

THE FACTS: BATHROOM SAFETY, NONDISCRIMINATION LAWS, AND BATHROOM BAN LAWS

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Equality Federation Institute

Equality Federation is the movement builder and strategic partner to state-based organizations advocating for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. We believe change is possible in every community. That's why we empower local leaders to build a strong movement for equality that secures critical grassroots wins at every level. For more information, visit www.equalityfederation.org.

Freedom for All Americans

Freedom for All Americans is the bipartisan campaign to secure full nondiscrimination protections for LGBT people nationwide. Bringing together Republicans and Democrats, businesses large and small, people of faith, and allies from all walks of life, Freedom for All Americans works at the federal, state, and local level to advance measures and laws protecting Americans from discrimination on the basis of sexual orientation and gender identity and expression—without allowing overly broad and harmful religious exemptions. For more information, visit www.freedomforallamericans.org.

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The Movement Advancement Project (MAP) is an independent think tank that provides rigorous research, insight, and analysis that help speed equality for LGBT people. MAP works collaboratively with LGBT organizations, advocates and funders, providing information, analysis and resources that help coordinate and strengthen efforts for maximum impact. MAP's policy research informs the public and policymakers about the legal and policy needs of LGBT people and their families. For more information, visit www.lgbtmap.org.

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THE FACTS: BATHROOM SAFETY, NONDISCRIMINATION LAWS, AND BATHROOM BAN LAWS

NONDISCRIMINATION LAWS DON'T COMPROMISE SAFETY - BATHROOM BAN LAWS DO



EXISTING CRIMINAL LAWS

Already Protect People in
Public Spaces



NONDISCRIMINATION LAWS

Don't Compromise Public Safety



BATHROOM BAN LAWS

Can't be Enforced
Without Serious
Violations of Privacy



Do Compromise
Public Safety

BATHROOM BAN LAWS HAVE OTHER SERIOUS NEGATIVE CONSEQUENCES



VIOLATE NUMEROUS
FEDERAL LAWS



CREATE A HOSTILE BUSINESS
CLIMATE AND HURT JOBS &
STATE ECONOMIES



MAKE IT IMPOSSIBLE FOR
TRANSGENDER PEOPLE TO GO
ABOUT THEIR DAILY LIVES

EXECUTIVE SUMMARY

Despite widespread discrimination against lesbian, gay, bisexual, and transgender (LGBT) people, federal and most state law still does not explicitly protect LGBT people from discrimination in employment, housing, and public accommodations. And anti-LGBT activists are using false and misguided fears about safety and privacy in bathrooms to defeat nondiscrimination protections and to restrict transgender people's access to restrooms. This report provides a thorough and rational discussion of the legal landscape pertaining to nondiscrimination laws, bathroom ban laws, and restroom safety.

Nondiscrimination Laws Don't Compromise Safety—Bathroom Ban Laws Do

Nondiscrimination laws that explicitly protect LGBT people have been enacted in 19 states and more than 200 municipalities—with no increase in public safety incidents. Additionally, harming someone in a restroom is already illegal, and is punishable by a fine or jail time; updating nondiscrimination laws to protect LGBT people doesn't change that.

By contrast, laws like North Carolina's HB2, called "bathroom ban laws" because they ban transgender people from using restrooms that match the gender they live every day, compromise public safety and can't be enforced without invading citizen privacy. Because bathroom ban laws require citizens to prove their sex, they are impossible to enforce unless the government is willing to engage in aggressive and invasive policing of its citizens' use of restrooms. And the vagueness of these laws may provide unchecked power to law enforcement officers or even embolden private citizens to take the law into their own hands, leading to aggressive confrontations, interrogations, or demands that other people using a restroom prove their sex. These laws also leave transgender people even more vulnerable to discrimination, harassment, and violence.

Bathroom Ban Laws Have Other Serious Negative Consequences

Bathroom ban laws invite lawsuits and risk loss of federal funding. Cities and states that pass such laws can also expect an added economic burden when businesses, visitors, and even other jurisdictions reduce or restrict their travel to, and business with, the area that passed the law. Finally, bathroom ban laws not only discriminate against transgender people, but they also endanger their health and contribute to a climate of harassment and criminalization that puts transgender people at risk of arrest, prosecution, incarceration, and more.

INTRODUCTION

Despite widespread discrimination against lesbian, gay, bisexual, and transgender (LGBT) people, federal and most state law still does not explicitly protect LGBT people from discrimination in employment, housing, and public accommodations. As advocates have advanced nondiscrimination protections covering LGBT people at the federal, state, and local levels, their efforts have met with significant backlash. First, anti-LGBT opponents have tried (often successfully) to defeat or repeal nondiscrimination protections covering LGBT people by fostering misguided fears that these protections compromise privacy and safety in restrooms. Second, anti-LGBT opponents have gone on the offensive, pushing for state and local laws that restrict transgender people's access to restrooms (referred to as "bathroom ban" laws throughout this report).

Certainly, safety and privacy in bathrooms are important for everyone—including people who are transgender. But frequently missing from these conversations is a considered analysis of the facts. For example, it's already illegal to enter to restroom to harm someone and updating nondiscrimination laws doesn't change that. Also, a fact-based analysis shows that bathroom ban laws result in a host of negative consequences, and actually compromise, rather than protect, public safety and privacy. Finally, missing from these conversations is a discussion of the current lack of nondiscrimination protections for LGBT people and the serious consequences of legislation designed to deny an entire category of people access to restrooms.

This report seeks to fill these voids by providing a thorough and rational discussion of the legal landscape pertaining to nondiscrimination laws, bathroom ban laws, and restroom safety.

LGBT People Need Nondiscrimination Protections

There are 9 million LGBT adults in the U.S., living in every major city and every state across the country.¹ LGBT people are young and old, more likely to be low-income, and are more racially diverse than the general population.² LGBT people, particularly transgender people, are vulnerable to being unfairly fired, kicked out of their apartment, harassed at school, or denied service in places like restaurants and stores. Many transgender people face extreme levels of discrimination within

Glossary

Lesbian, gay, and bisexual (LGB). The terms lesbian and gay refer to a person's sexual orientation and describe people who are attracted to individuals of the same gender. The term bisexual also refers to a person's sexual orientation and describes people who can be attracted to individuals of more than one gender.

Transgender. The term transgender describes individuals whose sex assigned at birth is different from the gender they know they are on the inside. At some point in their lives, many transgender people decide they must live their lives as the gender they have always known themselves to be, and transition to living as that gender.

Gender identity and gender expression. Gender identity is a person's deeply felt inner sense of being male, female, or along the spectrum between male and female. Gender expression refers to a person's characteristics and behaviors such as appearance, dress, mannerisms, and speech patterns that can be described as masculine, feminine, or something else. Note that gender identity and expression are different than sexual orientation, and transgender people may identify as heterosexual, gay, lesbian, or bisexual.

Gender non-conforming. This report uses the term gender non-conforming to describe a person who has, or is perceived to have, gender-related characteristics and/or behaviors that do not conform to traditional or societal expectations. Gender non-conforming people may or may not also identify as lesbian, gay, bisexual, or transgender.

Bathroom ban laws. Laws designed to restrict transgender people's access to restrooms by requiring people to use restrooms and facilities that correspond with the sex on their birth certificate, their anatomy, and/or chromosomes.

places of public accommodation, which generally include retail stores, restaurants, parks, hotels, doctors' offices, and banks. For example:

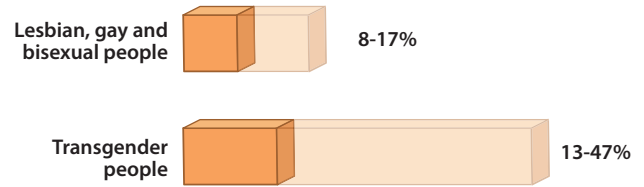
- The National Transgender Discrimination Survey found that 19% of respondents had been refused

a home or apartment because of their gender identity/expression, and 11% had been evicted for the same reason (including 37% of African American respondents).³

- Research conducted in 2013 found that opposite-sex couples were favored over same-sex couples when applying for rental housing 17% of the time.⁴
- Between 13% and 47% of transgender workers report being fired or denied employment because of their gender identity (see *Figure 1*).⁵
- Between 8% and 17% of lesbian, gay, and bisexual people report being unfairly fired or denied employment because of their sexual orientation as shown in *Figure 1*.⁶
- According to GLSEN's National School Climate Survey, 35% of LGBT students avoided school bathrooms because they felt unsafe or uncomfortable.⁷
- A majority (53%) of transgender people report experiencing verbal harassment or disrespect in a place of public accommodation and 8% percent report being physically attacked or assaulted in places of public accommodation.⁸
- 59% of transgender people say they have avoided bathrooms in the last year because they were afraid of problems, such as being confronted by others; 12% of transgender people report that they have been harassed, attacked, or sexually assaulted in a bathroom in the last year according to preliminary data from the U.S. Trans Survey (see *Figure 2*).⁹
- Existing nondiscrimination protections for LGBT people are complicated and inconsistent, varying by state, court district, type and size of employer, and more. A fuller explanation of local, state, and federal nondiscrimination protections for LGBT people is found in the Appendix. However, in brief, there is no federal law that explicitly and broadly prohibits discrimination on the basis of sexual orientation or gender identity in employment, housing, or public accommodations. Only 20 states explicitly protect LGBT people from discrimination in employment and housing, and only 19 of those states protect LGBT people from discrimination in public accommodations (see *Figure 3* on the next page). Most Americans agree that LGBT people should be protected from discrimination,¹⁰ so policymakers, advocates, and concerned citizens across the country have been working to update state and federal law to include clear protections for LGBT people.

Figure 1: Many LGBT Workers Are Denied Employment or Unfairly Fired

Percent Reporting Being Unfairly Fired or Denied Employment



Source: M. V. Lee Badgett et al., "Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination," The Williams Institute, June 2007.

Figure 2: Bathrooms Are Unsafe for Transgender People

12% of transgender people have been harassed, attacked, or sexually assaulted in a bathroom in the last year.



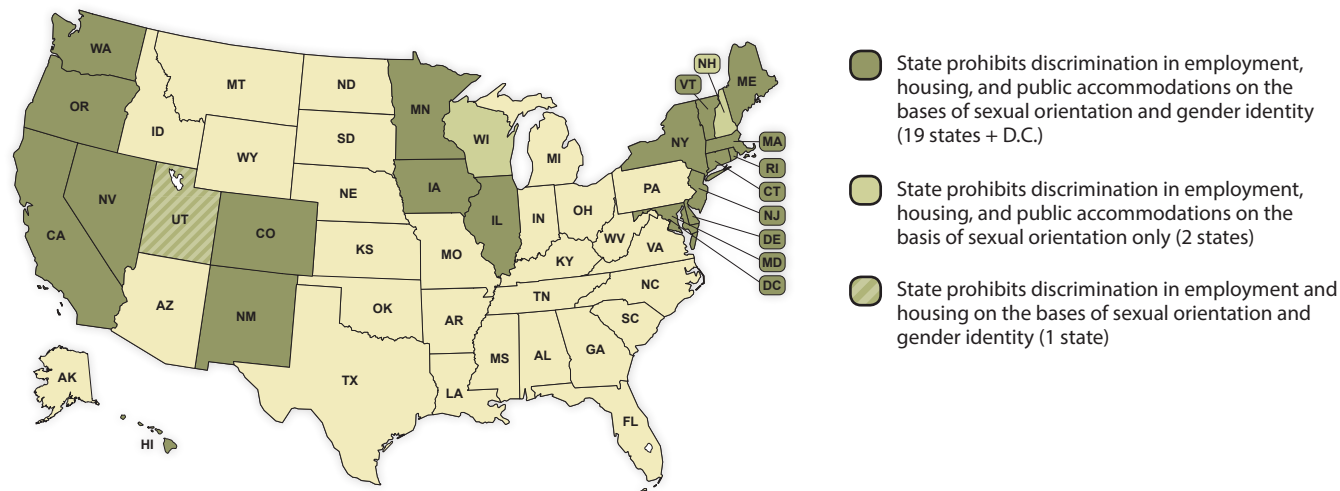
59% of transgender people have avoided bathrooms in the last year because they were afraid of problems, such as being confronted by others

Source: Harassment of Transgender People in Bathrooms and Effects of Avoiding Bathrooms: Preliminary Findings from the 2015 U.S. Transgender Survey, July 2016, <http://www.ustranssurvey.org/preliminary-findings>.

Anti-LGBT Activists Use Bathrooms to Deny Nondiscrimination Protections

Equal access to restrooms is an important aspect of nondiscrimination protections, but nondiscrimination laws cover more than just bathrooms. However, as a growing number of cities, counties, and states pass legislation to protect LGBT people from discrimination, anti-LGBT opponents have tried to shift the discussion away from the need for these protections by stirring up false and baseless fears around bathroom safety. The pace of these misleading attacks has increased in recent months,¹¹ likely in response to the nationwide freedom to marry, paired with the growing visibility of LGBT people, particularly transgender people.

Figure 3 : State Nondiscrimination Laws



Source: Movement Advancement Project, "Nondiscrimination Laws," http://lgbtmap.org/equality-maps/non_discrimination_laws.

In some instances, anti-LGBT activists have turned to fears around bathrooms to defeat positive nondiscrimination protections. As a recent example, in Houston, Texas, anti-LGBT opponents ran a campaign to challenge a 2014 nondiscrimination ordinance that prohibited discrimination across a wide range of institutions (including city and private employment, city services, housing, and public accommodations) based on sex, race, color, ethnicity, age, military status, disability, pregnancy, genetic information, religion, sexual orientation, and gender identity.¹² Opponents' campaign, which falsely claimed that nondiscrimination protections would jeopardize people's safety and privacy, successfully invalidated Houston's ordinance in 2015.¹³

In other instances, anti-LGBT activists have proposed harmful legislation that attempts to regulate bathroom use based on the sex a person was thought to be when they were born. Whatever form bathroom ban bills take, these proposals make it impossible for most transgender people to access public restrooms. Why? Because bathroom ban laws explicitly or effectively force transgender people into restrooms inconsistent with their gender (risking their safety), stigmatize transgender people by requiring them to use segregated restrooms (which generally aren't available), or force transgender people to refrain from using public restrooms altogether (causing physical and mental health problems).

For example, in response to a local LGBT nondiscrimination ordinance recently passed in Charlotte, the state legislature of North Carolina passed a law barring transgender people from using restrooms that match the gender they live every day. Under the law (North Carolina House Bill 2, or "HB2" throughout the report), all multiple-occupancy restrooms at public schools and public agencies may only be used by individuals in accordance with the sex listed on their birth certificate.¹⁴ This kind of law makes it impossible for transgender people to go about their daily lives like other people—and it opens the door to abuse, harassment, and even violence.

Bathroom ban bills and laws like the one in North Carolina take many forms (as described in the sidebar on page 4). For example, the city of Oxford, Alabama, recently passed a law requiring that people in places of public accommodation use the bathroom according to the sex marked on their birth certificates.¹⁵ The law in Oxford assigned a penalty of \$500 and/or six months in jail to anyone caught in the bathroom that did not correspond to their birth certificate.¹⁶ After great public outcry, the law was recalled before it took effect.¹⁷

Just this past legislative session, over 40 such bills like those passed in North Carolina and Oxford, Alabama, were proposed in almost half of states across the country. The law in North Carolina is, as of publication, under severe scrutiny by the public and by the federal government.¹⁸ See page 8 for a discussion of why bathroom ban laws like the one in North Carolina are harmful and impossible to enforce.

Bathroom Ban Bills Vary in How They Restrict Restroom Access

- 1. Facilities covered.** Proposed bathroom ban laws vary in scope. Some cover all bathrooms and changing facilities outside the home including those in schools, private businesses, government buildings, parks, restaurants, and all other places of public accommodation. Other laws more narrowly target certain facilities, like facilities in schools or government buildings.
- 2. Definition of “sex.”** Many bathroom ban bills and laws define “sex” as “the physical condition of being male or female,” and say that “sex” can be determined by a person’s physical anatomy or chromosomes.¹⁸ Some define “sex” as the sex recorded on a person’s birth certificate.²⁰ A bill considered in South Carolina states that a person’s “original birth certificate may be relied upon as definitive evidence of an individual’s sex.”²¹ Regardless of how “sex” is defined, the purpose of these bills is to force people to use restrooms according to the sex on a person’s birth certificate, rather than the gender they live as every day.
- 3. Proof or verification of sex.** To date, bathroom ban bills have not clarified how a person’s sex would be verified. In states where “sex” is defined according to a person’s birth certificate, the law could not be reliably enforced unless adults and students carry their birth certificate with them and produce it when necessary to prove they are in the correct restroom. States that have attempted to pass bills regulating restroom use according to physical anatomy or chromosomes have not clarified how students and adults would demonstrate what their anatomy or chromosomes are. So far, most bathroom ban bills have also typically not specified *who* is tasked with verifying people’s sex, nor have the bills provided funding for enforcement.
- 4. Business requirements.** Some proposed bathroom ban bills create a *legal requirement* for business owners or public agencies to prevent someone from using a restroom that doesn’t match the sex on their original birth certificate.²² Other laws offer *legal protection* to business owners, individuals, or public agencies and officials who prevent transgender people from using bathrooms according to their gender identity.²³ No bill to date has specified how a business should monitor customers’ restroom usage. However, some bills financially penalize business owners or public agencies that do not enforce these laws. The law proposed (but withdrawn) in Rockwall, Texas, would have assigned a \$500 fine to “any person in violation of this ordinance,” including “the owner, operator, or any employee of any facility that contains a single-sex multiple-occupancy restroom/ bathroom” who “knowingly” lets a transgender person use the restroom that matches their gender identity.²⁴
- 5. Schools.** Requirements for schools also vary, though most bills mandate that a school district prohibit students from entering a restroom designated for the opposite sex²⁵ without providing clear mechanisms of enforcement.²⁶ Some proposed bills set schools up for lawsuits by creating a private right to sue for a student who may have been in the restroom when a student of the “opposite sex” entered the room.²⁷ In Oklahoma, proposed legislation would permit the state school board to withhold state educational funding to any school district that adopted a transgender-inclusive school facilities policy.²⁸ These bills do not provide schools with funding for enforcement, nor do they address what will happen if a school loses federal funding because they violated federal law by following state law.
- 6. Bounty provision.** Some laws offer monetary damages to people who report encountering someone who is using the “wrong” restroom. For example, in Kansas, a proposed bill would entitle a student who “encounters a person of the opposite sex” to statutory damages of up to \$2,500 “for each instance,” as well as other monetary damages, even if the transgender student was simply minding their own business.²⁹ These provisions set up an effective bounty system for private citizens to harass and demand proof of sex from people who don’t conform to their stereotypes of what men and women should look like.

Bathroom Ban Bills Vary in How They Restrict Restroom Access *(continued)*

7. **Penalties for those who violate the law.** Most proposed bathroom ban legislation does not clarify what the penalty is for violating the law. Legislation proposed in Indiana makes it a misdemeanor to “knowingly enter a single-sex public facility designated to be used only by [the opposite sex],” punishable by a fine or jail time.³⁰ Similarly, Mississippi legislators proposed a bill that would make it a felony/misdemeanor to “knowingly and intentionally enter into restroom facilities . . . that were designated for use by the gender opposite the person’s gender at birth.”³¹ Oxford, Alabama’s recalled ordinance made violation of the law punishable by a \$500 fine or up to six months in jail.³² And a pair of bills in Virginia would have permitted police to issue summons to violators of the proposed laws, for a civil penalty of up to \$50 for a willful violation.³³
8. **Exceptions.** Many proposed bills list exceptions for whom the bathroom ban law would not apply, such as children under age 10 accompanied by an adult, emergency medical personnel, people cleaning the facilities, and people with disabilities or their assistants.
9. **Single-occupancy restrooms.** A number of proposed bills allow schools to let transgender students use single-occupancy restrooms in some circumstances. In Illinois for example, if a transgender student submits a written request from their parents, the school “may provide reasonable accommodation . . . to use a single-occupancy restroom or changing room or the regulated use of a faculty restroom or changing room.”³⁴ Segregating transgender students into single-occupancy restrooms is not a “reasonable accommodation”: it singles transgender students out and reinforces the notion that transgender students compromise the safety and privacy of their peers. Also, for many transgender students, there aren’t enough—or any—single-user restrooms at their school for that to be a viable alternative.
10. **Other extreme provisions.** Many proposed bathroom ban laws take an extreme position. For example:
 - A bill proposed in Oklahoma would require schools to construct or set aside multi-user facilities where no transgender people are allowed if any student or their parent to claims that potentially sharing a restroom with a transgender students violates their religious beliefs.³⁵
 - A Tennessee bill mandates that students use the restrooms and locker rooms that are designated for use by students “of the same sex as the sex indicated on the student’s *original birth certificate*” (emphasis added), meaning that even transgender students who have undergone gender transition and have changed the gender marker on their birth certificate (through onerous processes) cannot use the restroom that corresponds to the gender they live every day.³⁶

Public Bathrooms Have Often Been Used as an Argument to Oppose Equality

Despite a universal need to use the restroom, access to public restrooms has been a frequent battleground, from workers' rights at the turn of the 20th century to the fight for gender equality in the workplace, from the lingering impact of Jim Crow legislation, through the desegregation of American public schools, to the current movement for LGBT equality. Those fighting against public restroom use often hang their argument on the specter of "safety," especially the safety of women and girls. History has shown that these fears and concerns around bathrooms are unfounded. Everyone should be allowed to access restrooms without fear of discrimination or prosecution.

The first sex-segregated restrooms in the United States were mandated for workers by Massachusetts law in 1887.³⁷ According to research cited in *Time* magazine, these laws were bolstered by claims of protecting women, new to the workplace in the late 1800s, from the "harsh realities of the public sphere"—a paternalistic view taken by lawmakers who were exclusively male.³⁸ Employers continued to be reluctant to hire women, even more once it meant building new facilities. Regardless, building codes incorporated the "Separate Sphere" philosophy into many areas of public life, mandating sex-segregated waiting rooms, libraries, etc.³⁹ These laws informed today's modern plumbing codes, one reason sex-segregated restrooms persist into modern times in the United States (though, by comparison, restrooms are rarely sex-segregated in Europe).⁴⁰

Around the same time that workplace facilities were being built for and segregated by sex, Jim Crow laws were expanding across the United States, prohibiting black people and other people of color from using the same public facilities—including restrooms—as white people. In 1966, civil rights activist Sammy Younge, Jr. was murdered for trying to use a "whites only" restroom in Tuskegee, Alabama.⁴¹ When President Franklin D. Roosevelt signed the executive order prohibiting racial discrimination in government employment, some white women joined opponents of integration, voicing reluctance to use the same facilities as women of color.⁴²

Likewise, as schools were racially integrated, opponents of integration often used paternalistic messages to stir up fear.⁴³ Segregationists claimed that integration of schools would prohibit white female students from using the bathroom, to avoid sharing facilities with girls of color.⁴⁴ Similarly, during the initial advocacy for the Equal Rights Amendment (ERA), opponents used the false claim that the amendment would desegregate restrooms by sex to stir up opposition.⁴⁵

This is not the first time that we have seen discriminatory responses to historic moments of progress for our nation. We saw it in the Jim Crow laws that followed the Emancipation Proclamation. We saw it in fierce and widespread resistance to *Brown v. Board of Education*.

- Loretta Lynch

*United States Attorney General, in her remarks announcing the Department of Justice's Complaint against the State of North Carolina*⁴⁶

Misguided fears that treating people equally will compromise people's safety and privacy in restrooms have been used for decades as a reason to treat people unfairly. But those fears are as unfounded as they were in the 1880s, 1920s, 1940s, and 1960s.

NONDISCRIMINATION LAWS DON'T COMPROMISE SAFETY - BATHROOM BAN LAWS DO



EXISTING CRIMINAL LAWS

ALREADY PROTECT PEOPLE IN PUBLIC SPACES

- Criminal and civil laws already protect public spaces
- Harassment, assault, misconduct in restrooms is already illegal



NONDISCRIMINATION LAWS

DON'T COMPROMISE PUBLIC SAFETY

- 20 states have nondiscrimination laws with NO increase in public safety incidents
- Harassment, assault, misconduct in restrooms is already illegal



BATHROOM BAN LAWS

DO COMPROMISE PUBLIC SAFETY



Embolden Citizen Vigilantes



Put Transgender and Gender-Nonconforming People and Students at Particular Risk



How Would the State Verify Someone's Sex?



Who Would be Responsible for Verifying Someone's Sex?

BATHROOM BAN LAWS HAVE OTHER SERIOUS NEGATIVE CONSEQUENCES, TOO.

NONDISCRIMINATION LAWS DON'T COMPROMISE SAFETY—BATHROOM BAN LAWS DO

Safety and privacy in places like restrooms are important to everyone. However, contrary to the arguments made by anti-LGBT activists, passing nondiscrimination protections for LGBT people does not compromise safety and privacy. Ironically, it is bathroom ban laws that compromise public safety and privacy—for everyone—in their effort to limit transgender people's access to restrooms.

Existing Criminal Laws Already Protect People in Restrooms and Public Spaces

Harming someone in a restroom is already illegal, and is punishable by a fine or jail time. Law enforcement officers use these laws to hold perpetrators accountable and keep people safe. Updating our nondiscrimination laws to protect LGBT people doesn't change that. In fact, current criminal and civil laws include clear protections in public spaces, and in many cases include specific protections against misconduct in restrooms. For example, in North Carolina, since long before HB2 was passed:

- It is a crime to assault another person, in a restroom or elsewhere.⁴⁷
- It is a crime to sexually assault someone, in a restroom or elsewhere.⁴⁸
- It is a crime to secretly film someone without their consent where that person has a reasonable expectation of privacy (like in a restroom or changing room).⁴⁹
- It is a crime to invade someone's privacy to secretly peep on someone while they are changing or using the restroom.⁵⁰

Regardless of whether someone is permitted to be in a specific restroom, if an individual commits or attempts to commit an illegal action in that restroom, they can and should be held accountable.

Nondiscrimination Laws Don't Compromise Safety

Some opponents of LGBT equality have argued that nondiscrimination laws open the door to sexual predators. This is not borne out by fact. Nondiscrimination laws that explicitly protect LGBT people in employment, housing, and public accommodations have been around for a long time. They have been enacted in 19 states⁵¹ and more than 200 municipalities—with no increase in public safety incidents.⁵² In 2014, Media Matters contacted law enforcement officials in 12 of the states that prohibit discrimination against transgender people in places of public accommodation.⁵³ Not one state reported that the law had led to an increase in criminal activity in bathrooms (see *Figure 4* on the next page). This makes sense because passing nondiscrimination protections has no impact on existing laws that criminalize harmful behavior in bathrooms. So regardless of whether a state has a nondiscrimination law in place, entering a restroom to harm another person remains a crime. That doesn't mean that no one will ever break the law. It simply means that passing nondiscrimination protections has no impact on whether or not people will choose to break other criminal laws guarding against assault and harassment.

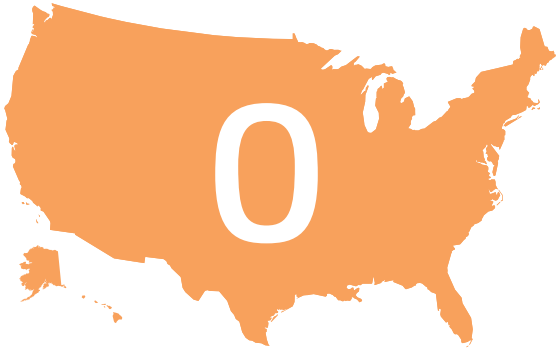
I know that this concern persists but I personally have not seen any factual basis for it.

I am not aware of any increased sexual assault or rape in women's restrooms as a result of Maine's 2005 adoption of protections in the Maine Human Rights Act for sexual orientation (which, in Maine, includes "a person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression").

- Amy Sneirson
Executive Director of the Maine
Human Rights Commission⁵⁴

Figure 4: No Increase in Public Safety Incidents

NOT ONE STATE



with a nondiscrimination law protecting against discrimination in places of public accommodation has reported that the law has led to an increase in criminal activity in bathrooms.

Source: Carlos Maza and Luke Brinker, "15 Experts Debunk Right-Wing Transgender Bathroom Myth," Media Matters for America, March 20, 2014, <http://mediamatters.org/research/2014/03/20/15-experts-debunk-right-wing-transgender-bathro/198533>.

Bathroom Ban Laws Can't Be Enforced Without Serious Violations of Privacy

Constructed in vague and over-broad terms, laws like North Carolina's HB2 are impossible to enforce unless the government is willing to engage in aggressive and invasive policing of its citizens' use of restrooms. But almost all of the bathroom ban laws proposed this year have no clear mechanism to indicate *how* such a law will be enforced or who is supposed to enforce the law.

How Would the State Verify Someone's "Sex"?

Proponents of bathroom ban laws want to force people to use restrooms according to their "sex," but their simplistic and inaccurate definition of sex creates problems for everyone. Existing and proposed bathroom ban laws define sex in various ways, but often rely on birth certificates, anatomy, or chromosomes for proof of sex. The legislation passed in North Carolina, for example, defines "biological sex" as the sex marked on a person's birth certificate.^{55,a} The legislation aims to force transgender people to use the restroom that matches the sex on their birth certificate, rather than the restroom that matches their gender identity and external appearance. However, because most of the time

it is difficult to tell who is transgender by simply looking at a person, the only way to determine if a person is in the "correct" bathroom as specified by such a law would be to require everyone in the state to carry their birth certificate with them at all times and to produce it on demand. This would at the very least be a gross government overreach, and would arguably also be an unconstitutional invasion of privacy.

Other bills define sex according to chromosomal makeup. For example, a bill has been introduced in Indiana that would criminalize "knowingly or intentionally enter[ing] a single sex public facility that is designated" for the opposite sex. This bill defines female as "an individual who: (1) was born female at birth; or (2) has at least one (1) X chromosome and no Y chromosome."⁵⁶ Contrary to popular belief, it's also not always possible to guess what someone's chromosomes are simply by looking at a person, and many non-transgender people have chromosomes that are different than what they might expect, often without even knowing it. The only way to reliably enforce this law would be to require everyone to undergo chromosome testing. But again, any procedure that involves examining a person's chromosomes, through a blood test and genetic testing, in order to access public restrooms would be clear government overreach and an unconstitutional invasion of privacy.

Most bathroom ban bills also fail to address how they would be enforced when it comes to people with intersex conditions—people who have chromosomal, anatomical, and/or hormonal conditions that mean they do not fit the common definitions of male or female. Approximately one in 2,000 people is born with an intersex condition, though many people only discover it later in life. Intersex people may have chromosomal variations such as some XX cells and some XY cells, or chromosomes that do not correspond to their anatomy. Birth certificates generally require doctors to assign intersex babies a male or female sex, but that gender may not match the individual's appearance or gender identity as they grow up.

Finally, bathroom ban bills offer no procedure for when a person's "sex" or gender is unclear to another individual in a restroom. Some transgender people and people who identify as gender non-conforming may also fall into this category, but so may many non-transgender people. That is, women who may look masculine, men who may look feminine, or any other person who simply

^a See page 16 for a full discussion of the legal challenges to the law in North Carolina.

has an appearance or manner of dress that doesn't conform to gender stereotypes may be seen as being in the "wrong" restroom. Consider a woman undergoing cancer treatment who has lost her hair; or a man with long hair, more feminine facial features, and a slight build; or a female athlete with short hair. In fact, non-transgender women who have a more masculine appearance or way of dressing (including some lesbian and bisexual women) often face harassment and even violence because they are perceived to be in the wrong restroom.⁵⁷ As scrutiny as to who "belongs" in a particular restroom increases because of state or local legislation, so does the likelihood that individuals such as these may also be interrogated, harassed, or even restricted from using a restroom—even when that restroom matches their sex as defined by their birth certificate.

See the next page for examples of citizen vigilantes taking enforcement too far.

Who Would Be Responsible for Verifying Someone's "Sex"?

Bathroom ban bills and statutes are unclear on who is tasked with enforcement, leaving the law open to dangerous misuse by business owners, law enforcement, security guards, or even private citizens.

For example, in North Carolina, the law now mandates that schools prevent students from using bathrooms and changing facilities that don't match the gender marked on their birth certificates. The law does not, however, indicate how schools should enforce the law. Are schools expected to hire bathroom monitors to check students' gender? Would they use private security companies? Are teachers expected to play this role?

Public agencies are also bound by the law and face the same challenges. It is unclear whether public agency officials need to hire private security to screen people outside of bathrooms, or if state or municipal law enforcement will be tasked with enforcing the law. Regardless, the law provides no funding to schools, public agencies, or even police departments for enforcement.

In fact, police departments across the state of North Carolina are themselves unsure as to how to enforce the new law. National Public Radio reached out to 10 police departments, most of which refused to comment.⁵⁸ But four departments confirmed that they did not know how to go about enforcing the law.⁵⁹ Raleigh police shared they would not enforce the

The only way for us be able to enforce HB2 would [be] to actually have officers posted outside of public restrooms requesting someone's birth certificate. And I know for certain that we could not do that. That would take everyone that we have on staff. It would take them off the streets, off patrol and having to put them at bathrooms.

- Christina Hallingse

*Public Information Officer, Asheville,
North Carolina Police Department*⁶⁰

law "because 'the bill doesn't speak to enforcement [] or penalty.'"⁶¹ Asheville police commented that they would be unable to enforce the law without taking "everyone that we have on staff" off the streets in order to have them police bathrooms.⁶²

Offering a rare clarification, the fiscal note of a proposed law in Tennessee calculates that universities could hire a full time staff member to collect and record birth certificates and monitor bathroom use, at an estimated cost of about \$54,000 per university.⁶³ The bill does not provide additional funding to cover the cost.

Finally, bathroom ban laws and bills rarely include mechanisms for ensuring compliance. If a public agency or school is not compliant with a law—for example, if they are not checking to make sure that all students and all employees and visitors are using the restroom that aligns with their "biological sex"—these laws do not indicate what penalties will be incurred. It is unclear if a public school or state agency risks losing public funding, or if the state will step in to make sure that the law is enforced using tax-payer dollars to pay for security officers or law enforcement.

Bathroom Ban Laws Compromise Public Safety

Despite the assertions of politicians pushing bathroom legislation, bathroom ban laws do not increase safety in public restrooms. In fact, these laws compromise safety, not just for transgender people and gender non-conforming people, but also for women and children (the very people proponents of bathroom ban laws claim to be most worried about). The vagueness of the laws may

Sexual Assault Prevention Organizations Support Nondiscrimination Protections for Transgender People

Amid the national uproar over bathroom ban laws, more than 300 of the nation's leading sexual assault and domestic violence prevention organizations released a statement in April 2016 calling for an end to legislation that harms transgender people and excludes them from restrooms and other facilities. The statement read in part:

"States across the country have introduced harmful legislation or initiatives that seek to repeal nondiscrimination protections or restrict transgender people's access to gender-specific facilities like restrooms. Those who are pushing these proposals have claimed that these proposals are necessary for public safety and to prevent sexual violence against women and children. As rape crisis centers, shelters, and other service providers who work each and every day to meet the needs of all survivors and reduce sexual assault and domestic violence throughout society, we speak from experience and expertise when we state that these claims are false.

"Nondiscrimination laws do not allow men to go into women's restrooms—period. The claim that allowing transgender people to use the facilities that match the gender they live every day allows men into women's bathrooms or women into men's is based either on a flawed understanding of what it means to be transgender or a misrepresentation of the law.

"As advocates committed to ending sexual assault and domestic violence of every kind, we will never support any law or policy that could put anyone at greater risk for assault or harassment. That is why we are able to strongly support transgender-inclusive nondiscrimination protections—and why we oppose any law that would jeopardize the safety of transgender people by forcing them into restrooms that do not align with the gender they live every day."

To read the full statement and see the entire list of supporting organizations, visit <http://endsexualviolence.org/files/NTFNationalConsensusStmntTransAccessWithSignatories.pdf>.

provide unchecked power to law enforcement officers or even embolden private citizens to take the law into their own hands, leading to aggressive confrontations, interrogations, or demands that other people using a restroom prove their sex.

Embolden Citizen Vigilantes

Proposed legislation in some states, such as Kansas, includes a "bounty provision": monetary damages that private citizens could claim if they encounter someone who was not using the facility in accordance with the sex on their birth certificate.⁶⁴ Such provisions encourage citizen policing and heighten the harassment and risk of physical assault that transgender and gender non-conforming people frequently experience.

In direct response to the bathroom ban law passed in North Carolina, one school district in the state passed (but then ultimately reversed) a policy permitting students to carry pepper spray.⁶⁵ A member of the school board stated that the policy could be used for students who might encounter a transgender person in the bathroom.⁶⁶

I've had people call me all sorts of names for having short hair. I've had people call me a boy, I've had people call me a dyke, I've had people call me gay. I'm grateful that that woman only called me disgusting and didn't physically attack me.

- Aimee Toms

Danbury, Connecticut,

*referring to a stranger who verbally harassed her*⁶⁷

Policies and rhetoric like this exacerbate the high rates of discrimination, bullying, and harassment transgender students already face at school.⁶⁸ According to GLSEN's bi-annual *School Climate Survey*, 23% of responding LGBT students reported being physically harassed based on their gender expression and 11% reported being physically assaulted based on their gender expression.⁶⁹ By encouraging violence against transgender students, these

Shocking Public Statements Encourage Violence against Transgender People

As part of the national conversation around transgender people and bathrooms, some public figures have made explicit statements suggesting or threatening violence against transgender and gender non-conforming people. A sampling of these statements includes:

- “The first man who goes into the restroom with my daughter will not have to worry about surgery.” – *Nashville Fire Dept. EMS District Chief Tim Lankford*, in a later-deleted, May 20, 2016 Facebook post⁷⁰
- “If my little girl is in a public women’s restroom and a man, regardless of how he may identify, goes into the bathroom, he will then identify as a John Doe until he wakes up in whatever hospital he may be taken to.” – *Tracy Murphree, GOP nominee for Denton County, TX Sheriff*, April 22, 2016⁷¹
- “I’m taking a Glock .45 to the ladies room. It identifies as my bodyguard. #BoycottTarget @Target” – *Liberty Counsel President Anita Staver*, commenting on Target’s transgender-friendly restroom policy, April 22, 2016⁷²
- “I’ll be honest with you, I don’t even know why there’s an issue about which bathroom to use. Because if you are a guy and you go into bathroom with my wife, I’m gonna make the news—I know there’s three cameras rolling—I’m gonna whip your tail if you go in there with my wife while she’s trying to use the bathroom, or my granddaughter.” – *Spartanburg County, SC Sheriff Chuck Wright*, April 8, 2016⁷³
- “I will tell you what, the first man that walks in my daughter’s bathroom, he ain’t going to have to worry about surgery.” – *Family Research Council Executive Vice President and Lt. Gen. (ret.) Jerry Boykin*, March 5, 2016⁷⁴
- “If this [a transgender girl using a girls’ locker room] ever happens in a school that my kids attend, I’ll be first in line to issue a [sic] ass whooping, both to the transgender, and the administration whom failed to protect our children.” – *Dallas, OR City Councilor Micky Garus*, November 5, 2015⁷⁵
- “I believe if I was standing at a dressing room and my wife or one of my daughters was in the dressing room and a man tried to go in there—I don’t care if he thinks he’s a woman and tries on clothes with them in there—I’d just try to stomp a mudhole in him and then stomp him dry.” – *Tennessee State Rep. Richard Floyd (now retired)*, January 12, 2012⁷⁶

laws do not increase safety in schools and rather reduce safety for transgender students—as well as any student that doesn’t appear stereotypically male or female.

Multiple news reports have surfaced, even from states without bathroom ban laws, of private citizens harassing people in public restrooms on the premise that they are using the “wrong” restroom.” In Frisco, Texas, a man followed a woman into the restroom at a hospital because she “dressed like a man.”⁷⁷ She was wearing basketball shorts and a t-shirt.⁷⁸

In Danbury, Connecticut, a young woman who had recently donated her hair to cancer patients was approached by a stranger who yelled anti-transgender insults and epithets at her.⁷⁹ In May, a private security guard in a D.C. grocery store harassed a transgender woman trying to use the women’s restroom.⁸⁰ The guard was arrested and charged with simple assault after allegedly pushing the woman out of the bathroom.⁸¹

Put Transgender and Gender-Nonconforming People and Students at Particular Risk

Public restrooms are already unsafe for transgender and gender non-conforming people. In a study of transgender and gender non-conforming people living in the District of Columbia, 70% reported being denied access to a restroom or being verbally harassed or physically assaulted.⁸² More than two-thirds of respondents (68%) had been told they were in the wrong facility, were told to leave, were questioned about their gender, were ridiculed or made fun, or otherwise verbally harassed or stared at or given strange looks.⁸³ Preliminary data from the National Center for Transgender Equality found that in the last year, 24% of transgender people were told, or asked if, they were using the wrong restroom and 9% say they were denied access to the appropriate restroom (see *Figure 5* on the next page).⁸⁴

Transgender and gender non-conforming students also already face daily harassment and even violence at school. Bathroom bans only add to students' anguish by forcing them to choose between harassment and humiliation in the school bathroom or "holding it" until they get home for the day, sometimes 10 or more hours with after-school programming. According to the National Transgender Discrimination Survey, 26% of respondents were denied access to gender appropriate bathrooms at school.⁸⁵ In GLSEN's National School Climate Survey, 59% of transgender students reported being required to use the bathroom or locker room of the sex on their identity documents, not their gender identity.⁸⁶

Providence is removing barriers and making a difference for our transgender and gender expansive students. This policy [providing access to facilities for transgender students] strengthens the commitments made in Providence, in the state [of Rhode Island] and by President Obama to make our schools more inclusive and welcoming to all students. It is the right thing to do, and I am proud that Providence is helping lead the way.

- Mayor Jorge O Elorza
Providence, Rhode Island⁸⁷

As a transgender student myself, I know what it is like to be isolated because of who I am. While in high school, I was told that I could only use the restroom in the nurse's office. This was inconvenient not only because the nurse's office was across campus from many of my classes, but it was also locked much of the time.

If I was late to class because I had to use the restroom, I would be punished. What was worse than the inconvenience was the isolation I felt as a transgender teenager. My high school separated me from my classmates simply because of who I am.

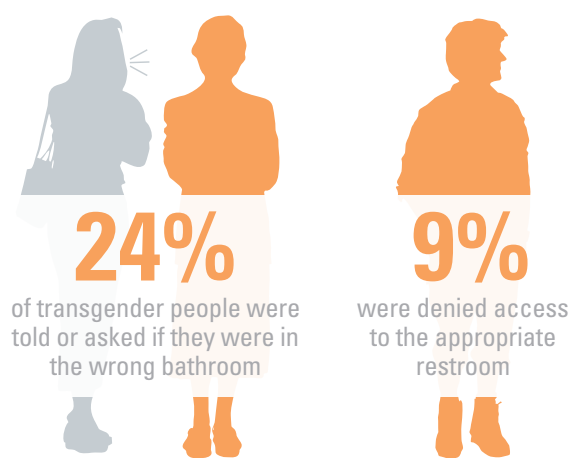
- Casey O'Dea
Senior at the University of New Hampshire
and president of Trans UNH⁸⁸

Many Schools Around the Country are Safely and Competently Meeting the Needs of Transgender Students

Most schools make it a priority to ensure that every student feels valued and respected, including transgender students. School districts across the country have successfully worked with transgender and non-transgender students to come up with respectful and inclusive policies that balance everyone's needs and concerns. Ten states, as well as numerous cities and school districts across the country, have explicit policies respecting transgender students' right to access restrooms corresponding to their gender identity.⁸⁹

In May 2016, the Departments of Education and Justice issued a joint guidance clarifying that Title IX's protections against sex discrimination in education meant that transgender students must be permitted to use facilities that correspond to their gender identity.⁹⁰ The guidance included numerous examples of schools that were already letting transgender students use the right restrooms, without any problems.

Figure 5: Transgender People Face Harassment In Restrooms



Source: Harassment of Transgender People in Bathrooms and Effects of Avoiding Bathrooms: Preliminary Findings from the 2015 U.S. Transgender Survey, July 2016, <http://www.ustranssurvey.org/preliminary-findings>.

BATHROOM BAN LAWS HAVE SERIOUS NEGATIVE CONSEQUENCES



VIOLATE PRIVACY AND COMPROMISE SAFETY

- Leave Vague Who Can and How to Verify Someone's Sex
- Embolden Citizen Vigilantes and Endanger Transgender People



VIOLATE FEDERAL LAW ON MANY LEVELS



Expose Employers to Federal Lawsuits



Risk Loss of Federal Education, Health, Jobs, and Violence Prevention Funding



Saddle States with Huge Litigation Costs at Taxpayer Expense



CREATE HOSTILE BUSINESS CLIMATE AND HURT JOBS & STATE ECONOMIES

BATHROOM BAN LAWS CREATE UNFAVORABLE BUSINESS ENVIRONMENTS BECAUSE

- They are vague in terms of enforcement and business responsibility,
- They increase the risk of lawsuits,
- They create unwelcome atmospheres for employees and customers, and
- They make it harder to recruit the best and brightest talent.



MAKE IT IMPOSSIBLE FOR TRANSGENDER PEOPLE TO GO ABOUT THEIR DAILY LIVES



Birth Certificate Requirements Leave Many Transgender People Unable to Safely Use Public Restrooms



Endanger the Health of Transgender and Gender Non-Conforming People



Contribute to the Criminalization of Transgender People

BATHROOM BAN LAWS HAVE OTHER SERIOUS NEGATIVE CONSEQUENCES

In addition to compromising privacy and safety, bathroom ban laws have a host of other serious negative consequences for the states and cities that pass them. They invite lawsuits and risk loss of federal funding. Cities and states that pass such laws can also expect an added economic burden when businesses, visitors, and even other jurisdictions reduce or restrict their travel to, and business with, the area that passed the law.

Violate Numerous Federal Laws

As described on the next pages, bathroom ban laws that discriminate on the basis of sex (including gender identity and gender expression) require schools and business to violate federal law, including Title VII, Title IX, and the Violence Against Women Act (VAWA). Along with putting millions of dollars of federal funding at risk, these laws force state taxpayers to shoulder the burden of paying for the legal fees spent defending bathroom ban laws in court.

Expose Employers to Federal Lawsuits

The Equal Employment Opportunity Commission (EEOC) has found that, under Title VII of the Civil Rights Act, it is illegal for employers to bar transgender employees from using restrooms consistent with their gender identity.⁹¹ As noted in the Department of Justice's complaint against the State of North Carolina, "access to bathrooms and changing facilities in the workplace at public agencies in the State of North Carolina is a term, condition and privilege of employment and, therefore, is covered by the nondiscrimination mandate of Title VII."⁹²

Although EEOC rulings are not binding on private employers, most employers abide by them, and those who do not may end up in federal court (which generally, though not always, gives deference to the EEOC). So employers who violate Title VII, including state and local governments, may be required to pay damages to employees who face discrimination. Along with possibly reinstating an employee to a lost position or awarding back pay for lost compensation, as well as paying legal costs and court fees, an employer may be required to pay compensatory or punitive damages.⁹³ Compensatory damages include costs

Please flag any investments in [North Carolina] that come through as I am not comfortable deploying dollars into startups there until the voters there fix this.

I have great faith in the people there and a lot of affinity for the state and its people. I am hopeful this will be repealed quickly.

- Bill Maris

*CEO of Google Ventures, in a note to the firm's partners restricting investment to North Carolina*⁹⁴

incurred by the victim as a result of the discrimination (for example, the cost of finding and securing another job) and compensation for emotional harm suffered by the victim. Punitive damages can be awarded if an employer was found guilty of particularly reckless or harmful discrimination.

Although there are caps on compensatory and punitive damages depending on the size of the employer,⁹⁵ these costs can add up for employers in a state that requires its businesses and municipal employers to violate the EEOC's rulings or (depending on the federal court district) similar federal court rulings. For municipal employers, these damages will be paid for by the taxpayers. The EEOC has specifically stated that "contrary state law" is not a defense against a charge of sex discrimination under Title VII.⁹⁶

Bathroom laws also put employers in an impossible situation: If an employer or the owner of a place of public accommodation disagrees with the law or even simply feels that it would be too difficult, time-consuming, or intrusive to enforce the law on customers or employees, that employer or owner risks breaking state law and incurring any penalties under the law. On the other hand, if an employer or owner agrees with the law and wants to enforce it with customers and employees, they risk violating federal law, alienating a customer base, losing employees due to intrusive gender inspections, and paying the cost of security staff to police the restrooms.

See the Appendix for a deeper discussion of local, state, and federal employment protections.

Ensuring Restroom Privacy for Everyone

The May 2016 “Dear Colleague” letter from the Department of Education and the Department of Justice encourages schools to make single-occupancy restrooms and changing rooms available for any student who seeks additional privacy, as long as the school does not require transgender students to only use those facilities.⁹⁷

This is a best practice for schools, employers, businesses, and public agencies: to provide single-occupancy restrooms and changing rooms for any individuals who wish more privacy. There are myriad people who may wish to use a single-occupancy restroom. Parents with children, nursing mothers, caregivers and those for whom they care, people with certain disabilities or medical needs, people who prefer to use the restroom or change alone, transgender and gender non-confirming people who face harassment in multiple-use restrooms—all these people may benefit from an single-occupancy restroom or changing room.

See page 23 for recommendations from national professional organizations and agencies on how to increase bathroom availability, safety, and privacy for everyone by making single-occupancy restrooms available.

Risk Loss of Federal Education, Health, Jobs, and Violence Prevention Funding

Educational Funding. Federal education protections under Title IX prohibit school districts from discriminating on the basis of sex, including gender identity, when accessing school facilities including restrooms and changing rooms.⁹⁸ Bathroom ban laws do just that—discriminate against students on the basis of gender identity when they access school facilities.

Schools that violate Title IX risk a reduction of federal financial assistance, and may be required to pay monetary compensation to the student, attorneys’ fees, and injunctive relief ordered by a court. The Department of Education has worked to protect educational funding for schools that violate Title IX by focusing first on remedying the discrimination and instituting explicit solutions and

GENDER SPECTRUM: When a business/school/institution decidedly and clearly shows that it recognizes and supports all gender identities, what effect does this have on you?

STUDENT: This makes me feel welcomed and understood. As a teenager, I want to feel the same as all of my peers. When a place validates my identity it gives me a sense that being transgender doesn’t have to be a big thing. It makes me feel reassured, safer, and more normal.

- Transgender Students and School Bathrooms: Frequently Asked Questions, Gender Spectrum⁹⁹

policies that prevent the discrimination from reoccurring, before taking legal action to withdraw funds.

In its complaint against North Carolina’s bathroom ban law, the Department of Justice claims that the University of North Carolina and its board of governors are in violation of Title IX by limiting use of multiple-occupancy bathrooms and changing facilities by the sex marked on people’s birth certificates.¹⁰⁰ According to the complaint, the Department intends to “secure the [federal financial assistance] recipient’s compliance through voluntary means.”¹⁰¹ In response to the Department of Justice’s complaint, in May 2016, the University of North Carolina backtracked from its previous statement that it would comply with HB2, declaring that it would not enforce North Carolina’s bathroom ban law.¹⁰² It is still unclear whether the State of North Carolina will take action against the University for refusing to follow state law.

Healthcare Funding. The federal Affordable Care Act prohibits discrimination on the basis of sex in federally-funded health programs and by any health provider that accepts Medicaid or Medicare payments from patients. Federal regulations released in May 2016 clarify that “sex” includes gender identity and sex stereotypes.¹⁰³ If a state law requires hospitals or clinics to force transgender people to use a restroom, changing room, or hospital bed inconsistent with their

gender identity, those health care providers could risk millions in federal health care funds.

Jobs Training Funding. The Workforce Innovation and Opportunity Act (WIOA) funds state job centers across the country for millions of dollars per state. WIOA grantees may not discriminate based on sex and noncompliance can result in loss of federal funds.¹⁰⁴ On January 26, 2016, the U.S. Department of Labor published a proposed regulation interpreting WIOA to prohibit gender identity discrimination, and specifically prohibiting WIOA funding recipients from “denying individuals access to the bathrooms used by the gender with which they identify.”¹⁰⁵ Therefore, bathroom ban laws would be in direct contradiction to WIOA and risk the loss of WIOA funds.

Violence Prevention Funding. The Violence Against Women Act (VAWA) provides financial assistance for the prevention, investigation, and prosecution of violent crimes against certain groups of people, particularly women and LGBT people.¹⁰⁶ Grants issued under VAWA fund violence prevention programs, victim assistance programs, legal aid, and crisis hotlines, and many other programs and services. The Violence Against Women Act prohibits discrimination on the basis of sexual orientation and gender identity in VAWA-funded programs and services. VAWA also protects transgender people’s right to access restrooms consistent with their gender identity.

States receive millions of federal dollars through VAWA-funded grants, which are at risk when a state violates federal law by permitting or requiring anti-violence programs to discriminate against LGBT people by, for example, by prohibiting a transgender women from accessing the services of a women’s shelter, a prohibition required by many of the bathroom ban bills.¹⁰⁷ In its complaint against North Carolina’s bathroom ban, the Department of Justice notes that the North Carolina Department of Public Safety and the University of North Carolina are both recipients of grants through the Violence Against Women Act. Upon receipt of the grant money, both entities signed contracts assuring they would not discriminate in violation of federal law.¹⁰⁸

If a court finds that North Carolina Department of Public Safety and the University of North Carolina are in violation of VAWA, their VAWA funding could be curtailed or cut, reducing vital programs that protect victims of violence, and costing state taxpayers millions of dollars.

Saddle States with Huge Litigation Costs at Taxpayer Expense

Discriminatory bathroom bans open state governments, school districts, and other entities up to expensive and protracted legislation, often on the taxpayers’ dime. For North Carolina alone, the Williams Institute estimates that “the costs and burden associated with litigation and administrative enforcement could be significant,” adding that the over-all cost of the legislation, including loss of federal dollars and business investment, could total a staggering \$5 billion.¹⁰⁹

As of publication, there are five lawsuits pending in North Carolina regarding the state’s bathroom ban law, including a lawsuit by the Department of Justice asserting that the law violates Title VII, Title IX, and the Violence Against Women Act. This litigation is likely to cost millions of dollars in legal fees and court costs, with litigants including the governor of the state, the state itself, the state Department of Public Safety, the University of North Carolina, and the University’s Board of Governors. The Human Rights Campaign found that Gov. McCrory hired an attorney for this case who had previously billed North Carolina \$360 per hour for work on a voter ID case in 2014 and 2015.¹¹⁰ This one lawyer’s fees alone had cost the state almost \$700,000 as of October 2015.¹¹¹ As public figures, agencies, and institutions, these parties will rely on public dollars to pay for their legal expenses, meaning that taxpayers will bear the cost of defending North Carolina’s bathroom ban law against the federal lawsuit brought by the Department of Justice. North Carolina Governor Pat McCrory and Republican leaders of North Carolina’s General Assembly have also filed their own lawsuits, at taxpayers’ expense, asking federal courts to rule that the bathroom ban law does not violate Title VII, Title IX or VAWA.¹¹²

North Carolina's HB2 Strips Away Local Nondiscrimination Laws

Traditionally, in civil and human rights law, federal laws provide a floor of protection below which state and local governments may not drop. Many states and cities provide additional protections for their citizens, including those that have protected LGBT people from discrimination by updating their existing laws to include sexual orientation and gender identity.

In late February 2016, the city council of Charlotte, N.C. passed a local nondiscrimination ordinance that prohibited discrimination in places of public accommodation, discrimination for city contractors, and discrimination in transportation on the basis of marital status, familial status, sexual orientation, gender identity and gender expression.¹¹³

North Carolina's HB2 nullified Charlotte's nondiscrimination ordinance as well as other ordinances across the state that protected city residents against discrimination.¹¹⁴

Just as federalism grants states the power and flexibility to provide protections for their citizens above and beyond those offered by the federal government, municipal governments are traditionally free to build stronger local protections for their residents.^c But what North Carolina has sought to do through HB2, and what additional states are proposing, is to *preempt* local governments from passing broader protections for municipal residents by restricting the kinds of protections allowed within a state's borders. Three states explicitly prevent local county boards and city councils from establishing stronger nondiscrimination protections than the state has set: Arkansas,¹¹⁵ North Carolina,¹¹⁶ and Tennessee.¹¹⁷ All three states passed their laws in response to the passage of local nondiscrimination ordinances within the state.

^c For more information about nondiscrimination protections and local and state law, read MAP's *LGBT Policy Spotlight: Local Employment Nondiscrimination Ordinances*. The report includes an in-depth examination of how Dillon's Rule and Home Rule interact with local and state nondiscrimination protections for LGBT people.

Create a Hostile Business Climate and Hurt Jobs & and State Economies

Businesses prefer to operate in states where the laws are clear, where customers feel welcome, and where businesses can go about their operations without fear of litigation. Bathroom ban laws create unfavorable business environments because they are vague in terms of enforcement and business responsibility, increase the risk of lawsuits, create unwelcome atmospheres for employees and customers, and make it harder to recruit the best and brightest talent. It is unsurprising, then, that businesses have been pulling out of North Carolina in the aftermath of its bathroom ban law.

Provisions in many bathroom ban laws require restroom use to be restricted based on the sex on an employee's or customer's birth certificate, without specifying how an employer or business open to the public is supposed to ensure that the law is not being violated. A business could be sued by employees or customers for *not* enforcing the state law, but the invasion of privacy resulting from asking employees and customers to prove their "sex" also exposes businesses to lawsuits. Similarly, not following the law opens employers up to a lawsuit from the state, while following the law puts employers at risk of a federal discrimination lawsuit.

Next, potential employees and customers alike may not want to associate with businesses that discriminate against transgender people (even if that discrimination is made mandatory by the state). This is why many businesses in North Carolina have made it clear that they will not be following the new law, making statements opposing bathroom ban laws in traditional social media, and in their places of business.¹¹⁸

Other businesses are making the difficult economic decision to take their business elsewhere.¹¹⁹ Most notably, online payment giant PayPal pulled out of a \$3.6 million expansion into Charlotte, North Carolina.¹²⁰ The withdrawal of business investment also means a loss of jobs or a reduction in new jobs. The Williams Institute estimates that the reduction in corporate investment cost the state a total of almost 2,000 jobs so far, which would have brought over \$40 million in annual salaries.¹²¹ State and municipal governments across the country have also banned non-essential travel to North Carolina rather than force their employees to risk discrimination.¹²² North Carolina citizens are paying the price as both jobs and money leave the state.

Two weeks ago, PayPal announced plans to open a new global operations center in Charlotte and employ over 400 people in skilled jobs. In the short time since then, legislation has been abruptly enacted by the State of North Carolina that invalidates protections of the rights of lesbian, gay, bisexual, and transgender citizens and denies these members of our community equal rights under the law.

The new law perpetuates discrimination and it violates the values and principles that are at the core of PayPal's mission and culture. As a result, PayPal will not move forward with our planned expansion into Charlotte.

This decision reflects PayPal's deepest values and our strong belief that every person has the right to be treated equally, and with dignity and respect. These principles of fairness, inclusion and equality are at the heart of everything we seek to achieve and stand for as a company. And they compel us to take action to oppose discrimination.

- Dan Schulman

*President and CEO, PayPal, April 5, 2016*¹²³

Can Make It Impossible for Transgender People to Go About their Daily Lives

Transgender people are part of workplaces and neighborhoods across our country, and they need to be able to use the restroom just like everyone else. Bathroom ban laws are designed to make it extraordinarily difficult, even impossible, for transgender people to go about their lives like other people. These laws not only discriminate against transgender people, they also endanger their health and contribute to a climate of harassment and criminalization that puts transgender people at risk of arrest, prosecution, incarceration, and more.

Birth Certificate Requirements Leave Many Transgender People Unable to Safely Use Public Restrooms

Many bathroom ban laws define "biological sex" as the sex found on one's birth certificate. Transgender people often struggle to obtain identity documents that match their lived gender. Many states have requirements that make updating documents like birth certificates difficult or impossible.¹²⁴ (Some states also limit access to identity documents for undocumented immigrants, putting undocumented immigrants at particular risk.) Some bathroom ban bills have even defined "biological sex" as the sex recorded on a person's *original* birth certificate, meaning that even if a transgender person was able to change the gender marker on their documents, they would still be barred from using the restroom that corresponded with their gender identity.

According to the National Transgender Discrimination Survey, only one-fifth (21%) of transgender people were able to update all of their identification documents and records to match the gender they live every day, and one-third were not able to update any of their documents.¹²⁵ Only 24% were able to change their birth certificate, which are often particularly difficult to change. North Carolina is one of a majority of states that either require burdensome proof of gender reassignment surgery to change the gender marker on a birth certificate, or a court order or both, which means undergoing expensive medical and/or legal procedures not all transgender people need or can afford.¹²⁶ For transgender people who are unable to update their birth certificates, bathroom ban laws can make it impossible for them to safely use the restroom. For example, a transgender man whose birth certificate lists him as female but who has

lived his adult life as a man would be required to use the women's restroom, risking violence, harassment, and likely causing the women in that restroom to feel uncomfortable or even call the police—but if he enters the men's room, he would risk arrest and prosecution based on the bathroom ban law.

I am at McDonald's [in] Paulsboro NJ, where [the] manager [] just followed me into the bathroom and threatened to throw me out.

I exited the bathroom and am remaining in the store.

I attempted to show my driver's license (I am legally female.) The manager refused to look at it.

I just contacted regional and filed a report. They said someone would get back to me.

- @DiracDrynx

*Transgender woman targeted in restroom, on Twitter*¹²⁷

Figure 6: Transgender People Unable to Update Identification Documents

One in five transgender people (21%) were able to update all of their identification documents and records to match the gender they live as every day...



... and one-third had not been able to update any of their documents

Source: Jaime M. Grant et al., "Injustice at Every Turn: A Report of the National Transgender Discrimination Survey" (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

I am a transgender man, yes, but I am a man. My family, my friends, my coworkers and many more in this state affirm my male identity. Who I am is not something that can be stripped away by this bill. What has been attacked is a basic right—a right to feel protected and safe.

I use the men's room exclusively as I should, yet this bill could deny me that fundamental right. This bill opens the door for me to get fired from my job or kicked out of my home simply because of who I am. The same goes for my lesbian, gay and bisexual community members. It could affect the health and well-being of me and many others multiple times a day in our workplaces and in our daily lives.

As members of the transgender community, we are no different than anyone else. We exist. You've probably passed us on the street whether you've known it or not. You may have shared a restroom with us. We use it, just like you, to pee. In peace. In privacy. Without fear. Instead of with this anxiety that has gripped my chest since this legislation was passed. A basic right such as this should not be the internal conflict it has become.

We will continue to exist despite bills like this that try to diminish our existence in both public and private places. What we want you to understand is that we are only looking for our safe spaces in this world, and our home in North Carolina should be one of them.

- Joaquin Carcano

*HIV Project Coordinator, UNC-Chapel Hill*¹²⁸

Endanger the Health of Transgender and Gender Non-Conforming People

When transgender and gender non-conforming people are denied access to restrooms, they face myriad health issues, both physical and mental.

Physical Health. Multiple health issues result from having to “hold it,” which is exactly what many transgender and gender non-conforming people must often do in order to avoid violence and harassment in public restrooms. According to GLSEN’s National School Climate Survey, 35% of LGBT students avoided school bathrooms because they felt unsafe or uncomfortable.¹²⁹ According to the Williams Institute’s study of bathroom use in Washington D.C., 54% of transgender people surveyed reported experiencing physical problems as a result of avoiding public restrooms.¹³⁰ These problems included dehydration (from limiting how much they drink to avoid having to use the restroom), urinary tract infections, kidney infections, and other kidney-related issues.¹³¹ Nine percent of transgender respondents to the D.C. survey reported that they avoided getting necessary medical attention because the medical facility or doctor’s office had gender-segregated restrooms.¹³² Preliminary data released by the National Center for Transgender Equality found that 31% of transgender people have avoided drinking or eating so that they did not need to use the restroom, and 8% report getting a urinary tract or kidney infection, or other kidney related problems from not being able to use the restroom in the last year (see *Figure 7*).¹³³

Mental Health. For transgender and gender non-conforming people, being denied access to restrooms can impact mental health. According to the Trans Lifeline, a crisis hotline for transgender people, calls to the hotline almost doubled after the passage of North Carolina’s bathroom ban law.¹³⁴ A study further examining data from the National Transgender Discrimination Survey found a higher prevalence of lifetime suicide attempts among participants who said they had not been allowed to use gender-appropriate bathrooms or other facilities at school. Because the NTDS did not inquire about when the reported suicide attempts occurred, the study was not able to determine whether encounters with bathroom discrimination at school came before or after participants’ suicidality.¹³⁵ Research has also found that living in a state with discriminatory policies increases certain negative mental health outcomes for LGB people, including anxiety and alcohol use.¹³⁶

Figure 7: Avoiding Restrooms Causes Serious Problems

31% of transgender people have avoided drinking or eating so that they did not need to use the restroom



8% report getting a urinary tract or kidney infection, or other kidney related problems from not being able to use the restroom in the last year.

Source: Harassment of Transgender People in Bathrooms and Effects of Avoiding Bathrooms: Preliminary Findings from the 2015 U.S. Transgender Survey, July 2016, <http://www.ustranssurvey.org/preliminary-findings>.

During my gender transition at a large suburban Chicago high school, I just wanted to find my own space. But what I soon discovered was that there was—literally—no space for me.

I recall those days as being filled with unease, wondering if some school official would call me by the wrong pronoun or question me too closely. I was always on guard about things like a name or bathrooms and changing facilities.

No one at the school made sure I had access to a facility that matched my appropriate gender. So, I dealt with it the only way I could — I went to the bathroom before I left home in the morning, drank little to no liquids during the day and rushed home in the afternoon to use the bathroom as soon as I arrived. I simply held it all day long.

- Nicholas Gladwell
*Sophomore at Cornell University*¹³⁷

Contribute to the Criminalization of Transgender People

Bathroom ban laws represent only one factor in a pattern of broader criminalization of transgender people. When law enforcement agencies, including city and state police, enforce laws and ordinances, they frequently do so in ways that disproportionately impact transgender people. Transgender people, and especially transgender women of color, frequently experience profiling by police, and are often subjected to invasive searches and treated with disrespect.

Bathroom ban laws provide yet another reason for police to stop, search and interrogate transgender people. For transgender people, interactions with police are usually negative and frequently dangerous:

- Transgender people are often treated with disrespect and misgendered by police (lack of an accurate identity document can put an individual at increased risk for this kind of behavior).¹³⁸
- Transgender people are subjected to invasive and unnecessary searches—and, too often, to physical and sexual violence—at the hands of law enforcement.¹³⁹
- When transgender people seek assistance from police, they themselves are often arrested, meaning a transgender person who is harassed or attacked because of a bathroom ban law may put themselves at risk if they call the police.¹⁴⁰

Discriminatory laws, now including bathroom bans, therefore disproportionately impact transgender people, especially transgender women of color, and lead to their increased criminalization.¹⁴¹

RECOMMENDATIONS

Pass (and Retain) Comprehensive Nondiscrimination Protections for LGBT People

The federal government, states, and municipalities should explicitly prohibit discrimination in employment, housing, healthcare, credit, and places of public accommodation based on gender identity and sexual orientation—including discrimination when it comes to restroom access. Municipalities and states should also oppose legislation that would preempt local nondiscrimination protections and limit further protections than at the state level.

Ensure Access to Restrooms in Accordance with Gender Identity

If not already covered in nondiscrimination laws or provisions, local and state governments and school districts should adopt policies explicitly permitting transgender people to access restrooms and other facilities in accordance with their gender identity.

Expand Access to Single-Occupancy Restrooms

When a restroom is meant for only one user, there's no reason to label it as "male" or "female." Some cities are sensibly trying to make restrooms more accessible to everyone by opening existing single-occupancy restrooms (which are often sex-segregated) to whomever needs them, benefiting parents with children, nursing mothers, people with disabilities and medical issues, elders and caregivers, people who prefer more privacy, and transgender and gender non-conforming people alike. Currently, four cities (Austin, Texas;¹⁴² Philadelphia;¹⁴³ New York City;¹⁴⁴ and Washington D.C.¹⁴⁵) require that all single-occupancy restrooms be available for people of any gender to use citywide.

Implement Bathroom Safety and Availability Recommendations

Major professional organizations and federal agencies offer strong recommendations for how to increase bathroom safety and availability for everyone.

American Restroom Association Guidelines

The American Restroom Association (ARA) shares simple guidelines for gender-neutral restrooms on its website, stating that the following people can benefit from gender-neutral single-occupancy facilities: wheelchair users, people who need assistance when using the restroom, people living with medical conditions that require frequent attention, paruretics (people with shy-bladder or bashful bladder syndrome), parents with young children of the opposite sex, transgender people, the vision-impaired, and all other users who benefit from having an additional option (e.g., when other restrooms are being cleaned, or to minimize long lines, which frequently disproportionately impact women).¹⁴⁶

Building and Plumbing Codes Such as the International Plumbers Code

The International Plumbers Code, adopted by many states as their own plumbers' code, requires multiple-occupancy bathrooms to be designated by sex, but clarifies that instead, facilities can have two single-occupancy family or assisted-use toilet facilities, which do not need to be designated by sex.¹⁴⁷

Occupational Safety and Health Administration Standards

According to the standards set by the Occupational Safety and Health Administration (OSHA) "where toilet rooms [used by employees] will be occupied by no more than one person at a time, can be locked from the inside, and contain at least one water closet, separate toilet rooms for each sex need not be provided."¹⁴⁸

Oppose Bathroom Ban Bills

State and local governments should oppose the passage of bathroom ban bills that restrict transgender people's use of restrooms and other sex-segregated facilities. As mentioned above, these laws compromise safety and privacy and they are impossible to enforce. The negative consequences of these laws are vast: they violate federal law and jeopardize federal funding, they are bad for business, and they threaten the safety, privacy, and health of all people—including transgender people.

CONCLUSION

While proponents of bathroom ban laws continue to use ugly rhetoric to support their claims that nondiscrimination protections threaten safety and privacy, the facts show otherwise. Nondiscrimination protections for LGBT people simply help ensure that LGBT people cannot be unfairly fired, kicked out of their homes, denied service in places like restaurants, and denied access to public restrooms. By contrast, bathroom ban laws do undermine safety and privacy in restrooms for the public at large, and amplify the risks of discrimination and violence for transgender and gender non-conforming people.

Bathroom ban laws also run afoul of federal laws in ways that leave businesses, schools, and states vulnerable to expensive litigation and potential loss of federal funding. The laws are written in vague language that leaves enforcement unclear and may embolden citizen vigilantes to take the law into their own hands, endangering the safety of students and adults alike. Recent, violence-filled public rhetoric from political leaders and anti-LGBT opponents reinforces this point. Bathroom ban laws also make it effectively impossible for many transgender people to use public restrooms, leading to serious health consequences for transgender adults and students alike.

In summary, nondiscrimination laws protect LGBT people from discrimination while still allowing law enforcement to hold offenders accountable. If anti-LGBT activists truly wanted to secure safety and privacy in public restrooms, they would stop advocating for invasive bathroom ban bills, work to institute the guidelines of the International Plumbers Code and the American Restroom Association, and support the creation of more single-occupancy restrooms that aren't sex segregated which could then be used by anyone who valued privacy, including but not limited to transgender people.

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APPENDIX

Legal Climate: Local, State, and Federal Nondiscrimination Protections for LGBT People

Federal nondiscrimination protections for LGBT people are a patchwork of statutory interpretations, federal case law, administrative guidance, and regulations.

Employment protections. Employment nondiscrimination laws ensure that employees are not unfairly fired from a job or mistreated at work because of their sexual orientation or gender identity. This includes the ability to use the restroom and changing rooms at work that coincide with an employee's gender identity.¹⁴⁹

There is no federal law that explicitly and broadly prohibits employment discrimination on the basis of sexual orientation or gender identity. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of sex, among other protected characteristics.¹⁵⁰ Most federal courts to have considered the issue, along with the Equal Employment Opportunity Commission (EEOC) have clarified that under Title VII's protections on the basis of sex to extend to gender identity and transgender status, and to a lesser extent, sexual orientation. Under these rulings, denying an employee access to a restroom according to their gender identity is form of employment discrimination in violation of Title VII.¹⁵¹ However, not all courts agree, and EEOC decisions are not binding on most private employers, so clear and comprehensive federal nondiscrimination protections are needed to eliminate confusion for workers and businesses alike.

Twenty states and the District of Columbia,¹⁵² along with over 200 counties and cities nationwide,¹⁵³ have laws explicitly prohibiting employment discrimination based on sexual orientation and gender identity and/or expression—the remaining states do not.¹⁵⁴

Public accommodations protections. Public accommodations nondiscrimination laws protect people from facing discrimination in, or being unfairly refused service or entry to, places accessible to the public, covering anywhere a person is when they are not at home, work, or school, including retail stores, restaurants, parks, hotels, doctors' offices, and banks. The Civil Rights Act of 1964 prohibits discrimination

in places of public accommodation on the bases of race, color, religion, and national origin but does not prohibit discrimination on the basis of sex.¹⁵⁵ While many types of public accommodations are covered by federal nondiscrimination laws, there is no federal law that explicitly and broadly prohibits discrimination on the basis of sexual orientation or gender identity across all public accommodations. Advocates for LGBT equality have long pushed for explicit federal legislation that would prohibit public accommodations discrimination.¹⁵⁶

At the state level, 19 states, and the District of Columbia, and over 200 cities and counties, have laws prohibiting discrimination based on sexual orientation and gender identity in places of public accommodation.¹⁵⁷

Education protections. Title IX of the Education Amendments of 1972 protects students against discrimination on the basis of sex.¹⁵⁸ All schools that receive federal financial assistance are bound by Title IX or risk losing their financial assistance. Over the past several years, the Department of Education has clarified on numerous occasions that Title IX's prohibition on sex discrimination extends to discrimination based on gender identity or sex stereotypes.¹⁵⁹ Along with the Department of Justice, the Department of Education has made it clear on multiple occasions—most recently in a "Dear Colleague" letter in May 2016¹⁶⁰—that discrimination includes denying students educational benefits on the basis of their gender identity, such as denying them equal access to restrooms and locker rooms consistent with their gender identity.

Federal and state courts have similarly found that discrimination on the basis of gender identity or expression in schools constitutes a violation of federal and state education laws. In April 2016, the federal Fourth Circuit Court of Appeals reversed a dismissal of a Title IX claim by a transgender student who was banned from using the boys' restroom by his local school board.¹⁶¹ The court recognized that it needed to defer to the Department of Education's interpretation that Title IX requires a student's gender identity to be respected, and that all students must be allowed access to facilities that correspond with their gender identity.¹⁶²

Twelve states and the District of Columbia prohibit discrimination in schools based on sexual orientation and gender identity, and one state on the basis of gender identity alone.¹⁶³ Thirty-seven states provide no such protections for transgender students.

Housing Protections. There is no federal law that explicitly and broadly prohibits housing discrimination on the basis of sexual orientation or gender identity. The federal Department of Housing and Urban Development (HUD) prohibits discrimination on the bases of sexual orientation and gender identity in HUD-funding housing programs.¹⁶⁴ This includes programs such as Section 8 housing and HUD-funded homeless and domestic violence shelters. It does not include general private sector housing.

Twenty states and the District of Columbia, and dozens of cities and counties, have laws prohibiting housing discrimination on the bases of sexual orientation and gender identity.¹⁶⁵

For more information about the (un)availability of nondiscrimination protections across the country, see our report *LGBT Policy Spotlight: Nondiscrimination Protections for LGBT People*.

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