1. Gender Marker Amendments on IDs41

 2. Gender Marker Match Requirements and Voter ID
 Laws.....43

 C. *Photo ID Matches*..... 45

V. STRENGTHENING THE FRANCHISE BY EASING THE BURDEN.....48

 A. *Challenging Voter ID Restrictions* 48

 1. Change Through the Courts.....48

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2.	Change Through the Legislature	48
B.	<i>Challenging Restrictive Gender Marker Change Laws</i>	49
1.	Legislating Access to Gender Marker Changes.....	49
2.	Community-Based Legal Aid for Individuals.....	50
V.	CONCLUSION	51

I. INTRODUCTION

In 2014, when Oliver, a trans masculine¹ resident of Maryland, went to vote for the first time, a polling worker turned him away because he presented as masculine but still had an “F” gender marker² on his ID.³ Oliver had legally changed his name, but had not changed his gender marker because it was an “expensive process.”⁴ He was forced to wait longer than an hour while election officials determined whether he would be allowed to vote.⁵ Eventually, Oliver cast his ballot because, as he knew

1. “Trans masculine” is an identity that falls under the umbrella of transgender identities. Gabriel Arkles, *Improving Law School For Trans* and Gender Nonconforming Students: Suggestions For Faculty*, 17 CUNY L. REV. F. 84, 85 n.1 (2014) “‘Transgender’ is a term that emerged in the 1990s to describe people who experience discrimination or bias because they identify or express gender differently than what is traditionally associated with the sex they were assigned at birth.” Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 733 n.12 (2007). The terms “trans” and “transgender” are used interchangeably as umbrella terms that “encompass many non-normative identities.” Shelby Hanssen, *Beyond Male or Female: Using Nonbinary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law*, 96 OR.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, 287–88 (2017). This includes both binary transgender people and nonbinary transgender people. *Id.* at 287. While “binary” transgender people identify as males and females, “the term ‘nonbinary’ describes any gender identity that does not squarely fit into the male or female binary classifications.” *Id.* This Article will use the term “transgender” to include both binary and non-binary transgender people. When distinguishing between binary and non-binary genders, this Article will refer to them as such.

2. This Article will use the umbrella abbreviation “ID” to refer to state-issued personal identification documents and records. This includes many different types of documents, including birth certificates, driver’s licenses, passports, Social Security cards and documents, military IDs, federally recognized tribal IDs, and state university IDs. *Photo Identification*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/passports/how-apply/identification.html> (last visited Mar. 1, 2020). A “voter ID” refers to state law requirements that voters present state-issued IDs in order to vote.

3. Julie Moreau, *Strict ID Laws Could Disenfranchise 78,000 Transgender Voters, Report Says*, NBC NEWS (Aug. 17, 2018, 1:05 PM), <https://www.nbcnews.com/feature/nbc-out/strict-id-laws-could-disenfranchise-78-000-transgender-voters-report-n901696>.

4. *Id.*

5. *Id.*

and argued, there is no legal requirement in Maryland that an individual's gender marker match their gender presentation at the polls.⁶

In 2018, Sade Viscaria was turned away at a Vermont polling place despite having amended her gender marker on her IDs to match her gender identity.⁷ According to Viscaria, the poll worker “would not accept her gender marker” on various IDs she showed them.⁸ Viscaria was refused a ballot because the individual poll worker didn't believe she was a woman.⁹

In North Carolina that same year, Natalee Fisher was afraid to vote because she had not changed her name or gender marker on her ID.¹⁰ She chose not to change her ID because, in North Carolina, “[t]he process was both expensive and invasive.”¹¹ Fisher decided to go to the polls in masculine clothing to avoid scrutiny and shame over the mismatch between her gender and her IDs.¹²

These stories are not isolated experiences for transgender voters. They reflect growing concern about voting access amongst transgender voters and national LGBTQ+ organizations.¹³ The Williams Institute, the leading research center on sexual orientation and gender identity law and public policy, estimates that “965,350 transgender adults will be eligible to vote in the 2020 general election.”¹⁴ Approximately 892,400 transgender adults live in states that require voters to show up in person

6. *Id.*

7. Glenn Garner, *Trans Woman Turned Away from Polls in Vermont*, OUT MAGAZINE (Nov. 6, 2018, 7:41 PM), <https://www.out.com/news-opinion/2018/11/06/trans-woman-turned-away-polls-vermont>.

8. *Id.*

9. *Id.*

10. Caleb Gayle, *Strict Voter ID Laws Threaten the Franchise of Trans Americans*, PACIFIC STANDARD MAGAZINE (June 28, 2019), <https://psmag.com/social-justice/strict-voter-id-laws-threaten-the-franchise-of-trans-americans>.

11. *Id.*

12. *Id.*

13. See *#VotingWhileTrans*, NAT'L CTR. FOR TRANSGENDER EQUAL. ACTION FUND, <https://transformthevote.org/voting> (last visited Apr. 18, 2020) [hereinafter *#VotingWhileTrans Guide*]; Jordan Cozby & Ryan Thoreson, *Trans Voters Will Be Disenfranchised in 2020 Unless We Take Action*, ADVOCATE (June 26, 2019, 6:31 AM), <https://www.hrw.org/news/2019/06/26/trans-voters-will-be-disenfranchised-2020-unless-we-take-action>; Kathryn O'Neill & Jody L. Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2020 General Election*, WILLIAMS INST. (Feb. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Feb-2020.pdf>.

14. O'Neill & Herman, *supra* note 13, at 2. This study relies on data from the National Center for Transgender Equality's U.S. Transgender Survey. Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey: Executive Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. ACTION (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>. As this report came out before the COVID-19 pandemic, its numbers do not include changes made by states to allow for expanded mail-in voting. See *infra* note 18.

with voter ID to cast a ballot.¹⁵ Further, around 500,000 of those voters live in states that have a voter ID requirement, meaning voters must present state-issued ID to prove their identity at the polls.¹⁶ Approximately 260,000 of those transgender voters have no ID that accurately reflects their name or gender.¹⁷ This statistic raises a critical question for transgender voters across the country: How can someone prove their identity at the polls when none of their state-issued IDs accurately reflect who they are?¹⁸

While scholars have addressed the disparate racial and socioeconomic impact of voter ID laws on one hand, and the legal obstacles to transgender people to obtain accurate identity documents on the other, this Article adds to the existing scholarship by connecting these

15. O'Neill & Herman, *supra* note 13, at 2.

16. *Id.* at 8–9; *see infra* Section II.B for the current state of voter ID laws.

17. O'Neill & Herman, *supra* note 13, at 2.

18. It is difficult to say exactly how states will administer elections in 2020 in light of the national pandemic caused by the COVID-19 virus. *COVID-19 and Elections*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/state-action-on-covid-19-and-elections.aspx> (last visited Apr. 23, 2020) (“Election officials and policymakers are giving full attention to possible mitigation strategies [for COVID-19] The goal is to address both the practical and legal questions around running elections while also decreasing the potential for spreading the virus. Much of the responsibility lies with local jurisdictions or the executive branch. However, policymakers are thinking ahead as well. Legislation is just beginning to be introduced to address how elections can be well-executed even as public gatherings are discouraged in many locations.”); *see also* Adam Brewster, *At Least 7 COVID-19 Cases Tied to In-Person Voting in Wisconsin*, CBS NEWS (Apr. 21, 2020, 4:36 PM), <https://www.cbsnews.com/news/at-least-7-covid-19-cases-tied-to-in-person-voting-in-wisconsin/>. There is an increased push to expand vote-by-mail options in states across the nation. *See, e.g.*, Nicole Hansen, *Keep Calm and Carry on Voting: How to Vote by Mail During the Coronavirus Outbreak*, ACLU (Mar. 11, 2020), <https://www.aclu.org/news/voting-rights/keep-calm-and-carry-on-voting-how-to-vote-by-mail-during-the-coronavirus-outbreak/>. There is also significant resistance to vote-by-mail options from conservative groups, state legislatures, and, as of April 2020, President Donald Trump himself. Jonathan Eisley & Maggie Miller, *Pandemic Sparks Partisan Brawl Over Voting by Mail*, HILL (Apr. 9, 2020, 6:00 AM), <https://thehill.com/homenews/campaign/491862-pandemic-sparks-partisan-brawl-over-voting-by-mail>; Jason Hancock & Bryan Lowry, *Missouri GOP Leaders Reluctant to Make Voting Changes in Response to COVID-19 Outbreak*, KAN. CITY STAR (Apr. 10, 2020, 5:20 PM), <https://www.kansascity.com/news/politics-government/article241912941.html>; Elizabeth Findell, *In Texas a Battle Brews Over Voting by Mail Amid Coronavirus*, WALL ST. J. (Apr. 16, 2020, 7:40 PM), <https://www.wsj.com/articles/in-texas-a-battle-brews-over-voting-by-mail-amid-coronavirus-11587037108>; Sam Levine, *Trump Urges Republicans to ‘Fight Very Hard’ Against Voting by Mail*, GUARDIAN (Apr. 8, 2020, 10:30 AM), <https://www.theguardian.com/us-news/2020/apr/08/trump-mail-in-voting-2020-election>. Lacking the gift of foresight, this Article can only discuss the normal circumstances for voting. Under normal circumstances, both the Williams Institute and this Article assume that transgender voters “would face fewer barriers when voting by mail since any seeming inconsistencies in regard to name, gender marker, and personal appearance would not be challenged by poll workers,” but, in states that do not have mail-only elections, “transgender voters may desire to or need to use physical polling locations.” O'Neill & Herman, *supra* note 13, at 4.

two strands. This Article investigates, documents, and describes the particular challenges that transgender voters face because of state voter ID requirements. This Article argues that barriers created by discretionary voter ID laws are exacerbated by state restrictions on amending name and gender on state-issued identity documents, which make obtaining accurate state-issued ID expensive, burdensome, or even impossible for transgender people. These policies may intersect and significantly increase the risk of transgender voters being turned away at the polls, forced to vote with provisional ballots, or scared off of attempting to vote in the first place. The disenfranchisement of broad swaths of transgender voters may be the result. While the nuances of voter ID policy advocacy are largely beyond the scope of this Article, it concludes by proposing that the disenfranchisement of transgender voters may be remedied through state-by-state policy changes and expansive, community-based, low-cost legal support for transgender people correcting their identity documents.

Part II describes the history and current state of voter ID laws. Part III discusses the importance of birth certificates as “breeder documents” and their role in obtaining accurate IDs. Part IV discusses the primary threats that voter ID and barriers and ID amendment pose to transgender voters, with specific emphasis on legal name, gender marker, and photo requirements on voter IDs. This Article concludes by providing potential institutional and community-based solutions for reducing or eliminating barriers that effectively disenfranchise transgender voters.

II. VOTER ID LAWS: WHAT THEY DO AND WHY THEY DO IT

A. *The Current Landscape of Voter ID Laws*

To understand how voter ID laws affect transgender voters, we must first look to what voter ID laws are and what they require. In general, voter ID laws require voters to present state-issued ID at the polls in order to cast a ballot.¹⁹ States, as opposed to the federal government, enact and enforce voter ID laws. ID requirements thus differ significantly from state to state. Five states run their elections entirely by mail; some of these states have statutory voter ID requirements, but because almost no voters vote in person, the laws have little effect.²⁰ Sixteen states require in-person voting,

19. Eugene D. Mazo, *Finding Common Ground on Voter ID Laws*, 49 U. Mem. L. Rev. 1233, 1234 (2019).

20. Table 18: States With All-Mail Elections, Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> (last visited May 6, 2020) (listing Colorado, Hawaii, Oregon, Utah, and Washington as all-mail election states).

but do not require voters to present state-issued IDs in order to vote at the polls, unless they are a first-time voter.²¹ Thirty-four states require voters to present state-issued ID at the polls in order to vote.²² Voting rights scholars and policy advocates generally categorize voter ID laws based on two different qualities:²³ (1) whether the law requires a person to show photo ID at polls, and (2) whether the law is “strict,” meaning that it requires a person without acceptable identification at the polls to take additional steps to vote.²⁴

Of the thirty-four states that require voter ID, twenty states require the ID to include a photo.²⁵ The so-called “photo ID” states are often broken into two categories: non-strict and strict photo IDs. In non-strict photo ID states, “[a]t least some voters without acceptable identification have an option to cast a ballot that will be counted without further action on the part of the voter.”²⁶ In this instance, unacceptable ID might be an unacceptable photo ID like a college student ID, or an ID without a photo, like a birth certificate or Social Security card. Voters with these IDs might have their identities verified by a poll worker who knows them, by signing an affidavit of identity, or by address verification.²⁷ Others have to sign provisional ballots, but need not follow up on the ballot for it to be counted.²⁸ In strict photo ID states, on the other hand, voters without photo IDs must both vote with a provisional ballot *and* take additional steps to

Colorado, Hawaii, Utah, and Washington are listed as voter ID states because in-person voters must present ID, but the vast majority of voters in these states vote by mail.

21. *Voter Identification Requirements Voter ID Laws*, NAT’L CONF. OF STATE LEGISLATURES (Aug. 25, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>. [hereinafter *NCSL Voter ID Laws*].

22. *Id.* (listing Wisconsin, Mississippi, Indiana, Kansas, Georgia, Tennessee, Florida, Hawaii, Idaho, Louisiana, Michigan, Rhode Island, South Carolina, South Dakota, Texas, and Alabama as voter ID states).

23. The National Conference of State Legislatures (“NCSL”) marks the blurred lines between strict and non-strict, photo and non-photo. *Id.* For example, “[s]ome might call Alabama’s law a *strict photo identification* law, because voters who don’t show a photo ID will generally be asked to cast a provisional ballot and then must bring the required ID to an election office by 5 p.m. on Friday after Election Day. However, there is an alternative: two election officials can sign sworn statements saying they know the voter.” *Id.* Similarly, “South Carolina and North Carolina have a photo ID requirement, but this requirement is waived in select circumstances.” *Id.* A full list of these blurred lines can be found at the NSCL website.

24. *Id.*; see also Mazo, *supra* note 19, at 1240–41.

25. *NCSL Voter ID Laws*, *supra* note 21.

26. *Id.*

27. *Id.*

28. *Id.*

verify their identity for their vote to be cast.²⁹ Seven states are categorized as strict photo ID states.³⁰

Table 1. Voter ID States by Category³¹

	Photo ID	Non-Photo ID
Strict	Georgia, Indiana, Kansas, Mississippi, Tennessee, Virginia, Wisconsin	Arizona, North Dakota, Ohio
Non-strict	Arkansas, Alabama, Florida, Hawaii, Idaho, Louisiana, Michigan, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas	Alaska, Colorado, Connecticut, Delaware, Iowa, Kentucky, Missouri, Montana, New Hampshire, Utah, Washington, West Virginia

No state law requires that a voter’s gender presentation at the polls must match the gender presentation in their photo IDs or the gender marker on their ID.³² While a number of LGBTQ+ agencies argue that “[g]ender discrepancies on IDs are not a valid reason to deny a regular ballot,”³³ poll workers in voter ID states have broad discretion to refuse a ballot based on perceived discrepancies.³⁴ This includes discrepancies between the person voting and the picture on voter ID. Some states require only that voter ID “contain[] the . . . photograph of the voter.”³⁵ Others require that poll workers “verify that any photograph appearing on that document reasonably resembles the elector.”³⁶ Voter ID statutes do not provide guidelines, factors, or limits for poll workers to consider when determining whether an ID sufficiently conforms to the statutory

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*; see also #VotingWhileTrans Guide, *supra* note 13.

33. #VotingWhileTrans Guide, *supra* note 13.

34. See, e.g., Deuel Ross, *Pouring Old Poison into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 377 (2014). Ross is Senior Counsel for the NAACP Legal Defense and Educational Fund. *Staff Biography for Deuel Ross*, LDF, <https://www.naacpldf.org/about-us/staff/deuel-ross> (last visited Feb. 28, 2021).

35. KAN. STAT. ANN § 25-2908(h)(1).

36. WIS. STAT. § 6.79(2)(a).

requirement; rather, poll workers have almost unbridled discretion to decide whether or not the voter ID is sufficient proof of the voter's identity.³⁷ Regardless of the exact language, poll workers in photo ID states must scrutinize differences between a person's appearance and the photograph on their ID.³⁸ In this context, "discretion" becomes code for gender policing, often forcing transgender voters to conform to gender identity and gender presentation stereotypes to access their right to vote.³⁹

Some states explicitly require a match between the name on an ID and the name on the voter registry. Of the thirty-five states that require voter ID, three states impose explicit name-match requirements,⁴⁰ and sixteen specifically require a person's legal name to appear on the voter ID.⁴¹ For example, Indiana's voter ID law explicitly requires that an individual's "name conforms to the name in the individual's voter registration record."⁴² In Oklahoma, a person's voter ID must similarly show a name that "substantially conforms to the name in the [voter] registry."⁴³ Poll workers' "broad discretion" to unilaterally turn a voter away if the poll worker does not believe the voter's ID sufficiently verifies their identity applies to name matches as well.⁴⁴ If an individual has legally changed their name but has not updated the registry to reflect this, they must file a letter to the Secretary of State and vote with a provisional ballot.⁴⁵ As Deuel Ross notes, "[t]o the extent there are no further

37. Ross, *supra* note 34, at 383-84.

38. *See id.* at 383.

39. *See* DEAN SPADE, *NORMAL LIFE* (Duke Univ. Press 2015) (discussing the ways that "the administration of gender norms impacts trans people's lives and how administrative systems in general are sites of production and implementation of racism, xenophobia, sexism, transphobia, homophobia, and ableism under the guise of neutrality") [hereinafter Spade, *NORMAL LIFE*].

40. OKLA. STAT. tit. 26, § 7-114; IND. CODE § 3-5-2-40.5(a)(1); WIS. STAT. §§ 5.02(16c), 6.79(2)(a).

41. *See NCSL Voter ID Laws*, *supra* note 21.

42. IND. CODE § 3-5-2-40.5(a)(1).

43. OKLA. STAT. tit. 26, § 7-114 (A)(1).

44. *See* Ross, *supra* note 34, at 384; Stephen Ansolabehere, *Access Versus Integrity in Voter Identification Requirements*, 63 N.Y.U. ANN. SURV. AM. L. 613, 621 (2007) ("In practice, poll workers have considerable discretion in the application of ID rules: they might ignore the rule altogether, or they might ask for identification even when the law does not require it or when they are forbidden from doing so."); Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1233 (2005) ("The lack of specific standards leaves discretion in the hands of local election officials and poll workers, and may result in the dissimilar treatment of similarly situated individuals from county to county . . .").

45. OKLA. STAT. tit. 26, § 7-114 (B)(3) ("A voter casting a provisional ballot as provided in this section who has legally changed his or her name, but has not updated the name on the voter registry, may note this fact on the affidavit and submit a form prescribed by the Secretary of the State Election Board to update his or her name. In such a case, and where the requirements of

standards, Indianan poll workers are left with extensive discretion” to refuse or accept ID based on whether they think the listed name “conform[s].”⁴⁶ For these reasons and others, voter ID laws are regularly challenged for being both facially discriminatory and discriminatory as applied. To understand the history of these challenges, we must look to how and why voter ID laws were enacted.

B. *A History of Voter ID and Its Challengers*

Voter ID laws arose largely after the “chaotic” 2000 presidential election, when “millions of eligible voters were turned away from the polls because administrative errors caused their names to be omitted from the registration rolls.”⁴⁷ As part of the Help America Vote Act (HAVA), a sweeping national election reform bill that emerged from the aftermath of the 2000 presidential election, Congress mandated that all states “require all first-time, in-person voters who register by mail to present . . . [valid ID] . . . with the voter’s name and address on it” at the polling place.⁴⁸ Republican-controlled state legislatures followed by enacting even stricter photo ID voting requirements.⁴⁹ In 2000, just eleven states had voter ID requirements, but that number was up to thirty-five by 2012.⁵⁰ Legislatures allegedly enacted these laws to limit voter fraud,⁵¹ although there is little evidence that such fraud occurs or has ever occurred.⁵²

Since they were enacted, voter ID laws have depressed voter turnout and disproportionately disenfranchised people of color and people living in poverty.⁵³ Obtaining a state-issued ID is expensive; requiring specific

Section 4-117 of this title are satisfied, the provisional ballot shall be deemed to meet the requirements of subparagraph a of paragraph 2 of this subsection.”).

46. Ross, *supra* note 34, at 383.

47. *Id.* at 377; Wendy R. Weiser, *Are HAVA’s Provisional Ballots Working?*, BRENNAN CTR. FOR JUST. AT NYU SCH. OF L. (Mar. 29, 2006), https://www.eac.gov/sites/default/files/document_library/files/Weiser-Are-HAVAs-Provisional-Ballots-Working.pdf.

48. Ross, *supra* note 34, at 377.

49. *See id.* at 378–79.

50. *Id.* at 364.

51. *See id.* at 377–80.

52. *See id.*; *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUST. AT NYU SCH. OF L. (Jan. 31, 2017), <https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth>; Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUST. AT NYU SCH. OF L. (2007), https://www.brennancenter.org/sites/default/files/2019-08/Report_Truth-About-Voter-Fraud.pdf; Sean Morales-Doyle & Rebecca Ayala, *There’s Good Reason to Question Texas’ Voter Fraud Claims*, BRENNAN CTR. FOR JUST. NYU SCH. L. (2019), <https://www.brennancenter.org/our-work/analysis-opinion/theres-good-reason-question-texas-voter-fraud-claims>.

53. Ross, *supra* note 34, at 364 (“In considering [the impact of voter ID laws], scholars and courts are largely focused on just three of the potentially discriminatory effects of voter ID laws: (1) that people of color are less likely to own acceptable forms of ID than white people; (2) that

IDs at the polls imposes a significant cost on voters.⁵⁴ This cost disproportionately affects poor people, Black, Latinx, and Native American people, and people in rural areas who have less access to government offices that provide state-issued IDs.⁵⁵ Voter ID laws also allow for disparate treatment of people by government officials. Because there are essentially no “checks to prevent or redress capricious enforcement practices by individual election officials or private partisan groups,”⁵⁶ these facially neutral laws give poll workers the “explicit or de facto discretion to decide whether a person may vote.”⁵⁷

Rather than being turned away, voters who cannot present acceptable voter ID have to vote on a provisional ballot.⁵⁸ Provisional ballots were another “one of the centerpieces” of HAVA.⁵⁹ Provisional ballots were implemented as a fail-safe for voters whose names are accidentally scrubbed from the “official list of eligible voters for the polling place,” and for voters who “an election official asserts . . . [are] not eligible to vote.”⁶⁰ When not on the voter registration roll, unable to show acceptable voter ID, or otherwise challenged by poll workers, a voter can cast a provisional ballot, which is then kept aside until after the election.⁶¹ Typically, a group of local elections officials will determine whether each provisional ballot is eligible and should be cast.⁶²

Provisional ballots are a common remedial process in voter ID states. Thirty-six states allow voters to cast provisional ballots if they do not have

these laws depress voter turnout; and (3) that the cost, time, and other burdens associated with obtaining acceptable ID fall hardest on people of color.”); Erin A. Penrod, *Disenfranchisement 2.0: Recent Voter ID Laws and the Implications Thereof*, 14 U. ST. THOMAS L.J. 207, 213 (2018) (“Recent voter ID laws are modern iterations of historical disenfranchisement laws designed to prevent black and other minority Americans from voting.”); Theodore R. Johnson & Max Feldman, *The New Voter Suppression*, BRENNAN CTR. FOR JUST. NYU SCH. L. (2020), <https://www.brennancenter.org/our-work/research-reports/new-voter-suppression> (“Many also claim that [voter ID] laws impose little burden because everyone has the requisite ID—but the reality is that millions of Americans don’t, and they are disproportionately people of color.”); Jessica A. González, *New State Voting Laws: A Barrier to the Latino Vote?*, CONG. HISP. CAUCUS INST. (Apr. 15, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2060460 (concluding that Latino communities are “especially vulnerable” to restrictive voting laws).

54. Ross, *supra* note 34, at 364.

55. *Id.* at 364.

56. Ross, *supra* note 34, at 383-84; *see also* Ansolabehere, *supra* note 44, at 621; Tokaji, *supra* note 44, at 1233.

57. Ross, *supra* note 34, at 382-83.

58. Mazo, *supra* note 19, at 1241.

59. Weiser, *supra* note 47, at 1.

60. Help America Vote Act of 2002 (“HAVA”), 42 U.S.C. § 15482(a) (2002).

61. *Provisional Ballots*, NAT’L CONF. OF STATE LEGISLATURES (Oct. 15, 2018), <https://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx>.

62. *Id.*

acceptable voter ID at the polls.⁶³ If a voter casts a provisional ballot because they do not have acceptable voter ID, some states require voters to provide additional evidence of their identity to have their provisional ballot cast.⁶⁴ Other states allow the ballot to be cast as it is.⁶⁵ There is no steady number for what percentage of provisional ballots are cast. In the 2008 election, ten states counted at least seventy-five percent of the provisional ballots cast.⁶⁶ In the same election, seventeen states counted fewer than forty-five percent of provisional ballots.⁶⁷ Since 2006, roughly seventy-nine percent of provisional ballots were cast in midterm elections, while only sixty-nine percent were cast in presidential election years.⁶⁸

While federal courts consistently find that voter ID laws are facially nondiscriminatory,⁶⁹ there is statistical and anecdotal evidence that they are administered in a racially discriminatory manner.⁷⁰ Scholars criticize voter ID laws for creating financial and administrative barriers that make it more difficult for low-income people, people living in rural areas, and people living on Native American reservations to vote.⁷¹ No organization has studied the *actual*, rather than hypothetical, number of transgender voters affected by this policy.⁷² Because no such data exist, this Article must rely on the Williams Institute's report on the number of transgender voters who could be affected by voter ID laws and anecdotal data from

63. *Id.*

64. *See supra* notes 20–21.

65. *See supra* notes 20–21.

66. Liz Kennedy, *Millions to the Polls: Provisional Ballots*, DEMOS (Feb. 18, 2014), <https://www.demos.org/policy-briefs/millions-polls-provisional-balloting>.

67. *Id.*

68. *EAVS Deep Dive: Provisional Ballots*, U.S. ELECTION ASSISTANCE COMM'N, (June 7, 2016), <https://www.eac.gov/documents/2018/06/07/eavs-deep-dive-provisional-ballots>.

69. Notably, the Supreme Court upheld Indiana's voter ID law in *Crawford v. Marion C'ty Elec. Bd.*, 553 U.S. 181, 203 (2008). The Court found that when voting rights are subjected to "severe restriction[s]" the regulation must face strict scrutiny, "[b]ut when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Crawford*, 553 U.S. at 190. The Court found that "detering and detecting voter fraud" was a legitimate interest, and subjected the law to a less exacting form of scrutiny, despite the fact that neither party presented the Court with any incidents of in-person voter fraud in Indiana prior to the law's enactment. *Id.* at 191, 195–96.

70. Ross, *supra* note 34, at 377–85.

71. *Id.* at 364, 396.

72. The Williams Institute study looks at the number of transgender voters *potentially* affected by this policy, i.e. the number of self-reporting transgender people who live in states with voter ID laws compared to the number of transgender people in those states who have accurate forms of ID that would be accepted at the polls. *See supra* notes 14–17 and accompanying text. The study does not collect qualitative or quantitative data regarding the number of transgender voters turned away at the polls in these states based on their ID.

news sources to understand the impact of voter ID laws on transgender voters. When considered together, data on the number of potentially affected voters, the number of transgender people who have limited or no access to accurate identification, and anecdotal evidence of discrimination by poll workers demonstrate that voter ID laws poses a risk to transgender voters.

Before discussing this risk in more detail, we will look to the process by which the state creates IDs and the process by which people access IDs, as these processes underlie voters' ability to access accurate IDs to present at the polls.

III. THE POWER OF BIRTH CERTIFICATES

To understand the complicated administrative process for obtaining and amending state-issued IDs, we look first to birth certificates.⁷³ While birth certificates have been used for hundreds of years, they were not a routine administrative device for recording live births in the United States until 1915.⁷⁴ All U.S. states were recording births for state administrative record-keeping by 1933.⁷⁵ While the Department of Health and Human Services manages the collection and publication of vital statistical information for the country, states manage the distribution and collection of birth certificates.⁷⁶ Thus, state law controls the form of birth certificates, access to birth certificates, and birth certificate amendments.⁷⁷

One of the critical pieces of information that birth certificates provide is a person's legal name given at birth.⁷⁸ Birth certificates also "establish the initial gender designation for other governmental identity

73. Scholars like Dean Spade, Lisa Mottet, and Kyle Velte have written extensively about the history of birth certificates, birth certificate amendments, and the ways administrative requirements reinforce social barriers and enact violence on transgender people. This Article relies heavily on their work. For a more comprehensive analysis of IDs and gender, see Spade, *supra* note 1; Spade, *NORMAL LIFE*, *supra* note 39; 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); Kyle C. Velte, *Mitigating the "LGBT" Disconnect: Title IX's Protection of Transgender Students, Birth Certificate Correction Statutes, and the Transformative Potential of Connecting the Two*, 27 AM. U.J. GENDER SOC. POL'Y & L. 29 (2019).

74. Spade, *supra* note 1, at 764.

75. *Id.* at 764–65.

76. *Id.* at 765.

77. *See id.* at 765.

78. Mottet, *supra* note 73, at 391.

documents.”⁷⁹ Birth certificates are “breeder documents,”⁸⁰ meaning the vital information on a birth certificate is used to fill in information on subsequent state-issued IDs.⁸¹ The information on a person’s birth certificate is carried over to other vital records, including drivers’ licenses, Social Security documentation, passports, and school records.⁸²

More and more, the state uses information on a person’s birth certificate to make decisions about that person’s life, including decisions about education, insurance, pensions, military eligibility, and more.⁸³ These documents are also used to confirm a person’s identity in all aspects of life—when pulled over for running a red light, when getting on a plane, and, in thirty-five states, when filling out a ballot.⁸⁴ As Professor Dean Spade notes:

Over the past forty years, increasing numbers of identity document issuing agencies, such as departments of health, DMVs, and the SSA, have created policies or practices allowing individuals to change the gender marker on their documents and records from “M” to “F” (male to female) or “F” to “M” (female to male). These policies emerged from a growing awareness of the existence of a population of people, currently labeled “transgender,” who live their lives identifying as and expressing a different gender than the one assigned to them at birth. Recognizing the social and economic difficulties faced by those whose lived expression of gender does not match their identity documentation, state and federal agencies have over time created a variety of policies aimed at allowing gender marker change on documents commonly used to verify identity.⁸⁵

To the extent that the information on IDs does not align with a person’s gender identity, these documents “fasten[] the hapless individual in an identity not their own.”⁸⁶ The ability to amend IDs to include the correct name and gender marker makes “identity-verification”⁸⁷ easier for transgender people, as this process allows their lived identities to align

79. *Id.* at 392.

80. *Id.* at 392 n.72 (“In fact, birth certificates and driver’s licenses are both referred to as “breeder” documents because once a person had these forms of identification, other identity documents can be created, with birth certificates being the primary breeder document.”).

81. *Id.* at 391.

82. *Id.*

83. Spade, *supra* note 1, at 765–66. These decisions include access to educational opportunities like school sporting teams, what public bathroom an individual may use, eligibility for combat, enrollment in the draft, what jail or prison the state places a person in, and more.

84. Ross, *supra* note 34, at 364.

85. Spade, *supra* note 1, at 733–34.

86. 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, 242 (2015).

87. Spade, *supra* note 1, at 743.

with the ones on their IDs. Undergoing an “ethics-minded analysis of the creation and impact of . . . systems of classification,” Spade finds that, for many, ID amendments are costly and burdensome administrative processes that bar transgender people from many aspects of daily life.⁸⁸

These barriers influence innumerable aspects of transgender people’s lives, including their ability to access housing, education, public accommodations, employment, and healthcare, to name just a few.⁸⁹ One of these is the right to vote.⁹⁰ Based on statutory requirements for voter ID laws discussed above, three aspects of voter ID laws create particular barriers to a free and fair franchise for transgender voters in the United States: (1) the name on an ID; (2) the gender marker on an ID; and (3) the photo on an ID, in states with photo ID requirements. This Article considers each in turn.

IV. VOTER IDS AND THE TRANS FRANCHISE

A. *Name Match*

There are a number of voting-related concerns related to the name listed on a person’s ID. One common conflict occurs when the name listed on the voter registry does not line up with the name on the ID a voter provides at the polls. For trans voters, poll workers have a number of ways to invalidate voter ID: a poll worker might turn them away because the name on their ID does not match their voter registration,⁹¹ or the names on their two forms of required ID do not match one another. It could also arise from poll workers reading gender into a name. If a poll worker assumes a name corresponds to a certain gender, and they do not perceive the voter

88. *See id.* at 744, 747 (describing state and federal gender marker amendment laws as “an elaborate matrix of policies that significantly and directly concern the classification of a set of people whose economic participation, and consequently, political power, is curtailed by those very policies.”).

89. *See id.* at 749, 776.

90. *See, e.g.,* #VotingWhileTrans Guide, *supra* note 13.

91. North Dakota is an exception to this rule, as it does not require voter registration. *When Do Eligible Voters Register for an Election?*, ND.GOV, <https://vote.nd.gov/PortalListDetails.aspx?ptlhPKID=79&ptlPKID=7> (last visited Feb. 28, 2021). North Dakota does, however, require voter ID to prove a voter’s eligibility. N.D. CENT. CODE § 16.1-05-07. The statute provides that, “poll clerks shall require the individual to show a valid form of identification with the information required under section.” *Id.* The ID must show the voter’s legal name, a current North Dakota address, and the voter’s date of birth. *Id.* If a voter does not have an ID with this information, they can use government documents, checks, or utility bills to prove their identity. *Id.* While a mismatch might not occur between the name on an ID and on the voter registry, it may still occur between the name on an ID and that on supplemental proof of identity.

as being that gender, the poll worker might not accept the ID as valid identification.⁹²

The potential harm is twofold. First, a trans person could be turned away from the polls because they cannot provide what poll workers consider sufficient verification of their identity. It is not difficult to imagine this situation: A trans woman who cannot afford to change her name legally presents a poll worker with her driver's license, which still has a traditionally masculine name. The poll worker refuses the ID, stating that they do not believe it is her ID because it has a man's name on it. The voter must either contest the decision and provide alternative proof of identity, or refrain from voting.

Second, as Natalee Fisher's story demonstrates,⁹³ fear of being questioned and outed can discourage transgender people from even attempting to vote. If a trans person fears that they will be involuntarily outed, or that they will face invasive and personal questions, they may choose not to go to the polls at all. Trans people do not have to be explicitly turned away from the polls to face disenfranchisement—it is harmful enough, and shameful enough, to fear increased scrutiny or harassment at the hands of a government official.

1. Name Amendments on IDs

Aside from a comprehensive state-by-state overhaul of voter ID laws, the most immediate solution to this barrier is for transgender people to amend their IDs and voter registration to reflect their true names. This, however, is no easy task. While all states allow people to legally change their name and amend the name listed on state-issued IDs, statistics show that very few transgender people living in the United States have IDs that reflect their accurate name.⁹⁴ According to a 2015 survey of trans people in the United States, sixty-eight percent of the people surveyed did not have a single ID that listed their correct name and gender.⁹⁵ Only forty-

92. The vignettes in Part I demonstrate this risk, although Natalee Fisher's does so most clearly. See Gayle, *supra* note 10. This paper relies on anecdotal evidence because no there is no data to prove how many people are turned away at the poll each year because of a perceived mismatch between gender presentation and name. For a general discussion on how voter ID laws can chill voting, see Sam Manzella, *For Trans Voters, Accurate IDs Are Critical at the Polls. Here's Why.*, NEWNOWNEXT (June 26, 2020), <http://www.newnownext.com/voting-while-trans-plus-one-the-id/06/2020/?fbclid=IwAR0g887eS9Ypla0EYDMoMlh4UyFDpMFiG0U5OpFmrsdyw071BwNKAXujtdw>.

93. See Gayle, *supra* note 10.

94. James et al., *supra* note 14.

95. *Id.*

four percent of respondents had amended the name on their driver's license or a comparable state-issued ID.⁹⁶ Thirty-five percent of respondents did not change their name on their identity documents because they could not afford to do so.⁹⁷ To understand how this disparity occurs, we must look to the process for a legal name change, and the fractured processes for amending your name on varying identity documents.

Some states allow common-law name changes,⁹⁸ a process by which a person holds themselves out as having a new name, and that name becomes legal.⁹⁹ It is not impossible to update a state-issued ID without a court-ordered name change, but it is difficult.¹⁰⁰ Court-ordered name changes, however, are the easier avenue for accessing name changes on other state-issued IDs, as the court order provides indisputable legal proof of a name change.¹⁰¹ The specific requirements for court-ordered name

96. *Id.*

97. *Id.*

98. A discussion of common-law name changes and their impact on ID corrections, while vital, interesting, and largely missing from scholarship, is beyond the scope of this paper. This paper focuses on court-ordered name changes, which are more commonly used by people attempting to correct their state-issued IDs, and more commonly accepted by state agencies in charge of various state-issued IDs.

99. *See, e.g.,* N.C. BAR ASS'N FOUND., NORTH CAROLINA GENERAL PRACTICE DESKBOOK § IV.VI.I (3d ed. 2004) ("North Carolina recognizes name change under common law."). "[A] person may lawfully change his name at will and assume a new name so long as it is not for a fraudulent, or illegal purpose. He may enter a contract or other obligation under any name he chooses to assume." *In re Mohlman*, 26 N.C. App. 220, 225 (1975).

100. *See* N.C. BAR ASS'N FOUND., NORTH CAROLINA GENERAL PRACTICE DESKBOOK § IV.VI.I (3d ed. 2004) ("Now, however, it is difficult to get by for very long without official, documented proof of identification that cannot be obtained merely by the common law practice of using a new name. It is possible to change your name on your driver license or DMV-issued identification card after common law name change. Relying on *Mohlman*, a 1988 opinion of the North Carolina Attorney General states that the Division of Motor Vehicles does not have the authority to establish a policy requiring documented proof from the Register of Deeds or official court documents for name change on driver licenses and identification cards. The opinion goes on to state that "[o]ther methods of satisfactory proof should be acceptable where documents of legal proceedings are not available or name change was pursuant to common law without legal proceedings").

101. *See id.*; Julia Shear Kushner, *The Right to Control One's Name*, 57 UCLA L. REV. 313, 318 (2009) ("Part II describes the law of name changes in the Anglo-American legal tradition. Most states continue to recognize a person's right at common law to change names through use and passage of time, without resort to judicial procedure. I assert, as do most others who write on the topic, that this right includes the right to change one's name with legal affect without resort to state assistance or approval. However, given the proof-of-identity requirements to obtain government identification, and the practical necessity of such identification, regardless of the contours of the common law right, I argue that government recognition of name changes no longer occurs outside of the statutory process.").

changes vary by state.¹⁰² There are a number of hurdles to acquiring a legal name change. The first hurdle is the cost of filing fees. Because these fees differ from state to state and, in some states, county to county, it is difficult to provide an average cost. To offer a few demonstrative examples, most California counties charge \$435 in filing fees for a name change, although a few counties charge more.¹⁰³ In New York, filing fees in New York County or Supreme Court are \$210; filing fees in New York City Civil Court are only \$65.¹⁰⁴ Name change filing fees in Texas average “about \$200 but var[y] by county.”¹⁰⁵ While some counties make name changes more affordable than others, court filing fees remain a costly barrier to those who do not qualify for a fee waiver.¹⁰⁶

Additionally, some states require people to publish notice of their name change.¹⁰⁷ Although there are no statistics specifically for transgender people, the Movement Advancement Project estimates “50% of LGBTQ[+] population lives in states that do not require publication of name change announcement.”¹⁰⁸ Ten states and four territories mandate

102. *Identity Document Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/identity_document_laws/name_change (last visited Apr. 26, 2020) [hereinafter *LGBTMAP Name Changes*].

103. Super. Ct. of Cal., *Superior Court of California Statewide Civil Fee Schedule*, <https://www.courts.ca.gov/documents/filingfees.pdf> (last visited Feb. 28, 2021).

104. *Name Change Basics*, NYCOURTS.GOV, <https://www.nycourts.gov/courthelp/NameChange/basics.shtml> (last visited Apr. 26, 2020).

105. *Name Change*, TEXAS LAWHELP.ORG, <https://texaslawhelp.org/article/name-change> (last visited Apr. 26, 2020).

106. While filing fee waivers for indigent clients are useful, they do not cover many working-class litigants who still cannot afford filing fees. In California, for example, to qualify for a filing fee waiver, a litigant must be (1) receiving public assistance; (2) be unable to “pay for both your household’s basic needs AND the court fees;” or (3) have a household income under the rate provided by the state, which is near the poverty line. *Fee Waivers*, CAL. CTS. JUD. BRANCH CAL., <https://www.courts.ca.gov/selfhelp-feewaiver.htm?rdeLocaleAttr=en> (last visited May 19, 2020). The income barrier for number (3) is approximately \$33,000 for a family of four in California. *Id.* A family of four with an average household income of \$40,000 would then not be eligible for a fee waiver, but paying a \$435 filing fee may still be a significant burden. Additionally, in some states, judges wield significant discretion when it comes to filing fee waivers. *See, e.g., Fee Waiver (Poor Person’s Relief)*, NYCOURTS.GOV, <http://www.nycourts.gov/courthelp/goingtocourt/feeWaiver.shtml> (last visited May 19, 2020) (“There is no official form for this request and different Judges may require different information to decide your fee waiver request Different Judges require different proof to decide your fee waiver request. So, the court may ask you to submit additional items to prove you do not have the money to pay your court costs.”).

107. *See* Andrea James, *Transgender Legal Name Change*, TRANSGENDER MAP, <https://www.transgendermap.com/legal/identity/name-change> (last visited Apr. 26, 2020); *LGBTMAP Name Changes*, *supra* note 102; Mottet, *supra* note 73, at 388 n.52 (“To receive a name change, one typically has to receive a court order and go through a publication process, although sometimes courts allow the publication requirement to be waived due to privacy concerns.”).

108. *LGBTMAP Name Changes*, *supra* note 102.

publication notifying the public of a name change.¹⁰⁹ An estimated twelve percent of LGBTQ+ people in the United States live in states with this requirement.¹¹⁰ An estimated thirty-eight percent of LGBTQ+ people live in one of the twenty-three states that have more relaxed publication requirements.¹¹¹ These states require publication, but give courts the ability to waive this requirement, or offer an alternative to newspaper publication, such as providing notice to creditors by certified mail.¹¹² These alternatives make name changes more accessible because they are often less expensive and less invasive than newspaper publication. Twenty-five states place further restrictions on individuals with a criminal record.¹¹³ This requirement is said to prevent people from defrauding their creditors,¹¹⁴ but has the practical effect of forcing a trans person to deadname¹¹⁵ themselves in a print publication. Additionally, publication can be expensive. Depending on the location and publication, personal advertisements in newspapers can range anywhere from \$50 to \$500.¹¹⁶

A name change court order does not automatically amend a person's other identity documents. Each of these changes requires a separate process:

- Birth certificates: Amending a name on a birth certificate often requires a separate application to the state's vital records authority.¹¹⁷

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. See, e.g., *Name Change FAQs*, CAL. CTS. JUD. BRANCH CAL., <https://www.courts.ca.gov/1054.htm?rdeLocaleAttr=en> (last visited Apr. 26, 2020). ("The law requires that you publish the *Order to Show Cause* form showing you are asking to change your name, and the date of your court hearing, to help prevent fraud by letting people know you are changing your name, and giving them a chance to object.")

115. A deadname is "the name that a transgender person was given at birth and no longer uses . . ." *Deadname*, MERRIAM-WEBSTER'S DICTIONARY, <https://www.merriam-webster.com/dictionary/deadname> (last visited Feb. 28, 2021). To deadname someone is "to speak of or address (someone) by their deadname." *Id.*

116. Venus Wong, *The Hidden Cost of Marriage No One Talks About*, REFINERY29 (Apr. 3, 2017, 1:50 PM), <https://www.refinery29.com/en-us/marriage-name-change-cost> ("Once the judge granted Capalad's name change request, she had to publish a name change notice in a local newspaper within 60 days, in order to make it a public record. [In New York, you] can only pick from a designated list of papers, and the publication costs differs depending on the title. As an example, *The New York Times* charges \$500, while *The New York Post* charges \$200. Capalad went with a smaller, local paper, which she paid \$45 to run her notice.")

117. See, e.g., *Name Change Checklist*, CA. DEP'T MOTOR VEHICLES, <https://www.dmv.ca.gov/portal/driver-licenses-identification-cards/updating-information-on-your-driver-license-or-identification-dl-id-card/> (last visited Apr. 26, 2020).

- Passports: Amending the name on a passport requires one of three different processes, depending on how long it has been since you received a passport, and whether you can legally document your new name with a legal name change.¹¹⁸
- Driver's Licenses: The process for amending the name on a driver's license differs significantly from state to state. Generally, this process requires an application to the state's Department of Motor Vehicles (or the equivalent agency). Some states require only a court order to amend the name on a driver's license.¹¹⁹ Other states require a court order and proof that an individual has changed their name with the Social Security Administration, an extra administrative step with its own unique requirements.¹²⁰ Other states like Texas will accept a number of documents as sufficient proof of a legal name change, including a court order, an amended birth certificate, and a Certificate of Naturalization.¹²¹
- Voter registration: One must complete another separate process, specific to their state, to update a legally changed name on the state's voter registry.¹²²

In short, in order to present any type of accurate identification, transgender people must jump through a number of administrative hoops that cisgender people do not face. The cost and time associated with these changes is alone a burden on transgender people, but also places additional obstacles on their path to the polling place.

118. *Change or Correct a Passport*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/passports/have-passport/change-correct.html>, (last visited Apr. 26, 2020). These processes are not simple in and of themselves. They require a number of different notarized forms, fees, photos. Even within the three different standard processes, eligibility determines which sub-process you must perform to amend your name. Some of them require an in-person application.

119. See LGBTMAP Name Changes, *supra* note 102. Kansas and Florida are two examples of this type of policy.

120. *Id.* Alabama, Arkansas, Georgia, Mississippi, and Wisconsin are examples of this policy.

121. See, e.g., *How to Change Information on Your Driver License or ID Card*, TEX. DEP'T OF PUB. SAFETY, <https://www.dps.texas.gov/driverlicense/changes.html> (last visited Apr. 26, 2020) (listing requirements for changing a name on a Texas driver's license).

122. *Change Your Voter Registration*, USA.GOV, <https://www.usa.gov/change-voter-registration> (last visited May 6, 2020).

2. Name Match Requirements and Voter ID Laws

These many requirements demonstrate how the concept of someone's "legal name" is multifaceted and complicated by administrative processes and barriers. This complication raises many questions for elections officials: As a representative for the state, do poll workers recognize a person by the legal name in their court order, or the one on their driver's license? What happens if both of these differ from the name on the voter registry? Such a scenario is not hard to imagine, given the varied processes laid out above. For example, imagine a transgender man legally changes his name. If he updates his name on his state-issued ID and updates his voter registry to reflect this new name in time for election day, in theory, things should run smoothly. If he has updated only one of these—say, the voter registry—in time for election day, a poll worker will likely question him about the mismatch.¹²³ Of primary concern is the fact that the voter had to out himself involuntarily to the poll worker. Without even considering the risk of disenfranchisement, this, at the very least, infringes on the voter's privacy, and he should not have to do it. This discrepancy also raises the risk of disenfranchisement. If the poll worker disbelieves the voter, or still believes the ID is insufficient proof of his identity, the poll worker has statutory authority to turn the voter away.¹²⁴

If the voter lives in a strict voter ID state, the poll worker may ask the voter to provide additional proof of his identity in the form of a utility bill or other official mailing in order to prove his identity. What if the voter forgot to update the name on his utility bills? If he has a file-stamped copy of his name change court order and remembers to bring it with him, he might be able to provide that, but this would, again, involuntarily out and deadname the voter to the poll worker, and it seems unlikely that most people carry their court orders around with them in daily life. In states like Oklahoma, this additional proof would still only allow him to vote with a provisional ballot. As previously noted, provisional ballots are far less likely to be counted than real ballots, even when a voter has proven their identity.¹²⁵

123. See Ross, *supra* note 34, at 382–83 (noting that poll workers have broad discretion to question disparities in ID, often with impunity).

124. See *supra* note 55 and contents therein (noting that poll workers have discretion to refuse IDs they believe do not sufficiently conform to the requirements in the state's voter ID law, with little to no check or oversight on their power).

125. See Kennedy, *supra* notes 66-67 and contents therein.

In conclusion, legal name changes and name change amendments on state-issued IDs are expensive, burdensome, and complicated on their own. The intersection of these many different laws and policies with voter ID requirements place a heavy burden on transgender voters. These intersecting policies make it difficult for transgender people to vote without undue scrutiny into their lives and may make it difficult for transgender people to vote at all.

B. Gender Marker Match

No state voting law requires that a person's gender presentation match the gender marker on their ID at the time they cast a ballot.¹²⁶ Many legal scholars have considered, in depth, the way administrative processes create barriers to gender marker changes and the way those barriers impose administrative violence on transgender people's lives.¹²⁷ This section connects these processes to the disenfranchisement of transgender people.

1. Gender Marker Amendments on IDs

Scholarship discussing gender marker changes usually addresses amending the gender marker on a person's birth certificate.¹²⁸ Gender markers can be updated on nearly all of the same identification and administrative documents as discussed with regard to name changes. As with legal name changes, gender marker change requirements differ from state to state and from administrative agency to administrative agency. Twenty-two states, Puerto Rico, and the District of Columbia do not require proof of medical transition (surgery or hormones, for example) or a court order for a birth certificate gender marker correction.¹²⁹ Fifteen states require proof of gender confirmation surgery for a gender marker change,¹³⁰ although what constitutes sufficient surgical intervention differs from state to state.¹³¹ Six states have unclear requirements regarding

126. See *supra* Section II.B.

127. See *supra* note 68 and contents therein; see *infra* Section III.

128. See *supra* note 68 and contents therein.

129. *Identity Document Laws and Policies: Birth Certificate*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/identity_document_laws/birth_certificate (last visited May 6, 2020) [hereinafter *LGBTMAP Gender Marker Changes*].

130. *Id.*

131. See Spade, *supra* note 1, at 736 ("In contrast to those policies, a large subset of gender reclassification policies require medical intervention for reclassification. The type of medical intervention, however, differs significantly from policy to policy. Three different birth certificate policies can be used as examples to show a range of requirements. California's birth certificate

surgery and/or court orders; another four have unknown or unwritten policies.¹³² Three states bar birth certificate gender marker amendments altogether.¹³³ Twenty-seven percent of the LGBTQ+ population in the U.S. lives in states that allow for the gender-neutral “X” gender marker on birth certificates.¹³⁴

As with any amendment to a birth certificate, if a person changes their gender marker before obtaining a driver’s license or other state-issued ID, the new ID will reflect the updated gender marker. They will still need to change their gender marker with the Social Security Administration. Amending a passport is, again, a separate process.¹³⁵ Because the gender marker on a birth certificate is imputed to the first version of each new ID,¹³⁶ it is easier to change the gender marker on your birth certificate before getting a drivers’ license or passport. If, however, a person already has a state-issued ID when they amend their birth certificate gender marker, they will need to undergo a separate process to amend that ID. Forty-eight percent of LGBTQ+ people in the United States live in states with easy-to-understand processes that do not require a certification from a healthcare professional for a gender marker amendment on a driver’s license.¹³⁷ Twenty percent of LGBTQ+ people live in states that require certification from a healthcare provider.¹³⁸ Another nineteen percent live in states that require proof of surgery, a court order, and/or an amended birth certificate.¹³⁹ Twelve percent live in states

gender change policy requires the applicant show that he or she has undergone any of a variety of gender confirmation surgeries [including but not limited to genital surgery. . .] New York City and New York State, however, each require genital surgery, and, interestingly, have differing requirements. People born in New York City are required to provide evidence that they have undergone phalloplasty or vaginoplasty, while people born in New York State must provide evidence that they have undergone penectomy or hysterectomy and mastectomy. The fact that two jurisdictions issuing birth certificates in the same state have come up with entirely different requirements for recognition of gender change, alone, attests to the inconsistency in this area.”)

132. *LGBTMAP Gender Marker Changes*, *supra* note 129.

133. *Id.*

134. *Id.* These states are Washington, Oregon, Nevada, California, Utah, Colorado, New Mexico, Rhode Island, Connecticut, and New Jersey. *Id.*

135. *Change of Sex Marker*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/passports/need-passport/change-of-sex-marker.html> (last visited May 6, 2020).

136. *See supra* Section III.

137. *Identity Document Laws and Policies: Driver’s License*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/identity_document_laws/drivers_license (last visited May 6, 2020) [hereinafter *LGBTMAP Driver’s License*]. Again, while it is imprecise to discuss the LGBTQ+ community rather than the transgender community here, there are no reliable statistics specifically for the trans community.

138. *Id.*

139. *Id.*

with no form and no surgical requirements, but with burdensome administrative requirements.¹⁴⁰ Finally, one percent live in states with “unclear, unknown, or unwritten” requirements.¹⁴¹ Forty percent of LGBTQ+ people in the United States live in states that allow a gender-neutral marker on driver’s licenses,¹⁴² but some of these regulations have unclear implementation dates or have been challenged.¹⁴³

Any attempt to synthesize the varying requirements for gender marker changes depending on the state’s requirements fails because of the high level of detail required by each amendment application. Some states allow for gender marker amendments on birth certificates if a person can provide a passport with an updated gender marker; others allow multiple routes for updating a gender marker on a driver’s license or birth certificate, some of which are easier to access than others. Additionally, as the policies regarding gender-neutral markers demonstrate, internal conflict between state-level administrative agencies further confuses the actual gender marker change requirements. And, as always, a description of these processes cannot encapsulate the real-life experience of walking into a DMV or other government agency and explaining to a public official, a stranger, why you are updating your gender marker on your ID. As with name changes, aligning every document that reflects your identity—and there are dozens—can be a burdensome, expensive experience, where each amendment has individualized requirements and costs to negotiate. Because they do not all happen at once, an individual can be left with conflicting gender markers on their various forms of ID.

2. Gender Marker Match Requirements and Voter ID Laws

These barriers can be particularly dangerous for transgender people attempting to vote in any state with voter ID requirements.¹⁴⁴ Any

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id.* (“In March 2019, Indiana’s Bureau of Motor Vehicles (BMV) announced that gender neutral markers on driver’s licenses would become available in October 2019. However, in September 2019, the state’s attorney general blocked this option, and in March 2020 issued an official opinion preventing gender neutral options from ever being allowed unless the state passes legislation explicitly permitting them. Hawai’i and Virginia’s gender-neutral markers will be available July 1, 2020. Illinois and New Jersey have both passed legislation to implement gender neutral markers. However, there is no clear date when this option will be made available to the public.”)

144. Jody L. Herman, *The Potential Impact of Voter ID Laws on Transgender Voters*, WILLIAMS INST. (Apr. 2012), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Apr-2012.pdf> [hereinafter Williams Institute, 2012 Report] (discussing how

discrepancy between a person's gender expression and the gender marker on their state-issued ID puts their right to vote at risk.¹⁴⁵ For a binary transgender person, a mismatch between gender marker and gender expression could raise alarm for a poll worker—for example, a transgender woman with an “M” gender marker on her driver's license. For a binary person, poll workers may express skepticism if the gender marker matches their gender expression but the poll worker does not “believe” they are that gender—essentially, if the poll worker does not believe they sufficiently “pass.” Sade's story demonstrates the increased scrutiny transgender people receive on their gender performance, even when their IDs sufficiently “prove” their gender.¹⁴⁶ This type of increased gender scrutiny also might harm gender-nonconforming cisgender voters. Take for example a woman who presents butch. Sporting short hair and traditionally masculine clothing, a poll worker may mistake her for a man and force her to undergo increased questioning and proof of identity. In this situation, the voter would have little to no recourse, as she has no interest in seeking a gender marker change, but she cannot otherwise prove her gender to a poll worker.

Voter ID—and the gender scrutiny that comes along with it—creates additional, unique barriers for nonbinary, genderqueer, and Two-Spirit¹⁴⁷ people, whose gender does not exist within the binary required by most state-issued IDs and whose gender expression may not conform with traditional notions of binary genders. Nearly sixty percent of LGBTQ+ people live in states without the option for a gender-neutral marker on drivers' licenses, which means that anyone falling under the nonbinary umbrella must use a gender marker that does not reflect their gender.¹⁴⁸ For voters in these states, voter ID requirements force nonbinary people

“transgender voters who have transitioned and do not have updated ID will be required to present ID that does not accurately reflect their gender in order to vote. In those cases, poll workers and election officials may decide that the ID presented does not match the voter, which could result in that vote not being counted”).

145. *Id.*

146. *See Garner, supra* note 7.

147. For a thorough discussion of Two-Spirit identity, *see* Katherine Starks, *Gender Markers on Government-Issued Identification in Saskatchewan: Rights, Reform, and Jurisdiction in a Shifting Legal Landscape*, 81 SASK. L. REV. 213, 217 (2018). (“Two-Spirit can be defined as a “name used by Indigenous People who assume [or cross] multiple gender roles, attributes, dress and attitudes for personal, spiritual, cultural, ceremonial or social reasons. These roles are defined by each cultural group and can be fluid over a person's lifetime. Being Two Spirit is a gift from Creator”).

148. *LGBTMAP Driver's License, supra* note 137. Again, there is no publicly available data that specifically targets trans and nonbinary people's access to IDs.

into a binary they do not fit into, a binary they fundamentally reject.¹⁴⁹ They must either dress in a way that reflects the binary gender listed on the IDs they use to vote or experience increased scrutiny of their gender and appearance—or both. Increased scrutiny may lead to misgendering, involuntary outing, public harassment, and blocking an individual's vote. Fear of these harms may also chill the nonbinary vote. As Aidan, a nonbinary voter, noted:

I am terrified of going out in public, trying to use my voice to cast a vote, and getting assaulted Those things are terrible to think about, but they happen, especially to people like me. And my parents, my family, my partner fears, What if I don't come home one day? All because of my ID not [reflecting] who I am?¹⁵⁰

C. Photo ID Matches

Even though no state law requires an alignment of gender presentation between a photograph on an ID and the presentation of the voter at the polling place, the discretion granted to poll workers to police gender by nonetheless requiring such an alignment poses significant concerns for trans voters.¹⁵¹ As the Williams Institute 2012 election survey explained,

in . . . states where strict photo ID laws have passed, transgender voters who have transitioned and do not have updated ID will be required to present ID that does not accurately reflect their gender in order to vote. In those cases, poll workers and election officials may decide that the ID presented does not match the voter, which could result in that vote not being counted.¹⁵²

It is easy to imagine such a scenario. For example, imagine a nonbinary person who uses they/them pronouns, assigned female at birth, attempts to vote in Kansas, a strict photo ID state with no gender-neutral marker available on drivers' licenses.¹⁵³ Their photo ID has an old photo where the voter presented in what could be considered a traditionally feminine way, with long hair and makeup. The voter now has close-cropped hair, wears no make-up, and dresses in loose-fitting, neutral-colored clothing. Because of the difference in appearance, the poll worker is skeptical that

149. See, e.g., Spade, *NORMAL LIFE*, *supra* note 39, at 41 (discussing how administrative policies and regulations narrowly construe gender in a binary, making nonbinary lives and identities “impossible” in the eyes of the state).

150. See Manzella, *supra* note 92.

151. See *LGBTMAP Gender Marker Changes*, *supra* note 129; see also *#VotingWhileTrans Guide*, *supra* note 13.

152. Williams Institute, 2012 Report, *supra* note 144.

153. See KAN. STAT. ANN § 25-2908; *LGBTMAP Gender Marker Changes*, *supra* note 129.

the ID “contains a photo of the voter” as required by Kansas’ statute.¹⁵⁴ Depending on the poll worker and their state of mind, a few scenarios may occur. First, the poll worker may let the nonbinary voter vote anyway, with or without questioning them about their gender and gender presentation.¹⁵⁵ Second, the poll worker may require the voter to vote with a provisional ballot.¹⁵⁶ The voter will cast a ballot that day and then provide the county board of canvassers with additional identification that proves their identity.¹⁵⁷ They will have to do this before the county board of canvassers¹⁵⁸ next meets—which means they will also have to figure out when the county board of canvassers will meet, as no particular time is set out in the statute.¹⁵⁹ At this meeting, the county board will determine whether or not the identification is sufficient, and from that, determine whether the provisional ballot gets cast.¹⁶⁰ Without a state-level open records request, this voter may never know whether their provisional ballot was cast.¹⁶¹

Imagine the same scenario occurs in Oklahoma, a non-strict photo ID state that also does not allow for gender-neutral markers on drivers’ licenses.¹⁶² This person’s risk of being involuntarily outed, scrutinized, and

154. KAN. STAT. ANN. § 25-2908(d).

155. See KAN. STAT. ANN. § 25-2908.

156. See *id.*

157. *Id.* (“The voter shall provide a valid form of identification as defined in subsection (h) of this section to the county election officer in person or provide a copy by mail or electronic means before the meeting of the county board of canvassers.”).

158. *Id.*; *Chapter III. Canvassing*, KAN. SEC’Y OF STATE, <https://www.sos.ks.gov/elections/19elec/2019-Kansas-Election-Standards-Chapter-III-Canvassing.pdf> (last visited May 6, 2020) (“The county board of canvassers, which is composed of the members of the board of county commissioners, conducts the final canvass in local elections and the intermediate canvass in national and state elections.” In Kansas, “the canvassing process includes counting ballots, tabulating votes by election district and certifying the results of all official primary and general elections and question submitted elections held pursuant to federal or state law.”).

159. See *id.*

160. KAN. STAT. ANN. § 25-2908 (“[T]he county election officer shall present copies of identification received from provisional voters and the corresponding provisional ballots. If the county board of canvassers determines that a voter’s identification is valid and the provisional ballot was properly cast, the ballot shall be counted.”)

161. See e.g., *ACLU of KS Files Suit Seeking Provisional Ballot Lists*, ACLU OF KAN. (Sept. 18, 2018), <https://www.aclukansas.org/en/press-releases/aclu-ks-files-suit-seeking-provisional-ballot-lists>.

162. OKLA. STAT. tit. 26, § 7-114; *LGBTMAP Gender Marker Changes*, *supra* note 129. The NCSL lists Oklahoma as a non-photo, non-strict ID state. *NCSL Voter ID Laws*, *supra* note 21 (“Oklahoma law . . . permits a non-photo voter registration card issued by the appropriate county elections board to serve as proof of identity in lieu of photo ID.”). Other groups like the Williams Institute list Oklahoma as a non-strict photo ID state because most Oklahoma voters show other ID than the voter registration card when voting, and this ID must include a photo. O’Neill & Herman, *supra* note 14. For this reason, this Article categorizes Oklahoma as a photo ID state.

harassed is essentially the same as the voter in Kansas, again depending on the discretion that individual poll worker chooses to wield.¹⁶³ Because this person lives in a non-strict photo ID state, though, they face fewer barriers because “[s]tates with non-strict voter ID laws provide other options for at least some voters who do not have an accepted form of ID.”¹⁶⁴ In Oklahoma, even if the photo on the ID does not match the person’s appearance at the poll,

[a] provisional ballot cast by a voter who declines or is unable to produce proof of identity shall only be considered verified and approved for counting if the voter’s name, residence address, date of birth, and driver’s license number or last four digits of social security number as provided on the affidavit match what is in the registration database.¹⁶⁵

In short, the voter will still be asked to vote with a provisional ballot, but that ballot will be automatically counted if the other information on the ID aligns with the information in the voter registration system.¹⁶⁶ While this may not be useful for voters who have not updated the name on their ID, it can protect voters whose gender presentation fluctuates over time.

The Williams Institute estimates that 142,050 voting-eligible transgender people live in strict photo ID law states.¹⁶⁷ Approximately 81,000 of these voters do not have updated IDs.¹⁶⁸ Approximately “247,950 voting-eligible transgender people” live in non-strict photo ID law states, and approximately 140,800 of them have not updated their IDs.¹⁶⁹ There is likely considerable overlap between transgender people who have not amended the name and gender marker on their drivers’ licenses and those who have not updated the photos on their IDs.¹⁷⁰ Because of the broad discretion given to poll workers in voter ID states, photo ID requirements also put transgender voters at risk of disenfranchisement.

163. See LGBTMAP Gender Marker Changes, *supra* note 129; see also #VotingWhileTrans Guide, *supra* note 13.

164. O’Neill & Herman, *supra* note 14.

165. OKLA. STAT. tit. 26, § 7-114; NCSL Voter ID Laws, *supra* note 21.

166. See OKLA. STAT. tit. 26, § 7-114.

167. O’Neill & Herman, *supra* note 14.

168. *Id.*

169. *Id.* Note that, unlike the National Council for State Legislatures, the Williams Institute includes Alabama in the list of strict photo ID law states.

170. O’Neill & Herman, *supra* note 14.

V. STRENGTHENING THE FRANCHISE BY EASING THE BURDEN

There are a number of ways to ensure that transgender people can fully and fairly access their right to vote. These come in two parts: Attorneys can either work to ease voter ID restrictions, or they can make accurate voter IDs more accessible to transgender people.

A. *Challenging Voter ID Restrictions*

1. Change Through the Courts

Challenges to voter ID could take a number of forms. For example, impact litigation groups could challenge voter ID laws as being discriminatory as applied. As noted above, though, federal courts consistently uphold voter ID laws, even in the face of evidence that they have a discriminatory impact on people of color.¹⁷¹

2. Change Through the Legislature

Another option is legislative action to overhaul voter ID requirements. This could either mean repealing voter ID laws entirely or creating a grievance process for voters to challenge an election official's decision to refuse their provisional ballot. Such legislation could even include crafting more specific guidelines for poll workers to determine whether an ID adequately proves a voter's identity. California has already begun mandatory training for their poll workers on gender identity and presentation to keep transgender voters safe at the polls.¹⁷² Other states, particularly voter ID states, could mandate similar trainings of all election officials.

These options, while persuasive, are not sufficient for three reasons—political, practical, and the problem of patchwork. Relaxing or eliminating voter ID requirements is politically disfavored at the moment. Indeed, there is a rising tide of state legislatures attempting to enact more and stricter voter ID requirements than the ones that currently exist.¹⁷³

171. See *supra*, Section II.B.

172. Joe Garofoli, *California to Start First-in-the-Nation Training to Help Transgender Voters*, SAN FRANCISCO CHRON. (Oct. 25, 2019), <https://www.sfchronicle.com/politics/article/California-to-start-first-in-the-nation-training-14560805.php>.

173. See *infra* note 53 and contents therein. In fact, following the 2021 election, state legislatures are making a renewed effort to impose harsher voter ID requirements. In just the first two months of 2021, “legislators in eighteen states have introduced forty bills [imposing] new or more stringent voter ID requirements for in-person voting.” *VOTING LAWS ROUNDUP: FEBRUARY 2021*, BRENNAN CTR. JUST. (Feb. 8, 2021), <http://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2021>. Ten states that do not currently have voter ID

Practically speaking, in the wake of the 2020 election, it is unlikely that voting rights advocates will have time to do much but defend against restrictive legislation aimed at disenfranchising people.¹⁷⁴ While eliminating voter ID might be favorable, it does not look likely in the near future. Finally, any changes that are made will still create a state-by-state and district-by-district patchwork of processes and requirements that will do little to ease the burden and confusion of voter ID requirements and will leave the promise of the franchise to the luck of geography for transgender voters.

B. *Challenging Restrictive Gender Marker Change Laws*

1. *Legislating Access to Gender Marker Changes*

If voter ID laws will not become less restrictive, then attorneys and advocates for transgender people must find ways to make accurate state-issued IDs more accessible to transgender voters. One path to making IDs more accessible is state-by-state legislation to simplify gender marker and name change requirements. Legal challenges made by LGBTQ+ legal nonprofits have eased some of these requirements in recent years. Recently, one of these cases took Kansas from having a complete ban on gender marker amendments on birth certificates to having one of the most accessible processes in the country.¹⁷⁵ But other states have not fared as well. In 2018, a case filed by Lambda Legal overturned a complete ban on gender marker amendments; in 2020, Idaho legislature enacted a law that reinstated this complete bar.¹⁷⁶ Although Lambda Legal is challenging this new law,¹⁷⁷ its enactment suggests some hesitance from states to ease the financial and administrative burden of legal name and gender marker changes. Ultimately, such challenges are valuable because they can clarify or make less burdensome gender marker and name change requirements, but they may not do so quickly or with great ease.

requirements introduced legislation to require voter ID. *Id.* A discussion of state legislative movements on voter ID changes, and effective advocacy for such, is vital to protecting the franchise of transgender voters in the United States. Unfortunately, such an in-depth analysis is beyond the scope of this paper.

174. *See id.*

175. *See Foster v. Andersen*, No. 18-2552-DDC-KGG, 2019 WL 329548, at *1 (D. Kan. Jan. 25, 2019).

176. *Idaho Enacts Unconstitutional Anti-Transgender Law*, LAMBDA LEGAL (Mar. 30, 2020), https://www.lambdalegal.org/blog/20200330_idaho-flouts-courts-enacting-unconstitutional-anti-trans-law. This comes after Lambda Legal won a lawsuit challenge a similar Idaho law in 2018. *Id.*

177. *Id.*

Another path is federal legislation. Federal legislation making name and gender marker corrections on passports easier and less expensive could help protect transgender voters in states that allow voters to present a passport as voter ID. But this is not a catch-all solution: not every state allows passports to be used as voter ID,¹⁷⁸ and passports are still difficult and expensive to obtain.¹⁷⁹

2. Community-Based Legal Aid for Individuals

The second path to making accurate IDs more accessible to transgender people, and perhaps the only one that could most immediately improve the lives of transgender voters who do not currently have accurate IDs, is the creation of community-based legal aid projects targeting transgender and nonbinary people. Many programs already exist that provide transgender people with pro bono or low-cost representation for legal gender marker and name changes.¹⁸⁰ Such programs ease both the cost and the administrative frustration of having to complete a gender marker or name change alone. As Professor Leonore Carpenter argues, LGBTQ+ direct service programs more effectively benefit LGBTQ+ clients because, unlike impact litigation, “the entire enterprise of direct legal services is driven by the principle of finding the greatest area of unmet need and meeting that need as completely as possible.”¹⁸¹

Comprehensive programs that help transgender people correct all IDs—including drivers’ licenses, passports, and voter registration rolls—are preferable, as these programs provide comprehensive support for the many administrative frustrations facing transgender voters. But even programs that provide direct representation in a legal name change or birth certificate amendment give transgender voters the initial legal support to begin correcting the rest of their documents. These programs can be run out of law firms, legal aid offices, law schools, or even social work offices, and can specialize institutional knowledge in state regulations. They can incorporate a comprehensive community education outreach program, which might make pro se gender marker and name changes more

178. *NCSL Voter ID Laws*, *supra* note 21.

179. *See supra* note 117 and accompanying text.

180. *See, e.g., Name and Gender Change Legal Clinic*, EQUITAS HEALTH, <https://equitashealth.com/services/name-gender-change> (last visited May 6, 2020); *see also Trans Legal Services Network Directory*, NAT’L CTR. FOR TRANSGENDER EQUAL. ACTION (Aug. 26, 2019), <https://transequality.org/issues/resources/trans-legal-services-network-directory>.

181. Leonore F. Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement*, 17 U. PA. J.L. & SOC. CHANGE 107, 109 (2014).

accessible.¹⁸² In states and organizations where primarily cisgender attorneys handle gender marker and name changes,¹⁸³ continued education is particularly important, as it ensures the attorneys providing direct services are attuned to the local transgender community's specific needs and concerns, which should be a primary concern for advocates.¹⁸⁴ While this type of community aid makes institutional barriers easier and less expensive for transgender people to navigate, it will not destroy the barrier itself. Without a change in voter ID legislation, poll workers will still have discretion to scrutinize transgender voters' appearance, and transgender voters still will not have procedural safeguards if their ballots are denied based on a perceived discrepancy in gender presentation and documentation. These challenges should not keep community aid organizations from doing vital work; rather, these challenges should inform state and national policy advocacy for voter ID changes.

V. CONCLUSION

Trans voters in voter ID states face unique barriers to exercising their constitutional right to vote. State and federal laws and regulations make it expensive and time-consuming for transgender voters to obtain state-issued ID that accurately reflects who they are—their correct name, their correct gender marker, and their correct photo. When trans voters take these inaccurate or mismatched IDs to the polls, voter ID laws impose added scrutiny on their identity and appearance. That scrutiny in turn increases the likelihood that their votes will not be counted. This combination imposes a burden on transgender American's right to vote that can only be remedied by changing restrictive voter ID laws. In the meantime, though, community-based efforts to expand access to affordable, accurate IDs can alleviate some of the barriers that transgender voters face.

182. Kylie Cameron, *KU Law Students Hosting Gender Marker, Name Change Webinar for the Community*, SUNFLOWER (Apr. 7, 2020), <https://thesunflower.com/50545/news/ku-law-students-hosting-gender-marker-name-change-webinar-for-wsu-community/>.

183. *See id.*

184. *See* Carpenter, *supra* note 181, at 109–10 (discussing the importance of collaboration between impact litigators and direct services providers who have more quantitative information about the needs of the local transgender community); Gabriel Arkles et al., *The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 SEATTLE J. SOC. JUST. 579, 594 (2010) (discussing the need for non-lawyer community voices in transgender civil rights movements, and the negative effects of lawyer-only spaces making decisions for transgender communities); *see also* Spade, *NORMAL LIFE*, *supra* note 39 (criticizing LGBTQ+ civil rights movements for excluding community-level transgender voices and discussing the need to prioritize community-centered direct services).